II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2017/2336

of 7 February 2017

SA.21877 (C 24/2007), SA.27585 (2012/C) and SA.31149 (2012/C) — Germany Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport

(notified under document C(2017) 602)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments pursuant to the provision cited above ([1]) and having regard to their comments,

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

Whereas:

1. **PROCEDURE**

1.1. *PROCEDURE SA.21877*

(1) In 2002, 2003, 2004, 2005 and 2006, the Commission received several complaints from the airline Air Berlin, an environmental NGO (Bund Umwelt und Naturschutz) and private citizens concerning alleged State aid to Flughafen Lübeck GmbH ('FLG'), Infratil Limited ('Infratil') ([3]) and the airline Ryanair ([4]).

(2) On 7 November 2005, the Commission asked Germany for information, which Germany provided on 7 February 2006. Further information was asked by letter dated 22 March 2006, to which Germany replied on 12 June 2006. Meetings between the Commission services, Infratil, the majority owner of the company operating the airport, and the Hanseatic City of Lübeck ('Hansestadt Lübeck') took place on 14 October and 4 December 2006. Subsequent to these meetings, Infratil provided additional information by emails and faxes dated 16 and 31 October 2006, 6 November 2006 and 4, 6 and 21 December 2006.

([1]) OJ C 287, 29.11.2007, p. 27.
([2]) OJ C 295, 7.12.2007, p. 29 and OJ C 241, 10.8.2012, p. 56.
([3]) *Infratil* is a New Zealand-based infrastructure investment company, investing in the energy, airport and public transport sectors. It owned and operated in particular the following airports: Wellington International airport, New Zealand; Glasgow Prestwick Airport and Kent International Airport, United Kingdom. It has in the meantime divested its investments in European airports.
([4]) *Ryanair* is an Irish airline and member of the European Low Fares Airlines Association. The business of the airline was linked with secondary, regional airports. The airline currently operates approximately 160 European destinations. Ryanair had a homogenous fleet consisting of 272 Boeing 737-800 aircraft with 189 seats. Ryanair operated 23 flights per week at the time of the opening decision in 2007 from Lübeck airport to 5 European destinations, namely London-Stansted, UK, Mailand-Bergamo and Pisa, Italy, Palma de Mallorca, Spain, and Stockholm-Skavsta, Sweden.

(3) By letter dated 18 January 2007, Germany asked the Commission to suspend the preliminary investigation of the file. In a letter of 2 May 2007, the Commission denied the request.

(4) On 24 April 2007, Germany sent additional comments to the Commission. On 21 June 2007, a meeting took place between Germany and the Commission services.

(5) By letter dated 10 July 2007, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) TFEU with regard to the financing of Lübeck airport, the financial relations between Hansestadt Lübeck and Infratil, and the airport's financial relations with Ryanair ('the 2007 Opening decision'). The formal investigation procedure was registered under the case number SA.21877 (C 24/2007).

(6) A corrigendum of the 2007 Opening decision was adopted on 24 October 2007.

(7) The 2007 Opening decision was published in the *Official Journal of the European Union* ([1]) on 29 November 2007. The corrigendum was published on 7 December 2007 ([2]). The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

(8) The Commission received comments from Ryanair, Air Berlin, Infratil, FLG, two NGOs ([3]), the Chamber of Industry and Commerce Lübeck ('IHK Lübeck') ([4]), the German airline association (Bundesverband der Deutschen Fluggesellschaften, 'BDF') and individual persons ([5]). Germany replied to those comments on 17 April 2008.

(9) The Commission's independent consultant Ecorys requested information from Germany on 24 July 2008 in order to compile a report on the matter. Germany addressed the Commission on 1 August 2008 in order to challenge Ecorys' right to obtain information and documents. The Commission replied on 8 August 2008, confirming that the Commission's competences are extended to Ecorys in this matter. Consequently, the requested information was obtained on 18 September 2008.

(10) On 16 April 2009, the Commission requested further information from Germany. Germany requested a prolongation of the deadline on 21 April 2009, and again on 7 July 2009. The requested information was submitted on 30 October 2009. Further information was requested by the Commission on 29 October 2009, which was submitted by Germany on 16 December 2009.

(11) On 17 October 2010, the Commission received information from Air Berlin.

(12) In a letter dated 28 March 2011, the Commission requested additional information from Germany. Germany asked for a prolongation of the deadline on 15 April 2011. On 20 April 2011, the Commission granted Germany's request for extension. On 21 April 2011, a further extension of the deadline was requested by Germany, which was granted by the Commission on 27 April 2011. Germany submitted the first part of the requested information on 16 May 2011. In a letter dating 20 May 2011, the Commission considered the submitted information incomplete and asked for the remaining information. Germany challenged this in a letter from 7 June 2011. The Commission replied on 15 June 2011, requesting the missing information.

(13) On 8 April 2011, the Commission sent a questionnaire to Ryanair. The answers were returned to the Commission by 4 July 2011. The Commission forwarded these submissions on 18 July 2011 to Germany, inviting for comments until 18 August 2011. On 8 August 2011, the Commission sent a translated version of Ryanair's submissions to Germany, postponing Germany's possibility to comment until 9 September 2011. Germany's comments were finally sent to the Commission on 8 September 2011. On 7 February 2012, the Commission requested further information from Ryanair concerning the Oxera study, which was submitted by Ryanair on 4 July 2011. On 13 February 2012, Ryanair requested an extension of the deadline to reply. On 16 February 2012, Oxera asked the Commission for clarification concerning one of the questions asked. The clarification was submitted by the Commission on 17 February 2012. Ryanair sent its comments on 13 April 2012. These comments were sent to Germany by the Commission on 27 June 2012. Germany commented on Ryanair's submissions in a letter from 10 September 2012.

([1]) OJ C 287, 29.11.2007, p. 27.
([2]) OJ C 295, 7.12.2007, p. 29.
([3]) Schutzgemeinschaft gegen Fluglärm Lübeck und Umgebung Groß Grönau eV and Check-in Lübeck e.V.
([4]) Industrie- und Handelskammer zu Lübeck (IHK).
([5]) Peter C. Klanowski and Horst Conrad.

(14) The final report by Ecorys from 29 March 2011 was sent to Germany on 29 June 2011, inviting Germany to comment. A translation of the report was sent to Germany on 24 August 2011, inviting Germany to comment until 26 September 2011. Germany sent its comments on 10 October 2011.

(15) On 30 June 2011, Germany sent the second part of the information requested by the Commission. Germany replied to the Commission's letter of 15 June 2011 on 29 June 2011. On 5 July 2011, the Commission asked Germany to send missing information. On 15 July 2011, Germany sent the missing information.

(16) On 4 July 2011, Ryanair sent comments to the Commission, which were forwarded to Germany on 8 August 2011. Germany commented on these submissions on 8 October 2011.

(17) The Commission requested further information from Germany on 20 February 2012. An extension of the deadline to submit the information until 17 April 2012 was requested by Germany on 19 March 2012. This was granted by the Commission on 21 March 2012. In a letter dated 17 April 2012, Germany replied to the Commission's questions from 24 February 2012. On 18 April 2012, the Commission asked Germany to send missing information until 28 April 2012, without the possibility of extension. The Commission further stated that, in case of non-compliance, an information injunction would be issued in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 ([1]). A meeting between the Commission and Germany was held on 2 May 2012. On 3 May 2012, the Commission agreed to an extension until 11 May 2012. In a letter dating 7 May 2012, Germany pointed out procedural errors on the Commission's side and refused the submission of further information.

(18) In a letter from 10 April 2013, Ryanair sent a report on Oxera's approach to the Market Economy Operator Principle ('MEO principle') to the Commission. The report was sent to Germany on 3 May 2013. Further submissions by Ryanair were sent to the Commission on 20 December 2013.

(19) In a letter from 24 February 2014, the Commission invited Ryanair to comment on the application of the 2014 Aviation Guidelines ([2]). On 21 March 2014, the Commission invited Infratil to comment on the 2014 Aviation Guidelines. A formal invitation for all interested parties to submit comments on the 2014 Aviation Guidelines was published in the Official Journal on 15 April 2014 ([3]). Germany sent its comments on 12 May 2014. Additional comments were submitted by Air Berlin, Infratil and the *Schutzgemeinschaft gegen Fluglärm Lübeck und Umgebung eV* ('SGF') ([4]).

1.2. *PROCEDURES SA.27585 AND SA.31149*

(20) On 28 January 2009, SGF sent a complaint regarding case SA.21877. This was registered under the State aid case number CP 31/2009 (SA.27585).

(21) By letter dated 5 February 2009, the Commission requested information from Germany regarding press reports about Lübeck airport. Germany replied by letters dated 5 March 2009 and 12 March 2009.

(22) By letter dated 16 April 2009, the Commission requested further information from Germany. Germany responded on 9 July 2009.

(23) On 22 June 2010 and 30 June 2010, SGF submitted a further complaint, alleging that further unlawful State aid was provided by Germany in favour of FLG and Infratil. This complaint was registered under the State aid case number CP 162/2010 (SA.31149).

(24) By letter dated 7 July 2010, the Commission sent that complaint to Germany and requested information. By letter dated 13 July 2010, Germany requested a prolongation of the deadline. The Commission granted the request by letter dated 14 October 2010.

([1]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union of the EC Treaty (OJ L 83, 27.3.1999, p. 1)
([2]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([3]) OJ C 113, 15.4.2014, p. 30.
([4]) This is a non-governmental organisation registered under the rules of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17).

(25) By letter dated 28 March 2011, the Commission requested further information from Germany. By letter dated 8 April 2011 the Commission requested information from Ryanair concerning its agreements with FLG.

(26) Germany requested a prolongation of the deadline until 15 July 2011. By letter dated 20 April 2011, the Commission invited Germany to answer to questions regarding the complaints until 28 April 2011. By letter dated 21 April 2011, Germany asked for further extension of the deadline. By letter dated 27 April 2011, the Commission accepted the extension of the deadline until 16 May 2011. Germany sent information on 16 May 2011.

(27) On 20 May 2011, the Commission sent a reminder pursuant to Article 10(3) of Regulation (EC) No 659/1999, stating that the information sent was incomplete. The deadline for the reply was 7 June 2011. Germany replied by letter dated 7 June 2011, rejecting that the letter of 20 May 2011 was a reminder within the meaning of Regulation (EC) No 659/1999, as two of the questions appeared to be reworded and in their opinion one of the questions was new.

(28) By letter of 15 June 2011, the Commission sent a second reminder pursuant to Article 10(3) of Regulation (EC) No 659/1999 to Germany, giving the possibility to provide information until 29 June 2011. In the event of non-compliance with that reminder, the Commission would consider issuing an information injunction. Germany replied by letter dated 29 June 2011 to some of the questions and informed the Commission that the replies to the remaining questions would be provided during July 2011.

(29) By letter dated 4 July 2011 the Commission received further information from Ryanair.

(30) By letter of 5 July 2011, the Commission sent a third reminder according to Article 10(3) of Regulation (EC) No 659/1999 to Germany giving it the possibility to provide information concerning the remaining questions by 15 July 2011. Germany responded by letter dated 15 July 2011.

(31) By letter dated 18 July 2011 the Commission forwarded Ryanair's submission from 4 July 2011 to Germany, inviting for comments. Germany requested the translation of the Ryanair submission into German. The Commission sent the German version of the submission to Germany by letter dated 8 August 2011.

(32) By letter dated 8 September 2011 Germany provided comments on Ryanair's submission. On 7 February 2012, the Commission requested further information from Ryanair concerning the Oxera study. On 13 February 2012, Ryanair requested an extension of the deadline to reply. Clarification concerning one of the questions asked by the Commission was asked on 16 February 2012. That clarification was provided by the Commission on 17 February 2012.

(33) By letter dated 22 February 2012, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) TFEU with regard to potential State aid in favour of Infratil, FLG, Ryanair, and other airlines operating from Lübeck airport ('the 2012 opening decision') ([1]). In reply, Germany asked the Commission in a letter dated 14 March 2012 for the blackening of certain information contained in the 2012 opening decision. The Commission partially accepted the request in a letter from 20 March 2012, explaining that it was unable to agree to the blackening of certain information. Germany further challenged the Commission's position on confidentiality in a letter from 3 April 2012. The Commission sent a letter to Germany on 25 April 2012 in this matter, submitting another version of the 2012 opening decision and providing further arguments.

(34) On 2 March 2012, Ryanair sent a request to the Commission, asking for the possibility to review the 2012 opening decision before publication, in order to prevent the publication of confidential information. The Commission replied on 6 March 2012 by pointing out that it is for the Member State to submit such information to Ryanair. After several interchanges between Ryanair, the Commission and Germany, Ryanair submitted a list of requests for removing confidential information and in addition criticised procedural issues on 27 April 2012. Moreover, Germany submitted further requests by Ryanair for blackening of certain information to the Commission on 30 April 2012. On 29 June 2012, the blackened version of the 2012 opening decision was sent to Ryanair.

(35) As requested by the Commission on 7 February 2012, Ryanair submitted comments in a letter dated 13 April 2012. Those comments were forwarded to Germany by the Commission on 27 June 2012. Germany commented on Ryanair's submissions in a letter dated 10 September 2012.

([1]) Prior to the opening, the measures were investigated in cases CP 31/2009 (SA.27585) and CP 162/2010 (SA.31149).

(36) In a letter dated 24 February 2012, the Commission asked Germany to provide more information on the cases within 20 days. On 19 March 2012, Germany requested an extension of the deadline until 20 April 2012. The Commission agreed to an extension of the deadline until 17 April 2012 in a letter dated 21 March 2012. Germany submitted the requested information on 17 April 2012. In a letter dated 18 April 2012, the Commission stated that the information submitted by Germany was incomplete and requested the missing information to be submitted by 28 April 2012. The Commission added that in case of non-compliance, an information injunction would be initiated in accordance with Article 10(3) of Regulation (EC) No 659/1999. On 3 May 2012, the Commission addressed another letter to Germany, urging it to submit the missing information by 11 May 2012.

(37) On 14 May 2012, Germany submitted comments to the Commission concerning the 2012 Opening decision.

(38) The 2012 opening decision was published in the Official Journal on 10 August 2012 ([1]). All interested parties were given the possibility to comment on the decision within one month. By two letters dated 16 August 2012 and 22 August 2012, Ryanair requested an extension of the deadline until 24 September 2012. Wizz Air requested an extension until 24 September on 24 August 2012. On 31 August 2012, Infratil requested an extension until 10 October 2012. Hansestadt Lübeck and FLG requested the Commission on 5 September 2012 to extend the deadline until 10 October 2012. On 7 September 2012, Bundesverband der deutschen Verkehrsflughäfen ('ADV') ([2]) asked for an extension of the deadline until 10 October 2012. On the same day, the Commission granted the requests for extension to Ryanair, Wizz Air, ADV, Hansestadt Lübeck, FLG and Infratil.

(39) On 9 September 2012, Pro Airport Lübeck e.V. submitted their observations.

(40) On 10 September 2012, Flughafen Hamburg GmbH ('Hamburg Airport') and the Landesregierung (State government) of Schleswig-Holstein requested the Commission to extend the deadline to submit comments until 10 October 2012. The Commission agreed to the extension on the following day. On 10 September 2012 SGF submitted its comments to the Commission.

(41) Ryanair submitted its comments to the Commission on 24 September 2012, including a report compiled by Oxera. By letter dated 8 October 2012, Hansestadt Lübeck submitted its comments to the Commission. On 10 October 2012, comments were submitted to the Commission by ADV, FLG, Infratil and Wizz Air, including a report by Oxera. The same day, Ryanair added to its submissions several reports compiled by Oxera.

(42) On 3 May 2014, Germany forwarded the non-confidential versions of the Oxera reports to Germany, inviting Germany to comment.

(43) On 15 May 2013, 17 January 2014 and 31 January 2014, Ryanair submitted further information.

(44) By letter dated 11 February 2013, the Commission asked Germany to submit all contracts in relation to the privatisation of Lübeck airport within 20 days. Such disclosure was denied to the Commission in a letter from 28 February 2014, since the privatisation of Lübeck airport was not part of the current procedure. After consultations between the Commission and Germany, Germany sent the details concerning the privatisation of Lübeck airport in a letter from 13 March 2014.

(45) The Commission informed Germany on 24 February 2013 and 17 March 2014 about the introduction of the 2014 Aviation Guidelines and its relevance for the current proceedings, inviting Germany to submit comments. In response, Germany submitted information on 27 March 2014. Further submissions were made by Wizz Air, in a letter dated 30 April 2014 and by Germany on 12 May 2014.

(46) By letter dated 2 September 2014, 12 September 2014 and 26 September 2014, Ryanair submitted further reports prepared by Oxera concerning the recent approach of the Commission concerning the MEO principle.

1.3. *JOINT PROCEDURE CONCERNING SA.21877, SA.27585 AND SA.31149*

(47) The Commission joined the procedures SA.21877, SA.27585 and SA.31149 in 2014.

(48) By letter dated 30 September 2014, the Commission requested further information from Germany.

([1]) OJ C 241, 10.8.2012, p. 56.
([2]) Federal Association for German Commercial Airports (Bundesverband der deutschen Verkehrsflughäfen).

(49) On 6 October 2014, Germany requested the Commission to extend the deadline for the submission of the requested information until 30 November 2014. The Commission extended the deadline until 17 November 2014. On 21 November 2014, the Commission sent a reminder to Germany to submit the requested information by 3 December 2014. The Commission stated that in the event of non-compliance with that reminder an information injunction would be initiated in accordance with Article 10(3) of Regulation (EC) No 659/1999. Germany provided the requested information on 3 December 2014. After a teleconference on 18 December 2014, Germany submitted further information on 12 January 2015 and 14 January 2015.

(50) By email dated 26 January 2015, 9 February 2015 and 27 February 2015, the Commission received submissions from Ryanair.

(51) On 30 January 2015, Air Berlin stated its interest in a Commission Decision concerning the alleged State aid to Ryanair.

(52) In a letter dated 23 March 2015, the Commission submitted further comments by third parties, inviting Germany to comment. Germany replied on 9 April 2015 by transmitting its comments on third party submissions.

(53) In an email from 20 April 2015, the Commission requested further information concerning Yasmina Flughafen-management GmbH ('Yasmina') ([1]), the operator of Lübeck airport in 2013 and 2014. Additional questions concerning the put option prize paid by Infratil were sent to Germany on 4 May 2015.

(54) Hansestadt Lübeck replied on 5 May 2015, answering the questions concerning Yasmina. In a letter dated 11 May 2015, Germany replied to the Commission's request for more information concerning the put option price.

(55) On 13 May 2015, the Commission asked Oxera a question concerning the alleged State aid for de-icing charges. In reply, Oxera submitted a report on de-icing on 18 May 2015.

(56) In an email dated 22 May 2015, the Commission asked Oxera for clarification concerning their reports from September 2014 and February 2015 on the profitability of the 2010 Side Letters, concluded between Ryanair and FLG. A reply was received by the Commission on 28 May 2015.

(57) On 23 June 2015, the Commission asked Germany additional questions. The replies were received on 25 June 2015 and 3 July 2015. Further questions were sent to Germany by the Commission on 29 June 2015, to which replies were received in a letter, dated 24 July 2015.

(58) Ryanair sent an explanatory Oxera note to the Commission on 3 July 2015.

(59) On 4 August 2015, the Commission asked Germany additional questions. The replies were received on 10 September 2015.

(60) Ryanair submitted another Oxera note dealing with MEO assessments of airport-airline agreements in the context of airport's overall profitability to the Commission on 30 November 2015. Hansestadt Lübeck submitted additional information on 20 January 2016 and Germany on 19 February 2016.

1.4. *APPEAL OF THE 2012 OPENING DECISION IN RELATION TO THE SCHEDULE OF AIRPORT CHARGES*

(61) Hansestadt Lübeck applied for the partial annulment of the 2012 opening decision. The General Court annulled the 2012 opening decision in relation to the schedule of airport charges for Lübeck airport adopted in 2006 ('2006 schedule of charges') ([2]). The Commission appealed against this judgment to the Court of Justice, which confirmed the judgment of the General Court ([3]). The 2012 opening decision was therefore definitely annulled in relation to the 2006 schedule of charges. Therefore, the 2006 schedule of charges will not be assessed in this Decision.

([1]) Yasmina was a 100 % subsidiary of 3 Y Logistic und Projektbetreuung GmbH ('3Y'), an investment company owned by a natural person, namely the Saudi Adel Mohammed Saleh M. Alghanmi. Yasmina was set up for the purpose of buying and operating Lübeck airport.
([2]) Case T-461/12 *Hansestadt Lübeck* v *European Commission* ECLI:EU:T:2014:758.
([3]) Case C-524/14 P *Commission* v *Hansestadt Lübeck* ECLI:EU:C:2016:971.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. *BACKGROUND OF THE INVESTIGATION AND CONTEXT OF THE MEASURES*

2.1.1. ***Catchment area, passenger development and airlines serving the airport***

(62) Lübeck airport is situated approximately 73 kilometres from the city of Hamburg, in the Land Schleswig-Holstein, Germany.

(63) The airport itself defines its catchment area as the metropolitan area of the city of Hamburg and Öresund (Greater Copenhagen/Malmö). This region could be served by the following airports:

— Hamburg airport (~78 kilometres distance from Lübeck airport, ~65 minutes travelling time by car),

— Rostock airport (~134 kilometres distance from Lübeck airport, ~1 hour 19 minutes travelling time by car),

— Bremen airport (~185 kilometres distance from Lübeck airport, ~1 hour 56 minutes travelling time by car),

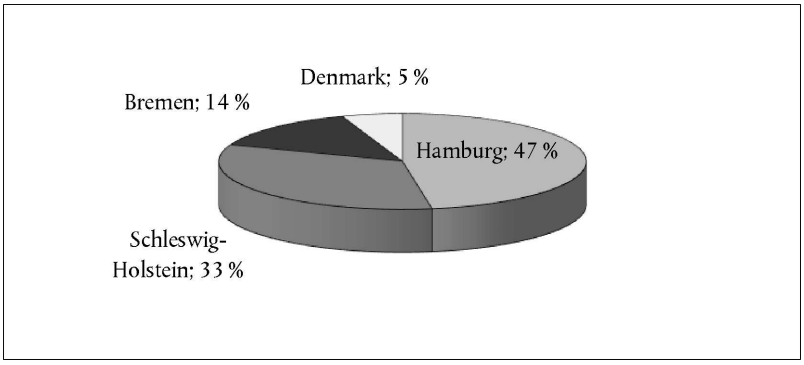
— Hannover airport (~208 kilometres distance from Lübeck airport, ~ 2 hour 8 minutes travelling time by car), and

— Copenhagen airport (~280 kilometres distance from Lübeck airport, ~3 hours travelling time by car and ferry).

(64) According to a market study carried out by the airport in 2009, the majority of the (outbound) passengers at Lübeck airport came from Hamburg (i.e. 47,20 %). The airport expected an increase of the Danish outbound passengers after the completion of the Fehmarn Belt Fixed Link between Germany and Denmark. Figure 1 summarises the origin of the passengers at Lübeck airport.

Figure 1

Origin of the outbound passengers at Lübeck airport (Market Study, 2009)



(65) The passenger traffic at the airport had increased from 48 652 in 1999 to 546 146 in 2010 (see Table 1). The airport expected to increase its passenger numbers to 2,2 million by 2015. However, that development did not materialise.

Table 1

Passenger development at Lübeck airport in 1999 to 2013 [1]

Year	Number of passengers
1999	48 652
2000	142 586
2001	192 726
2002	244 768
2003	514 560

Year	Number of passengers
2004	578 475
2005	710 788
2006	677 638
2007	612 858
2008	544 339
2009	697 559
2010	546 146
2011	344 068
2012	359 974
2013	367 252

([1]) See website Lübeck airport http://www.flughafen-luebeck.de/images/02-unternehmen/06-zahlen_fakten_daten/02-monatsstatistik/ab2000.pdf (Status: 22 May 2015).

(66) At the date of this Decision, no airline is operating from Lübeck. Neither scheduled nor charter flights are on offer.

2.1.2. ***Ownership of the airport***

(67) Lübeck airport was originally operated by *FLG*, which was a limited liability company. The ownership of some airport infrastructure and of the land had remained with Hansestadt Lübeck. FLG could use the airport infrastructure on the basis of a lease agreement. The ownership of FLG changed several times in the recent years. Until 30 November 2005 the sole shareholder of FLG was Hansestadt Lübeck, which held 100 % of the shares. Under the '2005 Participation Agreement' (Beteiligungsvertrag), Hansestadt Lübeck sold with effect of 1 December 2005 90 % of its shares in FLG to Infratil. The remaining 10 % were still held by Hansestadt Lübeck, as minority shareholding. The 2005 Participation Agreement included a number of conditions and put/call options for both parties (for further details see Section 2.3.1).

(68) To prevent Infratil from exercising its put option, an Additional Agreement (Ergänzungsvereinbarung 2009) was signed in 2009 between Hansestadt Lübeck and Infratil. According to the 2009 Additional Agreement, Infratil had to continue operating the airport until October 2009 and was compensated for certain costs in return (see Table 3).

(69) At the end of 2009, Infratil exercised its put option and sold back its shares to Hansestadt Lübeck.

(70) From November 2009 Hansestadt Lübeck was again the sole owner (100 % of shares) of FLG. In November 2009 the City Council of Lübeck ('Bürgerschaft') ([1]) decided that a new private investor for FLG should be found by the end of February 2010 and that the airport should not receive any further funding.

(71) On 25 April 2010 the citizens of Hansestadt Lübeck decided by public vote to ensure the survival of Lübeck airport. Hansestadt Lübeck deemed further investments for the improvement of the airport infrastructure necessary, in order to privatise the airport.

(72) On 16 August 2012, Hansestadt Lübeck published a call for tender in the supplement to the *Official Journal of the European Union* ([2]) concerning the sale of Lübeck airport. Until 24 September 2012, seven letters of interest were submitted. By 15 October 2012, five parties placed indicative, non-binding bids. By 20 November 2012,

([1]) Bürgerschaft of Hansestadt Lübeck consists of representatives of citizens of the city.
([2]) OJ 2012/S 156-261107 of 16 August 2012 (http://ted.europa.eu/udl?uri=TED:NOTICE:261107-2012:TEXT:EN:HTML&tabId=1).

three parties placed binding and final bids. A comparison of the three bids was conducted. It included a system of distribution of points, taking into account both the financial offer and the respective business and development plans. The offer by 3Y Logistic und Projektbetreuung GmbH, Frankfurt ('3Y') which envisaged an *asset deal*, was by far the most advantageous. 3Y was the holding company of Yasmina, a limited liability company set up for the purpose of buying and operating Lübeck airport. On 29 November 2012, the *Bürgerschaft* of Lübeck agreed to the terms and the sale. The sales contract was signed on 14 December 2012 and came into force on 1 January 2013. Yasmina acquired some of the assets of FLG. The assets not sold to Yasmina were transferred to Hansestadt Lübeck by merging FLG into Hansestadt Lübeck (German 'Verschmelzung'). FLG hence ceased to exist as an independent legal entity.

(73) As a result of the continuous losses made by the airport, Yasmina announced insolvency in April 2014, resulting in the initiation of insolvency proceedings on 23 April 2014. On 1 August 2014, Lübeck airport was taken over by a Chinese investor, PuRen Germany GmbH ('PuRen'). PuRen announced insolvency in September 2015, resulting in the initiation of insolvency proceedings on 30 September 2015. On 1 July 2016, Lübeck airport was taken over by Stöcker Flughafen GmbH & Co. KG ('Stöcker').

(74) The Commission investigated the following measures, which possibly constituted State aid in favour of FLG, Infratil, Ryanair and other airlines using the airport.

2.2. *POTENTIAL STATE AID IN FAVOUR OF FLG*

(75) The Commission has opened the formal investigation procedure on the following measures in favour of FLG:

— takeover of all losses incurred in the period 1978 to 2004;

— lease agreement for land and airport infrastructure (prior to 1 January 2006) at a price under the market price;

— takeover of outstanding liabilities resulting from several loans FLG had concluded with commercial banks;

— investment Aid to FLG by means of the 2005 Regional Airports Decision ([1]) and its alleged violation;

— compensation for FLG losses since November 2009;

— financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein in the years 2010-2015;

— subordination of shareholder loans of Hansestadt Lübeck to FLG.

2.3. *POTENTIAL STATE AID IN FAVOUR OF INFRATIL*

2.3.1. ***Sale of shares in FLG***

(76) In view of the continuous operating losses of FLG, Hansestadt Lübeck decided to sell its shares in FLG. In order to identify the best purchaser, it launched a call for tender, which was published in the *Official Journal of the European Union* on 21 March 2003.

(77) Hansestadt Lübeck received indications of interest of five undertakings. It sent a package containing more detailed information to the first four undertakings. One undertaking had submitted its indicative offer on 17 June 2003, after the expiration of the deadline.

(78) Only one undertaking, namely Infratil, submitted a formal bid. Therefore, Hansestadt Lübeck started negotiations with Infratil. A first sales agreement was concluded in March 2005. However, it was conditional upon obtaining a definitive planning approval (Planfeststellungsbeschluss) for prolonging the runway of the airport within a specified time frame. Following the ruling of the Higher Administrative Court (Oberverwaltungsgericht — 'OVG') Schleswig of 18 July 2005 ([2]), this condition could no longer be fulfilled.

([1]) Commission Decision of 19 January 2005, N644i/2002 — Germany — Ausbau der kommunalen wirtschaftsnahen Infrastruktur nach Teil II Ziffer 7 des Rahmenplans der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (i) Errichtung oder Ausbau von Regionalflughäfen (OJ C 126, 12.5.2005, p. 10).

([2]) The planning permission decision allowing for the developments of Lübeck Airport, which was made on 20 January 2005 and covered various infrastructural measures, has been contested in court by various parties. In the interim procedure two high court decisions have been taken which have force of law: These decisions are Decision 4 MR 1/05 of 18 July 2005 of Schleswig Higher Administrative Court (OVG) and Decision 101/05/EC of 21 October 2005 of Schleswig Higher Administrative Court (OVG). On the basis of these rulings, the planning approval was denied.

(79) The judgment fundamentally altered the negotiation position of both parties. As the outcome of the former public procurement procedure was only one formal bid, Hansestadt Lübeck considered it unlikely that after the suspension of the airport's expansion there would be more interested parties. As a result, it decided against publishing a second tender. Instead, Hansestadt Lübeck and Infratil reopened negotiations based on the new facts, and agreed on a conditional privatisation contract. A Participation Agreement was concluded on 24 October 2005 ('the 2005 Participation Agreement'). It entered into force on 1 December 2005.

(80) The 2005 Participation Agreement foresaw the transfer of 90 % of the shares in FLG from Hansestadt Lübeck to Infratil as of 1 December 2005. In return, Infratil paid the so called 'Purchase Price I' of EUR […] (*) as well as additional EUR […] to Hansestadt Lübeck, corresponding to a cash credit which Hansestadt Lübeck had previously granted to FLG for financing operating costs and new investments. Infratil also had to take over the operating losses of the airport for the year 2005.

(81) Furthermore the 2005 Participation Agreement provided that a 'Purchase Price II' of EUR […] had to be paid by Infratil at a later time, if the following two conditions were met:

(a) the airport received an unconditional and definitive planning approval covering a contractually specified content (see recital 82) that does not impose active noise management measures, such as a ban on night flights or noise quota (Lärmkontingent) on FLG, or FLG had contracted construction works with respect to contractually specified measures of a certain value;

(b) at least […] passengers were transported in 2008, or, if condition 1 has been fulfilled already in 2006 or 2007, […] passengers were transported in 2006 or […] passengers were transported in 2007.

(82) The contractually specified content of the planning approval covered the following:

— the extension of runways;

— the installation of an instrument landing system category II or III ('ILS CAT II' or 'ILS CAT III');

— the extension of parking space;

— the existing airport site;

— the extension of the apron;

(83) The following items needed to be deducted from the Purchase Price II:

— Purchase Price I (EUR […]);

— the operating losses of the airport for the years 2005 to 2008 of a maximum total amount of EUR […];

— the costs resulting from the State aid law suit which Air Berlin had filed in German civil courts which Germany estimates to amount to EUR […];

— if the planning approval is issued with the contractually specified content (see recital 82), the difference between the planning approval costs, excluding costs for compensation measures) and a fixed amount of […] euros; Germany estimates this difference to amount to […] euros;

— if the planning approval is not issued with the contractually specified content (see recital 82), the planning approval costs.

(84) According to the 2005 Participation Agreement, planning approval costs cover all costs affecting liquidity (liquiditätswirksam). This includes costs of compensation measures (Aufwendungen für Ausgleichsmaßnahmen) for the planning approval procedure that occur between 1 October 2005 and 31 December 2008.

(85) Furthermore the 2005 Participation Agreement contained a put option, allowing Infratil to rewind the original purchase of the shares in FLG and to reimburse some agreed costs, if

— the planning approval was not obtained or construction work has not been contracted with respect to the measures mentioned in recital 82 until 31 December 2008 and

— a specified number of passengers has not been reached.

(*) Confidential information.

(86) In the event of the exercise of the put option, Hansestadt Lübeck was obliged to reimburse Purchase Price I and to compensate certain losses. According to the 2005 Participation Agreement Hansestadt Lübeck would have to pay EUR […] to Infratil if the latter exercised the put option. This amount was calculated as follows:

Table 2

Put option price as per 31 December 2008 in EUR

Shareholder loans 2005	[…]
+ Balance of shareholder loans granted for:	
actual approved operating losses	[…]
actual approved investment costs	[…]
– public funding	[…]
costs of planning approval process	[…]
Air Berlin legal costs	[…]
= balance of shareholder loans granted	**[…]**
+ 5 % interest on shareholder loans p.a.	[…]
+ Purchase Price I	[…]
Total	**[…]**

2.3.2. ***The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs***

(87) In 2008, Infratil announced to exercise its put option, since the planning approval had not been obtained, customer numbers had not improved to the level specified in the 2005 Participation Agreement and FLG's operating losses had been greater than expected. To keep Infratil as an airport operator, Hansestadt Lübeck agreed to renegotiate certain terms of the 2005 Participation Agreement with regard to the put option. The result was the 2009 Additional Agreement, signed on 12 November 2008, which added further losses, investments and other costs related to the operation of the airport in 2009 to the put option price which Hansestadt Lübeck would have had to pay to Infratil under the 2005 Participation Agreement.

(88) According to the 2009 Additional Agreement, the new put option price was calculated as follows:

Table 3

Put option price October 2009 in EUR

Price of the put option (31 December 2008)	[…]
+ […] % interest rate on the price of the put option in 2008 for 2009	[…]
+ Balance of shareholder loans granted for:	
Actual approved operating losses 2009	[…]
Actual approved investment costs in 2009	[…]
Cost of planning approval process 2009	[…]
Other expenses 2009	[…]
Air Berlin legal cost incurred in 2009	[…]

= balance of shareholder loans granted	**[…]**
+ […] % Interest on shareholder loans for the year 2009	[…]
– Expenses 2009 not covered by loans	[…]
+ offset of the group insurance benefits (i.e. the share of Infratil's group insurance premiums attributable to FLG)	[…]
Total	**[…]**

(89) Group insurance benefits were payable by Hansestadt Lübeck in the context of a shareholder loan which had been granted to FLG by Infratil. The insurance policy covered all airports managed by Infratil. The share of costs attributable to FLG amounted to EUR […].

(90) The difference between the put option price paid in accordance with the 2009 Additional Agreement and the put option price that Hansestadt Lübeck would have had to pay under the 2005 Participation Agreement thus amounts to EUR […].

(91) In return, Infratil waived its right to exercise its put option before 22 October 2009 and granted Hansestadt Lübeck further participation rights. In addition, Infratil provided Hansestadt Lübeck with a written Letter of Intent between FLG and Ryanair, in which both parties confirmed their intention to increase passenger numbers and to cooperate with regard to the establishment of a Ryanair base at Lübeck airport.

2.4. *POTENTIAL STATE AID IN FAVOUR OF RYANAIR*

2.4.1. ***2000 Agreement***

(92) Until 2000, FLG was an airport depending on aviation revenues generated by charter flights and general aviation. In 2000 the airport changed its business model into an airport for low-cost carriers where revenues are generated through a combination of aviation and non-aviation activities.

(93) FLG signed an Air Services Agreement with Ryanair on 29 May 2000 ('the 2000 Agreement'). The 2000 Agreement with Ryanair included a specification of the airport charges to be paid by Ryanair, as well as the marketing support incentives to be paid by the airport. The 2000 Agreement was scheduled to start on 1 June 2000 and to continue until 31 May 2010.

(94) For the route to Stansted, the airport had assessed costs and revenues as follows:

Table 4

Costs and revenues involved in the 2000 Agreement from FLG's perspective

Elements of the agreement with Ryanair	< 18 turnarounds per week	≥ 18 turnarounds per week
FLG costs in EUR		
Marketing support – costs per arriving passenger	[…]	[…]
	Until 31 May 2005	From 1 June 2005
FLG Income in EUR		
Ryanair payable fees per plane	[…]	[…]
Ryanair payable fees per arriving passenger	[…]	[…]
Ryanair net payable fees per arriving passenger (fees minus marketing support)	*[…]*	*[…]*

Elements of the agreement with Ryanair	< 18 turnarounds per week	≥ 18 turnarounds per week
Other:		
Fee on turnover per ticket sold by FLG	[…] %	[…] %
Commission on turnover rental car booked by FLG	[…] %	[…] %
Security fee (paid by Ryanair to appropriate government body) in EUR	[…]	[…]

2.4.2. ***2010 Agreements***

(95) On 29 March 2010, Ryanair and Lübeck airport signed Side Letter No 1 to the 2000 Agreement covering the period from 28 March 2010 to 30 October 2010. This side letter prolonged the 2000 Agreement until 30 October 2010 and introduced a new per-passenger incentive payment of EUR […] to be paid by FLG to Ryanair, in addition to the payment for marketing services specified in the 2000 Agreement of EUR […] per passenger (below 18 rotations per week) or EUR […] per passenger (above 18 rotations per week). Since more than 18 rotations per week were flown by Ryanair, a total of EUR […] per passenger was to be paid by FLG to Ryanair. As all other conditions from the 2000 Agreement were maintained, passenger service fees per departing payments to be paid to FLG amounted to EUR […], ramp handling charges per turnaround amounted to EUR […], handling charges per passenger were EUR […] and security charges per passenger were EUR […].

(96) In October 2010, a Side Letter No 2 was signed, which did not maintain the conditions of the March 2010 Side letter, but returned to the schedule of marketing payments as stated in the original 2000 Agreement. The October 2010 Side letter extended the terms of the 2000 Agreement for 3 years until 1 November 2013.

(97) On the day that Side letter No 1 was entered into, namely on 29 March 2010, FLG also signed a Marketing Services Agreement with Airport Marketing Services Limited ('AMS'), a fully-owned subsidiary of Ryanair. That marketing services agreement also covered the period from 29 March 2010 to 30 October 2010 and set out the advertising services to be provided by AMS on the website www.ryanair.com, in return for a sum of EUR […] to be paid by FLG.

2.5. *CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT*

(98) The de-icing charges are laid down in a scheme of special charges, applicable to all airlines using the airport. The scheme of special charges is a document separate from the general schedule of charges applicable at the airport. It is updated every few years. The scheme of special charges distinguishes several categories, namely de-icing for aircrafts up to 10 t maximum take-off weight, de-icing for aircrafts from 10 t maximum take-off weight, de-icing liquid and hot water and lays down a price for each of these categories.

3. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(99) In its 2007 and 2012 Opening decisions, the Commission initiated investigations concerning possible State aid in favour of FLG, Infratil and Ryanair, Wizz Air and other charter airlines serving Globalis Reisen.

3.1. *POTENTIAL STATE AID IN FAVOUR OF FLG*

(100) The Commission had doubts concerning the loss transfer agreement of 19 October 1978 ('loss transfer agreement'), according to which Hansestadt Lübeck covered the operating losses of FLG in the period 1978 to 2004, the lease agreement for land and airport infrastructure and the takeover of outstanding liabilities. Furthermore, the Commission had doubts on the possible investment aid by means of the 2005 Regional Airports decision and its alleged violation, the compensation of losses since November 2009, the financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig-Holstein and the subordination of shareholder loans of Hansestadt Lübeck to FLG. In relation to those measures, the Commission expressed doubts whether, under normal market conditions, a market economy operator would also have provided similar advantages to FLG.

3.2. *POTENTIAL STATE AID IN FAVOUR OF INFRATIL*

(101) When 90 % of the shares in FLG were sold to Infratil, the Commission had doubts regarding the compatibility of the privatisation process with State aid rules. In addition, the Commission suspected possible State aid when the terms of the put option were renegotiated in 2008/2009.

3.3. *POTENTIAL STATE AID IN FAVOUR OF RYANAIR*

(102) With regard to the 2000 Agreement with Ryanair and the March and October 2010 Side letters, the Commission had doubts whether they conferred a selective advantage to Ryanair and therefore constituted State aid.

3.4. *CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT*

(103) The Commission had doubts whether the charges for de-icing, charged since November 2009, involved State aid, since there were indications that the prices charged for de-icing were lower than the costs incurred by the airport.

4. **COMMENTS FROM GERMANY**

4.1. *POTENTIAL STATE AID IN FAVOUR OF FLG*

(104) Germany pointed out that FLG does not exist anymore. During the course of the privatisation of Lübeck airport, FLG merged into Hansestadt Lübeck. Thereby, Hansestadt Lübeck became the universal successor of FLG and all claims between FLG and Hansestadt Lübeck disappeared. Therefore, Germany states that all questions of State aid between Hansestadt Lübeck and FLG became without object. In addition, Germany commented on the specific measures, stating that all measures were in accordance with State aid rules, since they either constitute existing aid or comply with the MEO principle.

— Loss transfer agreement: According to Germany, since the loss transfer agreement was concluded 1978 and ended on 31 December 2004, it cannot be included in the investigations. If it were to be categorised as State aid, it would merely constitute existing aid. Germany also argued that the loss transfer agreement constituted a general economic policy measure, which cannot be considered State aid. According to Germany, the loss transfer agreement also passes the MEO test as the relevant measures were intended to attract airlines to the airport and to raise passenger numbers.

— Lease agreement and takeover of loans: According to Germany, any aid in relation to those measures would be existing aid. In addition, Germany stated that the rent was in accordance with market standards, as proven by an independent study by Ernst & Young commissioned by Hansestadt Lübeck prior to the sale of FLG to Infratil and which was provided by Germany to the Commission. With respect to the takeover of loans, Germany stated that all debt guarantees were solely provided within the framework of the pre-financing of investments in infrastructure measures, which were in any event financed afterwards through payments under the loss transfer agreement.

— Investment aid to FLG by means of the 2005 Regional Airports Decision and its alleged violation: Germany stated that all concerned measures were never implemented or fell within the public remit sphere.

— Compensation for FLG losses since November 2009: Germany stated that the financing of FLG by Hansestadt Lübeck since 2009 was in accordance with Union State aid rules, since FLG did not exercise an economic activity, as its activities concerned services within the public remit or services of general economic interest.

— Financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein: Germany argued that the financing of infrastructure investments concern services of public interest or services of public remit and are thereby in accordance with State aid rules, as provided in the 1994 Aviation guidelines ([1]) (as is the case with regard to the compensation of losses since 2009).

([1]) 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).

— Subordination of shareholder loans of Hansestadt Lübeck to FLG: Germany stated that the subordination agreement of Hansestadt Lübeck in favour of FLG was common market practice and did not give FLG any advantage.

4.2. *POTENTIAL STATE AID IN FAVOUR OF INFRATIL*

4.2.1. ***Sale of shares in FLG***

(105) Germany argued that the agreed purchase price was in accordance with market standards. Germany further stated that the bidding procedure for the acquisition of 90 % of the shares of FLG was open, transparent, non-discriminatory and unconditional. Germany stated that a renegotiation of the agreement, which was due to the decision of *OVG Schleswig* from 18 July 2005 ([1]), did not change the outcome of the bidding procedure, which was that the bid of Infratil was the only and highest bid. According to Germany, a new call for interest, subsequent to the judgement, would have been unnecessary and unfruitful, as the situation then was even less attractive for potential bidders than before.

(106) Germany stated that there was no reason for a new call for interest, as the decision of *OVG Schleswig* changed the value of the airport, but not the actual subject of the bidding procedure. Moreover, Germany is of the opinion that a modification of agreements has to be possible at any time. These arguments were supported by reference to German public procurement law.

(107) Moreover, Germany stated that the expert report by Ernst & Young concluded that the conditions of the privatisation reflected the current market value of FLG and by far exceeded the economic results of a potential liquidation.

4.2.2. ***The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs***

(108) Germany stated that the agreement between Infratil and Hansestadt Lübeck has to be assessed in the context of the legal and economic situation of Lübeck airport in 2009. This includes the pending planning approval, the pending court cases involving the airport and the economic and financial crisis.

(109) Germany contested the allegation that there was an advantage for Infratil, since the price for the put option had already been negotiated in the context of the initial agreement with Infratil in 2005 by way of a public, transparent and non-discriminatory tender procedure. Germany argued that the moderate increase in the price in 2009 as compared to the amount agreed in 2005 should be seen as proportionate to the counter-performances by Infratil.

(110) Germany stated that the takeover of losses was economically more advantageous than the consequences from Infratil's exercise of its put option. Firstly, Germany stressed that to close the airport was not an option, as the full-time operation of the airport was a public service obligation. Secondly, it would not have been possible to find a new private investor within a reasonable time, as a Union wide public procurement procedure would have been necessary. Such a procedure consumes time (approximately 12 months) and resources.

4.3. *POTENTIAL STATE AID IN FAVOUR OF RYANAIR*

4.3.1. ***2000 Agreement***

(111) According to Germany, there was no economic advantage for Ryanair. Germany stated that a private operator comparable to FLG would have accepted the agreement with Ryanair under similar conditions. When concluding the 2000 Agreement, FLG was pursuing the strategy to get profitable in the long term. In that context, Germany argued that the business strategy of airports was usually based on aeronautic activities as well as non-aeronautic activities, including the operation of shops, restaurants and parking areas. Therefore, in Germany's view, it is profitable to offer low aviation fees to all airlines in order to raise passenger numbers and to achieve significant growth in the non-aeronautic sector, which can compensate for reduced incomes in the aeronautic sector.

([1]) Oberverwaltungsgericht Schleswig; 4MR1/05.

(112) Germany further stated that there were several advantages in recruiting airlines that provide scheduled services. In particular, Germany argued that the airport could expect that the respective airlines would not enter into an agreement with competing airports in the future. In addition, the airport was expected to attract other airlines.

(113) Germany supported its argument concerning the compliance with the conditions on the market with the expert report by Ernst & Young. In addition, Germany pointed out that the private majority shareholder Infratil also continued to support the strategy set out in recital 112 after the privatisation of the airport.

(114) Germany argued that the business strategy from 2000 holds up from an *ex post* perspective. Passenger numbers increased considerably, Ryanair added new destinations and Lübeck airport was able to acquire new airlines such as Wizz Air. Germany stated that the agreement with Ryanair was essential for the attraction of the private investor Infratil.

(115) Germany further stated that there was no selective advantage for Ryanair, as FLG would have offered the same conditions to any other interested airline.

(116) Furthermore, Germany is of the opinion that the alleged advantages in favour of Ryanair cannot be imputed to the State due to the ruling of *Stardust Marine* ([1]). According to Germany, FLG acted with autonomy and without any exertion of influence by the State, before, during and after the conclusion of the 2000 Agreement. Furthermore, Germany stated that FLG was not integrated into the structures of the public administration. Finally, Germany stated that the supervision of the public authorities over the management of FLG is limited to aviation and public remit matters and does not include business management activities. Further, Germany argued that Hansestadt Lübeck and in particular the supervisory board of FLG were not involved in the decision concerning the 2000 Agreement, as confirmed by the minutes of the supervisory board meeting from 11 July 2000 and a written confirmation of the former CEO of FLG.

(117) In addition, Germany stated that the 2000 Agreement does not distort or threaten to distort competition and does not affect trade between Member States, as there is no real competitive relationship between Lübeck airport and other airports.

4.3.2. ***2010 Agreements***

(118) Germany submitted that the Side Letter No 1 complies with market conditions and that it did not give an advantage to Ryanair. Germany argued by reference to the *Helaba I* ([2]) case that there is no advantage when other operators of regional airports offer Ryanair similar conditions. Germany further argued that this has been proven by Ryanair's comparator analysis.

(119) Germany argued that low cost carriers such as Ryanair and Wizz Air have fewer demands with regard to ground handling services and infrastructure services. Firstly, less check-in counters are needed as check-in for Ryanair flights is available online and less luggage is carried. Secondly, there are no passenger busses. Thirdly, since walking distances are shorter at Lübeck airport, the time for Ryanair airplanes on the ground is shorter. Fourthly, as there are no transfer flights, no facilities for transfer are needed. Finally, since the flight crew often takes charge of the cleaning inside the airplane, there is less demand for ground cleaning services.

(120) Germany argued that there was no imputability to the State, using the same arguments as for the 2000 Agreement.

(121) Germany pointed out that the Side Letter No 2 is an extension of the 2000 Agreement, and did not substantially change the 2000 Agreement. As the 2000 Agreement complies with the requirements of the market, the Side Letter No 2 would also do so.

(122) Lastly, Germany stated that there is no negative impact on competition or trade, since Lübeck airport is a small regional airport and is not in competition with Hamburg airport.

([1]) Case C-482/99 *France* v *Commission* ('Stardust Marine') ECLI:EU:C:2002:294.
([2]) Case T-163/05, *Bundesverband deutscher Banken* v *Commission (Helaba I)* ECLI:EU:T:2010:59.

4.4. *CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT*

(123) Germany stated that the charges for de-icing are not individually negotiated but are based on a scheme for special services, which are applicable to all airlines. Germany further noted that there was no State aid since the basic elements for such aid were absent. Firstly, the charges were not selective. Secondly, the charges were not imputable to the State, which is confirmed by the fact that Infratil and Yasmina, two private investors, were responsible for setting those charges during the time they were operating the airport for a substantial time. Thirdly, there was no advantage. The private investors Infratil and Yasmina decided not to change the scheme for special services, which is an indication that the de-icing charges were in accordance with the requirements of the market.

5. **OBSERVATIONS FROM THIRD PARTIES**

5.1. *POTENTIAL STATE AID IN FAVOUR OF FLG*

(124) In relation to a possible State aid in favour of FLG, the majority of commenting parties agreed with Germany on the matter. In particular, Ryanair, FLG, IHK Lübeck and ADV.

(125) Disagreeing third parties were SGF, BDF, and two individual persons Peter C. Klanowski and Horst Conrad. These parties argued that FLG received State aid from Hansestadt Lübeck:

— Loss transfer agreement: SGF stated that a public service obligation for the operation of the airport is only given for general aviation and does not include commercial aviation. Contrary to what Germany stated, SGF was of the opinion that airports in Germany can be closed at the request of the operator of the airport. SGF further stated that both the rent paid by FLG until 2006 and the rent paid afterwards are too low;

— Lease agreement and takeover of loans: According to BDF, the failure of Germany to provide sufficient information to the Commission is an indication for the existence of aid;

— Potential investment aid to FLG by means of 2005 Regional Airports Decision and its alleged violation: in disagreement with the statements in the opening decision, SGF stated that aid to the airport was granted prematurely, as there was no planning approval decision yet. According to SGF, this created a time advantage for Lübeck airport compared to other airports and threatened competition in the market. With respect to possible aid for infrastructure measures, SGF and Klanowski are of the opinion that some of the measures (namely the financing of security fences, lighting and the instrument landing system) have to be considered operating aid. Further, SGF stated that those measures do not fulfil the criteria concerning accounting and financial reporting as defined in the *Altmark* decision ([1]) by the Court of Justice. Moreover, SGF is of the opinion that the measures do not follow a clearly defined objective of general interest. In addition there is no satisfactory medium-term prospect for the use of the infrastructure. Finally, SGF stated that there is no access to the new infrastructure in an equal and non-discriminatory manner even under the new schedule of charges, as only Ryanair is able to fulfil the criteria to benefit from the lowest fees;

— Financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein: SGF further argued that future investments were calculated on the basis of incorrect assumptions and were therefore excessive. Apart from the airport's failure to generate higher passenger numbers, SGF added that the airport could not curb its losses. In reference to the North German Air Traffic Concept ('Norddeutsches Luftverkehrs-konzept'), SGF argues that all larger airports in North Germany (including Hamburg) have ample capacities at their disposal. It is stated that there are no bottlenecks in relation to available capacities until at least 2030. In addition, the investments, in particular the instrument landing system, cannot be regarded as reimbursement for a public service. According to SGF, it was in the economic interest of FLG to invest in this system in order to enable the achievement of its middle-term economic goals.

— Subordination of shareholder loans of Hansestadt Lübeck to FLG: SGF is of the opinion that Lübeck airport is an 'undertaking in difficulties' and has been so in 2008/2009. In that relation, the subordination agreement is regarded by SGF as an important tool to prevent insolvency. According to SGF, the subordination of shareholder loans amounted to EUR […].

([1]) Case C-280/00 *Altmark Trans GmbH und Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* ECLI:EU:C:2003:415.

5.2. *POTENTIAL STATE AID IN FAVOUR OF INFRATIL*

5.2.1. ***Sale of shares in FLG***

5.2.1.1. **Infratil**

(126) Infratil stated that the shares to FLG were purchased in accordance with a tender procedure which was Union wide, open, transparent and non-discriminatory. Moreover, the purchase price equals the market value of 90 % of the shares in FLG under the given circumstances. Therefore the 2005 Participation Agreement did not contain any elements of State aid. Infratil added that it gave the best bid, which cannot be altered by the fact that Hansestadt Lübeck and Infratil entered into a second round of negotiations to modify the terms of the original agreement.

5.2.1.2. **Ryanair**

(127) According to Ryanair, the privatisation has been realised by an open, transparent and non-discriminatory tender procedure, as was proved by an expert report drawn up by Ernst & Young. In this regard, Ryanair stressed the reputation and independence of Ernst & Young. According to Ryanair, closing the airport would not have been an option because of economic and policy reasons.

5.2.1.3. **Schutzgemeinschaft**

(128) With respect to possible State aid in connection with the privatisation of FLG, SGF expressed strong doubts as to the compatibility of the purchase price with market standard. Further, SGF argued that the agreement contained guarantees by Hansestadt Lübeck, which are also State aid relevant.

5.2.2. ***The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs***

5.2.2.1. **Infratil**

(129) Infratil explained that the 2009 Additional Agreement has to be seen in the context of the 2005 Participation Agreement and the condition of obtaining the planning approval. Since the planning approval was eventually not obtained because of the judgment of the *OVG*, Infratil announced that it would exercise its put option in 2008. The only option for Hansestadt Lübeck to prevent Infratil from this step was the 2009 Additional Agreement.

(130) Infratil stated that the option chosen by Hansestadt Lübeck met the requirements of the market. If Infratil had exercised the put option, HL would have had to bear all costs and losses stemming from the operation of Lübeck airport from 31 December 2008. A resale of the airport to a private investor would not have been possible within a short period of time and the closure of the airport was not an option for Hansestadt Lübeck, due to an obligation under public law and to financial reasons. In addition, the departure of Infratil would probably have caused Ryanair to reduce or cease to offer its services at Lübeck airport. Therefore, Infratil stated that the operating losses of FLG would have been higher if Infratil had exercised its put option.

(131) Infratil stated that the difference between the put option price paid in accordance with the 2009 Additional Agreement and the put option price that would have been payable in January 2009 had its basis in performances agreed by the parties. Hansestadt Lübeck would have had to cover all but two of the additional amounts in any case after the de-privatisation, leading to the conclusion that the 2009 Additional Agreement was the most economic ('wirtschaftlich') decision.

(132) Infratil further argued that the additional amounts did not constitute an advantage for Infratil. Firstly, the additional coverage of losses in 2009 would not have had to be paid by Infratil, if it had exercised its put option. Secondly, Hansestadt Lübeck's obligation to pay interest for the shareholder loans for the period from 1 January 2009 to 22 October 2009 cannot be considered an economic advantage, as Infratil could have realised the same or even higher returns from the proceeds of the put option in January 2009. In a hypothetical scenario, Infratil would have utilised the proceeds for the repayment of existing debts in order to save interest. Furthermore, no advantage was conferred to Infratil since Lübeck airport was not expected to make profits in the short term, but rather to continue to make losses.

(133) Infratil argued that the exercise of the put option did not enable Infratil to restore the situation *ex quo ante* completely, since Infratil had to carry certain losses (difference between approved operating losses and actual operating losses) without compensation.

(134) Even if the Commission were to find that the renegotiation of the put option constituted State aid, Infratil considers it to be in compliance with the internal market. If the Commission were to find that Hansestadt Lübeck granted aid to Infratil by taking over losses incurred by FLG in 2009, according to Infratil such aid would merely have been a compensation for the losses incurred in the discharge of services of general economic interest.

5.2.2.2. **Hansestadt Lübeck**

(135) Hansestadt Lübeck argued that the agreement to take over losses was the least costly and risky alternative. This is particularly justified on the basis of the legal obligation for Hansestadt Lübeck to operate the airport according to paragraph 45(1) of the German Air Traffic Authorisation Regulation (Luftverkehrs-Zulassungs-Ordnung, 'LuftVZO'). Therefore, a closing of the airport would not have been an option. In addition, closing the airport would have consumed too much time and resources.

(136) Additionally, Hansestadt Lübeck reminded the Commission that neither Hansestadt Lübeck nor Infratil had previous experience with the privatisation of an airport. This may lead to certain miscalculations, but certainly not to the conclusion that either party did not act in accordance with market principles. Furthermore, Hansestadt Lübeck argued that Infratil was the only bidder in the context of the privatisation, therefore minimising the negotiating power of Hansestadt Lübeck.

5.2.2.3. **Schutzgemeinschaft**

(137) SGF submitted that the 2009 Additional Agreement constitutes new aid, leading to an advantage for Infratil. As that the aid exceeds the *de minimis* threshold, it should have been notified, which Germany failed to do.

(138) According to SGF, Infratil clearly received an advantage from the 2009 Additional Agreement. Regarding the application of the MEO test, SGF pointed out that the positive impact of an agreement on the region should not be taken into consideration. In that context, SGF stated that Lübeck airport had no prospects of profitability. SGF added that FLG could only prevent insolvency in the beginning of 2008 because of the concessions made by Infratil. SGF disagreed that the MEO test was fulfilled, since no private investor would have been willing to keep operating with such losses, as the exercise of Infratil's put option shows.

(139) With regard to the closure of the airport, SGF argued that Hamburg is equipped with sufficient capacities to operate without Lübeck as back-up airport. In addition, according to SGF, the costs for closure were over-estimated by FLG. Table 5 was deemed more realistic, even though it may still be an overestimation according to SGF:

Table 5

Costs for closure of Lübeck airport as submitted by Schutzgemeinschaft

Costs	In thousands EUR
Costs of liquidator	[…]
Current losses for temporary continuation until 2010/2011	[…]
Social plan	[…]
Repayment of subsidies	[…]
Costs of auditor	[…]

(140) Additionally, the alleged duty to operate the airport as a public service is questioned by SGF, since the permit to operate the airport does not lead to a service of general economic interest. Such a permit can be cancelled.

5.2.2.4. **Ryanair**

(141) Ryanair argued that the difference between the put option prices agreed in 2005 and 2009 and the actual put option price paid by Hansestadt Lübeck could have been caused by a number of factors, such as trends in asset prices. Economic conditions prevailing in 2005 were far more buoyant than in 2009, and the difference in price may have been a reflection of this.

5.3. *POTENTIAL STATE AID IN FAVOUR OF RYANAIR*

5.3.1. ***2000 Agreement***

5.3.1.1. **Ryanair**

(142) Ryanair stated that the contract with FLG was entered into on the basis of economic considerations. Lübeck airport was seen as a viable secondary airport to Hamburg airport and Lübeck itself was regarded as valuable cultural destination. In addition, services were launched at Lübeck airport to secure a low cost base and to analyse the demographics so as to establish whether there was a sufficient hinterland surrounding a new airport. Even though Ryanair could not offer a business plan to substantiate its decision to start services at Lübeck airport, Ryanair emphasised that such a business plan is not generally required for a private market investor. Ryanair explained that its services from Lübeck airport were discontinued because of commercial considerations, including cost increases and a yield lower than anticipated (as a consequence of economic recession).

(143) Ryanair stated that regional airports in the Union are in a difficult market position. Therefore, airport revenues from both aeronautic and non-aeronautical activities have to be taken into consideration, which is referred to as the 'single till approach'. Since contracts with Ryanair typically promise a large number of passengers, such business relations often help to raise the airport's recognisability and to attract other airlines as well as retails and other service providers. In addition, Ryanair stated that there was strong evidence that the increased number of passengers would lead to a rise in non-aeronautical revenues. As proof, Ryanair submitted the following table:

Table 6

Non-aeronautic revenues as a percentage of total income at selected airports

GBP million	2010/2011 (%)
Bournemouth	[…]
Liverpool	[…]
Leeds Bradford	[…]
Humberside	[…]
Doncaster Sheffield	[…]
Exeter	[…]
Bristol	[…]
Luton	[…]
Manchester	[…]
Belfast International	[…]

GBP million	2010/2011 (%)
East Midlands	[…]
Newcastle	[…]
Birmingham	[…]
Glasgow	[…]
Cardiff	[…]
Stansted	[…]
Edinburgh	[…]
Aberdeen	[…]
Southampton	[…]
Average	[…]

Source: UK airports performance indicator.

(144) Ryanair argued that, from an market economy operator viewpoint, any commercial offer will normally be an improvement over the then-current situation, as long as it expects marginal benefits to exceed its marginal costs. Furthermore, Ryanair argued that it has to be considered that Ryanair has significantly reduced needs compared to other airlines given its business model and operational efficiency.

(145) In order to provide more evidence for the compliance of its 2000 Agreement with market requirements, Ryanair conducted a comparison between airports of comparable size and situation as Lübeck airport. Comparator airports are Bournemouth Airport, Grenoble Airport, Knock Airport, Maastricht Airport, Nimes Airport and Prestwick Airport. A comparison of charges paid by Ryanair at the comparator airports showed that costs paid by Ryanair at Lübeck airport were higher in general than the average level at the comparator airports on both a per-passenger and a per-turnaround basis. Ryanair urged the Commission to consider the comparator analysis more strongly than the profitability analysis in its assessment of whether the 2000 Agreement complies with the MEO principle.

(146) A report compiled by Oxera calculates the net present value ('NPV') of the 2000 Agreement. The report finds a positive NPV of EUR […]. Oxera conducted a number of sensitivity checks with respect to this calculation.

5.3.1.2. **Air Berlin**

(147) Air Berlin stated that the routes offered by Ryanair from Lübeck airport are in direct competition with those offered by Air Berlin at Hamburg airport. In particular, the destinations of London, Milan and Barcelona are concerned, since both airlines have them in their portfolio.

(148) Air Berlin argued that the purpose of Ryanair's marketing strategy was to poach potential clients of, amongst others, Air Berlin. Due to the low prices of Ryanair, customers moved from Hamburg to Lübeck airport. Air Berlin claims that as a result of the State aid, Air Berlin suffered substantial economic losses. Air Berlin had to discontinue some of its flights due to the parallel offer by Ryanair at Lübeck airport. In addition, Air Berlin stated that it finds it difficult to open new destinations from Hamburg airport as long as similar destinations are offered by Ryanair from Lübeck airport for excessively low prices.

(149) Furthermore, Air Berlin referred to the closure of Lübeck airport for 6 days from 19 April 2004 to support its arguments that Ryanair paid unfairly low charges and that there was competition between Lübeck and Hamburg. During the time of closure, Ryanair had to move its traffic from Lübeck airport to Hamburg airport. As a result of the higher airport charges at Hamburg airport, Ryanair incurred additional costs of EUR […], for which Ryanair billed FLG. Therefore, Air Berlin stressed that Ryanair already obtained an advantage of EUR […] over airlines operating at Hamburg airport within 6 days.

(150) Air Berlin further supported its argument by offering a table of passenger numbers and flights before (until 1999) and after (from 2000) Ryanair commenced its operation at Lübeck airport:

Table 7

Air Berlin table of passenger numbers and flights

	Passenger numbers (persons)	Movement of airplanes
1997	34 132	[…]
1998	60 520	[…]
1999	48 522	[…]
2000	142 586	[…]
2001	192 726	[…]
2002	244 684	[…]
2003	514 472	[…]

(151) According to Table 7, there was a significant increase in passenger numbers in 2000, when Ryanair started offering flights from the airport. Air Berlin stated that 97 % of those passengers can be attributed to Ryanair. This is put in perspective with the losses made by FLG before (until 1999) and after (from 2000) Ryanair commenced its operation at Lübeck airport:

Table 8

Air Berlin table of FLG losses

FLG	Losses (in EUR)
1999	[…]
2000	[…]
2001	[…]
2002	[…]
2003	[…]
Total	**[…]**

(152) On the basis of Tables 7 and 8, Air Berlin argued that, even though the passenger numbers almost doubled between 2002 and 2003, losses increased in that time period by more than EUR […]. In addition, Air Berlin specified that FLG granted Ryanair preferential conditions, rebates as well as refunds and other payments. The fees paid by Ryanair for using Lübeck Airport were below the fees laid down in the then applicable schedule of charges. Furthermore, Air Berlin stated that Ryanair was providing marketing service not depending on marketing costs. According to Air Berlin, the benefits for marketing services paid to Ryanair appear to be unrelated to the actual marketing expenditures incurred by Ryanair.

(153) Therefore, Air Berlin believes that the 2000 Agreement between FLG and Ryanair did not meet the market requirements. According to Air Berlin, Lübeck is operated for regional policy considerations rather than for profitability.

(154) According to Air Berlin the availability of preferential conditions for Ryanair in Lübeck on the one hand and the manner and condition of the conditional privatisation of the airport on the other hand can hardly be regarded separately. Air Berlin does not consider the participation agreement with Infratil as evidence for compliance with the MEO principle as a put option is included. On the contrary Air Berlin is of the opinion that an MEO would have launched a new call for tender for the airport in 2005.

(155) Additionally, Air Berlin stated that the agreement with Ryanair was imputable to Germany. According to the articles of association of FLG, the supervisory board has to give its approval for charges resulting from the use of the airport (Paragraph 12 of the articles of association). Four of the six members of the supervisory board are elected by Hansestadt Lübeck. Therefore, Air Berlin concluded that Hansestadt Lübeck could be held responsible. Air Berlin believes that certain statements by key FLG officials are further evidence for the imputability of the agreement at hand.

5.3.1.3. **Infratil**

(156) With respect to possible State aid granted to Ryanair, Infratil stated that the 2000 Agreement was economically sound, an important asset for the development of the airport and in full compliance with the MEO principle. Infratil is further of the opinion that the 2000 Agreement and its implementation are not imputable to Hansestadt Lübeck or other State entities. Hansestadt Lübeck or the supervisory board issued no orders or guidelines for the adoption of the 2000 Agreement and did not control that adoption.

5.3.1.4. **Bundesverband der Deutschen Fluggesellschaften**

(157) BDF is of the opinion that the conditions offered to Ryanair by FLG are not compatible with the internal market, as they do not fulfil the requirements of transparency, non-discrimination and do not contain sanctions if Ryanair does not fulfil its obligations under the 2000 Agreement.

(158) According to BDF, discriminatory derogations from the effective schedules of charges in favour of one particular airline lead to strong distortions of competition and to a subsidised redistribution of passengers within the same agglomeration, which does not make sense for the overall economy. Further, BDF stated that a measure has to be notified to the Commission if it cannot be ruled out that that measure involves State aid. BDF stated that it is legally possible to shut down a German airport at the request of the operator under certain conditions.

5.3.2. ***2010 Agreements***

5.3.2.1. **Flughafen Lübeck GmbH**

(159) FLG stated that the measure was not imputable to Germany, since the 2010 Agreements were negotiated by FLG autonomously.

5.3.2.2. **Ryanair**

(160) Ryanair argued that the 2010 Agreements are not imputable to the State.

(161) Ryanair stated that Side Letter No 1 and Side Letter No 2 are merely short side letters extending the duration of the existing arrangements under Ryanair's 2000 Agreement. The only new element was a commercially negotiated adjustment to marketing support in the Side Letter No 1. Ryanair therefore stated that the implications of the two side letters are covered by Ryanair's submissions regarding the 2000 Agreement.

(162) Ryanair submitted a report, compiled by Oxera ([1]), evaluating the expected profitability of Side Letter No 1 and Side Letter No 2, based on the 2009 business plan ([2]), drawn up by Lübeck airport prior to signing Side Letter No 1 and Side Letter No 2. The report indicates that, under reasonable assumptions at the time when the two

([1]) Oxera report, Economic MEOP assessment: Lübeck airport, 6 February 2015.
([2]) Business plan 'Takeoff Konzept' from 21 December 2009, see http://www.luebeck.de/stadt_politik/rathaus/wahlen/files/M21_Take_off_Konzept_HL-Umdruck_17-156_WA_Ltsh.pdf

Side Letters were signed, they were expected to be sufficiently profitable. An airport behaving like a MEO would have offered similar terms. According to Oxera, this also holds true if the 2010 Marketing services agreement was to be considered jointly with the March and October 2010 Side letters. Marketing costs for Lübeck airport were therefore included in the assessment.

5.3.2.3. **Air Berlin**

(163) Air Berlin pointed out that there were three agreements signed in 2010: Side Letter No 1, Side Letter No 2 and the 2010 Marketing services agreement. The Commission should take into account all of the 2010 Agreements in its assessment.

5.4. *CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT*

RYANAIR AND WIZZ AIR

(164) Ryanair and Wizz Air argued that all alleged aid granted by Lübeck airport to Wizz Air and other airlines cannot be imputed to the German State, based on the *Stardust Marine* judgment ([1]). Wizz Air argues that, even though Hansestadt Lübeck was the sole owner of the airport during the time in question, this is not sufficient to confirm any imputability to the State. Wizz Air argues that the lack of imputability to Germany was even more obvious during the time of ownership of 90 % of the FLG shares by Infratil.

(165) Ryanair and Wizz Air stated that those charges and any discounts represent an insignificant share of an airline's costs of dealing with an airport. According to Ryanair, those charges cannot be assessed in isolation since there is no retail market for de-icing. A discount on de-icing is likely to be counter-weighed by the commercial benefits being obtained by the airport elsewhere in the negotiations. Ryanair cited the Charleroi judgment, where it is confirmed that 'it is however necessary, when applying the private investor test, to envisage the commercial transaction as a whole' ([2]).

(166) Finally, Ryanair and Wizz Air stated that the price for de-icing fluid charged at Lübeck airport was the standard price charged across public and private airports.

6. **COMMENTS OF GERMANY ON THIRD PARTIES**

6.1. *COMMENTS ON RYANAIR'S SUBMISSIONS*

(167) According to Germany, Ryanair's submissions reveal that FLG acted in line with the MEO principle.

(168) Germany particularly highlighted the usefulness of Ryanair's approach of proving the market conformity of the agreement through a profitability analysis and a comparator analysis.

(169) According to Germany, the Side Letter No 1 and Side Letter No 2 are not relevant to the present investigation. Firstly, the March and October 2010 Side letters are not imputable to the State since they were autonomously negotiated and entered into by FLG, without interference of Hansestadt Lübeck. Secondly, with regards to Side Letter No 2, Germany pointed out that it merely constituted an extension of the 2000 Agreement, therefore not containing any material change. Therefore, all considerations on the 2000 Agreement also apply to the Side letters.

(170) Germany stated that it does not understand why the 2010 Marketing services agreement should be included in the present investigation, since it involved no public funds. The costs as laid down in the 2010 Marketing services agreement were covered by the IHK Lübeck. Moreover, Germany commented that the 2010 Marketing services agreement can be regarded as being in compliance with market standards. This is supported by the observation that FLG was charged with fewer costs than other airports with a similar agreement. Even more, the 2010 Marketing services agreement with Lübeck airport was based on the promise of Ryanair to expand its flight portfolio by two destinations.

([1]) Case C-482/99 *France* v *Commission* ('Stardust Marine') ECLI:EU:C:2002:294.
([2]) Case T-196/04 *Ryanair* v *Commission* ('Charleroi') ECLI:EU:T:2008:585.

(171) Another point added by Germany is the function of Lübeck airport as a back-up airport for Hamburg airport and as a necessary infrastructure for the Northern German population.

6.2. *COMMENTS ON SGF'S SUBMISSIONS*

(172) Germany stated that SGF was not an interested party within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation (EC) No 659/1999, and therefore had no right to submit comments. The members of SGF merely own land in close distance to the airport and therefore want to get rid of the perceived nuisances created by the operation of the airport. Such goals, however, have to be striven for by way of national legal remedies.

(173) Moreover, Germany argued that the substance of the submissions made by SGF was inaccurate. Firstly, Germany disagrees with SGF's statement that Lübeck airport does not fulfil a public service function. SGF had argued that the airport is only operated in the general interest to the extent of interests regarding 'general aviation'. Germany disagrees with that statement since Lübeck airport has an operational duty for reasons of infrastructural public service functions and the back-up function for Hamburg airport. The latter was officially laid down in the North German Air Traffic Concept ('Norddeutsches Luftverkehrskonzept').

(174) Regarding the lease agreement, Germany restated its position that there was no advantage for FLG through the old lease agreement until the end of 2005, nor through the new lease agreement from 2006.

(175) Germany further commented on SGF's submissions concerning the infrastructure investments. Germany stated that planning approval is merely an administrative tool which can be given retrospectively and which is neither a prerequisite to approve funding nor having an effect on competition. In addition, Germany disagrees with SGF's categorisation of the investments as maintenance measures rather than measures for the improvement of the traffic function of the airport. The measures were argued by Germany to be necessary in order to comply with national and international regulations. According to Germany, the fact that Ryanair is the largest user of the airport does not lead to the conclusion that it is favoured.

(176) Concerning SGF's calculations regarding the middle-term perspectives of Lübeck airport, Germany stated that the submitted observations were incorrect. Germany argues that it has been proven that at the time of the investment optimistic middle-term perspectives existed, as acknowledged by the Commission in its 2007 Opening decision.

(177) In addition, Germany commented on SGF's claims that FLG was an 'undertaking in difficulty'. Germany is of the opinion that any argumentation by SGF on the basis of the guidelines on State aid for rescuing and restructuring firms in difficulty was moot. According to Germany, those guidelines are not applicable, since the granted benefits do not constitute State aid in the first place. The benefits were never categorised as rescue or restructuring aid or they would have to be approved pursuant to other guidelines.

(178) Germany disagrees with SGF's statement that Hansestadt Lübeck claimed that the closure of the airport was impossible and that it did not consider such an option. According to Germany, Hansestadt Lübeck considered this option but decided against it, since calculations led to the conclusion that this would not be the most economic decision. In addition, Germany clarified that a closure of an airport cannot be done on an *ad hoc* basis due to paragraph 45(1) LuftVZO. Airport facilities are a public good and have an operational duty. Therefore, in order to be able to close the airport, the operation permit would have to be withdrawn as the result of a lengthy legal procedure. Germany claims that the granting of the withdrawal of the permit is excluded if the responsible administration believes the public interest to overweigh in favour of the continuation of the operation of the airport. Therefore, an attempt to close the airport would not be impossible, but certainly difficult, lengthy, and thereby costly. Such consequences were referred to have happened at the closing of airport Berlin-Tempelhof. Germany therefore believed the decision to discard the option of closing the airport and to rather expand and invest in infrastructure to attract a private investor to be the more economic decision. Retrospectively, this was the correct approach, since a private investor was found.

6.3. *COMMENTS ON AIR BERLIN'S SUBMISSIONS*

(179) According to Germany, Air Berlin would have been granted the same advantages as Ryanair if it had fulfilled the same criteria concerning passenger numbers and flight frequency. Instead, Air Berlin denied any offer for negotiations with FLG, since it never intended to take up services at Lübeck airport. In contrast, Air Berlin never objected to the conditions under which Ryanair operates at Hamburg airport. In addition, several airlines have

complained (amongst others to the Commission) that Air Berlin has been benefitting from substantial State aid by the United Arabic Emirates. Therefore, it cannot present itself as victim towards its main competitor Ryanair.

(180) Germany disagreed to the comments of Air Berlin concerning the existence of competition between Lübeck airport and Hamburg airport. In particular, Germany refers to the fact that Hamburg had 70 times as many passengers as Lübeck airport in 2000, when the 2000 Agreement with Ryanair was signed. The absence of complaints by other airports shows that there was no competition between the two airports. Germany further added that Hamburg airport and Rostock airport grew in 2008, while Lübeck airport decreased its passenger numbers by 10 %.

(181) Furthermore, Germany rejected Air Berlin's argument that there was an economic advantage for Ryanair. Germany stated that Air Berlin used inaccurate calculations and that the only test relevant for assessing whether an airport-airline agreement is market conform was the MEO principle. Germany believes that the Ryanair agreements met the market requirements, since the long-term prospects of the airport were positive in 2000.

6.4. *COMMENTS ON BDF'S SUBMISSIONS*

(182) Germany pointed out that Air Berlin is a member of BDF, leading to close ties and overlapping submissions. Germany disagreed that FLG would artificially create demand through excessively low prices and that FLG would deviate from the schedule of charges in a discriminatory manner in favour of one airline. According to Germany, FLG would not have had any reason to discriminate against single airlines in order to increase demand. On the contrary, more airlines would have meant more business at Lübeck airport. Therefore, Germany asserts that any airline could have entered into an agreement with Lübeck airport at similar conditions if it had made an offer comparable to that of Ryanair.

7. **ASSESSMENT**

7.1. *INTRODUCTION*

(183) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Internal market'. The criteria laid down in Article 107(1) TFEU are cumulative. In order to determine whether a measure constitutes State aid, the following conditions have to be fulfilled:

— the beneficiary is an undertaking;

— the measure confers an advantage;

— the advantage is granted through State resources;

— the advantage is selective; and

— the measure distorts or threatens to distort competition and is liable to affect trade between the Member States.

(184) Thus, it must be determined whether those criteria are met in relation to each of the measures under consideration, namely:

— the potential State aid in favour of FLG,

— the potential State aid in favour of Infratil,

— the potential State aid in favour of Ryanair, and

— the charges for the de-icing of aircrafts at the airport.

(185) As to the potential State aid in favour of FLG, the Commission will first assess whether the potential beneficiary of State aid, FLG, still exists and if not, whether the economic activity of FLG is still continued. In addition, the Commission has to assess whether the advantage lying in any potential State aid to FLG could have been passed on to its successors, i.e. whether there was economic continuity.

(186) As to the potential State aid in favour of Ryanair, the Commission will only assess the 2000 Agreement. At the date of this Decision, the Commission does not have enough information in its file to assess whether later agreements, in particular those concluded in 2010, constitute State aid in favour of Ryanair. Those agreements therefore will be assessed in a separate decision.

7.2. *POTENTIAL STATE AID IN FAVOUR OF FLG*

7.2.1. ***Beneficiary of the potential State aid***

(187) The Commission has opened the formal investigation procedure on potential State aid in favour of FLG. In January 2013, however, part of the assets of FLG were sold to Yasmina. FLG was merged into Hansestadt Lübeck and the legal entity FLG ceased to exist. In 2014, Yasmina announced insolvency, resulting in the initiation of insolvency proceedings in April 2014. In August 2014, PuRen took over the assets of Yasmina.

(188) In the cases where the Commission takes a negative decision ordering the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 of the Treaty, the recovery obligation may be extended to a new company to which the beneficiary of the aid in question has transferred or sold part of or all its assets, where that transfer or sale structure demonstrates that there is economic continuity between the two companies.

(189) If the Commission were to find that there was incompatible aid to FLG which needed to be recovered, it would have to assess who benefitted from the aid and which company the recovery obligation should be addressed to. If there was no company to which the recovery obligation could be extended, the Commission would not need to assess whether there was aid to FLG. Therefore, the Commission considers it appropriate to first assess whether there was economic continuity between FLG and Yasmina and whether the recovery obligation can be extended to Yasmina (see Section 7.2.2) and whether PuRen, the buyer of Yasmina's assets, could have benefitted from the aid (see Section 7.2.3). The Commission then assesses whether the economic activity which might have benefitted from the aid still exists (see Section 7.2.4). The question whether the measures provided to FLG included State aid, and if so, whether such aid was compatible, will only have to be examined if a beneficiary of the aid can be identified, i.e. either if there was economic continuity between FLG and Yasmina or PuRen, or if the aid remained at the level of the economic activity, i.e. at the level of the operation of Lübeck airport.

7.2.2. ***Economic continuity between FLG and Yasmina***

(190) In its decision concerning the sale of assets of the airline Alitalia ([1]), the Commission considered that if the acquisition of assets takes place at market price and does not show economic continuity between the old company and the new structure, it cannot be assumed that the new structure has benefited from the competitive advantage created by State aid already granted to the original company.

(191) According to established case law ([2]), economic continuity between the original entity and the new structure is established on the basis of a set of indicators. This set of indicators was confirmed by the Court in the case *Ryanair* v *Commission* ([3]). It is however not a mandatory set of cumulative requirements that have all to be fulfilled in each case ([4]). The following factors may be taken into consideration in assessing the economic continuity between two entities:

— the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets),

([1]) Commission Decision of 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6).
([2]) Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia* v *Commission* ECLI:EU:C:2003:252; Commission decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/Olympic Airways Services* (OJ C 18, 23.1.2010, p. 9); Commission decision of 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6); Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire* (OJ C 305, 10.10.2012, p. 5).
([3]) Case T-123/09, *Ryanair Ltd* v *Commission* ECLI:EU:T:2012:164.
([4]) Case T-123/09, *Ryanair Ltd* v *Commission* ECLI:EU:T:2012:164, paragraph 156.

— the sale price,

— the identity of the buyer(s),

— the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision), and

— the economic logic of the operation.

7.2.2.1. **Scope of the sold assets**

(192) The Commission notes, at the outset, that, in principle, a complete take-over of the seller's assets by the buyer may point in the direction of economic continuity between the buyer and the seller. However, that may not be the case if the overall assessment shows that the scope of the sale is left to the market. For instance, if the scope of the sales results from an open, transparent, non-discriminatory and unconditional tender procedure, this may point in the direction of economic discontinuity. In this context, the bidders should have the possibility to freely decide whether to bid for individual assets, a group of assets or all assets, they should not be obliged to enter into contracts concluded by the seller, and they should be able to choose freely if they want to take over all employees of the seller, some of them or none of them.

(193) The Commission observes that the published tender notice for the sale of FLG's assets specified that the bidders could either purchase 90 % of the shares in FLG or realise a comparable economic solution for taking over the operation of the airport. This allowed bidders therefore to bid for the shares in FLG, to bid for assets or bundles of assets or to find another economic solution, such as the lease of assets. This was confirmed in the information memorandum, submitted to all interested bidders prior to submitting an expression of interest. It was therefore clear to the interested bidders that they could offer purchasing shares or purchasing assets or bundles of assets. Indeed, of the five bidders that submitted an indicative offer, two bidders offered to purchase assets, whereas the other bidders offered to purchase shares. Of the three bidders that submitted binding offers, two bidders offered to purchase assets, one offered to purchase shares. 3Y, the holding company of Yasmina, offered the highest price for taking over a bundle of assets. According to Germany, Yasmina took over ca. […] % of the assets of FLG, based on the overall book value of the assets compared to the value of the assets taken over. Non-purchased items included, amongst others, […].

(194) The Commission observes that non-purchased items were subject to two lease agreements between Yasmina and Hansestadt Lübeck. One concerned the airport infrastructure and land that had been subject to a lease agreement between FLG and Hansestadt Lübeck prior to the sales. This lease contract was taken over by Yasmina. The other concerned the remaining assets of the airport that had been transferred from FLG to Hansestadt Lübeck when FLG was absorbed by Hansestadt Lübeck.

(195) The fact that FLG was sold in an asset deal and that the buyer did not buy a large proportion of the assets points towards an absence of economic continuity. On the other hand, Yasmina leased the assets which were not subject to the purchase from Hansestadt Lübeck, which indicates that as a result of the tender procedure, Yasmina could use all assets. This rather points to the existence of economic continuity.

(196) With regard to the workforce, the sales contract stated that the employees would be taken over by Yasmina in accordance with paragraph 613a of the German civil code (Bürgerliches Gesetzbuch, BGB). Paragraph 613a BGB is based on Council Directive 2001/23/EC [1]. That paragraph stipulates the rights and duties in the case of transfer of business. To be more specific, according to paragraph 613a, '[i]f a business or part of a business passes to another owner by legal transaction, then the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer. If these rights and duties are governed by the legal provisions of a collective agreement or by a works agreement, then they become part of the employment relationship between the new owner and the employee and may not be changed to the disadvantage of the employee before the end of the year after the date of transfer…' [2]. In addition, the previous employer or the new owner must notify employees affected by a transfer in writing prior to the transfer and the employee may object in writing to the transfer of the employment relationship.

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).
[2] Bürgerliches Gesetzbuch [BGB] Aug. 18. 1896, para 613a 242.

(197) On the basis of this legal provision, the workforce was informed of the transfer and was taken over if no objections were voiced. In this case, FLG had […] employees, of which […] objected to the takeover. These […] employees were transferred to be employed by Hansestadt Lübeck.

(198) The transfer of assets did not include any condition that would go beyond the legal obligations, such as a condition on the number of employees to be taken over, or an obligation to maintain the employees beyond the usual contractual obligations as determined by employment law.

(199) The only contractual stipulation related to employees is a reminder of the applicable employment law; overall, the fact that most of the employees were transferred does not necessarily indicate that there was economic continuity ([1]).

(200) However, on balance, given that Yasmina was in a position, through the combination of the sales of part of the assets with two lease contracts on the remaining assets, to use all of the assets previously owned and used by FLG, the scope of the sold assets rather points towards the existence of economic continuity.

7.2.2.2. **Sale price**

(201) In order to avoid economic continuity, the assets have to be sold at a market price, for instance through an open, transparent, non-discriminatory and unconditional tender procedure.

(202) The Commission has to assess whether FLG's assets were indeed sold through an open, transparent, non-discriminatory and unconditional tender procedure to the bidder submitting the highest bid, taking into account transaction security.

(203) First, the Commission notes that the invitation to submit an expression of interest for FLG's assets did not contain any limitation as to the parties that could submit offers, and did not impose any conditions on potential bidders. Any entity could submit an offer during the tender process. Furthermore, it was made public by publication in the electronic supplement to the *Official Journal of the European Union*.

(204) Secondly, as regards the principle of transparency, the Commission observes that the bidders had more than a month to decide whether to submit an expression of interest, on the basis of an information memorandum that could be requested from the seller. Subsequently, investors having submitted an expression of interest had about three weeks to evaluate the information provided to them during a due diligence ([2]) and to decide whether to submit an indicative offer until 15 October 2012. All investors having submitted indicative offers had the possibility to participate in an information meeting with the seller. The deadline for binding offers was 20 November 2012.

(205) The Commission also notes that already prior to publishing the tender notice, the seller determined the criteria according to which the economically best bid was to be selected and communicated the relevant criteria to the bidders from the start of the procedure.

(206) Thirdly, there was no discrimination between the bidders at any stage of the tender process. All bidders received the same information and clarifications about the tender rules and procedures, deadlines for submission of offers, and on FLG. No bidder was offered exclusivity in the negotiations. In the final phase, three bidders submitted binding offers.

(207) After having evaluated the binding offers on the basis of the criteria determined prior to the beginning of the procedure, Hansestadt Lübeck came to the conclusion that 3Y made the economically best offer. Hansestadt Lübeck suggested concluding the sales contract to the Bürgerschaft. The Bürgerschaft decided on 29 November 2012 to accept the offer of Yasmina and the assets of FLG were sold to 3Y, who had established Yasmina for that purpose, with effect from 1 January 2013.

([1]) Commission Decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

([2]) A due diligence is the examination of a potential target for merger, acquisition, privatisation, or similar corporate finance transaction normally by a buyer.

(208) Fourthly, a tender for the sale of assets is unconditional when a potential buyer is generally free to acquire the assets and to use them for its own purposes irrespective of whether or not it runs certain businesses ([1]). In this context, the Commission notes that the published tender notice for the sale of FLG's assets specified that the buyer should continue the operation of the airport. Furthermore, Yasmina, the successful bidder, paid a final purchase price of EUR […] for the purchase of assets of FLG. Yasmina also entered into two leasing contracts for the infrastructure, land and assets in the ownership of Hansestadt Lübeck. The lease amounted to respectively EUR […] per year and EUR […] per year. At the same time, Hansestadt Lübeck committed to provide an investment grant amounting to EUR […] to Yasmina if certain conditions were met. The sales of the assets of FLG was directly linked to the future investment grant to Yasmina. As the future grant was higher than the purchase price, the sales price was negative.

(209) In light of these elements, the Commission questions the un-conditionality of the tender procedure. If the sale of assets is carried out through a conditional tender, it cannot be presumed that the transaction was in line with market conditions because of the tender procedure. Therefore, the Commission is not in a position to conclude on the question whether Yasmina paid a market price for FLG's assets. If Yasmina paid indeed less than the market price, then this would point towards the existence of economic continuity.

7.2.2.3. **Identity of the buyer**

(210) The buyer was Yasmina, a subsidiary of 3Y. The sole shareholder of 3Y was the Saudi citizen Adel Mohammed Saleh M. Alghanmi. Yasmina was a private undertaking with no former ties to FLG or Hansestadt Lübeck. The fact that Yasmina was independent from FLG as well as from the public authorities, indicates that there is no economic continuity. The Commission therefore concludes that the identity of the buyer does not point towards the existence of economic continuity.

7.2.2.4. **The moment of the sale**

(211) Hansestadt Lübeck intended to privatise the airport before the Commission started any investigations. After the first privatisation to Infratil failed in 2009, Hansestadt Lübeck started a second attempt in 2012, which succeeded with the privatisation of the airport to Yasmina. The sale to Yasmina took place after the 2007 and 2012 Opening decisions, but before any final decision was reached by the Commission. The fact that the sale of the airport is part of the continuous efforts of Hansestadt Lübeck to privatise the airport indicates that it is not a deliberate attempt to avoid recovery of the aid. The timing of the sales process points to the absence of economic continuity.

(212) In addition, the Court has previously held that there is economic continuity when there is the 'objective fact that the effect of the transfer is to evade the obligation to repay the aid at issue' ([2]). However, since in the current case, there had been no decision by the Commission on the existence of aid at Lübeck airport since 2007, when the case was initially opened, it cannot be concluded that such an intention was present at the time of the privatisation. On the contrary, in this case, Hansestadt Lübeck acted in an economically consistent manner, since the privatisation of the airport was envisaged before the Commission started questioning possible State aid at Lübeck airport ([3]).

(213) Furthermore, the Court has previously held that there may be economic continuity where a company has been created to continue some of the activities of an undertaking which has become insolvent ([4]). However, this is not the case, since Hansestadt Lübeck initiated and finalised the sale to Yasmina without FLG being insolvent. The Commission therefore concludes that the moment of the sale does not point towards economic continuity.

7.2.2.5. **Economic logic of the operation**

(214) In the submission of its expression of interest, Yasmina presented an ambitious business plan which aimed at the transformation of Lübeck airport into a modern airport made attractive for a variety of undertakings. The plan was to attract businesses with a modern, high-tech business park, which was to include cinemas, banks, cafés, restaurants and parking facilities with special test tracks, a go-cart track, an ice rink, high fashion boutiques,

([1]) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), recital 94.
([2]) Case T-415/05, *Greece* v *Commission* ECLI:EU:T:2010:386, paragraph 146.
([3]) *Ibid.* The Court has found that economic inconsistency may be an indication for financial continuity.
([4]) Case C-610/10 *Commission* v *Spain* [2012] ECLI:EU:C:2012:781, paragraph 106.

a boutique hotel, a convention centre, as well as a fashion whole sale village. In addition, a Cargo Village was intended to be built, to connect water-ways with land- and air-ways and to make transport easier. This included storage possibilities, longer runways and maintenance infrastructure. Furthermore, further modifications to the current business plan were envisaged such as cheap fuel for small aircrafts, self-check-in service, fixed base operations with luxurious VIP passengers, advertising the airport as location for air shows and aviation expos. At the same time, Lübeck airport was to continue to operate as an airport, i.e. to offer charter and scheduled flights. From an *ex ante* perspective, Lübeck airport was to remain an airport, but with a changed business plan.

(215) The Commission observes that while Yasmina's business concept differed from the activities carried out by FLG, Yasmina still planned to offer similar aviation activities as FLG. On balance, this seems to rather point towards the existence of economic continuity. The fact that *ex post*, Yasmina was only able to offer reduced aviation activities, as Ryanair left Lübeck to start flying from the near Hamburg airport, does not alter this conclusion.

7.2.2.6. **Conclusion on economic continuity between FLG and Yasmina**

(216) The Commission observes that some of the indicators point towards an absence of economic continuity between FLG and Yasmina and some point towards the existence of economic continuity. Most importantly, the Commission cannot exclude that Yasmina paid less than the market price for the assets of FLG. Therefore, while some of the indicators point towards the absence of economic continuity, the Commission cannot rule out that there was nevertheless economic continuity between FLG and Yasmina. The Commission notes however that in any event, 3Y and Yasmina have been dissolved in the meantime. So even if there had been economic continuity between FLG and Yasmina, the recovery obligation could not be extended to Yasmina anymore.

7.2.3. ***Economic continuity between FLG and PuRen***

(217) If there was economic continuity between FLG and Yasmina, and given that Yasmina has been dissolved in the meantime, the Commission has to assess whether the buyer of Yasmina's assets benefitted from potential State aid to FLG and whether the recovery obligation would need to be extended to this buyer.

(218) Before Yasmina was dissolved, its assets were sold to another private investor, PuRen. The Commission notes that Yasmina's assets were sold in a court supervised insolvency proceeding in line with German insolvency law ([1]). This seems to indicate that in any event, if there had been economic continuity between FLG and Yasmina, the chain of economic continuity would have been broken at this stage. PuRen therefore did not benefit from potential State aid to FLG.

7.2.4. ***Advantage to the sold economic activity***

(219) The main economic activity that FLG exercised, i.e. the operation of Lübeck airport, also does not exist anymore, given that Lübeck airport has ceased to operate scheduled flights and charter flights. At the date of this Decision, no airline is serving Lübeck airport. Therefore, the sold economic activity could not have benefitted from the potential State aid to FLG either.

(220) Furthermore, the Commission has to assess whether the negative sales price paid by Yasmina for the assets of FLG could still have provided an advantage to the sold economic activity ([2]), in this case the airport. To this end, the Commission has to assess whether Hansestadt Lübeck behaved like a MEO. The costs of the sale of the airport would have to be compared to the costs of a counterfactual scenario, which could in the case at hand have been the closing of the airport or the continued operation of the airport by FLG.

(221) However, given that at the date of this Decision, no airline serves the airport and that therefore no scheduled flights or chartered flights are offered to or from Lübeck airport, the Commission considers that there is no need to assess whether the negative sales price provided an advantage to the sold economic activity. The sold economic activity has disappeared from the market.

([1]) Insolvency law ('Insolvenzordnung') of 5 October 1994 (BGBl. I S. 2866), last amended by Article 16 of the Law of 20 November 2015 (BGBl. I S. 2010).

([2]) See Commission Decision of 27 February 2008 on State aid C 46/07 (ex NN 59/07) which Romania has implemented for Automobile Craiova (former Daewoo Romania) (OJ L 239, 6.9.2008, p. 12).

(222) This finding is without any prejudice to the assessment of whether the most recent sales of Lübeck airport to Stöcker involved State aid to the buyer. Furthermore, the Commission reminds Germany that any measure aiming to prepare Lübeck airport to take up scheduled flights or charter flights in the future is subject to State aid control and would have to be notified to the Commission.

7.2.5. ***Conclusion***

(223) The Commission finds that there is no need to take a decision as to whether potential State aid to FLG constitutes State aid within the meaning of Article 107(1) TFEU, and if so, whether such State aid could be declared compatible with the internal market. The legal entity FLG has ceased to exist and so has its economic activity. Furthermore, even if there was economic continuity between FLG and Yasmina, it would not be possible anymore to recover the aid from Yasmina as it has been dissolved and its assets were sold in court supervised insolvency proceedings in line with German insolvency law.

7.3. *POSSIBLE STATE AID IN FAVOUR OF INFRATIL*

7.3.1. ***Sale of shares in FLG***

7.3.1.1. **Advantage**

(224) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal conditions, that is to say, in the absence of State intervention ([1]).

(225) According to Article 345 TFEU, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. The privatisation of a firm — a transfer from the public to the private sector — is an economic policy choice which, in itself, falls within the exclusive competence of Member States.

(226) In accordance with established case law ([2]) and Commission practice ([3]), when a Member State sells shares in undertakings, the purchaser does not receive an advantage if the Member State's behaviour is consistent with that of an MEO. This is the case when a hypothetical private shareholder, motivated by the prospect of profit, would have entered into the transaction. Thus non-economic considerations, such as industrial policy reasons, employment considerations or regional development objectives cannot be taken into account. This principle has been repeatedly confirmed by the Commission and the Court ([4]).

(227) In its *Stardust Marine* judgment the Court stated that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' ([5]).

(228) Therefore, in order to assess whether Hansestadt Lübeck acted as an MEO when privatising Lübeck airport, it is necessary to value the different options Hansestadt Lübeck had at that time, in order to verify whether Hansestadt Lübeck has chosen the financially most advantageous option available. In principle, an assessment carried out by one or more independent audit companies can serve as evidence for the market value of a transaction.

(229) In 2004, Hansestadt Lübeck ordered a valuation of closure and continuation of the airport by an independent private bank ([6]) ('the Berenberg study'). The Berenberg study assessed the worst case and best case value of the following options:

([1]) Case C-342/96 *Kingdom of Spain* v *Commission* ECLI:EU:C:1999:210, paragraph 41; Case C-39/94 *Syndicat francais de l'Express international (SFEI) and others* v *La Poste and others* ECLI:EU:C:1996:285, paragraph 60.

([2]) See for example: Case T-296/97 *Alitalia* v *Commission* ECLI:EU:T:2000:289; Cases T-228/99 and T-233/99, *WestLB* v *Commission* ECLI:EU:T:2003:57; Case T-366/00, *Scott SA* v *Commission* ECLI:EU:T:2007:99; Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia* v *Commission* ECLI:EU:C:2003:252; Case T-358/94, *Air France* v *Commission* ECLI:EU:T:1996:194.

([3]) XXIIIrd Report on Competition Policy, 1993, p. 255.

([4]) Commission Decision C(2013) 3546 final of 19 June 2013, SA.36197(N/2013) — *Portugal Privatisation of ANA — Aeroportos de Portugal*, OJ C 256, 5.9.2013, p. 3; Case C-40/85 *Belgium* v *Commission*, ECLI:EU:C:1986:305.

([5]) Case C-482/99 *France* v *Commission* ('Stardust Marine') ECLI:EU:C:2002:294, paragraph 71.

([6]) Valuation by Berenberg Consult GmbH (a subsidiary of Hamburger Privatbank Berenberg).

Table 9

Options of HL and valuation by Berenberg Consult

Options	Worst case (in EUR)	Best case (in EUR)	Mean value (in EUR)
Privatisation (best case incl. subsidies, sale of airport site in 2009, debtor warrant (Besserungsschein))	[…]	[…]	[…]
Ordinary closing (Ordentliche Schließung) (best case without direct liability of shareholders 'Durchgriff-shaftung')	[…]	[…]	[…]
Insolvency (best case without Durchgriffshaftung)	[…]	[…]	[…]
Continuing operations as before (no difference between best case and worst case)	[…]	[…]	[…]

(230) The reference date (Stichtag) was 31 December 2003. The Berenberg study concluded that the costs for continuing airport operations would amount to EUR […]. The Berenberg study has estimated these costs under the assumption that the airport would continue to be loss making in the following years. For the privatisation option, the valuation estimated costs to amount between EUR […] and EUR […]. This valuation included a positive purchase price of EUR […]. As a potential buyer of the airport would reflect expected losses in its purchase price, this estimated price indicates that the valuation assumed profitability after privatisation. The assumption of profitability can be explained by increased efficiency after privatisation and by an expected growth in passenger numbers. It is therefore substantiated. In particular, Ryanair had announced to create a base at Lübeck airport in case of a runway extension.

(231) On this basis, Hansestadt Lübeck decided to initiate the privatisation process of the airport as it was financially the most advantageous option available. The Commission notes that the Berenberg study expected it possible to sell the airport activities at a positive price, while if they were to remain in the public hand, these activities were expected to be continuously loss making.

(232) The agreement concluded between Hansestadt Lübeck and Infratil consists of several elements and contains different scenarios that reflect the situation in October 2005.

(233) Since the planning approval was suspended by the *OVG Schleswig* judgment in July 2005 (see recital 78), Infratil was prevented from expanding the airport. Therefore the value of FLG decreased. Furthermore the planned expansion of services by Ryanair, and thus the profitability of the airport, was largely depending on obtaining the planning approval in the future.

(234) Infratil, being a New Zealand investor and being one of the first private investors to invest in a regional airport in continental Europe, had only a small information base for its risk assessment. Based on previous experience and knowledge of German administrative proceedings, Hansestadt Lübeck could reasonably expect that the planning approval would be obtained. At the same time, Hansestadt Lübeck had to accept that Infratil would attribute a higher risk to the planning approval process and Hansestadt Lübeck had thus to accept that Infratil would not be willing to pay the full purchase price from the beginning. The result was the negotiation of a put option as well as the splitting of the purchase price into the immediately payable Purchase Price I and a Purchase Price II that only had to be paid if and once the planning approval was obtained. Due to the circumstances, the Commission concludes that a private shareholder would have negotiated similar options.

(235) The Commission has also to assess whether the transaction price stipulated for the negotiated options met market requirements.

Purchase Price I (EUR […]) and the put option

(236) In this scenario, the conditions specified in the 2005 Participation Agreement are not fulfilled and the planning approval is not obtained. As a result, Infratil does not have to pay Purchase Price II. The study of the independent consultant company Ecorys, commissioned by the Commission, shows that without the extension, Lübeck airport was expected to be loss making:

Figure 2

Low case NPV (90 % equity value) & purchase price

[…]

(237) Under these circumstances, Infratil would have been expected to exercise the put option. Purchase Price I therefore constitutes a merely symbolic price, secured by an exit strategy for Infratil to reverse the transaction. As in this scenario the operation of the airport would not be profitable, the Commission concludes that the positive price of EUR […] complies with the market conditions and that no economic advantage was granted to Infratil.

(238) The put option price of EUR […] (to be paid by Hansestadt Lübeck) mainly consists of payments for shareholder loans, investments, operating losses, and the costs for the planning approval process — costs which Hansestadt Lübeck would have had to cover without the privatisation of the airport. Considering the different components of the price, the put option would be equivalent to undoing the agreement, reversing the original transaction.

(239) The Commission further notes that the takeover of operating losses is limited to EUR […]. However, it can be concluded from the losses of the airport in the years prior to the privatisation that Infratil must have been aware that the actual losses would exceed this limit by far, in the case where Lübeck airport would not grow as expected.

Table 10

FLG losses 1995-2010 in EUR (thousand)

Year	Losses of FLG in EUR (thousand)
1995	[…]
1996	[…]
1997	[…]
1998	[…]
1999	[…]
2000	[…]
2001	[…]
2002	[…]
2003	[…]
2004	[…]
2005	[…]
2006 (1 January-31 March)	[…]
2007	[…]
2008	[…]
2009	[…]
2010	[…]

(240) When extrapolating the increase of the losses from the three years before the privatisation (2002-2004), losses of more than EUR […] could be expected for the period between 1 October 2005 and 31 December 2008. Even if the losses from the year prior to the privatisation were assumed to remain constant, losses of EUR […] could

have been expected. Therefore, in the case of a resale of the shares, and taking into consideration that Hansestadt Lübeck would take over EUR […] of losses, Infratil could have reasonably known that it would have to carry additional losses of between EUR […] and EUR […]. This estimation is supported by *ex post* data, according to which the airport had accumulated losses amounting to EUR […] in the period in question.

(241) It is clear that a private seller would not have been able to negotiate a more favourable put option price. The Commission therefore concludes that Hansestadt Lübeck acted like a MEO when negotiating the put option and that no economic advantage was granted to Infratil.

Purchase Price II (EUR […])

(242) Purchase Price II of EUR […] had to be paid by Infratil only if certain conditions were met that ensured the profitability of the airport.

(243) The price corresponds to the sales price negotiated by the parties in March 2005 during the public procurement procedure.

(244) The existence of an economic advantage can be excluded, if the sale complies with the market conditions. This can be assumed when a sale is carried out through a public tender and the following cumulative conditions are fulfilled ([1]):

— the shareholding is sold by a competitive tender that is open to all comers, transparent and non-discriminatory;

— no conditions are attached to the sale which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price;

— the shareholding is sold to the highest bidder;

— the bidders must be given enough time and information to carry out a proper evaluation of the assets upon which their bid is based.

(245) These conditions were met by the tender taking place in March 2005. As there were five different undertakings indicating their interest in buying the airport, it is not apparent that only Infratil was able to submit a credible bid. Furthermore the public tender procedure was designed to ensure effective and non-discriminatory competition under German national law.

(246) The Commission observes that the sales price in the first purchase agreement of March 2005 amounted to EUR […]. However, the terms of the agreement were renegotiated in October 2005. The resulting conditions for Purchase Price II, as well the agreed deductions mentioned in recital 83 were not an outcome of the original tender procedure. Therefore, in order to assess whether the agreed price meets the market requirements, the MEO principle needs to be applied.

(247) In order to establish whether Hansestadt Lübeck would have been able to negotiate a higher purchase price, the prevailing circumstances, in particular the level of risk from the exercise of the put option for Infratil and the potential losses resulting therefrom have to be taken into consideration.

(248) As outlined in recital 240, even taking into account the EUR […] of losses covered by the Hansestadt Lübeck, Infratil had to expect additional financial losses between EUR […] and EUR […] when exercising the put option. From an *ex ante* perspective, Infratil was therefore faced with the situation of potentially realising profits in the case of a materialisation of the second scenario, while at the same time risking high losses in the case of the exercise of the put option.

(249) Germany stated that from the perspective of 2005, Hansestadt Lübeck considered it very unlikely that the conditions for exercising the put option would materialise, namely that the planning approval would not be obtained and the passenger numbers would be below […].

(250) However, as noted in recital 234, Hansestadt Lübeck had to expect Infratil to attribute a higher risk to the planning approval process.

([1]) See point 403 of the European Commission's XXIIIrd Report on competition policy, 1993; point 4.2.3.1 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

(251) With regard to the passenger numbers, Germany argues that Ryanair announced to establish a base at Lübeck airport if existing runways would be enlarged and that the establishment of a *base* was expected to lead to passenger numbers of […] per year.

(252) The Commission notes that actual passenger numbers at Lübeck airport did not reach this threshold but rather decreased between 2005 and 2008 to 544 339 in 2008 (see Table 1). However, the Commission notes in this context that circumstances, like the effects of the financial crisis, which could not have been anticipated in 2005, may explain a significant deviation between expected and actual passenger numbers.

(253) The Ecorys study commissioned by the Commission as well as the expert report drawn up by Ernst & Young ordered by HL in 2005 expected the passenger numbers to rise to […] in 2008. This figure was based on the assumption that a planning approval would be obtained in the first half of 2008 and that construction works at Lübeck airport would be postponed until the end of 2008.

(254) Based on this numbers, it would have been rather reasonable for Hansestadt Lübeck to consider the possibility that passenger numbers would remain below the threshold of […]. Since reaching the passenger number threshold was a pre-condition for the put option to lapse, and since the obtaining of the planning approval was uncertain, the exercise of the put option had to be considered as an option.

(255) Thus given the reasonable possibility of Infratil exercising the put option and the corresponding risk of high losses, the Commission assumes that a private shareholder would not have been able to negotiate a higher purchase price, as the deal would otherwise not have been profitable for a potential investor.

(256) The Commission therefore regards Hansestadt Lübeck's decision to accept a sales price of EUR […] with the agreed deductions as specified in the 2005 Participation Agreement to be economically sound.

(257) This result corresponds to the findings of the Ernest & Young study, which estimates the revenues from the sale of the shares in FLG at about EUR […] and therefore concludes that the agreed price would have been accepted by a private investor in a comparable situation.

(258) The Ecorys study estimates a much higher market value for the shares of about EUR […]. However, the study does not consider the high financial risks for Infratil when exercising the put option as outlined in recitals 247 and 248. In the Ecorys study, this risk is put at zero and therefore not taken into account when estimating Purchase Price II. The varying numbers used for the calculation with regard to investments/CAPEX further contribute to a different risk assessment of both studies.

(259) Furthermore the use of different passenger number growth rates leads to a substantial difference in the results of the studies.

(260) In the light of these considerations, the Commission concludes that Purchase Price II as specified in the 2005 Participation Agreement complies with the market conditions and that no economic advantage has been granted to Infratil.

7.3.1.2. **Conclusion on the overall profitability of the deal**

(261) It follows from the assessment of the measure set out above that Hansestadt Lübeck was faced with the decision to either close the airport, to continue its loss-making operation or to sell Lübeck airport. Hansestadt Lübeck chose the most economic option available when deciding to sell the airport. When assessing the concrete terms of the 2005 Participation Agreement, the interrelation of the two scenarios (i.e. Purchase Price I and the put option and Purchase Price II) needs to be taken into account. As it has been found that it was reasonable from an *ex ante* perspective to consider both the payment of Purchase Price II and the exercise of the put option as possible, the risks for both parties resulting from this have to be considered. Especially with regard to the potential financial losses of Infratil resulting from the exercise of the put option, the Commission considers it unlikely that a private seller in the stead of Hansestadt Lübeck would have been able to negotiate a more favourable agreement.

(262) The Commission therefore concludes that Hansestadt Lübeck acted like a MEO when negotiating the 2005 Participation Agreement. As a result, the measure did not grant Infratil any economic advantage and did not constitute State aid.

7.3.2. ***The 2009 Additional Agreement and the renegotiation of the put option — Takeover of losses, investments and other costs of FLG in 2009***

(263) As stated above, the 2009 Additional Agreement signed on 12 November 2008 did not modify the amounts payable for the put option under the 2005 Participation Agreement, but included the takeover of losses, agreed investments and other costs related to the operation of Lübeck airport in 2009, resulting in a total put option price of EUR […] (see recital 90).

(264) In its 2012 Opening decision, the Commission had opened investigations into two separate measures:

(a) the takeover of losses, investments and other measures of FLG in 2009,

(b) the difference between the put option price agreed in 2005 and the actual put option price paid.

However, on the basis of the information received, the Commission finds that these two issues concern the same measure, namely the 2009 Additional Agreement between Hansestadt Lübeck and Infratil.

7.3.2.1. **Advantage**

(265) To determine whether the put option price under the 2009 Agreement included an economic advantage for Infratil, the Commission needs to apply the MEO test. In order to be able to determine whether Hansestadt Lübeck chose the financially most advantageous option available, the Commission has to place itself in the position of a private shareholder at the time when the agreement was signed ([1]).

(266) The Commission finds that after Infratil announced its intention to exercise its put option in 2009, Hansestadt Lübeck was faced with the following options:

(a) close the airport;

(b) search for a new private operator and meanwhile

— resume the operation of the airport; or

— sign the 2009 Additional Agreement so that Infratil would continue the operation of the airport until a new operator was found.

(267) The option of closing the airport (option a) would have required Hansestadt Lübeck to pay the put option price of EUR […] (see recital 238) immediately and to initiate the procedure for closing the airport, facing additional costs (see the Berenberg study, presented in Table 9).

(268) In the first subscenario of option b (Hansestadt Lübeck resumes operation of the airport until a new private investor is found), Hansestadt Lübeck would have had to pay the put option price to Infratil laid down in the 2005 Participation Agreement and to cover all costs arising from the operation of the airport until a new investor would be found. Deriving from the put option price paid in 2009 (see Table 3), the costs for operating losses, investment, the planning approval process and legal costs alone would have amounted to EUR […]. Therefore, already by October 2009, Hansestadt Lübeck would have faced costs of approximately EUR […] (put option price according to 2005 Participation Agreement plus operating costs for November 2008 to October 2009).

(269) Germany submitted that a resale of FLG to a new private investor would have required a new Union wide tender procedure, which is estimated to take a minimum of 12 months. The Commission notes that a private operator would indeed have taken into account the estimated duration of the tender procedure.

(270) Another subscenario in option b was to sign the 2009 Additional Agreement in order to keep Infratil from exercising the put option until 22 October 2009. In this scenario, assuming that Infratil would exercise its put option in October 2009, Hansestadt Lübeck would have had to pay the put option price under the 2009 Additional Agreement. As this price consists of the put option price of the 2005 Participation Agreement and additional costs relating to the operation of the airport in 2009, the potential costs for Hansestadt Lübeck are comparable to those of the second scenario.

([1]) Case C-482/99 *France* v *Commission* ('Stardust Marine') ECLI:EU:C:2002:294, paragraph 71.

(271) The 2009 Additional Agreement had however an advantage for HL in so far as it provided Hansestadt Lübeck with the time to prepare a tender to find a new investor. Furthermore, the immediate departure of Infratil carried the risk of causing Ryanair to reduce its services at Lübeck airport, and thereby to potentially enlarge future operating losses. Moreover, the reduction of Ryanair's services could have had a negative impact on the planning approval procedure, as FLG justified its need for an extension of the airport primarily with the growth of the low cost segment.

(272) In the light of these considerations, the Commission concludes that signing the 2009 Additional Agreement was the most advantageous option available and that Hansestadt Lübeck therefore acted like a MEO.

7.3.2.2. **Conclusion**

(273) In view of the comparison of the different options and the related costs, it can be concluded that the 2009 Additional Agreement was in line with the MEO principle, since it constituted the least financially burdensome and most economically forward looking option at the time.

(274) This finding is supported by the reasonable assumption that Hansestadt Lübeck would not have been able to find a new investor in 2009. This has proven to be true from an *ex post* perspective, since a new investor was only found in 2012.

(275) Furthermore, the elements of the put option price correspond to those under the 2005 Participation Agreement and merely expand the components of the put option price to the costs in 2009. Like the 2005 Participation Agreement, the 2009 Additional Agreement also contains a limit for the operating losses and investment costs to be paid by Hansestadt Lübeck.

(276) On the basis of those considerations, the Commission concludes that there was no economic advantage granted to Infratil and thus the measure did not constitute State aid.

7.4. *POTENTIAL STATE AID IN FAVOUR OF RYANAIR*

7.4.1. ***Economic advantage***

(277) Where an airport has public resources at its disposal, aid to an airline can, in principle, be excluded where the relationship between the airport and the airline satisfies the MEO test.

(278) Under the 2014 Aviation Guidelines ([1]), the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price ('first approach'), or if it can be demonstrated through an *ex ante* analysis — that is to say one founded on information available when the aid is granted and on developments foreseeable at the time — that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport and is part of an overall strategy leading to profitability at least in the long term ('second approach').

(279) The second approach means that it must be assessed whether, at the date when an agreement was concluded, a prudent market economy operator would have expected the agreement to be incrementally profitable. This to be measured by the difference between the incremental revenues expected to be generated by the agreement (that is, the difference between the revenues that would be achieved if the agreement were concluded and the revenues that would be achieved in the absence of the agreement) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the agreement were concluded and the costs that would be incurred in the absence of the agreement), the resulting cash flows being discounted with an appropriate discount rate.

(280) As regards the first approach (a comparison with the 'market price'), the Commission does not consider that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports ([2]). It therefore considers an *ex ante* incremental profitability analysis to be the most relevant approach for the assessment of arrangements concluded by airports with individual airlines.

([1]) See 2014 Aviation Guidelines, paragraph 53.
([2]) See 2014 Aviation Guidelines, paragraph 59.

(281) It should be noted that, in general, the application of the MEO principle based on an average price on other, similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method is not that relevant in the case of airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another and any debts or obligations entered into by the airport in the past ([1]).

(282) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations vary to a great extent. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.

(283) In addition, benchmarking is not an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions. Such distortions appear to be present in the aviation industry, for reasons explained in paragraphs 57 to 59 of the 2014 Aviation Guidelines:

> 'Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound ex ante profitability prospects, but essentially having regard to social or regional considerations.
>
> Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.
>
> In those circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future […]' ([2]).

(284) Moreover, as the Union courts have recalled, benchmarking by reference to the sector concerned is merely one analytical tool amongst others to determine if a beneficiary has received an economic advantage which it would not have obtained in normal market conditions ([3]). As such, while the Commission may use that approach, it is not obliged to do so where, as in this case, it would be inappropriate.

(285) Ryanair essentially argued that the MEO test can be applied based on a comparison with the commercial arrangements of other European airports. In particular, it compared charges paid by Ryanair at Bournemouth, Grenoble, Knock, Maastricht, Nîmes and Prestwick airports with the charges paid by Ryanair under the agreements at Lübeck airport. The study did not assess whether the sample of benchmark airports fulfilled all the criteria spelled out in the 2014 Aviation guidelines, as it only assessed traffic volumes, type of airport traffic and prosperity of the surrounding area ([4]).

(286) In its 2012 Opening decision, the Commission compared the charges laid down in the March and October 2010 Side letters with charges at Hamburg airport, which led to doubts as to the market conformity of the charges laid down in the Side letters. The Commission notes that traffic volume in Lübeck is much lower than in Hamburg airport. In fact, Hamburg is the airport with the most traffic in Northern Germany. Hamburg is used for all segments of air transport, whereas Lübeck was specialised in low cost carriers which required fewer check-in

([1]) See Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/2008 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair, recitals 88 and 89 (OJ L 27, 1.2.2011, p. 24).
([2]) See 2014 Aviation guidelines, paragraphs 57 to 59.
([3]) See, as regards benchmarking by reference to profitability (as opposed to pricing) in the sector, Joined Cases T-319/12 and T-321/12 *Spain and Ciudad de la Luz* v *Commission* ECLI:EU:T:2014:604, paragraph 44.
([4]) See 2014 Aviation guidelines, paragraph 60 for further criteria to be assessed.

counters and facilities for transfer passengers, no passenger busses, less luggage handling personnel and facilities, less cleaning personnel, and allowed for a shorter circulation time. Consequently, Hamburg airport is not sufficiently comparable to Lübeck airport.

(287) In light of those considerations, the Commission considers that the approach generally recommended in the 2014 Aviation guidelines for applying the MEO test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to this case ([1]).

(288) This approach is justified by the fact that an airport operator may have an objective interest in concluding a transaction with an airline where it may reasonably expect this transaction to improve its profits (or reduce its losses) compared to a counterfactual situation in which this transaction is not concluded, regardless of any comparison with the conditions offered to airlines by other airport operators, or even with the conditions offered by the same airport operator to other airlines.

(289) In addition to those considerations, the airport infrastructure must be open to all airlines and not dedicated to a specific airline in order to exclude that the advantage resulting from compatible aid to the airport operator is passed on to a specific airline.

(290) The Commission also notes in this context that price differentiation is a standard business practice. Such differentiated pricing policies should, however, be commercially justified.

(291) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* point of view, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound medium-term prospects ([2]).

(292) In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity must be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport have to be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport ([3]).

(293) The Commission considers in its constant decision making practice that costs which the airport would have to incur anyway, independently from the arrangement with the airline, should not be taken into account in the MEO test ([4]).

(294) According to the *Charleroi* judgement ([5]) when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of the agreement with Ryanair on FLG, taking into account all relevant features of the measure in question.

(295) The Court declared in the *Stardust Marine* judgment that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' ([6]).

([1]) See 2014 Aviation guidelines, paragraphs 59 and 63.
([2]) See 2014 Aviation guidelines, paragraph 63.
([3]) See 2014 Aviation guidelines, paragraph 64.
([4]) 2014 Aviation guidelines, paragraph 64; Commission Decision (EU) 2015/1226 of 23 July 2014 on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Services (OJ L 201, 30.7.2015, p. 48); Commission Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. and various air carriers operating at Alghero airport (OJ L 250, 25.9.2015, p. 38); Commission Decision (EU) 2016/2069 of 1 October 2014 concerning measures SA.14093 (C76/2002) implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair (OJ L 325, 30.11.2016, p. 63).
([5]) Case T-196/04 *Ryanair* v *Commission* ('Charleroi') ECLI:EU:T:2008:585, paragraph 59.
([6]) Case C-482/99 *France* v *Commission* ('Stardust Marine') ECLI:EU:C:2002:294, paragraph 71.

(296) In order to apply the MEO test, the Commission has to place itself at the time when the agreement was concluded. The Commission has also to base its assessment on the information and assumptions which were at the disposal of FLG when the agreement was concluded.

7.4.2. ***Application of the MEO principle to the 2000 Agreement***

7.4.2.1. **Preliminary remarks**

(297) The Commission notes that Air Berlin argued that the agreements between Ryanair and Lübeck airport were not profitable as the losses of FLG increased continuously (see Table 8) after the arrival of Ryanair. As Ryanair and Wizz Air were the only airlines flying regular lines from the airport, Air Berlin concluded that FLG's losses must be attributable to these airlines.

(298) The Commission notes that even if a significant correlation between the number of Ryanair passengers at Lübeck airport and the losses incurred by FLG could be established, such correlation would not necessarily imply that the losses result from the operation of Ryanair at Lübeck airport. Germany stated that more than […] % of the losses between 2000 and 2005 resulted from investments necessary to adapt the airport to increased passenger numbers. Such investments were necessary to increase the airport value in the event of the envisaged privatisation and to prepare the airport to attract any airline.

(299) In addition, the Commission recalls that the MEO test is based on an *ex ante* assessment. According to the case law of the Court of Justice, the conduct of a private market operator, which is used to assess the conduct of a public operator, does not need to be aimed at short-term profitability but can be guided by prospects of profitability in the longer term ([1]). Even where an airport is loss-making over the period of Ryanair's operation, it is still possible that an airport airline agreement is incrementally profitable to an airport on an *ex ante* basis.

(300) As a final remark, the Commission notes that in the context of the present investigation, Ecorys was asked to compile a report on the profitability of the 2000 Agreement between FLG and Ryanair ([2]). However, the report was based on a total cost approach, rather than an incremental cost approach and will therefore not be taken into consideration.

7.4.2.2. **Assessment of incremental costs and revenues**

(301) As a time frame for assessing the agreement in question a MEO would have chosen as a starting point the date of the signature of the agreement, i.e. 29 May 2000. As an end date a MEO would have taken the end date as stipulated in the 2000 Agreement, i.e. 31 May 2010.

(302) For the purpose of assessing the agreement in question and given the findings in recitals 282 to 301, both the existence and the amount of possible aid in this agreement have to be assessed in the light of the situation prevailing at the time it was signed and, more specifically, in the light of the information available and developments foreseeable at that time.

(303) At the time of the negotiation of the agreement, FLG expected the business of Ryanair at Lübeck airport to lead to increased passenger numbers, thereby increasing non-aeronautic revenues, to the expansion of non-aeronautic services, as well as to the attraction of further airlines. Even though FLG was making losses in the years preceding the agreement, Ryanair's business at the airport was expected to lead to moderate profits in the medium- to long-term.

(304) Germany provided data on the *ex ante* expected growth of passenger numbers as well as the expected incremental costs and revenues, in a best-case and worst-case scenario.

([1]) Case C-305/89, *Italian Republic* v *Commission of the European Communities (ALFA Romeo)* ECLI:EU:C:1991:142.
([2]) The report has previously been mentioned in Section 7.3.1.1 regarding the profitability of the agreement between HL and Infratil.

(305) Incremental revenues that a private investor would reasonably expect from the agreement include:

(a) additional aeronautical revenues from passengers and landing charges paid by Ryanair and

(b) additional non-aeronautical revenues from, for example, car parking, franchised shops, or directly operated shops.

(306) Applying the 'single-till' principle, the Commission takes the view that both aeronautical and non-aeronautical revenues should be taken into account [1].

(307) Germany submitted that based on the charges stipulated in the 2000 Agreement, the airport expected to have average aeronautical revenues of EUR […] per passenger. FLG estimated revenues from non-aviation business as representing […] % of aviation business income.

(308) Incremental costs that a private investor would reasonably expect from the agreement would include:

(a) incremental operational costs directly caused by the Ryanair agreement,

(b) costs for marketing services,

(c) investment costs directly linked to the Ryanair agreement.

(309) Germany stated that it was necessary to increase the number of staff of FLG to handle the expected passenger numbers. FLG expected incremental operational and personnel costs of EUR […] per passenger.

(310) Based on the 2000 Agreement, FLG expected incremental marketing costs for the period 2000-2012 of EUR […] in the best case and EUR […] in the worst case.

(311) Regarding investment costs, Germany stated that the airport infrastructure already existed prior to the agreement with Ryanair and that the initially planned operation of Ryanair at Lübeck airport did not require any additional infrastructure investments.

(312) Germany submitted the following revenues and operating costs for the best case (Table 11) and the worst case (Table 12):

Table 11

Best-case costs and revenues

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[…]	[…]	[…]	[…]
2001	[…]	[…]	[…]	[…]
2002	[…]	[…]	[…]	[…]
2003	[…]	[…]	[…]	[…]
2004	[…]	[…]	[…]	[…]
2005	[…]	[…]	[…]	[…]
2006	[…]	[…]	[…]	[…]
2007	[…]	[…]	[…]	[…]
2008	[…]	[…]	[…]	[…]
2009	[…]	[…]	[…]	[…]

[1] See 2014 Aviation guidelines, paragraph 64.

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2010	[…]	[…]	[…]	[…]
2011	[…]	[…]	[…]	[…]
2012	[…]	[…]	[…]	[…]
Total	**[…]**	**[…]**	**[…]**	**[…]**

Table 12

Worst-case costs and revenues

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[…]	[…]	[…]	[…]
2001	[…]	[…]	[…]	[…]
2002	[…]	[…]	[…]	[…]
2003	[…]	[…]	[…]	[…]
2004	[…]	[…]	[…]	[…]
2005	[…]	[…]	[…]	[…]
2006	[…]	[…]	[…]	[…]
2007	[…]	[…]	[…]	[…]
2008	[…]	[…]	[…]	[…]
2009	[…]	[…]	[…]	[…]
2010	[…]	[…]	[…]	[…]
2011	[…]	[…]	[…]	[…]
2012	[…]	[…]	[…]	[…]
Total	**[…]**	**[…]**	**[…]**	**[…]**

(313) FLG estimated positive financial effects from the 2000 Agreement with Ryanair. In this regard, Table 13 summarises the revenues from aeronautic and non-aeronautic activities, as well as the costs directly attributable to the operation of Ryanair at the airport and marketing costs.

Table 13

***Ex ante* profitability assessment**

profitability assessment	Best case (in EUR)	Worst case (in EUR)
aeronautic revenues	[…]	[…]
non-aeronautic revenues	[…]	[…]
operating costs	[…]	[…]
marketing costs	[…]	[…]
Total	**[…]**	**[…]**

(314) In the best case, Germany rounded passenger numbers to […], leading to aeronautic revenues of EUR […]. In the worst-case scenario, a total of […] passengers was expected, leading to aeronautic revenues of EUR […]. Since non-aeronautic revenues were expected to amount to […] % of aeronautic revenues, non-aeronautic revenues were calculated to be EUR […] in the best case and EUR […] in the worst case. It was calculated that operating costs would amount to a total of EUR […] in the best case and EUR […] in the worst case. Marketing costs were not calculated on a per passenger basis, but were estimated, in total, to be EUR […] in the best case and EUR […] in the worst case.

(315) Table 13 shows that revenues stemming from the 2000 Agreement were expected to exceed costs, leading to an annual surplus of EUR […] in the best case and EUR […] in the worst case.

(316) The Commission finds the approach taken by Germany sound. The estimated average aeronautical revenues were based on the terms of the 2000 Agreement with Ryanair. The non-aeronautical revenues were expected to be […] % of the aeronautical revenue, which seems to be in line with general expectations as regards non-aeronautical revenues at other airports (see Table 6). The assumption that the staff number would need to be increased when passenger numbers increase also seems reasonable.

(317) The Commission notes that investments related to the expansion of Lübeck airport were not specific to Ryanair but could potentially be exploited by other airlines. This indicates that investment costs did not have to be included in the incremental costs of the Ryanair agreement. In this respect, the Commission notes that Germany emphasised that FLG continuously attempted to attract other airlines and succeeded in this attempt by attracting other airlines (such as Wizz Air). In addition, according to Germany, Lübeck airport unsuccessfully tried to initiate negotiations for an agreement with Air Berlin for years.

(318) Germany submitted that in order to successfully privatise Lübeck airport, it was necessary to significantly increase passenger numbers. The Commission accepts that investments were made to prepare Lübeck airport for higher passenger numbers ([1]).

(319) The Commission further notes that the 2000 Agreement did not require FLG to make investments ([2]). FLG could have fulfilled its obligations under the contract without investing in an expansion of the airport.

(320) In the light of those considerations, the Commission concludes that Germany's approach not to attribute investments made at Lübeck airport to the agreement with Ryanair is reasonable.

(321) Having analysed the information provided by Germany, the Commission disagrees however on one point of the analysis and amends it accordingly. The 2000 Agreement sets out as its end date 30 May 2010. Germany took into account incremental costs and revenues for the years 2011 and 2012 when calculating the incremental profitability of the 2000 Agreement. The Commission considers that it is appropriate to take only into account the incremental costs and revenues generated over the duration of the contract. In view of this necessary amendment, the Commission has carried out its own analysis by using directly the incremental profitability analysis submitted by Germany and amending this analysis where necessary as summarised in Tables 14, 15 and 16:

Table 14

Best-case costs and revenues

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[…]	[…]	[…]	[…]
2001	[…]	[…]	[…]	[…]
2002	[…]	[…]	[…]	[…]
2003	[…]	[…]	[…]	[…]

([1]) See Decision (EU) 2015/1226.
([2]) Decision (EU) 2015/1584.

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2004	[…]	[…]	[…]	[…]
2005	[…]	[…]	[…]	[…]
2006	[…]	[…]	[…]	[…]
2007	[…]	[…]	[…]	[…]
2008	[…]	[…]	[…]	[…]
2009	[…]	[…]	[…]	[…]
2010	[…]	[…]	[…]	[…]
Total	**[…]**	**[…]**	**[…]**	**[…]**

Table 15

Worst-case costs and revenues

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[…]	[…]	[…]	[…]
2001	[…]	[…]	[…]	[…]
2002	[…]	[…]	[…]	[…]
2003	[…]	[…]	[…]	[…]
2004	[…]	[…]	[…]	[…]
2005	[…]	[…]	[…]	[…]
2006	[…]	[…]	[…]	[…]
2007	[…]	[…]	[…]	[…]
2008	[…]	[…]	[…]	[…]
2009	[…]	[…]	[…]	[…]
2010	[…]	[…]	[…]	[…]
Total	**[…]**	**[…]**	**[…]**	**[…]**

Table 16

***Ex ante* profitability assessment**

profitability assessment	Best case (in EUR)	Worst case (in EUR)
aeronautic revenues	[…]	[…]
non-aeronautic revenues	[…]	[…]
operating costs	[…]	[…]
marketing costs	[…]	[…]
Total	**[…]**	**[…]**

(322) The Commission has taken out the revenues and operating costs expected for the years 2011 and 2012, as in those years, the 2000 Agreement was expected to have expired already (see Tables 14 and 15). The Commission relied instead on the revenues and operating costs expected for the years 2000-2010, resulting in the revenues and operating costs presented in Table 16. As to the marketing costs, the Commission calculated the average marketing costs per passenger that could have been expected in the best case and in the worst case scenario according to the information provided by Germany. It then multiplied the average marketing costs per passenger with the number of passengers that could have been expected for the years 2000-2010, resulting in an expected marketing costs of EUR […] in the best case scenario, and EUR […] in the worst case scenario (see Table 16).

(323) Finally, while the *ex ante* analysis undertaken by FLG and submitted by Germany did not discount the future payments to the date on which the contract was concluded, it is clear from the figures provided that the contract was expected to be profitable.

(324) In addition to the data provided by Germany, Oxera has submitted a profitability analysis of the 2000 Agreement ([1]). Oxera used outturn data, i.e. data on the actual costs and revenues incurred, from the period prior to the agreement, where possible, to deduct assumptions about FLG's expectations at the time of signing the agreement. Oxera calculated passenger numbers based on outturn data up until the point of signing the agreement. Aeronautical revenues and marketing costs were based on the charges and payments stipulated in the 2000 Agreement. For the calculation of non-aeronautical revenues and operating costs, Oxera used outturn data from the period after the agreement was concluded.

(325) The NPV of the 2000 Agreement with Ryanair was estimated to be EUR […]. Therefore the agreement was expected to be profitable.

(326) Oxera calculated the NPV without attributing investment costs to the 2000 Ryanair agreement. This is in line with the Commission's finding (see recitals 316 to 320) that investments made at Lübeck airport did not have to be attributed to the 2000 Agreement.

(327) The Commission notes that Oxera used *ex ante* available data for the calculation of passenger numbers, aeronautical revenues and marketing charges but based its assessment of non-aeronautical revenues and operating costs on *ex post* data. Oxera stated that it did not have access to *ex ante* projections of non-aeronautical revenues and operating costs. The Commission notes that only revenues and costs that the airport expected to incur *ex ante*, at the time when it entered into the agreement with the respective airline, can be taken into account for assessing whether such agreement was in line with the MEO principle. An assessment partially based on *ex post* data can, however, serve to support the validation of the assumptions taken to determine the *ex ante* expected revenues and costs. Indeed, the *ex ante* data reconstructed by Oxera as regards aeronautic revenues (EUR […]) lies between the *ex ante* expected aeronautic revenues of FLG submitted by Germany in the best case (EUR […]) and the worst case scenario (EUR […]). The *ex ante* data reconstructed by Oxera as regards marketing costs (EUR […]) is even lower than the one submitted by Germany: FLG expected *ex ante* marketing costs of EUR […] in the best case and of EUR […] in the worst case. This confirms that the *ex ante* expectation of FLG was sufficiently conservative.

7.4.3. ***Conclusion***

(328) The information provided by Germany indicates that FLG could have expected a positive incremental return on the 2000 Agreement. The assumptions on which that expectation were based appear reasonable. This is supported by the fact that the expected growth of passenger numbers was outperformed by the real growth during the years 2000-2005. The limits to the growth of the passenger number were largely due to the impossibility to obtain the planning approval and to enlarge the airport, which were not foreseeable at the time of the conclusion of the 2000 Agreement. The expectations of FLG are supported by the study provided by Oxera.

(329) It could therefore have been reasonably expected that the 2000 Agreement with Ryanair would be incrementally profitable for FLG. Consequently, an MEO would have entered into the agreement, since it incrementally contributed, from an *ex ante* point of view, to the profitability of the airport. Similarly, in view of the clearly positive contribution the 2000 Agreement can also be considered to be part of the implementation of an overall strategy to lead to profitability at least in the long term.

([1]) Oxera report, Economic MEOP assessment: Lübeck airport, 1 September 2014.

(330) The 2000 Agreement between FLG and Ryanair therefore does not confer an economic advantage that Ryanair would not have obtained under normal market conditions. Therefore, it does not constitute State aid within the meaning of Article 107(1) of the Treaty. This finding is without any prejudice to the assessment of whether the 2010 Agreements involved State aid to Ryanair.

7.5. *CHARGES FOR THE DE-ICING OF AIRCRAFTS*

7.5.1. ***Selectivity***

(331) To fall within the scope of Article 107(1) TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid.

(332) According to case law of the European Courts, it needs to be determined whether under a particular statutory scheme (the 'system of reference'), a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question. A measure which differentiates between undertakings in a comparable situation would be prima facie selective. If a prima facie selective measure is justified by the nature or general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) TFEU ([1]).

(333) The Commission therefore has to undertake a three-step-analysis: First, the system of reference needs to be determined. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If such a derogation exists (and therefore the measure is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the system.

(334) In the case at hand, the Commission opened the formal investigation procedure in relation to the charges for the de-icing of aircrafts.

(335) First, the Commission has to determine the system of reference under which the charges for de-icing are to be assessed. In this context, the Commission notes that the charges for de-icing of aircrafts at the airport are laid down in a scheme of special charges. While such scheme of special charges is not part of the general schedule of charges for infrastructure use, the scheme of special charges has certain features in common with the general schedule of charges: the scheme of special charges sets out prices for certain services provided by the airport to airlines and prices for material needed for such services. It applies to all airlines using the airport. It is adapted every few years to cater for changes in the costs of the special services. In particular, the airport alone is competent to draw up the scheme of special charges.

(336) In its *Lübeck* judgment, the Court of Justice held that the 2006 schedule of charges of Lübeck airport was to be considered as reference system ([2]). In light of the similarities between the general schedule of charges and the scheme of special charges, the Commission concludes that the scheme of special charges at Lübeck airport has to be considered the reference framework under which the charges for de-icing of aircrafts at Lübeck airport are to be assessed.

(337) Second, the Commission has to assess whether the scheme of special charges differentiates between economic operators who are in a comparable factual and legal situation. The Commission observes that the scheme of special charges applies to all airlines using Lübeck airport. When using the de-icing services for aircrafts, the scheme of special charges does not differentiate between the different airlines. Indeed, every aircraft de-iced at Lübeck airport is subject to the same charges, which depend on the take-off weight of the aircraft as well as the amount of de-icing liquid and hot water used. Therefore, the charges for the de-icing of aircrafts at Lübeck airport do not derogate from the system of reference, because they do not differentiate between airlines using the airport. The Commission concludes that the de-icing charges are, *prima facie*, not selective.

([1]) Case T-210/02 *RENV British Aggregates Association* v *Commission*, ECLI:EU:T:2012:110, paragraphs 82 and 83; Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraphs 74 and 75; Case C-518/13 *Eventech* v *The Parking Adjudicator*, ECLI:EU:C:2015:9, paragraphs 54 and 55.

([2]) Case C-524/14 P *Commission* v *Hansestadt Lübeck* ECLI:EU:C:2016:971, paragraph 62.

(338) Given that the charges for de-icing are, *prima facie*, not selective, there is no need to assess whether such charges are justified by the nature or the general scheme of the system.

7.5.2. ***Conclusion***

(339) Therefore, the charges for de-icing of aircrafts do not constitute State aid within the meaning of Article 107(1) TFEU.

8. **CONCLUSION**

(340) The Commission finds that there is no need to take a decision as to whether potential State aid to FLG constitutes State aid within the meaning of Article 107(1) TFEU, and if so, whether such State aid could be declared compatible. The legal entity FLG has ceased to exist and so has its economic activity. Furthermore, even if there was economic continuity between FLG and Yasmina, it would not be possible to recover the aid from Yasmina anymore as Yasmina has been dissolved and its assets were sold in court supervised insolvency proceedings in line with German insolvency law.

(341) The sale of shares in FLG to Infratil in 2005 did not provide an advantage to Infratil, because Hansestadt Lübeck acted like a MEO when selling the shares. The renegotiation of the put option in 2009 and the taking over of further losses, investments and other costs, as laid down in the 2009 Additional Agreement did not provide an advantage to Infratil either. In that context also Hansestadt Lübeck acted like a MEO.

(342) The 2000 Agreement between FLG and Ryanair would, from an *ex ante* point of view, have contributed to the profitability of the airport. Consequently, a MEO would have entered into the agreement which does not provide an advantage to Ryanair.

(343) The charges for de-icing of aircrafts at the airport do not appear to be selective,

HAS ADOPTED THIS DECISION:

Article 1

It is not necessary to decide whether the potential State aid to FLG constitutes State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union and if so, whether it could be declared compatible with the internal market, as the economic activity of FLG has ceased to exist, and as it is not possible anymore to recover the aid.

Article 2

The sale of 90 % of the shares of FLG to Infratil and the conditions of the put option renegotiated in 2009 do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

The 2000 Agreement between Ryanair and Lübeck airport does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

The charges for the de-icing of aircrafts do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 February 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission