II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 23 July 2008

on measures by Germany to assist DHL and Leipzig Halle Airport

C 48/06 (ex N 227/06)

(notified under document number C(2008) 3512)

(Only the German text is authentic)

(Text with EEA relevance)

(2008/948/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the above Articles [1], and having regard to these comments,

Whereas:

1. PROCEDURE

(1) On 5 April 2006 the German authorities notified arrangements concerning the establishment of the European hub of DHL Group at Leipzig-Halle Airport (LEJ). On 27 April 2006, the Commission requested further information to which Germany replied on 24 July 2006. Meetings between the Commission services, the Airport, DHL, and the German authorities took place on 26 July and on 21 August 2006.

(2) By letter dated 23 November 2006, the Commission informed Germany of its decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of these measures. On 12 December 2006 Germany requested an extension of the deadline for its reply which was accepted by the Commission. Germany transmitted its comments on 23 February 2007.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

(4) The Commission received comments on the subject from interested parties. It transmitted the comments to Germany by letter dated 16 May 2007. Germany was given the opportunity to respond to them within one month. The Commission received Germany's observations by letter dated 13 June 2007.

(5) At the request of the German authorities, a meeting took place on 18 June 2007 and on 25 September 2007. These meetings were followed by the dispatch of additional information, as requested by the Commission, on 19 October 2007 and on 18 December 2007.

(6) Germany sent additional supplementary information to the Commission by letters dated 7 December 2007, 17 March 2008 and 9 April 2008.

[1] OJ C 48, 2.3.2007, p. 7.

[2] See footnote 1.

2. DETAILED DESCRIPTION OF THE FACTS

2.1. The parties

2.1.1. *Flughafen Leipzig/Halle GmbH*

(7) Flughafen Leipzig/Halle GmbH (hereinafter Leipzig Airport) is a subsidiary of Mitteldeutsche Flughafen AG (hereinafter MFAG). MFAG holds a participation of 94 percent in Leipzig Airport. The remaining shares are owned by Land Sachsen and the communities Delitzsch, Leipziger Land, and Schkeuditz. The shareholders of MFAG are: 73 percent Land Sachsen, 14 percent Land Sachsen-Anhalt, 6 percent Stadt Dresden, 5 percent Stadt Halle, 2 percent Stadt Leipzig. There are no private shareholders.

2.1.2. *DHL*

(8) DHL (owned by Deutsche Post AG) is one of the major express parcel operators with a worldwide turnover of EUR 18,2 billion in 2005. Its European hub is currently located at Brussels Airport (BRU). Following problems with regulatory permissions for night flights, DHL negotiated with several airports to find a new location for its European hub. The short list consisted of Leipzig, Brussels, and Vatry (XCR) (France). Finally, DHL decided to move its European hub to Leipzig by 2008.

(9) It should be noted that the DHL investment has been the subject of a previous state aid decision (N 608/2003). On 20 April 2004 the Commission approved the maximum regional aid intensity of 28 percent for DHL's investments at the airport under the 1998 Multisectoral framework rules ([3]). Land Sachsen granted an aid amount of EUR 70,8 million to DHL. On 2 July 2007 the Commission adopted a partially positive partially negative decision and approved an amount of EUR 1.58 million with respect to training aid granted by Freistaat Sachsen and Land Sachsen-Anhalt to DHL in relation to its operations at Leipzig Airport ([4]).

2.2. Measures under investigation

(10) The opening decision investigated the following three measures:

(a) Capital contributions of about EUR 350 million to Leipzig Airport for financing the construction of the new southern runway;

(b) The Framework agreement between Leipzig Airport, its parent company Mitteldeutsche Flughafen AG (MFAG) and DHL, which obliges the airport to construct the new southern runway, and to honour further assurances for the entire […] (*)-year duration of the agreement, inter alia a continuous 24/7 air access on the southern runway;

(c) The comfort letter issued by the Land Sachsen in favour of Leipzig Airport and DHL which guarantees that Land Sachsen will compensate DHL for damages up to EUR […] in the event that DHL will no longer able to operate as foreseen at the airport (e.g. if night flights will be banned by the regulatory authorities).

2.2.1. *Capital Contributions*

(11) According to the information at the disposal of the Commission, the planned investments involving the new southern runway will be financed by a mix of equity contributions and long-term shareholder debt.

(12) In the opening of investigative procedure the Commission calculated that the construction of the new southern runway would be financed by about EUR 350 million of public capital contributions.

2.2.2. *The Framework agreement*

(13) This is one of two measures notified by Germany on grounds of legal certainty; Germany maintains that these two measures do not constitute State aid in favour of DHL because the public authorities follow the market-investor principle. The Framework agreement sets out what Leipzig Airport and MFAG guarantee to fulfil prior to the construction and operation of the new hub and subsequently for the operation of the hub. The Framework agreement also includes other agreements on the operation terms, the airport fees, and the lease of land.

2.2.2.1. Warranty for 24/7 airport operation

(14) Under the Framework agreement (which has been signed on 21 September 2005) Leipzig Airport and MFAG have to fulfil the following conditions:

(a) Prior to the operation of the new hub on 1 October 2007, Leipzig Airport must complete the construction of the southern runway and ensure that the 24/7 operation of the airport will be possible. If Leipzig Airport cannot fulfil the conditions precedent to the start of the new hub, Leipzig Airport and MFAG may become liable to pay compensation up to EUR […] (according to section 5 of the framework agreement).

([3]) 1998 Multisectoral framework on regional aid for large investment projects (OL C 107, 7.4.1998, p. 7).

([4]) State Aid C 18/07 (ex N 874/06) — Training aid to DHL at Leipzig-Halle, Germany (not yet published in the Official Journal).

(*) Business secret.

(b) Subsequent to the start of operations at the new hub, Leipzig Airport must continue to ensure the 24/7 operation of the airport and provide sufficient capacity to ensure DHL's operations as agreed in the operating terms for the following […] years. If Leipzig Airport cannot fulfil the conditions subsequent to the start of the new hub, Leipzig Airport and MFAG are liable to compensate all damages and losses which DHL incurs. If DHL is essentially limited in its operations, DHL will also have the right to terminate the contract and receive compensation for all direct and indirect costs of moving to an alternative airport (according to sections 8 and 9 of the framework agreement). Leipzig Airport and MFAG have thus an unlimited obligation to compensate DHL for any resulting losses and damages — independently of whether caused by circumstance within or outside of Leipzig Airport's control. Germany estimates that in case night flights were to be banned by the regulatory authorities and DHL had to relocate to another airport, Leipzig airport could be liable to pay DHL up to EUR […].

2.2.2.2. Airport fee arrangements

(15) The airport fees will be the major source of revenue for financing the new southern runway. It is estimated that DHL will pay about EUR […] in 2008 which is the first full year for the operation of the new hub. The airport fees are agreed in a separate contract which is attached to the Framework agreement.

(16) All air carriers — either DHL or any other carrier — will be entitled to the same landing fees. The amount of the landing fee will decrease with the total traffic volume of Leipzig Airport. Therefore an air carrier which only undertakes a small number of movements will pay the same landing fee as DHL which will apparently be the heaviest user of the airport.

2.2.2.3. Lease contracts

(17) The airport has concluded two lease contracts with Deutsche Post Immobilien GmbH (hereinafter DPI) and a building lease contract with Deutsche Post Grundstücksvermietungsgesellschaft beta mbH & Co Objekt Leipzig KG (hereinafter DPBS) in respect of certain constructions at the airport. The latter companies are part of the Deutsche Post World Net group. They will rent the properties to DHL by separate contracts.

(18) Leipzig Airport will build an apron which will exclusively be used by DHL. The construction costs are estimated to be about EUR […]. Leipzig Airport will rent the apron to DPI at the following conditions:

(a) DPI pays the interest for the financing of the costs for the land and the construction, and a yearly amortisation of […] percent of the construction costs.

(b) Leipzig Airport is obliged to raise a credit to finance the construction of the apron. Thereby, Leipzig Airport must solicit offers from three different banks including Postbank (which is also a member of Deutsche Post World Net group) and choose the most favourable offer.

(c) The contract is concluded for […] years. DPI will be able to terminate the contract after […] years without any reason or if DHL terminates the Framework agreement. If the contract is terminated within the first […] years, DPI is obliged to pay the rental charges for […] years less rent already paid.

(19) The second lease contract concerns further ground handling areas which Leipzig Airport rents to DPI at the same conditions as with the foregoing lease contract. The construction costs are estimated to be about EUR […].

(20) The building lease contract concerns the plot of land on which DHL constructs its premises. Leipzig Airport will rent the building right to DPI at the following conditions:

(a) DPI pays a rent of EUR […] for […] m^2 which works out at about EUR […] per m^2.

(b) This rent is fixed until […] and is then adjusted by […] of the change of the general price index.

(21) The lease contract for the apron and the building lease contract include provisions so that DHL has an option to rent further designated land plots until […]. These options are granted […] until […]. Afterwards DHL has to pay EUR […] per m^2 to keep the option. This option price will increase until […].

(22) Both contracts include the provision that these land plots — independently of whether DHL executes its option or not — shall not be rented to competitors of DHL. The following companies are explicitly mentioned: […], and […].

2.2.3. *Comfort Letter*

(23) The comfort letter guarantees the financial viability of Leipzig Airport during the term of the framework agreement, and obliges Land Sachsen to pay damages of up to EUR […] in the event that DHL can no longer use the airport as planned. In contrast to the framework agreement by which Leipzig Airport and MFAG grant DHL an unlimited warranty, DHL can only claim compensation up to EUR […] from Land Sachsen under the comfort letter. Any compensation claims above EUR […] can only be addressed to Leipzig Airport and MFAG. Pending Commission approval the comfort letter has not yet entered into force.

2.3. **Initial assessment by the Commission**

2.3.1. *Existence of aid*

2.3.1.1. Capital injection

(24) In relation to the construction costs of the new southern runway the Commission expressed the opinion that Leipzig Airport should earn enough revenue from the investments in the new southern runway as to cover (at least) its incremental costs, an appropriate contribution to the fixed costs of the existing facilities. However, on the basis of the business plan submitted by the German authorities, the Commission came to the preliminary conclusion that the expected increase in revenue from the operation of the new southern runway will not cover its incremental costs and that therefore the investment therein constituted State aid.

2.3.1.2. Framework Agreement

(25) The opening decision set out that DHL will benefit of State aid if Leipzig Airport has offered more favourable contract terms than a private undertaking would have done. A private airport operator would expect to earn sufficient revenues from the investments in the new southern runway to cover (at least) its incremental costs, and to make an appropriate contribution to the fixed costs of the existing facilities, as well as offering appropriate remuneration for the capital employed while reflecting the risks assumed under the Framework agreement.

(26) The opening decision asserted that the expected increase in revenues from the operation of the new southern runway would not even cover its incremental construction costs and lead in 2006 to a loss of about EUR […] (see paragraph 70 of the opening decision). Consequently, Leipzig Airport would not be able to finance the risks assumed under the Framework agreement out of its own revenues.

(27) In conclusion, the opening decision raised serious doubts whether a private undertaking would have

(a) Agreed on airport fees and lease contracts which do not even finance the incremental costs of the southern runway;

(b) Assumed the commitments of the Framework agreement which further decrease the expected profitability of the airport operations;

(c) Concluded lease contracts which do not seem to correspond to local market conditions and limit the business opportunities.

2.3.1.3. Comfort letter

(28) Concerning the comfort letter, the Commission's opening decision stated that the conditions in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([5]) (hereinafter Guarantee Notice), which sets out the circumstances under which a guarantee does not constitute State aid, have not been met. It is required inter alia that the guarantee would in principle be available at market conditions from the financial markets without any intervention by the State, and that the guarantee is remunerated at market value. The new Guarantee Notice ([6]), which entered into force on 20 June 2008, follows the same principle and repeats this requirement.

(29) In the present case neither condition is met: Germany submitted that Leipzig Airport sought, but was unable to, cover the risks eventually addressed by the comfort letter through private financial institutions ([7]). And neither DHL nor the airport is under an obligation to pay a premium, at market value or otherwise, for the risk assumed by the Land Sachsen.

2.3.2. *Compatibility of aid*

2.3.2.1. Compatibility of capital injection

(30) In relation to the investment by the Land Sachsen in the construction of the new runway through capital contributions to Leipzig Airport, the Commission initially concluded that these constituted State aid. The compatibility of such aid has to be assessed under Article 87(3) of the EC Treaty and the practice of the Commission as consolidated by the 'Community guidelines on financing of airports and start-up aid to airlines departing from regional airports' ([8]) (hereinafter 'the 2005 Guidelines')

2.3.2.2. Compatibility of aid to DHL

(31) The Commission noted that DHL's investment into its new European hub at Leipzig Airport has been the subject of a previous state aid decision (N 608/03). The Commission approved the maximum regional aid intensity of 28 per cent for DHL's investments at the airport under the 1998 Multisectoral framework rules ([9]), whereupon the Land Sachsen granted an aid amount of EUR 70,8 m to DHL.

([5]) OJ C 71, 11.3.2000, p. 16 (paragraph 4.2).
([6]) OJ C 155, 20.6.2008, p. 10.
([7]) Submission from Germany, 21 July 2006, p. 7.
([8]) OJ C 312, 9.12.2005, p. 1.
([9]) 1998 Multisectoral framework on regional aid for large investment projects (OL C 107, 7.4.1998, p. 7).

(32) As the Commission had already authorised the maximum regional aid intensity of 28 per cent for the DHL investments, any further aid — which DHL could be granted under the comfort letter or the Framework agreement — can not be considered compatible with the common market.

3. COMMENTS FROM GERMANY

3.1. Aid to the airport in connection with the infrastructure developments

3.1.1. *Background facts regarding the development of Leipzig Airport*

(33) The German authorities stated that Leipzig Airport was originally built as a military base with one (Northern) runway. In 1960 a second (Southern) runway was added with the two runways forming a V-alignment. The alignment of this Southern runway was decided on the basis of the military airspace structure of the GDR. This design however did not take account of environmental or meteorological considerations: it did not provide favourable conditions for take-off and landing and the flight paths were directly above densely populated areas in North Leipzig and South Halle.

(34) By 1980 defects began to appear in the Southern runway which had a detrimental effect on the airport. Remedial action was taken by laying a new concrete surface on top of the runway. By the early 1990s it became apparent that these renovation measures were inadequate — cracks in the new upper surface caused extensive spalling and major longitudinal distortions at both ends of the runway. The resulting buckling of the runway posed a serious safety risk and required high levels of maintenance.

(35) After German reunification a master plan was put in place for the development of Leipzig Airport as a civil airport which envisaged the future construction of a two-runway system as a basis for action. In 1994, an Advisory Committee, on which the Federal Ministry of Transport, Land Sachsen and Land Sachsen-Anhalt were represented, was created to oversee the development of the airport's infrastructure. The committee was focused on whether the existing southern runway should be repaired before the construction of a new northern runway.

(36) The decision to develop a system of two parallel runways was made in 1997. The first step in the development of this system was the re-construction of the northern runway which started immediately. At this stage steps were taken to enable the airport to support two runways; for example: the taxiway was aligned and the northern runway was levelled. Detailed plans for the rebuilding of the southern runway were drawn up in 2002 as the last step in the airport's long-term expansion programme. This was to involve the renovation and realignment (through 20 degrees) of the existing southern runway.

(37) The final decision on the specifications of the renovated southern runway was taken on 4 November 2004. It was nevertheless the result of a lengthy, formal and complex planning procedure. On that date preparatory construction measures were already underway, for example preliminary archaeological analyses of the ground, realignment work and the purchase of additional land.

(38) The development of the airport also fits with Land Sachsen's Development Plan of December 2003, which identifies the optimisation of the runway system as express goals: both in terms of length and direction of the southern runway and in terms of adequate facilities for cargo handling.

(39) Germany submits that by the stage that these decisions were taken it had become increasingly clear that well known companies in the air freight sector regarded the civil airport of Leipzig/Halle as an attractive location and that the development of the southern runway would have been carried out even if DHL had not set up its European hub in Leipzig. It also argues that the fact that it was not until 21 September 2005 that the framework agreement was concluded between DHL and Leipzig airport is further evidence that the decision to rebuild the southern runway was taken independently of DHL's intentions.

3.1.2. *Existence of Aid*

(40) Germany disputes the Commission's assertion that state aid rules apply both to the operation and to the construction of regional airport infrastructure. It maintains that investment in infrastructure is not an economic activity but a matter for regional and economic policy. In this context, airports would not be 'undertakings' within the meaning of Article 87(1) EC. Germany argues that this is particularly important in relation to regional airports which would struggle to reach the necessary passenger volumes to become self-financing.

(41) Germany disputes the Commission's interpretation of the *Aéroports de Paris* judgment on three grounds. Firstly, Germany argues that the reasoning of the Court is not such that Article 87 EC should be understood in the light of Article 82 EC. Secondly, Germany argues that the *Aéroports de Paris* judgment refers to the operation of an airport, not — as in Leipzig/Halle — to the construction of publicly accessible infrastructure. Finally, according to Germany, *Aéroports de Paris* dealt with an international hub whose economic situation fundamentally differs from that of a regional airport. It is commonly known that private financing is not a viable alternative to public financing for the funding of regional airport infrastructure.

(42) Germany submits that the construction of the southern runway ought to be judged against the applicable Community rules '*Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the Aviation sector*' ([10]) (hereinafter 'the 1994 Guidelines') which stipulate that '*The construction or enlargement of infrastructure projects (such as airports …) represents a general measure of* economic *policy which cannot be controlled by the Commission under the Treaty rules on State aids*' rather than the 2005 Guidelines, which subject airport operators to state aid rules. Germany argues that (a) the application of the latter set of Guidelines to this case violates the principle of non-retroactivity and (b) Paragraph 85 of the 2005 Guidelines confirms that they can only be applied from their date of publication in the *Official Journal* (9 December 2005). Given that the decision to finance the infrastructure was made before that date, Germany argues that the old guidelines must be applied.

(43) Furthermore, a negative Commission decision would violate the principle of legitimate expectation. A prudent airport operator would not have foreseen that state-funding of regional airport infrastructure would be assessed against the rules on state aid. This assessment was first made in the 2005 Commission decisions involving *German regional airpo*rts and *Antwerp Airport* ([11]); which were adopted after the decision to rebuild the southern runway at Leipzig/Halle.

(44) Germany further argues that in Decision C 27/07 concerning *Flughafen Berlin Schönefeld* ([12]) the Commission acknowledged that the *Aéroports de Paris* decision only refers to the management of an international hub. The Commission itself explicitly remarked in *Flughafen Berlin Schönefeld* that this approach was expanded to all kinds of airports by the 2005 Guidelines. Therefore the enlargement of the scope of application of State Aid law is not based on case law but on a political decision of the Commission from 2005, which cannot therefore be retroactively applied.

(45) Finally, Germany argues that there is no recipient of state aid where the state transfers responsibility of the operation of infrastructure to a different body whose sole reason for existence is the administration of the infrastructure.

(46) Germany states that in the event that this reasoning is not accepted, the 2005 Guidelines foresee that the financing of activities that normally fall within the State's sovereign responsibilities do not fall within the scope of state aid rules. This applies to the areas of safety, air traffic control, police, customs, air navigation etc (see section 3.1.4 below).

(47) Germany points out that, according to the new state aid policy of the Commission, the airport operator can be an undertaking within the meaning of Article 87(1) EC and therefore recipient of aid. However, at the same time that operator shall be deemed to be the 'owner of the infrastructure' and donor of aid to DHL by the framework agreement. In its view these two roles are incompatible.

3.1.3. *Application of the market economy investor principle*

(48) Germany maintains that this case is covered by the exemption in the 1994 guidelines, thus rendering an analysis of the facts under the market economy investor principle unnecessary. In the event that the Commission comes to the contrary conclusion, Germany conducted the following analysis of the market economy investor principle with reference to three scenarios:

(1) status quo;

(2) expansion without knowledge that DHL would base its operations at Leipzig Airport; and

(3) expansion in the knowledge that DHL would base its operations at Leipzig Airport.

(49) In this regard, Germany argues that the test must be applied to the situation on 9 December 2005, when the 2005 Guidelines came into force, rather than to the actual decision of the supervisory board of 4 November 2004. Thus Germany submits that the test is whether a private investor would have continued with the construction of the second runway rather than maintain the status quo given the known facts on 9 December 2005.

(50) Germany's calculations, as presented below in recitals 55 and 56, are based on the Commission's calculations from the opening of procedure and the company's discounted value at the end of its lifetime (2042). A distinction is drawn between investments made before and after 9 December 2005.

(51) *Status Quo:* The airport is reliant upon its two runways but operates within certain limitations: for example there is a weight restriction in place on the southern runway of 30 tonnes; the maximum hourly traffic is limited to 38-42 takeoffs and landings (amounting to around 30 000 annually); and there are only 60 aircraft parking bays.

([10]) OJ C 350, 10.12.1994, p. 5.
([11]) Decision of 19 January 2005, N 644i/02 — German regional airports; Decision of 20 April 2005, N 355/04 — Antwerp Airport.
([12]) Decision of 10 July 2007, C 27/07 — Berlin Schönefeld Airport.

(52) *Expansion without knowledge that DHL would base its operations at Leipzig Airport:* Germany argues that even without DHL choosing to base its operations at Leipzig, the airport needed increased capacity to support higher levels of freight traffic and night flights due to the expected imposition of restrictions on night flights at Frankfurt/Main Airport. In 2012, an estimated 300 000 tonnes of air freight were expected to be displaced from Frankfurt/Main. This estimate is a quarter of the total volume of air freight and does not include the carrying of freight on passenger flights (which would not be impacted by the night flight restrictions). For the years 2013-2018, a further displacement of 100 000 tonnes of air freight is expected due to other airports reaching capacity restrictions. From 2019 onwards, the German authorities predict an annual growth rate of 3 %. They argue that this is a conservative estimate based on a report by ProTransAG ([13]) which forecasts annual growth rates of 8 to 10 % in the express services market.

(53) *Expansion with DHL:* For the scenario of an expansion with DHL the effects of the relocation of an express service provider to the airport Leipzig/Halle are particularly considered as from 2008. The forecast scenario 'Expansion with DHL' is stated to be a conservative one, a realistic middle scenario would reach a considerable better results. Hence the scenarios of expansion particularly differ in the early stage. Due to the establishment of DHL at the airport there is a considerably steeper increase of the development of sales.

(54) The development of the new southern runway is based on the same capital outlay in all scenarios, independently of the DHL settlement with earlier increases in turnover. Only the extension investments at the freight aprons are not made until 2012 in the scenario 'Expansion without DHL', according to the capacity requirements.

(55) In order to compare payment flows occurring at different times, the German authorities have in their calculations applied a discount factor of 6,5 % (this rate is adjusted for inflation, the nominal discount rate being 7 %). This discount factor was determined using the Capital Asset Pricing Model (hereinafter: CAPM) and was based on the following assumptions:

(a) Risk-free rate at the end of 2005 of German government bonds of 3,75 %

(b) Market risk premium (based on the risk of volatility or variation of the yield of a portfolio reflecting the overall market) of about 5 % based on an expert source ([14])

(c) A 'beta' 'β' representing the relation between the market risk and the risk involved in a specific investment. The German authorities based their beta of regional airports in the published report of PriceWaterhouseCoopers amounting to 0,65.

(d) A rate of inflation of approximately 0,50 % has been taken into consideration ([15]).

Table 1

Comparison of the 'Status Quo', 'Expansion without DHL' and 'Expansion with DHL' scenarios

(EUR thousand)

	(1)	(2)	(3)	(3-1)	(3-2)
	Status Quo	Expansion without DHL	Expansion with DHL	Difference	Difference
EBITDA 2006-2042	[…]	[…]	[…]	[…]	[…]
Investment costs 2006-2042	[…]	[…]	[…]	[…]	[…]
Discounted value of the company at the end of its lifetime	[…]	[…]	[…]	[…]	[…]
Sum	[…]	[…]	[…]	[…]	[…]

(56) Furthermore, the German authorities argue that a correction of the status quo scenario should be made in order to include purchase commitments and deconstruction costs. The airport had entered into obligations totalling EUR 108,3 million, which would have had to be paid out even if all construction work had been halted. Furthermore a return to 'status quo' would have necessitated deconstruction work costing an estimated EUR 100 million.

Table 2

Comparison of the 'Status Quo' and 'Expansion with DHL' scenarios, taking into account purchase commitments and deconstruction costs

(EUR thousand)

	(1)	(2)	(2-1)
	Status Quo	Expansion with DHL	Difference
EBITDA 2006-2042	[…]	[…]	[…]
Investment costs 2006-2042	[…]	[…]	[…]
Discounted value of the company at the end of the lifetime	[…]	[…]	[…]
Purchase commitments	[…]	[…]	[…]
Deconstruction costs	[…]	[…]	[…]
Sum	[…]	[…]	[…]

([13]) Expert report commissioned by the competent national authority as part of the planning approval procedure.

([14]) Dimson E./Marsh P./Staunton M: Chapter 10, in Handbook of investments: Equity risk premium, Volume 1, 2007.

([15]) Discount factor (real discount rate) = [risk free rate + (market risk premium × β)] — rate of inflation.

(57) Furthermore, the German authorities have informed the Commission by letters of 9 April 2008 that the previously carried out calculation in the context of the market economy principle include investments and operating costs with regard to security and safety measures that fall within the public policy remit and are outside the State aid control. Therefore, those costs should not be taken into account in the present calculation.

Table 3

Comparison of the 'Status Quo', 'Expansion without DHL' and 'Expansion with DHL' scenarios without the investment and operating costs into security and safety measures

(EUR thousand)

	(1)	(2)	(3)
	Status Quo	Expansion without DHL	Expansion with DHL
EBITDA 2006-2042	[…]	[…]	[…]
Investment costs 2006-2042	[…]	[…]	[…]
Discounted value of the company at the end of its lifetime	[…]	[…]	[…]
Sum	[…]	[…]	[…]

3.1.4. *Non-commercial activities*

(58) While maintaining its position that the financing of the expansion of the southern runway at Leipzig/Halle Airport is a general economic measure which as such is, as a whole, not subject to state aid control, the German authorities have provided the Commission with information regarding investments undertaken within the measure under examination which in their opinion fall within the areas of safety, air traffic control, police, customs, air navigation etc (see Table below). These investments are detailed in recitals 58 to 69.

Table 4

Investments into security and safety measures 2006-2042 in EUR (nominal values)

(EUR)

Total amount of the investments into security and safety measures 2006-2042	Status quo	Extension without DHL	Extension with DHL
Public Safety		[…]	[…]
Fence	—	[…]	[…]
Fencestreet	—	[…]	[…]
Control point 2	—	[…]	[…]
Control point 4	—	[…]	[…]
Control point 1	[…]	[…]	[…]
Security and control system	[…]	[…]	[…]
Access control system south	—	[…]	[…]
Integrated control center	[…]	[…]	[…]
Integrated control center equipment	[…]	[…]	[…]
Video equipment south	—	[…]	[…]
Veterinary border control	—	[…]	[…]
Firefighting		[…]	[…]
Interim fire brigade south	—	[…]	[…]
Firefighting and rescue equipment	[…]	[…]	[…]
Operational Safety		[…]	[…]
Uninterruptible Power Supply (UPS) Apron 4/5	—	[…]	[…]
Uninterruptible Power Supply (UPS) South/West	—	[…]	[…]
Uninterruptible Power Supply (UPS) South/East	—	[…]	[…]
Transformer station	—	[…]	[…]
High and low voltage cabling for German Weather Service (DWS)	—	[…]	[…]
High and low voltage cabling for German air traffic control (DFS)	—	[…]	[…]
Navigation lights		[…]	[…]
Navigation lights runway south	—	[…]	[…]
Navigation lights new aprons	—	[…]	[…]
Total	[…]	[…]	[…]

(59) In addition to investments, the German authorities draw the attention of the Commission to costs arising from the ongoing operational expenses (materials and personnel costs) for the relevant areas. They refer in this respect to the 2005 Guidelines, pursuant to which in general, 'activities that normally fall under State responsibility in the exercise of its official powers as a public authority' do not fall within the scope of the Guidelines (see points 33 and 54 of the Guidelines). The German authorities have deducted from these costs the revenue resulting from security charges according to § 8(3) of the Aviation Security Act (*Luftsicherheitsgesetz, hereinafter: LuftSiG*). This revenue concerns charges for the passenger control at the airport.

Table 5

Total operating security and safety cost and revenue 2006-2042 in EUR (nominal values)

(EUR)

Operation security cost and revenue 2006-2042	Status quo	Extension without DHL	Extension with DHL
(1) material cost	[…]	[…]	[…]
(2) personnel cost	[…]	[…]	[…]
(3) depreciation	[…]	[…]	[…]
(4) other cost	[…]	[…]	[…]
(5) *Sum security cost (1) + (2) + (3) + (4)*	[…]	[…]	[…]
(6) *Security charges*	[…]	[…]	[…]
(7) Total (5)-(6)	[…]	[…]	[…]

Public Safety

(60) The safety facilities and the security measures carried out correspond to obligations for airport operators arising from national legislation, namely the Aviation Security Act (*LuftSiG*), as well as the Air Traffic Act (*Luftverkehrsgesetz, hereinafter: LuftVG*) and the recommendations of the International Civil Aviation Organisation (ICAO) regarding measures to avert danger to aviation in the planning, construction and operation of commercial airports.

(61) In order to avoid unauthorised access to the secured area of the airport all persons, vehicles and goods have to pass through access control points, which are equipped with secured gates, x-rays and hand probes. A security and control system is used to operate and supervise access to the security area. The security control centre also allows access to the hazard alert system (i.e. fire detectors and building technology centre etc.) and the access control system (i.e. burglary, hold-up alarm system, video control monitoring etc.). Because of the change in the alignment of the new southern runway it was necessary to re-build the perimeter fence and furthermore to construct two additional access control points (control points 2 and 4).

(62) Moreover, the security measures listed must be set out by the operator in an aviation security programme within the meaning of Article 5(4) of Regulation 2320/2002 ([16]) which must be presented for approval to the Aviation Safety Agency. The operator of a commercial airport is obliged to perform the security measures provided for in the approved aviation security programme. The aviation security programme of Leipzig/Halle Airport was approved by the Air Traffic Department of the Ministry for Economic Affairs and Labour of Land Sachsen on 25 October 2007. In order to comply with the obligations arising from the Aviation Security Act, the airport operates its own security department.

(63) As the airport has decided to permit goods traffic from non-EU countries according to Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries ([17]) a veterinary border inspection post must be provided at the airport for the handling and possible storage of animal products and animals.

Firefighting

(64) The airport is obliged under law to provide fire prevention and rescue services. Airport fire prevention and rescue services are one of the pre-conditions in order to obtain an operating licence. In order to comply with the applicable regulations for fire fighting and rescue services it was necessary to provide the new southern runway with its own fire station. Leipzig/Halle airport is therefore equipped with two fire stations ([18]) located in the north and south areas of the airport respectively.

Operational safety/redundant electrical supply

(65) The airport is obliged to have a back-up electricity supply. Due to the regulatory requirements this can only be achieved with an Uninterruptible Power Supply (UPS). For this purpose, diesel dynamic UPS systems have been installed in each of the three navigation lighting stations on the southern runway.

(66) According to the German authorities, in order to secure the power supply including the redundancy capability and to create capacities for the establishment of further businesses on Leipzig/Halle Airport, it became necessary to expand the power supply. For this purpose, the construction of a transformer station at a cost of EUR 5 million was planned.

([16]) Establishing common rules in the field of civil aviation security (OJ L 355, 30.12.2002, p. 1).
([17]) OJ L 24, 30.1.1998, p. 9.
([18]) Both fire stations have identical technical equipment; a replacement investment is necessary after 15 years.

(67) The airport also incurred expenses (i.e. high and low voltage cabling) relating to the new orientation of the southern runway in relation to its obligations under air traffic control regulations (§ 27(d) LuftVG) and in relation to its obligations vis-à-vis the German Weather Service (§ 27(f) LuftVG).

Navigation Lighting

(68) In relation to navigation lighting the rules are set out in ICAO Annex 14 ([19]). In Germany, the 'General Principles of the Federation and the Länder on the marking and navigation lighting of airports with instrument flying' (*Gemeinsame Grundsätze des Bundes und der Länder über die Markierung und Befeuerung von Flugplätzen mit Instrumentenflugverkehr*) apply these rules. The airport incurred expense in relation to the navigation lighting that had to be installed in relation to the new runway.

(69) According to the German authorities the planned construction of further aprons in the years after 2010 will necessitate the provision of corresponding navigation lighting systems for the apron areas. They add that operational costs need to be taken into account (see table 4 above).

3.1.5. *Compatibility of aid*

(70) In the event that the Commission considers that the investment constitutes State aid, Germany wishes to point out that the investments consist of 'existing aid' within the meaning of Regulation 659/1999 ([20]), being 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market'.

(71) Germany also submits that rebuilding the southern runway was in the general interest within the meaning of Article 87(3) EC, and provides some argumentation in this regard. Germany states that construction of the new southern runway will increase the integration of national and international transport systems, and bring economic benefits to the region. International companies, which use express services to distribute their products, have located in the Halle/Leipzig region. The air cargo hub has already attracted a number of internationally active businesses to the region, which continue to create much-needed jobs. The freight hub generates a climate which is conducive to business and investment, and this, in turn, has a positive effect on employment. Germany refers to an analysis of Prof. Dr. Juenemann, which forecasts that the DHL hub in Leipzig/Halle alone will generate jobs for about 3 500 people directly and for about 7 000 people indirectly upon completion of the airport in 2008. Most of these jobs will be the result of specialised companies locating in the region because of the hub.

(72) The new alignment of the southern runway also has environmental benefits. It avoids that in the future densely populated areas in the North of Leipzig and in the South of Halle are over-flown. An area of Leipzig, which is located close to the airport grounds and at the head of the original southern runway, was particularly affected by noise. Because the take-off and approach paths of each runway were aligned differently, the noise pollution from aircraft was concentrated there. Furthermore, it is stated that by the new alignment of the southern runway damage to the environment in the densely populated conurbation Leipzig/Halle will be minimised.

(73) In addition, the old southern runway was not facing in a direction with favourable meteorological conditions for take-off and landing. The most common prevailing wind direction, taken over the year and for individual months, is south-westerly. Consequently, there is a difference of around 20 degrees between the alignment of the old southern runway and the predominant wind direction. This can be disadvantageous with regard to disruptive crosswind components. The new alignment satisfies meteorological requirements, above all enabling CAT III (all-weather) instrument flight operations, something which was previously not possible. A distance of more than 2000 metres between the runways allows independent air traffic.

(74) The German authorities assert that all planning decisions regarding the airport were made with a view to long-term demand, and the specific advantages of the airport, focussing increasingly on freight transport. Foremost amongst these advantages is the unrestricted night flight permission for both runways. There are extensive night flight restrictions at many European airports. Such restrictions significantly impact all air cargo operations, especially in the express sector, while the operation of an air cargo hub is only possible at airports without night flight restrictions.

(75) Typically, however, such airports are located in thinly populated areas with deficient ground transport infrastructures. Leipzig airport offers the advantage of being integrated in an excellent road and rail network. The regional plan for western Sachsen published in 2001 illustrates the planned development of infrastructure in the area. According to the plan the airport should be developed so as to enhance the region as part of a transport network for national as well as international freight.

(76) The airport is located at the intersection of two motorways which connect the main catchment areas with the airport in North-South and East-West direction. The road network is complemented by main roads which will be extended according to the development of the airport. The airport also has excellent rail connections. The ICE-Erfurt-Halle/Leipzig is located near to the airport and makes it easily accessible in combination with intercity and regional trains.

([19]) Annex to the Convention on International Civil Aviation.
([20]) OJ L 83, 27.3.1999, p. 1.

(77) In the view of the German authorities, this rare convergence of positive aspects is even more valuable considering the diminishing capacities and infrastructural shortcomings of other German airports. Thus Leipzig airport has decided, in contrast to other German airports, to specialise in the air cargo business — a niche market.

(78) The air freight sector, especially express freight, is showing considerable growth rates. This development is forcing the larger express service providers to expand their operational capacities, while existing airport capacities continue to decline, and night flight restrictions are rising.

(79) With regard to the Commission's misgivings about the viability of the southern runway renewal, the German authorities mention the decision in the Antwerp Airport case, where the Commission stated that in respect of regional airports, regional limitations may not allow airports to generate the revenues needed to provide adequate airport services or to maintain airports on economically viable terms. Therefore, to allow these airports to operate as regional access points in the public interest public financial support may be needed.

(80) The availability of two independent runways is an indispensable precondition for the operation of a modern cargo airport. This is all the more true in the case of central hubs and express services. Without a second runway Leipzig airport could not function as an air cargo hub and not focus on the niche market of the express freight sector as described above. Passenger numbers are entirely irrelevant as to the question whether a system of parallel runways is necessary.

(81) Because of the alignment of the old southern runway at the airport the old southern and the new northern runway could not operate at the same time. The take-off paths and the approach paths crossed at a point close to the airport, meaning that the German Air Traffic Control had to treat the two runways as if they were a single runway for flight operations. Furthermore adverse weather conditions or accidents could cause disruptions to the logistics chain. The availability of a second parallel runway is thus vital to guarantee the airport's undisrupted operation, and to attract air freight service providers. This assessment was shared by the competent authority within the planning approval procedure for the rebuilding of the southern runway. The authority had obtained an expertise on the question if it was necessary to turn the southern runway parallel to the northern one, or if the runways could be used as a V-runway system. The outcome was that even for passenger flights the average delays because of the use of a V-runway system would not be acceptable, and air freight traffic would be impossible to handle. It was also found that the delays at an express freight hub would accumulate because the loading and unloading of air freight from aircraft which had landed late would inevitably affect the departure times of the other aircraft. The logistic chains at the gateways would collapse. The parallel runway system thus increases the flexibility of the airport, and renders it more attractive to potential users.

(82) The planning authority confirmed after examining the relative merits of all the public interests concerned, that the plans for expansion made good economic sense and that the economic opportunities by far outweighed the risks. The planning authority came to the conclusion that there was, both macro-economically and micro-economically, a need for an infrastructure which would make the airport a central hub for air freight. Furthermore, the turning of the southern runway reduces the risk of collision. The Federal administrative Court upheld the planning decision in its judgement of 9 November 2006 and didn't find any errors of consideration in the decision.

(83) The German authorities reiterate that the decision to rebuild the southern runway was made independent of and before DHL's decision to move its principal operations from Brussels to Leipzig. In fact DHL was only assured the use of the southern runway during two defined time-slots during the night (corresponding to a guaranteed share of [10-25] %, in terms of time, for use of the southern runway), while use of the runway is free to anyone in the remaining night-time hours, and during the day.

(84) According to Germany, the measure does not therefore adversely affect Community trade since capacities in the market for air cargo transport — especially in the express sector — are currently extremely limited throughout Europe.

3.2. **Aid to DHL**

3.2.1. *Framework agreement*

3.2.1.1. Market conformity of guarantees provided by framework agreement

(85) According to Germany, the airport has followed the market economy investor principle when signing the Framework Agreement because the positive effects and profitability of the agreement with DHL outweigh the risks and commitments assumed by the airport. The remaining risk assumed by Leipzig Airport regarding obligations in terms of capacity and operation is very low.

(86) Germany is of the opinion that the airport acted as a private investor in first taking the decision to build the southern runway on 21 November 2004 and only a year later on 21 September 2005 to decide whether or not to sign the framework agreement. The relevant test is therefore whether the airport expected in 2005 to earn a higher cash-flow in the business scenario 'expansion with DHL' than in the alternative scenario 'expansion without DHL'. Due to the fact that the construction of the southern runway was already well advanced in September 2005, a stop of the works would not have been anymore an economically viable alternative.

(87) Contrary to earlier submissions, Germany also introduces terminal values in the cash-flow calculations, seeking to demonstrate a higher profitability of the southern runway. The calculation of the terminal value is based on a linear expansion of the business results in the years 2038 — 2042 with an average revenue growth of 3 percent.

(88) The introduction of the terminal values has a significant effect on the profitability of the business scenarios. While Germany calculates a discounted cash-flow for the period 2006 to 2042 of about EUR […] for the expansion with DHL and of about — EUR […] for the expansion without DHL, the terminal values — which are also discounted to 2006 — amount to about EUR […] and respectively EUR […]. As can be seen from these figures, the terminal values increase the profitability of the expansion scenario with DHL by a factor of almost […] and turn the expansion without DHL from a loss-making into a profitable project with a cash-flow of about EUR […].

(89) Taking the difference in the calculated cash-flow between the two scenarios, Germany arrives at the conclusion that the expansion scenario with DHL yields in 2005 a cash-flow which is about EUR […] higher than the expansion scenario without DHL ([21]).

(90) Concerning the risk calculation, Germany advances the argument that risk insurance is common business practice and that, in the current case, the risk can be financed from cash-flow. Germany values the risk arising from the framework agreement at about EUR […] in the event that night flight restrictions are put into place and suggests that this risk could be financed from the gain in cash-flow attributable to DHL ([22]). A private investor would have accepted the compensation risk because the EUR […] positive cash-flow for the expansion with DHL-scenario would be enough to cover the risk of compensation claim of EUR […].

(91) Besides this consideration for the risk of a night flight ban, Germany regards a discount rate of 6.5 percent as reasonable given that the revenues in the calculations are not adjusted to inflation and the low risks assumed by Leipzig Airport,. This assessment is backed up by references to decisions of the UK airport regulator concerning the setting of airport fees for the period 2008 to 2013. These calculations relied on comparable costs of capital (in real terms and pre-tax) of 6.2 percent for Heathrow Airport and 6.7 percent for Gatwick Airport.

(92) Furthermore, Germany emphasises that for assessing the proportionality of the Framework Agreement it has to be taken into account that (i) DHL assumes major business risks by investing about EUR 250 million in its new European hub and tying itself to Leipzig in the long term and (ii) Leipzig Airport would be compensated if DHL decided to stop its operations before the expiration of 15 years.

(93) Germany concludes that signing the Framework Agreement carries a greater economic advantage than not signing it and, therefore, a private investor would have signed the Framework Agreement with DHL. Consequently, the Framework Agreement has no element of State aid.

3.2.1.2. Market conformity of lease contracts

(94) Germany points out that a lease contract had to be agreed for the apron because the airport should always remain the owner of the infrastructure in order to guarantee the public access to the apron for reasons of air transport and planning rules, also in the case the contract with DHL is cancelled.

(95) Regarding special provisions established in the above mentioned lease contracts giving DHL an option right to rent land plots adjacent to DHL's premises and explicitly forbidding renting those land plots to DHL competitors Germany documents firstly that Airport Leipzig possess a large number of land plots which are not adjacent to DHL's premises and are available for the location of competitors. Secondly, Germany puts forward that the reservation of adjacent land plots to DHL is in line with the principle of 'protection of the economic interests of tenants' as recognised by German rent law ([23]).

3.2.1.3. Market conformity of airport fees

(96) According to Germany the airport has acted like a private investor as the starting and landing fees agreed with DHL correspond to normal market conditions being even considered to be in upper boundary compared to what DHL pays in other European hubs (see also below the comments and documentation by DHL). Thus Germany submits that the landing fees charged to DHL at Leipzig airport are far from preferential.

([21]) This result can also be seen from the calculations in the annex which show that the cash-flow difference between running the southern runway with and without DHL amounts *in 2005* to about EUR […] (compare the cash-flows in columns (4) and (5) of Table 1). If you add to this amount the difference in terminal values between the two scenarios and carry the sum forward to 2006 at the discount rate of 6,5 percent you also arrive at EUR […].

([22]) Germany assumes that the compensation claims will linearly decrease over time as a result of the amortization of DHL's investments. Starting from the maximum of EUR […] in year […], this implies e.g. EUR […] in year […] and EUR […] in year […]. By assuming a probability of 25 percent for a ban of night flights, the expected nominal risk amounts to EUR […] in year […] and its discounted value to EUR […]. This would be Germany's worst case scenario analysis as a change in law could only be applicable after 10-15 years (Submission from Germany, 23 February 2007, pp. 68 and 69).

([23]) See submission of 23 February 2007 by Germany, footnote 68, for an extensive list of relevant jurisprudence and for an explanation of the 'protection of the economic interests of tenants' provision ('Konkurrenzschutzklausel').

3.2.1.4. Comfort letter

(97) Germany holds firstly that the Land Sachsen is indirectly remunerated for the guarantee by way of the additional profit generated by the investments. Secondly, Germany considers that the issuing of comfort letters is standard business practice since the Land Sachsen granted the comfort letter of EUR […] to DHL in exchange for the comfort letter of EUR […] provided by Deutsche Post AG, DHL's parent company, to cover any possible claims of Leipzig Airport against DHL (e.g. DHL would be liable to pay a contractual indemnity equal to the sum of […]-years landing fees if it decided to quit Leipzig Airport during the first […] years of the framework agreement).

(98) Furthermore, Germany underlines that the comfort letter is subject to Commission approval, and has yet to enter into force.

4. **COMMENTS FROM THIRD PARTIES**

4.1. **DHL**

4.1.1. *Aid to the airport*

(99) According to DHL, the doubts expressed by the Commission regarding the necessity of the construction of the new southern runway are in direct contradiction to the Commission's 2007 'Action Plan for Airport Capacity, Efficiency and Safety in Europe', which calls for existing capacities to be increased in a bid to tackle congestion at European airports. DHL stated that its own protracted search for a suitable hub supported the observation made by the Commission that capacities in this sector are stretched.

(100) The expansion of Leipzig airport would render a significant contribution to meeting the capacity crisis. The Commission having identified air traffic as the 'engine' of economic growth, and air freight as the 'key' to growth in the Common market and foreign trade, an increase in the capacity of Leipzig airport is in the public interest of the Member states and the Community as a whole.

(101) In the opinion of DHL, the upgrading or reconstruction of already existing secondary runways is much more rational than a completely new building of a runway on a totally green-field site. Using a system of parallel runways avoids delays and switching traffic to other airports. The avoidance of delays in the air freight transport and especially for the operation of central hubs for the express freight traffic is more of an issue than for passenger air traffic.

(102) From DHL's point of view the most important advantages of the location of Leipzig/Halle airport are that there is no ban on night flights, the close network with railway and road freight traffic and the availability of resident local labour resources. The development of runways involves the provision of necessary infrastructure for public transport as a service of a general interest. This applies particularly in the case of the new German Länder, as the reconstruction of the substandard transport infrastructure in these areas, was undoubtedly a public task in the public interest.

(103) The complex planning approval adjudication for the southern runway ascertained that there was, both macro-economically and micro-economically, a need for the rebuilding of the southern runway. Therefore it can be excluded that the southern runway of the Leipzig/Halle airport was conceived and built in favour of DHL. This project was realised temporally and factually independently of DHL.

(104) In addition DHL submits that in its opening decision the Commission failed to have due regard for the specific requirements of express freight logistics. Unlike passenger air travel which can be diverted to other airports at short notice, the rendering of express services necessitates the construction of hubs at levels of investment so high as to require permanent establishment. By its very nature express air freight, being an 'overnight service', is heavily reliant on permanently granted night flight slots. Therefore the categorisation by the Commission of a fundamental precondition as preferential treatment is to question the economic basis of all providers of express services.

(105) DHL also argues that passing the financial responsibility for the southern runway on to DHL would impose an unacceptable disadvantage on it in the market for express services, since its competitors pay standard fees for cargo flights, without being burdened with investment costs for runways. In the opinion of DHL, the airport has acted like a private investor when signing the agreement as the starting and landing fees, the conditions agreed in the lease contract of the apron as well as in the building lease contract correspond to normal market conditions. The duration of the contract and the foreseen compensations are well-balanced. The guarantees given in the framework contract are justified for the nature of risks assumed and correspond to normal market conditions too. As regards the letter of comfort it has not been approved by the Commission yet and therefore it has not entered into force.

4.1.2. *Aid to DHL*

(106) DHL argues that the framework agreement does not provide any preferential treatment for DHL and that it only contains monetary consideration and conditions which are customary in the market.

4.1.2.1. Market conformity of warranties provided by framework agreement

(107) DHL argues that the Commission's questioning whether a private investor would have agreed to the liability obligation in the framework agreement is carried out without comparing the totally different economic risks of the parties.

(108) The establishment of the central hub at the airport Leipzig/Halle represents for DHL not only an investment of more than EUR 250 m but also a complete economic dependence on the usage and the indispensable availability of night flight slots in the long term. In case that night flight slots are no longer available, not only the investment of EUR 250 m would be devalued but it would also lead to a long-term impairment of the entire worldwide DHL express service with non-foreseeable consequential damages. According to DHL, each private investor who tries to induce a major customer to make an establishment with major financial risks would have to consider such risks in the sense of 'do ut des' if it wants to win the customer.

(109) Additionally, after the Airport's decision to build a second runway (which was taken independently from DHL), the Airports' risks are far lower than those of DHL. Thus, the very disproportionate distribution of economic risks can only be reflected in the liability provisions. Whereas DHL would suffer form excessive damages in case of a prohibition or reduction of night flights, the airport's damages would only amount to the loss of landing fees which would be easily replaceable by another user. However, a voluntary leave from DHL is already improbable because of the very high investment costs. Consequently, the liability provision in the framework agreement is objectively necessary and therefore also customary in the market.

(110) The necessity of a warranty for an express service operator to conduct night flights is also documented in the published contract between SAB (operator of Liège Airport) and TNT concerning the establishment of a central hub by TNT:

(a) The runways at Liège Airport are reserved for unlimited duration for 140 % of the activity volume of TNT at a specific point of time between 9 pm and 6 am (according to cipher 32.1 of the SAB-TNT contract). This clause, which goes far beyond the framework agreement in the present case as it warrants a capacity reserve at any time of 40 %, reflects only the objective necessity to warrant contractually and permanently essential night flight slots for the business to secure the high investments made.

(b) In addition to the above, SAB and the Region of Wallonia have accepted liability for all damages without limitation, including loss of profit, in case of non-fulfilment of such warranty for 20 years (according to cipher 8.c of the SAB-TNT contract).

(111) Furthermore, for DHL, the unequal distribution of damages' risks is reflected in the differing regulation concerning the amount and duration of the obligation to compensate: Whereas TNT holds the right to claim compensation from SAB for the whole contract duration in case of non-fulfilment of the warranty, the right to claim compensation from SAB decreases with the length of duration; in case of termination notice by TNT with the expiration of 10 years to the simple of the yearly average of the landing fees (according to cipher 10.3 c of the SAB-TNT contract).

4.1.2.2. Market conformity of lease arrangements

(112) As far as the Commission criticises a missing connection of the rental fees to the locally customary real estate prices concerning the apron, DHL points out that the rental contract does not constitute an ordinary rental contract in legal terms. Based on its legal form and nature, a leasing agreement does not tie up with the locally customary rental fees but is orientated at the interest rate of the lessor's provided capital. A connection of the user fee to the locally customary rental fee would therefore be off-topic and cannot be found in comparable leasing contracts.

(113) As far as the Commission criticises the airport's limited freedom of action resulting from the rental agreement to finance the investment costs through credits or equity, this criticism is based upon an unfounded interpretation of the rental agreement. As a matter of fact, the contract only obliges Leipzig Airport to obtain credit offers in order to receive an objective basis for the calculation of the user's fee and not to raise a credit. Thus, the airport is not obliged to make use of such offers but is free in the financing.

(114) The Commission's consideration concerning the building lease interest seems to be based on wrong information of the size of the building lease area according to cipher 1.5 of the building lease contract. In fact, the area amounts to […] m^2 so that instead of the assumed rent of […] EUR/m^2 a rent of […] EUR/m^2 is applicable. The Commission's assumed disproportion between building lease rent and option fees is therefore not given if the correct building lease area is taken into account.

4.1.2.3. Market conformity of airport fees

(115) The Commission's considerations based upon the incremental costs of the southern runway have to be rejected as the southern runway has been constructed for the general public and not only for the use of DHL. Consequently, subject of control can only be the payable landing fees. In comparison with other European DHL

hub-airports Bergamo (BGY), Brussels (BRU), Cologne (CGN), and Nottingham (EMA), the landing fees at Leipzig Airport (LEJ) are […] percent above average of the landing fees of European DHL hub-airports; in case of night flights landing fees remain […] percent above average (see tables below). Compared with the currently effective landing fees at Vatry, DHL pays almost […] times more for landing at Leipzig than at Vatry. Finally, all users of Leipzig airport pay the same landing fees. DHL concludes that there cannot be any doubt that landing fees are customary in the market.

Table 6

Landing fees for day flights

	A300	B757 (100 T)	B757 (93 T)	Durchschnitt
BGY	[…]	[…]	[…]	[…]
BRU	[…]	[…]	[…]	[…]
CGN	[…]	[…]	[…]	[…]
EMA	[…]	[…]	[…]	[…]
Durchschn. DHL-Hubs	[…]	[…]	[…]	[…]
Vatry	[…]	[…]	[…]	[…]
LEJ	[…]	[…]	[…]	[…]

The average fee is calculated based on the aircraft types (A300, B757) used by DHL.

Table 7

Landing fees for night flights

	A300	B757 (100 T)	B757 (93 T)	Durchschnitt
BGY	[…]	[…]	[…]	[…]
BRU	[…]	[…]	[…]	[…]
CGN	[…]	[…]	[…]	[…]
EMA	[…]	[…]	[…]	[…]
Durchschn. DHL-Hubs	[…]	[…]	[…]	[…]
Vatry	[…]	[…]	[…]	[…]
LEJ	[…]	[…]	[…]	[…]

The average fee is calculated based on the aircraft types (A300, B757) used by DHL.

4.2. **Mitteldeutsche Flughafen AG**

(116) Mitteldeutsche Flughafen AG as owner of Leipzig Airport begins its observations by stating that it agrees completely with the observations made by the Federal Republic.

4.2.1. *Aid to the Airport*

(117) In the opinion of the airport owner, the fact that companies are drawn to the airport shows that the site is suitable to meet demand. The development of Leipzig airport, and its integration into the regional transport network, were and are central to the region's growth, as supported by the European Union. The airport also meets the Europe-wide requirement for airport capacity creation for the preservation in order to maintain the EU's competitiveness in the air freight sector.

4.3. **ADV — Working Group of German Airports**

4.3.1. *Aid to the Airport*

(118) According to this trade body, Germany is heavily reliant on efficient transport links to global centres throughout the world. Because of the ever greater capital volume tied up in these goods, shorter transport times are more important. Over the last twenty years overnight delivery services have enjoyed dynamic growth — a trend which in light of continued globalisation is expected to continue. However, Germany is experiencing a shortage in the capacity to accommodate the large air freight carriers — a development which raises concerns for Europe as a whole. Night flight capacities at the three largest air cargo hubs in Frankfurt, Munich and Köln/Bonn are all but exhausted, and the situation is bound to deteriorate further when Frankfurt airport discontinues its night flight operations altogether. In the opinion of the working group this necessitates the creation of new capacities in order to safeguard the economy's competitiveness on the global market. The expansion of Leipzig airport meets this need while relieving other airports and enabling them to concentrate on passenger air travel. At the same time Leipzig airport is the cornerstone of economic development in Eastern Germany. According to the Working Group of German Airports the construction of a new southern runway at Leipzig airport was an urgent necessity.

4.4. **Stadt Leipzig**

4.4.1. *Aid to the Airport*

(119) According to the city of Leipzig, Leipzig's northern region is of fundamental importance to the international competitiveness of three of Germany's federal states as a commercial and economical centre. Thanks to the expansion of motorways, A-roads, a high-speed rail link and a commuter railway system, but most of all due to Leipzig airport, this logistics hub is being put into an excellent position to compete on a global level in the long term.

(120) A study carried out by the city of Leipzig, the Chamber of Industry and Commerce, and the commercial transport centre shows that central Germany/greater Leipzig could benefit from the creation of 100 000 jobs in the logistics sector.

(121) According to the city of Leipzig, the airport's southern runway is an essential public infrastructure facility of great significance not only to DHL, but to a large number of undertakings — due in particular to increasing night flight restrictions elsewhere. The relocation of DHL to Leipzig is deemed absolutely essential to attract other air freight companies, and to utilise the capacities of the airport's infrastructure.

(122) The city of Leipzig also submits that the new southern runway creates a system of parallel entry lanes, thus removing air traffic from densely populated areas. According to the city of Leipzig, the airport could not have been upgraded without public financing. The same is said to be true of competing European airports.

4.5. **Stadt Schkeuditz**

4.5.1. *Aid to the Airport*

(123) The city of Schkeuditz submits that it is set to become the focal point of significant regional development. Schkeuditz forms part of a supra-regional development axis, and over the past decade has become the centre of a modern transport system. These factors have afforded the city, particularly by Eastern German standards, extraordinary economic growth. Thanks to the excellent conditions at the site, this positive trend is expected to continue.

(124) Regarding the second runway, the city of Schkeuditz points out that the airport had determined on 19 July 1991 that the pace of development in the region necessitated the re-construction of the second runway.

4.6. **IHK Leipzig**

4.6.1. *Aid to the Airport*

(125) According to the Leipzig Chamber of Industry and Commerce, the State is charged with the provision of an adequate transport infrastructure, which gives it unrestricted control over its development and puts it under an obligation to exercise said control in the name of the people.

(126) Since 1991, investments were made in the development of infrastructure and in the technical equipment of the airport. These measures were complemented by further investments of the public authorities to improve the railway and road infrastructure around the airport. The close link of air traffic, railway and road connections has transformed the airport into a European hub for passenger and air freight traffic. The airport meets the latest requirements concerning a logistic site as to functionality, modernity and capacity. In 1993 the economy actors in Middle Germany began to agitate for the development of the airport.

(127) Logistics have emerged as an independent service sector, growing about 6 % p.a. with considerable potential for further growth. The eastern enlargement of the European Union has put the region into centre of the European economic area. In the region the industrial cluster provides good business for logistic service providers. The chemical industry with approx. 25 000 employees in Middle Germany mainly demands services in railway and intermodal transport. Meanwhile automotive industry and its components suppliers with approx. 60 000 employees in 450 companies and the semiconductor industry with approx. 22 000 employees demand transport services, where time constraints are highly important.

(128) Every major player in the logistics sector, which gravitates towards the major transport intersections, is present in the region, providing about 160 000 jobs. This corresponds to around six per cent of the region's total labour force. The Chamber of Industry and Commerce predicts the creation of an additional 100 000 jobs by the year 2015 from the region's transformation into a logistics hub. This figure corresponds to ten per cent of the total work force in this region.

4.6.2. *Aid to DHL*

(129) In addition to DHL, the airport has attracted a number of other air freight and logistics companies. Thus it cannot be said that competitors are excluded from Leipzig airport nor that DHL is afforded a favourable position. Amongst the undertakings resident at the site are NATO's Strategic Airlift Interim Solution (SALIS) and the Russian cargo carrier Tesis, which operates an air service to China. A further intercontinental freight carrier at the airport is Jade Cargo International. On 13 April 2007 the World Cargo Center, with the capacity to handle 200 000 tonnes of cargo annually, was completed at the airport, further consolidating the site's identity an air freight hub.

4.7. **IHK Halle-Dessau**

4.7.1. *Aid to the Airport*

(130) The Halle-Dessau Chamber of Industry and Commerce (IHK) is the economic-political representation of interests of more than 52 000 business enterprises. According to the Chamber, in Germany, the provision and financing of said infrastructure is a matter for the state. This canon of European and German transport policy is echoed in the investments at issue in the current case.

(131) In the opinion of the Chamber, the airport development:

(a) serves the implementation of the goals of the regional planning of Sachsen and Sachsen-Anhalt,

(b) was examined and permitted in a complex public procedure, the results of which were affirmed by the German Federal Administrative Court,

(c) improves the local conditions of the regional industry,

(d) leads to a higher employment in a region of sustainable unemployment,

(e) is built for use by the general aviation,

(f) can satisfy the long-term demand at the airport Leipzig/Halle.

(132) In 1993 the IHK Halle-Dessau and IHK Leipzig released a common position paper concerning the airport. The two trade organisations requested inter alia for the construction of a system of two runways, 3 600 m each, to increase the capacity of the airport.

(133) Following German reunification, public investment into transport infrastructure contributed significantly to the region's economic transformation. The Commission has recognised the need to assist the region, parts of which are still Objective 1-areas, in overcoming its significant disadvantages. Thanks to significant private and public investment, particularly in infrastructure projects, the region is becoming internationally competitive.

(134) However, unemployment figures in the region are still twice the EU average. This shows that the region is in need of continued public investment, particularly into an improved infrastructure to help strengthen competitiveness and attract business. Only then can the region make a worthwhile contribution to the goals set out in the EU's Lisbon strategy.

4.7.2. *Aid to DHL*

(135) The Chamber of Industry and Commerce wishes to point out that the airport's modernisation has been a gradual, continuous process which began in the early 1990s. In a time-intensive process, each step had to be publicly assessed and approved. The southern runway was planned and built subject to these same conditions, and cannot be said to have been constructed for the sole benefit of DHL.

4.8. **Ryanair**

(136) Ryanair does not touch upon the specifics of this case but rather makes more 'general' points, voicing concern that the Commission may not fully understand the airline-airport relationship, and recent developments in the air transport sector, thus arriving at a number of erroneous conclusions. Furthermore, Ryanair is concerned that the Commission will attempt to reinforce the flawed principles of the Charleroi decision and of the 'Guidelines on financing of airports and start-up aid to airlines departing from regional airports'.

4.9. **Panalpina**

(137) Panalpina has operated daily cargo flights from Leipzig to Moscow for more than a decade; Panalpina is committed to establishing Leipzig as their air freight hub, hoping to open a gateway to the Indian subcontinent and the Far East.

4.9.1. *Aid to the Airport*

(138) Panalpina expresses the fear that many of the larger European airports will dedicate any remaining capacity to passenger air traffic; Panalpina therefore appreciates a more cargo-focused airport. It also explains that while being located at the heart of Europe, Leipzig airport is far enough to the east to reduce flight times to and from Asia. The airport's 24-hour operation reflects the needs of the globalised supply chain of goods, and is one of its greatest assets.

(139) Panalpina commends the decision made in developing Leipzig into a cargo airport and in offering an infrastructure being capable in handling future air cargo flows around the clock. They are convinced that with the infrastructure and services provided at the airport Leipzig/Halle, more companies will settle in the vicinity of Leipzig, thus creating jobs. They assume that they have equal access to the overall infra and superstructure at the airport Leipzig/Halle to the same extent as other market participants have it.

4.10. **Jade Cargo International**

4.10.1. *Aid to the Airport*

(140) In light of the growing capacity crisis, the creation of new hubs is imperative. Since this infrastructure could not have been privately funded, Jade Cargo International submits that it disagrees with the Commission's demand for the operator to realise returns which a private investor would have expected. And the absence of such infrastructure would have negative effects not only in Germany's east, but in the EU as a whole.

(141) Jade Cargo International would expect a negative Commission decision to threaten the existence of Leipzig airport, and of its own operations. This, in turn, would detrimentally affect other economic sectors. Since the expansion of the airport does not distort competition, but is in the general economic interest, Jade Cargo International pleads for a positive Commission decision.

4.10.2. *Aid to DHL*

(142) According to Jade Cargo International, its own operations will benefit from the new southern runway, and it cannot agree with the Commission's reasoning that only DHL stands to profit from its construction. This erroneous conclusion is all the more incomprehensible in light of the fact that it is air traffic control, not the airport, which directs air traffic.

4.11. **Condor**

4.11.1. *Aid to the Airport*

(143) Condor considers the airport is well connected to other transport modes. In their opinion, investments appropriate to requirements are more sensible at existing and already cross-linked airports (like Leipzig/Halle) than at smaller airports which do not have the needed conditions available.

4.11.2. *Aid to DHL*

(144) According to Condor, investments in the expansion of Leipzig airport should raise no objections from the point of view of competition. The airport's modernised runway system will be available to every potential user. And given demand, modern, effective infrastructure is essential.

4.12. **Ruslan-Salis GmbH**

4.12.1. *Aid to the Airport*

(145) According to Ruslan-Salis (an air-cargo operator), no other airport in Germany and especially Germany's east was found to be suitable for its operations. For them, 'assured access' and 'assured availability' to the needed transport capacity play a decisive role.

(146) Among the factors taken into account when deciding to base its operations at Leipzig airport were the two-runway system, unrestricted 24-hour operation, direct rail and road links to every important destination in Central Europe and the repositioned and extended southern runway.

(147) According to Ruslan-Salis, the runway was built for the use of the general public and is not dedicated infrastructure. This was necessary and proportional to relieve bottle-necks in transport capacity, to fund the aviation sector and to achieve positive spill-over affects for the Leipzig-Halle-Merseburg-Dessau region.

4.12.2. *Aid to DHL*

(148) Ruslan-Salis disagrees with the Commission's interpretation that the southern runway and its apron will be predominantly used by DHL. It also disagrees with the assertion that the financing, construction and operation of the runway as a 'dedicated infrastructure' was a commercial transaction between the owner of the infrastructure and its user, and must be assessed as any other commercial transaction. It is furthermore incorrect that the expected rise in air traffic volume at the heart of the decision to expand the airport can be traced mainly to DHL.

(149) Ruslan-Salis uses the southern runway and any new infrastructures in the same way as DHL and any other company. No single user is afforded preferential treatment. The construction of the southern runway is in the general interest of any air cargo carrier operating at Leipzig airport. There is nothing to suggest that the infrastructure was dedicated to DHL, or that DHL enjoys any privileges.

4.13. **BARIG (Board of Airline Representatives in Germany e.v.)**

4.13.1. *Aid to the Airport*

(150) The members of BARIG are airlines with distributional or operational presence in Germany. They point out that the European Commission had underlined that European hubs are highly overloaded. This especially applies to the air freight sector, where the gap between capacity and demand is increasing. The Commission has directly warned against a 'Capacity Crunch' in its communication of 24 January 2007 ('*An Action-Plan for Capacity, Efficiency and Safety for airports in Europe*' ([24])). According to BARIG, a negative decision of the Commission would put the survival of the airport at risk.

(151) In the opinion of BARIG, the concept of the 2005 Guidelines does not fit to situation at Leipzig airport, as the enlargement of a cargo airport is under consideration, whereas the Guidelines deal with the competition for passengers primarily.

(152) To meet the capacity demands of the following years, cargo transport infrastructure has to be extended in a timely manner. If these investments are not financed by public funds, cargo airports would not be built or enlarged. Private investors would not make those investments.

([24]) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions An action plan for airport capacity, efficiency and safety in Europe, 24 January 2007, COM(2006) 819 final.

4.14. **Lufthansa AG**

4.14.1. *Aid to the airport*

(153) Lufthansa is in favour of the planned measures at Leipzig airport, including the rebuilding of the southern runway. The project is appropriate to need and economically sustainable. Lufthansa Cargo AG, a subsidiary of Deutsche Lufthansa AG, intends to carry out air freight services on a large scale to and from Leipzig. In addition to the hubs Frankfurt and Munich, Leipzig Airport is attractive for Lufthansa.

(154) Lufthansa AG points out the growing market volume for air freight, and that for Germany a growth of about 5.3 per cent is predicted. That postulates that infrastructural conditions keep pace with the growth. The investments at Leipzig Airport comply with the infrastructural requirements of the airfreight industry in reference to dimension, modernity and possibilities of further expansion.

(155) The parallel alignment of the runways allows for an economically reasonable optimisation of capacities and an increase of efficiency of the airport. This offers medium and long-term growth prospects for all users of the infrastructure.

4.15. **ACD (Aircargo Club Deutschland)**

4.15.1. *Aid to the airport*

(156) The members of ACD act in managerial positions in the air freight sector. They add that in their opinion the air freight sector will further growth in the next years. This involves the apprehension that the existing infrastructure of airports is not sufficient.

4.15.2. *Aid to DHL*

(157) ACD does not see any dependency of Leipzig Airport on DHL, as because of the strong economic development around Leipzig and Dresden there is a need for a capable airport in the region.

4.16. **BDF (Bundesverband der Deutschen Fluggesellschaften)**

4.16.1. *Aid to the airport*

(158) The BDF represents German scheduled flights, charter and low cost carriers and in doing so advocates need-based airport infrastructure. They opine that where there are bottlenecks of capacity at some German airports, whereas widely spread new small airports are developed, which are extensively public financed but contend for passengers. However, Leipzig Airport is not being developed for the benefit of one single user.

(159) According to BDF, State involvement by investments in the field of infrastructure should demonstrate clear macroeconomic profit and a long-term efficiency, these conditions are fulfilled in the present case. There is a genuine demand of clients — passenger — and especially freight air carriers.

4.17. **Cargolux**

(160) Cargolux uses Leipzig Airport as an offline station on its intercontinental all cargo flights departing from Luxembourg. The freight transported from Leipzig airport by Cargolux means a market share of 20.3 % of the total freight transported from this airport in 2006. Cargolux believes that it is one of the most important freight operators in Leipzig Airport and a relevant user of the infrastructures as well as a direct competitor of DHL.

4.17.1. *Aid to the airport*

(161) According to Cargolux, the improvement of the infrastructure of regional airports is crucial for the development of air cargo traffic in Europe (due to the saturation of major passenger hubs). The amount of the required investments as well as the long amortisation periods makes these investments only possible under public support. Thus, Cargolux welcomes the public initiatives and investments in regional airports as generators of employment and as supporters of the European industry, the customers and the public order.

5. **COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS**

(162) In commenting on the third party comments the German authorities reiterated the arguments previously made, they underlined that all of the third party comments had been in favour of the airport and its development. They also pointed out that none of the third parties raised any objections to the DHL arrangement.

6. ASSESMENT OF THE AID

6.1. Existence of Aid

(163) By virtue of Article 87(1) of the EC Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

(164) The criteria laid down in Article 87(1) EC are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 87(1) EC all of the following conditions need to be fulfilled. Namely, the financial support:

(a) is granted by the State or through State resources;

(b) favours certain undertakings or the production of certain goods;

(c) distorts or threatens to distort competition; and

(d) affects trade between Member States.

6.1.1. *Existence of State aid to the airport — capital contribution*

(165) As previously set out above in order to determine whether the notified measures constitute State aid within the meaning of Article 87(1) four conditions need to be fulfilled

6.1.1.1. Economic activity and notion of undertaking

(166) The Commission has to establish whether Leipzig Airport is an undertaking subject to EC competition law.

(167) It must first be noted that, according to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([25]) and that any activity consisting in offering goods and services on a given market is an economic activity ([26]). As regards the existence or otherwise of State aid, it is necessary to determine whether the beneficiary is engaged in an economic activity ([27]).

(168) Until recently, the development of airports was often determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was organised as part of the administration rather than like a commercial undertaking. Competition between airports and airport operators was also limited. The liberalisation of the market for air transport services has also meant that there are more airlines flying to more airports thereby increasing competition between airports. Taking into account these conditions, the financing of airports and airport infrastructure had previously been considered as falling within the public policy remit and, in principle did not raise State aid issues.

(169) This situation has however changed in recent years. Although these land-use planning considerations and administrative structures may still persist in some cases, in many others airports have been transferred from State to regional control, in some cases to be operated by public companies, or even to the private sector. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital. In recent years, private equity firms and investment and pension funds have shown a great interest in acquiring airports.

(170) The Community's airport industry has therefore undergone in the recent years fundamental organisational changes that reflect not only the active interest of private investors in the airport sector but also a change of attitude on the part of the public authorities regarding the contribution of private investment to airport development. This development has led to greater diversification and complexity of the functions undertaken by airports.

(171) These recent changes have also led to a change in the commercial relationships between airports. Whereas in the past airports were mostly managed as infrastructures with a view to ensuring accessibility and territorial development, in the last few years, more and more airports also have commercial objectives and are competing with each other in order to attract air traffic.

(172) The changing nature of airports has therefore to be reflected in the legal assessment of airport activities under State aid law. It is no longer possible to consider the operation and construction of airports as a task carried out by an administration, which in principle is outside the ambit of State aid control.

([25]) Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; Case C-55/96 *Job* Centre [1997] ECR I-7119, paragraph 21.

([26]) Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case 35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.

([27]) According to the European Court of Justice case law, any activity consisting in offering goods and services on a given market is an economic activity. See Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851 and Cases C-180/98 to 184/98 *Pavlov* [2000] ECR I-6451.

(173) The European Court, in the '*Aéroports de Paris*' case has also sought to clarify matters, stating that the operation of a big international airport consisting in the provision of airport services to airlines and to the various service providers within airports is an economic activity because it consists '*in the provision of airport facilities to airlines and the* various *service providers, in return for a fee at a rate freely fixed by the manager, and when the latter is public, does not fall within the exercise of its official powers as a public authority and is separable from its activities in the exercise of such powers*' ([28]). Thus, the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC Treaty, to which the rules of State aid apply.

(174) Given the ongoing developments of the sector, this approach has since been extended by the Commission to all kind of airports, including smaller ones (such as the one considered in the present decision) in its guidelines adopted in 2005. In the light of this recent transformation, the Commission considers that it is no longer possible *a priori* to exclude the application of State aid rules to airports as of 2000.

(175) Pursuant to the '*Aéroports de Paris*' decision once an airport engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 87(1) of the EC Treaty, and the Treaty rules on State aid therefore apply ([29]).

(176) The judgement of the Court of Justice in this case clarifying that the management and operation of an airport constitutes an economic activity has lead the Commission to conclude that from the date of this judgment the State aid rules apply in this sector. Accordingly, there is therefore no retroactive application of the 2005 guidelines as the German authorities have argued, the Court has simply clarified (a clarification which applies *ad vitam aeternam*) on the fundamental concept of aid ([30]).

(177) In this regard the Commission notes that the infrastructure which is the subject of the present decision will be operated on a commercial basis by the airport manager; it is therefore commercially exploitable infrastructure. The airport operator will charge users rates for the use of this infrastructure rather than infrastructure being made available without charge to users in the common interest.

(178) However, independently of its legal status not all the activities of an airport operator are necessarily of an economic nature. It is necessary to distinguish between its activities and to establish to what extent its activities are of an economic nature ([31]).

(179) The European Court of Justice has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include security, air traffic control, police, customs, etc. ([32]). The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities ([33]).

(180) Therefore the practice of the Commission ([32]) is that in relation to functions falling within the public policy remit, the financing of these functions or of infrastructure directly related to these functions does not constitute State aid. This means that the financing of infrastructure for instance necessary for security reasons or essential for the control and supervision of the air navigation and airspace may fall within the public policy remit ([34]).

(181) In the case at hand the continuous losses of the airport and the infrastructural investments have been financed by the public shareholders' equity and long-term debts. The extension and the realignment of the second, southern runway were planned to boost the airport's position at the freight traffic market. However, this being said certain of the investments may fall within the public policy remit. The investments Germany considers falling within the public policy remit have been set out previously.

(182) Having carried out an evaluation of the nature and the figures supplied by Germany in relation to investment and operational costs relating to the new southern runway, the Commission can conclude that in the present case certain costs fall within the public policy remit. These costs relate to security and police functions, fire and public safety measures, operational safety, German Weather Service and German Air Traffic Control. It is also the case that the users of the airport may also be charged for certain of these public policy measures.

([28]) ECJ, *Aéroports de Paris* case, *loc. cit., paragraph 121 with further references*.
([29]) Cases C-159/91 and C-160/91, *Poucet* v *AGV and Pistre* v *Cancave* [1993] ECR I-637.
([30]) In this context see the ruling of CFI of 12 February 2008 in Case T-289/03 *BUPA* v *Commission* (points 157 to 160).
([31]) Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.
([32]) Commission Decision N 309/02 of 19 March 2003 Aviation security — compensation for costs incurred following the attacks of 11 September 2001.
([33]) Case C-343/95 *Cali & Figli* v *Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N 309/02 of 19 March 2003; Commission Decision N 438/02 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.
([34]) See Commission Decision N 620/06 of 7 March 2007 Einrichtung des Regionalflughafens Memmingen.

(183) Therefore, to the extent that they fall within the public policy remit as set out above the costs in question may not amount to State aid within the meaning of Article 87(1) EC. However in the present case independently whether the Commission was to accept the approach advanced by the German authorities that none of the costs should be considered as State aid, the final assessment of the measure would not change. Even if these costs were to amount to state aid, such aid would be compatible aid (see below). Therefore the Commission does not have to reach a definitive conclusion on this question.

6.1.1.2. State resources and imputability to the State

(184) As has been stated by the Court ([35]) for the measures to be qualified as State aid in the sense of Article 87(1) EC, (a) they have to derive from the State's resources, either indirectly or directly and (b) they have to be imputable to the State.

(185) In the case under discussion, at all material times the State exercised direct or indirect control on the resources under consideration. Leipzig Airport has financed the enlargement by equity contributions of the public shareholders and has received long-term loans from its parent company Mitteldeutsche Flughafen AG (hereinafter MFAG), which has only public shareholders.

(186) The decision to grant these State resources is imputable to public authorities: The supervisory board of MFAG, a publicly owned company, declared that sufficient equity will be raised to finance the expansion of the airport. The majority of the MFAG's Supervisory Board members are representatives of public authorities (e.g. Land Ministers, Mayors etc.).

6.1.1.3. Economic advantage

(187) The capital contributions and shareholder's loans previously mentioned reduce the investment costs that the airport operator would normally have to bear and therefore confer an advantage on the airport.

(188) However, it could be argued that the capital contributions granted to Leipzig Airport do not constitute State aid within the meaning of Article 87(1) EC if the market economy investor test can be shown to be applicable in this case.

(189) In this regard the European Court in the Stardust Marine Judgment declared '*capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid*' ([36]).

(190) The Commission must then analyse whether Leipzig Airport's shareholders have acted as private investors in financing the expansion of the airport. It has to be assessed whether in similar circumstances a private investor operating under normal conditions of the market economy would have entered into the same or similar commercial arrangements as MFAG for the realignment of the southern runway.

(191) In doing so the Commission has to bear in mind, that '*[…] the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims* must *be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectorial — and guided by prospects of profitability in the longer term*' ([37]).

(192) In this particular case in relation to the investments relating to the new southern runway the German authorities appear to call into question the applicability of the market economy investor test. They argue that the test is not applicable to transport infrastructure because there are no comparable private investors. According to the German authorities, private investors have no interest in airports, especially where large renewal investments are necessary.

(193) The Commission cannot agree with this view. The private investor market test cannot be excluded because the private sector would not be involved in financing airport infrastructure ([38]). An economically difficult situation does not absolve the public investor from acting as reasonably as a private investor in the same situation would have done.

(194) 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*' ([39]).

([35]) See Case C-482/99 *France* v *Commission (Stardust Marine)* [2002] ECR I-4397.
([36]) Stardust Marine Judgement, paragraph 69.
([37]) Case C-305/89 *Alfa Romea* [1991] ECR I-1603, paragraph 20.
([38]) Which in any case is not true, see for example the construction of the privately owned airport of Ciudad Real, Spain.
([39]) Stardust Marine Judgement, paragraph 71.

(195) The decisive point of time is the date when the decision for investment was taken. The applicability of the private market investor test does not arise from the 2005 Guidelines but from the development of EC case-law and the decisions of the European Commission ([40]).

(196) Therefore, notwithstanding the assertions of the German authorities, in order to be able to apply the private investor test the Commission has to substitute itself for the public authority in question at the time the decision to make the investment was taken.

(197) In November 2004 when Leipzig Airport decided to start the construction works for the southern runway DHL had not yet entered into a legally binding commitment to move to Leipzig Airport. To have a conservative profitability assessment, the following analysis will make a comparison between 'Status quo' and 'Expansion without DHL' and will disregard 'Expansion with DHL'.

(198) The German authorities argue that Leipzig Airport acted like a private market investor. The German authorities submit that the realignment of the southern runway has helped to reduce the losses of Leipzig Airport and in the medium to long term, the financed investments allow to reach the break-even point.

(199) The German authorities need to be able to prove that the public authorities acted in a way that would be acceptable to a private investor. However, according to the information provided to the Commission, it is not ascertainable that the realignment of the southern runway was the most favourable solution for economic purposes.

(200) The conduct of an investor in a market economy is guided by prospects of profitability ([41]). The market investor test will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private undertaking, can be expected within a reasonable period.

(201) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Commission assesses whether the given measure constitutes aid by considering whether '*in similar circumstances a private shareholder, having regard to the foresee ability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question*' ([42]).

(202) As the Commission already in the 'Charleroi' decision pointed out, '*one cannot consider as consistent with the principle of private investor in a market economy any* commitments *made by an airport operator for which it cannot be proven that the airport activity as such will produce reasonable profits within a reasonable time. It goes without saying that any positive effects on the economy of the Region surrounding the airport cannot in any case be included in this evaluation, which is aimed at determining whether or not the intervention conceals elements of aid*' ([43]).

(203) As the Court held in its judgments, '*a private shareholder may reasonably subscribe the capital* necessary *to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation*' ([44]). However, as to the Court, '*when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid …*' ([45]).

(204) As previously mentioned Germany has submitted a business plan for the realignment of the southern runway. On the basis of the included income data and cost figures the Commission can review whether Leipzig Airport acted like a private investor with regard to financing, building and operating of the southern runway.

(205) Germany presented the business plans for three scenarios,

(a) 'Expansion with DHL': Rebuilding of the southern runway, DHL comes to Leipzig Airport;

(b) 'Status quo': No rebuilding or realignment of the southern runway;

(c) 'Expansion without DHL': Rebuilding of the southern runway, DHL does not come to Leipzig Airport.

(206) The business plans are based on the following assumptions, cost figures and income data as provided by the German authorities for the period from 2006 until 2042, no terminal value for the time after 2042 is specified.

(207) As previously stated the Commission cannot take into consideration the 'Expansion with DHL' scenario in determining the conformity of the investments with the MEIP ([46]).

([40]) See recitals 166 to 180 above.
([41]) Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 84; C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 20.
([42]) See 2005 Guidelines, paragraph 46.
([43]) Commission Decision *Charleroi* C 516/04 of 12 February 2004, paragraph 169.
([44]) Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 15, Case 303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 21.
([45]) Case 303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 22.
([46]) See above, paragraph 197.

(208) The forecast development of sales for the scenario 'Expansion without DHL' is based on two main assumptions: The investor expects a displacement effect of night-flight restrictions at Frankfurt/Main Airport in 2012, and capacity bottlenecks at other airports will lead to further growth between 2013 and 2018. The provisions of the enlargement were deemed necessary in order to ensure sufficient capacity to meet the expected growth of air freight. However, while the increasing demand for air freight traffic from Leipzig airport is mentioned as the reason for investment, this is not justified by in the present case by a specific cost-benefit-analysis.

(209) The risk of overcapacity existed when the decision to rebuild the southern runway was taken. Vacancy costs resulting from possible overcapacity (e.g. without DHL) would not be compensated. However, the presented calculations do not seem to take this risk into consideration.

(210) The following table ([47]) summarises the cash-flow calculations in relation to the two different scenarios 'Status quo' and 'Expansion without DHL'. These calculations are based on the business scenarios submitted by Germany which assume *inter alia* a growth rate of at least three percent for the air cargo business.

Table 8

Cash-flow calculations

(EUR million)

Cash-flow calculations (*)	(A) Airport Status Quo	(B) Airport Expansion without DHL	(C) = (B) — (A) Southern runway without DHL
(1) *EBITDA (2006-2042)*	[…]	[…]	[…]
(2) *EBITDA Safety Measures*	[…]	[…]	[…]
(3) EBITDA (2006-2042) corrected (1) + (2)	[…]	[…]	[…]
(4) Investments costs (2006-2042)	[…]	[…]	[…]
(5) Investments costs Safety measures (2006-2042)	[…]	[…]	[…]
(6) Investments costs 2005	[…]	[…]	[…]
(7) Cash flow 2005-2042 (3) + (4) + (5) + (6)	[…]	[…]	[…]

(*) *All values discounted to 2005; discounting rate = 6,5 %.*

([47]) There are a number of differences between the cash flow calculations in the current decision and in the decision to open the investigation. These differences can be explained as follows. While the opening decision discounted revenues and costs to 2006, the current calculations take 2005 as reference year because the decision to build the southern runway was taken in November 2004, and construction started in early 2005. The Commission learnt from the German submission to the opening that additional investment costs of EUR […] were incurred in 2005, which further increase the cash-flow losses. These investment costs were included.

(211) The Commission firstly notes that it has taken into account the total amount of the investment and operational costs for security and safety measures for the purposes of the Cash-flow calculations. However, as previously explained (see recitals 180 to 183) part of these expenses (operations and also investment costs) may represent measures which fall within the public policy remit

(212) This fact notwithstanding, the cash-flow of the airport for the period 2005-2042 totals to approximately [negative cashflow] euro. The Commission cannot therefore accept that a market economy investor would have decided to make the investment in the construction of the southern runway.

(213) The calculations show that Scenario B generates a cash-flow lower than Scenario A by about EUR [100-200] million. Building the southern runway reduces the cash flow in real terms, which is at disposal for the financing of the pre-existing facilities.

(214) As the airport has still to finance the existing capital assets amounting to EUR 642 million (book value 2005), it will not reach the required EBITDA to refinance completely the existing capital assets in Scenario B. On the basis of the presented cash flow calculations it cannot be assumed that the business operations of Leipzig Airport will reach break-even in the future. It cannot therefore be assumed that the Southern runway would have been built by a private investor on the basis of Scenario B.

(215) On this basis the Commission can conclude that the public authorities do not have a well founded expectation of a financial return on the investment in question and although it is their intention to make the airport more attractive to users and therefore more profitable, they are not guided by prospects of profitability in the longer term ([48]). Rather the aim of the public financing is, as explicitly indicated by the German authorities, regional development, and an increase in the accessibility of the region, the creation of jobs and environmental purposes (i.e. noise reduction).

([48]) Case C-305/89 *Italy* v *Commission ('Alfa Romeo')* [1991] ECR I-1603, paragraph 20.

(216) The Commission concludes that a private investor, even one operating at the scale of a group in a broader economic context, could not, in the normal circumstances of a market economy and even in the longer term, have expected an acceptable return on the capital invested in the case at hand.

(217) In these circumstances the Commission is entitled to consider that a private investor, even one pursuing a comprehensive long-term policy without regard to immediate returns, would not, in the normal circumstances of a market economy, have made the injections of capital in question.

(218) Furthermore, and without prejudice to the arguments set out and the conclusions reached above the Commission is obliged to observe that the discount rate applied by the German authorities in their calculations of 6.5 % (see point 117) implies that the calculations assume a very low risk investment premium of approximately 3.25 % based on a beta factor of 0.65. A beta of 0.65 means that if the value of the overall market decreases by 1 %, the value of the investment decreases by 0.65 %, which implies a lower volatility of the investment than the overall capital market and therefore results in a lower risk.

(219) In this regard, the Commission notes that some expert sources provide beta for aerospace and airport development in Europe based on statistical data of between 0,81 and 1,26 ([49]). These beta factors are calculated for international airports (mainly hub-airports) with good access to capital markets because of their listing on the stock exchange. The Commission considers that investments into smaller airports such as in the present case would give rise to a higher level of risk because of their size. Furthermore, in the present case the airport is publicly owned and its access to capital markets is limited, moreover, it is dependent on the support provided by its public shareholders. Therefore, the Commission notes that in addition to a higher beta factor a so-called 'illiquidity premium' should have been taken into account by the German authorities in their calculation but was not. If it had been taken into consideration the interest rates would have been higher and the net present value of the cash flow would have been at a lower level.

6.1.1.4. Specificity

(220) Article 87(1) EC requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. In the case at issue, the Commission notes that the advantages in question were granted to Leipzig airport only. The public funding is directed at a single undertaking. The capital contributions granted by public authorities have not been made available to any competing airports Airport. Thus it is a selective within the meaning of Article 87(1) EC.

([49]) See Damodaran Online, http://pages.stern.nyu.edu/~adamodar/.

6.1.1.5. Distortion of competition and affectation of trade

(221) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. In accordance with settled case law ([50]), for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

(222) As previously explained, the operation of an airport is an economic activity ([51]). Competition takes place not only between air carriers but also between airports. In the case at hand, these are inter alia undertakings possibly offering the requested premises to become a hub for air freight traffic.

(223) Any economic advantage which the airport Leipzig/Halle receives from the financing of the southern runway would strengthen its position vis-à-vis its competitors on the European market of providers of airport services. Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States

6.1.1.6. Conclusion

(224) For the reasons set out above the Commission concludes that the public financing of the development of the southern runway at Leipzig-Halle airport involves State aid within the meaning of Article 87(1) EC Treaty.

6.1.2. *Existence of State aid to DHL — Framework Agreement and Comfort Letter*

(225) As already explained in the opening decision (see recitals 42 to 46), the Commission considers that the measures under assessment are granted by State resources and are liable to distort competition.

6.1.2.1. Transfer of State resources

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

([50]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.
([51]) See above, paragraph 166ff.

(227) It is evident that the Framework Agreement and letter of comfort are financed by State resources and the decisions to grant them are imputable to public authorities: MFAG's supervisory board authorised on 3 June 2004 the conclusion of the Framework agreement. The majority of MFAG's supervisory board members are representatives of public authorities (e.g. finance ministers of Sachsen and Sachsen-Anhalt, mayors of Leipzig, Dresden, and Halle). The letter of comfort was signed by the finance minister of Land Sachsen on 21 December 2005.

6.1.2.2. Distortion of competition and affectation of trade

(228) To the extent that the measures grant a selective advantage to DHL and Leipzig Airport, the Commission considers that they are liable to distort competition and affect trade between Member States.

(229) It is also evident that the express parcel business is a market in which companies from different Member States compete. Any economic advantage which DHL receives from the listed public measures will strengthen its position vis-à-vis its competitors on the European express parcel market.

(230) As this assessment remained undisputed by Germany and third parties, the following discussion will focus on the extent to which the Framework agreement and the comfort letter favour DHL.

6.1.2.3. Economic advantages for DHL through Framework Agreement

(231) The Commission will analyse for each of the offered services — warranties, lease, and airport services — whether the Framework Agreement offers an appropriate remuneration which a private investor would have accepted.

(i) ***Warranties***

(232) The Framework Agreement does not offer any explicit premium payments for the provided warranties. The only possible source of remuneration will be the incremental cash-flow which the airport may earn from the construction and operation of the southern runway. The Commission will therefore, firstly, calculate the incremental cash-flow for the southern runway. Secondly, the Commission will check whether this incremental cash-flow provides a sufficient remuneration for the warranties provided.

(233) A private investor would have decided whether to enter into the Framework Agreement along with whether to build the southern runway, thus the reference date for the private investor test must be November 2004, before the date construction works started. As explained above (see recital 215 and following), the Commission holds that a private investor would not have wilfully damaged his negotiating position by sinking investment costs into the southern runway prior to the conclusion of a contract for its use. The cash-flow calculations clearly show that the southern runway without having DHL coming to Leipzig Airport would not have been a viable business alternative because an incremental cash-flow loss of about EUR […] would have resulted (see column 5 in Annex 1). Therefore by first constructing the southern runway, and then signing the Framework Agreement, the airport did not act as a private investor would have. The scenario 'expansion without DHL' was only feasible due the granting of substantial aid. Therefore the scenario cannot be used as a point of reference for the private market investor test.

(234) The Commission will therefore retain its approach developed in the opening decision to calculate the incremental cash-flow for the construction of the southern runway by taking the difference of the cash-flows resulting from the expansion scenario with DHL and the status-quo scenario (operation of the existing northern runway only).

(235) The calculation starts in 2005 when the airport incurred the first investment costs of about EUR […] for the southern runway of which the Commission only became aware after the opening decision.

(236) The cash-flow calculation will not go beyond 2042 and not include the terminal values proposed by Germany, because, according to an earlier submission by Germany ([52]), the useful life of a runway amounts to about 30 years. Furthermore, a private investor would not be willing to finance the southern runway if it did not yield a satisfactory return in its prime — the first 37 years of operation from 2005 until 2042. Therefore the cash-flow analysis will only cover this time period for the purpose of assessing the effect of the investment on the airport's profitability.

(237) The proposed terminal values are also disregarded because they lack credibility. The terminal values are based on an infinite rent which grows annually by 3 percent. Such a calculation is not realistic because a runway has a limited capacity and revenues cannot grow infinitely. This leads e.g. to the paradoxical result in Germany's calculation for the expansion scenario with DHL that the discounted terminal value is five times as high as the airport's discounted cash-flow for 2005 to 2042 ([53]).

(238) As explained in more detail in Annex 1, the calculations of the discounted incremental cash-flow of the southern runway show in 2005 that the revenues fall short of the investment costs by about EUR […] for the period 2005 to 2042 (see column 4 in Annex 1).

([52]) Submission from Germany, 21 July 2006, p. 12.
([53]) See the calculations provided by Germany (recital 88 above).

(239) The airport will therefore not be able to finance any risk costs out of the cash-flow of the southern runway. Risk insurance could only be said to be accepted business practice if the project was profitable and the airport could refinance the risk, as it is not the case.

(240) In offering unlimited warranties for the operation of the airport subsequent to the start of the DHL hub (according to sections 8 and 9 of the Framework Agreement), the airport takes over risks which it cannot control. As explained in more detail in recitals 17 to 19 of the opening decision, the airport is neither able to control the preferential access of DHL to the southern runway (which falls under the responsibility of the public flight control) nor the introduction of night flight restriction (which is the responsibility of public authorities).

(241) Germany itself calculates that the risk of a night flight ban puts a financial cost of about EUR […] on the airport. This leads consequently to an increase of the cash-flow loss to EUR […] (see column 4 of annex 1). Even though it is clear that the airport cannot finance the risk costs out of its own revenues, the Commission would nevertheless like to point out that these EUR […] can only be seen as a lowest end of the scale. Among other flaws in the calculation, Germany neglects that the airport would go into bankruptcy if it had to pay an amount of EUR […] or EUR […] to compensate DHL for the costs of moving to another airport due to a night flight ban. Additionally, the calculations by Germany do not take account of the other warranted risks (e.g. access to southern runway which is controlled by public flight control).

(242) Finally, the Commission wants to emphasise that the calculations would still show a negative cash-flow even if the Commission followed Germany's argument that security and safety costs of EUR […] fell within the public policy remit and had therefore to be excluded from the airport's costs ([54]). As shown in column 4 of annex 1, a substantial loss of EUR […] would also remain in this scenario.

(243) Although the above calculations are sufficient to prove that a private investor would not have granted such an unlimited warranty, the Commission would nevertheless like to add that closer scrutiny would establish even higher losses. As Germany pointed out, the UK regulator used a cost of capital (in real terms and pre-tax) of 6,2 percent for Heathrow Airport and 6,7 percent for Gatwick Airport in his calculations to set airport fees for the period 2008 to 2013. While both Heathrow and Gatwick Airport can rely on a substantial demand for flights into and from London, Leipzig Airport faces excess capacity and has to compete with other airports for attract low-cost passenger and cargo airlines. As Leipzig Airport is therefore exposed to higher market risks than Heathrow or Gatwick Airport, a cost of capital (in real terms and pre-tax) higher than 6,5 percent would seem appropriate.

([54]) The amount of EUR […] is the discounted sum of the operating and investment costs for safety and security measures which the airport plans to undertake for the southern runway. Annex 1 also lists the net present values of the safety and security and security costs for the other business scenarios.

(244) Additionally, the fact that — according to Germany ([55]) — private financial institutions were not ready to hedge the risks which result from the warranty for the operation of the airport subsequent to the start of the DHL hub confirms that no private operator would have offered such an unlimited warranty to cover risks which he cannot control.

(245) Arguments advanced by Germany and DHL that the mutual provision of warranties between contracting parties is usual business practice are not more than a general statement and are therefore irrelevant because the above calculations show clearly that in the particular case Leipzig Airport is just not able to finance the offered warranties out of its own resources. A private investor would only enter a contract which yields a profit and does not deteriorate its financial position.

(246) To conclude, the Commission would like to return to Germany's argument that — given the southern runway was already constructed — a private investor would have signed the framework agreement because the cash-flow was higher with than without DHL. Germany's argument misses the essential point that — as shown above — the risk costs cannot be financed out of own revenues. To be able to offer the warranties to DHL, Leipzig Airport must resort to the capital which has been contributed for the construction of the southern runway. However, as the foregoing section has established, these capital contributions themselves constitute aid. Therefore, whatever the timing of the analysis, it comes down to the result that the warranties have necessarily been financed by aid.

(ii) ***Lease contracts***

(247) Taking note of the comments by DHL and Germany, the Commission considers that the lease contracts do not provide financial advantages to DHL because of the following reasons:

(a) The lease contracts for the apron and the further ground handling areas are based on market interest rates and Leipzig Airport is not limited in its choice of financing.

(b) The reservation of certain land plots to DHL seems to constitute a customary provision in German rental law and does not — in any case — prevent the location of competitors at Leipzig Airport because a large number of land plots are still available to them.

(iii) ***Airport fee arrangement***

(248) Taking note of the comments by DHL and Germany, the Commission considers that the airport fee arrangements do not provide financial advantages to DHL because of the following reasons:

(a) DHL pays the same fees as other users of Leipzig Airport.

([55]) Submission from Germany, 21 July 2006, p. 7.

(b) As it can be seen from the comparison of airport fees which DHL has submitted, the airport fees charged by Leipzig Airport are […] to […] percent higher than at other competing cargo airports in Europe. The Commission has therefore no basis to conclude that the airport fee arrangement is not market conform.

6.1.2.4. Economic advantages for DHL through comfort letter

(249) The Guarantee Notice sets out criteria which ensure that a guarantee does not constitute State aid. Two essential cumulative conditions are:

(a) The guarantee could in principle be obtained on market conditions from the financial markets.

(b) The market premium for the guarantee is paid.

(250) The comfort letter — by which Land Sachsen assumes (i) to provide sufficient capital to Leipzig Airport and MFAG to fulfil the commitments given in the Framework Agreement and (ii) to be directly liable for DHL's compensation claims up to EUR […] m — fulfils neither of these two criteria:

(a) According to Germany ([56]), Leipzig Airport sought, but was unable to cover the risks eventually addressed by the comfort letter through private financial institutions.

(b) As neither DHL nor MFAG nor Leipzig Airport is obliged to pay any premium for the comfort letter, the risk exposure of Land Sachsen is not directly remunerated.

(251) Furthermore, it can also not be said that Land Sachsen is indirectly remunerated as shareholder of Leipzig Airport because the airport's share value will effectively decrease due to the cash-flow losses of the expansion with DHL. By the same token, any arguments about proportionality between the comfort letters granted by Land Sachsen and Deutsche Post AG are irrelevant because the incremental cash-flow for the southern runway is just not sufficient to finance the risk exposure of the airport and its owners.

([56]) Submission from Germany, 21 July 2006, p. 7.

6.1.2.5. Conclusions on existence and lawfulness of State aid to DHL

(252) The Commission finds that the (i) unlimited warranties granted by the Framework Agreement (according to sections 8 and 9); and (ii) the comfort letter constitute aid in the meaning of Article 87(1) EC Treaty because the Land Sachsen, MFAG, and Leipzig Airport hedge business risks for DHL at terms which a private investor would not have accepted. Without public support Leipzig Airport would have neither been able to finance the southern runway nor to enter into the Framework Agreement with DHL.

(253) As the Framework agreement had been signed and put it into effect before Germany notified it, the unlimited warranties granted by the Framework Agreement constitute unlawful aid in contravention of Article 88(3) EC Treaty.

6.2. **Compatibility of aid**

6.2.1. *Compatibility of aid to the airport*

(254) As set out above the total amount of the investments will be financed from public resources which (although some of the public financing may be destined for public policy expenditure) for the purposes of the present decision involves State aid ([57]).

(255) The Commission must establish if the aid can be found compatible with the common market. Article 87(3) of the Treaty provides for certain exemptions to the general rule of incompatibility set out in Article 87(1) of the Treaty.

(256) In this regard, the '2005 Guidelines' provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 87(3)(c). They mention a number of criteria which the Commission takes into account in this regard.

(257) The Commission must examine in particular, according to paragraph 61 of the 2005 guidelines, whether:

(a) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);

(b) the infrastructure is necessary and proportional to the objective which has been set;

([57]) The aid intensity cannot be precisely calculated as the Commission cannot exclude that the notional private investor would have reduced its exposure by investing a lower amount.

(c) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

(e) the development of trade is not affected to an extent contrary to the Community interest.

(i) ***construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.)***

(258) The project aims at the creation of a new air-freight hub and multimodal cargo centre based on the airport. The air freight sector, in particular express freight, is showing considerable growth rates. Air freight carriers are expanding their operational capacities. However, the three main air-freight hubs in Germany — Frankfurt Main, Munich and Köln/Bonn are facing night flight capacity constraints. In the event that Frankfurt Main Airport should have to discontinue its night flight operations or decrease the number of the night flights, Germany would face a serious air-freight capacity crunch.

(259) In this context, the investment is in line with the Commission's 2007 *Action Plan for Airport Capacity* ([58]), which notes that '*given the expected traffic evolution, Europe will face an* **ever growing gap** *between capacity and demand*' for airports and concludes that this '*capacity crunch at airports poses a* **threat** *to the safety, efficiency and competitiveness of all actors involved in the air transport supply chain*' ([59]). In the same *Action Plan*, the Commission highlights the need not only for more efficient use of existing runways, but also for '*support for new infrastructure*' and underlines the importance of regional airports in order to address this capacity crunch.

(260) The envisaged project forms part of the strategy for the development of the airport contained in the Trans-European Transport Network Outline Plan (2020 horizon) from 2004 as a 'Community connecting point'. The airport is located in the region of Middle Germany (close to five major Trans-European transport axes and Pan-European corridors) between the axes from North to South Europe (i.e. Federal motorway A 9) and from the West to Eastern Europe (i.e. Federal motorway A 14) with an access to excellent rail and road network. The access to rail and road network facilitates intermodality of freight transport and results in more efficient and environmentally friendly transport, and furthermore, contributes to sustainable development. Therefore the project is in line with the '*development of an integrated European air transport network*' as set out in Point 12 of the abovementioned Action Plan which notes that '*it would be desirable to unlock existing latent capacity at regional airports provided that Member States respect Community legal instruments relating to state aids*'.

([58]) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions An action plan for airport capacity, efficiency and safety in Europe, 24 January 2007, COM(2006) 819 final.

([59]) Action Plan, point 7 and box in page 3.

(261) It is foreseen that the implementation of the project will have a positive impact on the entire region and will significantly influence its economic and social development. It will in particular improve access to the Region and increase its attractiveness for investors and visitors. This should have a positive on employment bearing in mind that unemployment is significantly higher in the Leipzig-Halle region than the national average.

(262) The investment work at stake will facilitate a better, safer, more environmentally friendly and more rational use of the existing infrastructure and will therefore improve airport safety, security and efficiency. The new alignment of the southern runway avoids that in the future densely populated areas in the north of Leipzig and in the south of Halle are over-flown. In particular, an area of Leipzig, which is located close to the airport grounds at the head of the original southern runway, was affected by the noise because of the location of take-off and approach paths. In addition, the old southern runway was not facing in a direction with favourable meteorological conditions for take-off and landing. The most common prevailing wind direction, taken over the year and for individual months, is south-west. This can be disadvantageous with regard to disruptive crosswind components. The new alignment satisfies meteorological requirements enabling ILS CAT III (all weather) instrument flight operations. Furthermore, the distance between the two runways allows independent operation of air traffic, which was not the case previously for safety reasons because of risk of collision.

(263) The Commission can therefore conclude that the construction and operation of the infrastructure meets a clearly defined objective of general interest, being the development of an airport with a large air freight component in line with EU policy in this respect due account being taken of regional and environmental aspects and that this criterion of compatibility is fulfilled in the present case.

(ii) ***the infrastructure is necessary and proportional to the objective which has been set***

(264) The figures provided by the German authorities clearly show that the airport as currently laid out cannot meet expected growth foreseen in either passenger or freight traffic. As previously mentioned, it is expected that the airport will experience a gradual but significant increase in passenger and freight traffic over the lifetime of the new southern runway. In 2006 the airport handled 2.3 million passengers and according to estimates it will serve about 6-7 million passengers in 2010. Further increase is expected in the future in the freight traffic operations in particular with regard to further night flights restrictions at other German airports (i.e. Frankfurt Main, Köln/Bonn etc.).

(265) For various reasons the old southern runway was considered as deficient infrastructure not suitable for purpose. First, it has to be recalled that in the present case the old southern runway was built between 1957 and 1960. The alignment of the old southern runway was decided on the basis of the military airspace structure of the former German Democratic Republic and not the meteorological requirements for aviation. Around 1980, defects (i.e. cracks in the pavement slabs, spalling and washout of the runway bed) had already started to appear. In order to rectify these defects, a new concrete surface was built on top of the damaged runway in 1983/84. However, the new concrete surface was not connected to the original surface and the renewal of the runway was only superficial and proved to be inadequate.

(266) This inadequacy became particularly apparent from 1990 on, when the runway was used much more often. For example, cracks in the lower surface created cracks in the new upper surface causing extensive spalling and major longitudinal distortions at both ends of the runway which resulted in pavement buckling. Buckling of the pavement poses a serious danger to aviation safety when pavement blowups occur in summer as a result of higher temperatures. The consequences of this were an increasing level of damage and expensive and disproportional maintenance.

(267) In addition, the original southern runway was 2 500 m long and as such could only be used for short-haul flights. It could not be used for fully loaded aircraft weighing more than 30 t. Consequently, the efficiency of Leipzig Airport was seriously impaired (aircraft of the types Boeing B 747, B 767 and McDonnell Douglas MD 11 when fully fuelled and loaded require runways of between 2 925 m und 3 320 m for take-off). This deficiency also significantly increases the likelihood of interruptions in operations (e.g. in the event of the northern runway being closed). Also from the aviation safety perspective it was necessary to adapt the alignment of the old southern runway. Even with aircraft landing in the westerly direction, the two runways could not operate in parallel because there was always a possibility that approaching planes would have to abort the landing and take off again in order to avoid a collision. Therefore, the German Air Traffic Control Service (Deutsche Flugsicherung GmbH, DFS) had to treat the two runways as if they were a single runway for flight operations.

(268) In view of the conditions mentioned above, the maximum number of take-offs and landings which could occur on the original runway was calculated and a simulation conducted on the basis of the forecast flight schedule for a freight hub at Leipzig Airport. The results of the simulation of the forecast flight schedule showed there would be significant time delays for planes taking off and landing during peak hours. Planes landing could, on average, expect to wait around 21 minutes (in both directions of operation) and planes departing around six minutes. In specific cases, there were even delays of between 30 minutes and one hour for landings, and up to 18 minutes for take-offs.

(269) As noted previously, the capacity of the airport to obtain finance other than from or through the intercession of its public shareholders is very limited and therefore an aid intensity of 100 % was necessary. The German authorities have been able to show that all of the infrastructure that they will undertake and finance are necessary to attain the goals that they have set and the project is not disproportionately large or elaborate.

(270) Thus, taking all of the above considerations into account the Commission can reach the conclusion that the infrastructure in question is necessary and proportional to the objectives which have been set.

(iii) ***the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure***

(271) Due to its location in the centre of Europe and its surrounding market of approximately 7 million persons within 100 km of the airport and its location next to excellent road and rail infrastructure the airport has large growth potential. As previously stated, the air freight sector is showing considerable growth rates (i.e. average growth rate in international passenger transport between 2002 and 2006 of approximately 7.4 % and on the freight side 6.2 %) ([60]). However, the current airport capacities are facing night flight constraints.

(272) With regard to the freight growth at Leipzig airport the German authorities expect high growth rates in the first years and as from 2013 an average growth rate of 3 %. In comparison, IATA expects an average annual growth rate for 2007-2011 for passengers of about 5.1 % and freight of 4.8. The German authorities forecasted (in 1999) about 4 million passengers in 2004 and 6-7 million passengers in 2010. According to the German authorities a more recent study expects an increase from 2.1 million passengers in 2005 to 4.8 million passengers per year.

(273) Thus, in the medium term, the new infrastructure offers good perspectives for use, especially in relation to existing infrastructure, which the planned works will optimise.

(iv) ***all potential users of the infrastructure have access to it in an equal and non-discriminatory manner***

(274) As indicated by the German authorities, all potential users (airlines) will have access to the new infrastructure on an equal and non-discriminatory basis. DHL will use the new southern runway only 19 % of the time amounting to only 9.4 % of the overall capacity of the airport as a whole. With regard to the use of the runway capacity by DHL the Commission notes, that in most

([60]) IATA, Passenger and freight forecasts 2007 to 2011, October 2007.

(hub) airports it is not unusual that the incumbent airline utilise approximately 60 — 80 % of the overall runway capacity, effectively functioning as anchor tenants. This phenomenon is also becoming more prevalent in the low cost sector in their use of regional or secondary airports.

(275) The reservation of certain time frames (in effect slots) to DHL reflects the commercial reality of the express cargo business. Moreover, in the present case, Leipzig Airport is not a congested airport ('slot-constrained' airport) and therefore, there are no capacity restrictions. This means that the reservation of certain time frames does not have a negative impact on DHL's competitors. This has been largely confirmed by the observations received from cargo operators and passenger air carriers (i.e. Panalpina, Jade Cargo International, Ruslan-Salis, Lufthansa Cargo, CARGOLUX Condor etc.).

(276) With regard to the allocation of time frames (or slots) in Leipzig/Halle airport as with most (uncongested) airports the available slots are allocated on a 'first come first served' basis. Intrinsic to the operation of all airports is the concept that the air carriers retain the slots that they have received. This is referred to as 'grand-father rights'. The allocation of slots to DHL at this uncongested airport and the possibility for DHL to retain these slots is therefore not an advantage to DHL in State aid terms

(277) It should however be recalled that such 'rights' cannot derogate from Community or national law. In this regard, the Commission takes this opportunity to remind the German authorities that in the case of congestion of Leipzig/Halle airport they must carry out a capacity analysis in accordance with the provisions of Council Regulation No 95/93 (as amended) on common rules for the allocation of slots at Community airports ([61]).

(278) In the view of the above the Commission can conclude that all potential users of the infrastructure have access to it in an equal and non-discriminatory manner.

(v) ***the development of trade is not affected to an extent contrary to the Community interest***

(279) The airport falls in category C, as defined by paragraph 15 of the 2005 Guidelines. Although there will be an impact on competition and trade at Community level, the Commission has to determine if this is to an extent contrary to the Common interest.

(280) The Commission firstly notes that the new southern runway while it optimises capacity at the airport is no more than a replacement for a pre-existing runway which was not optimally positioned.

(281) As previously referred to, the main cargo airports in Germany with which Leipzig-Halle competes are facing capacity or night flight restrictions and therefore future competition is unlikely. There is therefore little or no risk of distortion of competition with these airports.

(282) As previously indicated, when DHL was canvassing for possible European hubs it settled on a short-list of Leipzig/Halle, Vatry and Brussels. In this regard the Commission notes that neither Brussels nor Vatry has commented during the opening of procedure. The Commission also notes that no other European airport has indicated during the opening of procedure that the development of Leipzig/Halle airport as set out above gives them cause for concern. Nor has the Commission identified specific competition concerns vis-à-vis any other EU airport.

(283) On the basis of the above, the Commission can therefore conclude that the development of trade is not affected to an extent contrary to the common interest.

6.2.2. *Incompatibility of the unlimited warranties under the Framework agreement and the comfort letter*

(284) As DHL has already benefited from the maximum amount of investment aid permissible under Article 87(3)(a) EC Treaty, the aid which DHL receives by the Framework Agreement and the comfort letter constitutes operating aid.

(285) According to the regional aid guidelines ([62]), operating aid is normally prohibited. Exceptionally, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) EC Treaty provided that certain strict conditions are fulfilled ([63]). As Germany has not provided any evidence that these conditions are met, the Commission finds that the operating aid to DHL is not compatible under Article 87(3)(a) EC Treaty.

(286) In absence of information proving the opposite, the Commission finds also that the aid to DHL does not fulfil any other objective of common interest. Therefore, as none of the exceptions provided by Article 87(2) and Article 87(3) EC Treaty are applicable, the unlimited warranties granted by the Framework Agreement and the comfort letter have to be considered as incompatible with the common market.

([61]) OJ L 14, 22.1.1993, p. 1.

([62]) Guidelines on national regional aid 2007-2013, OJ C 54, 4.3.2006.

([63]) In particular, operating aid has to target bottlenecks in regional development, to be proportional to the specific handicaps it seeks to alleviate, to be digressive, and to be limited in time.

6.2.3. *Elimination of incompatible aid granted to DHL*

(287) According to the Court of Justice's established case-law, the Commission is competent to decide that the state concerned must abolish or alter aid ([64]) when it has found that it is incompatible with the common market. The Court has also consistently held that the obligation on a state to abolish aid regarded by the Commission as being incompatible with the common market is designed to re-establish the previously existing situation ([65]). In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([66]).

(288) Following that case-law, Article 14(1) of Regulation (EC) No 659/99 ([67]) laid down that: 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (…). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

(289) To ensure that DHL does not enjoy any economic advantages out of the incompatible aid measures, the Commission considers three actions as necessary:

(a) The comfort letter must not be implemented.

(b) The unlimited warranties must be abolished.

(c) As the unlimited warranties have covered the period from 1 October 2007 (which is the operations start date of the DHL hub) onwards, the aid which has already been put at the disposal of DHL must be recovered.

(290) For the calculation of the aid element which has already been put at the disposal of DHL, the Commission would firstly like to note that, according to the case-law of the Court of Justice, no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount ([68]).

(291) To quantify the aid element, the warranty fee needs to be calculated for the first months of the DHL hub operations starting on 1 October 2007 until the abolition of the unlimited warranty. It has to be asked which fee would a private insurance have demanded on 21 September 2005, when the framework agreement was signed, for the period from 1 October 2007 until the abolition of the unlimited warranty. In a competitive insurance market, the warranty fee will be equal to the expected risk costs which the warranty has to cover.

(292) Germany has already provided an estimate of the expected risk costs of EUR […] for the complete […] years duration of the framework agreement. As already explained before, these risk costs result from the following calculation:

(a) Germany assumes that the compensation claims will linearly decrease over time as a result of the amortisation of DHL's investments. Starting from the maximum of EUR […] in year […], this implies e.g. EUR […] in year […] and EUR […] in year […].

(b) To simplify the analysis, Germany does not use a continuous probability distribution for the risk of a night flight ban but assumes that after half of the contract period — in year […] — a night flight restriction will be introduced with a probability of […] percent. Multiplying the nominal damage claims of EUR […] in year […] by the probability of […] percent gives expected nominal risk of EUR […] in year […] and a discounted value to EUR […] for the expected risk costs.

(293) The Commission considers that for having a correct estimate of the risk costs, Germany has to change the following elements in its calculation:

(a) Contrary to Germany's assumption, certain parts of DHL's compensation claims will remain stable over time (e.g. costs for removal of equipment, damage claims by DHL clients for late delivery, etc.). The development of the nominal damage claims over time must accordingly be adjusted.

(b) Germany's calculation only focuses on the risk of a night flight ban. However, the warranty also covers daily operational risks (e.g. preferred use of the southern runway). These risks must therefore be included in the calculation. The damage claims due to operational risks and their probability of entry must be estimated and the resulting net present value of these risk costs must be calculated.

([64]) Case C-70/72, *Commission* v *Germany*, [1973] ECR 00813, point 13.
([65]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, [1994] ECR I-4103, point 75.
([66]) Case C-75/97, *Belgium* v *Commission*, [1999] ECR I-030671 points 64-65.
([67]) OJ L 83, 27.3.1999, p. 1.
([68]) See, in particular, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, point 25, and Case C-415/03, *Commission* v *Greece*, [2005] ECR 0000, point 39.

(c) While the Commission could accept the simplified analysis proposed by Germany as regards the probability for the risk of a night flight ban, as regards the daily operational risks, the Commission considers that the probability must be estimated on an annual basis. The time-series of the expected yearly damage claims must be discounted to arrive at the net present value for the daily operational risk.

(294) Based on the re-estimated risk costs for the complete period of the framework agreement, Germany will have to accordingly apportion the risk costs to arrive at the warranty fee for the period from 1 October 2007 until the abolition of the unlimited warranty.

7. **CONCLUSION**

7.1. **In relation to the aid to the airport**

(295) The Commission considers that the measure in question, which allows Leipzig-Halle airport to realise the investment project in accordance with the conditions described previously, is not prejudicial to the common interest and that the five criteria set out in the Guidelines have been satisfied in the present case.

7.2. **In relation to the aid to DHL**

(296) The Commission finds that the unlimited warranties granted by the Framework Agreement and (the comfort letter constitute aid in the meaning of Article 87(1) EC Treaty because the Land Sachsen, MFAG, and Leipzig Airport hedge business risks for DHL at terms which a private investor would not have accepted.

(297) As DHL has already benefited from the maximum amount of investment aid permissible under Article 87(3)(a) EC Treaty, the Commission considers that the unlimited warranties granted by the Framework Agreement and the comfort letter have to be considered as incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany is planning to implement amounting to EUR 350 million in relation to the construction of a new runway and related airport infrastructure at Leipzig Halle Airport is compatible with the common market under Article 87(3)(c) of the EC Treaty.

Article 2

The State aid which Germany is planning to implement by granting the comfort letter in favour of DHL is incompatible with the common market. The aid may accordingly not be implemented.

Article 3

The State aid which Germany granted to DHL in the form of unlimited warranties (according to sections 8 and 9 of the Framework Agreement) is incompatible with the common market. These unlimited warranties granted by the Framework Agreement must accordingly be abolished.

Article 4

1. Germany shall recover the part of the aid referred to in Article 3 which has already been put at the disposal of DHL (i.e. the warranty fee for the period from 1 October 2007 until the abolition of the unlimited warranties).

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

Article 5

1. Recovery of the aid referred to in Article 3 which has already been put at the disposal of DHL shall be immediate and effective.

2. Germany shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 3 which has already been put at the disposal of DHL has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 7

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2008.

For the Commission

Antonio TAJANI
Vice President

Neelie KROES
Member of the Commission

ANNEX

Cash-flow calculations for aid to DHL

Table 1

Cash-flow calculations

(EUR million)

Cash-flow calculations (*)		(1) Airport Status Quo	(2) Airport Expansion with DHL	(3) Airport Expansion without DHL	(4)=(2)-(1) Southern runway with DHL	(5)=(3)-(1) Southern runway without DHL
EBITDA ([1]) (2006-2042)	a	[…]	[…]	[…]	[…]	[…]
Investment costs (2006-2042)	b	[…]	[…]	[…]	[…]	[…]
Investment costs 2005	c	[…]	[…]	[…]	[…]	[…]
Cash-flow 2005	d=a+b+c	[…]	[…]	[…]	[…]	[…]
Risk costs (**)	e	[…]	[…]	[…]	[…]	[…]
Risk-adjusted cash-flow 2005	f=d+e	[…]	[…]	[…]	[…]	[…]
Correction for security and safety costs						
Security and safety cost (operating + investment costs) (**)	g	[…]	[…]	[…]	[…]	[…]
Corrected cash-flow 2005	h=f+g	[…]	[…]	[…]	[…]	[…]

([1]) Earnings before interest, taxes, depreciation and amortisation.
(*) All values discounted to 2005.
(**) Calculated by Germany.

Calculation of the cash-flow for the southern runway

Germany submitted 3 different scenarios for the development of the 2006-2042 cash-flows of Leipzig Airport:

— *Airport — Status quo:* The southern runway is not built. The airport operations continue on the existing northern runway.

— *Airport — Expansion with DHL:* The southern runway is built and DHL begins operating its European hub in 2008.

— *Airport — Expansion without DHL:* The southern runway is built but DHL does not move to Leipzig and another operator will be attracted to the airport after 2010.

Based on the differences in cash-flows, the expected profitability of the southern runway is calculated thus:

— *Southern runway with DHL:* This column shows the cash-flow difference between the expansion with DHL and the status quo.

— *Southern runway without DHL:* This column shows the cash-flow difference between the expansion without DHL and the status quo.

Difference between cash-flow calculations of the opening and the current calculations

— While the *opening* decision discounted revenues and costs to 2006, the current calculations take 2005 as reference year because the decision to build the southern runway was taken in November 2004, and construction started in early 2005.

— The Commission learnt from the German submission to the opening that *additional investment costs of EUR […]* were incurred in 2005, which further increase the cash-flow losses. These investment costs were included.

Cash-flow calculations show substantial losses for southern runway

— The construction and operation of the southern runway with DHL yields a discounted *cash-flow loss* of about *EUR […]* in 2005. The discounted *cash-flow loss* for the expansion without DHL amounts to *EUR […].*

— Finally, the *risk costs of EUR […]* (as calculated by Germany) increase the *cash-flow losses* to *EUR […]* for the southern runway with DHL. It is thereby important to note that the estimated risk costs of EUR […] m merely represent lowest end of the scale since the Germany does not quantify all risks assumed by the airport and builds its calculations on very questionable assumptions.

— Even if the Commission followed Germany's argument that *security and safety costs* of *EUR […]* fell within the public policy remit and had therefore to be excluded from the calculation for the southern runway, a substantial *cash-flow loss of EUR […]* would remain.