II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1469

of 23 July 2014

on State aid SA.30743 (2012/C) (ex N 138/10) — Germany — Financing of infrastructure projects at Leipzig/Halle airport (2)

(notified under document C(2014) 5071)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ([1]),

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 provision(s) cited above ([2]),

Whereas:

1. PROCEDURE

(1) By letter dated 12 April 2010, Germany notified the Commission, for reasons of legal certainty, of planned capital injections into Mitteldeutsche Flughafen AG ('MFAG') and Flughafen Leipzig/Halle GmbH ('FLH'). Germany also informed the Commission that the notified capital injections are subject to its approval. In the meantime the financing of the project will be through shareholder loans, which were allegedly granted at market terms.

(2) By letters dated 10 June 2010, 26 November 2010 and 3 March 2011, the Commission requested further information on the notified measures (including the conditions of the shareholder loans). On 29 September 2010, 4 January 2011 and 26 April 2011 Germany submitted additional information.

(3) By letter dated 15 June 2011, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty ('opening decision') in respect to the shareholder loans and the capital injections in favour of FLH. Germany provided its comments on the opening decision on 15 August 2011.

(4) The Commission's opening decision was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the measure in question within 1 month of the publication date.

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

([2]) OJ C 284, 28.9.2011, p. 6.

([3]) See footnote 2.

(5) The Commission received comments on the subject from 34 interested parties. It forwarded these comments to Germany on 21 November 2011. Germany was given the opportunity to respond to these comments within 1 month. The Commission received Germany's observations on 20 December 2011.

(6) On 14 March 2012, the Commission sent a request for information. On 26 April 2012, the Commission received the response from Germany.

(7) The Commission requested further information on 15 May 2012, 20 July 2012 and 21 December 2012. Germany responded by letters dated 28 June 2012, 10 September 2012 and 15 January 2013.

(8) On 31 March 2014, the Commission adopted the 2014 Aviation Guidelines ([4]) replacing the 1994 Aviation Guidelines ([5]) as well as the 2005 Aviation Guidelines ([6]). On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 1 month of the publication date of the Guidelines ([7]).

(9) On 14 April 2014 the Commission requested further information regarding the application of common principles for the compatibly assessment of the aid in light of the 2014 Aviation Guidelines. Germany responded by letter dated 19 May 2014, 26 May 2014, 10 July 2014 and 11 July 2014.

(10) By letter dated 17 July 2014, Germany agreed that this Decision would be adopted and notified in the English language.

2. **DESCRIPTION OF THE MEASURES**

2.1. BACKGROUND TO THE INVESTIGATION AND THE INFRASTRUCTURE PROJECT

2.1.1. **Leipzig/Halle airport**

(11) Leipzig/Halle airport is located in the Free State of Saxony in Central Germany. The airport is operated by FLH ([8]), which is a subsidiary of MFAG ([9]). MFAG is a holding company with three subsidiaries (FLH, Dresden Airport GmbH and PortGround GmbH).

(12) After the German reunification, a master plan for the development of the airport was put in place. This plan foresaw the future construction of a two-runway system. In 1997, the construction of the northern runway was approved. In 2004, the shareholders decided to finance the construction of the southern runway ([10]).

(13) After the beginning of the operation of the southern runway in 2007, DHL Express relocated its European hub activities from Brussels to Leipzig. Besides DHL Express, Leipzig Halle is served also by Lufthansa Cargo and other air freight airlines. As a result, Leipzig/Halle airport became in 2011 the 2nd largest air freight airport (after Frankfurt/Main airport) in Germany. Table 1 summarises the development of passenger and air cargo at the airport since 2006.

([4]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([5]) Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).
([6]) Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).
([7]) OJ C 113, 15.4.2014, p. 30.
([8]) FLH's main shareholder is Mitteldeutsche Flughafen AG, which holds a 94 percent participation in FLH. The remaining shares are owned by Freistaat Sachsen, Landkreis Nordsachen and Stadt Schkeuditz. There are no private shareholders.
([9]) The shareholders of MFAG are: 76,64 percent Freistaat Sachsen, 18,54 percent Land Sachsen-Anhalt, 2,52 percent Stadt Dresden, 0,2 percent Stadt Halle, 2,1 percent Stadt Leipzig. There are no private shareholders.
([10]) The capital contributions from the public shareholders of FLH financing the construction of the new southern runway and other measures amounting up to EUR 350 million and decided until 2006, have been already assessed and found compatible with the internal market in Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1) and are therefore not within the scope of the present investigation.

Table 1

Passenger and air cargo development at Leipzig/Halle airport in 2006-13

Year	Passenger development	Air cargo and postal services development in tonnes	Aircraft movement SS (freight and passengers)
2006	2 348 011	29 330	42 417
2007	2 723 748	101 364	50 972
2008	2 462 256	442 453	59 924
2009	2 421 382	524 084	60 150
2010	2 352 827	663 059	62 247
2011	2 266 743	760 355	64 097
2012	2 286 151	863 665	62 688
2013	2 240 860	887 101	61 668

Source: Leipzig Halle airport (www.leipzig-halle-airport.de).

2.1.2. **The overview of the infrastructure investment programme**

(14) The shareholder loans and capital injections aim at financing the infrastructure and infrastructure-related measures summarised in Table 2 and amounting to EUR 255,6 million.

Table 2

The overview of infrastructure investment programme at Leipzig/Halle airport

Number	Description	Budgeted costs/anticipated costs (EUR)
M1	Acquisition of land/relocation/noise abatement/accompanying landscape conservation planning	[…] (*)
M2	Engine testing structure	[…]
M3	Taxiway and traversing bridge E7	[…]
M4	Northern take-off and landing runway extension: planning costs	[…]
M5	Site clearance in readiness for construction of taxiway Victor plus new fire station buildings/multi-purpose hangar	[…]
M6	Parallel taxiway Victor	[…]
M7	Additional de-icing areas	[…]
M8	Heliport	[…]
M9.1 — M9.4	Additional infrastructure measures: Rebuilding of Checkpoint I Functional security building Procurement of technical equipment Animal Farm	[…]

Number	Description	Budgeted costs/anticipated costs (EUR)
M10	Additional noise abatement	[…]
M11	Land side development of south eastern zone phase I	[…]
M12	Planning approval procedure for southern extension	[…]
M13	Northern apron expansion	[…]
M14	Eastern apron expansion	[…]
M15	Infrastructure adaptation	[…]
M16	Additional infrastructure measures: Northern zone hangar extension (M16.1) Construction of new aviation terminal and small aircraft shed (M16.2)	[…]
	Total	**255,625 million**

(*) Covered by the obligation of professional secrecy.

(15) M1 — Extensive noise abatement measures (including acquisition of land, relocation, accompanying landscape conservation planning): under the planning approval decision for the southern runway and aprons [11], Leipzig/Halle airport has to implement noise abatement measures in the night protection area. This night protection area was supposed to cover an area of some 211 km^2 with around 6 000 dwelling houses. After the first recalculation of the night protection area carried out at the end of February 2009, the initial protection area needs to be extended by approximately 4 000 additional dwelling houses.

(16) M2 — Engine testing structure: a new engine testing structure was constructed at Leipzig/Halle airport in 2007-08. Leipzig/Halle airport operates 24 hours a day, therefore it has to offer facilities to conduct tests on aircraft engines at day and night. The engine testing structure has been set up as a closed structure to limit noise emissions.

(17) M3 — Taxiway and traversing bridge 'E7': to ease the pressure on the existing taxiways and traversing bridges and to provide an alternative in the event of accidents or breakdowns, the taxiway and traversing bridge 'E7' was built in the east of the airport. For technical reasons, this infrastructure project is divided into three sub-projects: traversing bridge [12], taxiway and technical equipment (lighting). Work on the project began in 2008.

(18) M4 — Extension of northern take-off and landing runway (planning costs) from its current 3 600 metres to 3 800 metres: extension of the northern runway is aimed to ensure that freight aircraft with a high maximum take-off weight ('MTOW') can take off without any payload restrictions. The planning of this infrastructure project began in 2008.

(19) M5 — Site clearance in time for construction of taxiway 'Victor', new fire station building, multi-purpose hangar I: the fire station and multi-purpose hangar will have to be torn down and rebuilt. Work for the reconstruction of multi-purpose hangar I and the fire station began in May 2009. The new multi-purpose hangar will be used for the winter service equipment. The works will also include the construction of a fire brigade training facility.

[11] Planning approval decision for the southern take-off and landing runway and apron of a responsible German planning authority of 4 November 2004 and the first amendment to that decision of 9 December 2005.

[12] Leipzig/Halle airport has two taxiways which cross traffic routes (A14 motorway, high speed rail line, 4-lane national road), meaning that bridges have to be built for the taxiways.

(20) M6 — Parallel taxiway 'Victor': according to the notification, the construction of taxiway 'Victor' between two existing taxiways is essential to cover the further increasing capacities at Leipzig/Halle airport and to cover capacities in the south west of the airport at peak times and in the case of easterly weather conditions.

(21) M7 — Additional de-icing areas: the additional de-icing areas are necessary to ensure that the de-icing of aircraft runs smoothly and to avoid delays resulting from inadequate infrastructure.

(22) M8 — Heliport: in 2008-09, a helicopter parking space was created at Leipzig/Halle airport by adapting the surface structure and marking it out; it is used as a base for air rescue and emergency operations.

(23) M9.1 — Rebuilding of Checkpoint I: checkpoint I has to be rebuilt in order to comply with Regulation (EC) No 2320/2002 of the European Parliament and of the Council ([13]). It will be the base for all organisational activities relating to airport security (pass and key management, security training, management tasks), controls (for example of persons and freight), and security services (for example visitor service, VIP).

(24) M9.2 — Functional security building: a new security building will be used by the federal police, the regional police, customs and the German Meteorological Service.

(25) M9.3 — Procurement of technical equipment: in order to adjust to the new infrastructure, Leipzig/Halle airport must also acquire additional winter service equipment and additional firefighting equipment. The airport perimeter fence will also have to be retrofitted with detectors and digital video surveillance equipment with intelligent movement detection.

(26) M9.4 — Animal Farm: the project concerns the establishment of a separate building at the airport for the export/import of animals from third countries containing veterinary installations.

(27) M10 — Additional noise abatement: in the light of the predicted growth in especially air freight traffic at Leipzig/Halle airport, further noise abatement measures (and related works) are expected to be necessary in the medium-term as the airport expands.

(28) M11 — Land side development of south eastern zone phase I: the areas adjacent to the eastern side of the existing land-side installations (hangar and operational building) at Leipzig/Halle airport are to be fully equipped with electricity and a water supply, waste water installations and rainwater drainage by 2010; works began in 2008. Once the existing roundabout at the airfreight transhipment terminal has been connected to the public road network, additional noise abatement measures will have to be taken.

(29) M12 — Planning approval procedure for southern extension: the southern runway (3 600 metres) and apron at Leipzig/Halle airport are to be extended in the long-term. This will necessitate a planning approval process.

(30) M13 — Northern apron expansion: 12 additional stands are planned to be built by 2020. The development of terminal facilities in the north of the airport will make it possible to achieve a more even distribution of aircraft movements between the two runways.

(31) M14 — Eastern apron expansion: the eastern apron border is to be moved south to ensure the provision of the necessary obstacle-free areas for the runway operations. The apron also needs to be connected to the taxiway system and de-icing points.

(32) M15 — Infrastructure adaptation: the terminal facilities in the northern zone must be adapted to take into account the newly built apron in the northern zone and the relocation of cargo functions to that zone. To this end, the hangar and necessary ancillary functions are to be adapted for a category F aircraft.

(33) M16.1 — Northern zone hangar extension: this involves the construction of a new apron in the northern zone including the relocation of cargo functions to that zone and provisions of maintenance stands.

([13]) Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ L 355, 30.12.2002, p. 1).

(34) M16.2 — Construction of new aviation terminal and small aircraft shed: a new aviation terminal and a small aircraft shed will have to be built. The former aviation terminal was demolished when the new southern runway was built.

2.2. MEASURES UNDER INVESTIGATION AND GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(35) The opening decision investigated the following measures financing the investment project (that is to say infrastructure and infrastructure-related measures) at Leipzig/Halle airport:

(i) shareholder loans in favour of FLH amounting up to, potentially, EUR 255,6 million ('bridge financing partially already put into place');

(ii) capital injections into FLH amounting up to EUR 255,6 million.

(36) With regard to the notified infrastructure measures, the Commission raised doubts whether they can be indeed considered to fall within the public policy remit, and thus, whether their financing does not constitute State aid.

(37) The Commission concluded that the shareholder loans to and capital injections into MFAG do not constitute State aid since they are both intended to be transferred to FLH. MFAG can only be regarded as a vehicle for transfer of funds to FLH, and thus, not as an aid beneficiary itself.

2.2.1. **Shareholder loans in favour of FLH**

(38) The infrastructure and infrastructure-related projects have been first financed through shareholder loans, which will be converted into capital only after the authorisation of these financing measures by the Commission. Between 2006 and 2011 ([14]) the total amount of shareholder loans granted to FLH accounted for EUR […] million.

(39) The conditions of the shareholder loans in 2006-08 were determined on the basis of a loan agreement between Sachsen LB and MFAG. The base lending rate is the 3-months-EURIBOR plus a risk margin of […] basis points. For the year 2009, the base lending rate is the 3-months-EURIBOR plus a risk margin of […] basis points. For the year 2010 the base lending rate is the 3-months-EURIBOR plus a risk margin of […] basis points.

Initial assessment of the existence of aid by the Commission

(40) Regarding the aid nature of the shareholder loans in favour of FLH, the Commission expressed doubts whether FLH's shareholder loans were granted at conditions which could have been normally obtained on the market. In particular with regard to the comparable loan agreements, the Commission expressed doubts whether indicative proposals submitted by an e-mail without the aim to enter into legally binding loan agreements and without the underlying assessment of the probability of default and collateralisation can be considered as a reliable market benchmark.

(41) In absence of a market benchmark, the Commission based its assessment on the proxy set out in the 2008 Reference Rate Communication ([15]). In the absence of a rating of FLH and the underlying collaterals, the conditions of FLH's shareholder loans seemed therefore to be more favourable than the proxy established by the Commission for the market rate in application of the 2008 Reference Rate Communication.

(42) The possible aid element amounts to the difference between the market interest rate and the actual interest rate.

2.2.2. **Capital injections into FLH**

(43) The capital injections into FLH, aimed at financing the infrastructure and infrastructure-related measures (see Table 2), are subject to the Commission's approval. Consequently, it is only after the authorisation of the aid that it is envisaged to convert FLH's shareholder loans into equity.

(44) The total amount of financing aimed at reimbursement of costs for infrastructure and infrastructure-related projects amounts to EUR 255,6 million. A total of EUR 240,3 million is to be deposited in MFAG's capital reserve fund and earmarked for passing on to FLH in order to increase its equity (that is to say own capital reserve). FLH's shareholders for their part will inject the remaining amount directly into FLH's capital reserve fund.

([14]) Until 1 April 2011.

([15]) Communication from the Commission on the revision of the method of setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

(45) According to Germany, the capital injections will be carried out without any underlying business plan and long-term prospects for profitability.

(46) Although some of the infrastructure projects to be funded by the planned capital injections have already started, prior to the start of the projects, the public shareholder announced in each case their intention of financing those measures before any works started. The capital injections themselves have not yet been carried out.

Commission's initial assessment of the existence of aid

(47) With regard to the aid nature of the capital injections, the Commission expressed doubts whether, in absence of any long-term expectations for profitability, FLH's shareholders acted as a market economy operator. Hence, the Commission had doubts whether the capital injections could be seen as not constituting State aid.

2.2.3. **Compatibility of aid**

(48) As FLH's shareholder loans and the subsequent capital injections might constitute State aid, the Commission had to examine whether this aid could be found compatible with the internal market on the basis of Article 107(3)(c) of the Treaty. In this regard, the 2005 Aviation Guidelines summarised the common principles for compatibly assessment of the aid to finance airport infrastructure pursuant to Article 107(3)(c) of the Treaty.

(49) In the opening decision, the Commission concluded that certain criteria set out in the 2005 Aviation Guidelines are met in the present case. In this respect, the Commission concluded that the aid meets a clearly defined objective of common interest, in particular as it increases connectivity of the region for freight services and has a positive impact on the local development. Having regard to the positive outlook on the development of the airport, the Commission concluded that the airport has good medium-term prospects for use, and that the infrastructure programme is necessary.

(50) However, in the opening decision the Commission expressed doubts whether the infrastructure measures in question are adequate to the objective which has been set. Furthermore, the Commission expressed concerns that not all users have access to the airport in an equal and non-discriminatory manner. The Commission also stated that, since FLH, as a specialised freight airport, is in competition with airports in other Member States, it cannot conclude at the current stage that the development of trade is not affected to an extent contrary to the common interest. Moreover, the Commission had also doubts regarding the necessity and proportionality of the aid.

(51) Consequently, the Commission expressed its doubts whether the financing of the notified measures can be considered compatible with the internal market pursuant to Article 107(3) of the Treaty.

3. **COMMENTS FROM GERMANY**

3.1. CONTEXT OF THE INVESTIGATED MEASURES

(52) Germany started its comments with further clarifications regarding the context of the investigated measures. In this context, Germany asserted that the Reunification Treaty of 1990 had already foreseen the further development of Leipzig/Halle airport. According to Germany, a master plan for the development of the airport was set up and it was decided to develop a system of two parallel runways. Germany explained further that the construction of the northern runway was approved in 1997 and its operation started in 2000, while the construction of the southern runway was approved in 2004 and its operation started in 2007.

(53) Against this background, Germany asserted that due to its parallel runway system and the relocation of several large air cargo operators, Leipzig/Halle airport had been able to position itself as the second largest air cargo hub in Germany. In this context, Germany submitted that since 2010 the airport had been able to foster its place as one of the most important air freight transhipment centres in Europe. Germany added also that currently 133 companies were present at the airport, employing a total of 5 106 people in 2010 (an increase by 14,4 % in comparison to 2009).

(54) In the view of Germany, the airport is therefore a driver for economic development in the region and plays an important role for the regional employment. Germany emphasised that this is also confirmed by an increase in revenue and freight volumes handled at the airport: in the period 2005 to 2009 the revenue generated by FLH rose from EUR 47 million to EUR 80 million. With regard to cargo volumes, Germany stated that in comparison to other airports, Leipzig/Halle is registering constant growth rates (whereas 101 364 tonnes of freight were processed

in 2007, this figure rose to 442 453 tonnes in 2008, 524 084 tonnes in 2009 and 663 059 tonnes in 2010). In order to complement its statement, Germany pointed out that the air cargo volume rose by 18,5 % in 2009 and 26,5 % in 2010. According to Germany, a further increase in the cargo volume was expected. In this respect Germany clarified that approximately 820 000 tonnes of air cargo were expected to be handled by 2020 ([16]). However, Germany submitted that, this forecast will be already met by 2015 ([17]).

(55) Moreover, Germany stated that the airport had experienced a gradual increase in passenger numbers in recent years (from 1 988 854 passengers in 2002 to 2 723 748 passengers in 2007). Although, according to Germany, there has been a decline in passenger traffic since 2007 (only 2 352 827 passengers in 2010), in the medium- to long-term, Germany expected an increase in passenger traffic up to 4,6 million passengers by 2020.

(56) Germany stated that contrary to many other Union airports, such as the three major German cargo airports, Frankfurt/Main, Cologne-Bonn and Munich, Leipzig/Halle airport has an unrestricted night flight permission for commercial air cargo traffic. According to Germany, this was one of the reasons why the airport has good prospects for the future. Germany also pointed out that the German Federal Administrative Court (Bundesverwaltungsgericht) confirmed the prohibition of night flights at Frankfurt/Main airport, the biggest German air cargo hub, by judgment of 4 April 2012. Germany stated that at Frankfurt/Main airport departures and arrivals were therefore totally prohibited between 23:00 and 5:00.

(57) Germany submitted also that FLH was not able to finance the planned infrastructure measures from its own resources. In this context, Germany emphasised that due to the investment backlog stemming from the time of the former German Democratic Republic, the airport had to make investments in a much shorter time than airports located in the Western parts of Germany. According to Germany, in particular, the significant short-term investments cannot be financed out of FLH's own resources, as there is a substantial gap between the investment volume (EUR 225,6 million) and the airport's annual revenues (EUR 80 million in 2009).

3.2. NOTION OF ECONOMIC ACTIVITY AND PUBLIC POLICY REMIT

3.2.1. **Notion of economic activity and applicability of State aid rules to airport infrastructure**

(58) Germany first recalled that it did not agree with the Commission's position that the construction of airport infrastructure constitutes an economic activity. Hence, Germany submitted that the notified measures do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(59) In this regard, Germany submitted that the concept of an 'undertaking' within the meaning of Article 107(1) of the Treaty does not apply to airports, at least in regard to financing of airport infrastructure. Germany stressed that the establishment of airport infrastructure did not constitute an economic activity, but rather a general transport, regional and economic policy measure. It referred to point 12 of the 1994 Aviation Guidelines which stated that 'the construction or enlargement of infrastructure projects […] represents a measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids. Infrastructure development decisions fall outside the scope of application of this communication' and argued that the 2005 Aviation Guidelines did not replace this point.

(60) Moreover, Germany asserted that the construction of airport infrastructure does not constitute an economic activity because a private investor would not engage in that activity. In this regard, Germany stated that there is no possibility of the investment being profitable, since it is not possible to recover the construction costs from the users of the airport by means of airport charges. That is so, according to Germany, because those charges require an authorisation from the relevant airport authority of the respective Land in which the airport is located and private investors have no influence over their level. According to Germany, those charges cannot therefore be fixed freely by the operator in the light of economic considerations, and in fact, they are set without any relation to the investment costs. Areas let for commercial purposes other than airline operation are, in view of Germany, irrelevant.

(61) Germany stated further, in that regard, that airports have higher than average fixed costs relating to infrastructure, equipment and operation. In addition, their freedom of action is limited by strict legal obligations and conditions.

([16]) Based on estimates before 2011.
([17]) Based on the 2011 estimates.

(62) Germany considered further that the references to the *Aéroports de Paris* judgment ([18]) and to the *Leipzig/Halle* judgement ([19]) were irrelevant. With regard to the *Aéroports de Paris* judgment, Germany submitted that the judgment does not deal with the construction of airport infrastructures, but with the operation of an airport. Additionally, Germany considered that the *Aéroports de Paris* judgment does not deal with the interpretation of the concept of 'undertaking' within the meaning of Article 107(1) of the Treaty, but concerns an infringement of the prohibition on the abuse of a dominant position within the meaning of Article 102 of the Treaty. With regard to the *Leipzig/Halle* judgment, Germany considered that the judgment of the General Court does not have any effect as a precedent in case-law, as it is subject to an appeal.

3.2.2. **Public policy remit**

(63) According to Germany, even if the financing of infrastructure measures was subject to State aid rules, it would not constitute State aid within the meaning of Article 107(1) of the Treaty since the financing of infrastructure measures mainly constituted the necessary and proportionate reimbursement of costs for the performance of tasks falling within the prerogative powers of the State. In this regard, Germany stated that according to the 2005 Aviation Guidelines, the activities that normally fall under State responsibility in the exercise of its official powers as a public authority were not of an economic nature and did not fall within the scope of State aid rules.

(64) Germany claimed that in connection with the performance of tasks falling within the public policy remit, the practice of the Commission distinguished at least between the following categories of security-related measures: the protection of air traffic against external threats, such as hijacking and other acts of violence against air traffic, the protection of air traffic against operational risks and the protection of third parties against operational hazards from air traffic. In the view of Germany, with regard to the protection of air traffic against operational risks, the airport operator has the duty to renovate, modernise and expand the airport infrastructure in order to prevent operational hazards. Germany stated that the third category of measures typically covers the protection of third parties against aircraft noise and other harmful environmental effects.

(65) Regarding the different infrastructure measures at stake, Germany argued that these measures mainly constituted compensation for the performance of activities falling within the public policy remit since the measures protected third parties against operational hazard from air traffic.

(66) With regard to the noise abatement measures, Germany stated that in the context of the planning approval procedure, noise abatement measures in approximately 10 000 dwelling houses would need to be installed. Germany argued that according to the provisions of the recently amended *Gesetz zum Schutz gegen Fluglärm* (Aircraft Noise Act, 'FluglärmG'), the noise abatement measures would only cover an area of just 78 km^2 with about 3 000 dwelling houses and costs amounting to EUR […] million. However, according to Germany, FLH did not benefit from this amendment of FluglärmG, and a more strict protection area still applies. In the regard, Germany asserted that Leipzig/Halle airport has to bear significantly higher costs than its competitors (in Germany and outside the Union).

(67) In addition, the airport also acquired properties of badly affected residents and paid them compensation. Furthermore, Germany stated that the airport carried out some nature conservation activities in order to compensate for its building activities. Germany argued that this was intended to prevent or reduce the impact of aircraft noise and of the construction works on third parties, and was thus a public policy function. According to Germany, protecting third parties from noise, particularly aircraft noise, was one of the fundamental official duties and functions of the State.

(68) Germany also argued that the engine noise testing facility, that is to say M2, constituted a public policy remit measure. It stated that the noise limits set in the context of the planning approval decision for the construction of the southern runway could be fulfilled during daytime (6:00 to 22:00) without a closed engine testing structure. However, according to Germany, pursuant to the operating permit of 31 July 2007, the airport had to run tests in the closed testing structure also during the day. Furthermore, Germany explained that the engine test were required in the context of maintaining the operational safety of aircraft and would exceed the allowed noise limits, if performed during the night outside a closed structure. Therefore, in the view of Germany the construction of the engine testing facility in the form of a closed building serves to protect local residents against any unacceptable levels of aircraft noise.

([18]) Case T-128/98 *Aéroports de Paris* v *Commission*, [2000] ECR II-3929.

([19]) Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH* v *Commission* ('*Leipzig-Halle airport*' judgment), [2011] ECR II-1311.

(69) Concerning measure M3, Germany argued that the construction of these infrastructure elements falls within the public policy remit since it was carried out in order to protect air traffic against operational hazards. Regardless of the volume of traffic which is supposed to be handled in the future, the existing taxiway links were already insufficient in the past to guarantee safe and smooth handling of air traffic. Moreover, Germany stated that the new taxiway is the emergency access route for the fire brigade from the eastern fire station to the northern area of the airport. According to Germany, even if State aid rules were applicable, it has to be kept in mind that some of these costs of the taxiway were related to the lighting. Regarding lighting, Germany pointed out that the Commission had already decided in its *Memmingen* decision ([20]) that lighting constituted an element of aircraft guidance and control and could therefore be classified as activities falling within the public policy remit that falls outside the ambit of State aid rules.

(70) According to Germany, M4 would also be carried out in the fulfilment of activities falling within the public policy remit since operational capacity and safety reasons required to provide wide-body aircraft that operate at their permitted MTOW under certain climatic conditions with additional take-off distance, including an additional deceleration area in case of an aborted take-off.

(71) Regarding measure M5, in the view of Germany, the site clearance in time for the construction of the taxiway Victor had been carried out in fulfilment of activities falling within the public policy remit since the taxiway Victor was required to guarantee safe operation and to prevent accidents, safety risks and adverse environmental impact. According to Germany, contrary to the opinion of the Commission, the construction of the taxiway Victor was not intended to increase capacity and indirectly turnover. Germany stated that it was solely constructed for operational safety and environmental reasons.

(72) Furthermore, according to Germany, the construction of the two new fire station buildings was carried out in the fulfilment of activities falling within the public policy remit since according to settled Commission practice, measures relating to fire safety, especially the construction and operation of the airport fire station buildings and the procurement of the relevant equipment, are considered as falling within the public policy remit. Germany pointed out that the construction of a firefighting facility was usually publicly funded at German airports.

(73) Moreover, according to Germany the construction of the multi-purpose hangar was also carried out in the fulfilment of activities falling within the public policy remit since the hangar would be solely used for the storage of the winter service equipment and as an emergency shelter. Germany explained that the provision of premises for winter service equipment constitutes an official State function since it guarantees the safe operation of the airport during the winter period. Moreover, Germany stated that it enabled the airport to meet its statutory obligation to operate the airport at all times.

(74) Germany explained that the provision of the emergency shelter falls within the general interest as it serves to safeguard human life. Germany cited ICAO provisions that require airport managers to provide space for the treatment of wounded people and for the storage of dead bodies in the case of an emergency. Moreover, according to Germany, the multi-purpose hangar can also accommodate passengers that cannot continue their journey due to natural phenomena (for example the ash cloud in 2010).

(75) Furthermore, Germany stressed that the construction of the new hangar was necessary since the enlargement of the multi-purpose hangar at its previous position would not have been possible.

(76) With regard to measure M6, Germany referred to the arguments in connection with M5. Furthermore, Germany stated that the construction of the taxiway Victor had been postponed.

(77) According to Germany the expansion of the de-icing areas (M7) was also conducted in fulfilment of an official State function as the facilities were required for operational safety and environmental reasons. Furthermore, Germany explained that the additional de-icing areas were not required to guarantee sufficient capacity in case of increasing traffic since Leipzig/Halle airport could handle increasing traffic even without additional de-icing areas. It argued that the expansion of the de-icing areas became necessary as a result of the experiences during the

([20]) Commission decision of 7 March 2007 in State aid case N620/06 Germany Memmingen/Allgäu Regional airport (OJ C 133, 15.6.2007, p. 8).

winter operation 2008-09. According to Germany, the additional de-icing facilities serve to guarantee smooth de-icing of aircrafts and to prevent delays caused by inadequate de-icing infrastructure at the airport. In this respect, Germany submitted that delays, in turn, would have a negative impact on the environment, such as kerosene consumption, harmful emissions and noise.

(78) Regarding measure M8, Germany argued that the construction of a heliport facilitates air rescue at the airport and in general.

(79) Regarding M9.1, Germany stated that the rebuilding of Checkpoint 1 was absolutely necessary in light of Regulation (EC) No 300/2008 of the European Parliament and the Council ([21]). Germany pointed out that this rebuilding falls within the public policy remit and that its financing was limited to the costs incurred.

(80) Additionally, Germany is also of the opinion that the construction of the functional security building (M9.2) fell within the public policy remit and that the financing was limited to the costs incurred. Germany stated that the new functional security building also helped to comply with Regulation (EC) No 300/2008 and was necessary to meet the needs of the federal and regional police, customs and the German Meteorological Service.

(81) Regarding M9.3 which concerned the procurement of technical equipment, that is to say the procurement of additional winter service equipment, of additional firefighting equipment and the retrofitting of the airport perimeter fence with detectors and digital video surveillance equipment, Germany argued that the three measures fell within the public policy remit.

(82) Regarding the new winter service equipment, Germany stated that the equipment permitted that the runways can be cleared in parallel, what ensured a safe operation of the airport, and hence was falling within the public policy remit.

(83) Moreover, Germany pointed out that according to §8 of the German Luftsicherheitsgesetz (Aviation Security Act, 'LuftSiG'), which implemented Regulation (EC) No 300/2008, the airport had to be surrounded by a perimeter fence. Germany emphasised that according to settled Commission practice, the airport security infrastructure, such as perimeter fencing, falls within the public policy remit.

(84) Concerning measure M9.4 (that is to say the construction of a new animal transport building including veterinary facilities), Germany also submitted that the establishment of this building falls within the public policy remit, as it was aimed to ensure that no animal diseases or other illnesses were brought into Germany and the Union.

(85) Regarding M12, Germany stated that in order to be able to further develop cargo traffic and to diminish the risk of accidents on the ground, the planning permission was needed.

(86) With regards to M11 and M13 to M16, Germany pointed out that it did not claim in its notification that these measures were implemented to carry out activities falling within the public policy remit. According to Germany, these measures included the land side development of the south-eastern zone, the northern apron expansion, the eastern apron expansion, infrastructure adaptation in the northern zone and additional infrastructure measures in the northern zone.

3.3. FINANCING OF THE INFRASTRUCTURE THROUGH FLH'S SHAREHOLDER LOANS

3.3.1. **Financing conditions**

(87) Regarding the financing of the infrastructure measures at stake, Germany stated that the measures were financed by shareholder loans which were granted under normal market conditions, and thus do not constitute State aid pursuant to Article 107(1) of the Treaty. Germany pointed out that these loans had so far not been converted into equity and that the conversion of the shareholder loans is subject to Commission's approval decision.

(88) Germany clarified that the loans are provided according to the construction needs and that their total amount is changing on a monthly basis. According to Germany, the loan duration starts at the date on which the loan is paid out. Germany further explained that each loan matures at the end of the year (31 December) in which it is provided. In this context, Germany stated that these loans were then prolonged for a further period of 1 year. According to Germany, multiple extensions of the duration are possible until the expected authorisation of the capital injections by the Commission is received.

([21]) Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (OJ L 97, 9.4.2008, p. 72).

(89) Germany stated further that the loan amount and the payable interest are due on the end-date (that is to say 31 December of each year), but the duration of the loan might be prolonged by 1 additional year. Furthermore, Germany argued that this extension option allowed the prolongation of the loan until the date on which the Commission takes its final decision.

(90) With regard to the interest rate for each loan, Germany explained that it was set on the basis of the EURIBOR applicable at the moment of providing each tranche plus a risk margin. According to Germany, if a loan is provided on 1 July its duration (until the end of the year) will be 6 months and the interest rate will be the sum of the 6-month EURIBOR and a risk margin. Germany clarified further that if a loan is provided on 1 May (a duration of 8 months until the end of the year) the reference base rate will be calculated by interpolating the 6-month and the 9-month EURIBOR rates. Germany clarified further that as of the month of January following the year in which the loan was extended the valid interest rate will be the 12-month EURIBOR plus a risk margin. Germany provided an overview of the accumulated loan amounts and conditions as summarised in Table 3.

Table 3

Overview of FLH's shareholder loans 13.12.2006-1.1.2012

Date	Amount in million EUR (accumulated)	EURIBOR	Risk margin	Total interest rate (EURIBOR + margin)
13.12.2006	[…]	3,90	[…]	[…]
1.1.2007	[…]	3,90	[…]	[…]
1.1.2008	[…]	4,73	[…]	[…]
1.1.2009	[…]	3,03	[…]	[…]
1.1.2010	[…]	1,25	[…]	[…]
1.1.2011	[…]	1,50	[…]	[…]
1.1.2012	[…]	1,94	[…]	[…]

Source: Submission of Germany dated 26 April 2012, annex 14.

(91) Regarding the risk margin rates, for the years 2006 to 2008, Germany stated that a risk margin of […] basis points was used. Germany clarified that this rate was determined by comparing the loan conditions of the following loan agreements:

(a) Loan agreement between MFAG and Sachsen LB from 19/22.8.2003 setting a margin of […] basis points per annum;

(b) Loan agreement between MFAG and Sachsen LB/Nord LB from 16.5.2007 setting a margin of […] basis points per annum;

(c) Loan agreement between MFAG and Postbank from 28.6.2007/15.7.2007 setting a margin of […] basis points per annum;

(92) Germany stated that the average risk margin calculated was rounded up from […] basis points to […] basis points on average.

(93) Regarding the risk margin of […] basis points set in 2009, Germany clarified that the rate was determined by comparing the conditions of two indicative offers from Sachsen Bank and Nord LB of 8 and 9 January 2009 respectively, and the loan agreements between MFAG and Sachsen LB and Postbank of 19/22 August 2003 and 28 June/15 July 2007. Germany stated that due to prudence considerations the margin was rounded up from […] basis points to […] basis points on average.

(94) According to Germany in 2010, the risk margin amounted to […] basis points. Furthermore, Germany explained that this figure was determined by comparing two indicative offers from Sachsen LB ([22]) and Nord LB ([23]) of

([22]) Loan offer from Sachsen LB from 14.1.2010 proposing margins from 55 bps p.a. up to 80 basis points per annum depending on the loan amount (the higher the loan amount, the lower the margin offered).

([23]) Loan offer from Nord LB from 11.1.2010 proposing risk margins from 22 basis points per annum up to 238 basis points per annum depending on the loan amount.

11 and 14 January 2010 respectively, and the loan agreement between MFAG and Sachsen LB of 19/22 August 2003. Germany stated that due to prudence considerations, the average margin was again rounded up from […] basis points to […] basis points on average.

(95) Germany explains that in 2011, the interest margin used amounted to […] basis points and that the calculation was based on a comparison between two indicative offers from Sachsen Bank and Nord LB of 29 June 2011, and the loan agreements between Postbank and MFAG dated 28 June/15 July 2007, and between Sachsen LB and MFAG dated 19/22 August 2003. According to Germany, the margin calculated was again rounded up from […] basis points to […] basis points on average.

3.3.2. **Application of market comparators to identify the market rate of FLH**

(96) Germany stated that in its opinion the market conformity of FLH's shareholder loans should be assessed on the basis of market comparators and not on the basis of the 2008 Reference Rate Communication.

(97) Moreover, Germany argued that the loan agreement between MFAG and Sachsen LB of 19/22 August 2003 indeed constituted a suitable benchmark to identify the market level of the interest rates for the shareholder loans. Germany rejected the argument that the loan agreement between MFAG and Sachsen LB was not a suitable basis for benchmarking because it was concluded with a different beneficiary, namely MFAG and not FLH. Germany pointed out that the Commission itself regarded MFAG only as a vehicle for the transfer of funds to FLH and not as an aid beneficiary itself. Germany explained that the control, profit and loss transfer agreement between MFAG and FLH obliged FLH to transfer all its profits to MFAG and required MFAG to cover all losses of FLH, thus the net annual profit/loss for FLH was always zero. As a consequence, the interest margin granted to a group company was always equivalent to the interest margin granted to the parent company and vice versa.

(98) According to Germany, even though the loan agreement was concluded in 2003, it contained a long-term roll-over loan running until 2013 with interest fixed for 3 months at a time. In this respect, Germany stated that the risk margin of […] basis points was thus applicable between 2006 and 2008 and would still apply today. Moreover, Germany disagreed with the Commission's argument that Sachsen LB was only able to offer the interest margin of […] basis points due to a reduced level of interest provided through EIB financing. According to Germany, the EIB financing had no influence on the determination of the interest margin of […] basis points.

(99) Germany also rejected the Commission's observation that the loan agreement between Postbank and MFAG could not be used as a benchmark. It was concluded for the benefit of FLH, it was not agreed at a different time, and the payment was not subject to specific conditions. Furthermore, Germany argued that the binding financing offer from Sachsen LB and Nord LB dated 16 May 2007 was a suitable benchmark.

(100) Moreover, referring to the argument of the Commission that it doubted whether indicative proposals submitted by an e-mail without the aim of entering into legally binding loan agreements could be considered as a reliable market benchmark ([24]), Germany stated that Nord LB and Sachsen Bank both have had long-standing business relations with MFAG and were kept regularly informed about the economic situation of FLH and MFAG, thus the indicative proposals were based on a thorough risk assessment.

(101) Furthermore, Germany pointed out that even if the market conforming nature or the aid equivalent of the loans or both were to be tested according to the 2008 Reference Rate Communication, there would be no State aid. Germany stressed that the new method for calculating the reference rate only applied from 1 July 2008. As a consequence, for loan agreements concluded before this date, the previous Reference Rate Communication has to be applied.

3.3.3. **Credit rating of MFAG/FLH**

(102) Germany confirms that FLH has not been rated by public credit rating agencies. Nevertheless, Germany stated that there are some indications of its creditworthiness. Germany stated further that the main shareholder of FLH is MFAG, which owns 94 % of the shares in FLH. According to Germany, as there is a *Loss and Profit Sharing Agreement* between MFAG and FLH from 6 December 2000, which obliges MFAG to cover any losses of FLH, the rating of FLH should be at least the same (or higher) as the rating of its parent company MFAG.

([24]) Recital 95 of the opening decision.

(103) Germany stated that MFAG has not been rated by public credit rating agencies. Nevertheless, Germany provides some internal bank ratings for MFAG. Germany stated that in 2006 Nord LB had rated MFAG with a rating note of […] on its internal rating scale (with a probability of default of […] %) which corresponds to a rating of […] to […] on the Standard & Poor's rating scale, […] to […] on Moody's and […] to […] on Fitch. Germany stated further that MFAG is in this rating category since 2006. Germany clarified further that on 2 August 2011 and 20 April 2012 respectively, this assessment has been confirmed by Nord LB. Additionally, Germany stated that also Deutsche Kreditbank AG (DKB) has provided its rating indications, in which it confirms that based on the financial reports of MFAG for the year 2006, the company is assigned a rating of […] on the internal rating scale of the bank, which corresponds to a rating of […] by Standard & Poor's and […] by Moody's.

(104) Table 4 summarises the ratings assigned to MFAG from 2006 to 2012 (the period under consideration).

Table 4

Rating of MFAG in 2006-12

(…) ([25])

3.3.4. **Loss given default (LGD) assessment**

(105) With regard to the collateralisation of the loans and the LGD, Germany clarified that the loans are provided by FLH's shareholders in the form of bridge-financing which means that they should be converted into capital after the authorisation of the Commission. In this respect, Germany clarified further that this is why the loans are not collateralised.

(106) Germany submitted that there are no specific repayment modalities for the shareholder loans since it was assumed that the loans will be converted into equity, and therefore, no repayment will take place. According to Germany, in the event that the loans would not be converted into equity because the Commission would not approve the financing of the infrastructure measures, pursuant to §488 (3) of the *Deutsches Bürgerliches Gesetzbuch* (German Civil Code), a loan agreement can be terminated within 3 months. The termination of the agreement leads to the maturity of the loan amount with interest.

(107) Germany argues that although the loans are not collateralised, the LGD of FLH should be considered to be at least lower than […] % and even close to […] % because the value of the assets of FLH (that is to say EUR […] million in 2010) exceeds the value of the liabilities (EUR […] million in 2010). In Germany's view, in the case of bankruptcy, FLH's assets would be sufficient to cover these claims.

(108) Germany stated that the assets of FLH, which consist of land property, buildings, technical installations, machines among others, are not pledged in any way towards its shareholders or external creditors.

3.3.5. **No advantage gained from capital injections**

(109) Regarding capital injections for the construction of the airport, Germany stressed that the test of the market economy operator ('MEO test') was not applicable since the construction of the airport constituted a general economic policy measure that did not fall in the ambit of State aid control.

3.4. COMPATIBILITY OF AID

(110) Germany submitted that even if the financing of the planned measures constituted State aid, it would be compatible with the internal market as it satisfied the conditions set out in point 61 of the 2005 Aviation Guidelines. After the entry into force of the 2014 Aviation Guidelines Germany submitted that the aid would be also compatible with the common principles as set out in section 5 of those Guidelines.

3.4.1. **Well-defined objective of common interest**

(111) Germany stated that the financing of the investments at stake serves a well-defined objective of common interest.

([25]) Confidential business information.

(112) In this regard, Germany submitted that the air freight sector, in particular express freight, is showing considerable growth rates in particular at Leipzig/Halle airport (between 2007 and 2010 the freight volume increased from 101 364 tonnes to 663 059 tonnes). Germany continued its statement clarifying that air freight carriers are expanding their operational capacities. According to Germany, the three main air-freight hubs, Frankfurt/Main, Munich and Köln/Bonn, are facing night flight capacity constraints. Germany asserts further that according to a judgment of 4 April 2012, Frankfurt/Main Airport is not allowed to carry out any night flight operations anymore. Hence, in Germany's opinion, FLH helps to decongest other freight airports in Germany.

(113) With regard to the contribution of the airport to the connectivity of the region, Germany stated that the envisaged project forms part of the strategy for the development of the airport contained in the Trans-European Transport Network Outline Plan from 2004 valid up to 2020 as a '*Community connecting point*'. According to Germany, 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 (that is to say Federal motorway A 9) and from the West to Eastern Europe (that is to say Federal motorway A 14) with an access to rail and road network. In addition, Germany clarified that the access to rail and road network facilitates more efficient transport of freight. Furthermore, Germany stated that the project is in line with the 'Development of an integrated European air transport network' as set out in point 12 of the action plan for airport capacity, efficiency and safety in Europe ([26]) 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 aid'.

(114) Germany submitted further that the implementation of the project will have a positive impact on the entire region and will significantly influence its economic and social development. According to Germany, the investment project will in particular improve access to the region and increase its attractiveness for investors and visitors. In this regard, Germany argued that the investment project will also have a positive impact on employment. In order to support this argument, Germany asserted that the rate of unemployment in the Sachsen region amounts to 10,3 %, in Saxony-Anhalt to 11,2 % what is above the German average of 6,9 %.

(115) Hence, Germany submitted that the State aid serves a well-defined objective of common interest.

3.4.2. **Need for State intervention**

(116) Germany submitted that no private investor would be interested in financing these infrastructure measures. In this regard, Germany stated that Leipzig/Halle airport suffers from the historical investment backlog. In addition, according to Germany the measures concern long-term infrastructure investments which address the needs of the airport in view of the future increase of freight transport. Germany argues, without providing evidence, that the measures are neither disproportionate in size, nor disproportionately costly. In Germany's opinion, a further reduction of State financing is not possible as infrastructure of this magnitude cannot be financed from own resources of airport operators.

(117) Germany has also raised the argument that revenues from the airport services do not cover the costs of building the infrastructure and substantiated this argument on the basis of a funding gap analysis and counterfactual assessment.

(118) Hence, Germany is of the opinion that the aid will bring a material improvement for the investment project that the market itself cannot deliver and that there is a need for state intervention.

3.4.3. **Appropriateness of the aid measure**

(119) Germany submitted that the aid would be an appropriate aid measure. In this respect, Germany submits that due to the location of the airport in the former German Democratic Republic, the airport suffers from an investment backlog and needs to carry out substantial investments within shorter time period than other airports.

([26]) An action plan for airport capacity, efficiency and safety in Europe, COM(2006) 819 final, 24 January 2007.

(120) Moreover, according to Germany, the infrastructure measures would not have been carried out at all without State aid. To support this, Germany submitted that in 2005, the MFAG group generated revenues of EUR 83,8 to 118 million and FLH EUR 47 to 80 million. Hence, in Germany's opinion, the investment volume of EUR 255,625 million is thus 2 to 3 times the consolidated revenue of MFAG and 3 to 5 times the revenue of FLH over the period in which the infrastructure projects were decided upon.

(121) Finally, Germany stated that the ratio between revenue and investment volume demonstrates that the undertakings concerned would not carry out these measures without public financing.

3.4.4. **Incentive effect**

(122) With regards to the incentive effect, Germany pointed out that the amount and intensity of State aid of the infrastructure measures at stake were justified. Germany claimed that the infrastructure measures would not have been carried out at all without the State financing (see section 3.4.3).

(123) Contrary to the Commission's view, Germany pointed out that the fact that some of the investment projects had already been completed did not reduce the incentive effect since the financing commitments by the shareholders were already given before the start of implementing the infrastructure measures. According to Germany, the statement of the Commission that the infrastructure projects might yield any appreciable return on capital clearly mistakes the nature of the measures in question and is also in conflict with the Commission's previous decision-making practice. According to Germany, the Commission had already acknowledged on numerous occasions that measures of this type normally yield no appreciable return on capital.

3.4.5. **Proportionality of the aid (aid limited to the minimum)**

(124) According to Germany, the proportionality of the infrastructure measures could also be inferred from the fact that they help to reduce the congestion at other German cargo airports.

(125) Furthermore, Germany stated that the amount and intensity of the financing was restricted to the absolute minimum required to carry out the infrastructure measures. According to Germany, the costs were determined in advance by obtaining cost estimates and preliminary plans. Moreover, Germany submitted that contrary to the Commission's claim, the airport was not able to increase its revenues by augmenting airport charges. In the view of Germany, this is the case because most of the investments relate to infrastructure measures for which no separate charge can be imposed.

(126) Furthermore, Germany stated that it was generally not possible to cover investment costs for the construction of airport infrastructure by increasing charges for airport users. Germany argued that since the airport charges were approved by the relevant airport authority of the respective Land in which the airport concerned was located, investment costs for the construction of airport infrastructure could not be passed on to the users of the infrastructure at the discretion of the operator. According to Germany, any further increase of the airport charges of Leipzig/Halle airport would not be market conform and not enforceable vis-à-vis airlines using the airport. According to Germany, it has to be kept in mind that the charges at FLH are already above the usual market level.

(127) Furthermore, Germany argues that the envisaged aid intensity was justified. According to Germany, only the envisaged extent of public funding could guarantee that investments can be carried out to the extent and within the time frame that is required. Germany stated that the impossibility of financing regional airport infrastructure measures of this kind privately is sufficiently demonstrated both by the Commission's decision-practice and by the fact that there is not a single known case in which private investors have funded such measures at their own costs.

(128) Germany argued that the Commission has repeatedly and frequently approved aid intensities up to 100 %. According to Germany, for investments similar to the investments at stake, the Commission practice has shown that such investments have to have an aid intensity of at least 75 % in order to be carried out.

(129) Germany stated that since FLH has been constructed in the public interest of Germany, the infrastructure measures were not based on any business plan, profitability calculation or financial statements.

(130) At the request of the Commission, Germany provided funding gap calculations as summarised in Table 5 and Table 6.

Table 5

Funding gap calculation — Scenario I — Investments financed through capital injections carried out in 2014

Scenario I — Investments financed through capital injections carried out in 2014	In EUR million
Discount rate (1)	[…] %
NPV of the Σ Cash flows of FLH 2006-55	[…]
NPV of the notified investments measures M1-M16.2 (including costs falling within the public policy remit)	189,4
NPV of the funding gap	166,9
Aid intensity (2)	88,1 %

(1) The discount rate was established using the Capital Asset Pricing Model: $r_e = r_f + ß_i$ (MRP)
R_f = Basis rate = […] % on 30.12.2005
$ß_i$ = Beta factor = […] on 1.1.2006
MRP = Markt Risk Premium before taxes = […] % on 1.1.2006.
(2) NPV of the funding gap/NPV of the investments = EUR 166,9 million/EUR 189,4 million = 88,10 %.

Table 6

Funding gap calculation — Scenario II — Investments financed though capital injections carried simultaneously with investments

Scenario II — Investments financed through capital injections carried out at the time of the financing need (1)	In EUR million
Discount rate	[…] %
NPV of the Σ Cash flows of FLH 2006-55	[…]
NPV of the notified investments measures M1-M16.2 (including costs falling within the public policy remit)	189,4
NPV of the funding gap	142,1
Aid intensity (2)	75,00 %

(1) Investment time frame is identical with the financing through capital injections.
(2) NPV of the funding gap/NPV of the investments = EUR 142,1 million/EUR 189,4 million = 75,00 %.

3.4.6. **Avoidance of undue negative effects on competition and trade between Member States**

(131) With regard to the avoidance of undue negative effects on competition and trade between Member States, Germany emphasised that the overall balance of infrastructure measures at Leipzig/Halle airport would be positive and the measures would not have an undue effect on trade and competition between the Member States. In this respect, Germany submitted that the infrastructure measures in question are of a non-expansionary nature and have no effect on traffic volume. Germany pointed out that the Commission had already acknowledged in other decisions that measures that were non-expansionary in nature have no material impact on competition between airports.

(132) Germany divided the potential competitors of FLH into three main categories: (i) airports in the vicinity of Leipzig/Halle airport, (ii) other German cargo airports and (iii) major Union cargo airports.

(133) Regarding airports in the vicinity of Leipzig/Halle, Germany noted that none of these airports specialise in air cargo transports. Furthermore, Germany submitted that none of the following airports, such as Altenburg-Nobitz, Berlin Brandenburg, Dresden, Erfurt, Hof, Magdeburg, Magdeburg-Cochstedt and Prague airport, were in real competition with Leipzig/Halle. To support this, Germany stated that for some of these airports the geographical distances were too large, the airports were located in different economic regions, the catchment areas were quite different or the airports were of a very small size.

(134) Regarding the other German cargo airports, Germany stated that the competition of Leipzig/Halle airport was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with Leipzig/Halle, had capacity bottlenecks or restrictions on night flights.

(135) According to Germany, there was also no competitive overlap with the other Union cargo airports, mainly Brussels and Vatry. In this respect, Germany stated that due to its central position in the middle of Europe, Leipzig/Halle airport uniquely served both Western and Eastern Europe, but that neither Brussels nor Vatry were in the position to guarantee sufficient access to the increasingly important Central and Eastern European markets. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was for instance more than 80 times larger than the air cargo volume at Vatry airport. Moreover, according to Germany, Vatry did not enjoy the same good connections to the rail and road network as Leipzig/Halle airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restriction on night flights and therefore competition was limited.

(136) In addition, Germany stated that contrary to the Commission's view, all potential users had equal and non-discriminatory access to the airport infrastructure. According to Germany, individual users of the airport did not receive any unjustified volume based rebates. Moreover, in the view of Germany, the question of equal and non-discriminatory access to the airport was already addressed by the Commission in its previous decision regarding the financing of Leipzig/Halle airport ([27]).

(137) Consequently, Germany is of the opinion that the State aid, if any, can be deemed compatible with the internal market.

4. COMMENTS FROM THIRD PARTIES

4.1. MITTELDEUTSCHE AIRPORT HOLDING (MFAG)

(138) On 26 October 2011, MFAG submitted comments on the opening decision together with FLH. The comments of MFAG are broadly in line with comments of Germany.

4.1.1. **Notion of economic activity and public policy remit**

(139) MFAG stated further that the construction of infrastructure at Leipzig/Halle airport does not constitute an economic activity. Hence, according to MFAG the financing in question does not fall within the ambit of Article 107(1) of the Treaty. In this regard, MFAG submitted that a private investor would not have carried out the measures in question and would still not carry them out. Therefore, MFAG stated that there is no market for airport infrastructure. In this context, MFAG stated further that airports are not able to finance their infrastructure investments themselves. MFAG was concerned that the application of State aid rules to airport infrastructure will lead to diminishing of investments in airport infrastructure.

(140) MFAG stated also that Leipzig/Halle airport was developed in the public interest and that the MEO test is not applicable to the financing of airport infrastructure. In this regard, MFAG submitted that in the Union there was not a single case of a private investor building or substantially developing an airport from its own resources. Therefore, according to MFAG, instead of using the MEO test, the Commission has to assess whether the infrastructure is offered to all its users in an open and non-discriminatory manner. MFAG stated further that this is the case at Leipzig/Halle airport. Hence according to MFAG, the infrastructure measures had not been based on a business plan or long-term profitability prospects.

([27]) Decision 2008/948/EC.

(141) In addition, MFAG clarified further that the construction of the airport helped to pursue regional policy goals and to support an economically disadvantaged region. MFAG emphasised that this is a typical State responsibility which cannot be carried out by private investors, and can therefore not be assessed under the State aid rules.

(142) MFAG argued further that even if — *quod non* — the financing of infrastructure in general constitutes an economic activity, the measures at stake fall within the public policy remit, and thus do not constitute State aid.

(143) Regarding public policy remit activities, MFAG stated that the Commission has to distinguish between the protection of air transport against external threats, the protection of air traffic against operational risks, and the protection of third parties against operational dangers of the air traffic. In this respect, MFAG stated that the protection against operational threats and the protection of third party rights should be regarded as falling under the public policy remit. MFAG stated that in its decision-making practice the Commission had considered measures in the areas of fire protection, air navigation and air traffic control, particularly Deutscher Wetterdienst (German Meteorological Service) and Deutsche Flugsicherung (German Air Navigation) as falling within the public policy remit.

4.1.2. **Market conformity of FLH's shareholder loans**

(144) According to MFAG, the shareholder loans were granted on market terms. MFAG stated that the ratings of MFAG by Nord LB and Deutsche Kreditbank AG should be taken into account. In this respect, MFAG clarified that Nord LB and Deutsche Kreditbank AG rated MFAG and FLH in the rating category […] with an average probability of default of […] %. MFAG clarified also that the rating category […] is comparable with the external rating category of Standard & Poor's of […] to […] Moody's of […] to […] and Fitch of […] to […].

(145) MFAG stated further that FLH's shareholder loans are also highly collateralised. Furthermore, MFAG clarified that FLH's loans will be used to finance sustainable infrastructure investments. MFAG clarified also that the assets of FLH are not pledged with any mortgages ('*Grundpfandrechte*'). Hence, MFAG is of the opinion that given the very good rating and high level collateralisation the risk margin should be set at maximum of […] basis points.

(146) As the risk margins of FLH's loans are set between […] and […] basis points, MFAG is of the opinion that the loans are on market terms and void of any State aid.

4.1.3. **Compatibility of the aid**

(147) MFAG is of the opinion that in any case the capital injections would be compatible with the internal market.

(148) MFAG stated that Leipzig/Halle airport has a major positive impact on employment in the region with 5 100 employees (including employees of MFAG, airlines, restaurants, catering undertakings, public authorities, and other undertakings) working directly at the airport and approximately 8 100 indirect employees.

(149) Moreover, MFAG stressed that in view of the capacity bottlenecks and night flight restrictions at other airports (such as Frankfurt/Main, Munich, Berlin, Düsseldorf, and Hamburg), Leipzig/Halle airport plays an important role in terms of decongestion of these other German airports, and hence contributes to the security of supply for Germany as a whole.

(150) With regard to the non-discriminatory nature of the airport charges, MFAG stated that the schedule of airport charges at Leipzig/Halle airport is not designed to favour only one airline and all airlines are charged with the same landing charges. Hence, according to MFAG, the infrastructure is used by all its users in a uniform and non-discriminatory manner.

(151) Regarding the necessity of aid and its incentive effect, MFAG stated that the measures would not have been carried out without the shareholder loans or capital injections. According to MFAG, the total investment sum of EUR 225,6 million accounts for two or three times MFAG's average turnover and more than five times FLH's average annual turnover in the period in which the infrastructure projects were decided upon. According to MFAG, the fact that the measures have already been carried out in part does not exclude the presence of the incentive effect since these measures have only been carried out after receiving financing guarantees and decisions of the public shareholders, which also provided the interim financing through the shareholder loans.

(152) MFAG stated that the measures at stake did not negatively distort competition. Moreover, MFAG considered that there is no negative impact on Brussels airport or on Vatry airport. According to MFAG, Brussels airport suffers from night flight restrictions, which were the reason why DHL decided to move in the long-term to Leipzig/Halle. With regard to Vatry, MFAG stated that according to press articles there is only a very limited freight activity at this airport (only around 5 to 6 flights per week).

4.2. ARBEITSGEMEINSCHAFT DEUTSCHER VERKEHRSFLUGHÄFEN (ADV)

(153) ADV sent its comments on the opening decision on 27 October 2011. ADV's comments are fully in line with the comments of MFAG. ADV pointed out that Leipzig/Halle airport is important for the regional development.

4.3. DEUTSCHE FLUGSICHERUNG (DFS)

(154) DFS submitted its comments by letter dated 28 October 2011.

(155) DFS stated that infrastructure projects M3 to M8 and M10 (see Table 2) contribute to safe and smooth management of air traffic at Leipzig/Halle airport. In this respect, DFS stated that M3 helped to relieve the pressure on taxiways and traversing bridges, M5 was urgently needed to ensure that there were no obstacles to taxiing in the southern part of the airport, and M8 served as the basis for air rescue and emergency operations. DFS stated further that M10 would help DFS's work according to §29b (2) of *Luftverkehrsgesetz* (Air Transport Act, 'LuftVG') to work toward the protection of the public against unreasonable noise.

4.4. SHAREHOLDER OF MFAG OR/AND FLH

4.4.1. **Landkreis Nordsachsen**

(156) Landkreis Nordsachsen submitted its comments by letter dated 27 October 2011.

(157) Landkreis Nordsachen stated that the airport was an important impetus for the economic development and employment in the region. In addition, Landkreis Nordsachsen pointed out that for historical reasons the airport has a greater need for further investments than other German airports. It stated that the concept of activities falling within the public policy remit must be interpreted more broadly.

(158) Landkreis Nordsachsen stated further that the airport charges are not sufficient to finance the necessary investments. In its view the planned capital injections had an incentive effect. Landkreis Nordsachsen concluded its comments with the statement that without the financing the airport would not have been able to implement the infrastructure project.

4.4.2. **Stadt Dresden**

(159) The City of Dresden, a minority shareholder in MFAG, submitted its comments on 28 October 2011. The comments of the City of Dresden were in line with comments of MFAG and Landkreis Nordsachsen.

(160) The City of Dresden stated that the airport is the biggest employer in the region, employing directly 5 100 people. Hence, the City of Dresden underlined that the airport is an important economic stimulus for the region. Furthermore, the City of Dresden argued that due to the night flight permission, Leipzig/Halle airport plays an important role in decongesting other German airports.

(161) The City of Dresden stated that the investments costs into airport infrastructure cannot be fully financed through airport charges by airport users. It stated further that historically the development of airports was generally publicly funded. Moreover, according to the City of Dresden, in Germany airport charges are not freely set by airport operators, but have to be officially approved by public authorities.

(162) The City of Dresden also stated that the infrastructure measures at Leipzig/Halle airport did not unduly affect the internal market as all competing German and foreign airports were operating close to full capacity, while Vatry airport is hardly operated at all.

4.4.3. **Stadt Leipzig**

(163) On 28 October 2011 the Commission received the comments of the City of Leipzig, which is a shareholder in MFAG. The comments of the City of Leipzig were fully in line with the comments of City of Dresden and MFAG.

4.5. AIR CARGO FORWARDERS AND EXPRESS PARCEL DELIVERY COMPANIES

4.5.1. **European Air Transport Leipzig (EAT)**

(164) On 27 October 2011 EAT, an air freight company based at Leipzig/Halle airport, submitted its comments on the opening decision. EAT stated that it is a 100 % subsidiary of Deutsche Post AG and uses Leipzig/Halle airport as its principal hub.

(165) EAT stated that to its knowledge all potential users have an equal and non-discriminatory access to the infrastructure. EAT clarified further that this is in particular supported by the transparent pricing system that applies to all users.

4.5.2. **Lufthansa Cargo**

(166) Lufthansa Cargo submitted its comments on 26 October 2011. Its comments are fully in line with the comments of EAT. Lufthansa Cargo confirmed that all potential users have an equal and non-discriminatory access to the airport.

4.5.3. **Emons Spedition**

(167) Emons Spedition submitted its comments on 18 October 2011. Emons's comments are fully in line with EAT. Emons underlined that the public funding of improvements of airport infrastructure is essential for airports and airport users.

4.5.4. **Spero Logistics Europe**

(168) Spero Logistics Europe submitted its comments on 28 October 2011. Spero's comments are fully in line with the comments of EAT and Emons Spedition.

(169) Spero stated further that the permission to operate night flights is of a particular importance for air cargo transport. Spero clarified that it decided to base its operations at Leipzig/Halle because of its geographical location (in the centre of Europe, offering access to the biggest European market, and shorter flying time to Asia).

4.5.5. **Deutsch Russische Wirtschaftsallianz e.V. (German-Russian Economic Alliance)**

(170) On 25 October 2011, Deutsch Russische Wirtschaftsallianz ('Wirtschaftsallianz') submitted that the development of the airport is essential for the economic growth in the region.

(171) Wirtschaftsallianz stated that Leipzig/Halle airport was important in the context of the SALIS project set up for special transport necessary for NATO's operations in Afghanistan. Wirtschaftsallianz argued that the conditions for implementing this project were currently available only in Leipzig. Wirtschaftsallianz clarified further that this concerns in particular security requirements under NATO Directives, 24/7-operating licence, 3 000 metres runways, sufficient storage and loading areas, and technical maintenance capacity for the Russian aircraft used in the SALIS project.

4.5.6. **Other freight forwarders and associations**

(172) The Commission received also comments from Skyline Air Services, Netzwerk Logistik Leipzig-Halle e.V., Kühne+Nagel, Jet-Speed, Jade Cargo, Baring, Air Cargo Club Deutschland, Aerologic, and Volga-Dnepr. Their comments were fully in line with the comments of EAT, stressing the importance of Leipzig/Halle airport for the regional development and accessibility.

4.6. PASSENGER AIRLINES AND TOURISM ASSOCIATIONS

4.6.1. **Germanwings**

(173) Germanwings, the subsidiary of Deutsche Lufthansa AG, submitted its comments on 26 October 2011.

(174) Germanwings stated that the construction and development of airport infrastructure could not be fully financed from airport charges. Germanwings explained that a very large proportion of the measures identified in the opening decision were related to air safety measures or measures implementing safety rules. Germanwings stated further that these measures do not fall within the ambit of State aid rules.

(175) Germanwings stressed that the Commission should take into account the specific situation of Leipzig/Halle airport and the backlog of investments in airport infrastructure due to the reunification of Germany.

(176) Furthermore, Germanwings stated that the infrastructure at Leipzig/Halle airport is available to all potential users without any discrimination or a *de facto* preferential treatment of one airline.

4.6.2. **Other airlines and tourism associations**

(177) The Commission received comments also from Austrian Airlines, Alltours, Bundesverband der Deutsche Luftverkehrswirtschaft, Deutscher Reise Verband, and Bundesverband der Deutschen Tourismuswirtschaft. Their comments were fully in line with the comments of Germanwings.

4.7. UNDERTAKINGS LOCATED IN THE PROXIMITY OF THE AIRPORT AND ASSOCIATIONS

4.7.1. **BMW Werk Leipzig (BMW)**

(178) BMW submitted its comments by letter of 27 October 2011.

(179) BMW stated that Leipzig/Halle airport is important for the local industry and has positive external effects on the region and undertakings established. BMW stated further that the Commission should take into consideration the investment backlog at Leipzig/Halle airport before the reunification of Germany. Given the importance of the airport for the region, BWM considers that the public funding should be deemed compatible.

4.7.2. **EADS Elbe Flugzeugwerke (EADS)**

(180) EADS submitted its comments on the opening decision by letter of 27 October 2011.

(181) EADS pointed out that Leipzig/Halle airport is very important for the region's economy and had been a major factor in EADS's decision to establish its subsidiary in this region.

4.7.3. **European Energy Exchange AG (EEX)**

(182) EEX, an energy trading company with its headquarters in Leipzig, submitted its comments on 27 October 2011.

(183) EEX stated that Leipzig/Halle airport was very important for the region and for EEX's employees. EEX stated further that it does not see any possibility of replacing FLH by using other European airports as an alternative.

4.7.4. **Industrie- und Handelskammer Halle-Dessau (Halle-Dessau Chamber of Trade and Industry) (IHK)**

(184) IHK submitted its comments on 26 October 2014.

(185) IHK stated that there are positive interdependencies resulting from the competition on the Union airport market. In this respect IHK stated that infrastructure improvements at one location also positively impacted other airports. In this sense, IHK stated further that the positive network effects of the infrastructure programme at Leipzig/Halle airport were predominant. In IHK's opinion the region's structural weakness and backlog of investments in Eastern Germany needs to be taken into account. Finally, IHK stated that without an initial public investment, extensive follow-up investments by the private sector were inconceivable.

4.7.5. **Other associations**

(186) The Commission received also comments from Handwerkskammer zu Leipzig, Industrie- und Handelskammer zu Leipzig, Wirtschaftsinitiative Mitteldeutschland, and Leipziger Messe. These comments were fully in line with the comments of BMW and EADS.

4.8. SCHKEUDITZ CITIZENS' 'ANTI-NOISE' INITIATIVE

(187) The citizens' initiative submitted its comments on 24 August 2011.

(188) The citizens' initiative stated that its members had noticed that the southern runway was almost exclusively used by DHL. According to the citizen's initiative DHL was almost the sole user of the runway and the south-eastern area of the airport. The initiative explained that in view of the intensive use of this infrastructure by DHL, it could not be assumed that the investments related to passenger transport.

5. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

(189) Germany began its observations by stating that 34 third party comments supported the implementation of the notified measures.

(190) Germany stated that the third party comments confirmed its view that the infrastructure measures in question fall within the public policy remit. In this context, Germany stressed that DFS emphasised that M3 to M8 and M10 constituted measures that were carried out in the exercise of governmental responsibilities. Germany also emphasised that numerous third parties argued that State aid rules were not applicable for the measures at stake.

(191) Additionally, Germany pointed out that the comments clearly demonstrate that the public funding complies with the criteria pursuant to Article 107(3) of the Treaty. Germany stated that in particular the cities, local authorities and chambers of commerce as well as the undertakings located in the region emphasised the economic and regional importance of the airport. According to Germany, it was therefore undoubted, that the construction and the operation of the airport serve a clearly defined objective of common interest. Moreover, Germany argued that the third party comments also confirmed the necessity and proportionality of the public funding.

(192) With regard to the possible undue negative impact on competition and trade, Germany pointed out that neither Vatry nor Brussels airport submitted comments on the opening decision. According to Germany, this showed that none of those airports was concerned by any negative impact of the measures at stake. Germany pointed out that this view was also supported by other third parties, such as Lufthansa Cargo, Austrian Airlines, Germanwings and Jade Cargo. Germany stated further that Alltours, Deutscher Reise Verband, BARING and Aircargo Club Deutschland also stated that there is no competitive overlap of catchment areas between Leipzig/Halle and Brussels or Vatry airports.

(193) Regarding the requirement of an equal and non-discriminatory access to the airport, Germany pointed out that the third party comments confirm that the airport charges were determined in a non-discriminatory manner.

6. ASSESSMENT

(194) By virtue of Article 107(1) of the 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 internal market.'

(195) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures at stake constitute State aid within the meaning of Article 107(1) of the Treaty, those measures need to fulfil the following conditions:

(a) be granted by the State or through State resources,

(b) favour certain undertakings or the production of certain goods,

(c) distort or threaten to distort competition,

(d) affect trade between Member States.

6.1. NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

6.1.1. **Notion of undertaking**

(196) As regards the existence or otherwise of State aid, it is necessary to determine first whether the beneficiary is engaged in an economic activity, and thus can be regarded as an undertaking within the meaning of Article 107(1) of the Treaty ([28]).

([28]) See Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851 and Cases C180/98 to 184/98 *Pavlov* [2000] ECR I-6451.

(197) In this regard, Germany submitted that the concept of 'undertaking' within the meaning of Article 107(1) of the Treaty does not apply to airports, at least with regard to financing of regional airport infrastructure. Germany was of the opinion that the construction of such infrastructure is not an economic activity, but a general measure pursuing transport, economic and regional policy considerations. Moreover, Germany asserted that the construction of airport infrastructure does not constitute an economic activity because a private investor would not engage in that activity. Germany stated further, in that regard, that airports have higher than average fixed costs relating to infrastructure, equipment and operation. In addition, their freedom of action is limited by strict legal obligations and conditions. Germany considered further that the references to the *Aéroports de Paris* judgment and to the *Leipzig/Halle* judgement are irrelevant for the measures at stake. With regard to the *Aéroports de Paris* judgment, Germany submitted that the judgment does not deal with the construction of airport infrastructures, but with the operation of an airport. Additionally, Germany considered that the *Aéroports de Paris* judgment does not deal with the interpretation of the concept of 'undertaking' within the meaning of Article 107(1) of the Treaty, but concerns an infringement of the prohibition on the abuse of a dominant position within the meaning of Article 102 of the Treaty. With regard to the *Leipzig/Halle* judgment, Germany considered that the judgment of the General Court does not have any effect as a precedent in case-law, as it is subject to an appeal.

(198) With regard to the concept of 'undertaking', it must be pointed out, that the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed ([29]). Any activity consisting in offering goods and services on a market is an economic activity ([30]). The economic nature of an activity as such does not depend on whether the activity generates profits ([31]).

(199) In *Aéroports de Paris* ([32]), the Court held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity. In its judgment in the *Leipzig/Halle airport* case ([33]), the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.

(200) The Commission recalls that in its *Leipzig/Halle airport* judgment, the General Court held that, from 2000, the application of State aid rules to the financing of airport infrastructure could no longer be excluded ([34]). Consequently, from the date of the judgment in *Aéroports de Paris* (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.

(201) The General Court also held in its *Leipzig/Halle airport* judgement that it is not relevant whether the construction or the extension of an airport infrastructure pursues objectives of regional, economic or transport policy. According to established case law it is not relevant which purposes are followed by specific measures but rather what effects they cause ([35]).

(202) Moreover, the General Court has confirmed in its *Leipzig/Halle airport* judgment that the existence of a market for airport infrastructure is shown by the fact that Leipzig Halle Airport competed with other regional airports, in particular with Vatry (France) and Brussels (Belgium) to become DHL's European air freight hub.

([29]) See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4) part 2.1 and associated case law, in particular joined Cases C-180/98 to C-184/98 *Pavlov and Others*, [2000] ECR I-6451, but see also Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289; Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, and Case C-49/07 *MOTOE* [2008] ECR I-4863.

([30]) Case 118/85 *Commission* v *Italy*, [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy*, [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75.

([31]) Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, [1980] ECR 3125, paragraph 88; Case C-244/94 *FFSA and Others*, [1995] ECR I-4013, paragraph 21; and Case C-49/07 *MOTOE*, [2008] ECR I-4863, paragraphs 27 and 28.

([32]) Case T-128/98 *Aéroports de Paris* v *Commission*, [2000] ECR II-3929, confirmed by Case C-82/01, [2002] ECR I-9297, paragraphs 75-79.

([33]) Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH* v *Commission* ('*Leipzig-Halle airport*' judgment), [2011] ECR II-1311, in particular paragraphs 93 and 94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle* v *Commission*, [2012] not yet reported.

([34]) See *Leipzig/Halle airport* judgment, paragraph 106.

([35]) *Leipzig/Halle airport* judgment, paragraph 102 and following.

(203) According to the case law it be also must considered that, for the purpose of assessing the economic nature of airport manager's activities in the context of the public financing of infrastructure development measures, there is no reason to dissociate the activity of building or enlarging infrastructure, from its subsequent use ([36]).

(204) Moreover, the General Court has held in its *Leipzig/Halle airport* judgment that: '[r]unways are essential elements for the economic activities engaged in by an airport operator. The construction of landing and take-off runways thus permit an airport to engage in its principal economic activity or develop that activity, where what is in question is the construction of an additional runway or the development of an existing runway.'

(205) In the light of the case law cited in recitals 196 and 204, the Commission notes that the infrastructure, which is the subject of this Decision, will be either directly operated on a commercial basis by FLH, the airport manager, or will indirectly support and enable the commercial operation of the airport as a whole.

(206) In this respect, the Commission observes that according to German law, in particular the […] the charges have to be established by the airport operator and submitted for approval to the Federal Ministry for Transport. The Commission notes that the airport charges are set by the airport operators within the regulatory constrains to avoid any undue discrimination between the airport users and possible abuses of a dominant position of the airport manager. However, the Commission considers that this does not preclude airport managers from setting the level of airport charges taking into account the necessary investments and its costs. This is in particular confirmed by the requirements of […] and […] of the […]

(207) The Commission notes further that the construction and the development of the infrastructure subject to this Decision, will allow FLH to increase its capacity and its economic activity as operator of Leipzig/Halle Airport. FLH, the airport manager, provides airport services for money, resulting, in particular, from airport charges, but also from other revenue related to the exploitation of the infrastructure and the provision of ancillary services, such as for example renting out of hangars, which must be regarded as remuneration for the provision of services rendered.

(208) Hence, the Commission considers that the infrastructure subject to this Decision is commercially exploitable infrastructure. FLH is therefore an undertaking within the meaning of Article 107(1) of the Treaty.

6.1.2. **Activities falling within public policy remit**

(209) However, not all the activities of an airport are necessarily of an economic nature ([37]). Since the classification of an entity as an undertaking is always in relation to a specific activity, it is necessary to distinguish between the activities of a given airport and to establish to what extent those activities are of an economic nature. If an airport carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.

(210) The Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid ([38]). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature ([39]).

([36]) Case C-205/03P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 88; and *Leipzig/Halle airport* judgment, paragraph 95.
([37]) *Leipzig/Halle airport* judgment, paragraph 98.
([38]) Case C-118/85 *Commission* v *Italy*, [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées*, [1988] ECR 2479, paragraph 18.
([39]) See, in particular, Case C-364/92 *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati* v *Commission*, [2009] ECR I-2207, paragraph 71.

(211) The public funding of such non-economic activities does not constitute State aid, but has to be strictly limited to compensating the costs to which they give rise and may not be used to finance other activities ([40]). Any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid. Moreover, if an airport is engaged in non-economic activities, alongside its economic activities, separated cost accounting is required in order to avoid any transfer of public funds between the non-economic and the economic activities.

(212) Public financing of non-economic activities must not lead to undue discrimination between airports. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ([41]). Therefore, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature.

(213) In the light of recitals 209 and 212, the Commission has therefore to analyse the nature of the infrastructure measures subject to this Decision which are carried out at Leipzig/Halle airport.

(214) Germany asserted that the notified measures M1 to M11 concern activities falling within the public policy remit and that the financing of these activities is strictly limited to the extent of costs necessary for these measures. Hence, Germany was of the opinion that these costs do not fall within the ambit of State aid rules. In this respect, Germany asserted that the measures M1 to M11 fall within one of the following categories:

(i) measures that safeguard civil aviation against acts of unlawful interference ([42]), which are subject to the German *Luftsicherheitsgesetz* (Air Security Law, 'LuftSiG'), in particular §8 thereof;

(ii) measures relating to operational safety, subject to §45 *Luftverkehrs-Zulassungs-Ordnung* (Air Traffic Licensing Regulation, 'LuftVZO'); or

(iii) measures relating to protection of third parties against operational risks of air transport (such as noise pollution).

(215) With respect to measures relating to operational safety, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport ([43]). In this context, it needs to be noted, that costs related to regulatory requirements and standards also cannot be considered to fall within the public policy remit. Subject to a more detailed review with respect to individual activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate on a given market has to ensure the safety of the installations (for airports these are for example runways, taxiways and aprons), and has also to ensure compliance with regulatory standards.

(216) With regard to runways, taxiways and aprons, the Commission considers that those are essential elements for the economic activities engaged in by an airport manager. The construction of runways, taxiways and aprons thus allows an airport manager to exercise its primary economic activity.

(217) With regard to the measures pursuant to §8 LuftSiG, meaning air traffic control, meteorological services and the fire brigade can, in principle, be considered to constitute activities falling within the public policy remit.

([40]) 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, Aviation security — compensation for costs incurred following the attacks of 11 September 2001 (OJ C 148, 25.6.2003, p. 7). Commission Decision N 438/02 of 16 October 2002, Aid in support of public authority functions in the port sector (OJ C 284, 21.11.2002, p. 2).

([41]) See among others Case C-172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck*, [2005] ECR I-01627, paragraph 36, and case-law cited in that judgment.

([42]) According to Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ L 355, 30.12.2002, p. 1).

([43]) Commission decision of 20 February 2014 in State aid case SA.35847 (2012/N) — Czech Republic — Ostrava Airport, not yet published in the OJ, recital 16.

(218) As regards the applicable legal framework, Germany has submitted that for the fire brigade there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for a fire brigade falls within the legal competence of the Länder and that these costs are usually remunerated by the relevant regional authorities. The remuneration of these costs is limited to the extent necessary to cover these costs.

(219) As regards air traffic control and meteorological services, the Commission notes that §27(d) and §27(f) LuftVG provides that the costs related to §27(c) LuftVG are covered by the State for a number of specific airports. Airports are eligible for cost coverage as '*recognised airports*' pursuant to §27(d) and §27(f) LuftVG if the Federal Ministry for Transport has recognised a necessity due to safety reasons and transport policy related interests ([44]). German airports which have not been recognised are not eligible for cost coverage pursuant to §27(d) and §27(f) LuftVG and have therefore, in principle, to bear the costs related to the measures foreseen in §27(c) LuftVG themselves. These costs are inherent to the operation of the airports. Since some airports have to bear these costs themselves while other airports do not, the latter might be granted an advantage, even if control and air safety measures as well as meteorological services can be considered to be non-economic. Leipzig/Halle airport has been recognised to be such an airport and is hence eligible for cost coverage pursuant to §27(d) and §27(f) LuftVG. The other airports have to bear these costs themselves. Therefore, covering the costs of Leipzig/Halle airport related to air control and safety measures as well as to meteorological services pursuant to §27(d) and §27(f) LuftVG gives an advantage to Leipzig/Halle airport.

(220) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FHL thus relieved this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules. In any case, regardless of the legal classification of those costs as falling within the public remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, where the State is to pay those costs, the airport operator would be relieved from a cost that it should normally have incurred.

(221) In the light of the considerations in recitals 215 and 220, the Commission finds it appropriate to draw more specific conclusions regarding investment costs allegedly falling with the public policy remit.

M1 Acquisition of land, relocation, noise abatement and accompanying landscape conservation planning, M2 Engine testing structure and M10 additional noise abatement

(222) Germany submitted that the measures M1, M2 and M10 fall within the public policy remit, because they are aimed to protect third parties against operational risks of air transport, such as protecting house owners and environment from the effects of noise pollution.

(223) The Commission considers that the costs relating to measures M1, M2 and M10 constitute normal costs an undertaking would have to bear in order to construct installations that are in line with certain regulatory standards. Moreover, these measures cannot be dissociated from the economic activity of the airport. This is in particular exemplified by the fact that without these measures the airport would not be allowed to operate flights during the night and would not be allowed to concentrate on the air cargo business in relation with the planning approval decision for the construction of the southern runway at Leipzig/Halle airport and its expansion strategy.

(224) Hence, the Commission considers that measures M1, M2 and M10 cannot be regarded as falling within the public policy remit.

([44]) §27(d)(1) *LuftVG: 'Flugsicherungsdienste und die dazu erforderlichen flugsicherungstechnischen Einrichtungen werden an den Flugplätzen vorgehalten, bei denen das Bundesministerium für Verkehr, Bau und Stadtentwicklung einen Bedarf aus Gründen der Sicherheit und aus verkehrspolitischen Interessen anerkennt'.*

M3 (Taxiway and traversing bridge 'E7'), M4 (Extension of northern runway (planning costs), M5 (Site clearance in readiness for construction of taxiway 'Victor'), M6 (Parallel taxiway 'Victor'), M12 Planning approval procedure for southern extension (runway and apron), M13 (Northern apron expansion), M14 (Eastern apron expansion), M15 (Infrastructure adaptation), and M16 (Additional infrastructure measures regarding the Northern hangar extension and the construction of the new aviation terminal and small aircraft shed)

(225) In the present case the extension of the Northern runway is planned to ensure that freight aircraft with a high MTOW can take off without any payload restrictions, while the extension of the aprons should provide for better distribution of flight movements. Moreover, with regard to taxiways, the Commission notes that at an airport, taxiways connect runways with ramps, hangars, terminals and other facilities. These connections allow the aircraft to vacate the runway, allowing another to land or depart. Hence, taxiways and traversing bridges are intrinsically linked to runways for which the airport operator receives fees. In addition, the information given by Germany confirms that these measures are essential in view of the volume and flows of traffic. If the constructions were not be made, the airport would not benefit from the expected increase in traffic flows or the current volume of traffic flows would have to be decreased in order to ensure safe operation of the aircraft. The Commission considers that this does not contradict the fact that a certain number of taxiways and traversing bridges can only be used safely for a limited volume of traffic.

(226) In this respect, the Commission recalls that runways, taxiways and aprons are essential elements for the economic activities in which an airport manager is engaged. The construction of runways, taxiways and aprons thus allows an airport manager to exercise its primary economic activity and cannot be disassociated from this economic activity.

(227) The Commission observes that measures M3, M4, M5, M6, M12, M13, M14, M15 and M16 are taken on a commercial basis by the airport manager. They are therefore commercially exploitable infrastructure, and cannot be considered to fall within the public policy remit.

M11 Land side development of south eastern zone phase I

(228) The Commission observes that measure M11 involves the equipment of existing buildings with electricity and water supply, waste water installations and rainwater drainage, as well as additional noise abatement measures.

(229) In the light of the assessment carried out in recitals 215 and 220, these measures do not concern activities that normally fall under State responsibility in the exercise of its official powers as a public authority. Rather they contribute to the upgrading of infrastructure which is used for commercial purposes, and thus, involve an economic activity, and therefore they cannot be considered to fall within the public policy remit.

M5 (new fire station building) and M9 (firefighting equipment)

(230) With regard to the fire station building and firefighting equipment, as stated in recital 218, this activity can in general be considered to fall within the public policy remit.

(231) As regards the legal framework, Germany submitted that for the fire station building and the firefighting equipment there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the new fire station building and firefighting equipment falls within the legal competence of the Länder and that these costs are remunerated usually by the relevant regional authorities, as submitted by Germany. The remuneration of these costs is limited to the extent necessary to cover these costs.

(232) Hence, the construction costs relating to the new fire station building and the costs for the purchase of firefighting equipment can be considered to fall within the public policy remit.

M5 (multi-purpose hangar) and M9.3 (winter service equipment)

(233) With regard to the multi-purpose hangar, Germany asserted that it falls within the public policy remit, because in case of emergency it would be used as an emergency shelter. According to Germany, the costs for building this hangar fall also within the public policy remit, because it is currently used to store winter service equipment necessary for the safe operation of the airport during the winter time.

(234) As regards the construction of the multi-purpose hangar at Leipzig/Halle airport, the Commission observes that this building can be used for different purposes. Furthermore, as already stated in recital 215, the costs of winter service equipment (M9.3) necessary for the safe operation of the airport are normal costs of running a business and cannot be considered to fall within the public policy remit. Consequently, the Commission considers that the construction costs of the multi-purpose hangar also do not fall within the scope of the public policy remit.

(235) Nevertheless, this finding does not preclude Germany from entrusting the airport in emergency situations with specific tasks falling within Services of General Economy Interest.

M7 Additional de-icing areas

(236) Germany argues that additional de-icing areas are necessary for the safe and timely operation of aircraft at the airport. According to Germany, the extension of the existing de-icing areas is necessary due to the increasing traffic at the airport in order to avoid delays of the scheduled flights. In addition, Germany emphasises that revenues from the de-icing services provided by the airport do not cover the costs of the establishment of the infrastructure.

(237) First of all, the Commission notes that the fact whether an activity is profitable or not is not decisive for the notion of economic activity ([45]). Second, the Commission notes that the de-icing services are rendered against remuneration to air carriers. They are essential services that any airport provides as part of its economic activity. The more of those services are provided the more flights can depart from the airport, and thereby the airport can increase its revenues.

(238) Consequently, the Commission considers that de-icing services are intrinsically linked with the economic exploitation of an airport, and cannot be disassociated from this activity, and hence must be considered as economic activities.

M8 Heliport

(239) The measure covers the establishment of a helicopter parking space which will be used as a base for air rescue services only.

(240) The Commission considers that the creation of a heliport facilitates air rescue. Therefore, the provision of a heliport for rescue services can be considered to fall within the public policy remit. The compensation must be strictly linked to the costs of these services.

M9 Additional infrastructure measures

(241) The additional infrastructure measures include the rebuilding of checkpoint I, the construction of a functional security building to meet the needs of the federal and regional police, customs, animal farm and the airport perimeter fence (including digital video surveillance system and movement detectors). According to Germany these measures are necessary to safeguard civil aviation against acts of unlawful interference and fall therefore within the scope of §8 LuftSiG.

(242) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FLH thus relieves this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.

(243) With regard to the costs related to the use of the functional security building by German Meteorological Service, the Commission notes that §27(f) LuftVG regulates that the costs related to §27(c) LuftVG are covered by the State for a number of specific airports. Airports are eligible for cost coverage as '*recognised airports*' pursuant to §27(f) LuftVG if the Federal Ministry for Transport has recognised a necessity due to safety reasons and transport policy related interests. German airports which have not been recognised are not eligible for cost coverage pursuant to

([45]) *Leipzig/Halle* judgment, paragraph 115.

§27(f) LuftVG and have therefore, in principle, to bear the costs related to the measures foreseen in §27(c) LuftVG themselves. These costs are inherent to the operation of the airports. Since some airports have to bear these costs themselves whereas other airports do not, the latter might be granted an advantage, even if the German Meteorological Service can be considered to be non-economic. Leipzig/Halle airport has been recognised to be such an airport and is hence eligible for cost coverage pursuant to §27(f) LuftVG. The other airports have to bear these costs themselves. Therefore, covering the costs of Leipzig/Halle airport related to meteorological services pursuant to §27(f) LuftVG gives an advantage to Leipzig/Halle airport..

6.1.3. **Conclusion**

(244) In the light of the finding in section 6.1.1, FLH is an undertaking within the meaning of Article 107(1) of the Treaty.

(245) With regard to the finding in section 6.1.2, the financing of the following measures cannot be considered as falling within the public policy remit: M1 acquisition of land, relocation, noise abatement and accompanying landscape conservation planning, M2 engine testing structure, M3 taxiway and traversing bridge 'E7', M4 extension of northern runway (planning costs), M5 site clearance in readiness for construction of taxiway 'Victor', M5 multi-purpose hangar, M6 parallel taxiway 'Victor', M7 additional de-icing areas, M9.3 winter service equipment, M10 additional noise abatement, M11 land side development of south eastern zone phase I, M12 planning approval procedure for southern extension (runway and apron), M13 northern apron expansion, M14 eastern apron expansion, M15 infrastructure adaptation, and M16 additional infrastructure measures regarding the northern hangar extension and the construction of the new aviation terminal and small aircraft shed. The financing of these activities allows an airport manager to exercise its primary economic activity and cannot be dissociated from this activity.

(246) With regard to M5 new fire station building, M9 firefighting equipment and M8 heliport, the Commission considers that these measures can be regarded as falling within the public policy remit (see section 6.1.2).

(247) With regard to M9 additional infrastructure measures regarding the rebuilding of checkpoint I, the construction of a functional security building to meet the needs of the federal and regional police, customs, animal farm and the airport perimeter fence (including digital video surveillance system and movement detectors), the Commission considers that these activities may fall within the public policy remit. However, to the extent that these measures fall within §8(3) LuftSiG, according to this provision of the German law only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the listed activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FLH thus relieves this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.

(248) With regard to the costs related to the use of the functional security building by German Meteorological Service (related to M9), the Commission considers for the reasons in recital 243 that covering the costs of Leipzig/Halle airport related to meteorological services pursuant to §27(f) LuftVG gives an advantage to Leipzig/Halle airport, even if meteorological services can be considered to be non-economic.

6.2. AID NATURE OF THE SHAREHOLDER LOANS IN FAVOUR OF FLH

6.2.1. **Relation between the shareholder loans and the capital injections**

(249) Before assessing whether the shareholder loans in favour of FLH constitute State aid, it is necessary to determine whether the shareholder loans and the capital injections should be considered as separate measures or as a single measure.

(250) The evidence shows that both operations were decided at the same time, as part of a wider plan to finance the improvements of the infrastructure of the airport, and that the shareholders of FLH had the intention to convert their loans into equity. However, Germany has declared that the capital injections have not been irrevocably granted and that FLH has no direct entitlement to the capital increase.

(251) Under these circumstances, the Commission considers that the shareholder loans and the capital injections can be considered as separate measures.

6.2.2. **Economic advantage**

(252) In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the '*market economy lender principle*'. According to that principle, debt capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be qualified as State aid ([46]).

(253) In the present case, the Commission has to assess whether the conditions of shareholder loans (see Table 3) provided to FLH confer an economic advantage to it, which the recipient undertaking would not have obtained under normal market conditions.

(254) Germany is of the opinion that the '*market economy lender principle*' was fully respected as the shareholder loans were provided at market conditions. In order to justify the conditions of the loans at issue, Germany compares the conditions of the shareholder loans with the conditions provided from other banks (see the arguments given in sections 3.3.1 and 3.3.2).

(255) According to its decision-practice, in order to determine whether the financing under assessment was granted at favourable conditions, the Commission may — in the absence of other proxies — compare the interest rate on the loan in question with the Commission reference rate. The Commission's reference rate is established pursuant to the methodology laid down in the 2008 Reference Rate Communication.

(256) The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. However, because the Commission reference rate is a proxy, where the Commission has other indicators in a specific case of the interest rate that the borrower could obtain on the market, it may base its assessment on those indicators.

The credit rating of FLH

(257) In order to be able to assess the conditions of the shareholder loans, the Commission has first to assess the credit-worthiness of FLH.

(258) FLH is not rated by a credit rating agency. Germany however argues that due to the profit-and-loss transfer agreements concluded between FLH and MFAG, the rating of the mother companies should be taken into account.

(259) The Commission observes that according to German law, MFAG remains liable for any loan contracted by the FLH during the time at which the profit-and-loss transfer agreement existed, even if the agreement is subsequently revoked.

(260) On that basis, the Commission takes the view that the rating of FLH should be considered to be at least the rating of its parent company, MFAG.

(261) Also MFAG has not been rated by credit rating agencies. Nevertheless Germany has provided some bank internal ratings for MFAG, as summarised in Table 4.

(262) In view of recitals 257 to 261, the Commission considers that FLH has at least the lowest rating of MFAG, that is to say […] on the Standard & Poor's rating scale in 2006 and […] on the Standard & Poor's rating scale from 2007 to 2012.

The loss given default (or the level of collateralisation):

(263) If the shareholder loans at stake could be considered as highly collateralised, the market practice in such cases would suggest increasing the rating of the debt instrument (the 'issue rating') in question by one notch compared to the issuer rating ([47]). Therefore, the Commission has to establish the loss given default ([48]) ('LGD') of the shareholder loans at stake.

([46]) Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point 11). That Communication deals with the manufacturing sector, but is applicable to the other economic sectors. See also Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.

([47]) See, e.g. Moody's, Updated Summary Guidance for Notching Bonds, Preferred Stocks and Hybrid Securities of Corporate Issuers (February 2007).

([48]) The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor's exposure taking into account recoverable amounts from collateral and the bankruptcy assets; as a consequence the LGD is inversely proportional to the validity of collaterals.

(264) As the loans were intended to be only a short-term bridge financing facility, they were not collateralised. Nevertheless, Germany argued that the LGD should be at least lower than 30 %, because the value of the assets of FLH (EUR […] million in 2010), which are not pledged, exceeds the value of the liabilities (EUR […] million in 2010).

(265) In this regard, the Commission notes that the book value of the assets is not sufficient to estimate the liquidation value in case of insolvency or bankruptcy of the airport. In the paper published by the Basel Committee on Banking Supervision in June 2006 it is recommended to consider the LGD for senior claims on corporates not secured by recognised collateral to be around 45 % ([49]). Hence according to the 2008 Reference Rate Communication the shareholder loans at stake have a 'normal' level of collateralisation with a LGD in the middle category (30 % < LGD < 60 %).

(266) Hence the Commission considers that the level of collateralisation is not sufficient in order to allow increasing the rating of the undertaking by one notch.

Benchmarking of the conditions of FLH's shareholder loans with market proxies based on credit default swap (CDS) spreads:

(267) In order to assess whether FLH's shareholder loans were in line with market conditions, the Commission has performed a benchmarking with market proxies based on credit default swap (CDS) spreads.

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

Benchmark rate = base rate + risk margin + fee

(269) The base rate represents the cost for banks of providing liquidity (funding cost). In the case of fixed-rate funding (that is to say when the interest rate is fixed for the duration of the loan), it is appropriate to determine the base rate on the basis of swap rates ([50]) with a maturity and currency corresponding to the maturity and the currency of the debt. The risk margin compensates the lender for the risks associated with the specific debt financing, in particular the credit risk. The risk margin can be derived from an appropriate sample of CDS spreads ([51]) relating to reference entities (such as company bonds) with a similar rating as the loans for FLH. Finally, it appears appropriate to add 10-20 basis points as an approximation for the bank fees companies usually have to pay ([52]).

(270) The Commission considers that the financing measures under assessment do not represent a typical loan. For the purpose of the current assessment it is assumed that the loans are provided as a revolving credit facility, which is renewed each year with new interest rate conditions. Consequently, the maturity is assumed to be 1 year.

(271) The loans are granted with a floating base rate taking the 1-year EURIBOR as a reference rate. The assessment of the risk margin can be made on the basis of a sample of CDS spreads for each relevant point in time. Table 7 summarises the number of observations (companies with a rating of FLH from all industries, excluding financial institutions and government) and the corresponding CDS spreads.

([49]) Paper International Convergence of Capital Measurement and Capital Standards published by the Basel Committee on Banking Supervision in June 2006.

([50]) The swap rate is the longer maturity equivalent to the Inter-Bank Offered Rate (IBOR rate). It is used in the financial markets as a benchmark rate for establishing the funding rate.

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

([52]) See e.g. Oxera, *Estimating the cost of capital for Dutch water companies*, 2011 (p. 3), or Bloomberg data on underwriting fees for bond issuance. In the remainder of this Decision, a 20 bps fee will be used to arrive at a conservative estimate.

Table 7

Overview of observations of companies with rating of FLH

Date	Rating	Number of observations	Quartile 1 (basis points)	Quartile 2 (basis points)	Quartile 3 (basis points)
13.12.2006	[…]	34	4	5	7
1.1.2008	[…]	4	10	12	22
1.1.2009	[…]	15	73	107	141
1.1.2010	[…]	16	16	19	24
1.1.2011	[…]	18	12	17	21
1.1.2012	[…]	21	15	20	39

(272) The risk margin of the benchmark rate is established on the basis of a weighted average CDS spreads of the 2nd Quartile (see Table 7).

(273) Table 8 compares the actual interest rate that is charged for the shareholder loans under assessment and the benchmark rate.

Table 8

Comparative overview of FLH's actual and benchmark rate

Date	Actual interest rate (%)				Benchmark rate (%)			
	Base rate	Risk margin	Fee	Sum	Base rate	Risk margin	Fee	Sum
13.12.2006	3,90	[…]	0	[…]	3,90	[…]	[…]	[…]
1.1.2008	4,73	[…]	0	[…]	4,73	[…]	[…]	[…]
1.1.2009	3,03	[…]	0	[…]	3,03	[…]	[…]	[…]
1.1.2010	1,25	[…]	0	[…]	1,25	[…]	[…]	[…]
1.1.2011	1,50	[…]	0	[…]	1,50	[…]	[…]	[…]
1.1.2012	1,94	[…]	0	[…]	1,94	[…]	[…]	[…]

(274) According to the market practice the benchmark rate established on the basis of CDS spreads needs to take into account a bank fee of approximately […] basis points ([53]). In order to arrive at a conservative estimate, in the case at stake a bank fee of […] basis points is added.

(275) The Commission considers that the results in Table 8 provide an indication that the loans were indeed in line with market conditions. In this regard, the Commission notes that in all years — except 2009 — FLH's actual rate was above the benchmark rate. However, the lower actual interest rate in 2009 is offset by the higher rates in 2010 to 2012 on larger shareholder loan volumes.

(276) Moreover, the Commission observes that these results were also confirmed by the benchmarking loans listed by Germany in sections 3.3.1 and 3.3.2.

6.2.3. **Conclusion**

(277) In the light of the considerations in sections 6.2.1 and 6.2.2, the Commission considers that the FLH's shareholder loans were granted on market terms, and thus do not constitute State aid within the meaning of Article 107(1) of the Treaty.

([53]) See e.g. Oxera, Estimating the cost of capital for Dutch water companies, 2011 (p. 3), or Bloomberg data on underwriting fees for bond issuance.

6.3. AID NATURE OF THE CAPITAL INJECTIONS IN FAVOUR OF FLH

6.3.1. **State resources and imputability to the State**

(278) In order to constitute State aid, the measures in question have to be financed from State resources and the decision to grant the measure must be imputable to the State.

(279) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it ([54]). Resources of local authorities are, for the application of Article 107(1) of the Treaty, State resources ([55]).

(280) The Court has also ruled that whether a measure is granted directly by the State or by public or private bodies established or appointed by it to administer the measure is irrelevant to whether it is considered to be State aid ([56]).

(281) In the present case, the relevant measures, namely capital injections in favour of FLH, will be granted in part directly from the budget of the local authorities (the Land Sachsen-Anhalt, Freistaat Sachsen and the relevant cities and municipalities) and in part through the funding granted from the budget of the local authorities, which will be channelled through MFAG, as an intermediary body, into FLH. In this context, the Commission notes that the funds channelled through MFAG were earmarked by the local authorities to be transferred into FLH.

(282) Hence, at all material times the State exercised direct or indirect control on the resources under consideration. Thus, the Commission considers that the relevant measures are financed through State resources. The decision to grant these State resources is also imputable to public authorities, as FLH's public shareholder agreed to provide capital injections.

6.3.2. **Economic advantage**

(283) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention ([57]). Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention ([58]). Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(284) The Commission further recalls that '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' ([59]). In the present case, in order to determine whether the public financing of Leipzig/Halle airport grants FLH an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the direct investment grants and capital injections to that of a MEO who is guided by prospects of profitability in the long-term ([60]).

(285) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO test is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ([61]).

(286) In Stardust Marine the Court stated that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation' ([62]).

([54]) Case C-482/99 *France* v *Commission* ('*Stardust Marine*') [2002] ECR I-4397.
([55]) Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais*, [2011] ECR II-1999, paragraph 108.
([56]) Case 78/76, *Steinike & Weinlig* v *Germany*, [1977] ECR 595, paragraph 21.
([57]) Case C-39/94 *Syndicat français de l'Express international (SFEI) and others* v *La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain* v *Commission of the European Communities* [1999] ECR I-2459, paragraph 41.
([58]) Case 173/73 *Italian Republic* v *Commission of the European Communities* [1974] ECR 709, paragraph 13.
([59]) Case C-482/99 *France* v *Commission* (*Stardust Marine*) [2002] ECR I-4397, paragraph 69.
([60]) Case C-305/89 *Italy* v *Commission* (*ALFA Romeo*) [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-03871, paragraph 84.
([61]) Case 40/85 *Belgium* v *Commission* [1986] ECR I-2321.
([62]) *Stardust Marine*, paragraph 71.

(287) Furthermore, the Court declared in the EDF case that, '[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen' ([63]).

(288) In order to be able to apply the MEO test, the Commission has to place itself at the time when each decision to provide public funds to FLH was taken. The Commission must also base its assessment on the information and assumptions, which were at the disposal of the relevant local authorities at the time, when the decision regarding the capital injections at stake was taken.

(289) Germany also stressed that the infrastructure is necessary to create jobs (5 106 jobs depend directly on the airport). The Commission however, observes that the social and regional considerations cannot be taken into account when conducting the MEO test.

(290) In this particular case in relation to the infrastructure and infrastructure-related investments Germany appears to call into question the applicability of the MEO test.

(291) Germany argued that the MEO test cannot be applied to transport infrastructure because there are no comparable private investors. According to Germany, private investors have no interest in airports, especially where large investments are necessary. In this context, Germany submitted that this would mean that investments that private operators would not undertake would automatically fall outside the scope of State aid rules.

(292) The Commission cannot agree with this view of Germany. The MEO test cannot be excluded just because the private sector would not be involved in financing airport infrastructure. 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. In this context, the Commission notes that the case-law of the Court of Justice of the European Union has clarified that investment in economic activities which would not be undertaken by private investors operating in a market economy can contain State aid elements ([64]).

(293) Germany is not of the opinion that FLH's shareholders acted as a MEO by deciding to increase the own capital of the airport and converting the shareholders loans into equity. The Commission notes that Germany stated that the capital increases were done without an underlying business plan and without long-term prospects for profitability.

(294) Despite the inherent and significant uncertainties related to the project, such as the long-term nature of the investment project (around 50 years), there was neither an *ex ante* business plan, nor a sensitivity analysis nor any underlying profitability assumptions. This is not in line with the type of analysis that a prudent investor would have undertaken for a project of such magnitude.

(295) On this basis, the Commission finds that the capital injections by the public shareholders and MFAG to FLH granted the latter an economic advantage (to the extent that the investment grants were not purely related to public policy remit activities as concluded in section 6.1.2).

6.3.3. **Selectivity**

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

(297) In the case at hand, the capital injections only benefit FLH. Hence, the measure is selective within the meaning of Article 107(1) of the Treaty.

6.3.4. **Distortion of competition and effect on trade**

(298) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid ([65]). The economic advantage that will be granted by the capital injections to the airport operator strengthens its economic position, as the airport operator will be able to set up its business without bearing the inherent investment costs.

([63]) Case C-124/10P *European Commission* v *Électricité de France* (*EDF*) [2012], not yet published, paragraph 85.
([64]) *Leipzig/Halle* judgment, paragraph 115.
([65]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.

(299) As assessed in section 6.1.1, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, the Commission underlines that notably with respect to freight forwarders, air cargo specialised airlines and also passenger airlines and charter operators, airports that are not located in the same catchment areas and in different Member States can also be in competition with each other to attract those airlines.

(300) The General Courts confirmed that Leipzig/Halle airport is in competition with airports in other Member States, in particular Brussels (Belgium) and Vatry (France) airports notably as regards to cargo flights ([66]). In addition, Leipzig/Halle airport currently serves approximately 890 000 tonnes air cargo and is the second biggest freight airport in Germany.

(301) Germany submitted that the competition of Leipzig/Halle airport with other German air cargo airports was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with the airport, had capacity bottlenecks or restrictions on night flights.

(302) According to Germany, there was also no competitive overlap with the other European cargo airports, mainly Brussels and Vatry. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was more than 80 times larger than the air cargo volume at Vatry airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restriction on night flights and therefore competition was limited.

(303) From the submission of third parties, the Commission observes that Leipzig/Halle airport is used by different international air cargo carriers, such as Wirtschaftsallianz for the SALIS project, Jade Cargo, Volga-Dnepr Group, Baring etc. Moreover, Leipzig/Halle airport is the European hub of DHL. The notified infrastructure measures involve a further extension of the airport's infrastructure to serve bigger planes without any MTOW restrictions. In this regard, the Commission further observes that the airport operates two runways (southern and northern runway with a length of 3 600 metres).

(304) On the basis of what precedes, the Commission considers that the possible economic advantage which FLH might receive from capital injections to finance the different infrastructure development and extension projects at Leipzig/Halle airport strengthen its position vis-à-vis its competitors on the Union's market of providers of airport services, in particular as regards freight.

(305) Therefore, the Commission considers that the public funding under examination distorts or threatens to distort competition and affects trade between Member States.

6.3.5. **Conclusion**

(306) In the light of the considerations in recitals 278 to 305, the Commission considers that the public funding granted to FLH in the form of capital injections constitutes State aid within the meaning of Article 107(1) of the Treaty.

6.4. LAWFULNESS OF THE AID

(307) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(308) As the capital injections are subject to a Commission decision and were not yet put at the disposal of FLH, the Commission considers that Germany has respected the prohibition of Article 108(3) of the Treaty ([67]).

6.5. COMPATIBILITY OF AID

6.5.1. **The applicable legal framework**

(309) Since the capital injections into FLH constitute State aid, the Commission has to examine if this aid identified in recital 306 can be found compatible with the internal market.

([66]) *Leipzig/Halle airport*, paragraph 93 and Decision 2008/948/EC, recital 8.
([67]) Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127.

(310) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. The aid in question can be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.

(311) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.

(312) According to the 2014 Aviation Guidelines, the Commission will apply the principles set out in these guidelines to all notified investment aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the projects were notified prior to that date ([68]).

(313) The Commission has already concluded in recital 308 that the direct and annual capital injections do not constitute unlawful State aid granted before 4 April 2014.

(314) However, in the present case the Commission observes that Leipzig/Halle airport with more than 800 000 tonnes is a freight specialised airport. The Commission further observes that the measures at stake relate to the airport's expansion strategy to enter the freight market.

(315) According to point 22 of the 2014 Aviation Guidelines, the Commission does not yet have sufficient experience in assessing the compatibility of aid to airports specialised in freight transport to summarise its practice in the form of specific compatibility criteria. Hence, for those categories of undertakings, the Commission will apply the common principles of compatibility as set out in section 5 of the 2014 Aviation Guidelines through a case-by-case assessment.

6.5.2. **Compatibility assessment**

(316) To assess whether a State aid measure can be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, the Commission generally analyses whether the design of the aid measure ensures that the positive impact towards an objective of common interest exceeds its potential negative effects on trade and competition.

(317) The Communication on State Aid Modernisation ([69]) called for the identification and definition of common principles applicable to the assessment of compatibility of all aid measures carried out by the Commission. An aid measure will be considered compatible with the internal market pursuant to Article 107(3) of the Treaty provided that the following cumulative conditions are met:

(a) contribution to a well-defined objective of common interest;

(b) need for State intervention;

(c) appropriateness of the aid measure;

(d) incentive effect;

(e) proportionality of the aid (aid limited to the minimum);

(f) avoidance of undue negative effects on competition and trade between Member States;

(g) transparency of aid: Member States, the Commission, economic operators, and the interested public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder as outlined in section 8.2 of the 2014 Aviation Guidelines.

6.5.2.1. Contribution to a well-defined objective of common interest

(318) A State aid measure must have an objective of common interest in accordance with Article 107(3) of the Treaty. Investment aid to airports is usually considered to contribute to the achievement of an objective of common interest, if it (i) either increases mobility and the connectivity of the regions by establishing access points for intra-Union flights; or (ii) combats air traffic congestion at major Union hub airports; or (iii) facilitates regional development.

([68]) Point 173 of the 2014 Aviation Guidelines.

([69]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation (SAM), COM(2012) 209 final.

(319) The capital injections subject to this Decision are aimed at financing infrastructure measures at Leipzig/Halle airport, an airport specialised in air freight. As submitted by Germany, the air freight sector, in particular express freight, is showing considerable growth rates. Germany stated further that the three main air-freight hubs in Germany, Frankfurt/Main, Munich and Köln/Bonn, are facing night flight capacity constraints. In this regard, Germany stated that according to the judgment of the German Federal Administrative Court of 4 April 2012, Frankfurt Main/Airport is not allowed to carry out any night flight operations anymore. As a consequence, Germany stated that FLH helps to counter a serious air-freight capacity crunch in Germany.

(320) Germany stated further that the envisaged project forms part of the strategy for the development of the airport contained in the Trans-European Transport Network Outline Plan from 2004 valid up to 2020 as a *Community connecting point*. Leipzig/Halle 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 (that is to say Federal motorway A 9) and from the West to Eastern Europe (that is to say Federal motorway A 14) with an access to rail and road network.

(321) Moreover, according to Germany, 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 road and rail infrastructure, the airport has large growth potential. As stated in recital 319, the air freight sector is showing considerable growth rates (that is to say an average growth rate in international passenger transport between 2007 and 2011 of approximately 5,0 % and on the freight side of 4,3 %) ([70]). However, the current airport capacities are facing night flight constraints (see recital 319).

(322) As mentioned in recital 319, it is expected that the airport will experience a gradual but significant increase in freight traffic. With regard to cargo volumes, Germany stated that in comparison to other airports, Leipzig/Halle is registering constant growth rates (whereas 101 364 tonnes of freight were processed in 2007, this figure rose to 442 453 tonnes in 2008, 524 084 tonnes in 2009 and 663 059 tonnes in 2010). In order to complement its statement, Germany pointed out that the air cargo volume rose by 18,5 % in 2009 and 26,5 % in 2010. According to Germany, a further increase in cargo volume was expected. In this respect Germany clarified that approximately 820 000 tonnes of air cargo were expected to be handled by 2020 ([71]). However, Germany submitted that, this forecast will be already met by 2015 ([72]). 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 (that is to say Frankfurt Main and others).

(323) The Commission notes that the implementation of the project will have a positive impact on the entire region and will positively influence its economic and social development. Germany submitted that currently 133 companies were present at the airport, employing a total of 5 106 people in 2010 (an increase by 14,4 % in comparison to 2009). Germany stated further that the investment project will in particular improve access to the region and increase its attractiveness for investors and visitors. The Commission notes that this was also supported by the observations of the third parties (see section 4). Moreover, this should have a positive impact on employment bearing in mind that unemployment is significantly higher in the Leipzig/Halle region (unemployment in the Sachsen region amounts to 10,3 %, in Saxony-Anhalt to 11,2 %) than the national average (of 6,9 %).

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

6.5.2.2. Need for State intervention

(325) A State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern.

([70]) IATA, Passenger and freight forecasts 2007 to 2011, October 2007.
([71]) Based on estimates before 2011.
([72]) Based on the 2011 estimates.

(326) Germany submitted that Leipzig/Halle airport suffers from a historical investment backlog. Germany was of the view that the financing is limited to the necessary and legally foreseen minimum, both in terms of aid amount and aid intensity. In addition, according to Germany the measures concern long-term infrastructure investments which address the needs of the airport in view of the future increase of freight and passenger transport. Germany argued that the measures are not disproportionate in size nor disproportionately costly. Germany stated that the costs have been reduced to a minimum level following thorough advance planning and cost estimates. In Germany's opinion, a further reduction of State financing is not possible as infrastructure of this magnitude cannot be financed by airport operators from their own resources.

(327) Germany has raised the argument that revenues from the services do not cover the costs of building the infrastructure and substantiated this argument on the basis of a funding gap analysis and a counterfactual assessment.

(328) The Commission concludes that the aid will bring a material improvement for the investment project that the market itself does not deliver and that there is a need for State intervention.

6.5.2.3. Appropriateness of the aid measure

(329) The aid measure must be an appropriate policy instrument to address the objective of common interest.

(330) As explained in section 6.5.2.2, Germany has demonstrated that the funding of the project through capital injections is an appropriate instrument to improve the condition of the infrastructure at Leipzig/Halle airport. No other less distortive form of aid would assure the financing of the necessary infrastructure works.

(331) The Commission concludes that the aid measure at stake is an appropriate policy instrument.

6.5.2.4. Incentive effect

(332) The aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or which they would carry out in a restricted or different manner or location.

(333) First of all, works on an individual investment can start only after an application has been submitted to the granting authority. If works start before an application is submitted to the granting authority, any aid awarded in respect of that individual investment will not be considered compatible with the internal market.

(334) Germany submitted that the works have not started before the application for aid was submitted to the granting authority. Hence, the Commission can conclude that this criterion is met.

(335) Second, an investment project at an airport may be economically attractive in its own right. Therefore, it needs to be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any State aid. If this is confirmed, the Commission will consider that the aid measure has an incentive effect.

(336) The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid.

(337) Where no specific counterfactual is known, the incentive effect can be assumed when there is a capital cost funding gap, that is to say, when on the basis of an *ex ante* business plan, it can be shown that there is a difference between the positive and negative cash flows (including investment costs into fixed capital assets) over the lifetime of the investment in net present value terms ([73]).

(338) In the present case, Germany has submitted a funding gap calculation identifying a funding gap of at least EUR 142,1 million (see Table 5 and Table 6). Moreover, a counterfactual scenario assessment shows that if the infrastructure investments would be entirely financed through loans, the airport would not be able to provide the necessary financing.

(339) Hence, the Commission can conclude that the investment aid has an incentive effect.

([73]) This does not preclude foreseeing that future benefits may offset initial losses.

6.5.2.5. Proportionality of the aid (aid limited to the minimum)

(340) The aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned.

(341) In order to be proportionate, investment aid to airports must be limited to the extra costs (net of extra revenues) which result from undertaking the aided project/activity rather than the alternative project/activity that the beneficiary would have undertaken in the counterfactual scenario, that is to say, if it had not received the aid. Where no specific counterfactual is known, in order to be proportionate, the amount of the aid should not exceed the funding gap of the investment project (the so-called 'capital cost funding gap'), which is determined on the basis of an *ex ante* business plan as the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment. For investment aid the business plan should cover the period of the economic utilisation of the asset.

(342) In any event, the aid intensity must not go beyond the actual funding gap of the investment project.

(343) As stated in sections 6.5.2.2 and 6.5.2.3, Germany has submitted a complementary calculation of the funding gap for the notified project amounting to EUR 142,1 million justifying an aid intensity of 75 % (see Table 6) provided that the capital injections would have been injected simultaneously with the investments carried out. However, as the capital injections will only be carried out after the approval of the Commission in 2014, the funding gap identified by Germany amounts to EUR 166,9 million justifying an aid intensity of 88,1 % (see Table 5).

(344) In the absence of a threshold for maximum permissible aid intensities at freight airports, the aid intensity is limited to the funding gap of the investment project. Hence, the Commission can conclude that the aid amount is proportionate and limited to the minimum.

6.5.2.6. Avoidance of undue negative effects on competition and trade between Member States

(345) The negative effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive.

(346) In order to further limit any distortions, the airport, including any investment for which aid is granted, must be open to all potential users and must not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

(347) Germany submitted that the overall balance of the effects of the measures on competition and trade between Member States is positive. In this regard, Germany first confirmed that all potential users (airlines and air cargo carriers) will have access to the new infrastructure on an equal and non-discriminatory basis.

(348) Secondly, Germany submitted that the infrastructure measures in question are of a non-expansionary nature. With regard to any potential effect on competitors of Leipzig/Halle airport, Germany stated that airports in the vicinity of Leipzig/Halle were not specialised in air cargo transports. Moreover, with regard to Altenburg-Nobitz, Berlin Brandenburg, Dresden, Erfurt, Hof, Magdeburg, Magdeburg-Cochstedt and Prague airport, Germany stated that for some of these airports the geographical distances were too large, the airports were located in different economic regions, the catchment areas were quite different or the airports were of a very small size.

(349) Regarding the other German cargo airports, Germany stated that the competition of Leipzig/Halle airport was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with Leipzig/Halle, had capacity bottlenecks or restrictions on night flights.

(350) According to Germany, there was also no competitive overlap with the other European cargo airports, mainly Brussels and Vatry. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was more than 80 times larger than the air cargo volume at Vatry airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restrictions on night flights and therefore competition was limited.

(351) Hence, the Commission can conclude that the negative effects of the aid are sufficiently limited. Consequently, the Commission can conclude that the compatibility criterion is met.

6.5.2.7. Transparency of aid

(352) Germany is reminded of the transparency obligations with regard to publication of details of aid granted, as outlined in section 8.2 of the 2014 Aviation guidelines.

6.5.3. **Conclusion**

(353) Therefore, the Commission considers that all common conditions for compatibility pursuant to Article 107(3)(c) of the Treaty have been satisfied in the present case.

(354) In view of the assessment made, the Commission concludes that the measure is compatible with the internal market on the basis of Article 107(3)(c) of the Treaty to the extent that it is limited to the financing of the funding gap of the investment project.

7. **CONCLUSION**

(355) In light of the finding in section 6.1.1, FLH is an undertaking within the meaning of Article 107(1) of the Treaty. According to the assessment in section 6.1.2, the Commission considers that the financing of the measures M5 new fire station building, M9 firefighting equipment and M8 heliport can be regarded as falling within the public policy remit. According to the assessment in section 6.1.2, the financing of all other measures cannot be exempted from scrutiny under Union State aid rules.

(356) According to the considerations in section 6.2.1, the Commission considers that FLH's shareholder loans were granted on market terms, and thus do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(357) In light of the considerations in section 6.3, the Commission considers that the public funding granted to FLH in the form of capital injections constitutes State aid within the meaning of Article 107(1) of the Treaty. As the capital injections are subject to a Commission decision and were not put at the disposal of FLH, the Commission considers that Germany has respected the prohibition of Article 108(3) of the Treaty.

(358) According to the assessment in section 6.5, the Commission considers that all common conditions for compatibility pursuant to Article 107(3)(c) of the Treaty have been satisfied in the present case. Therefore, the Commission concludes that those measures are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty to the extent that they are limited to the financing of the funding gap of the investment project.

(359) The Commission notes that on 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language,

HAS ADOPTED THIS DECISION:

Article 1

The shareholder loans granted to Flughafen Leipzig/Halle GmbH do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

1. To the extent that the capital injections into Flughafen Leipzig/Halle GmbH cover costs falling public policy remit for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG and costs of the heliport, they do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

2. To the extent that the capital injections into Flughafen Leipzig/Halle GmbH are limited to the funding gap of the investment project and do not cover costs relating to the public policy remit set out in paragraph 1, they constitute State aid which is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

3. To the extent that the amount of the capital injections exceeds the amounts declared compatible with the internal market in paragraph 1 and 2, they constitute State aid which is incompatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2014.

For the Commission
Joaquín ALMUNIA
Vice-President