II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/506

of 20 February 2014

on the measures taken by Germany with regard to Flughafen Berlin-Schönefeld GmbH and various airlines — SA.15376 (C 27/07, ex NN 29/07)

(notified under document C(2014) 868)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) Between 2003 and 2006, the Commission received complaints from various parties according to which certain airlines and the manager of Berlin Schönefeld airport ('Schönefeld') may have received unlawful State aid with respect to their operations at that airport.

(2) In a letter dated 17 August 2006, the Commission invited the Federal Republic of Germany ('Germany') to provide information on this matter. Germany complied with this request for information by letter dated 20 December 2006.

(3) By letter dated 10 July 2007 ('the opening decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') with respect to the aforementioned measures. At the same time, the Commission issued an information injunction under Article 10(3) of Council Regulation (EC) No 659/1999 ([3]) (with respect to all documents, data and information necessary for the Commission to be able to assess whether the measures in question constituted State aid.

(4) Germany sent its observations to the Commission on 4 October 2007 and supplemented it with further documents on 3 March 2008.

([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. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

([2]) OJ C 257, 30.10.2007, p. 16.

([3]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 30 October 2007 ([4]). The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

(6) The Commission received comments from several interested parties. On 16 January 2008 and 20 February 2008, the Commission passed these comments on to Germany. By letter dated 15 May 2008, Germany sent its observations on the comments of the interested parties. The Commission then requested further information on 31 August 2009. Germany complied with this request in three stages, on 28 September 2009, 12 October 2009 and 28 October 2009. On 4 April 2011, the Commission once again asked Germany for information. In response to this request, Germany sent new observations and further documents on 19 May 2011. On 10 October 2011, the Commission forwarded further submissions received from interested parties to Germany. Germany commented on those submissions on 7 November 2011. Following a further request for information by the Commission on 17 January 2012, Germany replied on 14 February 2012.

2. GENERAL CONTEXT

(7) After the reunification of Germany in 1990, Berlin found itself in a very specific situation with respect to air traffic, as a consequence of having been divided into an eastern part and a western part for decades. The inner-city airports of Berlin Tegel Airport ('Tegel') and Berlin Tempelhof Airport ('Tempelhof') are located in what was West Berlin. The airport of Schönefeld is located in what was East Berlin on the border between the city of Berlin and the region of Brandenburg (*Land Brandenburg*).

(8) Tempelhof was opened in 1923 and could only be used by small aircraft owing to its short runway. This airport could not be modernised easily because it is located on a listed historical site and surrounding residential areas made any expansion impossible. Tempelhof airport ceased operating on 30 October 2008.

(9) Tegel was opened in 1948 to allow for airlift supplies into Berlin during the Cold War blockade. From 1968, many airlines moved their operations from Tempelhof to Tegel, as the Tempelhof site was not suitable for jet aircraft. Since 1975, Tegel has become Berlin's main passenger airport. In the early 1990s, Tegel began to reach maximum capacity at peak times. The only way to avoid significant capacity constraints in the long term was an extension of the runway and the construction of a larger terminal. However, this was not possible because this airport, like Tempelhof, is an inner-city airport surrounded by residential areas and access roads. Moreover, any increase in air traffic at Tegel would translate into increased noise pollution for local residents.

(10) Schönefeld was opened in 1946 on the orders of the Soviet military administration in Germany. It initially served as a primarily military airport which was also used by commercial airlines, such as Aeroflot and, later, the East German airline Interflug. Until the change in Germany's political situation in 1990, Schönefeld airport was extended several times. Designed as a military airport, Schönefeld was not suited to the needs of modern commercial air traffic. Moreover, after the change in the political situation, the site was no longer in good conditions. Large investments had thus to be made in the 1990s to bring the site up to West European security standards. Furthermore, Schönefeld is more remote to the city centre than Tempelhof and Tegel and for that reason, was perceived as less attractive than these two airports at least by certain categories of passengers and airlines.

(11) The three Berlin airports were originally operated by different companies for historical reasons. With the reunification of Germany, they were pooled within a single holding company, Berlin Brandenburg Flughafen Holding GmbH ('BBF'), jointly owned by the regions (*Länder*) of Berlin and Brandenburg (37 % each) and the German Federal Government (26 %). Until 2003, this holding company had two subsidiaries: Berliner Flughafen-Gesellschaft mbH ('BFG'), which operated Tegel and Tempelhof, and Flughafen Berlin-Schönefeld GmbH ('FBS'), which operated Schönefeld. In October 2003, BBF merged with FBS. FBS thereby became the owner of BFG. As of 1 January 2012, FBS was renamed Flughafen Berlin Brandenburg GmbH ('FBB').

(12) In the light of the generally expected increase in air traffic to and from Berlin (see Table 1 below), partly due to Berlin's recovery of its role as the capital city of Germany, it became rapidly clear in the 1990s that there was a need for a more efficient utilisation of the existing airport capacity then spread over the Berlin agglomeration as a result of the city's past political division.

([4]) See footnote 2.

Table 1

Traffic at Berlin airports (million passengers)

Year	Schönefeld	Tegel	Tempelhof
1991	1,1	6,7	n.a.
1992	1,4	6,6	n.a.
1993	1,6	7	1,1
1994	1,8	7,2	n.a.
1995	1,9	8,2	n.a.
1996	1,8	8,3	n.a.
1997	1,9	8,6	n.a.
1998	1,9	8,8	0,9
1999	1,9	9,5	n.a.
2000	2,1	10,3	n.a.
2001	1,9	9,9	n.a.
2002	1,6	9,1	n.a.
2003	1,7	11,1	0,5
2004	3,3	11	0,4
2005	5	11,5	0,5
2006	6	11,8	0,6
2007	6,3	13,5	0,4
2008	6,6	14,5	0,4
2009	6,8	14,2	closed
2010	7,3	15,0	closed
2011	7,1	16,9	closed
2012	7,1	18,2	closed

Source: Data from Commission Decision in State aid case NN 25/09 (ex N 167/09) — Germany — Financing of Berlin Brandenburg International Airport (OJ C 179, 1.8.2009, p. 5), updated with data extracted from FBB annual reports.

(13) Against this backdrop, the idea of one single airport for the Berlin-Brandenburg area was discussed immediately after the reunification of Germany. Based on forecasts of passenger numbers for the Berlin airports, it was assumed that an increase in air traffic could only be handled efficiently by a single airport that would be of a suitable size and properly equipped with modern technology.

(14) The planning for the creation of the single Berlin airport started in January 1992. In that context, on 20 June 1993 it was announced that the area south of Schönefeld, as well as two other sites (Sperenberg Airfield and Jüterborg Airfield) were identified as possible locations for the new airport infrastructures. Tegel and Tempelfhof were not considered potentially suitable due to the negative impact of these inner-city airports on local residents (in particular in terms of noise) and because they could not be extended to a sufficient extent to host the new single Berlin airport in any event. Schönefeld was eventually chosen because it is relatively close to, though outside,

the city centre, and has good connections by road and train. Consequently, it was decided to expand and modernise the existing Schönefeld airport, turn it into the main Berlin airport with the name Berlin-Brandenburg Willy Brandt ('BER'), and at the same time, close down Tegel and Tempelfhof airports. This decision was formalised in an agreement signed by the German Federal Government and the Berlin and Brandenburg Regions *(Länder Berlin und Brandenburg)* on 28 May 1996.

(15) The shareholders of BBF planned to develop the BER project through a private airport owner and operator. In 1997, it was decided to launch a privatisation process whereby all shares in BBF would be sold to a private investor, and a concession over the airport would be granted to the future buyer.

(16) However, BBF's existing shareholders could reach an agreement with none of the bidders. This resulted in the public owners declaring in 2003 that the privatisation process had failed and that the project to develop BER would proceed with public shareholders ([5]).

3. DESCRIPTION OF THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT

3.1. The control and profit transfer agreement

(17) BBF and BFG signed a control and profit transfer agreement (*Beherrschungs- und Gewinnabführungsvertrag*) on 6 August 1992. This contract was originally foreseen for a duration of 5 years, with tacit renewal for a new period of two years unless a party decides to terminate it with a one-year notice. A similar agreement was signed between BBF and FBS. Under German law, a control and profit transfer agreement between a company and its subsidiary is an agreement whereby the management of the subsidiary is controlled by the parent company and the subsidiary has the obligation to transfer its profits and losses to the parent company. In practice, as a result of such an agreement, the profits and losses of the parent company and its subsidiary are counted together and taxed accordingly. As a result of the control and profit transfer agreements concluded between BBF and its subsidiaries, these various companies were considered as a single taxable entity for corporate tax purposes.

(18) In 2003, as a result of the merger between BBF and FBS, the rights and obligations of BBF under the control and profit transfer agreement of 6 August 1992 with BFG were taken up by FBS. Moreover, the control and profit transfer agreement between BBF and FBS ceased to have any relevance upon that merger. This agreement will not be further considered in this decision.

(19) In practice, the control and profit transfer agreement of 6 August 1992 between BBF and BFG ('the control and profit transfer agreement') led to a compensation of the losses generated by the operation of Schönefeld by the profits generated by the operation of Tegel, at least in certain years.

(20) Schönefeld airport indeed generated operating losses, at least until 2006, as illustrated by the following table, which provides the EBITDA ([6]) and EBIT ([7]) of the airport for the period from 2003 to 2006, on the basis of the costs and revenues that are directly linked to the operation of this airport:

Table 2

EBITDA and EBIT of the Schönefeld airport from 2003 to 2006

EBITDA/EBIT (EUR million)	2003	2004	2005	2006
EBITDA	[…] ([1])	[…]	[…]	[…]
EBIT	[…]	[…]	[…]	[…]

([1]) Marking of business secrets in the sense of the Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions l (OJ C 297, 9.12.2003, p. 6).
Source: Annex 19 to Germany's comments of 4 October 2007 following the opening of the formal investigation procedure.

([5]) See Frankfurter Allgemeine Zeitung (FAZ), 23.5.2003, No 119, p. 16 (http://www.faz.net/aktuell/wirtschaft/unternehmen/luftfahrt-privatisierung-der-berliner-flughaefen-endgueltig-gescheitert-1101944.html).
([6]) Earnings before interest, taxes, depreciation and amortisation.
([7]) Earnings before interest and taxes.

(21) However, the bad performance of the Schönefeld airport has not called into question the viability of the group encompassing FBS, BFG and, until 2003, their holding company BBF ('the FBS group'). The FBS group has consistently been able to generate sufficient own financial resources or find necessary financing on the market. To the Commission's knowledge, insofar as public funding was provided to the FBS group from sources external to it, this only occurred in relation to the financing of the BER project and was authorised by the Commission ([8]).

(22) This situation is due in particular to the relatively good economic performance of Tegel, which mitigated the negative impact of the operating losses generated by Schönefeld on the FBS group. Between 1990 and 2005, Tegel, unlike Schönefeld and Tempelhof, was a modern airport, hosting the main international full-service carriers serving Berlin, and was perceived as the most attractive airports of the Berlin agglomeration at least by certain categories of passengers and airlines. Moreover, there has been overall an upwards trend in the passenger air traffic in Berlin between 1990 and 2005, which benefited the FBS group as a whole.

(23) As can be seen in Table 1, the number of passengers per year at Tegel increased steadily in the 1990s and as of 2004. At Schönefeld, the number of passengers per year grew substantially in the first half of the 1990s (from 1,1 million to 1,9 million passengers from 1991 to 1995) but stagnated in the second half and declined between 2000 and 2003 (from 2,1 million to 1,7 million passengers per year). Between 1991 and 2003, the larger part of the traffic growth in Berlin, in absolute terms, was absorbed by Tegel, and not by Schönefeld. Indeed, whereas the number of passengers per year at Schönefeld increased by 600 000 over that period, it increased by 4,4 million at Tegel. The traffic continued to steadily grow at both airports between 2003 and 2012: as indicated in Table 1, the traffic grew by 417 % at Schönefeld (from 1,7 million to 7,1 million passengers per year), while it grew by 63 % at Tegel (from 11,1 million to 18,2 million passengers per year). Contrary to the period 1991-2003, the traffic growth in absolute terms was almost equally shared between the two airports, which means that in relative terms, Schönefeld's growth was much higher than Tegel's.

3.2. **The schedules of airport charges at Schönefeld**

(24) In the 1990s, the FBS group tried to encourage airlines to move from Tegel, which was operating at close to full capacity to Schönefeld, which was under-utilised ([9]). The objective was to address the congestion problem at Tegel while optimising the use of Schönefeld's capacity. Airlines which were already operating from Tegel and Tempelhof as well as airlines which were not yet operating from a Berlin airport were contacted for that purpose. Several carriers showed interest but eventually did not move to Schönefeld for marketing reasons, in particular due to the lack of an anchor tenant ([10]) at Schönefeld and the fact that Schönefeld's infrastructures were not as modern as at Tegel, this disadvantage not being offset by attractive airport charges or other financial incentives. Overall, the attempt to shift traffic from Tegel to Schönefeld and to attract to Schönefeld carriers that were not previously

([8]) This provision of public funding was approved by the Commission as compatible aid. See Commission Decisions in State aid cases NN 25/09 (ex N 167/09) and SA.35378 (12/N) (OJ C 36, 8.2.2013, p. 10) — Germany — Financing of Berlin Brandenburg International Airport.)

([9]) Germany provided the following indications: (i) Schönefeld's capacity amounted to 4,5 million passengers per year in 2003-2004 and reached 7 million passengers per year in 2005 (to be compared with a traffic of 1,7 million, 3,3 million and 5 million passengers respectively in 2003, 2004 and 2005); (ii) Tegel's capacity amounted to 9,5 million passengers per year in 2003-2004 and reached 11,5 million passengers in 2005 (to be compared with a traffic of 11,1 million, 11 million and 11,5 million passengers respectively in 2003, 2004 and 2005). The capacity at an airport is difficult to measure because it depends on the maximum capacity of the various elements of the infrastructures, which are not always adequately measured in terms of a maximum number of passengers, but sometimes for instance in terms of a maximum number of aircraft movements. Moreover, when the number of passengers is the relevant measure, the maximum capacity takes the form of a cap on the maximum hourly passenger throughput, rather than a maximum number of passengers per year. This is because there are often large variations in the passenger throughput between peak and non-peak hours and days and there can be seasonal variations in the throughput. Therefore, the above indications cannot fully capture the capacity utilisation of Schönefeld and Tegel. Moreover, in certain cases, an airport can operate beyond its theoretical capacity (for example by handling more passengers than the maximum hourly throughput) but this may lead to sub-optimal conditions (long waiting times, delays etc.). It is however undisputed that over the period under assessment, Tegel was operating at close to full capacity and Schönefeld was under-utilised.

([10]) An anchor tenant is a leading carrier at an airport (in terms of traffic), whose prestige and name recognition attracts other airlines to the airport, thereby further increasing traffic.

flying from Berlin largely failed at that time. This is illustrated by the fact that as already indicated, whereas traffic at Tegel increased by 4,4 million passengers between 1991 and 2003, it increased by only 600 000 passengers at Schönefeld over the same period.

(25) This triggered strategic reflections as regards the best way to improve the economic situation of Schönefeld pending the opening of the BER airport. The temporary closure of the airport was not considered as an option. The strategic reflections touched upon the level of the airport charges and how to set them in order to attract further traffic.

(26) In Germany, airport infrastructure services provided to airlines are priced on the basis of each airport's schedule of charges as published in the *Nachrichten für Luftfahrer*, which is the German official journal for air transportation matters. Each airport prepares its schedule of charges and must notify it to the competent civil aviation authorities of the region (*Land*).

(27) Since 2003, there have been different schedules of charges at Schönefeld. From 1 August 2003 to 30 April 2004, there was a common schedule of charges for Tegel, Tempelhof and Schönefeld ('the 2003 Schedule'). That schedule was perceived as insufficiently attractive to incentivise airlines to open new routes or increase frequencies from and to Schönefeld.

(28) Against this backdrop, in 2003 FBS' shareholders commissioned a consultancy ([…] - 'the consultant') to develop a strategy that could improve Schönefeld's financial situation until the opening of BER and that could be implemented quickly.

(29) The consultant's analysis revealed that there was a potential for a significant expansion of air traffic in Berlin, for a variety of reasons. The consultant estimated that Berlin's catchment area included up to 10 million potential passengers per year. The consultant identified a series of structural factors prone to an increase in air traffic. The main core factors were the presence of the headquarters of large multi-national companies, the fact that Berlin is Germany's largest university city and a centre for 'ethnic traffic' ([11]) and the fact that it was viewed in the early 2000s as a developing capital city and a tourist 'honeypot' ([12]). The consultant also showed that, compared with other capital city airports, Berlin still had considerable potential in 2003 for the establishment and growth of a low cost carrier ('LCC') traffic.

(30) At that time, LCC traffic was enjoying significant growth across Europe ([13]) and various analyses showed that LCC traffic was generated for the most part by new passengers and therefore could come in addition to traditional traffic. The consultant forecasted that the potential for additional LCC traffic at Schönefeld amounted to a growth of between 600 000 and 900 000 additional passengers per year in the short term, namely from 2003 to 2005, and 300 000 additional passengers per year in the medium term, namely from 2005 to 2010.

(31) Furthermore, the consultant found that implementing a strategy consisting in attracting LCCs to Schönefeld would require only limited adaptations and no large-scale investment in infrastructures or significant modifications to existing infrastructures.

(32) The consultant therefore recommended such a strategy ('the LCC Strategy'). It suggested to implement it via a combination of volume-based discounts to airport charges and financial incentives ([14]).

(33) FBS decided to put in place and implement the LCC strategy and adopted a new schedule of charges ('the 2004 Schedule') to that effect. The 2004 Schedule was specifically designed for Schönefeld, unlike the 2003 Schedule. This new schedule, which was adopted on 30 April 2004 and applied as of 1 May 2004, foresaw the following types of charges:

(a) take-off and landing fees, based in particular on the maximum take-off weight of the aircraft;

([11]) 'Ethnic traffic' is generated by residents originating from remote foreign countries that regularly use air transport to go back to their home countries or are visited by friends or relatives travelling from these countries also by air. Berlin hosts large groups of first and second-generation immigrants.

([12]) Berlin was at that time the third largest tourist destination in Europe, accounting for the greatest number of guest nights in Germany, and attracted a high proportion of day-trippers.

([13]) Europe's LCC traffic increased considerably in the early 2000s, driven by the profitable expansion of industry leaders Ryanair and easyJet as well as a number of new entrants.

([14]) A more detailed description of the consultant's assessment can be found in section 7.2.1.

(b) passenger fees, based on the number of departing passengers and the destination of the flight;

(c) aircraft parking fees based on the maximum take-off weight of the aircraft and the duration of the use of parking areas.

(34) Various financial incentive mechanisms were embedded in this schedule:

(a) a 'passenger volume discount' whereby part of the passenger fees were reimbursed on the basis of the number of passengers transported, as follows:

Table 3

Passenger volume discounts according to the 2004 Schedule

Number of passengers per year	Reimbursement rate (%)
More than 50 000	5
More than 100 000	10
More than 150 000	15
More than 250 000	20

(b) a 'growth incentive', made up of a 'destination incentive' and a 'frequency incentive' which were granted respectively for the opening of new routes from Schönefeld and the creation of additional frequencies on existing routes from Schönefeld. The destination incentive amounted to 80 % of the *Landegrundtarif* (defined as the sum of the applicable take-off and landing fees and passenger fees for the relevant aircraft movements) in the first year, 60 % in the second year, 40 % in the third year and 20 % in the fourth year. The frequency incentive amounted to 60 % of the *Landegrundtarif* in the first year and 40 % in the second year. A bilateral agreement between FBS and the airline was to be entered into to set the precise conditions.

(35) The 2004 Schedule was subsequently amended in July 2005. This amendment ruled that airlines could receive the destination incentive if they opened new routes from the Berlin airport system, that is, routes to destinations that were not previously connected by direct flights with Berlin. By contrast, the destination incentive was previously open to new routes from Schönefeld even if the same destination was served by direct flights from other Berlin airports.

(36) On 19 January 2006 a new schedule of charges ('the 2006 Schedule') was adopted and entered into force retroactively on 1 January 2006. In comparison with the 2004 Schedule, the frequency incentive was removed. The 2006 Schedule foresaw three main different financial incentives: a 'growth funding' ([15]) that is, an incentive linked to an increase in the number of passengers or freight tonnage by flight movement, a 'destination funding' awarded for the opening of a new direct route between Berlin and another destination, and a 'passenger volume discount'.

(37) According to the 2006 Schedule, a carrier has to choose between the destination funding and the growth funding upon the opening of a new route from Berlin. The choice had to be made before the new route was to be opened and the carrier was to be bound by this one-off decision.

(38) The destination funding was an incentive set to amount to 80 % of the *Landegrundtarif* in the first flight season following the opening of the new route, 60 % in the second season, 40 % in the third season, 20 % in the fourth season, and 10 % in the fifth season. Besides, airlines were obliged to repay the destination funding as follows if they exited from the new route before the end of the fifth flight season: 60 % of the *Landegrundtarif* due for the first flight season, 40 % for the second season, 20 % for the third season, 10 % for the fourth season, and 0 % for the fifth season.

([15]) This 'growth funding' concept differs from the 'growth incentive' existing under the 2004 Schedule.

(39) As regards the growth funding, a carrier could benefit from it if it achieved an increase in the number of passengers or tonnage of cargo transported per flight movement compared with the previous year. The growth funding was set to be calculated on the basis of the magnitude of the achieved growth, according to formula laid down in the schedule, and translated into discounts to airport charges which were to be degressive over time. The growth funding was limited to a maximum of five years.

(40) The 'passenger volume discount', for its part, was only slightly modified and extended compared with the 2004 Schedule. Under the 2006 Schedule, the passenger volume discount, from then on known as 'volume funding', consisted in a reimbursement from the take-off and landing fees as well as from the passenger fees according to the number of passengers transported. The reimbursement rates were set as follows:

Table 4

Volume funding: discounts according to the 2006 Schedule

Number of passengers per year	Reimbursement rate (%)
More than 50 000	5
More than 100 000	10
More than 250 000	15
More than 500 000	20
More than 1 million	30
More than 2 million	40

3.3. **Individual agreements between FBS and certain carriers**

3.3.1. *The establishment of easyJet as an anchor tenant at Schönefeld*

(41) In 2003, in the context of the implementation of the LCC Strategy at Schönefeld, FBS launched negotiations with easyJet Airline Company Ltd ('easyJet'), which was looking for a location for a new base in continental Europe. In return for attractive airport charges and other financial incentives, easyJet offered to base four aircraft at Schönefeld as of its first year of operation at that airport (2004), six aircraft in the second year and an additional aircraft every year from 2006 to 2009. According to Germany, FBS saw this as an opportunity to attract a well-established LCC as an anchor tenant at Schönefeld.

(42) On 19 December 2003, FBS and easyJet concluded an agreement ('the 2003 easyJet agreement') reflecting the above-described terms. The agreement set a specific charge system for easyJet, which deviated from the applicable schedule of charge. It only sets charges defined as an amount per departing passenger. Moreover, it establishes a discount system based on the number of additional passengers carried by easyJet over the relevant year in comparison with the previous year. This specific discount system was later transposed into the 2006 Schedule under the name 'growth funding' (see recitals 36 and 39). In addition, FBS and easyJet agreed on a destination funding in the form of a one-off premium of EUR […] for each new daily frequency put in place by easyJet. However, payments made on the basis of this system were discontinued in 2004. In total, 19 new daily frequencies created by easyJet were supported under that system.

(43) FBS and easyJet originally concluded their agreement for a period of 10 years and provided easyJet with the option of extending the contract for a further 10 years. However, on 11 September 2007, FBS and easyJet entered into an amending agreement ('the 2007 easyJet amending agreement') which modified the duration and other conditions of the original agreement. This amending agreement stipulated that the 2003 easyJet agreement, as modified, would expire at the opening of BER, which was then planned for 2011. With respect to airport charges, the 2007 easyJet amending agreement contained a 'dynamic reference' to the airport's general schedule of charges ([16]), as a result of which the schedule of charges applicable at Schönefeld, even if modified by FBS after the conclusion of the agreement, would apply to easyJet at any point in time.

([16]) This reference relates to the level of airport charges as well as to the discount system and other financial incentive mechanisms embedded in the schedule.

(44) easyJet's traffic at Schönefeld increased very rapidly between 2003 and 2006. easyJet was even able to increase the number of aircraft based at Schönefeld quicker than laid down in its agreement with FBS. As a result, in 2006 Schönefeld became the largest base of easyJet outside the United Kingdom.

(45) This is illustrated by the following table, which shows the development in easyJet's traffic at Schönefeld (both in absolute terms and as a percentage of the total number of passengers at Schönefeld) between 2004 and 2010.

Table 5

Development in easyJet's traffic at Schönefeld between 2004 and 2010

	2004	2005	2006	2007	2008	2009	2010
easyJet	1 003 387	2 355 251	2 811 568	2 921 241	3 218 851	2 887 114	2 971 263
Proportion of easyJet passengers in the total volume of passengers at Schönefeld	30 %	46 %	46 %	46 %	48 %	42 %	41 %

3.3.2. *The establishment of other airlines at Schönefeld*

(46) In addition to establishing easyJet as an anchor tenant, FBS took steps to attract other LCCs. FBS managed to conclude individual agreements with the following LCCs: Germanwings GmbH ('Germanwings'), Ryanair Limited ('Ryanair'), Volare Airlines S.p.A. ('Volare'), V-Bird Airlines B.V. ('V-Bird'), Norwegian Air Shuttle AS ('Norwegian Air Shuttle'), Icelandair Reykjavik Airport ('Icelandair') as well as Aer Lingus Limited ('Aer Lingus'), which for the purposes of this decision will be considered as an LCC ([17]).

(47) In the case of both Ryanair and Germanwings, two successive agreements were concluded, one in 2003 and one in 2004.

(48) The agreements with Ryanair, Volare and V-Bird as well as the first agreement with Germanwings were concluded before the adoption and date of application of the 2004 Schedule (cf. recital 33) These agreements described the routes that were to be operated from Schönefeld and the corresponding frequencies. They foresaw financial incentives in the form of payments, defined specifically for each carrier, which were negotiated in order to convince these carriers to launch and expand operations at Schönefeld without waiting for the adoption of a new schedule of charges with embedded financial incentives. These payments were made conditional upon the airline carrying out at least a certain percentage of the scheduled flights corresponding to the operations foreseen in the agreement ([18]). The first agreement with Ryanair foresaw a payment of EUR […] million over one year (the duration of the agreement). The agreements with V-Bird and Volare each foresaw a payment of EUR […] million over three years, broken down into degressive annual instalments. The first agreement with Germanwings foresaw a payment in the form of a degressive discount to the applicable airport charges over a period of three years, as well as the financing by FBS of marketing activities for an amount of EUR […] per year.

(49) The other agreements, which were concluded upon or after the entry into force of the 2004 Schedule were in substance based on the same principles. They also described the routes that were to be operated from Schönefeld and the corresponding frequencies and allowed the carriers concerned to benefit from various financial incentives. However, they contained a 'dynamic reference' to the airport's general schedule of charges, as a result of which the schedule of charges applicable at Schönefeld, even if modified by FBS after the conclusion of the agreement, would apply to the carrier concerned at any point in time ([19]). The agreements contained clauses whereby the granting of certain incentives foreseen in the applicable Schedule was made conditional upon the airline carrying out at least a certain percentage of the scheduled flights corresponding to the operations described in the agreement. In addition,

([17]) See the overview of these individual agreements in Table 6.
([18]) For example, the payment of the contractually agreed grant to Germanwings was made conditional upon Germanwings carrying out at least […] % of the scheduled flights corresponding to its planned operations.
([19]) The same approach was followed in the 2007 easyJet amending agreement (see recital 43).

some of these agreements foresaw that FBS would award grants to finance part of the marketing costs of the airlines concerned. For example, the agreement with Norwegian Air Shuttle foresaw a one-off payment by FBS of EUR […] to finance substantiated marketing costs incurred by the carrier. Aer Lingus and Icelandair, were also offered one-off grants, of EUR […] and EUR […] respectively, to finance part of their marketing costs.

(50) The following table provides an overview of the time-spans of these various agreements.

Table 6

Time-spans of the agreements between FBS and various LCCs

Airline/Agreement	Date of conclusion of the agreement	Period during which the agreement was set to apply (1)
Ryanair (first agreement)	31 March 2003	1 May 2003-30 April 2004
Ryanair (second agreement)	28 April 2004	1 May 2003-30 April 2008
Germanwings (first agreement)	14 October 2003 (2)	26 October 2003-31 October 2006
Germanwings (second agreement)	23 December 2004	1 May 2004-30 April 2008
Volare	22 October 2003 (3)	26 October 2003-31 March 2007 (4)
V-Bird	3 November 2003 (5)	3 November 2003-3 November 2007 (6)
Icelandair	6 June 2004	6 June 2004-31 March 2009
Norwegian Air Shuttle	17 May 2004	29 March 2004-31 March 2009
Aer Lingus	13 May 2004	30 March 2004-31 March 2009

(1) Some of these agreements started to apply retroactively as of a date earlier than the date at which they were concluded. This is the case for example for the second agreement with Germanwings, which started to apply retroactively as of the date of application of the 2004 Schedule. This is also the case for the second Ryanair agreement, which superseded the first Ryanair agreement and started to apply retroactively on 1 May 2003, which is the date of application of the first Ryanair agreement.
(2) An agreement between FBS and Germanwings had already been signed shortly beforehand (on 29 September 2003) and was due to apply as of 26 October 2003. However, it was superseded by the agreement of 14 October 2003 before it started to apply. Therefore, the agreement of 29 September 2003 has never applied.
(3) On 22 October 2003, FBS and Volare signed two agreements, the 'main agreement' and a 'side agreement'. For the purposes of this decision, they will be regarded as one single agreement.
(4) Volare however discontinued its operations at Schönefeld in 2004.
(5) On 3 November 2003, FBS and V-Bird signed two agreements, the 'main agreement' and a 'side agreement'. For the purposes of this decision, they will be regarded as one single agreement.
(6) V-Bird however discontinued its operations at Schönefeld in 2004.
Source: Annexes 16 and 20 to Germany's comments of 4 October 2007 following the opening of the formal investigation procedure.

(51) Table 7 below illustrates the development in the traffic of the airlines concerned at Schönefeld between 2003 and 2010.

Table 7

Development of passenger numbers of the LCCs covered by the investigation over the period from 2003 to 2010

Development of passenger numbers of airlines with individual agreements 2003 to 2010								
	2003	2004	2005	2006	2007	2008	2009	2010
Germanwings	71 925	341 980	826 842	1 249 903	1 393 362	1 284 424	1 255 248	1 197 054
Ryanair	190 635	239 025	227 168	358 340	444 956	756 731	1 193 959	1 386 332
Norwegian Airshuttle AS	—	35 381	59 035	102 682	169 376	191 742	204 508	221 237

Development of passenger numbers of airlines with individual agreements 2003 to 2010								
	2003	2004	2005	2006	2007	2008	2009	2010
Aer Lingus	—	31 992	96 991	119 750	133 014	142 728	133 670	123 269
Icelandair	—	7 000	12 937	15 395	20 027	21 582	9 655	8 609
Volare	19 240	138 828	—	—	—	—	—	—
V-Bird	10 978	95 925	—	—	—	—	—	—
Total share of these airlines in the passenger traffic at Schönefeld	17 %	26 %	24 %	30 %	34 %	36 %	41 %	40 %

(52) Overall, the implementation of the LCC Strategy led to a very sharp increase in the traffic at Schönefeld. Indeed, as shown in Table 1, the number of passengers almost doubled between 2003 and 2004, going from 1,7 million to 3,3 million. It continued to rise sharply afterwards, reaching 5 million in 2005 and 6 million in 2006. Between 2003 and 2009, the number of passengers was multiplied by four.

3.4. **Terminal B and the leasing of premises to easyJet at that terminal**

(53) At Schönefeld, Terminal B and Terminal A are physically linked and form together the airport's North Terminal. In terms of capacity, Terminal B is one of the smallest terminal areas at Schönefeld. The majority of passengers and airlines are handled at Terminal A, which is much larger. The only functions performed at Terminal B are passenger and luggage check-in as well as passenger security checks. The other parts of the passenger handling process (waiting for departure, preparation for boarding and boarding itself) are carried out at Terminal A. Also, all passengers and luggage arrive at Terminal A.

(54) In anticipation of the significant additional traffic that was to be handled as a result of the 2003 easyJet agreement FBS concluded another agreement with this carrier in March 2004. Through this other agreement ('the 2004 easyJet tenancy agreement'), FBS granted the exclusive use of the check-in desks and crew rooms of Schönefeld's Terminal B to easyJet, for which the agreed rental payments were to be made separately from the airport charges. Moreover, the agreement provided easyJet with branding rights, allowing it to display its brand in certain areas of the terminal.

(55) From 2004 to 2007, easyJet rented approximately […] m^2 of office space and check-in desks, that is […] % of the total floor area of Terminal B. Since February 2008, easyJet has moved to separate offices and now only uses […] m^2 of office space at Terminal B.

(56) The open areas of Terminal B including halls and corridors and the coffee shop located there may be used by passengers other than those travelling with easyJet since there is no physical separation between Terminal A and Terminal B.

(57) Passenger handling at Terminal B differs from that at other terminals in respect of a technical feature of the baggage handling system's security equipment. The system used at Terminal B has an integrated X-ray machine for checking baggage. At Terminal A, the X-ray check is done by hand directly when passengers enter the check-in area. Germany considers that in terms of the technical effectiveness of the baggage handling system, the machine at Terminal B is equivalent to that of the baggage handling system at Terminal A.

3.5. **Measures subject to the formal investigation procedure**

(58) The measures subject to the formal investigation procedure are the following:

— the control and profit transfer agreement ('measure 1'), whose potential beneficiary was identified in the opening decision as being FBS,

— the fee arrangements laid down in the 2003 easyJet agreement ('measure 2'), whose potential beneficiary was identified as being easyJet,

— the conditions, including discounts to airport charges and various financial incentives, offered to various other LCCs through the agreements referred to in Table 6 above (hereafter referred to collectively as 'measure 3'), whose potential beneficiaries were identified as being Ryanair, Volare, Germanwings, V-Bird, Norwegian Air Shuttle, Aer Lingus and Icelandair,

— the 2004 easyJet tenancy agreement ('measure 4') whose potential beneficiary was identified as being easyJet.

4. GROUNDS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

4.1. Measure 1: the control and profit transfer agreement

(59) In the opening decision, the Commission noted that Schönefeld had been generating losses over a certain time and was still loss making. It also found that the offsetting of these losses by the profits generated by BFG had been instrumental in keeping FBS afloat. The Commission adopted the provisional conclusion that this cross-subsidisation, which stems from the control and profit transfer agreement, conferred an economic advantage on FBS, which that undertaking may not have obtained under normal market conditions. The Commission considered that that economic advantage was selective since it benefitted only one company, and that it was distorting competition and affecting trade between Member States.

(60) Moreover, the Commission adopted the provisional conclusion that this economic advantage would be financed through State resources and would be imputable to the State. As regards State resources, the Commission stressed that FBS was a public undertaking whose shareholders were the German federal government and two German regions (*Länder*), and that eight out of 12 members of its Supervisory Board were representatives of German public authorities. The Commission thus took the view that FBS's resources had to be seen as State resources. As regards the imputability of measure 1 to the State, the Commission emphasised in particular the nature of FBS' activities, noting that airports played a fundamental role in several public policy areas, and that the public authorities were rarely absent from the decision-making process when the manager of an airport took decisions which determine the long-term development of such infrastructure.

(61) The Commission thus found that the measure at issue might constitute State aid. It raised doubts as to the compatibility of this possible aid with the internal market, notably on the basis of the exemption provided for by Article 107(3)(c) of the TFEU. In that respect, the Commission noted that the measure at issue would be operating aid if it qualified as State aid, that it did not seem necessary and proportionate to the achievement of a public policy objective, and that it was not combined with a restructuring process. The Commission also raised doubts as to the compatibility of this measure under Article 106(2) of the TFEU, noting that the German authorities had not indicated that they had entrusted FBS with the operation of services of general economic interest. The Commission also referred to paragraphs 34 and 35 of the Community guidelines on financing of airports and start-up aid to airlines departing from regional airport ([20]) ('the Aviation Guidelines'), according to which the operation of an airport may be regarded as a service of general economic interest only in exceptional circumstances.

4.2. Measure 2: the 2003 easyJet agreement

(62) The Commission indicated in the opening decision that the airport charges paid by easyJet were substantially lower than the ones stemming from the applicable schedule of charges. The Commission further underlined that whereas the financial incentives awarded to other LCCs at Schönefeld are based on the applicable schedule of charges at each point in time, the 2003 easyJet agreement did not contain such a 'dynamic' reference to the schedule of charges. The Commission thus took the preliminary view that the 2003 easyJet agreement may confer a selective advantage on easyJet, which appeared to distort competition and affect trade between Member States.

(63) The Commission also provisionally concluded that this measure was financed through State resources and was imputable to the State, including on the basis of the arguments summarised above with respect to measure 1, which also apply to measure 2. In addition to these arguments, the Commission indicated that the conclusion of agreements such as the one entered into with easyJet and other LCCs had probably required the approval of the Supervisory Board, most members of which are representatives of German public authorities. The Commission also noted that the fee discount scheme put in place by FBS had to be approved by the Brandenburg Ministry for Urban Development, Housing and Transportation. Those were seen as a further indication that measure 2 (as well as measure 3) was imputable to the State. The Commission also noted that the Minister President of the Brandenburg region (*Land Brandenburg*) is a member of the Supervisory Board of FBS while being a superior to the Ministry of Urban Development, Housing and Transportation.

([20]) OJ C 312, 9.12.2005, p. 1.

(64) Moreover, the Commission expressed doubts as to the compatibility of this measure with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines.

4.3. **Measure 3: agreements with various other LCCs**

(65) The Commission noted in the opening decision that only certain carriers had benefitted from the discount scheme established at Schönefeld to foster traffic growth and underlined the lack of transparency of that discount scheme. The Commission pointed out that some of the agreements under investigation were entered into at a time when the applicable schedule of charges did not provide for discounts, and that the 2004 Schedule was designed to provide a legal basis *ex post* for these arrangements. Moreover, according to the Commission, the discount scheme embedded in the 2004 Schedule could not validly enter into force since the 2004 Schedule was only approved by the competent authority subject to notification of the discount arrangements to the Commission and no such notification took place ([21]). In particular, in light of these elements, the Commission took the preliminary view that the agreements in question may confer a selective advantage on the airlines concerned. Moreover, the Commission considered that this economic advantage appeared to distort competition and affect trade between Member States.

(66) The Commission brought forward the same arguments as for the 2003 easyJet agreement concerning the involvement of State resources in measure 3 and the imputability of this measure to the State.

(67) Finally, the Commission raised doubts as to the compatibility of the agreements at issue with the internal market, should they qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines.

4.4. **Measure 4: the 2004 easyJet tenancy agreement**

(68) Regarding the agreement between FBS and easyJet on the use of Terminal B at Schönefeld, the Commission mentioned the judgment by the Potsdam Regional Court *(Landgericht Potsdam)* ([22]) in the opening decision. According to this judgment, the Regional Court *(Landgericht)* had established that easyJet had been granted exclusive use of an entire terminal at Schönefeld airport (Terminal B) and that all other airlines which had previously used this terminal had had to leave. This terminal would have various features that would distinguish it from Schönefeld's other terminals. Those other terminals would not be equipped, for example, with a multi-layer luggage transportation system allowing baggage handling to be processed significantly faster than with their single-layer transportation systems.

(69) The Commission also mentioned that the Regional Court *(Landgericht)* had established that the granting of an exclusive right to easyJet was not based on any particular reason in particular in view of the fact that other airlines also serving Schönefeld handled just as many passengers and served as many routes at Schönefeld as easyJet. Besides, the Commission took the view that the […] EUR monthly rent charged by FBS to easyJet was likely to be below market price.

(70) The Commission thus took the preliminary view that the 2004 easyJet tenancy agreement may confer a selective advantage on easyJet. Moreover, the Commission considered that this economic advantage appeared to distort competition and affect trade between Member States.

(71) The Commission brought forward the same arguments as for the 2003 easyJet agreement concerning the involvement of State resources in measure 4 and the imputability of this measure to the State.

(72) Finally, the Commission raised doubts as to the compatibility of this measure with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines for start-up aid to airlines.

5. **COMMENTS FROM INTERESTED PARTIES**

5.1. **Air France**

(73) According to Air France, the reduced fees charged by FBS at Schönefeld are not a general measure, as in this case the necessary publicity did not take place. Furthermore, the length of the 2003 easyJet agreement (20 years) would be at odds with the Commission's decision-making practice. Long-term financial support could not be objectively justified and no incentive effect could be demonstrated.

([21]) To support that preliminary conclusion, the Commission referred to a judgment of 20 October 2004 delivered by the Potsdam Regional Court *(Landgericht Potsdam)* (Az. 2 O 70/04, page 5).

([22]) Judgment of 20 October 2004 delivered by the Potsdam Regional Court *(Landgericht Potsdam)* (Az. 2 O 70/04).

(74) As regards the use of Terminal B by easyJet, Air France took the view that this was the only terminal which was reserved exclusively for use by one airline. The 2004 easyJet tenancy agreement would not have been subject to any tendering procedure. easyJet would be the only airline able to offer a convenient and reliable baggage delivery service at Schönefeld.

5.2. **Lufthansa**

(75) Deutsche Lufthansa AG ('Lufthansa') pointed out in its comments that the business development of the three Berlin airports (Tegel, Schönefeld and Tempelhof) was extremely positive and the profit-sales ratio in the last three years had been around […] %. Lufthansa took the view that Schönefeld was subsidised by the airlines operating from Tegel.

5.3. **Germania**

(76) Germania Fluggesellschaft mbH ('Germania') took the view that the benefits provided at Schönefeld were financed by the passengers using Tegel as a result of the control and profit transfer agreement between FBS and BFG. According to Germania, the way in which the charges were calculated and the links between the companies operating Schönefeld and Tegel, which according to Germania amounts to collusion, results in cross-subsidisation. Germania considers that FBS did not act in relation to the offsetting of losses as a market economy operator would have done. Germania considers it unlikely that operations could cover FBS' costs at Schönefeld.

(77) Germania stated that airlines at Schönefeld would receive operating aid, as a result of individual agreements on airport charges. Germania added that the 2004 Schedule was neither approved nor published.

(78) Germania considered that the rent charged to easyJet for the use of Terminal B was not the normal market rate. This would amount to favourable treatment and State aid. The exclusive use of the entire terminal would allow easyJet to provide a more efficient service, whereas other airlines would not have that opportunity.

5.4. **DBA**

(79) According to DBA Luftfahrtgesellschaft ('DBA'), a low cost airline which was controlled by Air Berlin until it ceased operations in 2008, price competition on the Berlin air transport market would be particularly strong. The competitive environment would had sharpened further with the implementation of the LCC Strategy at Schönefeld, particularly with the entry of Germanwings and easyJet. This would put pressure on the airlines operating out of Tegel, especially the other low-cost airlines such as Air Berlin/DBA.

(80) DBA took the view that the rent paid by easyJet for Terminal B could not be regarded as the normal market rate. Moreover, the exclusive use of the baggage handling equipment in Terminal B would represent a favourable treatment and was relevant in terms of State aid legislation.

5.5. **Association of European Airlines**

(81) The Association of European Airlines ('AEA'), which represents the interests of European network carriers, considers that cross-subsidisation between Tegel and Schönefeld, and between the AEA members operating predominantly out of Tegel and the subsidised airlines competing against them and based at Schönefeld, constituted discrimination. According to the AEA, without this anti-competitive cross-subsidisation, the airlines operating from Schönefeld would not be economically viable and the charges at Tegel could be significantly lower. As Tegel was close to Schönefeld there would be no public need for the subsidies.

(82) The AEA argued in addition that the measures referred to in the opening decision were not objectively justifiable and the reductions and incentives were arbitrary and discriminatory and therefore incompatible with the Aviation Guidelines.

5.6. **Germanwings**

(83) Germanwings argued that FBS had behaved vis-à-vis it at all times like a private investor would have done. Germanwings pointed out that in spite of the phasing out of its discounts over time, it had extended its route network from Schönefeld. Germanwings stated that it it had been confident that the financial arrangements with FBS would comply with the law, especially as the three Berlin airports would form a unified airport system.

(84) Germanwings indicated that that it did not regard the airports of Hamburg, Dresden, Leipzig or Lübeck ([23]) as suitable competitive alternatives to Schönefeld because it mainly operates on German domestic routes. In view of the short flight times on domestic routes, the above-mentioned airports would be too far away from Berlin to be valid substitutes for Schönefeld.

(85) Germanwings further stated that the letting of Terminal B to easyJet was contrary to antitrust and State aid law because easyJet was not in any way involved in the financing of Terminal B and the letting took place without a corresponding tendering procedure. Moreover, the rent would be too low given that Terminal B, unlike Terminals A and C, had a modern baggage-handling facility.

5.7. **Lübeck Airport**

(86) Lübeck Airport indicated that it had not observed any negative impact of FBS's commercial strategy on the market.

5.8. **Ryanair**

(87) Ryanair took the view that with regard to short and medium-haul flights, there was no competition between the airports of Dresden, Hamburg and Lübeck on the one hand and Schönefeld on the other hand. The distance between Schönefeld and, respectively, Dresden, Hamburg and Lübeck would be too great for such competition to take place. An agreement regarding Schönefeld would thus have no effect on the other airports mentioned.

(88) Ryanair claims that the charges it pays at Schönefeld would be identical to those in the schedule of charges, which were in line with standard practice in the sector. The agreement with FBS would be similar to those with a number of private airports and would have been concluded in the same way by a market economy investor. Ryanair provided a study by a consultancy firm ([…]), which examined the contractual arrangements between Ryanair and FBS. Based on a comparative analysis of Schönefeld with Liverpool and Luton airports, the consultancy firm came to the conclusion that FBS acted vis-à-vis Ryanair in line with what would be expected from a private market economy operator.

(89) Ryanair also argued that Berlin, like London and Milan, was a major European economic and administrative centre and therefore an important European destination. Airlines operating in Berlin could therefore rely on a sufficient number of passengers willing to travel there.

5.9. **easyJet**

(90) With respect to the 2003 easyJet agreement, easyJet argued that a market economy operator acting in lieu of FBS would also have adopted this type of strategy. Indeed, the measure had brought FBS a substantial increase in passenger numbers and improved annual results.

(91) easyJet further stated that the existence of an individual fee arrangement between FBS and easyJet did not necessarily mean that discriminatory rebates had been granted. easyJet took the view that other airlines operating with the same growth targets would have been granted exactly the same treatment as easyJet. In any event, the rebates would be justified in light of the economies of scale provided by easyJet. easyJet accounted for a large proportion of all passengers at Schönefeld and would have made a disproportionate contribution to the improvement of FBS's results.

(92) Regarding its use of Terminal B, easyJet remarked that this was not a closed-off airport terminal. In fact the area rented by easyJet was a separate check-in area and associated office space at Schönefeld's North Terminal. Most of the area was publicly accessible and was also used by other carriers' passengers. At the time when the agreement with easyJet was signed there would have been sufficient spare capacity at Terminal B. Other airlines would therefore not have suffered from any disadvantage. easyJet stressed that since it began its operations at Schönefeld in 2004, it was the airline with by far the largest passenger throughput. Its exclusive use of certain parts of Terminal B would therefore be objectively justified.

(93) In addition, easyJet stated that the baggage handling system at Terminal B merely reflected usual technical standards and did not provide it with any advantage over other airlines.

(94) As regards the market value of Terminal B, easyJet stated that the rent it paid was higher than what would reflect the market value of Terminal B, given that it was insufficient to meet easyJet's capacity requirements. A rent comparison could only be made with similar areas at Schönefeld airport or, in relation to the offices, with office space in the immediate vicinity of the airport.

([23]) Those airports were mentioned in the opening decision as examples of airports potentially harmed by some of the measures under investigation (see for instance paragraph 151 of the opening decision).

5.10. **FBS**

(95) FBS referred to Berlin's particular situation, namely the airport system (originally made up of three airports) and the plans for the construction of the central Berlin Brandenburg airport (BER). In 2003, Schönefeld was operating at about half its traffic-handling capacity only and the airport was failing to cover its costs. According to FBS, the closure of Schönefeld would have led, inter alia, to the loss of Schönefeld's operating licence, which was essential for the running of BER.

(96) FBS pointed out that the allegedly competing airports mentioned by the Commission in the opening decision were not actually competing against the Berlin airports because they were too remote from it.

(97) With regard to the control and profit transfer agreement, FBS argued that in the business world, such agreements between companies within a group were commonplace. FBS took the view that a transfer of profits between the three Berlin airports was a purely internal matter for the undertaking. According to FBS, the airport system formed a single undertaking, pursuing common interests, and mutually bound by company law. The airport system would constitute a single geographic and product market. It would be normal market practice, and in the present case it would also make commercial sense.

(98) FBS disputed some of the provisional findings arrived at in the opening decision as regards the involvement of State resources. According to FBS, the fact that the schedule of charges had to be approved by public authorities was not sufficient to conclude that FBS's resources were under State control. According to FBS, the system of charge schedules applied equally to public and private shareholders at airports and took account of the public interest in the operation of air transport, in line with legal standards. Besides, according to FBS, the Minister President of Brandenburg *(Ministerpräsident des Landes Brandenburg)*, who sat in FBS' supervisory board, could not issue instructions to the ministry responsible for approving schedules of charges. Furthermore, when it comes to the determination of charges, the legal relationship between the airport and airlines was governed purely by private law and was binding under civil law, regardless of the approval by the relevant authority.

(99) FBS also stated that the schedule of charges would have the effect of general terms and conditions and would form an integral part of the contract between an airport and an airline, independently of any official approval. The schedule of charges, including the discount schemes, would have been offered to all airlines without distinction since 1 May 2004. Individual contractual arrangements would have only been meant to establish bilateral settlement terms and to set forth the objectives in detail. No special advantages would have been granted through those agreements.

(100) FBS argues that owing to the differing capacity utilisation patterns at Berlin's two main airports, with Tegel operating at close to full capacity without any significant expansion possibilities, as opposed to Schönefeld which had substantial free capacities and was in addition the future location of BER, FBS had to take measures in 2003 after the failed attempt to privatise the company, with a view to managing air transport in the Berlin conurbation on a sustainable, economically efficient basis.

(101) FBS claims in addition that it was necessary to maintain Schönefeld in operation for the future operation of BER in the interest of the FBS group. According to FBS, even a temporary closure of Schönefeld would have made it *de facto* impossible to achieve the long-term strategic goal of operating a centralised Berlin airport on the Schönefeld site.

(102) According to FBS, it was therefore necessary to bridge, in as economically efficient a manner as possible, Schönefeld's operation from 2003 until such time as BER would open. FBS added that in order to better harness Schönefeld's available capacities, it had launched the implementation of the LCC strategy proposed by a renowned consultancy firm. That LCC strategy would have been viewed as the economically most favourable option for FBS, since its proposed schedule of charges with embedded incentive schemes appeared likely to increase traffic at Schönefeld in the short term through targeted, degressive financial incentives.

(103) According to FBS, the LCC strategy had been highly successful. The number of passengers at Schönefeld soared, with no decrease in passenger volumes at the other Berlin airports. FBS emphasised that the increased traffic led to increased revenues and the economic difficulties were quickly overcome. Already in 2006 the operating results (EBIT) of FBS were positive for the first time. According to FBS this positive trend was set to continue, and this was particularly significant for the financing capability of the new airport.

(104) FBS argues that the strategic change initiated in 2003 had been essential for economic reasons and that FBS had behaved like a prudent market economy operator in taking that step. On the basis of the business plan underpinning the LCC Strategy, FBS would have been in a position to assume that the airport's operations would not continue to be unprofitable. FBS referred to the study that it commissioned to auditing firm […] ('the first expert study'), which was finalised in 2007 and which would have confirmed that from the perspective of a market economy operator, it was rational to implement the LCC Strategy and put in place a corresponding schedule of charges.

(105) FBS claims that the individual agreements concluded with certain LCCs before the date of application of the 2004 schedule of charges had been necessary for the implementation of the LCC strategy in order to offer airlines an incentive to base themselves at Schönefeld. FBS referred to a second study, commissioned to auditing firm […], which was also finalised in 2007. In the framework of that study, the consultancy analysed the profitability of the various agreements forming measure 3 and found that FBS behaved like a rational market economy operator when it concluded each of them. All these individual agreements with the different airlines would have been concluded on the basis of purely economic considerations with a view to improving FBS's economic situation in the short term.

(106) With regard to the 2003 easyJet agreement, FBS maintained that it had been an essential component of the implementation of the LCC strategy and that it did not involve State aid. The LCC strategy would have created an incentive for easyJet — one of the leading LCCs in Europe — to establish a base at Schönefeld.

(107) On the basis of the successful conclusion of the 2003 easyJet agreement easyJet (viewed as an 'anchor tenant'), FBS would have been able to attract other airlines to Schönefeld. The contractual relationship with easyJet (including the latter's obligation to base a minimum number of aircraft at Schönefeld) would have ensured a high level of planning certainty on both sides and would have significantly contributed to increasing Schönefeld's profitability.

(108) FBS argues that the 2003 easyJet agreement did not fundamentally deviate from the 2004 Schedule and entailed no undue granting of advantages. FBS also pointed out that the 2007 easyJet amending agreement explicitly referred to the 2006 Schedule, which was applicable at the time.

(109) FBS further stressed that the individual contracts with LCCs had been signed before the 2005 Aviation Guidelines were adopted and, at least for some agreements, even before the adoption of the *Charleroi* decision of the Commission ([24]).

(110) Besides, according to FBS, renting facilities at Terminal B to easyJet conferred no specific advantage on it. The allocation of a separate terminal to easyJet would have been done on economic and practical grounds because of that airline's high passenger throughput at Schönefeld. easyJet would have paid a normal market price, which would have been agreed on the basis of existing rents at Schönefeld. The allocation of terminal areas was common practice at German and international airports. Furthermore, there would be no advertising rights giving easyJet an advantage over other airlines, since easyJet would have been given branding rights in its check-in area only, in the same way as any other airline.

6. **COMMENTS FROM GERMANY**

6.1. **State influence**

(111) Germany argued that FBS's resources are not under State control, and that their use could not be attributed to the State. According to Germany, the incentives and rebates in question were not financed through public resources, but were the result of the business activities of an undertaking operating under private law.

(112) Germany argued in this context that FBS and its subsidiaries, though partially state-owned, were not integrated into the public administration, but had been explicitly made subject to the principles of competition and free market. Germany added that the public shareholders expected FBS to yield profits.

([24]) Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

6.2. **The control and profit transfer agreement (measure 1)**

(113) Germany took the view that the control and profit transfer agreement did not involve any cross-subsidisation giving rise to State aid.

(114) Germany pointed out that in public law terms, as well as under EU legislation ([25]), Berlin's airports were interlinked in such a way as to form a single 'airport system'. The purpose of such an airport system would be to treat different airports as a single airport with multiple runways. FBS and BFG would thus have to be viewed as a single undertaking. Germany stressed that the Commission itself had referred to a control and profit transfer agreement, a joint IT structure, centralised key functions and unified company plans as criteria for considering individual companies within a group as non-autonomous ([26]).

(115) According to Germany, the transfer of profits would not involve transferring the costs of Schönefeld to Tegel and Tempelhof. It would have no impact on airport charges at Tegel. The charges levied at all three airports would be based on the underlying costs at each site.

(116) Moreover, Germany pointed out that FBS, like any other private undertaking, was following a strategic plan with a view to making long-term profits. The main feature of this plan would be the creation of a single airport for Berlin on the Schönefeld site.

6.3. **Legal validity of the 2004 Schedule**

(117) According to Germany, the provisional conclusion reached by the Commission in the opening decision, according to which schedules of charges that have not been unconditionally approved by the competent regional authority are not valid ([27]), would not correctly reflect the legal situation prevailing in Germany. Approval by the competent authority of the region (*Land*) in accordance with Section 43a of the Air Traffic Licensing Order ([28]) would not be a pre-requisite for the legal validity of the schedule of charges. According to the established case-law of the Federal Court of Justice *(Bundesgerichtshof)* and the lower German courts, the airports' published schedules of charges would constitute 'standard terms of business' (*Allgemeine Geschäftsbedingungen*) as defined under German civil law ([29]). This means that the schedules of charges would play the role of contractual conditions offered by default to those airlines using the airport, whether or not the competent authority has approved the relevant schedule of charges ([30]).

(118) According to Germany, in the judgment of 20 October 2004, referred to by the Commission at paragraph 22 of the opening decision ([31]), the Potsdam Regional Court *(Landgericht Potsdam)*, misconstrued the circumstances. Moreover, Germany indicated that this judgment had been appealed. In that context, the Brandenburg Higher Regional Court *(Brandenburgisches Oberlandesgericht)* had issued judicial guidance (*'richterlicher Hinweis'*) according to which the judgment of the Potsdam Regional Court *(Landgericht Potsdam)* ought not to be upheld. Germany pointed out that subsequently, the complaint at the root of the proceedings had been withdrawn as part of a settlement between the parties to the dispute. The ruling by the Potsdam Regional Court *(Landgericht Potsdam)* would thus have never taken effect and would have been rendered inoperative by the withdrawal of the complaint, even though it was not explicitly annulled. Germany indicated that the Potsdam Regional Court *(Landgericht Potsdam)* would have subsequently revised its interpretation of the law and in a very similar subsequent case, dismissed a complaint about Schönefeld's schedule of charges.

6.4. **Individual agreements between FBS and certain airlines (measures 2 and 3)**

(119) Germany stated that the system of charges and individual contractual arrangements with various airlines at Schönefeld should be viewed in the context of the implementation of the LCC strategy.

([25]) See Article 2(h) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

([26]) Commission Decision of 2002/346/EC of 17 October 2001 on the State aid granted by Germany to Deckel Maho Seebach GmbH, recital 16 (C 27/2000) (OJ L 126, 13.5.2002, p. 14); Commission Decision 202/468/EC of 15 January 2002 on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG, Wismar, Mecklenburg-Western Pomerania, recital 67 (C 41/2001) (OJ L 165, 24.6.2002, p. 15).

([27]) See recital 65.

([28]) Section 43 in the old version of that order.

([29]) See Federal Court of Justice *(Bundesgerichtshof)*, judgment of 24 November 1977, file number: III ZR 27/76, *Zeitschrift für Luft- und Weltraumrecht* (Journal for Aviation and Space Law, ZLW) 1979, 140 (143); Berlin Regional Court *(Landgericht Berlin)*, judgment of 25 August 2000, file number: 96 O 197/99, Journal for Aviation and Space Law 2001, 475 (479); Federal Court of Justice *(Bundesgerichthof)* judgment of 23 January 1997, file number: III ZR 27/96, Journal for Aviation and Space Law 1997, 510.

([30]) See Federal Court of Justice *(Bundesgerichtshof)*, judgment of 24 November 1977, file number: ZR III 27/76, Journal of Aviation and Space Law 1979, 140 (148); Federal Administrative Court *(Bundesverwaltungsgericht)*, judgment of 8 July 1977, file number: VII C 72/74, Journal of Aviation and Space Law 1977, (49); Giemulla, in: Giemulla/Schmid (Publisher), Frankfurt Comments on air traffic law, Cologne 2007, Section 43 of the Air Traffic Licensing Regulations, paragraph 16.

([31]) See footnote 20 above.

(120) Germany argued that in that context, as Berlin's airports form a single 'airport system', they are not in competition against one another. Schönefeld would have played a complementary role, taking the pressure off Tegel so as to compensate for the latter's lack of capacity. The LCC strategy would have been a legitimate way of indirectly controlling traffic. It would not have brought about any reduction in passenger numbers at Tegel. Rather, passenger numbers at both airports would have risen considerably in the years preceding the opening of the formal investigation procedure. Besides, given the geographical distance involved, Berlin's airports would not be competing against Leipzig, Dresden, Hamburg or Lübeck, particularly with respect to cost sensitive LCC passengers.

(121) According to Germany, it would have been essential for the implementation of the LCC Strategy to get an airline as an anchor tenant to use Schönefeld as a hub. This would have been the first step towards establishing a large volume of traffic at that airport and would have made the latter more attractive to other airlines. It would have been impossible to attract such an anchor tenant if the same conditions had applied at Schönefeld as at Tegel, as shown by experiences with failed attempts to persuade airlines to move from Tegel to Schönefeld in the 1990s. To divert traffic and use Schönefeld's capacity efficiently, it was necessary to attract air traffic to that airport. Airlines were given an appropriate incentive through the implementation of the LCC strategy, which involved a schedule of charges with embedded volume discounts and other financial incentives.

(122) It would have been necessary to implement the LCC strategy through individual agreements with several airlines prior to the entry into force of the 2004 Schedule, so as to limit the losses incurred by Schönefeld as quickly as possible and to obtain a favourable position on the then fast-growing LCC market. In that respect, Germany pointed out that a formal amendment to an airport's schedule of charges entailed extensive administrative work and that it could therefore not have been completed quickly enough to start implementing the LCC Strategy as soon as possible, namely by the end of 2003.

(123) Germany argued that FBS had acted like a market economy operator in adopting the measures under assessment, since its business decisions were based on the LCC Strategy and the individual agreements had been concluded on the basis of a solid business plan developed by the consultant. Germany also referred to the assessments carried out by two auditing firms, […] and […] which were commissioned by FBS to assess whether the market economy operator principle had been complied with by the LCC Strategy and the individual agreements, and found that this was the case.

(124) According to Germany, the auditors concluded that, as regards both the management decision on a strategic reorientation and the introduction of a financial incentive scheme, it could be shown that a market economy operator in a comparable situation would have taken the same decisions. As regards the 2003 easyJet agreement and the individual agreements mentioned in Table 6 (except the one with V-Bird), […] calculated their net present values ('NPV'), which all turned out to be positive, and thus found that a market economy investor would have acted in exactly the same way as FBS. […] had nevertheless raised a doubt specifically concerning the duration of the 2003 easyJet agreement, as originally agreed by the parties. […] considered that given this duration (10 years with an option to extend it by a further 10 years), a rational market economy operator, when concluding this agreement, would have probably taken into account the impact of the contemplated agreement on the future operations of the BER airport, which was due to open before the expiry of the 2003 easyJet agreement ([32]). According to […], the existence of the 2003 easyJet agreement may have put pressure on the charges that FBS would have been able to negotiate with other carriers for their operations at BER, affecting the profitability of the future airport. However, Germany pointed out that this comment on the originally foreseen duration of the 2003 easyJet agreement was no longer relevant since the agreement in question had been modified by the 2007 easyJet amending agreement, which introduced a provision whereby the agreement would expire upon the opening of BER, then scheduled for 2011.

(125) Furthermore, in its observations on third parties' comments, Germany took the view that the statements by certain third parties on the 2004 schedule of charges and the individual agreements with LCCs were partially incorrect and taken out of context. Germany underlined that the schedule of charges at Schönefeld would have encouraged the

([32]) This impact had not been taken into account in the calculation that led to a positive NPV for the 2003 easyJet agreement over periods during which it was originally set to apply (10 years or 20 years, depending on whether easyJet would opt for a 10-year extension after the first 10 years).

uptake of new destinations and would be non-discriminatory since any airline which managed to attract a sufficient number of passengers to Schönefeld or which opened new routes or new frequencies from Schönefeld would benefit from the discounts.

6.5. **The 2004 easyJet tenancy agreement (measure 4)**

(126) Regarding the use of Terminal B by easyJet, Germany stressed that easyJet rents only part (24 %) of the total usable area of Terminal B. According to Germany, allocating the use of office space and check-in desks in a particular area of a terminal to a particular airline was common practice at international airports and did not constitute preferential treatment.

(127) As regards the exclusivity granted to easyJet, Germany stressed that in view of the large number of passengers to be carried by easyJet, it would not be possible on purely practical grounds for other airlines to use Terminal B, as the terminal's capacity would already have been exceeded by easyJet.

(128) Germany pointed out that other airlines were also granted exclusive use of specific areas of terminals at Schönefeld. In particular, the Lufthansa group (Condor, Sun-Express and Germanwings) had initially enjoyed sole use of Terminal D when it was built in 2004-2005.

(129) Germany also disputed the comments made by some third parties in relation to measure 4 and claimed that the rent data mentioned by some of these third parties was false and unsubstantiated. The rents paid by easyJet would be set by reference to the general standard rents for Schönefeld. Germany took the view that contrary to the claims of some interested parties, rents at Schönefeld could not be compared with those at Tegel.

(130) With regard to possible advantages for easyJet arising from the particular baggage handling equipment at Terminal B, Germany stated that this equipment was manufactured by the same company as that at Terminal A and was designed to comply with the same technical standards. However, as a result of the incorporation of X-ray technology, the equipment at Terminal B would be more complex and consequently would have a lower technical capacity, longer baggage delivery times and a greater tendency to break down. To that extent, the baggage handling facilities at Terminal B would actually place easyJet at a disadvantage compared with the airlines operating from Terminal A. Besides, because of the layout of the buildings, it would be possible to carry luggage to the waiting aircraft from Terminal A in considerably less time than from Terminal B. This would place easyJet at a further disadvantage compared to the airlines located at Terminal A.

(131) Germany claimed that contrary to the comments of some interested parties, the baggage handling facilities had not been refurbished for easyJet. The X-ray equipment would have been merely incorporated in the existing baggage handling system in 2003 for security reasons.

(132) Finally, Germany argued that the allocation of easyJet's passenger traffic to Terminal B had been based on non-discriminatory and appropriate criteria, though without a public procurement procedure, which for such cases is foreseen neither by German law nor by Union law. According to Germany, when easyJet decided to launch operations at Schönefeld in 2004, it was clear that this carrier would account for a very significant proportion of the airport's traffic from the outset. Indeed, already in 2004, easyJet generated 30 % of the airport's traffic. It was appropriate and rational to concentrate easyJet's operations at one single terminal, and Terminal B was found to be the most suitable location in view of its free capacity. According to Germany, access to Schönefeld was neither restricted nor prevented for other carriers, since the airport had sufficient capacity to host all potentially interested carriers.

7. **ASSESSMENT OF THE MEASURES**

(133) In accordance with Article 107(1) of the TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the internal market.

(134) The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) of the TFEU, each of the four following conditions need to be fulfilled. The financial support must:

— be granted by the State or through state resources,

— favour certain undertakings or the production of certain goods,

— distort or threaten to distort competition, and

— affect trade between Member States.

(135) In the present case, Germany has argued that FBS consistently acted as a prudent market economy operator guided by profitability goals would have done in a similar situation, such that the measures under assessment do not confer any economic advantage that the company would not have obtained under normal market conditions. If this is indeed the case, the measures implemented by FBS do not constitute State aid.

7.1. **Market economy operator principle – General considerations**

(136) In judging whether a particular agreement entered into by a public company with a third party with respect to the provision of a good or service confers an economic advantage to the third party in question, the Commission examines whether a prudent market economy operator, guided by profitability prospects, would have adopted similar measures in similar circumstances. The comparison between the conduct of a public company such as FBS and a hypothetical prudent market economy operator must be made by reference to the attitude which the market economy operator in question would have had at the time of the conclusion of the transaction in question, having regard to the available information and foreseeable developments at that time, and regardless of subsequent events.

(137) Thus the concept of foreseeable profitability for the public company concerned is of central importance. This does not necessarily mean that for a transaction to be free of State aid, the operator must enter into it only for the purposes of short-term profitability. However, the Court has also ruled that the conduct of a public investor may be compared with that of a private investor guided by prospects of profitability in the longer term ([33]).

(138) In the present case, the Commission has first of all assessed whether in the medium to long-term the LCC Strategy adopted as of 2003 by FBS appeared potentially capable of generating positive results, as well as whether it would have been rational, from a profitability perspective, to close down Schönefeld. The Commission has then analysed each measure covered by the formal investigation procedure in the light of the market economy operator principle, and has concluded that those measures did not constitute State aid.

7.2. **Preliminary analysis: assessment of FBS's strategic options from a market economy operator perspective**

(139) The economic context in which FBS was running Schönefeld between the early 1990s and 2003 has been described in sections 2, 3.1 and 3.2 above.

(140) As explained in those sections, FBS was also running the other Berlin airports, notably Tempelhof and Tegel. From the outset, Tempelhof was not considered as a suitable infrastructure for possible expansion, given its peculiarities and its inner-city location. Tegel was a modern airport which was overall more attractive to airlines and passengers than Schönefeld because it had more modern infrastructures and was closer to the city centre. In the 1990s, Tegel was already operating at close to full capacity and could not be significantly extended to avoid long-term capacity constraints. By contrast, Schönefeld was largely under-utilised and could be extended if necessary.

(141) A second important element of the context was the prospect of a single Berlin airport substituting for all existing Berlin airports and located at Schönefeld. As indicated in recital 14, the decision to carry out such a project was formalised in an agreement concluded by the German federal government and the Berlin and Brandenburg regions (*Länder Berlin und Brandenburg*) in May 1996.

(142) A third important element was the failed attempt to shift traffic from Tegel to Schönefeld in the 1990s, and the fact that after a period of stagnation in the second half of the 1990s, Schönefeld's traffic decreased steadily between 2000 and 2003, the year in which the public authorities acknowledge that they had failed to privatise the Berlin airports.

([33]) Case C-305/89 *Italy* v *Commission* (ALFA Romeo) [1991] ECR I-1603, paragraph 20. Case T-228/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraphs 250-270.

(143) In 2003, this led the public authorities and FBS to examine the different strategic options available to FBS. At that time, as indicated above, the objective of having a new and single airport in Berlin located at Schönefeld and incorporating part of Schönefeld's existing infrastructures was not questioned ([34]). The objective of FBS and the public authorities was thus to find an optimal strategy for Schönefeld for the period from 2003 up to the opening of BER, scheduled for 2011. In that context, as already indicated in recital 28, they commissioned a study from Roland Berger ('the consultant's study'), which recommended a strategy consisting in attracting LCCs to Schönefeld (LCC Strategy).

(144) In addition to the LCC Strategy (option 1), FBS still had the options of retaining the strategy implemented up to that time at Schönefeld (option 2), or temporarily closing Schönefeld until the new airport BER would open (option 3).

7.2.1. *Option 1 versus option 2*

(145) As will be shown below, it would have been rational, for a prudent market economy operator guided by medium to long-term profitability prospects and acting in lieu of FBS, to choose option 1 rather than option 2.

The consultant's study

(146) As explained at recitals 29 and 30, the consultant found that there was a potential for a significant expansion of air traffic in Berlin, for a variety of structural reasons and that compared with other capital city airports, Berlin still had considerable potential in 2003 for the establishment and growth of an LCC traffic.

(147) The consultant compared Berlin with other large cities from the viewpoint of LCC traffic. It found in particular that the number of frequencies per inhabitant in the metropolitan area was much lower in Berlin (0,011) than in other large European cities such as London (0,029), Brussels (0,040), Cologne (0,030) and Dublin (0,051). Also, the consultant found that the percentage of LCC frequencies out of all frequencies was much smaller in Berlin than in other major European cities and estimated on that basis that this percentage could be increased from […] % to at least […] % and possibly […] %.

(148) Further, on the basis of the experience of other major cities, the consultant estimated that if measures were taken to develop LCC traffic, two thirds of the additional LCC traffic would be made up of 'new passengers', namely passengers that would not travel by air from Berlin absent the additional LCC offer brought about by the measures in question ([35]). The consultant considered that part of the 'new passengers' would be 'diverted' from other modes of transport such as train or coach.

(149) On the basis of these analyses, the consultant forecasted that the potential for additional LCC traffic at Schönefeld amounted to a growth of between 600 000 and 900 000 additional passengers per year in the short term, namely from 2003 to 2005, and 300 000 additional passengers per year in the medium term, namely between 2005 and 2010. As a result of such steep growth, Schönefeld could be expected to handle between 3 million and 4,2 million passengers more than in 2003. This meant that FBS could hope to reach a level of traffic between 4,7 million and 5,9 million passengers in total in 2010 at Schönefeld ([36]).

(150) The consultant then assessed in detail the feasibility of a strategy focusing on LCC at Schönefeld, identifying the possible obstacles and factors able to mitigate the success of such a strategy.

(151) The consultant first analysed in detail the operational requirements of LCC, which differ from those of traditional carriers in several respects. Basing its analysis on the situation of a series of European airports hosting LCCs, it found that the main requirements to be expected from LCCs were:

— a short turnaround (25-30 minutes ([37])) – the most important requirement,

([34]) See footnote 8

([35]) The consultant pointed out that existing analyses relating to European and American markets showed that between 50 % and 80 % of the passengers carried by a new entrant LCC are 'new passengers', with the precise ratio depending on the route concerned.

([36]) In reality, FBS reached an even higher level (7,3 million passengers).

([37]) In 2003, that is before the launch of the LCC Strategy, 26 out of the 32 airlines operating at Schönefeld had a turnaround comprised between 45 and 90 minutes.

— a set of airport services reduced to the minimum in terms of passenger and baggage handling but a high level of quality for the requested services,

— 'walk boarding' ([38]) instead of the more expensive use of jet bridges, with a short distance between the terminal and the ramp,

— simple and functional infrastructures, with no expensive IT systems, intuitive and simple routings within the airport,

— sufficient land transport connections to the airport,

— exclusive allocation of gates, sales and check-in counters and provision of sufficient office spaces to LCCs.

(152) The consultant found that Schönefeld could broadly meet these requirements. In particular, short turnover times at Schönefeld were operationally possible. Moreover, the consultant emphasised the optimal connections to the airport by bus, train and road. The consultant nevertheless identified various relatively minor loopholes and weaknesses, relating to walk boarding, exclusive allocation of terminal areas and office spaces, intuitive routings within the airport and distances between terminals and ramps. Including in light of solutions found at other airports hosting LCCs, the consultant recommended a series of relatively limited adaptations that could be made to fully meet the requirements of LCCs that would be interesting in launching operations at Schönefeld. No large-scale investment in infrastructures or significant modifications to existing infrastructures were found necessary. In particular, as regards walk-boarding, it appeared that additional walk boarding gates could be added to the existing infrastructures within a few months and at low costs.

(153) In addition, the consultant assessed the competitive pressure that would be exerted on Schönefeld's LCC operations should FBS decide to develop them. The consultancy concluded that such constraint would be limited in particular because the closest international airports able to host significant LCC traffic, such as Dresden, Leipzig or Hannover, were too remote to exert substantial competitive pressure. According to the consultant, this confirmed that the large potential for LCC traffic in the Berlin area could indeed be realised at Schönefeld.

(154) Besides, the consultant identified and analysed the various options available to FBS to offer attractive airport charges to LCCs. This aspect was seen as a crucial element of a possible LCC Strategy. Indeed, it is undisputed that because of their own pricing policy vis-à-vis passengers, in the context of a strategy focusing on high volumes and attractive fares, LCCs demand low airport charges from airport managers. Moreover, since they are often 'point-to-point' rather than 'hub-and-spoke' carriers, they are able to open new routes, close existing ones, increase or decrease frequencies in a very flexible and dynamic fashion. This increases their ability to put pressure on airport managers to obtain the lowest airport charges possible. It was thus clear that no LCC Strategy would be successful without a more attractive system of airport charges at Schönefeld.

(155) The options assessed by the consultant were in particular (i) a general decrease in airport charges, (ii) volume based discounts, (iii) a charge differentiation based on the nature of the services provided or (iv) combinations of these various basic options. On the basis of a legal and economic review of these options, it recommended an approach consisting in combining a general reduction in airport charges, a volume-base discount to the passenger fee and a charge differentiation based on the level of services provided which would notably involve an exemption from parking fees for a turnaround of less than 30 minutes. Apart from the general reduction in airport charges, these measures were designed in particular with a view to benefitting only LCCs that were yet to come to Schönefeld, and not carriers already operating at the airport. The rationale of that strategy was to attract new carriers without negatively impacting the revenues generated by carriers already present at the airport.

([38]) Walk boarding requires passengers to go out of the terminal and walk along the ramp to board an aircraft.

(156) Finally, the consultant identified and analysed various possible measures intended to increase non-aviation revenues, stemming in particular from the activities of restaurants and food chains, car parks, shuttles, advertising spaces etc. These recommendations took into account the volume and type ([39]) of additional traffic expected from the proposed LCC Strategy.

(157) In its study, the consultant has followed a sound methodology and carried out a detailed assessment taking into account all relevant factors. In particular, the quantification of the potential for additional LCC traffic, which is based on the specific features of the Berlin area as well as the experience of large 'benchmark cities', is a robust analysis. It was also meaningful to assess the extent to which a LCC Strategy could be thwarted by competition exerted by other airports, and the conclusions drawn from that analysis are reasonable. The review of the requirements of LCCs potentially interested in launching operations at Schönefeld, as well as the identification of measures intended to enable Schönefeld fully satisfy those requirements was equally robust. This analysis was indeed systematic and very detailed. So is the analysis of the various possible airport charge schemes envisaged to attract LCCs.

(158) Moreover, it should be noted that in the context of its study, the consultant produced a number of documents for FBS, which together with documents produced by FBS itself (including an *ex ante* financial plan of 5 September 2003 with profitability forecasts) formed the basis of FBS' decision to implement the LCC Strategy. The following table provides an overview of the financial results expected in 2003 from the LCC Strategy and from a strategy whereby FBS would continue to focus on traditional traffic (referred to as 'option 1' in the second expert's study). As regards the LCC Strategy, two scenarios were envisaged, a 'pessimistic scenario' and a 'realistic scenario', which differ by the magnitude of the expected additional LCC traffic.

Table 8

Financial impact of option 1 and option 2 in terms of expected profit margins of Schönefeld over the period 2003-2012 (million euros)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Profit margin without LCC (option 1)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Profit margin with LCC (option 2 — 'pessimistic scenario')	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Profit margin with LCC (option 3 — 'realistic scenario')	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

Source: FBS's financial plan

(159) For both the 'realistic' and 'pessimistic' scenarios, the above estimates were derived from the additional LCC traffic forecasts drawn up by the consultant. These estimates tend to confirm that the LCC Strategy would lead to a more favourable financial situation than a counterfactual situation whereby FBS would continue to focus on traditional carriers. Indeed, FBS could expect to continue to generate significant losses until 2012 if it were to choose option

([39]) For instance, the consultant recommended the establishment of a fast food chain within the airport, which was expected to meet the requirements of a significant number of passengers travelling with LCCs.

1, with no significant decrease in these losses. By contrast, the LCC Strategy could be expected to lead to a significant and steady reduction in losses, with a return to profitability as of 2009 under the 'realistic scenario'.

(160) As a result, the conclusions of the the consultant's study together with FBS' own forecasts would have been seen by a prudent market economy operator guided by medium to long-term profitability prospects as a sound basis to take a strategic decision. It would thus have been rational for such a prudent market economy operator to choose option 1 rather than option 2.

The first expert's study

(161) As already indicated, FBS commissioned a study from an auditing firm […] ('the first expert') to stress test the material available to FBS when it decided to implement the LCC Strategy ('the first expert's study'). That study was finalised in 2007 and concluded that from a market economy operator perspective, it was rational to implement the LCC Strategy and put in place a corresponding schedule of charges, namely the 2004 Schedule. The expert used as a basis of its analysis a series of documents dating from 2003, including in particular a financing plan prepared by FBS for the period from 2004 to 2012, and various documents drawn up by the consultant in the framework of the study carried out for FBS.

(162) The first expert's conclusions are in line with those reached by the consultant study. Even though the first expert's study is not essential to the Commission's assessment, it is an additional element confirming that it would have been rational for a prudent market economy operator to choose option 1 rather than option 2.

Conclusion

(163) In view of the above, it is concluded that it would have been rational, for a prudent market economy operator guided by medium to long-term profitability prospects and acting in lieu of FBS, to choose option 1 rather than option 2 in 2003.

7.2.2. *Option 3 versus options 1 and 2*

(164) As already indicated, one possible option for FBS would have been to close Schönefeld down (option 3), at least until the opening of BER. FBS was in a position to take such decision not only in 2003 (the year in which FBS decided to launch the LCC Strategy) but also earlier and subsequently. From the available documents, it appears that FBS has never seriously considered such option, at least not since the conclusion of the control and profit transfer agreement in 1992. Moreover, the benefits of such option were not analysed in the consultant's study.

(165) In assessing whether this option would have been found more beneficial than options 1 and 2 by a prudent market economy operator guided by profitability prospects, it is essential to take the BER project into account. As indicated at recital 14, the planning for the creation of the single Berlin airport started in January 1992 and on 20 June 1993 it was announced that the area south of Schönefeld, adjacent to the existing airport, was one of the possible locations for the new airport infrastructures of BER. Therefore, already in 1992-1993, the fact that Schönefeld could host the new single Berlin airport was more than a remote possibility. This possibility became a certainty with the agreement signed on 28 May 1996 by the Federal Government and the Berlin and Brandenburg regions (*Länder*), which has never been called into question since then.

(166) Against this backdrop, the closure of Schönefeld would have entailed a series of major inconveniences for a prudent market economy operator acting in lieu of FBS. It should first be recalled that, while Templehof was gradually closing its operations, Tegel had increasingly been operating at the limits of its capacity since the 1990s and as shown by Table 1, its traffic has been growing significantly since then ([40]). It could not, in any event, handle the whole traffic of the Berlin area. Schönefeld was necessary to ensure that Berlin would have sufficient airport capacities, and its closure would have led to a significant shortage. Indeed, between 1991 and 2003, Schönefeld was accounting for between 13 % and 20 % of Berlin's total air passenger traffic. Schönefeld was particularly needed at peak periods, in particular in periods when the activity of charter services from Berlin is intense. Schönefeld was also crucial for cargo flights because unlike Tegel, it has a 24-hour operating license and can thus be used for night flights. Besides, Tegel and Tempelhof could not be extended significantly to overcome capacity limitations in the long term ([41]).

([40]) At that time, Tempelhof's traffic was very modest compared to the traffic at the two other Berlin airports.
([41]) See recitals 9 and 14.

(167) In addition, Schönefeld itself had significant free capacities, as a result of which it could handle additional traffic. As illustrated by Table 1, the presence of Schönefeld enabled Berlin's traffic to grow significantly over time, in particular as of the launch of the LCC Strategy in 2003. Indeed, between 2003 and 2006, Berlin's traffic increased from 13,3 million to 18,4 million passengers and more than 80 % of that growth was absorbed by Schönefeld. Therefore, the closure of Schönefeld would have deprived Berlin not only from a significant part of its existing traffic but also from a significant potential to increase that traffic.

(168) The prospect that the closure of an airport may give rise to a capacity shortage in the area where the airport is located and may limit the potential to increase air traffic in this area would not necessarily by itself deter a prudent market economy operator guided by profitability rather than public policy objectives from implementing that closure. However, in this case, the closure of Schönefeld and its impact on the overall capacity of airport infrastructures in the Berlin area, and consequently, on the overall air traffic in this area would have had a serious impact on the traffic of BER, as the future single airport in the Berlin area, at the outset of its operations. If Schönefeld had been closed down, BER would have started its operations in far worse business conditions than if Schönefeld had been kept in operation, that is, with a much lower traffic. This factor would have deterred a prudent market economy operator, acting in lieu of FBS, from closing Schönefeld down because of its impact on the profitability of the company.

(169) Moreover, if Schönefeld had been closed down before the opening of BER, it would have been necessary for FBS to create the entirety of BER's initial traffic by convincing airlines operating from Tegel to move their operations to the new airport (instead of merely discontinuing them) and by convincing airlines not operating from Berlin to launch operations there. This would have been a far less favourable situation than one where Schönefeld would have still been operating when BER would open. Indeed, in this latter scenario, a significant part of the initial traffic of the new airport would be 'naturally' created by the airlines already operating at Schönefeld, including those attracted since 2003 through the LCC Strategy.

(170) In addition, the closure of Schönefeld would have brought about a far-reaching administrative impact on the BER project. Indeed, the closure of the airport would have triggered the cancellation of its operating license. Therefore, an entirely new planning procedure and a fully new operating permit would have been necessary for the new airport. By contrast, should Schönefeld continue to operate, the opening of BER would only require an extension of Schönefeld's operating permit, which would entail a far lighter administrative process, involving much lower financial expenses, less time and a far lower degree of uncertainty as to the outcome of the process. In particular, should a fully new planning procedure and operating permits be required, significant uncertainties would affect the outcome of the assessment of the environmental impact of the project. Furthermore, it is common ground that a brand new airport project is much more delicate than a mere extension of infrastructures already in operation from a public acceptance point of view.

(171) The cessation of operations at Schönefeld would have also resulted in costs for laying off workforce and the need to hire, recruit and train new staff at a later stage, when BER would open. This would have given rise to additional costs and operational difficulties compared to a scenario where staff working at Schönefeld would have been readily available to work at the new airport as of its opening.

(172) The above aspects are very difficult to quantify in particular because they affect the economic situation of a future airport in the short, medium and long-term. However, it is clear that they would severely impact the economic conditions under which BER would open and operate, and even the viability of the project, which is of major strategic importance for FBS. Therefore, even on a qualitative basis, these inconveniences ought to be regarded as sufficiently serious to outweigh any benefits that could be expected from a closure of Schönefeld in the form of fixed cost savings, notably in a situation in which it could be expected that a strategy aimed at increasing LCC traffic in Schönefeld would have led to positive financial results.

7.2.3. *Conclusion of the preliminary analysis*

(173) In view of the foregoing, it is concluded that from a prudent market economy operator perspective, it would not have been rational to close Schönefeld down at any point in time between 1992 and the opening of BER. Furthermore, among the three strategic options available in 2003, a prudent market economy operator guided by profitability prospects would have chosen option 1, namely the LCC Strategy, rather than options 2 or 3. As part of this strategy, it would have offered attractive airport charges (and/or financial incentives mitigating the costs of airport charges) to LCCs in order to attract them to Schönefeld.

7.3. **Assessment of the control and profit transfer agreement (measure 1)**

(174) In the opening decision, the Commission doubted that FBS had acted like a prudent market economy operator when it offset the losses generated by Schönefeld at the level of the FBS group with profits from operations at Tegel and Tempelhof given the persisting losses generated by Schönefeld ([42]).

(175) The control and profit transfer agreement *(Beherrschungs- und Gewinnabführungsvertrag)* was signed on 6 August 1992, well before the '*Aéroports de Paris*' judgment ([43]) rendered on 12 December 2000. The German authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid, and accordingly such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question on the basis of State aid rules such financing measures granted ([44]) before the '*Aéroports de Paris*' ([45]) judgment, i.e. 12 December 2000. Therefore, the control and profit transfer agreement could potentially constitute State aid only as of this date. The temporal scope of the Commission's investigation with respect to this measure is thus limited to the period running from 12 December 2000 until the date of the opening of the formal investigation procedure.

(176) As stressed by Germany, concluding control and profit transfer agreements within groups is a standard business practice, in particular for considerations relating to corporate tax law. Moreover, the 'compensation' of losses and profits generated by various companies within a group is also usual, and can take the form of a transfer agreement as well as mere payments of dividends by subsidiaries to their parent companies. The mere fact that the FBS group put in place a control and profit transfer agreement in 1992 and has maintained it since then cannot as such give rise to State aid.

(177) As already stated by the Commission concerning the market economy operator test, 'a wide margin of judgement must come into entrepreneurial investment decisions. The principles [of the market economy operator test] have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid. This approach will also have to be applied to any cross-subsidisation by a profitable part of a public group of undertakings of an unprofitable part. This happens in private undertakings when either the undertaking in question has a strategic plan with good hopes of long-term gain, or that the cross-subsidy has a net benefit to the group as a whole. In cases where there is cross-subsidisation in public holding companies the Commission will take account of similar strategic goals.' ([46])

(178) Therefore, in this case, the cross-subsidisation cannot be deemed to confer an economic advantage on Schönefeld if it is part of a strategic plan with long-term gains or if it is overall beneficial for the FBS group.

(179) For all the reasons mentioned in section 7.2.2, it was clear at least since 1992, and therefore well before the '*Aéroports de Paris*' judgment ([47]), that it was rational to maintain Schönefeld in operation instead of closing it down even if it generated losses for many years. Indeed, Schönefeld's closure would have caused serious economic harm to BER airport (which as the future single Berlin airport was expected to generate profits at least in the long term, and even put the viability of this major strategic project into question. Indeed, the decision to build a sole airport in Berlin was not only driven by land planning or environmental considerations, but also with the view to absorbing potential increase in traffic and increasing revenues. As recognised by the 2009 Commission decision approving the aid to the financing of the BER airport, the success of the project relied on the expected traffic growth in Berlin ([48]) in a single airport ([49]). In order to maintain Schönefeld in operation, possibly with a view to transforming Schönefeld into a profitable airport (first by inviting airlines to relocate at Schönefeld and later by

([42]) Opening decision, paragraphs 69 to 71.
([43]) 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.
([44]) The relevant criterion for the date at which a possible aid measure is deemed to have been granted is the date of the legally binding act by which public authorities undertake to award the measure at stake to its beneficiary. See Case T-358/94 *Compagnie Nationale Air France* v *Commission* [1996] ECR II-2109, paragraph 79, Case T-109/01 *Fleuren Compost BV* v *Commission* [2004] ECR II-127, paragraph 74, and Joined Cases T-362/05 and T-363/05 *Nuova Agricast* v *Commission* [2008] ECR II-297, paragraph 80, and Joined Cases T-427/04 and T-17/05 *France and France Télécom* v *Commission* [2009] ECR II-4315, paragraph 321.
([45]) Decision C 38/2008 of 3 October 2012 on Munich airport Terminal 2, not yet published in the Official Journal, recitals 74 to 81.
([46]) Commission communication to the Member States - Application of Articles 92 and 93 of the ECC Treaty and of Article 5 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ C 307, 13.11.93, p. 3) to public undertakings in the manufacturing sector, recital 29.
([47]) See footnote 42.
([48]) See in particular recital 82 of the decision in case NN 25/09 (ex N 167/09).
([49]) See in particular recital 78 of the the decision in case NN 25/09 (ex N 167/09).

implementing the LCC strategy), it was necessary to ensure its economic viability by using part of the profits generated by Tegel and Tempelhof to finance it. Therefore, the cross-subsidisation occurring in this case is part of '*a strategic plan with good hopes of long-term gain*', and in any event, it is beneficial to the FBS group as a whole in the long run compared to a counterfactual situation where Schönefeld would be closed down. These long-term benefits – the successful opening and profitable operation of a new single airport for the Berlin agglomeration (plus the expected profits from the operations of Schönefeld after some years of implementing the LCC strategy) – could be expected by FBS to exceed the losses accumulated by Schönefeld before the opening of BER.

(180) Therefore, by concluding and maintaining in place the control and profit transfer agreement and maintaining Schönefeld in operation, the FBS group has not conferred any economic advantage on Schönefeld ([50]). The conclusion and implementation of the control and profit transfer agreement since 12 December 2000 thus does not involve State aid.

7.4. **Agreements between FBS and various airlines: preliminary remarks**

(181) Before the agreements between FBS and various airlines are assessed, it is useful to make various preliminary remarks, notably in light of the judgment of the General Court in the *Charleroi* case (the '*Charleroi* judgment') ([51]), which was issued after the formal investigation procedure was opened in the present case.

7.4.1. *Application of the market economy operator principle to the agreements between FBS and various airlines*

(182) Certain third parties argued in substance that the agreements at issue confer an economic advantage on the airlines concerned because the conditions offered through these agreements would deviate from the general rules applicable to airport charges at Schönefeld or because the same conditions are not offered equally to all airlines.

(183) The crucial question raised by these arguments is the following. If there is a system of published charges at a given airport run by a public company and if the airport manager offers discounts to these charges or financial incentives having the same effect as such discounts ([52]), do such discounts and incentives ([53]) confer by themselves and in all circumstances an economic advantage on the airlines concerned?

(184) The answer to this question is no. Indeed, in the *Charleroi* judgment which concerned in particular a discount offered by the Walloon region to an airline at an airport for which the region was responsible for setting airport charges, the General Court stated: *'The mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator.'* ([54]) It follows from this statement that discounts to airport charges (or financial incentives which reduce the net financial flows from the airlines to the airport manager) do not automatically confer an economic advantage. In order to determine whether they do so, it is necessary to assess whether a prudent market economy operator guided by profitability prospects would have accepted to grant similar discounts and incentives to the particular carrier concerned ([55]).

(185) For a prudent market economy operator running an airport, there can be many reasons for not offering the same conditions to all airlines. In particular, it can be rational to offer specific financial incentives (including in the form

([50]) Assuming that Schönefeld airport can be viewed as an undertaking within the FBS group, even if it is not a distinct legal entity, and could receive State aid 'from' FBS.

([51]) Case T-196/04 *Ryanair Ltd* v *Commission* [2008] ECR II-3643.

([52]) Such as payments or charge reductions available upon the opening of a new route or frequency, or marketing grants intended to cover part of the marketing costs incurred by the airline, for example when opening a new route.

([53]) These incentives are proposed through bilateral agreements or through financial incentive schemes based on parameters such as the number of passengers, and laid down in a published act such as a schedule of charges.

([54]) *Charleroi* judgment, paragraph 101.

([55]) The Commission took a similar approach in its Decision C (2011) 3497 final of 24 May 2011 to open the formal investigation procedure in case SA.31662 — C/2011 (ex NN/2011) — Romania — Timisoara International Airport — Wizz Air (OJ C 270, 13.11.2011, p. 11). See also recital 129, where the Commission held that 'In accordance with settled case-law, it is necessary to assess whether, in similar circumstances, a private airport operator would have entered into same or similar commercial arrangements as Timisoara airport, having regard in particular to the information available and foreseeable developments at the date of those contributions'.

of marketing grants) and specific discounts to the published airport charges to airlines that bring a high number of passengers to the airport. These favourable conditions can be objectively justified by the expected additional traffic, in view of the non-aeronautical revenues brought about by that additional traffic ([56]) and also because, even if the margin per passenger generated by the airport charges paid by the airline is reduced by the discounts and financial incentives, this margin may be significant in absolute terms in light of the numbers of passengers at stake.

(186) Numerous factors can be taken into account by a prudent market economy operator running an airport to determine the conditions offered to airlines, not only the expected additional traffic but also the moment in which the agreement with the airline is negotiated (and the situation of the airport in that period, in particular in terms of capacity utilisation), the routes on which the airline considers operating ([57]), the airline's operational requirements at the airport, the types of services required from the airport and their characteristics, the pressure exerted by airlines during negotiations ([58]) etc.

(187) For a prudent market economy operator running an airport, it can thus be justified to offer different conditions to different airlines in terms of airport charges and financial incentives, whether through bilateral agreements or through discount and financial incentive schemes embedded in the acts setting the charges ([59]). For the purposes of assessing whether such discounts and financial incentives confer an economic advantage, it must be determined whether, when the airport manager took the decision to offer them, it could reasonably expect this decision to be profitable, or in other words, to lead to a higher profit (or lower losses) than would be achieved in the counterfactual situation.

(188) Furthermore, contrary to what certain third parties have suggested, when it comes to conditions offered by airport managers to airlines through bilateral agreements (for instance specific grants for the opening of new routes) and not resulting from general discount or financial incentive schemes embedded in a published schedule of charges, a prudent market economy operator has no reason to ensure that such conditions are based on a set of general and transparent criteria applicable to all carriers. When negotiating a bilateral arrangement with an airline, a prudent market economy operator is expected to take into account all the relevant features of the airline's proposed services rather than a set of pre-determined transparent criteria which may constrain its margin of negotiation. Therefore, the comments made by certain third parties as regards the alleged lack of transparency of the discount and financial incentives offered by FBS in this case are irrelevant in the context of the application of the market economy operator principle.

7.4.2. *Lawfulness of the 2004 Schedule and of the bilateral agreements between FBS and various airlines under national law*

(189) The question of whether the 2004 Schedule lawfully entered into force under national law, while important under German law, is irrelevant in the context of the application of the market economy operator principle. Indeed, the fact that a discount to generally applicable airport charges, or a financial incentive with an equivalent effect, is granted via a bilateral agreement rather than through a general scheme embedded in a published schedule of charges is irrelevant. As a matter of fact, a prudent market economy operator could decide to grant discounts or incentives through either type of mechanism and the profitability of such decisions would not depend on the chosen mechanism. Therefore, the question of whether the conditions offered by FBS to certain airlines resulted from the mere implementation of a valid applicable schedule of charges or from bilateral arrangements is irrelevant.

([56]) This refers to revenues flowing to the airport manager as a result of the additional activity of car parks, shops, restaurants etc. generated by the additional passengers.

([57]) Different routes can bring different profiles of passengers in particular in terms of purchasing behaviour at airports and related potential to generate non-aeronautical revenues. Therefore, two different sets of routes can have different impacts in terms of revenues accruing to the airport manager.

([58]) Since they aim to be able to offer as low fares as possible, LCCs tend to exert more pressure than traditional carriers on airport managers to obtain low airport charges.

([59]) Such as the passenger volume discount, frequency incentive and destination incentive schemes embedded in the 2004 Schedule.

(190) Besides, the question of whether FBS had the right, under national law, to enter into bilateral agreements that would set conditions deviating from the applicable schedule of charges ([60]) is equally irrelevant. As stated by the General Court in the *Charleroi* judgment: '[…] whether the conduct of an authority granting aid complies with national law is not a factor which should be taken into account in order to decide whether that authority acted in accordance with the private investor principle or granted an economic advantage in contravention of Article 87(1) EC.' ([61])

7.4.3. *Effects of conditions offered to airlines operating at Tegel*

(191) In their comments, certain interested parties have argued that airlines operating at Schönefeld would be subsidised by airlines operating at Tegel through low airport charges and other favourable conditions. This alleged cross-subsidisation would come from the fact that FBS would compensate the effect of low charges at Schönefeld through high charges at Tegel.

(192) These comments suggest that for the conditions offered at Schönefeld to be free of State aid, they should equate to those offered at Tegel.

(193) However, this is not the case. First, Tegel and Schönefeld differ in many respects other than airport charges, in particular concerning the nature of the airport infrastructures and the distance to the city centre. Therefore, they are not perfect substitutes for one another. This is evidenced by the failure to persuade airlines to move from Tegel to Schönefeld before the implementation of the LCC Strategy.

(194) Moreover, airlines are not 'forced' to operate from Tegel or from Schönefeld. In addition to these options, airlines have two other options: operate neither from Tegel nor from Schönefeld or just operate with lower capacity at those airports (and use their aircraft and crew on routes other than from Berlin as LCCs have proven to be able to quickly adjust their capacity to changing market circumstances). Therefore, any attempt by FBS at imposing on an airline considering operating from Schönefeld the same conditions as at Tegel may simply lead that airline to abandon its plans and to decide to operate neither from Schönefeld nor from Tegel or downsize operations from Berlin.

(195) Therefore, there would be no reason for a prudent market economy operator to take into consideration the conditions prevailing at Tegel when determining the level of charges at Schönefeld. Following the same line of reasoning and taking into account the limited economic scope, the downsizing and the eventual cessation of operations of Tempelhof, there would be no reason for a prudent market economy operator to take into consideration the conditions prevailing at Tempelhof when determining the level of charges at Schönefeld.

7.4.4. *Application of the market economy operator principle to the airport/airlines agreements*

(196) The Commission notes that in the present case, the agreements at issue have to be seen as part of the implementation of the LCC Strategy, which was expected to lead to positive results for Schönefeld in the medium/long term.

(197) In order to assess whether any of the agreements at issue confers an economic advantage, it is necessary to analyse whether, at the date when the agreement was concluded, a prudent market economy operator would have expected this agreement to lead to a higher profit than would have been achieved otherwise. This higher profit is to be measured by the difference between the incremental revenues expected to be generated by the contract (that is, the difference between the revenues that would be achieved if the contract were concluded and the revenues that would be achieved absent the contract) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the contract were concluded and the costs that would be incurred absent the contract), the resulting cash flows being discounted with an appropriate discount rate.

(198) Furthermore, in this analysis, all the relevant incremental revenues and costs associated with the transaction must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) must not be assessed separately. Indeed, as stated in the *Charleroi* judgment: 'It is (…) necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to

([60]) This issue arises in particular in relation to the 2003 easyJet agreement, which was concluded when the 2003 Schedule was applicable and clearly deviated from its terms (see recital 42). Moreover, the first agreement with Ryanair, the first agreement with Germanwings and the agreements with Volare and V-Bird were concluded when the 2003 Schedule was applicable and foresaw the payment of grants, which were not provided for in the schedule (see recital 48). Similarly, the agreements with Aer Lingus, Icelandair and Norwegian Air Shuttle were concluded when the 2004 Schedule was applicable and foresaw the payment by FBS of grants to cover part of the marketing costs of the carriers concerned without this being provided for in the schedule (see recital 49).

([61]) *Charleroi* judgment, paragraph 98.

determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context […].' ([62])

(199) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred absent the agreement as well as the costs of the marketing grants and other financial incentives.

7.5. **Assessment of the 2003 easyJet agreement (measure 2)**

(200) The 2003 easyJet agreement was concluded before the entry into force of the 2004 Schedule and initially foreseen for a period of 10 years with an option to extend it by a further 10 years.

(201) Germany has submitted evidence exhibiting the *ex ante* financial prospects of the project, based in particular on the FBS forecasts of 17 December 2003, i.e. before the date of the agreement signed between FBS and easyJet on 19 December 2003, see recital 42). FBS foresaw that the agreement would bring about a positive incremental operational profit for each year of the period 2004-2012 and that the operational break-even would be reached in 2010:

Table 9

FBS forecasts as regards the incremental profits generated by the 2003 easyJet agreement (million euros)

	2004	2005	2006	2007	2008	2009	2010	2011	2012
Operating profit without easyJet	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Additional operating profit with easyJet	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Consolidated operating profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

(202) The Commission considers that these forecasts and their underpinning assumptions were a sound basis to sign the 2003 easyJet agreement.

(203) The traffic forecasts expected from the 2003 easyJet agreement were calculated on the basis of the number of aircraft to be based by easyJet at Schönefeld over time, as set out in the agreement, and a load factor of […] %, which appears plausible in view of the usual load factors achieved by LCCs.

(204) The business plan took into account all relevant categories of incremental cost and incremental revenue forecasts, including aeronautical and non-aeronautical categories of revenues and the costs of the financial incentives offered to easyJet. These forecasts took into account, in particular, the additional traffic and flight movements expected from the agreement and the terms of the agreement.

(205) To stress test this strategic decision, FBS eventually commissioned auditing firm […] ('the second expert') to assess whether a prudent market economy operator, guided by profitability prospects, would have signed that contract in 2003. That assessment ('the second expert study') also covered agreements signed with other airlines and was finalised in 2007.

(206) The second expert based its analysis of the 2003 easyJet agreement on FBS' forecasts already mentioned in recital 158.

(207) The second expert verified in detail the soundness of FBS' cost and revenue forecasts and made a few adjustments to these assumptions when it considered that FBS' assumptions had not been adequate, on the basis of the information available when the agreement was concluded.

([62]) *Charleroi* judgment, paragraph 59.

(208) For example, the second expert made an adjustment in the business plan to incorporate an investment cost of EUR […] million in order to create additional gates for easyJet at Terminal B. Moreover, it made adjustments to reflect the fact that FBS's forecasts were based on a version of the draft agreement with easyJet, which exhibited some differences with the signed agreement. The second expert thus made adjustments in the business plan in order to align it in full with the terms of the signed agreement.

(209) Besides, the second expert calculated the net present value (NPV) of the easyJet 2003 agreement for the period 2004-2007 at 30 December 2003 value, on the basis of FBS's forecasts, adjusted as explained above. The NPV of a time series of expected cash flows, both incoming and outgoing, is defined as the discounted sum of the individual expected cash flows over the relevant period. The NPV is a standard tool used by undertakings to assess the profitability of a project. The second expert calculated the aggregated NPV of the 2003 easyJet agreement at the end of each year until the expiry of the agreement. To that end, the second expert calculated the discount rate to be applied for the discounting of cash flows, on the basis of a classical capital asset pricing method ([63]), so that the discount rate truly reflects FBS' costs of capital in 2003.

(210) The resulting NPVs are displayed in the following table:

Table 10

NPV of the cash flows expected from the 2003 easyJet agreement

Aggregated NPV at year's end (at 30 December 2003 value):	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
NPV (EUR million)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

Source: Second expert's study.

(211) These NPVs are all positive and confirm that it was rational to conclude the 2003 easyJet agreement.

(212) The second expert noted in its report that the impact of the agreement as originally signed, that is for a period of 10 years with an option to extend it for a further 10 years, on the BER airport had not been taken into consideration by FBS in 2003, when the opportunity to sign the agreement was assessed. As noted by the second expert, the 2003 easyJet agreement in its initial terms was set to be still applicable for several years after the opening of BER, scheduled for 2011. Moreover, that agreement foresaw conditions which were apparently more favourable than those envisaged in the general charges planned for BER as of its opening. According to the second expert, there could therefore be a risk that the existence of the 2003 easyJet agreement would result in other carriers exerting significant pressure on FBS in order to reduce the difference between the general charges prevailing at BER and those agreed with easyJet. However, in 2003 this was a very remote risk which could not be foreseen with any degree of likelihood let alone be quantified, notably in the light of the fast changing market developments of the LCC business. As a matter of fact this risk never became concrete. Indeed, the 2007 easyJet amending agreement, which was set to expire upon the opening of BER, replaced the 2003 easyJet agreement.

(213) Therefore, the second expert Study confirms that a prudent market economy operator would have concluded the 2003 easyJet agreement.

(214) To conclude, the 2003 easyJet agreement does not involve State aid.

([63]) Under the Capital Asset Pricing Model, the formula to determine the discount rate 'ra' is the following:
$ra = rrf + Ba\ (rm - rrf)$
where:
rrf = the rate of return for a risk-free security
rm = the broad market's expected rate of return
Ba = beta of the asset.

7.6. **Assessment of the agreements with other airlines (measure 3)**

(215) FBS' decisions to conclude the agreements with Ryanair, Germanwings, Volare, Icelandair, Norwegian Air Shuttle and Aer Lingus were also based on *ex ante* forecasts of incremental traffic, costs and revenues, which revealed that it would be profitable to conclude these agreements.

(216) For each of these agreements, the traffic forecasts expected were calculated on the basis of the number of flight movements expected from the carrier's planned operations and reasonable assumptions about their load factors. These forecasts took into account all relevant categories of incremental cost and incremental revenue forecasts, including aeronautical and non-aeronautical categories of revenues and the costs of the financial incentives offered to the carriers by FBS.

(217) As in the case of the 2003 easyJet agreement, FBS's *ex ante* forecasts were stress tested by the second expert which concluded that signing contracts with those airlines would still lead to incremental revenues exceeding incremental costs for each year of each contract over the period of application of the agreements (despite some more conservative conclusions). To reach that conclusion, the second expert carried out an analysis for each contract on the basis of those adjusted forecasts, which fully comply with the methodology described in sections 7.4.4 and 7.5. The second expert exclusively based its review and adjustments on data and forecasts available to FBS when the opportunity to conclude the agreement was assessed.

(218) The *ex ante* NPVs calculated by the second expert for eight of the nine agreements concerned at the time when those agreements were concluded, over the period during which they were set to apply, is presented in Table 11 below:

Table 11

NPVs of the agreements between FBS and various LCCs

Airline/Agreement	Period during which the agreement was set to apply	NPV over the duration of the agreement (EUR)
Ryanair (first agreement)	1 May 2003-30 April 2004	[…]
Ryanair (second agreement)	1 May 2003-30 April 2008	[…]
Germanwings (first agreement)	26 October 2003-31 October 2006	[…]
Germanwings (second agreement)	1 May 2004-30 April 2008	[…]
Volare	26 October 2003-31 March 2007	[…]
Icelandair	6 June 2004-31 March 2009	[…]
Norwegian Air Shuttle	29 March 2004-31 March 2009	[…]
Aer Lingus	30 March 2004-31 March 2009	[…]

Source: Second expert's study.

(219) As shown by this table, all these NPVs are positive. Therefore, it would have been rational for a prudent market economy operator guided by profitability prospects to accept the terms of these agreements at the date at which they were signed.

(220) For the agreement with V-Bird ([64]), no NPV was calculated. The second expert pointed out that no *ex ante* business plan was available for this agreement. However, the terms of this agreement are very similar to those of the agreement with Volare. Both agreements were signed almost concomitantly, for similar periods (of three and a half and four years respectively). They foresaw the applicability of the 2003 Schedule to determine airport charges, as well as the payment of the same incentive grant (EUR […] million) for Volare and V-Bird. The operations involved in both agreements were to generate a very close number of flight movements and the same type of aircraft. Moreover, at the time of the conclusion of these agreements, it was reasonable to assume that both companies would have a similar load factor. The incremental traffic to be expected from both agreements was thus similar.

([64]) This is the only agreement with a LCC that is covered by the formal investigation procedure but not mentioned in table 11.

Finally, both agreements could be expected to lead to similar incremental operating costs for FBS. On the basis of the similarities between these two agreements, it was reasonable to conclude, that the V-Bird agreement complies with the market economy operator test.

(221) In any event, V-Bird suspended operations on 8 October 2004 and filed for and was subsequently declared bankrupt on 18 October 2004. V-Bird was liquidated in early January 2005. There is therefore no undertaking existing any more which would have benefited, either directly or indirectly, from any potential State aid involved in the V-Bird agreement.

(222) In view of the foregoing, none of the agreements listed in Table 6 involve State aid.

7.7. **Assessment of the 2004 easyJet tenancy agreement (measure 4)**

(223) Certain interested parties have taken the view that the 2004 easyJet tenancy agreement provided easyJet with the exclusive use of Schönefeld's Terminal B and prevented other airlines from having access to it.

(224) As indicated in recital 55, from 2004 to 2007, easyJet rented approximately […] m^2 of office space and check-in desks, that is 24 % of the total floor area of Terminal B. The public areas of Terminal B (corridors, halls, coffee shop) are accessible to passengers of airlines other than easyJet, given the physical connection between Terminal B and Terminal A.

(225) Allocating check-in areas to specific airlines and granting branding and advertising rights to these airlines in the immediate surrounding areas are normal business practice at European and international airports and such arrangements are widespread.

(226) Especially where an airline or an alliance of airlines carries a substantial number of passengers from or to a given airport, it is rational from an operational (and thus from a business) point of view that its activities are concentrated in a single terminal. This optimises the operational processes of both the airport and the airline.

(227) Therefore, an airport manager does not necessarily confer an economic advantage on an airline by providing it with the exclusive use of all the check-in desks and office spaces at a Terminal. This might possibly be the case only when the airport manager grants exclusive use of areas in excess of what the carrier needs (thereby preventing other airlines from using physically available capacity) or when an abnormally low rent is charged. As shown below, the 2004 easyJet tenancy agreement fulfils none of those conditions.

(228) Ever since it began flight operations at Schönefeld, easyJet has been by far the dominant airline. Between 2004 to 2007 easyJet carried between […] % and […] % of all Schönefeld's passengers. It was anticipated already in 2003 that easyJet would be by far the largest carrier in terms of traffic. Indeed, because of easyJet's contractual obligation to base a defined number of aircraft at Schönefeld, FBS was able to assume correspondingly large passenger numbers from the moment when easyJet began operations.

(229) According to the International Civil Aviation Organisation, the capacity of Terminal B was 600 000 passengers per year, which is significantly lower than the number of passengers that easyJet was expected to carry from and to Schönefeld as of 2004 ([…] million ([65])). It is therefore clear that through the 2004 easyJet tenancy agreement, FBS was not engaging into any kind of 'capacity hoarding' strategy designed to prevent other airlines from competing against easyJet at Schönefeld. In 2006, […] million passengers were handled at Terminal B, that is, more than twice as much as the theoretical capacity, without any major technical modifications. The possibility to handle so many passengers arose in particular from the use of the terminal facility by one single carrier, which allowed for the optimisation of the passenger flows.

(230) Regarding the rental charge, it is meaningless to compare rental prices at different airports because of the differences in their capacity, market conditions, and the quality of the facilities. The rental prices paid by easyJet were in fact in line with FBS's rental charge grid, with no discount granted.

(231) At terminal B easyJet pays EUR […] per m^2 for counter space and EUR […] per m^2 for offices. Similar charges were agreed for similar facilities with other airlines at other terminals. Germanwings, for instance, also paid EUR […] per m^2 for counter space at Terminal A. Aeroflot was charged EUR […] per m^2 for an office at Terminal A. At Terminal B, Condor rented offices before easyJet and paid a lower rent for the same kind of premises in Terminal B. Whereas easyJet paid EUR […] per m^2 for office space, Condor was charged EUR […] per m^2 only.

([65]) Second expert Study, Table 2, page 22.

(232) This type of comparison is appropriate to assess the existence of an economic advantage within the 2004 easyJet tenancy agreement. Indeed, unlike an agreement governing the whole operations of an airline at an airport and its main financial relationships with the airport ([66]), a tenancy agreement for check-in desks and office spaces relates to the provision of access to relatively standard facilities, at least within one given airport. Moreover, rents involved in such contracts account for minor amounts compared to airport charges, marketing grants and other financial incentives. Therefore, there is no significant incentive for the airport manager to determine tailor-made rents or to try to extract the highest possible rents through negotiations with airlines. The commercial interest of the airport manager rather lies in the concentration of the operations of a given airline in one location to ensure operational efficiency to the benefit of its customer, especially when, as in the case of FBS, it tries to attract airlines and entice them to increase their traffic.

(233) Therefore, contrary to what third parties have argued, it would not necessarily make sense to allocate areas to airlines on the basis of calls for tender. Such practice actually appears to be very unusual across European airports. The conduct expected from a rational airport operator guided by profitability prospects consists in finding appropriate areas for each main airline operating at the airport, in terms of capacity and other characteristics, and charge a reasonable rent in line with usual practices within the airport.

(234) For these reasons, the level of a rent does not confer an economic advantage if it is broadly in line with the rents charged to other airlines within the airport. This is the case for the 2004 easyJet tenancy agreement.

(235) Furthermore, it is rational for an airport operator to conclude such contracts for a duration that is in line with the duration of the 'main' agreement governing the operations of the airline at the airport. This is the case fort the 2004 easyJet tenancy agreement.

(236) As regards the baggage handling facility, the systems in place at Terminal A and Terminal B are identical from a technical viewpoint, except in one aspect: the facility at Terminal B includes a fixed X-ray machine. It was installed at the request of the German Federal police, which would otherwise have withdrawn the operating permit of Terminal B. The technical equipment of the baggage handling facility at Terminal B does not give easyJet any operational advantage, such as quicker or smoother loading/unloading of baggage. Rather, it offers an integrated method of carrying out X-ray checks, but this has no impact on the airline's check-in procedures.

(237) In fact, the integrated security system rather causes operational difficulties for easyJet. If a problem with a piece of passenger luggage is detected that requires a manual check, the passenger has to be called back to the control room at Terminal B. But by then the passenger will already be in the departure lounge and has to be informed and fetched back. This is a cumbersome procedure which implies that the check-in acceptance time limit applied by Schönefeld for passengers at Terminal B is at least 30 minutes. easyJet currently applies a 40 minute time-limit, since there is otherwise no guarantee that the process can be completed on time. At Terminal A, by contrast, there is no need for this type of procedures. A 20 minute time-limit before take-off is common practice and poses no technical problems.

(238) Another difficulty relates to the fact that the baggage-handling facilities at Terminal B and Terminal A differ in their susceptibility to technical malfunction. Owing to the integrated security technology, with the greater complexity it entails, the baggage-handling facility at Terminal B was working for […] % of the operating hours during the period from May to December 2004, whereas the facility at Terminal A was ready for service for […] % of the time.

(239) From all of the foregoing, it is concluded that none of the provisions of the 2004 easyJet tenancy agreement resulted in an economic advantage being conferred on easyJet. Therefore, that agreement does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

The following measures which Germany has implemented for the companies mentioned in points (a)-(l) do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

(a) the control and profit transfer agreement concluded on 6 August 1992 by Berlin Brandenburg Flughafen Holding GmbH and Berliner Flughafen-Gesellschaft mbH;

(b) the agreement concluded on 19 December 2003 between Flughafen Berlin-Schönefeld GmbH and easyJet Airline Company Ltd;

([66]) Such as the 2003 easyJet agreement.

(c) the agreement concluded on 31 March 2003 between Flughafen Berlin-Schönefeld GmbH and Ryanair Limited;

(d) the agreement concluded on 28 April 2004 between Flughafen Berlin-Schönefeld GmbH and Ryanair Limited;

(e) the agreement concluded on 14 October 2003 between Flughafen Berlin-Schönefeld GmbH and Germanwings GmbH;

(f) the agreement concluded on 23 December 2004 between Flughafen Berlin-Schönefeld GmbH and Germanwings GmbH;

(g) the agreement concluded on 22 October 2003 between Flughafen Berlin-Schönefeld GmbH and Volare Airlines S.p.A.;

(h) the agreement concluded on 3 November 2003 between Flughafen Berlin-Schönefeld GmbH and V-Bird Airlines B.V.;

(i) the agreement concluded on 6 June 2004 between Flughafen Berlin-Schönefeld GmbH and Icelandair Reykjavik Airport;

(j) the agreement concluded on 17 May 2004 between Flughafen Berlin-Schönefeld GmbH and Norwegian Air Shuttle AS;

(k) the agreement concluded on 13 May 2004 between Flughafen Berlin-Schönefeld GmbH and Aer Lingus Limited;

(l) the agreement concluded in March 2004 between Flughafen Berlin-Schönefeld GmbH and easyJet Airline Company Ltd for the use of certain areas and facilities at Terminal B of Schönefeld airport.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President