



2024/3021

9.12.2024

COMMISSION DECISION (EU) 2024/3021

of 9 September 2024

on the measures SA.43260 (2018/C) implemented by Germany in favour of Flughafen Frankfurt-Hahn GmbH and Ryanair DAC

(notified under document C(2024) 6468)

(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), first subparagraph, thereof,

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

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

Whereas:

1. PROCEDURE

- (1) Deutsche Lufthansa AG ('Lufthansa' or the 'complainant') submitted a complaint to the Commission on 3 November 2015, alleging that Germany had implemented certain measures allegedly constituting State aid through the regional authorities of the German *Land* Rhineland-Palatinate to the benefit of Flughafen Frankfurt-Hahn GmbH (hereinafter 'FFHG'), the operator of Frankfurt-Hahn airport, and of Ryanair DAC ('Ryanair') with respect to its operations at Frankfurt-Hahn airport.
- (2) By letter dated 26 October 2018, 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) in respect of certain measures ⁽²⁾ (the 'opening decision'). Germany commented on the opening decision with submission of 5 February 2019.
- (3) By the publication of the opening decision in the *Official Journal of the European Union* on 13 September 2019, the Commission invited interested parties to submit their comments on that measure.
- (4) The Commission received comments from interested parties, i.e. Lufthansa on 3 July 2019, Ryanair on 25 October 2019 and FFHG on 31 October 2019.
- (5) By letters dated 15 November 2021, 15 December 2021 and 28 March 2024, Germany provided the Commission with further information. Between 2019 and 2023 Lufthansa provided further written information.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Recipients of the measures

- (6) The recipients of the measures are FFHG and Ryanair.

⁽¹⁾ OJ C 310, 13.9.2019, p. 5.

⁽²⁾ Commission Decision of 26 October 2018 in case SA.43260 (2015/FC) – Germany – Alleged aid to Frankfurt Hahn Airport and Ryanair (OJ C 310, 13.9.2019, p. 5).

2.1.1. FFHG

- (7) As described in the opening decision (recitals 13 and 14), Frankfurt-Hahn airport is located in the German *Land* Rhineland-Palatinate, approximately 120 km west of the city Frankfurt/Main. It had been a US military airbase until 1992 and was subsequently converted into a civil airport for both passenger and cargo transport. Frankfurt-Hahn airport holds an operating licence allowing it to operate 24 hours a day seven days a week.
- (8) Frankfurt-Hahn airport is operated by FFHG. FFHG was created in 2001. Initially Flughafen Frankfurt/Main GmbH ('Fraport') owned the majority of the shares in FFHG, with the *Land* Rhineland-Palatinate as the minority shareholder. In January 2005 the Land Hesse also became a minority shareholder.
- (9) From January 2005 to 31 December 2008 the shareholders of FFHG were thus Fraport (65 % stake), the *Land* Rhineland-Palatinate (17,5 % stake) and the Land Hesse (17,5 % stake).
- (10) With effect from 1 January 2009, the *Land* Rhineland-Palatinate took over FFHG by acquiring the 65 % controlling stake from Fraport. Following this acquisition, the two remaining shareholders of FFHG were the Land Rhineland-Palatinate (82,5 % stake) and the Land Hesse (17,5 % stake).
- (11) On 1 March 2017, the *Land* Rhineland-Palatinate signed a Share Purchase Agreement, closed on 9 August 2017, by which it sold its 82,5 % stake in FFHG to HNA Airport Group GmbH, a group company of the globally active Chinese HNA Group ('HNA Group'). The remaining 17,5 % stake in FFHG is still held by the Land Hesse.
- (12) FFHG filed for insolvency in October 2021.
- (13) As explained in the opening decision (recitals 15 to 17), passenger traffic from Frankfurt-Hahn airport is mainly made up of low-cost flights. As regards passenger transport, the main airline operating from Frankfurt-Hahn airport is Ryanair.
- (14) Between 1998 and 2007, passenger numbers at Frankfurt-Hahn airport increased from approximately 39 000 passengers to approximately 4 million passengers per year. Between 2007 and 2019, passenger traffic gradually decreased to around 1,5 million passengers per year.
- (15) Besides passenger flights, cargo flights are operated to and from Frankfurt-Hahn airport. In 2019, around 171 000 tonnes of air freight were transported through Frankfurt-Hahn airport. In peak year 2011, around 286 000 tonnes were transported.

2.1.2. Ryanair

- (16) Ryanair is an Irish low-cost airline founded in 1984. In 2019, Ryanair carried approximately 142 million passengers and served over 200 airports.

2.2. The disputed measures

2.2.1. Measures relating to FFHG

2.2.1.1. The guarantee granted by the Land Rhineland-Palatinate to FFHG

- (17) According to Germany, Haitec AG ('Haitec')⁽³⁾, an aircraft maintenance company founded in 2008, decided to establish itself at Frankfurt-Hahn airport to provide aircraft maintenance services on a more permanent basis in 2013, and in particular, to expand its offer at the airport to the maintenance of bigger aircrafts. To this end, Haitec bought land from FFHG on 20 December 2013 for around EUR 7,7 million with the objective of constructing a bigger maintenance hall on that land. The construction of the hall was finalised in the autumn of 2016, with Haitec having invested approximately EUR 40 million, an amount significantly higher than originally planned.

⁽³⁾ Now HAITEC Aircraft Maintenance GmbH.

- (18) In the last stage of negotiations of the land sale agreement between FFHG and Haitec, Haitec required to include a right of withdrawal in the agreement, which needed to be covered by a guarantee of the *Land* Rhineland-Palatinate.
- (19) According to this right of withdrawal, Haitec could withdraw from the sales agreement during a period of about 15 years (until 31 December 2028) if one of the following three circumstances occurs:
- (a) FFHG or its legal successors would lose the license to operate Frankfurt-Hahn airport;
 - (b) the operation of Frankfurt-Hahn airport would be fully ceased;
 - (c) FFHG would become insolvent and the airport operation would not be continued by another operator.
- (20) In case Haitec exercises its right of withdrawal, Haitec has to return the land to FFHG and has the right to receive 80 % of the purchase price in an amount of EUR 6,2 million. Since under any of the three circumstances giving rise to withdrawal listed in recital 19, FFHG would very likely be unable to pay back EUR 6,2 million to Haitec, Haitec demanded a security for the payment of its claim. Therefore, on 20 February 2014, Haitec received a guarantee (*Bürgschaftserklärung*) by the *Land* Rhineland-Palatinate in which the *Land* commits to paying EUR 6,2 million to Haitec in case of withdrawal from the land sale agreement under the circumstances listed in recital 19.
- (21) The German authorities explained that for the provision of that guarantee, FFHG pays a premium of 2,56 % per year on the guarantee amount of EUR 6,2 million to the *Land* Rhineland-Palatinate. The guarantee premium was established by [the consultancy]. [The consultancy] used Moody's RiskCalc tool and estimated the stand-alone rating of FFHG at [...] for one year and [...] for 5 years on the basis of the 2012 audited financial statements of the airport. On that basis, [the consultancy] estimated a range for market conform annual guarantee premiums between 1,51 % and 2,56 %. FFHG and the *Land* Rhineland-Palatinate took the upper bound of the estimated range and agreed on a guarantee premium of 2,56 % per year (around EUR 158 000). The guarantee arrangements do not provide for adjustments in the guarantee premium.

2.2.1.2. The 'double' sale by FFHG of a plot of land

- (22) In November 2014, FFHG received EUR [10-25] million for a real estate transaction, by which FFHG sold two pieces of land, the 'campus' plot and the 'housing' plot, to the *Land* Rhineland-Palatinate ('the 2014 sales contract'). FFHG retained a right of withdrawal from the 2014 sales contract as concerns the 'housing' plot. The 2014 sales contract provided that the sales price in case of exercising the withdrawal right should be based on a new expert opinion. In the context of this real estate transaction, the *Land* Rhineland-Palatinate created 29 new employment positions in the Landesbetrieb Liegenschafts- und Baubetreuung (LBB), which were mainly (but not exclusively) filled with employees coming from FFHG. The Commission concluded in the opening decision that the 2014 sales contract had taken place at market value. That conclusion was based on an expert opinion of the Expert Opinion Committee for Property Values for the Area of Osteifel-Hunsrück commissioned by the *Land* Rhineland-Palatinate and complemented by a report of the Structure and Approval Direction North ('SGD Nord').
- (23) In 2015, FFHG initiated a public tender procedure to sell the plot of land 'housing'. ADC Airport Harbour Investment GmbH ('ADC') submitted an offer of EUR 1,25 million.
- (24) Subsequently, the *Land* Rhineland-Palatinate initiated the privatisation procedure for Frankfurt-Hahn airport. The successful bidder, Shanghai Yiquian Trading Co. Ltd. ('SYT'), made an offer that included the plots of land 'campus' and 'housing'. The *Land* Rhineland-Palatinate used the offer of ADC as indicative of the market price of the plot 'housing' and set the price for that plot in the privatisation contract with SYT at EUR 1,25 million. The privatisation contract with SYT was concluded on 2 June 2016. In order to enable the *Land* Rhineland-Palatinate to transfer in the framework of the privatisation the plots of land 'campus' and 'housing' together to SYT, it had been foreseen that FFHG would renounce to its right to withdraw from the 2014 sales contract with the *Land* Rhineland-Palatinate. However, SYT failed to pay on 10 June 2016 the price for the privatisation contract, and the *Land* Rhineland-Palatinate then exercised its right to cancel the sale to SYT on 6 July 2016.

- (25) On 6 June 2016, FFHG exercised its right of withdrawal from the 2014 sales contract. The exercise of the right of withdrawal was notarised on 6 July 2016. FFHG did not pay any compensation to Rhineland-Palatinate for exercising the withdrawal right regarding the 'housing' plot. Germany explains that this is because the expert opinion of the Expert Opinion Committee for Property Values for the Area of Osteifel-Hunsrück from 2014, complemented by a report of SGD Nord, had concluded for the purpose of the 2014 sales contract that the costs for tearing down the buildings on the 'housing' plot (former army barracks) and the subsequent rehabilitation of the land would be more expensive than the value of the land, once those works would have been carried out. The expert opinion excluded the possibility of a negative market value, and therefore set the market value of the 'housing' plot at zero EUR. FFHG sold the 'housing' plot for EUR 1,25 million to ADC by a contract of 6 July 2016. That contract has three parties, ADC, FFHG and the *Land* Rhineland-Palatinate, as the contract not only comprised the sale of the 'housing' plot by FFHG to ADC, but also the sale of the 'campus' plot by the *Land* Rhineland-Palatinate to ADC.
- (26) The Commission in the opening decision raised doubts whether the exercise of the withdrawal right regarding the plot 'housing' by FFHG towards *Land* Rhineland-Palatinate without paying any compensation had taken place at market value (see recitals 184-189 of the opening decision), because Germany had not provided an evaluation of the value of the land at the moment of the exercise of the withdrawal right, despite the fact that the 2014 sales contract provided that the sales price in case of exercising the withdrawal right should be based on a new expert opinion.

2.2.2. Measures relating to Ryanair

2.2.2.1. Marketing support to Ryanair

2005 marketing agreement

- (27) On 4 November 2005, the *Land* Rhineland-Palatinate and Ryanair concluded a marketing agreement ('the 2005 marketing agreement'), which was valid until the end of 2016. The agreement was concluded by the *Land* only, independently of FFHG, which was not a party to the marketing agreement. At the time of conclusion of the marketing agreement, the *Land* only held a 17,5 % share in FFHG, whereas 65 % of the shares were held by Fraport, which is not controlled by the *Land* Rhineland-Palatinate.
- (28) It was agreed that the funding provided by the *Land* to Ryanair through the 2005 marketing agreement would be used for marketing and sales activities carried out by Ryanair that would benefit the joint touristic marketing of the *Land* Rhineland-Palatinate and of Ryanair (recital 90 of the opening decision). The payments were to be made to Ryanair on the basis of corresponding invoices for promotional activities in favour of the tourist locations of the *Land* Rhineland-Palatinate. To implement these marketing activities, Ryanair developed a 'marketing concept'.
- (29) Under the 2005 marketing agreement the *Land* purchased from Ryanair (i) links on Ryanair's website to the touristic offers in the *Land* Rhineland-Palatinate (Article 1 of the marketing agreement); (ii) two pages in the in-flight magazine of Ryanair (Article 2 of the marketing agreement); and (iii) a press campaign benefiting the tourist industry of the *Land* (Article 3 of the marketing agreement). As regards the latter, the agreement specifies for which amount Ryanair needs to purchase advertising space from third parties for the years 2006 to 2010 (from EUR 160 000 in 2006 to EUR [400 000–500 000] in 2009 and 2010).
- (30) The 2005 marketing agreement also provides for the payments to be made by the *Land* Rhineland-Palatinate to Ryanair, which – according to Article 7 of the agreement – should be at least 50 % less than the prices charged by Ryanair to other customers of online marketing services. Furthermore, Article 9 of the marketing agreement provides that Ryanair commits to basing a certain number of aircraft (*) at Frankfurt-Hahn airport, varying across the years covered by the agreement (as specified in the Annex to the agreement), since the marketing measures as

(*) Basing an aircraft at an airport means that the aircraft usually stays at that airport overnight. This implies that the aircraft is used to operate several flights from that airport.

defined by the agreement are only effective if more incoming tourists are transported into the region. If Ryanair does not base the agreed number of aircraft at Frankfurt-Hahn airport, the *Land* Rhineland-Palatinate has the right to immediately terminate the marketing agreement.

- (31) The following table sets out the payments due by the *Land* to Ryanair per year under the 2005 marketing agreement, as well as the number of aircraft Ryanair commits to base at Frankfurt-Hahn airport per year:

Table 1

2005 marketing agreement – payments due by the *Land* Rhineland-Palatinate and number of Ryanair aircraft to be based at Frankfurt-Hahn airport.

Year	Number of aircraft to be stationed at Frankfurt-Hahn airport	Payment by <i>Land</i> Rhineland-Palatinate to Ryanair (EUR)
2006	8	[0-2 million]
2007	10	[0-2 million]
2008	12	[0-2 million]
2009	14	[0-2 million]
2010	16	[0-2 million]
2011	17	[0-2 million]
2012	18	[0-2 million]
2013	18	[0-2 million]
2014	18	[0-2 million]
2015	18	[0-2 million]
2016	18	[0-2 million]

- (32) Apart from an overview over prices charged by various websites for advertising campaigns, Germany has not provided any detailed *ex ante* evaluation of the 2005 marketing agreement undertaken by the *Land* which would demonstrate that the agreement was market conform.

2017 marketing agreement

- (33) On 20 October 2017, after the sale of its shares in FFHG to HNA Group ⁽³⁾ in March 2017, the *Land* Rhineland-Palatinate concluded a new marketing agreement (called a ‘Collaborative Campaign Agreement’, hereinafter ‘the 2017 marketing agreement’) with Ryanair. That agreement entered into force as of 1 October 2017 and was concluded for a maximum duration of 5 years. Depending on the *Land*’s budgetary constraints, the *Land* had the right to terminate the agreement with effect from 31 December 2018 at the earliest.
- (34) The new agreement provided for annual marketing payments by the *Land* to Ryanair in principle in an amount of EUR 1,2 million per year. For the period 1 October to 31 December 2017, the pro rata payment was fixed at EUR 350 000, for 2018 an additional amount of maximum EUR 200 000 was foreseen (amounting to a total of EUR 1,4 million for 2018) if a corresponding transfer of unused funds planned for the year 2017 would have been made in accordance with the applicable budgetary rules of the *Land*.
- (35) The parties agreed to determine a detailed marketing campaign and its value on an annual basis. The annual payment would amount to no more than EUR 1,2 million.

⁽³⁾ HNA Group was a Chinese conglomerate, mainly active in aviation and tourism.

- (36) For the duration of the contract, Ryanair committed to carrying at least [100 000–200 000] passengers per year to Frankfurt-Hahn airport, who would stay at least one night in the *Land* Rhineland-Palatinate ('air tourists'). Should less than [100 000–200 000] air tourists be achieved, no payment would be due. Should there be more than [100 000–200 000], but less than [100 000–200 000] air tourists, only [...] % of EUR 1,2 million would have been due.
- (37) In addition, the 2018 campaign plan provided for measures creating and enhancing awareness for the destination Rhineland-Palatine via social media, Ryanair's Customer Relationship Management database and websites, as well as targeted advertising. In addition, a comprehensive marketing campaign was planned for a value of EUR [0–1,2 million] using both traditional media channels as well as highly targeted digital media.
- (38) Germany argues that the 2017 marketing agreement was concluded after the privatisation of Frankfurt-Hahn airport and that the parties to the agreement have acted as market economy operators, respecting the market conditions for the conclusion of such a marketing agreement. According to Germany, the decision of *Land* Rhineland-Palatinate to conclude the marketing agreement with Ryanair was based on a benchmarking study conducted by an independent expert resulting in Ryanair offering the best value for money as regards the marketing services that the *Land* was looking for. Apart from the benchmarking study Germany has not provided any detailed *ex ante* evaluation of the marketing agreement undertaken by the *Land* that would demonstrate that it complied with commercial behaviour and the market economy operator principle.

2.2.2.2. 2013, 2015 and 2016 airport services agreements between FFHG and Ryanair

- (39) FFHG and Ryanair have concluded a series of agreements governing the financial conditions under which Ryanair operates at Frankfurt-Hahn airport. In the Commission Decision (EU) 2016/788 ⁽⁹⁾ ('Hahn I Decision'), the Commission concluded that airport services agreements between FFHG and Ryanair from 2002 ('2002 airport service agreement') and 2005 ('2005 airport service agreement') complied with the market economy operator principle and hence did not constitute State aid. The 2002 airport service agreement was initially set to apply until 13 February 2017, with an option for prolongation until 13 February 2022, and the 2005 airport service agreement was initially set to apply until 2027.
- (40) However, on 27 March 2013 a Side Letter Agreement ('the 2013 Side Letter Agreement' or the '2013 airport service agreement') was concluded between FFHG and Ryanair for a duration of 3 years (2013 to 2016). According to its own terms, the 2013 Side Letter Agreement 'sums up and replaces all previously made agreements regarding the operation of passenger aircraft to and from Frankfurt-Hahn airport'. Germany did not submit an assessment of the 2013 Side Letter Agreement under the market economy operator principle. The 2013 Side Letter Agreement is a side letter to the standard ground handling agreement applicable at Frankfurt-Hahn airport. It does not deviate from the schedule of airport charges, and rather confirms its applicability. It updates the ground handling rules applicable to Ryanair to general developments in the aviation industry.
- (41) On 8 March 2015, by means of an Annotation to the ground handling agreement attached to the 2013 Side Letter Agreement ('the 2015 Annotation' or the '2015 airport service agreement'), the 2013 Side Letter Agreement was modified on the following points: (a) prolongation of the 2013 Side Letter Agreement until 31 March 2017; (b) provision of ramp vehicle/maintenance van to Ryanair and (c) provision of administrative office and storage space for spare parts to Ryanair. Germany clarified that the marketing support of approximately EUR 100 000 for each new route opened from/to Frankfurt-Hahn airport mentioned in recital 109 of the opening decision was already included in the 2002 Ryanair agreement. Germany has informed the Commission that, in any event, no marketing support for a new route has been granted during the application of the 2015 Annotation.

⁽⁹⁾ Commission Decision (EU) 2016/788 of 1 October 2014 in case SA.32833 (11/C) (ex 11/NN) implemented by Germany concerning the financing arrangements for Frankfurt Hahn airport put into place in 2009 to 2011 (OJ L 134, 24.5.2016, p. 1).

- (42) On 8/9 September 2016, FFHG and Ryanair concluded a new agreement for 5 years, applicable from 1 April 2017 until 31 March 2022. This agreement takes the form of a Side Letter to the 2013 Side Letter Agreement ('the 2016 Side Letter No 2' or the '2016 airport service agreement'). The 2016 Side Letter No 2, which primarily sets out which amount of airport charges apply under which circumstances, makes certain amendments to the 2013 Side Letter Agreement and replaces the Annotation of 2015.
- (43) According to Germany, Side Letter No 2 of 2016 only modifies the 2013 Side Letter Agreement and the Annotation of 2015 on two points:
- (a) the airport charge of EUR [...] per passenger under the Side Letter No 2 of 2016 applies provided that Ryanair carries at least [...] passengers per year, whereas it previously applied as of [...] passengers per year;
 - (b) it introduces a new marketing support system, whereby no airport charges were to be applied to any passenger above the previous year's departing passengers number.

2.2.2.3. Training support to Ryanair

- (44) The complainant holds – on the basis of the annual reports of Hahn Campus Management GmbH ('HCM'), a 100 % subsidiary of FFHG, – that HCM received an amount of around EUR 1,685 million in training aid from the authorities of the *Land* Rhineland-Palatinate in the period 2001-2002 to train unemployed people or people threatened with unemployment. Furthermore, HCM commissioned a company called a und o Gettmann Arbeitsmarkt- und Organisationsberatung ('a und o Gettmann') with managing the administrative procedure, notably gathering the evidence that the payments were used to actually execute the training (*Verwendungsnachweise*).
- (45) According to the complainant, Ryanair provided training services to HCM within the framework of a training programme for flight attendants and pilots and was remunerated for those services. In this context, the complainant mentions an amount of EUR 4 million. The complainant also quotes a press article in which an expert estimated that around 80 to 90 % of the pilots and flight attendants that were trained through the HCM programme were eventually employed by Ryanair. The complainant states that it was a known fact that Ryanair's employees had to finance their qualification themselves and Ryanair did not bear the costs of training its own personnel (both pilots and cabin crew). The complainant quotes to that effect a statement on Ryanair's website of 2003 regarding cabin crew training.

2.2.2.4. Financing of a crew and pilot school and a maintenance hall to the benefit of Ryanair

- (46) The complainant holds that FFHG built a training centre worth EUR 9 million for Ryanair in 2010. According to the complainant, the training centre has up to 16 training rooms and 70 bedrooms and has been used by Ryanair to train pilots and crew members since August 2010.
- (47) Furthermore, the complainant holds that FFHG constructed a maintenance hall in 2010 to lease it to Ryanair, while the lease agreement was not cost covering for FFHG. According to the complainant, the maintenance hall is designed for two Boeing 737-800 aircrafts, which is the type of aircraft used by Ryanair. According to the complainant, the maintenance hall was built specifically upon Ryanair's request. In this respect the complainant refers to press articles showing that Ryanair had been in negotiations with several airports regarding the construction of such facilities.
- (48) The complainant holds that in order to build this hall, FFHG published a tender for a concession agreement with a value of up to EUR 8 million. Yet, the concession contract that FFHG eventually concluded with a construction company to build the maintenance hall had a volume of EUR 17,46 million. The construction company subsequently rented out the maintenance hall to FFHG for 30 years. The complainant states that FFHG acquired the economic ownership of the maintenance hall in 2011 for EUR 12,1 million, and in turn sublet it to Ryanair until 2027, at a below-cost price of approximately EUR 8,3 million in total.

- (49) The complainant considers that the ‘concession’ was not a genuine concession, since the construction company did not operate the hall in order to cover its investments costs through fees paid by third party users. Instead, the construction company merely leased it back to FFHG for 30 years to cover the investment costs. Therefore, de facto FFHG bore the financial risk of building the maintenance hall. Moreover, as FFHG acquired the economic ownership of the maintenance hall in 2011 for around EUR 12,1 million and Ryanair was only obliged to pay approximately EUR 8,3 million in rent until 2027, the rent was not cost covering and thus provides an advantage to Ryanair.

2.3. Grounds for initiating the procedure

- (50) The opening decision raised the question whether the following measures involve State aid and could be considered compatible with the internal market:

- (a) regarding measures of potential aid to FFHG:
 - (1) the guarantee granted by the Land Rhineland-Palatinate to FFHG with respect to a sale of land to the aircraft maintenance company Haitec; and
 - (2) the ‘double’ sale by FFHG of a plot of land;
- (b) regarding measures of potential aid to Ryanair:
 - (1) the training aid to Ryanair;
 - (2) the financing of a crew and pilot school and a maintenance hall;
 - (3) the 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair; and
 - (4) the 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair.

2.3.1. *The guarantee granted by the Land Rhineland-Palatinate to FFHG with respect to a sale of land to the aircraft maintenance company Haitec*

- (51) The Commission took the preliminary view that the guarantee premium of 2,56 % constitutes State aid to FFHG as it did not seem to reflect a market-oriented price and therefore did not seem in line with the market economy operator principle (‘MEOP’). The Commission considered that [the consultancy] was likely to have underestimated the market benchmark ⁽⁷⁾.

2.3.2. *The ‘double’ sale by FFHG of a plot of land*

- (52) The Commission took the preliminary view, that the conditions under which FFHG exercised its withdrawal right with regards to the ‘housing’ plot in 2016 did not comply with the MEOP. The exercise of the withdrawal right, without any compensation to the Land Rhineland-Palatine, while the plot ‘housing’ was sold to ADC for EUR 1,25 million one month after the withdrawal, preliminarily indicates an economic advantage ⁽⁸⁾.
- (53) In the absence of further information from Germany, the Commission expressed doubts as to whether the aid would be compatible with the internal market in accordance with the criteria laid down in Section 5.1.2 of the 2014 Guidelines on State aid to airports and airlines (the ‘2014 Aviation Guidelines’) ⁽⁹⁾ ⁽¹⁰⁾.

2.3.3. *The training aid to Ryanair*

- (54) The Commission took the preliminary view that the training aid constitutes State aid towards Ryanair, incompatible with the internal market.
- (55) The Commission’s preliminary observations included the following:
- (a) The fact that public funds were granted with the aim of combating unemployment does not render the training activity in question non-economic.

⁽⁷⁾ Opening decision, recital 158.

⁽⁸⁾ Opening decision, recitals 186–188.

⁽⁹⁾ Communication from the Commission – Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

⁽¹⁰⁾ Opening decision, recitals 326–330.

- (b) HCM appears to be a mere intermediary between the *Land* Rhineland-Palatinate and Ryanair for the channelling of grants from the *Land*'s Ministry of Labour, Social Affairs, Family and Health to Ryanair.
- (c) It is unclear whether Ryanair was paid twice for providing the training services, as argued by the complainant, i.e. once by the students, and once by the *Land* Rhineland-Palatinate – or whether the alleged payments should be qualified as a compensation for training costs that Ryanair would normally have borne itself, in a context where it seems to have hired most of the persons that followed the trainings in question.
- (d) In the absence of further information from Germany, the Commission expressed doubts that the measure in question could qualify as training aid under Article 31 of the General Block Exemption Regulation ('GBER') ⁽¹¹⁾ ⁽¹²⁾.

2.3.4. *The financing of a crew and pilot school and a maintenance hall*

- (56) The Commission took the preliminary view that financing of a crew and pilot school and a maintenance hall constitutes State aid for Ryanair. The Commissions concluded on a preliminary basis that the funding in question conferred an economic advantage to Ryanair, given that profitability analysis submitted by Germany raised several doubts ⁽¹³⁾.

2.3.5. *The 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair*

- (57) The Commission took the preliminary view that both marketing agreements constitute State aid towards Ryanair and are incompatible with the internal market. The Commissions doubted that the marketing agreements were compatible with the MEOP. The Commission had doubts, in particular, that the *Land* Rhineland-Palatinate could derive any element of profit from those agreements that a hypothetical private operator would take into consideration when assessing whether to conclude those agreements ⁽¹⁴⁾.
- (58) Moreover, the Commission was concerned that the main objective of the agreements was not to acquire marketing services with a view to promoting the territory of Rhineland-Palatinate but rather to support financially Ryanair's air transport operations from and to Frankfurt-Hahn, to enhance air traffic at that airport.

2.3.6. *The 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair*

- (59) The Commission took the preliminary view that the *Land* Rhineland-Palatinate as a majority shareholder of FFHG, was involved in FFHG's decision to conclude agreements, and doubted that a market economy operator driven by profitability prospects in the same situation of FFHG would have concluded the 2013 Side Letter Agreement, the 2015 Annotation and the 2016 Side Letter No 2 ⁽¹⁵⁾.
- (60) With regards the 2016 Side Letter No 2, the Commissions had doubts that it satisfied the MEOP, in particular as the assumptions on which the PwC study on which Germany relies to demonstrate market conform behaviour by the *Land* is based, appeared too optimistic ⁽¹⁶⁾.

⁽¹¹⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽¹²⁾ Opening decision, recital 230.

⁽¹³⁾ Opening decision, recitals 264–267.

⁽¹⁴⁾ Opening decision, recitals 233–252.

⁽¹⁵⁾ Opening decision, recitals 277–291.

⁽¹⁶⁾ Opening decision, recitals 287–290.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from the complainant

3.1.1. *Regarding measures relating to FFHG*

3.1.1.1. The guarantee granted by the Land Rhineland-Palatinate to FFHG

- (61) In its comments to the opening decision, Lufthansa argues that the Commission wrongly took the view that the MEOP applies.
- (62) Firstly, Lufthansa argues that the *Land* did not act as a private investor, since no private operator would issue such a guarantee in the specific situation. The payment guarantee would be triggered if there was discontinuation of the airport operation before 2024. Lufthansa highlights this risk because Ryanair was under no contractual duty to operate at Frankfurt-Hahn airport and could leave the airport overnight. In 2008 Ryanair had already threatened to leave the airport.
- (63) In the alternative, Lufthansa argues that, even if the MEOP applied, the premium from FFHG was too low and thus an advantage was conferred to FFHG.
- (64) Lufthansa challenges the approach followed by Germany and the Commission in the opening decision to assess the level of the premium. In particular, Lufthansa challenges the Commission's finding that the minimum market-conform rate would be 3,10 %. That consideration was based on treating FFHG as a 'borrower', while in the present case the guarantee would cover a penalty payment to Haitec rather than the repayment of a loan. Therefore, the Communication from the Commission on the revision of the method for setting the reference and discount rates (the 'Communication on reference rates') ⁽¹⁷⁾ must be used as a proxy. The minimum premium would then amount to 7,98 %.

3.1.1.2. The 'double' sale by FFHG of a plot of land

- (65) Lufthansa argues that the expert opinions quoted in the opening decision regarding the sale of land have been prepared by public entities. Lufthansa considers those do not qualify as independent experts. However, this comment relates to the initial sales price in the 2014 sales contract and does not relate to the doubts raised on the exercise by FFHG of its right to withdraw from the sale concerning the 'housing' plot of land in the context of its sale to ADC one month later. Lufthansa agrees with these doubts and argues that the latter conferred an advantage to FFHG.

3.1.2. *Regarding measures relating to Ryanair*

3.1.2.1. The 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair

- (66) The complainant argues that it is unusual for a public authority to enter into such an agreement. The only precedent concerned the airport in Zweibrücken, where the aid was in fact found unlawful and incompatible.
- (67) The complainant observes that the marketing agreement only concerns Frankfurt-Hahn airport and not the entire *Land* of Rhineland-Palatinate.
- (68) According to Lufthansa, it should further be noted that, at least for the year 2008, the *Land* Rhineland-Palatinate paid Ryanair twice for internet links: once under the Zweibrücken agreement and once under 2005 marketing agreement under assessment in the present case.
- (69) The complainant also contests that Ryanair truly performed a press campaign benefiting the tourism industry of the *Land*. The tourism strategy in 2015, which was targeting foreign visitors, should not be considered when assessing the 2005 marketing agreement.

⁽¹⁷⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

- (70) Furthermore, the complainant disputes that the number of aircrafts agreed to be stationed at Frankfurt-Hahn airport was reached and claims that the *Land* Rhineland-Palatinate did not terminate the agreement despite this alleged violation of the agreement.
- (71) Moreover, the complainant suggests that 30 % to 50 % of *Land* Rhineland-Palatinate's marketing budget was spent on Ryanair. Such a choice is discrimination in favour of Ryanair, especially considering that Ryanair also received marketing support under the 2005, 2015, 2016 airport service agreements as well as marketing support from other airports.

3.1.2.2. The 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair

- (72) The complainant considers the airport service agreements imputable to the State as the *Land* Rhineland-Palatinate, in its capacity as a majority shareholder of FFHG and member of the supervisory board, was likely involved in the signing of the agreements.
- (73) In addition, a private investor in a similar situation would have considered the primary economic outcome of the agreement, namely the significant deficit, and would have refrained from renewing the same agreement. In accordance with the judgment of the Court of Justice in Case C-300/16 ⁽¹⁸⁾, all information liable to have a significant influence on the decision-making process of the investor must be taken into account.
- (74) Lufthansa further claims that FFHG became aware of the 2012 expert opinion by AT Kearney, which assessed the profitability, or lack thereof, of FFHG. Based on the recommendation of that expert opinion, FFHG approached Ryanair in early 2013 and asked for an increase of the fees. However, Ryanair only agreed upon some cosmetic changes. Thus, FFHG should not have concluded the 2013 and 2015 airport service agreement if it acted as a private investor.
- (75) With regards to the 2016 airport service agreement, the specific investor situation for FFHG was somewhat different from the 2013 and 2015 agreements. Lufthansa claims that the 2016 airport service agreement would not have been concluded by a reasonably acting investor in the specific situation of FFHG, since it was concluded upon pressure of Ryanair towards a potential new owner of the airport amidst an ongoing (fourth) privatisation proceeding and upon terms which were even more beneficial than the ones of the 2005 airport service agreement, which had not been sufficient to prevent FFHG, taken as a whole, from generating significant losses over the years.
- (76) Furthermore, there are no predictable or even computable economic parameters to undertake a private investor test, mainly because Ryanair did not commit to any specific volume of activity at Frankfurt-Hahn airport.
- (77) Lufthansa also notes that quotes from the local parliamentary sessions, which convey information provided to FFHG supervisory board members, prove that the main parameters of the agreement had already been agreed on 28 July 2016 by FFHG's management upon pressure by Ryanair. Yet, the PwC feasibility study is dated from September 2016. Therefore, Lufthansa considers that this confirms the doubts expressed by the Commission in the opening decision that the study was not undertaken prior to the conclusion of the 2016 airport service agreement. Instead, the aim of the study was to avoid that FFHG files for insolvency amidst the privatisation procedure.
- (78) Finally, Lufthansa claims that the total aid amount under the 2013, 2015 and 2016 airport service agreements amounts to at least EUR 70 million.

3.1.2.3. The training support to Ryanair

- (79) Lufthansa considers that Ryanair is the beneficiary of the alleged training aid since the *Land* transferred the payments to HCM with the aim of passing them on to Ryanair.

⁽¹⁸⁾ Judgment of the Court of Justice of 20 September 2017, *European Commission v Frucona Košice a.s.*, C-300/16 P, ECLI:EU:C:2017:706, paragraph 60.

- (80) The complainant links the alleged training aid to the 2001 marketing agreement between FFHG and Ryanair arguing that they are closely linked in terms of time.
- (81) The complainant disputes Germany's assertion that the alleged training aid does not concern an economic activity. Lufthansa contests that the training support was intended to support the qualification of unemployed persons or persons threatened by unemployment and that thus activities pertained to labour market policy as claimed by Germany.
- (82) The complainant also claims that Ryanair did not bear the costs for training its personnel.
- (83) The complainant uses various sources to determine the amount of the alleged training aid, in particular the annual reports of HCM. He submits that State funds paid for the training of Ryanair pilots and cabin crew amounted to approx. EUR 2,9 million and were thus significantly higher than assumed in the opening decision. From the annual reports of HCM for 2001 and 2002 it becomes clear that HCM received at least EUR 2 675 555,20 from the *Land* Rhineland-Palatinate, which it then, according to the complainant, passed on to Ryanair. The complainant submits that one part of the aid was paid directly to Ryanair for trainings which Ryanair allegedly performed itself with its staff. Another part was used for the training of flight staff, which was later hired by Ryanair.
- (84) Furthermore, the complainant argues that the alleged training aid is incompatible with the internal market. He considers that the conditions for exemption of the alleged training aid under Article 31 GBER are not fulfilled and criticises in that respect, firstly, the lack of transparency of the aid, secondly, the fact that the notification threshold has been exceeded and, thirdly, that the condition laid down in Article 31(2) GBER is not fulfilled because the training content allegedly supported equals mandatory training standards.
- (85) Finally, the complainant disputes Germany's objection with regards to the retention period for commercial documents under German law (10 years). The complainant had provided details on the alleged training aid to the Commission in a complaint filed in 2011. The Hahn I Decision explicitly states in its recitals 2 and 3 that the Commission forwarded this complaint to Germany on 18 March 2011. Germany therefore became aware of this issue nine years after the payment of the funds in 2002, and it would hence have been up to the management of HCM to retain and store the relevant documents. The complainant adds that in such a case it should be considered that Germany had the documents available but did not produce them to the Commission upon request. Hence, pursuant to Article 15(1) of Council Regulation (EU) 2015/1589 ⁽¹⁹⁾, a decision should be taken on the basis of the information available.

3.1.2.4. The financing of a crew and pilot school and a maintenance hall.

- (86) The complainant's comments on the circumstances surrounding the construction of the maintenance hall and the crew and pilot school relate to its submissions of 4 March 2011 and 9 June 2016. The complainant notes in particular that there were press reports according to which the investment of FFHG into the crew and staff training facilities amounted to EUR 9 million. Furthermore, the complainant refers to various indicators including organic links to FFHG's supervisory board at the time, which show the imputability of the respective agreements to the State.
- (87) The complainant further submits that additional agreements existed regarding the pilot and crew training facilities which were built for Ryanair.

3.2. Comments from Ryanair

3.2.1. Regarding training aid to Ryanair

- (88) Ryanair invokes the limitation period for recovery pursuant to Article 17 of Regulation (EU) 2015/1589 and argues that it has elapsed since the last payment of the aid in 2003.

⁽¹⁹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- (89) Furthermore, Ryanair points out that the statute of limitations in Ireland is six years and that, therefore, Ryanair does not necessarily keep records of agreements beyond that duration. Ryanair is therefore unable to rely on any information on this alleged aid measure to defend itself or to prove the absence of aid or its compatibility. Any investigation on this would thus constitute a violation of Ryanair's rights of defence and right to good administration. Finally, Ryanair argues that it was not the beneficiary of the State support, but instead that the consultancy a und o Gettmann commissioned by HCM was the beneficiary of aid. There is a contradiction between the Commission's finding that HCM acted as a 'mere intermediary' between the *Land* Rhineland Palatinate and Ryanair and the fact that HCM funded 50 % of the training with its own funds.

3.2.2. *The financing of a crew and pilot school and a maintenance hall.*

- (90) Pursuant to the opening decision, Germany provided a profitability analysis of the arrangements at issue to prove their compliance with the MEOP which consists in the calculation of an aggregate net present value of the cash flows attributable to the arrangements. The Commission has criticised several points in this analysis. The Commission denied Ryanair access to the file. Ryanair is therefore unable to provide comments on the points raised by the Commission against the profitability analysis provided by Germany.

3.2.3. *The 2005 and 2017 marketing agreements concluded between Land Rhineland-Palatinate and Ryanair*

- (91) First, Ryanair argues that there was a real need for marketing services. Frankfurt-Hahn airport and the region surrounding the airport is dependent on revenue generated from tourism. It has become fairly common for regional authorities to carry out a portion of their brand promotion on websites and other media offered by airlines. The fact that even major cities, such as Rome and Paris, have to invest separately in international advertising proves the even greater need for less well-known cities and regions to invest in marketing their own image and brand.
- (92) Second, the marketing services provided by Ryanair satisfy the marketing needs of their purchasers. The purpose of the *Land* was not to advertise Ryanair's flight connections to London-Stansted, Edinburgh, Newquay and Rome, but clearly to promote the region around Frankfurt-Hahn airport on the internet. According to Ryanair the advertising on its website and marketing in in-flight magazines allows optimal targeting of a captive audience. The market for low-cost airlines is characterised by the existence of a sizeable population of undecided passengers who browse the website of airlines for suggestions of destinations. Especially passengers looking for last-minute offers have only a general idea of their type of destination (e.g. a sun destination, a historic city, etc.) and finalise their choice based on the marketing content brought to their attention. Ryanair's website and its other promotional means easily stand out in terms of value for the advertiser, and are certainly not 'comparable', in this respect to that of any other air carrier – let alone the official tourism website of a local government, which is rarely visited by foreigners. Ryanair in particular refers to the uniqueness and attractiveness of its website.
- (93) Third, the reference to routes in the 2005 and 2017 agreements did not aim at promoting Ryanair but it is rather the *Land* which needs Ryanair's commitments regarding a certain number of flights and passengers because the efficiency and effectiveness of the advertisement for the region depends on its visibility, which in turn depends on the number of potential tourists visiting the Ryanair website and the number of passengers in Ryanair's aircraft exposed to in-flight marketing. According to Ryanair, commitments in terms of number of flights and passengers are the best guarantee that the marketing by Ryanair on behalf of the *Land* is given adequate visibility. Moreover, increasing the proportion of inbound passengers is desirable for the *Land*. From a regional authority's perspective such as the *Land*, inbound passengers arriving to, and then departing from its airports are much more likely to generate non-aeronautical income for the region than local passengers using the airports to fly to foreign destinations. Foreign passengers are far more likely to spend money in the region in hotels, restaurants, for souvenirs, local products and services, car rental etc, and the regional attractions are naturally more interesting to inbound passengers.

- (94) In a subsidiary manner, Ryanair argues that the *Land* may have pursued economic goals through the marketing agreements. Even a shareholder with a 17,5 % share may pursue economic goals. Even a non-controlling interest such as the *Land*'s interest in FFHG before 2009 can justify a joint analysis with the airport service agreements from the legal perspective. Fraport and the *Land* Hesse, the other two shareholders of FFHG, were also a State-owned company and a State entity respectively. In other words, even before the *Land* Rhineland-Palatinate acquired an 82,5 % stake in FFHG on 1 January 2009, both the signatory of the 2005 marketing agreement and the owners of FFHG were ultimately representing the State. Therefore, the conclusion that the signatory of the agreement and FFHG cannot be considered to constitute a single economic entity is not imperative. At a minimum, the Commission should distinguish between the period from 4 November 2005 (i.e. the signature of the 2005 marketing agreement) until 31 December 2008 where the *Land* owned 17,5 % of FFHG and 1 January 2009 to 2 August 2017 where it owned 82,5 % of FFHG.
- (95) In addition, the pursuit of a general interest by the *Land* does not exclude the simultaneous pursuit of commercial interests. The *Land* may have acted as the owner of a 'brand portfolio'.
- (96) Furthermore, the marketing services were priced at their market value. The price of the marketing services on Ryanair's media reflected the exceptional popularity of Ryanair's website. According to Ryanair, the Commission's practice, in particular in the *Marseille* and *Bratislava* cases ⁽²⁰⁾, supports this assumption. In the latter case, the Commission found that even when an airport does not pay for additional marketing services on the Ryanair website, but it simply appears as a destination on the website, it cannot be excluded that a certain value could be attached to it.
- (97) Finally, Ryanair argues it did not benefit from an advantage. Ryanair claims that its marketing for its own services is different in terms of content and is time sensitive. Ryanair's marketing services are purchased by public and private buyers alike. There is no rule that marketing services purchased by a client should not benefit others.

3.2.4. *The 2013, 2015 and 2016 airport service agreements concluded between FFHG and Ryanair*

- (98) According to Ryanair, the opening decision does not present a comparator analysis and applies only a profitability analysis to the 2013, 2015 and 2016 airport services agreements, without providing any reason for the exclusion of the comparator analysis. The Commission should compare Ryanair's agreements with public airports that are alleged to involve State aid with those it has concluded with private and public-private airports. The Commission should rely, as a starting point, on a comparator approach and use a cost-based solution only in the absence of any available benchmark, consistent with EU case-law. In light of the *Chronopost* judgment ⁽²¹⁾ and the Commission Notice on the notion of State aid ⁽²²⁾, it is only in cases where a private investor comparator is not available that the test may change from a market-based comparator test to a cost/revenue-based profitability test. Therefore, the Commission should rely on a profitability test (based on costs and revenues) only in a subsidiary manner.
- (99) With regards to the 2013 and 2015 airport services agreements, the Commission made a legal error by finding that an alleged decreased profitability (which was not the case), rather than a lack of profitability, is sufficient for a finding of aid. The Commission's approach assumes that a market economy operator would never accept a decrease in profits as a result of a renegotiation of agreements for any reason. If this approach was confirmed, the market economy operator test would morph into a requirement for constant or growing profits. This would disregard frequent circumstances where a commercial operator may accept lower profits. For example, the net effect of a

⁽²⁰⁾ Commission Decision (EU) 2016/1698 of 20 February 2014 in case SA.22932 (11/C) (ex NN 37/07) concerning measures implemented by France in favour of Marseille-Provence airport and airlines using the airport (OJ L 260, 27.9.2016, p. 1); Commission Decision 2011/60/EU of 27 January 2010 in case C-12/08 (ex NN 74/07) – Slovakia – Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24), paragraph 114.

⁽²¹⁾ See judgment of the Court of Justice of 3 July 2003, *Chronopost v UFX*, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, ECLI:EU:C:2003:388, paragraphs 38-40.

⁽²²⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), paragraphs 225-228.

reduction in prices introduced as a consequence of the market entry of a competitor might be a decrease in profits, but the operator may nevertheless have exhibited profit-maximizing behaviour. In this case for instance, in light of changes in the conditions of trading, it could have made sense for FFHG to consent to a decrease in profitability to match efforts made by Ryanair to save the operation of under-performing routes. For instance, an air passenger duty of EUR 8 was introduced in Germany in 2010 and a security charge of EUR 3,36 (later raised to EUR 4,4) was introduced in Germany in 2014. Each time, the parties appear to have waited for a year or two to determine if the measure would be maintained or withdrawn in the face of its negative impact on traffic before considering adjustments.

- (100) According to Ryanair, by narrowly focusing on the 2013 Side Letter and 2015 Annotation and disregarding the broader picture of the adjustment of the 2005 airport service agreement, the Commission would disregard the principle that '[i]t is [...] necessary, when applying the private investor test, to envisage the commercial transaction as a whole ...' ⁽²³⁾.
- (101) Also, a December 2013 report from the business consultancy Oxera commissioned by Ryanair shows that the 2013 airport services agreement and 2015 airport services agreement were profitable for the airport both on a stand-alone basis and if the airport could have continued or renewed a previous airport services agreement. This provides strong evidence that both agreements are in line with the MEOP.
- (102) Regarding the 2016 airport services agreement, Ryanair claims that it was profitable from an *ex ante* perspective, as shown by the Oxera report.
- (103) Furthermore, Ryanair disputes that the 2016 airport services agreement is imputable to the State and involves State resources. The agreement was signed on 9 September 2016, at a moment when the *Land* had just emerged from a recent failed sale of FFHG and was actively engaged in the sale of FFHG to another buyer, and shortly (5 months) before the *Land* signed a share purchase agreement with HNA Airport Group GmbH on 1 March 2017. Considering that preparing a share purchase agreement takes a few months, it is foreseeable that when the 2016 airport services agreement was signed, the *Land* already knew that FFHG would be sold to HNA Airport Group GmbH and that the *Land* would not have to perform the 2016 airport services agreement. The 2016 airport services agreement was therefore signed by the *Land*, but on behalf of HNA Airport Group GmbH. Since HNA Airport Group GmbH is not a State entity, its financial resources are not State resources and the agreement was not imputable to the State either.

3.3. Comments from FFHG

3.3.1. The 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair

- (104) FFHG refers to the Oxera report submitted by Ryanair and reiterates that the 2013, 2015, 2016 airport service agreements are in line with the MEOP.
- (105) FFHG disputes the doubts raised by the Commission with regard to the timing and the assumptions of the 2016 PwC study. On the timing FFHG explains that the PwC forecasts were made available to FFHG in draft form before its final version and therefore were taken into account before concluding the 2016 airport service agreement. The incentive scheme in the agreement (so-called 'Growth Scheme') is designed in such a way that Ryanair will not receive a discount on the per-passenger fee if the number of passengers decreases or remains the same compared to the previous year. It could therefore be assumed *ex ante* that Ryanair's passenger traffic would increase during the term of the 2016 airport service agreement. The business plan of FFHG for 2017 also expected the total passenger numbers to increase by [5–10] % between 2016 and 2017. Furthermore, the Commission's concerns about the lack of risk assessment by the PwC study were addressed in the Oxera report. This also applies to the Commission's

⁽²³⁾ Judgment of the Court of First Instance of 17 December 2008, *Ryanair v Commission*, T-196/04, ECLI:EU:T:2008:585, paragraph 59.

concerns regarding the risk that Ryanair could have immediately ceased all activities at Frankfurt-Hahn airport from 2016 onwards. The calculation of the Oxera study is based on an annual growth rate of [3,5–4,0] %; this corresponds to the industry's performance at the time. If Ryanair could have benefited from the incentive scheme, the value of the 2016 airport service agreement would have increased from EUR [20–25] million (in the base scenario) to EUR [25–30] million.

3.3.2. *The financing of a crew and pilot school and a maintenance hall.*

- (106) FFHG claims that the financing of a crew and pilot school and a maintenance hall is in line with MEOP. FFHG challenges the Commission's doubts on methodological points of the profitability analysis set out in the opening decision.
- (107) First, the depreciation amount was already excluded from the cash flows calculated by Germany.
- (108) Second, the initial investment cost of around EUR [100 000 – 200 000] were already taken into account, and even if they had not been taken into account (which was not the case), their addition would still lead to a positive Net Present Value ('NPV').
- (109) Third, FFHG explain that the yearly cash in-flows questioned in the opening decision, in fact concerned either yearly collection costs and/or fixed ancillary costs which represent cash *out*-flows and were duly calculated in the profitability analysis, or interests, whose exclusion from the profitability analysis would have positive impact on the NPV.
- (110) Fourth, the discount rate of [4,0–4,5] % which the opening decision (recital 266) questions as too low, was in fact rather conservative. Even assuming that an appropriate alternative discount rate could have been [5–10] %, this higher discount rate would have had a positive, rather than negative, impact on the NPV due to the cash-flow profile for these agreements, since the special rent payment from Ryanair for 2010 represented a significant EUR [0–5] million cash in-flow and each of the following 14 years would result in a very minor cash out-flow. FFHG therefore concludes that increasing the discount rate would still lead to the conclusion that the agreements were MEOP-compliant.

4. COMMENTS FROM GERMANY

4.1. **Regarding measures to FFHG**

4.1.1. *The guarantee granted by the Land Rhineland-Palatinate to FFHG*

- (111) Germany denies the existence of an economic advantage and alternatively refers to Commission Regulation (EU) No 1407/2013 ⁽²⁴⁾.
- (112) With regards to the economic advantage Germany reiterates that the cumulative conditions of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽²⁵⁾ (the 'Guarantee Notice') were fulfilled. Indeed, Germany argues that (a) the borrower was not in financial difficulties at the time the contract was concluded; (b) the scope of the guarantee could be determined at the time it was issued; and (c) it was covering no more than 80 % of the obligation. According to Germany, the first two of these conditions were not disputed by the Commission in the opening decision. The only doubt expressed by the Commission in the opening decision seems to concern the last of the above-mentioned cumulative conditions, namely that FFHG paid a market-oriented price for the guarantee. In this respect, Germany argues that the price is market-oriented.

⁽²⁴⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

⁽²⁵⁾ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

- (113) Firstly, Germany argues that the *Land* does not have the expertise to calculate the market conform guarantee premium and could reasonably expect that the results from [the consultancy] were accurate. Germany submits that, in practice, the *Land* could not be expected, also in terms of costs, to question [the consultancy]'s report without any indication of doubt as to its accuracy and to the fact that it could lead to an advantage, within the meaning of Article 107(1) TFEU, to FFHG. Germany contends that it is not necessary to determine whether the Commission's calculation is correct or not, since the *Land* has used a competent third party to determine a guarantee premium that is in line with market premiums and has thus fulfilled its obligation under EU State aid law. The *Land* points out that, in this particular case, the parties would have agreed on a different guarantee premium if [the consultancy] had come to a different conclusion. The *Land* therefore assumes that a legitimate expectation was created that should be taken into account by the Commission.
- (114) Secondly, Germany submits that the guarantee under assessment is a contract performance guarantee (*Vertragserfüllungsbürgschaft*). According to Germany, this type of guarantee entails a benefit for the guarantor (i.e. the *Land*) in the event of the guarantee being called in (*Bürgschaftsfall*), which should be taken into account when setting the guarantee premium. A contract performance guarantee should be assessed according to different criteria than a guarantee to secure a loan, as it reduces the default risk for the guarantor. Indeed, Germany explains that, in the event of a default of FFHG, the guaranteed amount would only be paid by the *Land* to Haitec once the property has been returned by Haitec. In the event of the guarantee being called, the *Land* would therefore receive the property, including the maintenance hall that has since been built on it, without owing any compensation to Haitec. Such a maintenance hall could be used even without flight operations and would at least maintain, if not increase, the value of the property.
- (115) In the event of the guarantee not being called, as long as the *Land* was still a shareholder of FFHG, the *Land* would also have benefitted from the retransfer of the property to FFHG because the retransfer would have increased the overall value of FFHG's shares.
- (116) Even after the transfer of the *Land*'s shares to the private investor HNA, a benefit for the *Land* remained, as FFHG was obliged to transfer the property to the *Land* if the guarantee was called⁽²⁶⁾. The fact that the property, thanks to the maintenance hall constructed on it, would be valuable, would reduce the *Land*'s actual risk of default.
- (117) The assumption of FFHG and the *Land*, at the time the guarantee was agreed, that the sale to Haitec would lead to a sustainable increase in the value of the plot of land was confirmed in retrospect, as the investments of ca. EUR 40 million made by Haitec turned out to be significantly higher than originally planned.
- (118) Furthermore, Germany argues that even if one assumes that the Commission's calculation of the guarantee premium is correct and that the difference between the premium determined by [the consultancy] (2,56 %) and the premium determined by the Commission (3,10 % – 4,41 %) constitutes an economic advantage for FFHG, this advantage only consists in a difference of 0,54 points, i.e. an annual difference of EUR 33 480. After 3 years the total of EUR 100 440 would still be considerably lower than the amount set in Article 3(2) of Regulation (EU) No 1407/2013.
- (119) Finally, Germany is not aware of any connection between the mother company of Haitec (City Leasing Ltd) and Ryanair.

4.1.2. The 'double' sale by FFHG of a plot of land

- (120) Germany informs the Commission that, contrary to what had been foreseen in the 2014 sales contract between FFHG and the *Land* Rhineland-Palatinate, no expert opinion has been prepared when FFHG exercised its right to withdraw. Rather, the transfer of the plot 'housing' took place at the value of zero EUR, that is the same price as the initial sale.

⁽²⁶⁾ Share purchase agreement with HNA, point 8.2(4).

- (121) Germany justifies this decision by arguing that there had been no indication that the prices for the plot 'housing' would have changed in the period of time between the 2014 sale contract and the exercise of the right to withdraw in 2016. In addition, Germany observes that the initial expert opinion of the Expert Opinion Committee for Property Values for the Area of Osteifel-Hunsrück commissioned by the *Land* Rhineland-Palatinate and complemented by a report of SGD Nord had concluded to a significant negative value of the plot (ca. EUR [-5 – -2] million, based on an estimate of the cost for tearing down buildings and rehabilitate the land of EUR [4–6] million and on a positive sales value of the land, once the buildings torn down and the site rehabilitated, of EUR [1–4] million). In order to further underscore its position, Germany requested a new expert opinion from the Expert Opinion Committee for Property Values for the Area of Osteifel-Hunsrück after it had been notified of the opening decision, to assess whether, based on the information available at the time of the exercise of the right to withdraw, the market value of the plot 'housing' was indeed zero EUR. That opinion confirms the analysis of Germany. Germany explains that the fact that ADC has offered a higher sales price may be the result of speculation that the plot 'housing' could be successfully developed after the privatisation of the airport. That subjective expectation of a private investor (which does not seem to have been conformed, as the land is still unused) cannot put into question the objective analysis by the *Land* at the time of the sale, as confirmed by the later expert opinion.

4.2. Regarding measures of potential aid to Ryanair

4.2.1. *The 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair*

- (122) Germany argues that the 2005 marketing agreement is independent from the airport services offered by FFHG and that the payments made by the *Land* Rhineland-Palatinate to Ryanair correspond to market prices. To this end, Germany compared the prices charged by Ryanair with those charged by other websites for similar advertising campaigns. Furthermore, Germany argues that tourism is important for the economy in the *Land* Rhineland-Palatinate, and that the strategy for tourism established in 2015 puts a special emphasis on the foreign market and that, therefore, attracting more incoming tourists from abroad has a special emphasis in the marketing strategy of the *Land* Rhineland-Palatinate. In this context, Germany considers advertising on the website of Ryanair most effective, due to the international users visiting that website.
- (123) From Germany's point of view, the 2005 and 2017 marketing agreement were tourism promotion measures, and not a promotion of Ryanair. Therefore, the marketing agreements were designed in line with market conditions, i.e. the payments provided by the *Land* were in each case matched with value-added marketing services.
- (124) The specific services were provided by Ryanair as separate marketing services, irrespective of the flight operations in or close to the *Land* of Rhineland-Palatinate. More specifically, the aim was to promote Rhineland-Palatinate as tourist site and to increase the share of tourists spending at least one night in Rhineland-Palatinate among Ryanair passengers arriving in commercial airports located in, or close to, Rhineland-Palatinate (inbound traffic). In addition to Frankfurt-Hahn airport, these include Karlsruhe/Baden-Baden, Strasbourg, Saarbrücken, Luxembourg, Cologne-Bonn and Frankfurt-Main airports. The last marketing agreement was concluded in October 2017, when the privatisation of Frankfurt-Hahn airport had already been completed through the transfer of the *Land's* shares in the summer 2017.
- (125) According to Germany, this broad approach of the *Land*, in particular the inclusion of the various airports, also contradicts the Commission's hypothesis (recital 239 of the opening decision) that the marketing measures were primarily aimed at promoting Ryanair's air services to and from Rhineland-Palatinate. This is contradicted by the fact that most of the passengers transported by Ryanair from Frankfurt-Hahn airport depart ([75–80] % of Frankfurt-Hahn passenger traffic is outgoing, as evidenced by a study from Dornier Consulting's submitted by Germany). The Commission's assumption that the objective of promoting tourism 'has not been achieved' must be rejected as purely speculative. The Commission has failed to understand that the marketing agreements did not only aim at increasing passengers. Germany rejects the Commission's preliminary view that the 2005 and 2017 marketing agreements entailed, in fact, operating aid for Ryanair. In particular, Germany underlines that Ryanair's obligations under the 2017 marketing agreement could also be fulfilled if tourists who had travelled to other airports located outside of the *Land* were brought to Rhineland-Palatinate and stayed there overnight.

- (126) Ryanair was chosen as a contracting party because Ryanair has a high level of competence in the field of location marketing and because, as an airline, Ryanair is carrying tourists to airports located in the *Land* or in its vicinity from various airports. Ryanair was realistically able to bring a large number of guests to the *Land*, because Ryanair is serving a large number of airports located in and around the *Land* and had built up a large market presence in the marketing sector over the years and was known for the provision of effective marketing services.
- (127) Germany argues that the marketing services could be purchased without public tender, because German public procurement law provided for an exemption when only one operator, Ryanair, is realistically able to deliver the services. Also, because the purchase was part of its public policy tasks, namely the promotion of tourism and regional economic development, the *Land* Rhineland-Palatinate acted as a public purchaser that was pursuing its public policy objective.
- (128) Furthermore, FFHG was in no way involved in the conclusion of the marketing agreements. Therefore, the Commission should separate the marketing strategy from the development of Frankfurt-Hahn airport.
- (129) Germany also submits that the prices for the marketing services were market conform. At the beginning of 2017, an external and independent expert with specific expertise in both the tourism and airport sectors was contracted. The latter established the market prices for the marketing services by means of a benchmarking exercise and a market survey, which showed that Ryanair's offer was the most advantageous. The expert identified then various aspects to be considered in order for the 2017 marketing agreement to be in line with market conditions, such as a duration limited to a maximum of 3 years and independent monitoring.
- (130) Ryanair and the *Land* Rhineland-Palatinate agreed that that payments would only take place if the number of overnight guests for the relevant period is adequately documented on the basis of generally accepted methodologies and market standards. Coyne Research was tasked with monitoring Ryanair's compliance with the terms of the agreement. Germany explains that, between the [...] and [...] trimesters of [...], Ryanair has brought more than [...] overnight guests to Rhineland-Palatinate ([...] % via Frankfurt-Hahn Airport).
- (131) Due to the initiation by the Commission of the procedure laid down in Article 108(2) TFUE, the *Land* Rhineland-Palatinate terminated the agreement as of 31 December 2018.

4.2.2. *The training support to Ryanair*

- (132) Germany confirmed that Ryanair was the final recipient of payments from the *Land* and that HCM was only an intermediary. Germany raised four further observations: firstly, the payments do not constitute State aid; secondly, the amount of funding allegedly provided to Ryanair according to the complainant is incorrect; thirdly, Germany cannot provide the information the Commission requested in the opening decision; and fourthly, the limitation period for a potential recovery has already expired.
- (133) Regarding the first point, Germany argues that the payments to Ryanair for the training support are not State aid because they do not relate to an economic activity. Rather, these payments finance labour market policy measures. They therefore concern an exercise of public powers. The payee was Ryanair because Ryanair provided services that enabled HCM, with the help of a und o Gettmann, to implement the activities, i.e. to conduct the training.

- (134) Regarding the second point, Germany makes three observations. Firstly, the funding was only provided with a corresponding proof of use and the funding intensity was limited to 50 %. Secondly, Lufthansa's allegation that the *Land's* lawyer confessed during a hearing in Case T-492/15 ⁽²⁷⁾ that the *Land* had indeed provided Ryanair with unlawful operating aid is not known to Germany or the *Land*, nor is there any mention of such an admission in the minutes of the Court hearing. Lufthansa could have accessed the audio files of the court hearing as evidence of this claim but did not do so. Thirdly, Lufthansa deduces from HCM's annual reports that the *Land* granted support totalling at least EUR 2,7 million. Lufthansa's statements are inconclusive and there are no indications that the funds transferred to HCM were misused and not used for the intended social policy measures.
- (135) Regarding the third point, Germany reiterates the difficulty of providing more information given that the archiving period under German law is 10 years and has expired. Hence, regarding the Commission's consideration in the opening decision that the measure in question could possibly qualify as training aid within the meaning of the GBER, Germany replied that due to the incomplete documentation, the *Land* cannot determine whether the conditions of Article 31 GBER were met. The *Land* does not know whether and, if so, to what extent the persons trained under these programs were employed by Ryanair after completing their training. The German authorities do not know whether and, if so, to what extent Ryanair normally bears the training costs for the various categories of its employees and when employees may have to bear the training costs themselves (on a *pro rata* basis).
- (136) Regarding the fourth point, Germany observes that the question whether the cumulative conditions for the existence of State aid are met in the present case is not relevant, since any recovery would in any event be time-barred after 10 years in line with Article 17 of Regulation (EU) 2015/1589. In accordance with Article 17(2) of Regulation (EU) 2015/1589, the start of the period is calculated from the date on which the aid is granted, whereby the date of the last payment is decisive. The last payment occurred at the end of 2003, so that the limitation period expired at the end of 2013. Germany alleges that the training support was first examined in the Commission's request for information of 13 March 2017. At that point, the limitation period had already expired more than 3 years earlier and could therefore no longer be interrupted.

4.2.3. *The financing of a crew and pilot school and a maintenance hall.*

- (137) Germany disputes the existence of State aid on the grounds that the decision to build the maintenance hall and the financing of the crew and pilot school were an autonomous decision by the management of FFHG.
- (138) It further rejects the allegation of the complainant that only the main aircraft types used by Ryanair at the time (Boeing 737) could be serviced in the maintenance hall. Other medium-haul aircraft, such as Airbus A320, could also be operated there. Germany explained that the maintenance hall is designed to have a long-term service life of approximately 30 years. Since the agreement with Ryanair is set for a period of 15 years, FFHG would not have had any interest in designing a maintenance hall for the exclusive use of Ryanair.
- (139) Germany argues that there is no evidence support the finding of an advantage granted to Ryanair through the conclusion of the agreements. FFHG carried out a detailed profitability study, which was presented to the supervisory board. Some of the assumptions in this study have been questioned by the Commission. Germany has no evidence to suggest that the management's assumptions, at the time, were manifestly incorrect from the relevant *ex ante* perspective.
- (140) In addition, Germany points out that, even if one were to assume in the present case that an advantage under State aid law is granted to Ryanair and that the measure was imputable to the State (which it was not), such investment aid could be considered compatible with the internal market under Article 107(3) TFEU and the 2005 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ⁽²⁸⁾ (the '2005 Aviation Guidelines') applicable at the time.

⁽²⁷⁾ *Deutsche Lufthansa AG v Commission*, Hearing of 9 July 2018.

⁽²⁸⁾ OJ C 312, 9.12.2005, p. 1.

- (141) Finally, Germany argues that the financing of a crew and pilot school and a maintenance hall would be compatible with the internal market. According to Germany, around 50 qualified jobs were created through the construction of the maintenance hall and the construction of the crew and pilot school. Germany considers that the infrastructure created was necessary and appropriate to achieve the objective of regional development, as evidenced by its good utilisation, which also satisfies the medium-term prospects.

4.2.4. *The 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair*

- (142) Germany maintains its position that the 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair do not constitute State aid. Moreover, Germany highlights that contrary to the Commission's assumption in the opening decision (recitals 108 and 109), Germany's assessment and reasoning have not changed over time.
- (143) The change and adaptation of the contractual basis over a period of about 15 years is common practice in this industry. This is due, for instance, to the changes in the applicable regulatory framework and, in particular, to the fact that new Commission guidelines on State aid to airports and airlines were introduced twice during this period, redefining the practice of the operation of a regional airport.
- (144) Germany doubts whether any advantage could be imputed to the State. Germany reiterates that FFHG's management at the time acted independently, which means that such agreements were negotiated independently with Ryanair. In particular, those contracts did not require the approval of the supervisory board (*Aufsichtsrat*), but could legally be concluded solely by the management.
- (145) The fact that the *Land* Rhineland-Palatinate concluded marketing agreements with Ryanair in 2005 and later again in 2017, does not suggest that the *Land* intended to maintain and promote Ryanair's air transport activities at Frankfurt-Hahn airport.
- (146) In addition, Germany doubts whether the selectivity exists in the light of the latest case-law of the Union courts. Germany submits that the mere fact that a bilateral agreement has been concluded cannot, in itself, justify selectivity. In its judgment in Case T-77/16 of 13 December 2018 ⁽²⁹⁾, the General Court pointed out that the mere fact that bilateral agreements depart from the requirements of the applicable schedule of charges or other bilateral agreements does not give rise to selectivity. Rather, the Commission must be able to demonstrate that the conditions granted to an airline differ from those which would apply to other airlines. Germany explains that the 2013 and 2015 airport service agreements do not provide for new airport fees which depart from the general airport charges scheme applicable at Frankfurt-Hahn airport. Rather, the 2013 and 2015 airport service agreements are further extension of the existing conditions for a period of 3 and 5 years respectively.
- (147) In Germany's view, the agreed fees with Ryanair are in line with the general airport charges scheme applicable at Frankfurt-Hahn airport, which has remained largely unchanged since 2006. The only difference between the 2016 Side Letter No 2 and the general airport charges scheme applicable at Frankfurt-Hahn airport is that the airport charges of EUR [...] per departing passenger already apply from [...] departing and arriving passengers and not only from [...] passengers. Furthermore, Germany argues that any other airline which would generate a comparable volume of passengers could have used the airport on comparable, non-discriminatory terms, i.e. it could have entered into a similar agreement with FFHG.
- (148) Germany argues that also the 2016 Side Letter No 2 complied with the market economy operator principle and submitted an incremental profitability analysis prepared by PwC (the 'PwC study') to this end. Recital 287 of the opening decision indicated that the study had been commissioned at most 2 days before the conclusion of the 2016 Side Letter No 2. Germany clarified that the PwC study has been in preparation and discussed with FFHG over a long period of time, and hence was fully known by the management of FFHG when concluding the agreement. Germany therefore disputes that the study has been commissioned only 2 days before the agreement was concluded. In fact, Germany explains that PwC had supported the negotiation process from the outset.

⁽²⁹⁾ Judgment of the General Court of 13 December 2018, *Ryanair and Airport Marketing Services v Commission*, T-77/16, ECLI:EU:T:2018:947.

- (149) Furthermore, Germany maintains that there is no advantage granted to Ryanair through the 2016 Side Letter No 2 and the assessment of PwC is correct. In the two years following the conclusion of the contract, passenger numbers were above 2 million, i.e. on average around 2,28 million, i.e. over [7–10] % above the forecast.
- (150) In this context, Germany also stresses that the 2013 Side Letter Agreement does not contain any provision stipulating that the airport charges of EUR [...] per passenger apply from [...] departing and arriving passengers. This was not necessary, since the Side Letter Agreement expressly states that the passenger costs for departing passengers are not included in the 2013 Side Letter Agreement. Rather, the basis for the airport charges for the departing and arriving passengers has always been the airport charges scheme applicable at Frankfurt-Hahn airport, which applies equally to all users of Frankfurt-Hahn airport. The fees agreed with Ryanair were therefore in line with the 2012 airport charges scheme applicable at Frankfurt-Hahn airport, which has remained nearly unchanged since 2006. Germany points out that the Commission has already found that the 2006 airport charges scheme applicable at Frankfurt-Hahn airport did not confer an economic advantage on airport users ⁽³⁰⁾.
- (151) Furthermore, the main purpose of the 2015 Annotation was to extend the existing contracts until 31 March 2017 to ensure legal certainty at the beginning of the privatisation process. The 2015 Annotation includes a number of aspects, some of which were previously unregulated, such as support of Ryanair in its search for hangar capacities. However, some provisions were so general and non-specific (e.g. 'cooperate to find low-cost hangarage facilities') that it appears evident that the parties were expressing mere intentions in this respect. However, it did not give rise to legal obligations with concrete quantifiable monetary consequences that could have been the subject of an economic analysis. On the contrary, there would have been a need for further contractual clarifications, which did not occur.

5. ASSESSMENT OF THE MEASURES

5.1. Existence of aid

- (152) By virtue of Article 107(1) TFEU any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (153) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) TFEU all of the 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.
- (154) In the following sections, the Commission will assess whether the measures as described above in Section 2 meet these cumulative criteria and thus constitute aid in the meaning of Article 107(1) TFEU.

5.1.1. *Regarding measures of potential aid to FFHG*

5.1.1.1. Guarantee granted by the Land Rhineland-Palatinate to FFHG

5.1.1.1.1. Notion of undertaking and economic activity

- (155) The Commission concludes in accordance with the opening decision that FFHG is as an undertaking carrying out an economic activity in the sense of Article 107(1) TFEU (see recitals 148 and 149 of the opening decision).

⁽³⁰⁾ Commission Decision (EU) 2016/789 of 1 October 2014 in case SA.21121 (C29/2008) (ex NN 54/2007) implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair (OJ L 134, 24.5.2016, p. 46, ELI: <http://data.europa.eu/eli/dec/2016/789/oj>), recital 494.

5.1.1.1.2. Use of State resources and imputability to the State

(156) The Commission regards in accordance with the opening decision (see recital 150) the guarantee as imputable to the State and as involving State resources.

5.1.1.1.3. Economic advantage

(157) The opening decision did not come to a conclusion with regards to the economic advantage.

(158) The question is whether the guarantee given by the *Land* to FFHG, in particular the price for the guarantee agreed upon between FFHG and the *Land*, constitutes an economic advantage. For this purpose, it has to be established whether the guarantee complies with the market economy operator principle, i.e. it has to be assessed whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to grant the guarantee in question ⁽³¹⁾.

(159) Section 3 of the 2008 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽³²⁾ ('Guarantee Notice') sets out a number of conditions to facilitate the assessment of whether a guarantee complies with the market economy operator principle and the existence of an advantage can be ruled out.

(160) The cumulative conditions set out in point 3.2 of the Guarantee Notice which need to be met in order to rule out the presence of an economic advantage are as follows: (a) the beneficiary of the guarantee is not in financial difficulty; (b) the guarantee can be properly measured when it is granted; (c) the guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; and (d) a market-oriented price is paid for the guarantee.

(161) The *Land* and FFHG agreed on a guarantee premium of 2,56 % based on an assessment made by a consultant contracted for this purpose ⁽³³⁾. In its assessment, the consultant contracted by the German authorities first estimated the stand-alone rating of FFHG with the Moody's RiskCalc tool. Based on the audited financial reports of FFHG for 2012 the stand-alone rating was evaluated at [...] for one year and [...] for five years ⁽³⁴⁾. The consultant of the German authorities adjusted this stand-alone rating based on contract specific characteristics of the guarantee, obtaining an estimate of [...] (corresponding to [...] on Standard & Poor's scale).

(162) The Commission expressed in its opening decision doubts regarding the estimations of the consultants contracted by the German authorities. The doubts related to the method applied, as well as to the relevance of the data used to determine the guarantee premium. In addition, the complainant expressed doubts about the applicability of the market operator principle.

(163) The Commission will thus assess whether the market operator principle is applicable and, if so, if the guarantee premium of 2,56 % is market conform.

⁽³¹⁾ See, for instance, judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraph 29; judgment of the Court of Justice of 21 March 1991, *Italy v Commission* ('ALFA Romeo'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

⁽³²⁾ OJ C 155, 20.6.2008, p. 10.

⁽³³⁾ Recital 21.

⁽³⁴⁾ FFHG's rating estimate using Moody's RiskCalc tool and unaudited financial statements for 2012 is equal to [...].

5.1.1.1.3.1. The applicability of the MEOP

- (164) The first question is whether the conduct of the *Land* Rhineland-Palatinate could, based on an economic analysis, in principle have been adopted by a private operator. This presupposes that the activity in question is an economic activity and that a private investor would *a priori* engage in such an activity.

5.1.1.1.3.1.1. Entering into a guarantee agreement is an economic activity

- (165) According to the Court of Justice, '[t]he applicability of the private investor test ultimately depends [...], on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it' ⁽³⁵⁾. In the present case, the State has entered into a guarantee agreement with Haitec in favour of FFHG. A guarantee agreement with Haitec, as well as the agreement on the guarantee premium with FFHG, falls within civil law, in this case the German *Kreditsicherungsrecht* (secured transactions law). Therefore, by concluding this agreement, the State did not act in its sovereign function but as a private operator. Neither Lufthansa nor the German Government dispute that the activity in question is not of an exercise of public power and is therefore an economic activity.

5.1.1.1.3.1.2. A private operator could have engaged in the guarantee agreement in question

- (166) According to the Court of Justice, the examination whether a private operator would have engaged in such an economic activity is to be interpreted broadly ⁽³⁶⁾. It is considered compatible with the MEOP for the public sector to provide capital to ensure the temporary survival of a undertaking, provided that it continues to operate profitably after restructuring ⁽³⁷⁾. It is only when the economic situation of the company to which the capital is injected, in conjunction with the situation of the sector concerned, shows no prospect of improvement that the injection of additional capital can no longer be considered compatible with the MEOP principle. These reasoning also apply to guarantee premiums at the time they are set ⁽³⁸⁾.
- (167) Contrary to what is claimed in the complainant's observations, Germany confirmed to the Commission that Haitec was not in financial difficulty. Furthermore, the question whether, *de facto*, no other private investor would have granted such a guarantee to Haitec in favour of FFHG at that time is irrelevant. The only decisive factor is whether the activity is still economically sustainable, so that a *hypothetical* investor could envisage such a choice. The mere fact that FFHG was legally obliged to continue an allegedly loss-making business with Ryanair (which is not true in this case) is not sufficient to classify the guarantee between the *Land* and HAITEC as commercially unviable. As mentioned above, temporary deficits do not exclude the applicability of the MEOP as long as a sustainable improvement in the long term is evident. In this case, the information provided by Haitec shows that Haitec's investments in the maintenance hall of around EUR 40 million were significantly higher than originally planned, which shows that the guarantee had an economic incentive effect that led to a sustainable strengthening of the site and was therefore economically reasonable.
- (168) In order to assess whether the economic activity in question would have been carried out by a private operator, it is also necessary to look at the legal framework of the economic activity itself, in this case the guarantee agreement. In other words, for the MEOP to be inapplicable, the guarantee agreement would have to be unprofitable even in its theoretical conception. As mentioned above, the guarantee was designed to have a positive economic effect, which it did have. However, even in the scenario of a hypothetical failure of the construction project due to the occurrence

⁽³⁵⁾ See judgment of the Court of Justice of 5 June 2012, *Commission v Électricité de France (EDF)*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 82 *et seq.*

⁽³⁶⁾ Judgment of the Court of First Instance of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 107.

⁽³⁷⁾ See judgment of the Court of Justice of 21 March 1991, *Italian Republic v Commission*, C-305/89, ECLI:EU:C:1991:142, paragraph 20: 'It should be added that although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectorial – and guided by prospects of profitability in the longer term.'

⁽³⁸⁾ See judgment of the Court of Justice of 21 March 1991, *Italian Republic v Commission*, C-303/88, ECLI:EU:C:1991:136, paragraphs 23 and 24.

of one of the circumstances listed in recital 19, the guarantee agreement was designed to be still economically lucrative despite these circumstances. In fact, the guarantee contract was drafted in terms that, in the event of a guarantee claim, the guarantee sum would only be due by the *Land* concurrently with the return of the property by Haitec and, pursuant to Section C, point 3, Article 8, of the contract, without obligation of FFHG to compensate Haitec for expenses of any kind. This means that in the event of a guarantee claim, FFHG would receive a plot of land, including the hall built on it, without reimbursing Haitec for the related expenses. FFHG would receive hence a propriety with a higher value and could use it for other commercial purposes. In turn, the value of the *Land's* shares in FFHG would increase. The Commission also notes that after the transfer of the *Land's* shares in FFHG to HNA in 2017, FFHG was obliged to transfer the property, including the hall built on it, to the *Land* if the guarantee was called. Therefore, a private investor could have envisaged such an economic activity.

(169) The Commission concludes that the MEOP applies.

5.1.1.1.3.2. The market-conformity of the guarantee premium

(170) The second question at stake is whether the guarantee premium of 2,56 % is market-conform.

(171) The Commission's doubts were the following ⁽³⁹⁾. First, to calculate the yield on bonds issued by [...] rated companies with a 15 years maturity, the 'benefit approach' takes the yield on bonds issued by those companies with a 10 years maturity and then adds the spread between the yield on German sovereign bonds with a maturity of 15 and 10 years. This spread is likely to be lower than the same spread for companies with a rating of [...], because of German sovereign bonds have a very high rating of AAA (i.e. for such high-quality ratings, the spread between bond yields of different maturities is not large compared with a similar spread for firms with a lower rating). As a result, the Commission found that [the consultancy]'s estimate of the guarantee premium using this method is likely to underestimate the market benchmark. Second, the same doubt arises from the application of a benchmarking approach with CDS rates, which are widely recognised indicators of credit risk. CDS rates reveal that an appropriate guarantee premium for a company with the stand-alone rating of [...] should be in the range of 3,10 % – 4,41 %, depending on whether an adjustment for contract specific characteristics is included. The agreed guarantee premium of 2,56 % is below the lower bound of this range. Third, the Commission noted that, even by accepting all the rating adjustments proposed by Germany and taking [...] as FFHG's rating, the guarantee premium obtained from CDS rates (3,1 %) is greater than the 2,56 % agreed by the parties. Overall, these arguments raised the concern that the agreed guarantee premium may be too low compared to market conditions for companies with the same rating as FFHG.

(172) Germany's observation that the *Land* was entitled to rely on [the consultancy]'s expertise and that the guarantee premium determined by [the consultancy] could not be questioned *ex post*, must be discarded. It would mean that the Commission's exclusive competence to review State aid could be circumvented by incorrect national or private consultancy firms' assessments. The Commission was therefore entitled to question [the consultancy]'s calculations in order to assess whether or not there was an economic advantage.

(173) Similarly, Germany's argument that the Commission did not take into account in its calculation the fact that the guarantee in question is a 'contract performance guarantee' and conferred an economic advantage on the *Land* Rhineland-Palatinate which offsets the lower guarantee premium, is not relevant for the calculation of the market price.

(174) Conversely, Lufthansa's claimed that the guarantee premium obtained from CDS rates (3,1 %) is the wrong benchmark, because the Commission wrongly treated FFHG effectively as a 'borrower'.

⁽³⁹⁾ Opening decision, recitals 154–159.

- (175) Furthermore, according to Lufthansa, the guarantee premium should have amounted to at least 7,98 %, leading to an advantage of 5,42 %. Lufthansa argues that the Communication on reference rates should have been taken into account, but only as a proxy for the calculation of the guarantee premium. Lufthansa claims that the economic situation of FFHG was indeed such that no other private investor would have considered such a contract, and that this risk profile would need to be taken into account.
- (176) The Commission rejects both these arguments. The Commission was entitled to use the Communication on reference rates and accordingly evaluated FFHG with a [...] rating, which as explained above (recital 171), is not a high-quality rating, and results precisely from the economic situation of FFHG.
- (177) The Commission therefore concludes that the guarantee premium was not market conform.
- (178) To conclude, the price difference between the minimum market-conform rate established by the Commission (3,10 %) and the actual rate (2,56 %) for the guarantee constitutes an economic advantage (0,54 %).

5.1.1.1.4. Selectivity

- (179) Article 107(1) TFEU requires that, in order to be defined as State aid, a measure favours 'certain undertakings or the production of certain goods'. The guarantee to Haitec at below market price favours only FFHG as an undertaking and is hence selective.

5.1.1.1.5. Distortion of competition and effect on trade

- (180) In the opening decision the Commission considered that FFHG competes with other airport operators of the Union, at least potentially, to attract Union airlines, in a context where Union airlines enjoy the freedom to offer air transport services on every intra-Union route, in accordance with the Union's air transport legislation. Therefore, the economic advantage identified at the level of the Haitec guarantee on a preliminary basis distorts competition, at least potentially, and affects trade between Member States ⁽⁴⁰⁾.
- (181) However, it must be examined whether the difference of 0.54 points, which constitutes the economic advantage, is an aid measure which is exempt from the notification requirement under Article 108(3) TFEU pursuant to Article 3(1) of Regulation (EU) No 1407/2013.
- (182) First, the guarantee premium falls within the scope of Article 1 of Regulation (EU) No 1407/2013.
- (183) Second, under Article 3(2), first subparagraph, of Regulation (EU) No 1407/2013, the total amount of *de minimis* aid granted to an undertaking by a Member State may not exceed EUR 200 000 over any period of three fiscal years.
- (184) However, if, as in the present case, the measure at stake is a guarantee, the gross grant equivalent must be taken into account in accordance with Article 4(6) of Regulation (EU) No 1407/2013 and other specific conditions must be complied with. According to Article 4(1) of Regulation (EU) No 1407/2013, Regulation (EU) No 1407/2013 applies only to aid the gross grant equivalent of which can be calculated precisely in advance ('transparent aid'). Under Article 4(6) of Regulation (EU) No 1407/2013, aid comprised in guarantees constitute transparent *de minimis* aid if, on the one hand, the guarantee per undertaking covers up to 80 % of the underlying loan and, on the other hand, the guaranteed amount does not exceed EUR 1,5 million for a duration of 5 years or EUR 750 000 for 10 years. At the same time, under Article 4(6), point (a), of Regulation (EU) No 1407/2013, it must be ensured that the beneficiary of the aid is not subject to insolvency proceedings or meets the conditions laid down by national law for the opening of insolvency proceedings at the request of its creditors.

⁽⁴⁰⁾ Opening decision, recital 161.

- (185) In the present case, neither FFHG nor any enterprise linked to it within the meaning of Article 2(2) of Regulation No 1407/2013 was granted State aid under the Commission Regulation No 1407/2013 in the 3 years preceding the grant of the guarantee. FFHG was neither subject to insolvency proceedings at the time nor fulfilled the conditions for the opening of such proceedings in the period in which the aid was granted. Germany also confirmed that the guarantee does not exceed 80 % of the sales contract. Finally, the difference of 0,54 points between the minimum market-conform rate established by the Commission (3,10 %) and the actual rate (2,56 %) is converted into an annual gross grant equivalent of EUR 33 480 which, after 3 years, equals to a total of EUR 100 440, which is significantly below the maximum amount under the Regulation (EUR 200 000).
- (186) In conclusion, the advantage granted to FFHG through the guarantee fulfils the condition of the Regulation (EU) No 1407/2013.

5.1.1.1.6. Conclusion

- (187) According to Article 3(1) of Regulation (EU) No 1407/2013, the measure shall be deemed not to meet all the criteria in Article 107(1) TFEU, and shall therefore be exempt from the notification requirement in Article 108(3) TFEU.

5.1.1.2. The 'double' sale by FFHG of a plot of land

- (188) Concerning the exercise of the right of withdrawal by FFHG from the sale of the plot of land 'housing' to *Land Rhineland-Palatinate*, the Commission considers it appropriate to start the analysis with the sole point on which it had raised doubts in the opening decision, namely whether the return of ownership of the plot 'housing' from the *Land Rhineland-Palatinate* to FFHG took place at market value.
- (189) First, the Commission regrets that, contrary to what had been foreseen in the 2014 sales contract, no expert opinion has been commissioned at the time of the exercise of the right of withdrawal by FFHG. This circumstance is a *prima facie* indication that the return of ownership may not have taken place at market value.
- (190) Instead, the return of the plot 'housing' took place at the same price as the price determined for this plot by the Expert Opinion Committee for Property Values for the Area of Osteifel-Hunsrück, complemented by a report of SGD Nord, for the 2014 sales contract, i.e. zero EUR.
- (191) Second, the Commission observes that one month after FFHG exercised its right of withdrawal, it sold the same plot of land for EUR 1,25 million to ADC, a private investor by a contract of 6 July 2016 between ADC, FFHG and the *Land Rhineland-Palatinate* (recital 25).
- (192) Third, as Germany explained in its communication of 26 October 2017, the Commission observes that signing of this sales contract has a history, in which both FFHG and the *Land Rhineland-Palatinate* have been involved (recitals 22 to 26).
- (193) The Court held in *Land Burgenland v Commission* that where a public authority proceeds to sell an undertaking belonging to it by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified. In such circumstances, the Commission is not obliged to resort to other methods in order to check the market price, such as independent studies ⁽⁴¹⁾.

⁽⁴¹⁾ Judgment of the Court of Justice of 24 October 2013, *Land Burgenland and Others v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95.

- (194) In the present case, the *Land* Rhineland-Palatinate knew that FFHG had received an offer, as part of a public tender, of EUR 1,25 million for the 'housing' plot, since it used this offer to set the price for that plot in the privatisation agreement with SYT. Furthermore, the *Land* Rhineland-Palatinate also knew, because it was party to the sales contract concluded between the *Land* Rhineland-Palatinate, FFHG and ADC on 6 July 2016, i.e. one month after FFHG exercised its right of withdrawal, that in that contract, the plot of land 'housing' was valued at EUR 1,25 million.
- (195) For these reasons, by accepting without contestation that FFHG exercised its right of withdrawal without the appointment of an expert to estimate the market value of the plot 'housing', the *Land* Rhineland-Palatinate did not act in accordance with the behaviour of a market economy operator. A market economy operator would have insisted on appointing an expert, who would have determined the value of the plot. In line with the principles set out in recital 193 and in view of the offer of ADC received during the public tender procedure, the value that the market was willing to pay for the plot of land 'housing' was EUR 1,25 million at that very point in time. The *Land* was entitled to require this price from FFHG for the 'housing' plot as a compensation.
- (196) Hence, the Commission concludes that the exercise of the right of withdrawal at a price of zero EUR, rather than at EUR 1,25 million, has provided an advantage of EUR 1,25 million to FFHG.
- (197) As set out in the opening decision (recitals 179, 180 and 190), the other conditions for finding the presence of State aid (undertaking and economic activity, use of State resources and imputability to the State, selectivity, distortion of competition and effect on trade) are fulfilled. Neither Germany, nor the interested parties have contested this in their observations.
- (198) Hence, the exercise of the right of withdrawal at zero EUR, rather than at EUR 1,25 million, constitutes State aid of EUR 1,25 million to FFHG.

5.1.2. *Regarding measures of potential aid to Ryanair*

5.1.2.1. The training support to Ryanair

5.1.2.1.1. Notion of undertaking and economic activity

- (199) In the opening decision the Commission preliminary considered Ryanair to be an undertaking and the provision of training to constitute an economic activity ⁽⁴²⁾.
- (200) Since Germany maintains its position, i.e. that the training support does not constitute State aid as it constitutes an exercise of public power, the Commission needs to address the arguments presented by Germany.
- (201) The German authorities submitted that a measure aiming at reducing unemployment, such as the measure under assessment, has a social component, which is in the public interest. However, irrespective of whether this measure could fall under the German State's obligation to be a 'social State' (*Sozialstaatsprinzip* laid down in Article 20(1) of the German Basic Law) and thus constitute an exercise of public power under the German legal order, the concepts of 'economic activity' and 'exercise of public authority' are autonomous concepts of European State aid law and must therefore be understood accordingly. An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject ⁽⁴³⁾. As already stated in the opening decision ⁽⁴⁴⁾, a measure to combat unemployment has been considered in the past as supporting an economic activity and therefore as State aid ⁽⁴⁵⁾.

⁽⁴²⁾ Opening decision, recitals 205-208.

⁽⁴³⁾ Judgment of the Court of Justice of 18 March 1997, *Calì & Figli v Servizi Ecologici Porto di Genova*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23.

⁽⁴⁴⁾ Opening decision, recital 207.

⁽⁴⁵⁾ See for example Commission Decision of 2 July 2016 in State aid case SA.36671 (2013/N) – Sweden – Vocational introduction employment aid for young workers (OJ C 204, 18.7.2013, p. 9).

- (202) The Commission assessed whether the training support at stake, aiming at combating unemployment, could be considered a social service of general interest and by that an 'exercise of public power' according to European State aid law. However, social services of general interest only qualify as 'exercises of public power' if they are based on the principle of solidarity. As the measure consists of several payments, there is no system of mutual and yet independent contributions based on membership. The measure is also not included in the German national educational system.
- (203) Furthermore, the training aid is not only in the public interest but also in the economic interest of Ryanair. As Ryanair is awarded a remunerated contract, Ryanair, first and foremost, fulfils a standard commercial service for which a market exists.
- (204) Finally, it appears that although the State may have examined the training delivered before granting the funds, there does not seem to have been any continuous monitoring. Germany also does not seem to have set the content of the trainings themselves. Hence, the training support does not constitute an exercise of public power.
- (205) If a measure does not constitute an exercise of public power, the public interest is irrelevant for the assessment of the existence of 'State aid' within the meaning of Article 107(1) TFEU.
- (206) Therefore, as Germany did not provide any new element that could lead the Commission to another conclusion, the training support concerns an economic activity.

5.1.2.1.2. Use of State resources and imputability to the State

- (207) In its observations on the opening decision (see recital 132), Germany confirmed that Ryanair was the final recipient of payments from the *Land* and that HCM was only an intermediary. Ryanair's arguments to the contrary must therefore be rejected.
- (208) The fact that Germany allegedly only financed 50 % of the funds paid out by HCM to Ryanair, as Ryanair argues, is irrelevant for the purpose of determining whether State resources have been used and whether the training support is imputable to Germany, as only the part financed by Germany is under investigation here.
- (209) Therefore, the Commission concludes that State resources were used which are imputable to the State.

5.1.2.1.3. Economic advantage

- (210) In order to conclude whether or not Ryanair enjoyed an advantage as a result of the training support, Germany and interested parties were invited to provide information on whether or not Ryanair normally bears the training costs in question itself and on the question of whether or not Ryanair was paid twice (once by the students and once by HCM) for the training costs incurred under this programme.

- (211) According to the Court of Justice, it is for the Commission to prove, in its decision, the existence of State aid ⁽⁴⁶⁾. However, this obligation is to be assessed in the light of the information available to the Commission at the time it adopted its decision ⁽⁴⁷⁾. Indeed, 'the Commission may not in principle be barred from relying on a set of circumstances which taken as a whole indicate the de facto existence of an aid programme' ⁽⁴⁸⁾. Within the overall assessment of an economic advantage, the Commission is to take into account all the options that an operator would reasonably have envisaged, all the information available and likely to have a significant influence on its decision, and the developments that were foreseeable at the time when the decision to confer an advantage was taken ⁽⁴⁹⁾.
- (212) Germany and Ryanair did not provide any information on whether or not Ryanair normally bears the training costs in question itself and on the question of whether or not Ryanair was paid twice. Germany and Ryanair argued that after 6 years under Irish law and 10 years under German law, they were no longer obliged to keep the information. Yet, after Lufthansa submitted a formal complaint on 4 March 2011 which was forwarded to Germany on 18 March 2011, the Commission asked Germany specific factual questions on the training support to which Germany replied on 14 June 2011. A national law on record keeping may not reduce the obligation of a Member State or an interested party to cooperate with the Commission. Even in this case, Germany became aware of the possible qualification of the training support as State aid in 2011, i.e. at a time when it was still under its national obligation to keep the document in the archives. It was clear at that time that a Commission decision on this measure was likely to follow. The responsibility for not keeping the documents therefore falls on Germany. The Commission therefore assesses the existence of aid on the basis of the information it has received.
- (213) Germany's 2019 submission shows that, over the period 2001-2003, funding of EUR [1,5–2,0 million] was granted by the Ministry of Labour, Social Affairs, Family and Health of Rhineland-Palatinate to HCM.
- (214) Germany's 2019 submission shows that at least two cheques for EUR 220 427,64 and EUR 639 146,04 were issued by HCM to Ryanair. The cheques were debited from HCM's account on 17 January 2003.
- (215) In addition, a further EUR 680 627,94 from the Ministry of Labour, Social Affairs, Family and Health of Rhineland-Palatinate have been paid to HCM in 2003.
- (216) Neither Germany nor Ryanair have provided any evidence to show that the price of the training provided by Ryanair was market conform and corresponded to market needs.
- (217) Therefore, the Commission considers that the training support constitutes an economic advantage for Ryanair.

5.1.2.1.4. Selectivity

- (218) Neither the observation of Germany nor the ones from the involved parties disputed the selectivity of the measure. The Commission maintains therefore its preliminary conclusion that any economic advantage involved in the measure, benefitting only Ryanair, would be selective within the meaning of Article 107(1) TFEU.

⁽⁴⁶⁾ See judgment of the Court of Justice of 17 November 2022, *Volotea and easyJet v Commission*, Joined Cases C-331/20 P and C-343/20, ECLI:EU:C:2022:886, paragraph 111.

⁽⁴⁷⁾ See judgment of the Court of Justice of 17 November 2022, *Volotea and easyJet v Commission*, Joined Cases C-331/20 P and C-343/20, ECLI:EU:C:2022:886, paragraph 112; see also judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, C-234/84, EU:C:1986:302, paragraph 16, and judgment of the Court of Justice of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, ECLI:EU:C:2017:706, paragraph 70.

⁽⁴⁸⁾ See judgment of the Court of Justice of 13 April 1994, *Federal Republic of Germany and Pleuger Worthington GmbH v Commission*, Joined Cases C-324/90 and C-342/90, ECLI:EU:C:1994:129, paragraph 15.

⁽⁴⁹⁾ See judgment of the Court of Justice of 17 November 2022, *Volotea and easyJet v Commission*, Joined Cases C-331/20 P and C-343/20, ECLI:EU:C:2022:886, paragraph 113.

5.1.2.1.5. Distortion of competition and effect on trade

(219) As concluded in the opening decision and in the absence of any comments contesting the distortion of competition and effect on trade, the Commission considers that this criterion is fulfilled.

5.1.2.1.6. Conclusion

(220) The Commission concludes that the training support constitutes State aid.

5.1.2.2. The financing of a crew and pilot school and a maintenance hall

5.1.2.2.1. Notion of undertaking and economic activity

(221) Ryanair constitutes an undertaking and the financing of a crew and pilot school and a maintenance hall an economic activity within the meaning of Article 107(1) TFEU.

5.1.2.2.2. Economic advantage

(222) As indicated in recital 105 of the opening decision, Germany provided a profitability analysis of the agreements at issue to prove their compliance with the market economy operator principle. This analysis consists in the calculation of an aggregate NPV of the cash flows attributable to the agreements (i.e. maintenance hall, crew and pilot school and accommodation for students). These cash flows include revenues, such as rents from Ryanair and payments for the use of accommodations, as well costs, such as maintenance costs. Cash flows projections cover the period 2010-2024 and are discounted at a [4,0–4,5] % rate. Based on these assumptions, the analysis shows a positive NPV of EUR [100 000–200 000], which means that discounted cash in-flows outweigh out-flows. According to Germany, this result reveals the profitability of the agreements and suggests their compliance with the market economy operator principle.

(223) The profitability analysis submitted by Germany seemed to contain several flaws, set out in the opening decision.

(224) First, the Commission considered preliminarily that cash flows calculated by Germany included depreciation amounts of EUR [40 000–50 000] to EUR [60 000–70 000] per year which in principle should not be part of the calculation, since depreciation is an accounting concept which does not correspond to actual cash flows. If the depreciation amounts would be excluded from the calculation, the net present value would become negative at around EUR [- 500 000 – - 400 000].

(225) Second, it seemed that no initial investment costs for transforming the premises into living quarters had been included in analysis. This appeared implausible as Germany pointed out that a transformation of the premises was necessary.

(226) Third, the analysis included a cash in-flow of EUR [1 000–10 000] per year, whose nature was not clear. Adjusting the cash flows accordingly would make the net present value associated with these three agreements even more negative.

(227) Finally, the Commission preliminarily considered that the discount rate of [4,0–4,5] % did not appear to be justified and seemed excessively low for the time period in which these agreements were signed in 2009/2010.

(228) FFHG was able to provide justifications for those flaws, which the Commission considers sufficient to invalidate the preliminary analysis of the Commission set out in the opening decision.

(229) First, having assessed the profitability analysis submitted by Germany, the Commission concludes that the depreciation amount was already excluded from the cash flows calculated by Germany.

(230) Second, the Commission finds that the initial investment cost of around EUR [100 000–200 000] were already taken into account in the profitability analysis, and acknowledges that even if they had not been taken into account (which was not the case), their addition would still lead to a positive NPV.

- (231) Third, the Commission is convinced by FFHG's explanation that the yearly cash in-flows questioned in the opening decision in fact concerned either yearly collection costs or fixed ancillary costs which represent cash *out*-flows and were duly calculated in the profitability analysis.
- (232) Fourth, the Commission acknowledges that even assuming that the discount rate of [4,0–4,5] % which the opening decision (recital 266) questioned was too low, a higher discount rate would have had a positive, rather than negative, impact on the NPV due to the cash-flow profile for these agreements. The Commission indeed notes that a special rent payment from Ryanair for 2010 represented a significant EUR [0–5] million cash in-flow and each of the following 14 years resulted in a very minor cash out-flow. The Commission concludes that increasing the discount rate would still lead to the conclusion that the agreements were MEOP-compliant.
- (233) Based on those additional explanations, which it has verified, the Commission reverses the position expressed in the opening decision and concludes that there is no economic advantage to Ryanair.

5.1.2.2.3. Conclusion

- (234) The Commission concludes that the financing of a crew and pilot school and a maintenance hall to the benefit of Ryanair do not constitute State aid to Ryanair within the meaning of Article 107(1) TFEU.

5.1.2.3. The 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair

5.1.2.3.1. Notion of undertaking and economic activity

- (235) As an airline, Ryanair constitutes an undertaking within the meaning of Article 107(1) TFEU. Both marketing services and air services constitute economic activities. The first criterion of Article 107(1) TFEU is therefore fulfilled.

5.1.2.3.2. Use of State resources and imputability to the State

- (236) The marketing agreements were concluded between the *Land* Rhineland-Palatinate and Ryanair. The marketing support payments were directly financed from the budget of the *Land*, and therefore financed by State resources and imputable to the State.

5.1.2.3.3. Economic advantage

- (237) In determining whether a measure constitutes aid, it is necessary, according to settled case-law, to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions ⁽⁵⁰⁾.
- (238) It is necessary to analyse whether the market economy operator principle is applicable to the agreements at issue, and if so, if it is complied with.

5.1.2.3.3.1. Individual assessment of the marketing agreements

- (239) The first question is whether the 2005 and 2017 marketing agreements and the 2013, 2015 and 2016 airport agreements shall be assessed individually or in conjunction. The second question is whether the *Land* Rhineland-Palatinate and Frankfurt-Hahn airport's operator FFHG shall be considered as one single entity for the purposes of applying the principle of the private investor in a market economy.

⁽⁵⁰⁾ See for instance judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

- (240) With regards to the first question, according to Germany, FFHG was not involved in any way in the conclusion of the marketing agreements. Especially after the privatisation of Frankfurt-Hahn airport in 2017, the *Land* Rhineland-Palatinate did not have any reason to involve FFHG in the conclusion of the marketing agreements. The *Land* Rhineland-Palatinate did also not control FFHG in 2005 as minority shareholder (17,5 %) and did not have any reason to involve it in the marketing agreement. The contracting parties were only the *Land* and Ryanair. Therefore, the marketing strategy is to be examined separately from the development of Frankfurt-Hahn airport.
- (241) Furthermore, with regards to the second question, the Commission already noted in the opening decision that both marketing agreements were concluded by the *Land* Rhineland-Palatinate at a time when the *Land* did not control FFHG. Indeed, at the time of conclusion of the 2005 marketing agreement with Ryanair, the authorities of the *Land* Rhineland-Palatinate only held a 17,5 % share in FFHG whereas the majority of the shares in FFHG (65 %) was owned by Fraport, a company of which the *Land* Rhineland-Palatinate did not own stakes at any time⁽⁵¹⁾. When the marketing agreement of 2017 was concluded in October 2017, the *Land* Rhineland-Palatinate did not control FFHG either since it had sold its shares in the company to HNA Airport Group GmbH on the basis of a share purchase agreement closed on 9 August 2017, and thus before the marketing agreement was concluded. Therefore, the *Land* Rhineland-Palatinate cannot be considered as an airport operator, forming a single economic entity with FFHG, in the framework of the application of that principle. This differs from the situation that gave rise to the first *Charleroi airport* judgment⁽⁵²⁾. In that case, the airport was owned by and economically dependent on the Walloon Region that entered into the contentious agreement with Ryanair, which meant that the Walloon Region took part in the economic activity carried out by the airport and obtained financial consideration for granting the measures.
- (242) Ryanair argues that even a non-controlling interest such as the *Land*'s interest in FFHG before 2009 can justify a joint analysis from a legal perspective, because Fraport and the *Land* Hesse, the other two shareholders of FFHG, were also a State-owned company and a State entity respectively. Therefore, Ryanair claims that before the *Land* Rhineland-Palatinate acquired an 82,5 % stake in FFHG on 1 January 2009, both the signatory of the 2005 marketing agreement and the owners of FFHG were, ultimately, the German State.
- (243) The Commission rejects this line of reasoning for the following reasons: first, as stated above, the *Land* Rhineland-Palatinate did not own any shares in Fraport. Second, the *Land* Hesse and the *Land* Rhineland-Palatinate are separate local public legal entities (*Körperschaften des Öffentlichen Rechts*, i.e. *Gebietskörperschaften*) and, due to the federal system in Germany, are not subject to the Federal State's control when concluding marketing or airport service agreements, as regional economic investment in an airport falls within the competence of the *Länder* in the absence of a federal competence (Article 30 and Article 70(1) of the German Basic Law). Therefore, the shares that the *Land* Hesse holds could not influence the shareholder powers that the *Land* Rhineland-Palatinate could exercise on FFHG. The economic benefits accruing to the *Land* Hesse as shareholder do not to benefit the *Land* of Rhineland-Palatinate either, given the clear separation of the budgets of the public legal entities. Therefore, the Commission will only assess whether the *Land* Rhineland-Palatinate as a single entity acted as private investor in a market economy.
- (244) In light of the above, the Commission will assess the marketing agreements individually and the market operator principle solely for the *Land* Rhineland-Palatinate.

⁽⁵¹⁾ Cf. Hahn I Decision, recitals 17 et seq. and 182. At the time of the conclusion of the marketing agreement of 2005, the main shareholders of Fraport were the *Land* Hesse (31,7 %), Stadtwerke Frankfurt am Main Holding GmbH – a company owned by the city of Frankfurt am Main (20,3 %), the Federal Republic of Germany (exchangeable bond; 6,6 %), Julius Bär Investment Management LLC (5,4 %) and Deutsche Lufthansa AG (4,95 %).

⁽⁵²⁾ Judgment of the Court of First Instance of 17 December 2008, *Ryanair v Commission*, T-196/04, ECLI:EU:T:2008:585, paragraphs 53 to 61.

- (245) Since the *Land* Rhineland-Palatinate cannot be considered as the operator of Frankfurt-Hahn airport for the purpose of the assessment of the 2005 and 2017 marketing agreements, the incremental costs method set out in the 2014 Aviation Guidelines regarding the application of the market economy operator principle to agreements between publicly controlled airports and airlines is not applicable to the 2005 and 2017 marketing agreements.

5.1.2.3.3.2. Applicability of the market operator principle

- (246) According to Germany, the payments in question do not constitute State aid because the sums paid by the *Land* Rhineland-Palatinate to Ryanair corresponded to the market price of the marketing services provided.
- (247) First of all, it must be assessed whether the marketing agreements are an exercise of public powers. These marketing agreements are typically made between two private entities, e.g. an airport and an airline. As regards the applicability of the market economy operator principle, it should be borne in mind that the comparison is not with any market economy operator in general but rather with a market economy operator in the situation of the *Land* Rhineland-Palatinate.
- (248) Consideration has therefore to be given to the scope of the market economy operator principle with regard to the *Land* Rhineland-Palatinate.
- (249) According to paragraph 77 of the Commission Notice on the notion of State aid ‘only the benefits and obligations linked to the role of the State as an economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account’, which among other things means that no account is to be taken of public interest considerations such as regional development.
- (250) The benefits of marketing agreements in terms of developing regional tourism, namely the potential revenue generated by tourism for the region, are not relevant to an assessment of compliance with the market economy operator criteria ⁽⁵³⁾. In the present case, Germany and Ryanair have not presented any evidence to indicate that, through the conclusion of the marketing agreements, the *Land* Rhineland-Palatinate could have expected any financial gain as market economy operator aside from the development of tourism in the region.
- (251) Thus, it does not matter how thoroughly Germany assessed that Ryanair had a high level of competence in the field of location marketing and was the only airline operating at Frankfurt-Hahn airport that could be considered for the purchase of marketing services. It also does not matter whether Ryanair was selected in accordance with the German public procurement law. The assessment is limited to the question whether the marketing agreements, could result in a financial gain aside from developing regional tourism
- (252) Germany did not dispute that the *Land* Rhineland-Palatinate does not benefit from any increase in the revenue of the operator of Frankfurt-Hahn airport that might result from an increase in traffic. The *Land* Rhineland-Palatinate does not operate Frankfurt-Hahn airport and was only a minority shareholder (17,5 %) in Frankfurt-Hahn airport at the time of the conclusion of the 2005 marketing agreement and not a shareholder at the time of the conclusion of the 2017 marketing agreement, which are the sole points in time that matter for the assessment under the market economy operator principle. The German authorities have not put forward any gains linked to an increase in Frankfurt-Hahn airport’s revenue that might have benefited the *Land* Rhineland-Palatinate as a shareholder of the airport.
- (253) On the contrary, Germany reiterated in their comments on the opening decision that the marketing agreements should be considered as facilitating the promotion of tourism along with accessibility, connectivity and economic development of the region, their aim not being to seek profits from the operation of Frankfurt Hahn airport.

⁽⁵³⁾ See Decision (EU) 2020/1671, recital 178.

- (254) No business plan was drawn up assessing such potential benefits before the decisions were made to conclude the marketing agreements with Ryanair.
- (255) Future proceeds from airport charges and other revenues accruing to FFHG as a result of Ryanair's air transport operations at Frankfurt-Hahn airport are not part of the revenues that a hypothetical market economy operator driven by profitability prospects and in the same situation as the *Land Rhineland-Palatinate* would have taken into consideration when assessing whether to conclude the two marketing agreements at issue. When the 2017 marketing agreement was concluded, the *Land Rhineland-Palatinate* was indeed no longer a shareholder of FFHG. When the 2005 marketing agreement was concluded, the *Land Rhineland-Palatinate* was a minority shareholder of FFHG. Although, in 2005, the *Land* would have only indirectly benefitted from the increase in profits generated by FFHG through dividends or capital gains, as minority shareholder of FFHG, the *Land Rhineland-Palatinate* would have had no interest in fully financing measures aimed at increasing traffic at Frankfurt-Hahn airport without co-financing by FFHG itself or by its controlling shareholder, and without acquiring any additional share in FFHG.
- (256) All these elements demonstrate that the decisions to conclude the marketing agreements had no economic link with the shares held by the *Land Rhineland-Palatinate* in FFHG ⁽⁵⁴⁾. Germany did not dispute this.
- (257) In conclusion, the payments made by the *Land* to Ryanair on the basis of the marketing agreements are of the same nature as payments to an airline by a public entity to launch or maintain air transport services to a given airport with a view to fostering the economic development of the region where the airport is located. While this is a practice that may be commonly observed in public entities in charge of the economic development of a region, such a practice is alien to a market economy operator led by profitability considerations. The Commission thus considers that the market operator principle is not applicable.
- (258) Therefore, the market economy operator principle is not applicable to the conclusion of the 2005 and 2017 marketing agreements by the *Land Rhineland-Palatinate* with Ryanair because the *Land Rhineland-Palatinate* gained no benefit from them in its role as economic operator, but rather pursued public policy objectives.
- (259) Finally, the Commission notes that a measure is considered not to constitute an advantage where a State measure represents compensation corresponding to consideration for services provided by undertakings entrusted with a service of general economic interest in order to perform public service obligations, where those undertakings do not in fact enjoy a financial advantage and where the measure does not have the effect of putting those undertakings in a more favourable position than their competitors ⁽⁵⁵⁾. In the present case, however, Germany made no indication that Ryanair was entrusted with public service obligations.

5.1.2.3.3.3. For the sake of completeness: Determination of the advantage conferred to Ryanair

- (260) The finding that the market economy operator principle does not apply to the marketing agreements suffices to find that the payments Ryanair has received constitute an advantage for Ryanair.

⁽⁵⁴⁾ See Commission Decision (EU) 2020/1671, recital 178.

⁽⁵⁵⁾ See judgment of the Court of Justice of 2 September 2010, *Commission v Deutsche Post AG*, C-399/08, ECLI:EU:C:2010:481, paragraph 41 and judgment of the Court of Justice of 9 June 2011, *Comitato 'Venezia vuole vivere' and others v Commission*, C-71/09 P, ECLI:EU:C:2011:368, paragraph 92.

- (261) For the sake of completeness, in order to determine the existence of an advantage for Ryanair if the market economy operator principle was applicable to the marketing agreements, which was not the case, the Commission has examined all the relevant circumstances of the case, in accordance with the Notice on the notion of State aid. For instance, there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions, especially if the purchase does not meet the actual needs of the authority ⁽⁵⁶⁾.
- (262) The question at the heart of the Commission's assessment of the existence of an advantage conferred on Ryanair in that alternative scenario is whether the *Land* Rhineland-Palatinate had an actual need for marketing services purchased from Ryanair in order to fulfil its public policy objective, namely the promotion of the *Land* Rhineland-Palatinate.
- (263) Germany's and Ryanair's claim that the *Land* Rhineland-Palatinate purchased marketing services from Ryanair at market prices, can be set aside. The decisive question here is whether there has been an actual need for those services. The Commission thus will neither address the external expert opinion on the market conformity of the price nor the monitoring system that was put in place to monitor the continued alleged market conformity of the implementation of the marketing agreement.
- (264) The Commission assesses whether the marketing agreements have been concluded to purchase genuine marketing services, or whether the true purpose of those agreements was to grant aid to Ryanair in return for Ryanair operating air services from Frankfurt-Hahn airport.

5.1.2.3.3.3.1. The purchase of marketing services served only as justification for the payments made to Ryanair to keep the latter at Frankfurt-Hahn airport

- (265) For the reasons set out below, the Commission came to the conclusion that the purchase of marketing services served only as justification for the payments made to Ryanair to keep the latter at Frankfurt-Hahn airport; even if the marketing services had some marketing effect (which was not the case), it was not the main intention of the agreements, which must be viewed rather as concealed subsidies, and the financial benefits of the marketing effect did not accrue to the *Land* Rhineland-Palatinate.

— *There was no real intention on the part of the Land Rhineland-Palatinate to advertise the region*

- (266) Germany disputes the Commission's consideration in the opening decision that the marketing agreements did not aim at advertising the region. The German authorities argue that the Commission bears the burden of proof for this assumption. The Commission disagrees. It has established in the opening decision that, *prima facie*, the purpose of the marketing agreements has been to ensure that Ryanair flies to Frankfurt-Hahn airport at a given frequency. It was then on Germany to show that in reality, the *Land* Rhineland-Palatinate has bought genuine marketing services.
- (267) For the following reasons, on the basis of the observations received, the Commission confirms the preliminary assessment of the opening decision.
- (268) First, the lack of intention on the part of the *Land* Rhineland-Palatinate to advertise the region is indicated by the circumstances in which the marketing agreement was set up.

⁽⁵⁶⁾ See judgment of the General Court of 14 June 2023, *Ryanair and Airport Marketing Services v Commission*, T-79/21, ECLI:EU:T:2023:334, paragraph 167: 'As regards the applicants' criticism concerning the legal basis of the "real need" test, it should be borne in mind that the lawfulness of a Commission decision finding that there was State aid within the meaning of Article 107(1) TFEU must be assessed primarily in the light of the objective rules of the FEU Treaty (see, to that effect, judgment of 16 July 2014, *Germany v Commission*, T-295/12, not published, EU:T:2014:675, paragraph 181 and the case-law cited).'

- (269) The *Land* Rhineland-Palatinate had an economic policy interest in keeping Ryanair at Frankfurt-Hahn airport. The *Land* Rhineland-Palatinate granted to Ryanair in the years 2001 to 2003 aid for conducting pilot and crew training (recitals 199 to 220). Germany argued that Frankfurt-Hahn airport was an important employer, adequate to reduce unemployment in the region of Frankfurt-Hahn.
- (270) Furthermore, in the passenger segment, the competitiveness of Frankfurt-Hahn airport in relation the airports nearby was highly dependent on Ryanair. Due to its geographical location, Frankfurt-Hahn airport is not as easily accessible by public transport from the nearest city as, for example, Cologne-Bonn, Frankfurt am Main or Strasbourg airports, which each have a direct train connection. Frankfurt-Hahn is attractive to passengers mainly because of the low-cost flights it offers. The airport was therefore heavily dependent on Ryanair continuing to operate at the airport and offering low-cost fares.
- (271) Second, the Commission cannot comprehend why *Land* Rhineland-Palatinate sought to promote the region as a tourist destination by investing a considerable share of its marketing budget – Lufthansa, which has not been contradicted on that point by Germany, speaks of 30 to 50 % – in the marketing services of one single airline.
- (272) The *Land* Rhineland-Palatinate can be reached by various means of transport, including car, train and bus. Due to its geographical location, the most convenient way to reach or travel from the airport is by car or bus. It is not particularly attractive for tourists to have to rent a car to reach the nearest tourist destination (ca. 1 hour to Trier or Koblenz). This suggests that the design of the airport itself is more geared to flying passengers from the *Land* Rhineland-Palatinate somewhere else. Indeed, according to Germany's submission, a study from Dornier Consulting found that [75–80] % of the airport traffic was outgoing, meaning that the vast majority of Ryanair's passengers from Frankfurt-Hahn depart. This suggests that promoting routes from/to this airport is more likely to improve tourism elsewhere.
- (273) Also, Germany did not elaborate on the assumption from Ryanair that the *Land* used the marketing services of Ryanair as brand portfolio. Therefore, this *ex post* assumption from Ryanair cannot be maintained.
- (274) Therefore, the Commission considers that the main expected effect and objective of the agreements at issue for the *Land* Rhineland-Palatinate was not to acquire marketing services with a view to promoting the territory of Rhineland-Palatinate but rather to financially support Ryanair's air transport operations from and to Frankfurt-Hahn airport.

— *Ryanair's flight operations were targeted, rather than marketing services*

- (275) The services purchased by the *Land* Rhineland-Palatinate on the basis of the marketing agreements consist of links on Ryanair's website to the touristic offers in the *Land* Rhineland-Palatinate⁽⁵⁷⁾, re-targeting ads utilising the data gathered from visitors of Ryanair's website⁽⁵⁸⁾, a placement of Rhineland-Palatinate on Ryanair's Facebook page and blog⁽⁵⁹⁾, two pages in the in-flight magazine of Ryanair⁽⁶⁰⁾ and a press campaign benefiting the tourist industry of the Rhineland-Palatinate⁽⁶¹⁾. These media channels essentially target (potential) Ryanair customers and not even all of them. For example, the 2017 marketing agreement only provides for a placement of the destination Rhineland-Palatinate on Ryanair's United Kingdom, Ireland and Italy homepages – explicitly mentioning Ryanair's flight connections to London-Stansted, Edinburgh, Newquay and Rome in this context. It thus appears that rather than promoting the territory of Rhineland-Palatinate as such the limited marketing services provided by Ryanair on the basis of the 2005 and 2017 marketing agreements, notably the adverts limited just to the parts of the airline's websites associated with the destination concerned, appear to promote first and foremost Ryanair's own air transport operations from/to Rhineland-Palatinate.

⁽⁵⁷⁾ See Article 1 of the 2005 marketing agreement and Annex 1 of the 2017 marketing agreement.

⁽⁵⁸⁾ See Annex 1 of the 2017 marketing agreement.

⁽⁵⁹⁾ See Annex 1 of the 2017 marketing agreement.

⁽⁶⁰⁾ Article 2 of the 2005 marketing agreement.

⁽⁶¹⁾ Article 3 of the 2005 marketing agreement.

- (276) The Commission does not dispute Ryanair's claim that the marketing on their website might effectively lure clients into buying a flight to Rhineland-Palatinate. It might be that the visitors have, as Ryanair argues in its comments on the opening decision, 'a seamless transition from viewing an advertisement to buying a ticket on the same website, or, the other way around, from booking a ticket to viewing advertising related to the destination, which could influence the choice of their destination for the next trip'.
- (277) The key point, as explained above (recital 275), is that the Ryanair marketing services are specifically targeted at those who have already decided to visit Ryanair's website. This may be, as Ryanair itself has stated, during the purchase of a flight ticket, i.e. typically persons who are already customers of Ryanair. Therefore, this feature is a further indication that the marketing services were not designed to, nor had the effect of, promoting the region in general, but rather promoted specifically the air transport services to Frankfurt-Hahn airport offered by Ryanair.
- (278) Furthermore, both marketing agreements contain precise commitments of Ryanair regarding air service operations (basing of a certain number of aircraft at Frankfurt-Hahn airport according to the 2005 marketing agreement and carrying a certain number of passengers per year according to the 2017 marketing agreement). An entity solely interested in the acquisition of marketing services would have no interest in including obligations imposed on the provider of the marketing services as regards air transport operations into the agreements formalising this acquisition. The existence of those obligations in the marketing services agreements implies de facto that Ryanair is remunerated, through the marketing payments made by the *Land* Rhineland-Palatinate, for its air transport operations from/to Frankfurt-Hahn airport.

— *The targeting of Ryanair, rather than any online marketing service provider in general*

- (279) The advertising in Ryanair's in-flight magazine targeted only a narrow set of potential travellers, namely those already using the services of Ryanair. The tourists targeted by Ryanair are not the main interested clientele for tourism in the *Land* Rhineland-Palatinate. The *Land* Rhineland-Palatinate can be reached by various means of transport, including car, train and bus. This contradiction suggests that the *Land* Rhineland-Palatinate had no real intention to promote tourism by concluding the marketing agreements with Ryanair.
- (280) The marketing services have benefited Ryanair more than they have promoted the *Land* Rhineland-Palatinate and its surrounding area. The marketing services provided by Ryanair could not promote the *Land* Rhineland-Palatinate and its surrounding area effectively, and therefore the choice of Ryanair was not sufficiently justified in economic terms; Ryanair's marketing services did not have the alleged effect; and even if the agreements at issue did have an effect, they benefited Ryanair more than anyone else.
- (281) As indicated above, the Commission doubts that the marketing agreements concluded with Ryanair had a positive effect for the *Land*. Assuming that these marketing campaigns did have the effect of encouraging customers of Ryanair to purchase flight tickets to Rhineland-Palatinate, that effect would primarily have benefited Ryanair, and would have been the fruit of an effort to promote its services that Ryanair could have been expected to have taken on itself.
- (282) The Commission found in the Montpellier decision that Ryanair achieves its load factor objectives through its pricing policy ('yield management'). Ryanair's yield management aims to encourage Ryanair's potential customers to choose a specific destination at a price that is ideal for Ryanair. A key element of Ryanair's yield management is to determine the maximum price that passengers are prepared to pay for their plane ticket while ensuring optimal loading of the aircraft in order to maximise Ryanair's revenues and capture the European market ⁽⁶²⁾. For Ryanair, there is a huge difference between high-season prices and low-season prices. This means that passengers travelling in high season are more profitable for Ryanair than passengers travelling in low season.
- (283) The promotion of destinations that allow Ryanair to obtain a high-season price will be in Ryanair's interest too. Therefore, if the marketing campaign has an impact, it Ryanair will benefit directly.

⁽⁶²⁾ See Commission Decision (EU) 2020/1671, recital 294.

- (284) In addition, a marketing campaign could help to attract passengers who would not have been persuaded by the price alone, or who would not have envisaged travelling with Ryanair to Rhineland-Palatinate if they had not been exposed to a marketing campaign. Passengers who are attracted through marketing campaigns consequently reduce the pressure on Ryanair to attract passengers solely through its pricing policy in order to achieve its load factor objectives.

5.1.2.3.3.2. Ryanair's practice observed in other cases

- (285) The Commission also notes that the use of marketing agreements as a justification for payments to Ryanair in order to maintain Ryanair at a given regional airport is not unprecedented. In particular, the Commission's formal investigation in Case SA.33961, concerning Nîmes airport, showed that, in a situation where the load factor of a particular route had significantly decreased, Ryanair put pressure on the public entities concerned to purchase additional marketing services by threatening to stop operating the route if the financial contribution was not increased on a one-off basis ⁽⁶³⁾. With regard to Altenburg-Nobitz airport, the Commission's formal investigation in Case SA.26500 ⁽⁶⁴⁾ found that, after the airport operator refused to pay a sum demanded by Ryanair as marketing fees for the 2011 summer schedule, Ryanair stopped operating at the airport in March 2011 ⁽⁶⁵⁾. Most recently, in case SA.47867, regarding Montpellier airport ⁽⁶⁶⁾, the Commission considered that the marketing agreements with a local association were disguised subsidies to promote Ryanair's flight routes. This conclusion was later confirmed by the General Court ⁽⁶⁷⁾.

5.1.2.3.3.3. For the sake of completeness: conclusion on the advantage conferred to Ryanair

- (286) The Commission concludes from the aforementioned evidence that the purchase of the marketing services by the *Land* Rhineland-Palatinate from Ryanair merely justifies the payments made to Ryanair for its flight operations, but does not provide a financial gain to the *Land* Rhineland-Palatinate in its role as economic operator and does not correspond to a genuine purchase of services for the promotion of tourism. The 2005 and 2017 marketing agreements therefore also for that reason conferred an advantage to Ryanair.

5.1.2.3.4. Selectivity

- (287) The marketing agreements were concluded with Ryanair, following individual negotiations, and moreover without any prior public tender as far as the Commission is aware. Therefore, any economic advantage involved in those agreements would be selective ⁽⁶⁸⁾.

5.1.2.3.5. Distortion of competition and effect on trade

- (288) As airlines compete with each other in intra-Union trade and Ryanair is an airline active across the Union, the Commission considers on a preliminary basis that the any economic advantage involved in the agreements in question is liable to distort competition and to have an effect on intra-Union trade.

⁽⁶³⁾ See Commission Decision (EU) 2016/633 of 23 July 2014 on State aid SA.33961 (2012/C) (ex 2012/NN) implemented by France in favour of Nîmes-Uzès-Le Vigan Chamber of Commerce and Industry, Veolia Transport Aéroport de Nîmes, Ryanair Limited and Airport Marketing Services Limited (OJ L 113, 27.4.2016, p. 32), recitals 102, 547 and 548.

⁽⁶⁴⁾ Commission Decision (EU) 2016/287 of 15 October 2014 on State aid SA.26500 – 2012/C (ex 2011/NN, ex CP 227/2008) implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd (OJ L 59, 4.3.2016, p. 22).

⁽⁶⁵⁾ See judgment of the General Court of 13 December 2018, *Ryanair and AMS v Commission*, T-165/16, ECLI:EU:T:2018:952, paragraph 258.

⁽⁶⁶⁾ See Commission Decision (EU) 2020/1671, recital 245.

⁽⁶⁷⁾ See judgment of the General Court of 14 June 2023, *Ryanair and Airport Marketing Services v Commission*, T-79/21, ECLI:EU:T:2023:334, paragraphs 161 to 310.

⁽⁶⁸⁾ See paragraph 126 of the Notice on the notion of State aid and judgment of the Court of Justice of 4 June 2015, *Commission v MOL*, Case C-15/14 P, ECLI:EU:C:2015:362, paragraphs 60 *et seq.*

5.1.2.3.6. Conclusion

(289) The Commission concludes that the marketing agreements in question constitute State aid to Ryanair within the meaning of Article 107(1) TFEU.

5.1.2.4. The 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair

(290) Concerning the 2013, 2015 and 2016 airport service agreements between FFHG and Ryanair, the Commission considers it appropriate to start its assessment with the application of the market economy operator principle to assess whether the 2013, 2015 and 2016 airport service agreements conferred an advantage to Ryanair.

(291) In that regard, it is important to keep in mind that prior to the conclusion of those agreements, the relationship between Ryanair and the airport has been governed by the 2002 and the 2005 airport service agreements. Concerning those agreements, the Commission found in the Hahn I Decision that they complied with the market economy operator principle and therefore did not constitute State aid.

(292) In addition, it is important to keep in mind that the airport charges paid by Ryanair under the 2013 and 2015 airport service agreements correspond to the airport charges that are included in the general airport charges scheme that applies to Frankfurt-Hahn. The general schedules of charges of 2002 and 2006 were assessed by the Commission in the Hahn I Decision and the Commission concluded that they did not constitute State aid.

(293) The 2002 airport service agreement was initially set to apply until 13 February 2017, with an option for prolongation until 13 February 2022, and the 2005 airport service agreement was initially set to apply until 2027.

(294) Therefore, the 2013, 2015 and 2016 airport service agreements have to be assessed against that base line, because Ryanair was entitled, in principle, to continue operating at Frankfurt-Hahn airport on the basis of the market-conform conditions agreed with FFHG in the 2002 and 2005 airport service agreements until 2022 and 2027, respectively. As long as the subsequent airport service agreements merely correspond to the existing agreements (the 2002 and 2005 airport service agreements), which would normally continue to run, the economic positions of Ryanair and FFHG are not changed by the conclusion of the airport service agreements of 2013, 2015 and 2016.

5.1.2.4.1. The 2013 Side Letter agreement

(295) The 2013 Side Letter agreement is a side letter to the standard ground handling agreement. As underlined by Germany and Ryanair in their observations after the opening decision, the 2013 Side Letter agreement does not deviate from the schedule of airport charges, but confirms its applicability and merely updates the ground handling rules applicable to Ryanair to general developments in the aviation industry.

(296) As the 2013 Side Letter agreement does not modify in a substantial manner the previously applicable rules, and the previously applicable rules comply with the market economy operator principle (as determined by the Commission in the Hahn I Decision), the Commission concludes that the 2013 Side Letter agreement does not confer any advantage to Ryanair and therefore does not constitute State aid.

5.1.2.4.2. The 2015 Annotation

(297) As described in recital 41, the 2015 Annotation prolongs the 2013 Side Letter agreement by three years until 2017. In addition, it includes amendments concerning the provision of a ramp vehicle / maintenance van and the provision of administrative office and storage space for spare parts.

(298) The mere provision of a ramp vehicle / maintenance van and of administrative office and storage space do not go beyond a commercial gesture towards the main client of the airport. They are not capable of altering the Commission's finding in the Hahn I Decision that the payments made by Ryanair to FFHG for airport services comply with the market economy operator principle.

- (299) As the 2015 Annotation does not modify in a substantial manner the previously applicable rules, and the previously applicable rules comply with the market economy operator principle, the Commission concludes that the 2015 Annotation does not confer any advantage to Ryanair and therefore does not constitute State aid.

5.1.2.4.3. The 2016 Side Letter No 2

- (300) The 2016 Side Letter No 2 contains two modifications concerning the airport charges to be paid by Ryanair: (a) a reduced airport charge of EUR [...] per passenger applies as of [...] passenger per year. Previously, based on the general schedule of charges of 2006, it applied only as of [...] passenger per year; and (b) a new marketing support system, whereby no airport charges at all will be applied to any passenger above the previous year's departing passengers number. The duration of the agreement is until 31 March 2022.
- (301) Germany has replied to the doubts raised by the Commission in the opening decision, and repeated by Lufthansa in its submission concerning the date of the PwC study. In particular, in line with the explanations provided by FFHG in its comments on the opening decision, Germany has clarified that the PwC study has not been commissioned 2 days prior to the conclusion of the agreement, but rather has been in preparation and discussed with FFHG over a longer period of time, and hence its findings were known to the management of FFHG when concluding the agreement.
- (302) The Commission also needs to correct the preliminary finding in the opening decision (recital 288) that the counterfactual would be a progressive decline in Ryanair's passenger numbers over the following years.
- (303) As Germany explained in detail, the context of the conclusion of the 2016 Side Letter No 2 was the planned privatisation of the airport. Ryanair insisted to obtain a 5-year airport service agreement and threatened otherwise to immediately leave the airport. Based on the information transmitted by Germany, the Commission finds that that threat must have seemed credible to the airport. The credibility of this threat is indeed confirmed both by Lufthansa, which relies several times on the fact that Ryanair could easily leave the airport, and the Oxera report submitted by Ryanair. Contrary to what the Commission had considered in the opening decision (recital 288), the assumption in the PwC study that, in the counterfactual scenario, Ryanair would immediately cease all activity at FFHG as of 2016 is therefore considered realistic.
- (304) Germany also clarified that the cost and revenue forecasts referred to in the PwC study were available to FFHG before the agreement was signed and were used by FFHG to assess the opportunity to conclude the agreement.
- (305) The PwC study assumes that, under the baseline scenario, FFHG could expect a constant number of passengers carried by Ryanair of [2–3] million per year from 2017 to 2021. In the opening decision (recital 287), the Commission considered that scenario quite optimistic. However, these assumptions were based on the internal planning documents of FFHG, which FFHG made available to PwC, as confirmed in the observations of Germany on the opening decision. Therefore, in the absence of credible indications to the contrary, the Commission accepts those scenarios.
- (306) The PwC study compares a scenario where Ryanair remains at the airport with the scenario where Ryanair leaves the airport. It finds that the Ryanair contract generates an additional yearly free cashflow of EUR [4–5 million] in 2017, which gradually increases to reach EUR [4,5–5,5 million] in 2021. Despite certain weaknesses of the study, in particular the lack of a variation of Ryanair's numbers of passengers in sensitivity checks, the Commission ultimately considers that a market economy operator could have based its decision on such a study.
- (307) The study showed that the 2016 Side Letter No 2 had a capital value of EUR [20–25] million, which is the result of aggregating the free cash flows and discounting them with [5–10] % per year.

- (308) This result is also not put into question by the AT Kearney expert opinion which had a different purpose. It analyses the profitability of FFHG as a whole. However, the relevant question for applying the market economy operator principle to the 2016 Side Letter No 2 is whether, absent that agreement, FFHG would be worse off. That is the case, because it would have between EUR [4–5] and [4,5–5,5] million less of free cashflow per year.
- (309) For those reasons, the Commission concludes that the 2016 Side Letter No 2 complies with the market economy operator test. The 2016 Side Letter No 2 therefore does not confer an advantage to Ryanair and does not constitute State aid.

5.2. Compatibility of the aid

- (310) In this section, the Commission will assess the compatibility of the measures that have been found to constitute State aid:
- (a) State aid to FFHG as a result of the 2016 withdrawal of the 'Housing' plot from the 2014 land sale agreement;
 - (b) training aid to Ryanair;
 - (c) marketing support to Ryanair.

5.2.1. *Regarding the aid measure to FFHG*

- (311) The only measure to FFHG under investigation for which the Commission concludes that it constitutes aid is the 'double sale' by FFHG of a plot of land (recital 200).
- (312) The Commission has set out in the opening decision (recitals 326–330), why, if the exercise of the withdrawal right by FFHG at zero EUR constitutes State aid, it has doubts as to its compatibility with the internal market, and reminded Germany that the burden of proof for showing compatibility is on Germany.
- (313) Germany has not invoked any ground of compatibility of the aid, but limited its argumentation to claiming that this measure does not entail aid to FFHG.
- (314) Therefore, the Commission concludes that the aid of EUR 1,25 million for the sale of the plot of land 'housing' is incompatible with the internal market. Germany has to recover it from its beneficiary.

5.2.2. *Regarding the aid measures to Ryanair*

5.2.2.1. The training aid to Ryanair

- (315) It must first be examined whether the training aid fulfils the conditions for a block exemption and, if not, whether the condition laid down in Article 107(2) and (3) TFEU are met.

5.2.2.1.1. General Block Exemption Regulation

- (316) In the opening decision, the Commission took the preliminary view that the training aid might fulfil the condition laid down in Article 31 GBER, but that further information was required to take a definitive view. However, despite the Commission's request for further information, it did not receive any from Germany or the interested parties.
- (317) Germany and Ryanair argued that they could not provide further documents as their obligation to preserve the requested documents had expired under the applicable national law.

- (318) The Court of Justice has ruled that it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the compatibility conditions for are met ⁽⁶⁹⁾. Member States and interested parties are aware of the 10 years limitation period of Article 17 of Regulation (EU) 2015/1589. They therefore may not invoke an allegedly shorter national limitation period governing their obligation to retain documents to escape that burden of proof.
- (319) The Commission has no information about the exact costs funded by the training aid and therefore cannot assess whether the costs were eligible under the GBER. Pursuant to Article 31(3) GBER, eligible costs would have been (a) the trainers' personnel costs for the hours during which the trainers participate in the training; (b) the trainers' and trainees' operating costs directly related to the training project; (c) the costs of advisory services related to the training project; (d) the trainees' personnel costs and general indirect costs for the hours during which the trainees participate in the training.
- (320) Moreover, Germany has not submitted information regarding the nature and the content of the training that would allow the Commission to determine that the training, or part of it, was not of the sort which undertakings carry out to comply with national mandatory standards on training (Article 31(2) GBER).
- (321) Also, Germany provided no information showing that the maximum aid intensities laid down in Article 31(4) GBER have been respected.
- (322) In the absence of these information the Commission considers that Germany has not shown that the training aid fulfils the condition under Article 31 GBER.

5.2.2.1.2. Article 107(2) TFEU

- (323) The Commission cannot declare the training aid compatible under Article 107(2) TFEU because the aid does not have a social character in the narrow sense of Article 107(2), point (a) TFEU, nor does it serve to remedy a damage caused by natural disasters or exceptional occurrences (Article 107(2), point (b) TFEU), nor is it granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany (Article 107(2), point (c) TFEU).

5.2.2.1.3. Article 107(3) TFEU

- (324) According to the case-law of the Court, the Commission is obliged to exercise its discretion to assess a State aid measure not complying with the conditions set out in the GBER under Article 107(3) TFEU. In doing so, it can draw on the experience gained in previous cases, as summarised in the criteria set out in the GBER ⁽⁷⁰⁾, and on the Commission Communication ⁽⁷¹⁾ setting out criteria for the compatibility assessment of training aid subject to individual notification (the 'Communication') as from 2009.

⁽⁶⁹⁾ See judgment of the Court of Justice of 28 April 1993, *Italy v Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

⁽⁷⁰⁾ See judgment of the General Court of 14 July 2011, *Freistaat Sachsen (Germany) v European Commission*, T-357/02 RENV, ECLI:EU:T:2011:376, paragraphs 42 to 48.

⁽⁷¹⁾ Communication from the Commission – Criteria for the analysis of the compatibility of State aid for training subject to individual notification (OJ C 188, 11.8.2009, p. 1), point 3: 'This guidance is intended to make the Commission's reasoning transparent and to create predictability and legal certainty. Pursuant to Article 6(1)(g) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [...] any individual training aid, whether granted ad hoc or on the basis of a scheme, will be subject to this guidance when its grant equivalent exceeds EUR 2 million per training project.'

- (325) In the present case, the exemptions under Article 107(3), points (a), (b) and (d) do not apply ⁽⁷²⁾.
- (326) To be compatible with the internal market pursuant to Article 107(3), point (c) TFEU, the aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second being that it must not adversely affect trading conditions to an extent contrary to the common interest ⁽⁷³⁾.
- (327) As a preliminary point, the Commission observes that it has adopted, in 2009, the Communication. Where the Commission adopts guidelines, it is in principle bound by those guidelines for the purpose of exercising its discretion. However, where Member States invoke particular reasons why the Commission should depart from its guidelines, the Commission is obliged to examine those arguments and exercise its discretion taking into account those arguments ⁽⁷⁴⁾.
- (328) In the present case, the aid has been granted prior to the adoption of the Communication. Germany and interested parties have not specifically commented on compliance of the aid with the Communication. For those reasons, the Commission considers it appropriate to base its assessment directly under Article 107(3), point (c) TFEU, taking inspiration from the principles set out in the Communication.
- (329) Firstly, the aid must aim to facilitate the development of economic activity. Germany stated that the training aid is based on a labour market policy of the *Land* Rhineland-Palatinate. The aim of aid is to qualify people so that they can access the labour market, specifically in the air transport sector. On the one hand, training potential employees is an investment in the economic development of the air transport sector. On the other hand, the increase in employment in the region has a direct impact on the economy of the region, as it affects consumption and investment. Therefore, the first condition is fulfilled.
- (330) Secondly, the training aid must not adversely affect trading conditions to an extent contrary to the common interest.
- (331) According to points 9, 10, 12 and 16 of the Communication, training aid is presumed not to adversely affect trading conditions to an extent contrary to the common interest, when (a) there is a market failure justifying the aid; (b) the aid is not the only policy instrument available to Member States to encourage training; (c) the training aid has an incentive effect and was necessary; and finally (d) the aid is proportionate.
- (332) The Communication indicates that first of all, training aid should only be granted in a situation of market failure. In this assessment, the nature of the training, as well as the transferability of the skills acquired during the training shall play a role. The more general the training, and the more transferrable the skills, the more likely it is that the training will provide positive externalities. Furthermore, inclusion of disabled or disadvantaged workers increases the positive externalities of the training.

⁽⁷²⁾ Article 107(3), point (a) TFEU concerns aid granted to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. This exemption concerns only those regions where the economic situation is extremely unfavourable in relation to the EU as a whole, which is not the case of Rhineland-Palatinate.

Article 107(3), point (b) TFEU concerns aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. A labour market policy limited to the region of Rhineland-Palatinate is not an important project of common European interest.

Finally, the aid does not promote culture and heritage conservation in virtue of Article 107(3), point (d) TFEU.

⁽⁷³⁾ See judgment of the Court of Justice of 22 September 2020, *Republic of Austria v Commission and Others*, C-594/18 P, ECLI:EU:C:2020:742, paragraphs 18-20.

⁽⁷⁴⁾ See judgment of the Court of Justice of 19 July 2016, *Kotnik and Others*, C-526/14, ECLI:EU:C:2016:570, paragraphs 37 to 41.

- (333) The aid was part of a labour market policy that consisted in the programmes 'Qualification of pilots for a position as captain or first officer in the cockpit 2001/2002', 'Flight attendant qualification 2001/2002', 'Qualification of pilots for a position as captain or first officer in the cockpit 2002/2003' and 'Flight attendant qualification 2002/2003'.
- (334) The nature of the training is quite specific. The training enables the trainees to work only as a flight attendant or a flight captain/first officer. As regards the transferability of the skills acquired, the training was only provided by Ryanair and Germany and Ryanair have not produced evidence to dispute that 80-90 % of the personnel in question was employed by Ryanair after the training, as it was claimed by the complainant. It can be assumed that the skills learned in the training are transferable to work in other airlines, so that even if this claim by the complainant is correct, the personnel may choose not to stay with Ryanair. It is however not known whether the training was certified, meaning that other airlines could actually employ a person who had undergone this training. Germany only indicated that the trainings in question were aimed at unemployed persons and persons threatened by unemployment. It did not specify whether the training targeted disabled or disadvantaged workers who would not have received such an opportunity in the labour market.
- (335) Based on the information in the file, airlines have different policies as to whether they pay for the training of pilots and flight attendants themselves (as is the case for 'traditional' airlines), or whether the applicants for positions have to pay themselves for their training. But under both models, the market normally provides for the training, and there is no need for State intervention or State financing of the training.
- (336) For those reasons, the Commission considers that Germany has not demonstrated the existence of a market failure, and concludes that, in general, the market provides for the training in question, without the need for the State to intervene by granting training aid.
- (337) In any event, in order to show the necessity and incentive effect of the aid, it must be demonstrated that, by comparison to the situation without aid, that the training offered by the undertaking in question was improved in terms of size, quality, scope or targeted participants. The Commission did not receive any information on the effect the training had on unemployment in the region, as well as the general economic situation in Rhineland-Palatinate. Germany did not submit any counterfactual analysis, comparing the levels of intended training with aid and without aid. In fact, Germany could not demonstrate that the persons undergoing the training were in fact employed afterwards. The Commission therefore does not know if the training as flight attendant or flight captain was necessary to decrease unemployment. Germany has failed to demonstrate how the training aid has incentivised the airline industry to employ more staff. The Commission can therefore not assess the necessity and the incentive effect of the training aid.
- (338) In order to be proportionate, the aid must be limited to the minimum necessary to achieve the objective pursued. Since it has already been established that there is no evidence of a market failure and that as a result, there is no need for policy measures to promote training, that the aid was not necessary and did not have an incentive effect, there is no need to assess whether the aid amount was kept to the minimum in order to achieve the objective of the aid. The training aid is therefore not compatible with the internal market under Article 107(3), point (c) TFEU, interpreted in light of the criteria set out in the Communication.
- (339) The training aid to Ryanair was hence incompatible State aid.

5.2.2.2. The 2005 and 2017 marketing agreements between the Land Rhineland-Palatinate and Ryanair

- (340) The marketing agreements constitute operating aid to Ryanair, mitigating the operating costs that it should normally bear to operate flights from/to Frankfurt-Hahn airport.

- (341) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met ⁽⁷⁵⁾.
- (342) Germany does not consider that the 2005 and 2017 marketing agreements with Ryanair constitute State aid within the meaning of Article 107(1) TFEU, and so it has brought forward no arguments as to the compatibility of these agreements with the internal market.
- (343) The compatibility of the aid has to be assessed at the date on which it was granted ⁽⁷⁶⁾. For the 2005 marketing agreement, this was 4 November 2005, i.e. before the entry into force on 9 December 2005 of the 2005 Aviation Guidelines. For the 2017 this was 20 October 2017. The 2014 Aviation Guidelines apply to the 2017 marketing agreement.
- (344) As concerns the 2005 marketing agreement, the Commission follows the same approach it has taken in previous decisions where it had to assess the compatibility of aid granted before the entry into force of the current 2014 Aviation Guidelines and the 2005 Aviation Guidelines ⁽⁷⁷⁾.
- (345) Before the 2005 Aviation Guidelines were adopted, the Commission had adopted the 1994 Aviation Guidelines ⁽⁷⁸⁾. However, the 1994 Aviation Guidelines did not specifically provide compatibility conditions for operating aid aimed at promoting air traffic from regional airports. In line with the approach taken in previous decisions, the Commission must therefore assess the compatibility of the aid in question directly on the basis of Article 107(3), point (c) TFEU.
- (346) In this respect, it should be noted that the Commission's assessment of this type of State aid has been refined over time, although some points have remained unchanged. These points stem from the general principles governing the compatibility of aid in accordance with the aforementioned provision of the TFEU.
- (347) Accordingly, in the decision on *Manchester airport* of June 1999 ⁽⁷⁹⁾, the Commission found that reductions in airport charges granted in a non-discriminatory and time-limited manner as measures aimed at promoting new routes were compatible with State aid rules.
- (348) Subsequently, in its decision of February 2004 on *Charleroi airport* ⁽⁸⁰⁾, the Commission explained that 'operational aid measures intended to help the launch of new airlines or strengthen certain frequencies may be a necessary tool for the development of small regional airports. The measures may indeed persuade the interested companies to take the risk of investing in new routes. However, in order to declare such aid

⁽⁷⁵⁾ See judgment of the Court of 28 April 1993, *Italy v Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

⁽⁷⁶⁾ See recital 85 of the 2005 Aviation Guidelines and recital 174 of the 2014 Aviation Guidelines.

⁽⁷⁷⁾ See for example Commission Decision (EU) 2015/1227 of 23 July 2014 in State aid case SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia (OJ L 201, 30.7.2015, p. 109, ELI: <http://data.europa.eu/eli/dec/2015/1227/oj>), recitals 452 to 470; Decision (EU) 2016/633, recitals 511 to 531.

⁽⁷⁸⁾ Communication from the Commission – Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽⁷⁹⁾ See Commission Decision of 14 June 1999 in State aid case NN 109/98 United Kingdom, Manchester Airport (OJ C 65, 13.3.2004, p. 5).

⁽⁸⁰⁾ 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, ELI: <http://data.europa.eu/eli/dec/2004/393/oj>) ('Charleroi decision'). This decision was annulled by the Court of First Instance's judgment in case *Ryanair v Commission*, T-196/04, ECLI:EU:T:2008:585. However, it shows how the Commission's assessment of the aid in question has developed.

compatible on the basis of Article 87(3)(c) of the Treaty, it should be determined whether this aid is necessary and in proportion to the objective sought, and whether it affects trade to an extent that is contrary to the common interest'. The Commission therefore identified certain conditions to be met in order for this operating aid to be declared compatible, in particular the following ⁽⁸¹⁾.

- (a) The aid must contribute to the objective of Community interest of developing a regional airport through a net increase in traffic on new routes ⁽⁸²⁾.
- (b) The aid must be necessary in the sense that it is not granted for a route already operated by the same or another airline or a similar route ⁽⁸³⁾.
- (c) The aid must have an incentive effect in the sense that it must help to develop an activity that, after a certain period, is likely to become profitable, which implies that the aid is limited in time ⁽⁸⁴⁾.
- (d) The aid must be proportionate, i.e. the amount must be linked to the net development of traffic ⁽⁸⁵⁾.
- (e) The aid must have been granted transparently and without discrimination and must not be combined with other types of aid.

(349) The 2005 Aviation Guidelines and the 2014 Aviation Guidelines precisely define these compatibility principles, but it remains the case that operating aid granted to airlines may be declared compatible by the Commission where it contributes to the development of smaller airports through a net increase in traffic on new routes, where the aid is necessary (i.e. it is not granted for a route already operated by the same or another airline or for a similar route), where it is limited in time, where the route for which the aid is granted is likely to become profitable, where the amount is linked to the net development of traffic, where the aid is granted transparently and without discrimination, and where it is not combined with any other type of aid ⁽⁸⁶⁾.

(350) In conclusion, the Commission takes the view that, in this case, the compatibility of the 2005 marketing agreement should be assessed in the light of the aforementioned general principles.

(351) The compatibility of the 2017 marketing agreement should be assessed on the basis of the 2014 Aviation Guidelines that also reflect these general principles. According to recitals 138 to 155 of the 2014 Aviation Guidelines, start-up aid to airlines needs to meet the following conditions:

- (a) contribution to a well-defined objective of common interest, i.e. increase of mobility of the Union's citizens or facilitation of regional development of remote regions;
- (b) need for State intervention;
- (c) appropriateness of State aid as policy instrument;
- (d) existence of incentive effect;
- (e) proportionality of the aid amount;
- (f) avoidance of undue negative effects on competition and trade.
- (g) the requirements regarding transparency, non-accumulation of aid and non-discrimination, which follow from recitals 133, 159 and 161 to 163 of the 2014 Aviation Guidelines.

⁽⁸¹⁾ A similar assessment has been made by the Commission in other recent cases. See for example Decision (EU) 2015/1227, recitals 452 to 470; Decision (EU) 2016/633, recitals 511 to 531.

⁽⁸²⁾ See recitals 283 to 297 of the Charleroi decision.

⁽⁸³⁾ See recitals 288 to 309 of the Charleroi decision.

⁽⁸⁴⁾ See recitals 311 to 317 of the Charleroi decision.

⁽⁸⁵⁾ See recitals 318 to 325 of the Charleroi decision.

⁽⁸⁶⁾ See Decision (EU) 2015/1227, recital 457; Decision (EU) 2016/633, recital 516.

- (352) Germany and Ryanair did not submit how the operating aid granted to Ryanair through the 2005 and 2017 marketing agreements would contribute to a well-defined objective of common interest. The Commission has rebutted above (recitals 266 to 288) the argument that the *Land's* intention had been to promote tourism or the economic development in the region.
- (353) In any event, even if the purchase of marketing services pursued an objective of common interest, which was not the case, Germany and Ryanair have not submitted any argument to show that the aid complies granted through the 2005 and 2017 marketing agreements with the other requirements set out above.
- (354) Therefore, the Commission concludes that Germany and Ryanair have not demonstrated that there was a need for State intervention, and that the aid to Ryanair was appropriate to encourage economic development in the region. Germany and Ryanair equally failed to demonstrate that the amount of aid was proportionate, and could avoid undue negative effects on competition and trade. Finally, Germany and Ryanair have not demonstrated that the requirements regarding transparency, non-accumulation of aid and non-discrimination of the 2014 Aviation Guidelines were fulfilled.
- (355) The aid granted by the 2005 and 2017 marketing agreements therefore constitutes unlawful and incompatible State aid.

6. RECOVERY

- (356) According to the Treaty on the Functioning of the European Union and the established case-law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market ⁽⁸⁷⁾. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁸⁸⁾.
- (357) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ⁽⁸⁹⁾.
- (358) In line with the case-law, Article 16(1) of Regulation (EU) No 2015/1589 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (359) Thus, given that the State aid to FFHG as a result of the 2016 withdrawal of the 'housing' plot from 2014 land sale agreement, as well as the training aid and the marketing agreement of 2005 and of 2017 to Ryanair were implemented in breach of Article 108(3) TFEU, and are to be considered as unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiaries until effective recovery. The amount to be recovered shall bear interest from the date when the State aid was put at the disposal of the beneficiaries until effective recovery.
- (360) Pursuant to Article 17(1) Regulation (EU) 2015/1589 'the powers of the Commission to recover aid shall be subject to a limitation period of 10 years' and pursuant to paragraph 2, first sentence, '[t]he limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme'.

⁽⁸⁷⁾ Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

⁽⁸⁸⁾ Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

⁽⁸⁹⁾ Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

- (361) As regards the training aid to Ryanair, Germany stated that EUR 1 880 197,11 was granted to HCM from 2001 to 2003. Germany presented evidence of at least two cheque payments of EUR 220 427,64 and EUR 639 146,04 to Ryanair through a und o Gettman. These payments were made from HCM's account on 17 January 2003. According to Germany, the aid was fully paid out before the end of 2003. The Commission considers therefore that the aid was awarded in 2003.
- (362) Article 17(2) of Regulation (EU) 2015/1589 says: 'Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.'
- (363) The Commission's notification to a Member State that a complaint has been lodged is an act interrupting the limitation period within the meaning of Article 17(2) of Regulation (EU) 2015/1589.
- (364) As a matter of fact, Lufthansa submitted a formal complaint on 4 March 2011 which was forwarded to Germany on 18 March 2011. In the course of the assessment of this complaint, the Commission asked specific factual questions on the training aid to which Germany replied on 14 June 2011.
- (365) With this action in 2011, the limitation period has been interrupted within the meaning of Article 17(2) of Regulation (EU) 2015/1589, with the consequence that the recovery of the aid awarded in 2003 is not time-barred.

7. CONCLUSION

- (366) The Commission finds that the guarantee granted by the *Land* Rhineland-Palatinate to FFHG constitutes *de minimis* aid and is therefore exempted from prior notification. The Commission also finds that the airport service agreements of 2013, 2015 and 2016 between FFHG and Ryanair and the financing of a crew and pilot school and a maintenance hall to the benefit of Ryanair comply with the market economy operator principle and do not constitute State aid.
- (367) The Commission finds that Germany has unlawfully implemented the following measures in breach of Article 108(3) TFEU, and that those measures cannot be declared compatible with the internal market, thus Germany shall recover the incompatible State aid with interest:
- (a) State aid to FFHG as a result of the 2016 withdrawal of the 'housing' plot from the 2014 land sale agreement;
 - (b) training aid to the benefit of Ryanair;
 - (c) State aid to Ryanair under the marketing agreements of 2005 and 2017,

HAS ADOPTED THIS DECISION:

Article 1

The airport service agreements of 2013, 2015 and 2016 between FFHG and Ryanair and the financing of a crew and pilot school and a maintenance hall to the benefit of Ryanair Germany has implemented do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).

The guarantee granted by the *Land* Rhineland-Palatinate to FFHG that Germany has implemented is exempt from prior notification pursuant to Article 108(3) TFEU because it constitutes *de minimis* aid.

Article 2

The following measures unlawfully put into effect by Germany in breach of Article 108(3) TFEU in favour of FFHG and Ryanair are incompatible with the internal market:

- (a) State aid of an amount of EUR 1,25 million granted to FFHG in 2016 as a result of the 2016 withdrawal of the 'housing' plot from the 2014 land sale agreement;
- (b) State aid of an amount of EUR 220 427,64, EUR 639 146,04 and EUR 680 627,93, granted to Ryanair to finance training;
- (c) State aid granted to Ryanair under the marketing agreement of 2005 in the years 2005 to 2016 of an amount of EUR 11,2 million (see for the yearly breakdown above in Table 1) and under the marketing agreement of 2017 of an amount the German authorities still need to establish (EUR 350 000 for 2017 and up to EUR 1,2 million for each subsequent year).

Article 3

1. Germany shall recover the aid referred to in Article 2 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁹⁰⁾.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

⁽⁹⁰⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1, ELI: <http://data.europa.eu/eli/reg/2004/794/oj>).

Article 5

1. Within 2 months following notification of this Decision, Germany shall submit the following information:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiaries;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the Bundesrepublik Deutschland.

The Commission may publish the amounts of aid and recovery interest recovered in application of this decision, without prejudice to Article 30 of Regulation (EU) 2015/1589.

If the decision contains confidential information which should not be published, please inform the Commission within 15 working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent electronically to the following address:

European Commission
Directorate-General for Competition
State Aid Greffe
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Stateaidgreffe@ec.europa.eu

Done at Brussels, 9 September 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President