

Official Journal of the European Union

L 232



English edition

Legislation

Volume 58

4 September 2015

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1469

of 23 July 2014

on State aid SA.30743 (2012/C) (ex N 138/10) — Germany — Financing of infrastructure projects at Leipzig/Halle airport (2)*(notified under document C(2014) 5071)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽²⁾,

Whereas:

1. PROCEDURE

- (1) By letter dated 12 April 2010, Germany notified the Commission, for reasons of legal certainty, of planned capital injections into Mitteldeutsche Flughafen AG ('MFAG') and Flughafen Leipzig/Halle GmbH ('FLH'). Germany also informed the Commission that the notified capital injections are subject to its approval. In the meantime the financing of the project will be through shareholder loans, which were allegedly granted at market terms.
- (2) By letters dated 10 June 2010, 26 November 2010 and 3 March 2011, the Commission requested further information on the notified measures (including the conditions of the shareholder loans). On 29 September 2010, 4 January 2011 and 26 April 2011 Germany submitted additional information.
- (3) By letter dated 15 June 2011, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty ('opening decision') in respect to the shareholder loans and the capital injections in favour of FLH. Germany provided its comments on the opening decision on 15 August 2011.
- (4) The Commission's opening decision was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measure in question within 1 month of the publication date.

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

⁽²⁾ OJ C 284, 28.9.2011, p. 6.

⁽³⁾ See footnote 2.

- (5) The Commission received comments on the subject from 34 interested parties. It forwarded these comments to Germany on 21 November 2011. Germany was given the opportunity to respond to these comments within 1 month. The Commission received Germany's observations on 20 December 2011.
- (6) On 14 March 2012, the Commission sent a request for information. On 26 April 2012, the Commission received the response from Germany.
- (7) The Commission requested further information on 15 May 2012, 20 July 2012 and 21 December 2012. Germany responded by letters dated 28 June 2012, 10 September 2012 and 15 January 2013.
- (8) On 31 March 2014, the Commission adopted the 2014 Aviation Guidelines⁽⁴⁾ replacing the 1994 Aviation Guidelines⁽⁵⁾ as well as the 2005 Aviation Guidelines⁽⁶⁾. On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 1 month of the publication date of the Guidelines⁽⁷⁾.
- (9) On 14 April 2014 the Commission requested further information regarding the application of common principles for the compatibility assessment of the aid in light of the 2014 Aviation Guidelines. Germany responded by letter dated 19 May 2014, 26 May 2014, 10 July 2014 and 11 July 2014.
- (10) By letter dated 17 July 2014, Germany agreed that this Decision would be adopted and notified in the English language.

2. DESCRIPTION OF THE MEASURES

2.1. BACKGROUND TO THE INVESTIGATION AND THE INFRASTRUCTURE PROJECT

2.1.1. Leipzig/Halle airport

- (11) Leipzig/Halle airport is located in the Free State of Saxony in Central Germany. The airport is operated by FLH⁽⁸⁾, which is a subsidiary of MFAG⁽⁹⁾. MFAG is a holding company with three subsidiaries (FLH, Dresden Airport GmbH and PortGround GmbH).
- (12) After the German reunification, a master plan for the development of the airport was put in place. This plan foresaw the future construction of a two-runway system. In 1997, the construction of the northern runway was approved. In 2004, the shareholders decided to finance the construction of the southern runway⁽¹⁰⁾.
- (13) After the beginning of the operation of the southern runway in 2007, DHL Express relocated its European hub activities from Brussels to Leipzig. Besides DHL Express, Leipzig Halle is served also by Lufthansa Cargo and other air freight airlines. As a result, Leipzig/Halle airport became in 2011 the 2nd largest air freight airport (after Frankfurt/Main airport) in Germany. Table 1 summarises the development of passenger and air cargo at the airport since 2006.

⁽⁴⁾ Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

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

⁽⁶⁾ Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

⁽⁷⁾ OJ C 113, 15.4.2014, p. 30.

⁽⁸⁾ FLH's main shareholder is Mitteldeutsche Flughafen AG, which holds a 94 percent participation in FLH. The remaining shares are owned by Freistaat Sachsen, Landkreis Nordsachsen and Stadt Schkeuditz. There are no private shareholders.

⁽⁹⁾ The shareholders of MFAG are: 76,64 percent Freistaat Sachsen, 18,54 percent Land Sachsen-Anhalt, 2,52 percent Stadt Dresden, 0,2 percent Stadt Halle, 2,1 percent Stadt Leipzig. There are no private shareholders.

⁽¹⁰⁾ The capital contributions from the public shareholders of FLH financing the construction of the new southern runway and other measures amounting up to EUR 350 million and decided until 2006, have been already assessed and found compatible with the internal market in Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1) and are therefore not within the scope of the present investigation.

Table 1

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

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

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

2.1.2. The overview of the infrastructure investment programme

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

Table 2

The overview of infrastructure investment programme at Leipzig/Halle airport

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

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

(*) Covered by the obligation of professional secrecy.

- (15) M1 — Extensive noise abatement measures (including acquisition of land, relocation, accompanying landscape conservation planning): under the planning approval decision for the southern runway and aprons ⁽¹¹⁾, Leipzig/Halle airport has to implement noise abatement measures in the night protection area. This night protection area was supposed to cover an area of some 211 km² with around 6 000 dwelling houses. After the first recalculation of the night protection area carried out at the end of February 2009, the initial protection area needs to be extended by approximately 4 000 additional dwelling houses.
- (16) M2 — Engine testing structure: a new engine testing structure was constructed at Leipzig/Halle airport in 2007-08. Leipzig/Halle airport operates 24 hours a day, therefore it has to offer facilities to conduct tests on aircraft engines at day and night. The engine testing structure has been set up as a closed structure to limit noise emissions.
- (17) M3 — Taxiway and traversing bridge 'E7': to ease the pressure on the existing taxiways and traversing bridges and to provide an alternative in the event of accidents or breakdowns, the taxiway and traversing bridge 'E7' was built in the east of the airport. For technical reasons, this infrastructure project is divided into three sub-projects: traversing bridge ⁽¹²⁾, taxiway and technical equipment (lighting). Work on the project began in 2008.
- (18) M4 — Extension of northern take-off and landing runway (planning costs) from its current 3 600 metres to 3 800 metres: extension of the northern runway is aimed to ensure that freight aircraft with a high maximum take-off weight ('MTOW') can take off without any payload restrictions. The planning of this infrastructure project began in 2008.
- (19) M5 — Site clearance in time for construction of taxiway 'Victor', new fire station building, multi-purpose hangar I: the fire station and multi-purpose hangar will have to be torn down and rebuilt. Work for the reconstruction of multi-purpose hangar I and the fire station began in May 2009. The new multi-purpose hangar will be used for the winter service equipment. The works will also include the construction of a fire brigade training facility.

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

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

- (20) M6 — Parallel taxiway 'Victor': according to the notification, the construction of taxiway 'Victor' between two existing taxiways is essential to cover the further increasing capacities at Leipzig/Halle airport and to cover capacities in the south west of the airport at peak times and in the case of easterly weather conditions.
- (21) M7 — Additional de-icing areas: the additional de-icing areas are necessary to ensure that the de-icing of aircraft runs smoothly and to avoid delays resulting from inadequate infrastructure.
- (22) M8 — Heliport: in 2008-09, a helicopter parking space was created at Leipzig/Halle airport by adapting the surface structure and marking it out; it is used as a base for air rescue and emergency operations.
- (23) M9.1 — Rebuilding of Checkpoint I: checkpoint I has to be rebuilt in order to comply with Regulation (EC) No 2320/2002 of the European Parliament and of the Council ⁽¹³⁾. It will be the base for all organisational activities relating to airport security (pass and key management, security training, management tasks), controls (for example of persons and freight), and security services (for example visitor service, VIP).
- (24) M9.2 — Functional security building: a new security building will be used by the federal police, the regional police, customs and the German Meteorological Service.
- (25) M9.3 — Procurement of technical equipment: in order to adjust to the new infrastructure, Leipzig/Halle airport must also acquire additional winter service equipment and additional firefighting equipment. The airport perimeter fence will also have to be retrofitted with detectors and digital video surveillance equipment with intelligent movement detection.
- (26) M9.4 — Animal Farm: the project concerns the establishment of a separate building at the airport for the export/import of animals from third countries containing veterinary installations.
- (27) M10 — Additional noise abatement: in the light of the predicted growth in especially air freight traffic at Leipzig/Halle airport, further noise abatement measures (and related works) are expected to be necessary in the medium-term as the airport expands.
- (28) M11 — Land side development of south eastern zone phase I: the areas adjacent to the eastern side of the existing land-side installations (hangar and operational building) at Leipzig/Halle airport are to be fully equipped with electricity and a water supply, waste water installations and rainwater drainage by 2010; works began in 2008. Once the existing roundabout at the airfreight transshipment terminal has been connected to the public road network, additional noise abatement measures will have to be taken.
- (29) M12 — Planning approval procedure for southern extension: the southern runway (3 600 metres) and apron at Leipzig/Halle airport are to be extended in the long-term. This will necessitate a planning approval process.
- (30) M13 — Northern apron expansion: 12 additional stands are planned to be built by 2020. The development of terminal facilities in the north of the airport will make it possible to achieve a more even distribution of aircraft movements between the two runways.
- (31) M14 — Eastern apron expansion: the eastern apron border is to be moved south to ensure the provision of the necessary obstacle-free areas for the runway operations. The apron also needs to be connected to the taxiway system and de-icing points.
- (32) M15 — Infrastructure adaptation: the terminal facilities in the northern zone must be adapted to take into account the newly built apron in the northern zone and the relocation of cargo functions to that zone. To this end, the hangar and necessary ancillary functions are to be adapted for a category F aircraft.
- (33) M16.1 — Northern zone hangar extension: this involves the construction of a new apron in the northern zone including the relocation of cargo functions to that zone and provisions of maintenance stands.

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

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

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

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

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

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

- (36) With regard to the notified infrastructure measures, the Commission raised doubts whether they can be indeed considered to fall within the public policy remit, and thus, whether their financing does not constitute State aid.
- (37) The Commission concluded that the shareholder loans to and capital injections into MFAG do not constitute State aid since they are both intended to be transferred to FLH. MFAG can only be regarded as a vehicle for transfer of funds to FLH, and thus, not as an aid beneficiary itself.

2.2.1. Shareholder loans in favour of FLH

- (38) The infrastructure and infrastructure-related projects have been first financed through shareholder loans, which will be converted into capital only after the authorisation of these financing measures by the Commission. Between 2006 and 2011 ⁽¹⁴⁾ the total amount of shareholder loans granted to FLH accounted for EUR [...] million.
- (39) The conditions of the shareholder loans in 2006-08 were determined on the basis of a loan agreement between Sachsen LB and MFAG. The base lending rate is the 3-months-EURIBOR plus a risk margin of [...] basis points. For the year 2009, the base lending rate is the 3-months-EURIBOR plus a risk margin of [...] basis points. For the year 2010 the base lending rate is the 3-months-EURIBOR plus a risk margin of [...] basis points.

Initial assessment of the existence of aid by the Commission

- (40) Regarding the aid nature of the shareholder loans in favour of FLH, the Commission expressed doubts whether FLH's shareholder loans were granted at conditions which could have been normally obtained on the market. In particular with regard to the comparable loan agreements, the Commission expressed doubts whether indicative proposals submitted by an e-mail without the aim to enter into legally binding loan agreements and without the underlying assessment of the probability of default and collateralisation can be considered as a reliable market benchmark.
- (41) In absence of a market benchmark, the Commission based its assessment on the proxy set out in the 2008 Reference Rate Communication ⁽¹⁵⁾. In the absence of a rating of FLH and the underlying collaterals, the conditions of FLH's shareholder loans seemed therefore to be more favourable than the proxy established by the Commission for the market rate in application of the 2008 Reference Rate Communication.

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

2.2.2. Capital injections into FLH

- (43) The capital injections into FLH, aimed at financing the infrastructure and infrastructure-related measures (see Table 2), are subject to the Commission's approval. Consequently, it is only after the authorisation of the aid that it is envisaged to convert FLH's shareholder loans into equity.
- (44) The total amount of financing aimed at reimbursement of costs for infrastructure and infrastructure-related projects amounts to EUR 255,6 million. A total of EUR 240,3 million is to be deposited in MFAG's capital reserve fund and earmarked for passing on to FLH in order to increase its equity (that is to say own capital reserve). FLH's shareholders for their part will inject the remaining amount directly into FLH's capital reserve fund.

⁽¹⁴⁾ Until 1 April 2011.

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

- (45) According to Germany, the capital injections will be carried out without any underlying business plan and long-term prospects for profitability.
- (46) Although some of the infrastructure projects to be funded by the planned capital injections have already started, prior to the start of the projects, the public shareholder announced in each case their intention of financing those measures before any works started. The capital injections themselves have not yet been carried out.

Commission's initial assessment of the existence of aid

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

2.2.3. Compatibility of aid

- (48) As FLH's shareholder loans and the subsequent capital injections might constitute State aid, the Commission had to examine whether this aid could be found compatible with the internal market on the basis of Article 107(3)(c) of the Treaty. In this regard, the 2005 Aviation Guidelines summarised the common principles for compatibly assessment of the aid to finance airport infrastructure pursuant to Article 107(3)(c) of the Treaty.
- (49) In the opening decision, the Commission concluded that certain criteria set out in the 2005 Aviation Guidelines are met in the present case. In this respect, the Commission concluded that the aid meets a clearly defined objective of common interest, in particular as it increases connectivity of the region for freight services and has a positive impact on the local development. Having regard to the positive outlook on the development of the airport, the Commission concluded that the airport has good medium-term prospects for use, and that the infrastructure programme is necessary.
- (50) However, in the opening decision the Commission expressed doubts whether the infrastructure measures in question are adequate to the objective which has been set. Furthermore, the Commission expressed concerns that not all users have access to the airport in an equal and non-discriminatory manner. The Commission also stated that, since FLH, as a specialised freight airport, is in competition with airports in other Member States, it cannot conclude at the current stage that the development of trade is not affected to an extent contrary to the common interest. Moreover, the Commission had also doubts regarding the necessity and proportionality of the aid.
- (51) Consequently, the Commission expressed its doubts whether the financing of the notified measures can be considered compatible with the internal market pursuant to Article 107(3) of the Treaty.

3. COMMENTS FROM GERMANY

3.1. CONTEXT OF THE INVESTIGATED MEASURES

- (52) Germany started its comments with further clarifications regarding the context of the investigated measures. In this context, Germany asserted that the Reunification Treaty of 1990 had already foreseen the further development of Leipzig/Halle airport. According to Germany, a master plan for the development of the airport was set up and it was decided to develop a system of two parallel runways. Germany explained further that the construction of the northern runway was approved in 1997 and its operation started in 2000, while the construction of the southern runway was approved in 2004 and its operation started in 2007.
- (53) Against this background, Germany asserted that due to its parallel runway system and the relocation of several large air cargo operators, Leipzig/Halle airport had been able to position itself as the second largest air cargo hub in Germany. In this context, Germany submitted that since 2010 the airport had been able to foster its place as one of the most important air freight transshipment centres in Europe. Germany added also that currently 133 companies were present at the airport, employing a total of 5 106 people in 2010 (an increase by 14,4 % in comparison to 2009).
- (54) In the view of Germany, the airport is therefore a driver for economic development in the region and plays an important role for the regional employment. Germany emphasised that this is also confirmed by an increase in revenue and freight volumes handled at the airport: in the period 2005 to 2009 the revenue generated by FLH rose from EUR 47 million to EUR 80 million. With regard to cargo volumes, Germany stated that in comparison to other airports, Leipzig/Halle is registering constant growth rates (whereas 101 364 tonnes of freight were processed

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

- (55) Moreover, Germany stated that the airport had experienced a gradual increase in passenger numbers in recent years (from 1 988 854 passengers in 2002 to 2 723 748 passengers in 2007). Although, according to Germany, there has been a decline in passenger traffic since 2007 (only 2 352 827 passengers in 2010), in the medium- to long-term, Germany expected an increase in passenger traffic up to 4,6 million passengers by 2020.
- (56) Germany stated that contrary to many other Union airports, such as the three major German cargo airports, Frankfurt/Main, Cologne-Bonn and Munich, Leipzig/Halle airport has an unrestricted night flight permission for commercial air cargo traffic. According to Germany, this was one of the reasons why the airport has good prospects for the future. Germany also pointed out that the German Federal Administrative Court (Bundesverwaltungsgericht) confirmed the prohibition of night flights at Frankfurt/Main airport, the biggest German air cargo hub, by judgment of 4 April 2012. Germany stated that at Frankfurt/Main airport departures and arrivals were therefore totally prohibited between 23:00 and 5:00.
- (57) Germany submitted also that FLH was not able to finance the planned infrastructure measures from its own resources. In this context, Germany emphasised that due to the investment backlog stemming from the time of the former German Democratic Republic, the airport had to make investments in a much shorter time than airports located in the Western parts of Germany. According to Germany, in particular, the significant short-term investments cannot be financed out of FLH's own resources, as there is a substantial gap between the investment volume (EUR 225,6 million) and the airport's annual revenues (EUR 80 million in 2009).

3.2. NOTION OF ECONOMIC ACTIVITY AND PUBLIC POLICY REMIT

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

- (58) Germany first recalled that it did not agree with the Commission's position that the construction of airport infrastructure constitutes an economic activity. Hence, Germany submitted that the notified measures do not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (59) In this regard, Germany submitted that the concept of an 'undertaking' within the meaning of Article 107(1) of the Treaty does not apply to airports, at least in regard to financing of airport infrastructure. Germany stressed that the establishment of airport infrastructure did not constitute an economic activity, but rather a general transport, regional and economic policy measure. It referred to point 12 of the 1994 Aviation Guidelines which stated that 'the construction or enlargement of infrastructure projects [...] represents a measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids. Infrastructure development decisions fall outside the scope of application of this communication' and argued that the 2005 Aviation Guidelines did not replace this point.
- (60) Moreover, Germany asserted that the construction of airport infrastructure does not constitute an economic activity because a private investor would not engage in that activity. In this regard, Germany stated that there is no possibility of the investment being profitable, since it is not possible to recover the construction costs from the users of the airport by means of airport charges. That is so, according to Germany, because those charges require an authorisation from the relevant airport authority of the respective Land in which the airport is located and private investors have no influence over their level. According to Germany, those charges cannot therefore be fixed freely by the operator in the light of economic considerations, and in fact, they are set without any relation to the investment costs. Areas let for commercial purposes other than airline operation are, in view of Germany, irrelevant.
- (61) Germany stated further, in that regard, that airports have higher than average fixed costs relating to infrastructure, equipment and operation. In addition, their freedom of action is limited by strict legal obligations and conditions.

⁽¹⁶⁾ Based on estimates before 2011.

⁽¹⁷⁾ Based on the 2011 estimates.

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

3.2.2. Public policy remit

- (63) According to Germany, even if the financing of infrastructure measures was subject to State aid rules, it would not constitute State aid within the meaning of Article 107(1) of the Treaty since the financing of infrastructure measures mainly constituted the necessary and proportionate reimbursement of costs for the performance of tasks falling within the prerogative powers of the State. In this regard, Germany stated that according to the 2005 Aviation Guidelines, the activities that normally fall under State responsibility in the exercise of its official powers as a public authority were not of an economic nature and did not fall within the scope of State aid rules.
- (64) Germany claimed that in connection with the performance of tasks falling within the public policy remit, the practice of the Commission distinguished at least between the following categories of security-related measures: the protection of air traffic against external threats, such as hijacking and other acts of violence against air traffic, the protection of air traffic against operational risks and the protection of third parties against operational hazards from air traffic. In the view of Germany, with regard to the protection of air traffic against operational risks, the airport operator has the duty to renovate, modernise and expand the airport infrastructure in order to prevent operational hazards. Germany stated that the third category of measures typically covers the protection of third parties against aircraft noise and other harmful environmental effects.
- (65) Regarding the different infrastructure measures at stake, Germany argued that these measures mainly constituted compensation for the performance of activities falling within the public policy remit since the measures protected third parties against operational hazard from air traffic.
- (66) With regard to the noise abatement measures, Germany stated that in the context of the planning approval procedure, noise abatement measures in approximately 10 000 dwelling houses would need to be installed. Germany argued that according to the provisions of the recently amended *Gesetz zum Schutz gegen Fluglärm* (Aircraft Noise Act, ‘*FluglärmG*’), the noise abatement measures would only cover an area of just 78 km² with about 3 000 dwelling houses and costs amounting to EUR [...] million. However, according to Germany, FLH did not benefit from this amendment of *FluglärmG*, and a more strict protection area still applies. In the regard, Germany asserted that Leipzig/Halle airport has to bear significantly higher costs than its competitors (in Germany and outside the Union).
- (67) In addition, the airport also acquired properties of badly affected residents and paid them compensation. Furthermore, Germany stated that the airport carried out some nature conservation activities in order to compensate for its building activities. Germany argued that this was intended to prevent or reduce the impact of aircraft noise and of the construction works on third parties, and was thus a public policy function. According to Germany, protecting third parties from noise, particularly aircraft noise, was one of the fundamental official duties and functions of the State.
- (68) Germany also argued that the engine noise testing facility, that is to say M2, constituted a public policy remit measure. It stated that the noise limits set in the context of the planning approval decision for the construction of the southern runway could be fulfilled during daytime (6:00 to 22:00) without a closed engine testing structure. However, according to Germany, pursuant to the operating permit of 31 July 2007, the airport had to run tests in the closed testing structure also during the day. Furthermore, Germany explained that the engine test were required in the context of maintaining the operational safety of aircraft and would exceed the allowed noise limits, if performed during the night outside a closed structure. Therefore, in the view of Germany the construction of the engine testing facility in the form of a closed building serves to protect local residents against any unacceptable levels of aircraft noise.

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

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

- (69) Concerning measure M3, Germany argued that the construction of these infrastructure elements falls within the public policy remit since it was carried out in order to protect air traffic against operational hazards. Regardless of the volume of traffic which is supposed to be handled in the future, the existing taxiway links were already insufficient in the past to guarantee safe and smooth handling of air traffic. Moreover, Germany stated that the new taxiway is the emergency access route for the fire brigade from the eastern fire station to the northern area of the airport. According to Germany, even if State aid rules were applicable, it has to be kept in mind that some of these costs of the taxiway were related to the lighting. Regarding lighting, Germany pointed out that the Commission had already decided in its *Memmingen* decision⁽²⁰⁾ that lighting constituted an element of aircraft guidance and control and could therefore be classified as activities falling within the public policy remit that falls outside the ambit of State aid rules.
- (70) According to Germany, M4 would also be carried out in the fulfilment of activities falling within the public policy remit since operational capacity and safety reasons required to provide wide-body aircraft that operate at their permitted MTOW under certain climatic conditions with additional take-off distance, including an additional deceleration area in case of an aborted take-off.
- (71) Regarding measure M5, in the view of Germany, the site clearance in time for the construction of the taxiway Victor had been carried out in fulfilment of activities falling within the public policy remit since the taxiway Victor was required to guarantee safe operation and to prevent accidents, safety risks and adverse environmental impact. According to Germany, contrary to the opinion of the Commission, the construction of the taxiway Victor was not intended to increase capacity and indirectly turnover. Germany stated that it was solely constructed for operational safety and environmental reasons.
- (72) Furthermore, according to Germany, the construction of the two new fire station buildings was carried out in the fulfilment of activities falling within the public policy remit since according to settled Commission practice, measures relating to fire safety, especially the construction and operation of the airport fire station buildings and the procurement of the relevant equipment, are considered as falling within the public policy remit. Germany pointed out that the construction of a firefighting facility was usually publicly funded at German airports.
- (73) Moreover, according to Germany the construction of the multi-purpose hangar was also carried out in the fulfilment of activities falling within the public policy remit since the hangar would be solely used for the storage of the winter service equipment and as an emergency shelter. Germany explained that the provision of premises for winter service equipment constitutes an official State function since it guarantees the safe operation of the airport during the winter period. Moreover, Germany stated that it enabled the airport to meet its statutory obligation to operate the airport at all times.
- (74) Germany explained that the provision of the emergency shelter falls within the general interest as it serves to safeguard human life. Germany cited ICAO provisions that require airport managers to provide space for the treatment of wounded people and for the storage of dead bodies in the case of an emergency. Moreover, according to Germany, the multi-purpose hangar can also accommodate passengers that cannot continue their journey due to natural phenomena (for example the ash cloud in 2010).
- (75) Furthermore, Germany stressed that the construction of the new hangar was necessary since the enlargement of the multi-purpose hangar at its previous position would not have been possible.
- (76) With regard to measure M6, Germany referred to the arguments in connection with M5. Furthermore, Germany stated that the construction of the taxiway Victor had been postponed.
- (77) According to Germany the expansion of the de-icing areas (M7) was also conducted in fulfilment of an official State function as the facilities were required for operational safety and environmental reasons. Furthermore, Germany explained that the additional de-icing areas were not required to guarantee sufficient capacity in case of increasing traffic since Leipzig/Halle airport could handle increasing traffic even without additional de-icing areas. It argued that the expansion of the de-icing areas became necessary as a result of the experiences during the

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

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

- (78) Regarding measure M8, Germany argued that the construction of a heliport facilitates air rescue at the airport and in general.
- (79) Regarding M9.1, Germany stated that the rebuilding of Checkpoint 1 was absolutely necessary in light of Regulation (EC) No 300/2008 of the European Parliament and the Council⁽²¹⁾. Germany pointed out that this rebuilding falls within the public policy remit and that its financing was limited to the costs incurred.
- (80) Additionally, Germany is also of the opinion that the construction of the functional security building (M9.2) fell within the public policy remit and that the financing was limited to the costs incurred. Germany stated that the new functional security building also helped to comply with Regulation (EC) No 300/2008 and was necessary to meet the needs of the federal and regional police, customs and the German Meteorological Service.
- (81) Regarding M9.3 which concerned the procurement of technical equipment, that is to say the procurement of additional winter service equipment, of additional firefighting equipment and the retrofitting of the airport perimeter fence with detectors and digital video surveillance equipment, Germany argued that the three measures fell within the public policy remit.
- (82) Regarding the new winter service equipment, Germany stated that the equipment permitted that the runways can be cleared in parallel, what ensured a safe operation of the airport, and hence was falling within the public policy remit.
- (83) Moreover, Germany pointed out that according to §8 of the German Luftsicherheitsgesetz (Aviation Security Act, 'LuftSiG'), which implemented Regulation (EC) No 300/2008, the airport had to be surrounded by a perimeter fence. Germany emphasised that according to settled Commission practice, the airport security infrastructure, such as perimeter fencing, falls within the public policy remit.
- (84) Concerning measure M9.4 (that is to say the construction of a new animal transport building including veterinary facilities), Germany also submitted that the establishment of this building falls within the public policy remit, as it was aimed to ensure that no animal diseases or other illnesses were brought into Germany and the Union.
- (85) Regarding M12, Germany stated that in order to be able to further develop cargo traffic and to diminish the risk of accidents on the ground, the planning permission was needed.
- (86) With regards to M11 and M13 to M16, Germany pointed out that it did not claim in its notification that these measures were implemented to carry out activities falling within the public policy remit. According to Germany, these measures included the land side development of the south-eastern zone, the northern apron expansion, the eastern apron expansion, infrastructure adaptation in the northern zone and additional infrastructure measures in the northern zone.

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

3.3.1. Financing conditions

- (87) Regarding the financing of the infrastructure measures at stake, Germany stated that the measures were financed by shareholder loans which were granted under normal market conditions, and thus do not constitute State aid pursuant to Article 107(1) of the Treaty. Germany pointed out that these loans had so far not been converted into equity and that the conversion of the shareholder loans is subject to Commission's approval decision.
- (88) Germany clarified that the loans are provided according to the construction needs and that their total amount is changing on a monthly basis. According to Germany, the loan duration starts at the date on which the loan is paid out. Germany further explained that each loan matures at the end of the year (31 December) in which it is provided. In this context, Germany stated that these loans were then prolonged for a further period of 1 year. According to Germany, multiple extensions of the duration are possible until the expected authorisation of the capital injections by the Commission is received.

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

- (89) Germany stated further that the loan amount and the payable interest are due on the end-date (that is to say 31 December of each year), but the duration of the loan might be prolonged by 1 additional year. Furthermore, Germany argued that this extension option allowed the prolongation of the loan until the date on which the Commission takes its final decision.
- (90) With regard to the interest rate for each loan, Germany explained that it was set on the basis of the EURIBOR applicable at the moment of providing each tranche plus a risk margin. According to Germany, if a loan is provided on 1 July its duration (until the end of the year) will be 6 months and the interest rate will be the sum of the 6-month EURIBOR and a risk margin. Germany clarified further that if a loan is provided on 1 May (a duration of 8 months until the end of the year) the reference base rate will be calculated by interpolating the 6-month and the 9-month EURIBOR rates. Germany clarified further that as of the month of January following the year in which the loan was extended the valid interest rate will be the 12-month EURIBOR plus a risk margin. Germany provided an overview of the accumulated loan amounts and conditions as summarised in Table 3.

Table 3

Overview of FLH's shareholder loans 13.12.2006-1.1.2012

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

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

- (91) Regarding the risk margin rates, for the years 2006 to 2008, Germany stated that a risk margin of [...] basis points was used. Germany clarified that this rate was determined by comparing the loan conditions of the following loan agreements:
- (a) Loan agreement between MFAG and Sachsen LB from 19/22.8.2003 setting a margin of [...] basis points per annum;
 - (b) Loan agreement between MFAG and Sachsen LB/Nord LB from 16.5.2007 setting a margin of [...] basis points per annum;
 - (c) Loan agreement between MFAG and Postbank from 28.6.2007/15.7.2007 setting a margin of [...] basis points per annum;
- (92) Germany stated that the average risk margin calculated was rounded up from [...] basis points to [...] basis points on average.
- (93) Regarding the risk margin of [...] basis points set in 2009, Germany clarified that the rate was determined by comparing the conditions of two indicative offers from Sachsen Bank and Nord LB of 8 and 9 January 2009 respectively, and the loan agreements between MFAG and Sachsen LB and Postbank of 19/22 August 2003 and 28 June/15 July 2007. Germany stated that due to prudence considerations the margin was rounded up from [...] basis points to [...] basis points on average.
- (94) According to Germany in 2010, the risk margin amounted to [...] basis points. Furthermore, Germany explained that this figure was determined by comparing two indicative offers from Sachsen LB ⁽²²⁾ and Nord LB ⁽²³⁾ of

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

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

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

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

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

- (96) Germany stated that in its opinion the market conformity of FLH's shareholder loans should be assessed on the basis of market comparators and not on the basis of the 2008 Reference Rate Communication.
- (97) Moreover, Germany argued that the loan agreement between MFAG and Sachsen LB of 19/22 August 2003 indeed constituted a suitable benchmark to identify the market level of the interest rates for the shareholder loans. Germany rejected the argument that the loan agreement between MFAG and Sachsen LB was not a suitable basis for benchmarking because it was concluded with a different beneficiary, namely MFAG and not FLH. Germany pointed out that the Commission itself regarded MFAG only as a vehicle for the transfer of funds to FLH and not as an aid beneficiary itself. Germany explained that the control, profit and loss transfer agreement between MFAG and FLH obliged FLH to transfer all its profits to MFAG and required MFAG to cover all losses of FLH, thus the net annual profit/loss for FLH was always zero. As a consequence, the interest margin granted to a group company was always equivalent to the interest margin granted to the parent company and vice versa.
- (98) According to Germany, even though the loan agreement was concluded in 2003, it contained a long-term roll-over loan running until 2013 with interest fixed for 3 months at a time. In this respect, Germany stated that the risk margin of [...] basis points was thus applicable between 2006 and 2008 and would still apply today. Moreover, Germany disagreed with the Commission's argument that Sachsen LB was only able to offer the interest margin of [...] basis points due to a reduced level of interest provided through EIB financing. According to Germany, the EIB financing had no influence on the determination of the interest margin of [...] basis points.
- (99) Germany also rejected the Commission's observation that the loan agreement between Postbank and MFAG could not be used as a benchmark. It was concluded for the benefit of FLH, it was not agreed at a different time, and the payment was not subject to specific conditions. Furthermore, Germany argued that the binding financing offer from Sachsen LB and Nord LB dated 16 May 2007 was a suitable benchmark.
- (100) Moreover, referring to the argument of the Commission that it doubted whether indicative proposals submitted by an e-mail without the aim of entering into legally binding loan agreements could be considered as a reliable market benchmark ⁽²⁴⁾, Germany stated that Nord LB and Sachsen Bank both have had long-standing business relations with MFAG and were kept regularly informed about the economic situation of FLH and MFAG, thus the indicative proposals were based on a thorough risk assessment.
- (101) Furthermore, Germany pointed out that even if the market conforming nature or the aid equivalent of the loans or both were to be tested according to the 2008 Reference Rate Communication, there would be no State aid. Germany stressed that the new method for calculating the reference rate only applied from 1 July 2008. As a consequence, for loan agreements concluded before this date, the previous Reference Rate Communication has to be applied.

3.3.3. Credit rating of MFAG/FLH

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

⁽²⁴⁾ Recital 95 of the opening decision.

- (103) Germany stated that MFAG has not been rated by public credit rating agencies. Nevertheless, Germany provides some internal bank ratings for MFAG. Germany stated that in 2006 Nord LB had rated MFAG with a rating note of [...] on its internal rating scale (with a probability of default of [...] %) which corresponds to a rating of [...] to [...] on the Standard & Poor's rating scale, [...] to [...] on Moody's and [...] to [...] on Fitch. Germany stated further that MFAG is in this rating category since 2006. Germany clarified further that on 2 August 2011 and 20 April 2012 respectively, this assessment has been confirmed by Nord LB. Additionally, Germany stated that also Deutsche Kreditbank AG (DKB) has provided its rating indications, in which it confirms that based on the financial reports of MFAG for the year 2006, the company is assigned a rating of [...] on the internal rating scale of the bank, which corresponds to a rating of [...] by Standard & Poor's and [...] by Moody's.
- (104) Table 4 summarises the ratings assigned to MFAG from 2006 to 2012 (the period under consideration).

Table 4

Rating of MFAG in 2006-12(...) ⁽²⁵⁾**3.3.4. Loss given default (LGD) assessment**

- (105) With regard to the collateralisation of the loans and the LGD, Germany clarified that the loans are provided by FLH's shareholders in the form of bridge-financing which means that they should be converted into capital after the authorisation of the Commission. In this respect, Germany clarified further that this is why the loans are not collateralised.
- (106) Germany submitted that there are no specific repayment modalities for the shareholder loans since it was assumed that the loans will be converted into equity, and therefore, no repayment will take place. According to Germany, in the event that the loans would not be converted into equity because the Commission would not approve the financing of the infrastructure measures, pursuant to §488 (3) of the *Deutsches Bürgerliches Gesetzbuch* (German Civil Code), a loan agreement can be terminated within 3 months. The termination of the agreement leads to the maturity of the loan amount with interest.
- (107) Germany argues that although the loans are not collateralised, the LGD of FLH should be considered to be at least lower than [...] % and even close to [...] % because the value of the assets of FLH (that is to say EUR [...] million in 2010) exceeds the value of the liabilities (EUR [...] million in 2010). In Germany's view, in the case of bankruptcy, FLH's assets would be sufficient to cover these claims.
- (108) Germany stated that the assets of FLH, which consist of land property, buildings, technical installations, machines among others, are not pledged in any way towards its shareholders or external creditors.

3.3.5. No advantage gained from capital injections

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

3.4. COMPATIBILITY OF AID

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

3.4.1. Well-defined objective of common interest

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

⁽²⁵⁾ Confidential business information.

- (112) In this regard, Germany submitted that the air freight sector, in particular express freight, is showing considerable growth rates in particular at Leipzig/Halle airport (between 2007 and 2010 the freight volume increased from 101 364 tonnes to 663 059 tonnes). Germany continued its statement clarifying that air freight carriers are expanding their operational capacities. According to Germany, the three main air-freight hubs, Frankfurt/Main, Munich and Köln/Bonn, are facing night flight capacity constraints. Germany asserts further that according to a judgment of 4 April 2012, Frankfurt/Main Airport is not allowed to carry out any night flight operations anymore. Hence, in Germany's opinion, FLH helps to decongest other freight airports in Germany.
- (113) With regard to the contribution of the airport to the connectivity of the region, Germany stated that the envisaged project forms part of the strategy for the development of the airport contained in the Trans-European Transport Network Outline Plan from 2004 valid up to 2020 as a '*Community connecting point*'. According to Germany, the airport is located in the region of Middle Germany (close to five major Trans-European transport axes and Pan-European corridors) between the axes from North to South Europe (that is to say Federal motorway A 9) and from the West to Eastern Europe (that is to say Federal motorway A 14) with an access to rail and road network. In addition, Germany clarified that the access to rail and road network facilitates more efficient transport of freight. Furthermore, Germany stated that the project is in line with the 'Development of an integrated European air transport network' as set out in point 12 of the action plan for airport capacity, efficiency and safety in Europe ⁽²⁶⁾ which notes that 'it would be desirable to unlock existing latent capacity at regional airports provided that Member States respect Community legal instruments relating to State aid'.
- (114) Germany submitted further that the implementation of the project will have a positive impact on the entire region and will significantly influence its economic and social development. According to Germany, the investment project will in particular improve access to the region and increase its attractiveness for investors and visitors. In this regard, Germany argued that the investment project will also have a positive impact on employment. In order to support this argument, Germany asserted that the rate of unemployment in the Sachsen region amounts to 10,3 %, in Saxony-Anhalt to 11,2 % what is above the German average of 6,9 %.
- (115) Hence, Germany submitted that the State aid serves a well-defined objective of common interest.

3.4.2. Need for State intervention

- (116) Germany submitted that no private investor would be interested in financing these infrastructure measures. In this regard, Germany stated that Leipzig/Halle airport suffers from the historical investment backlog. In addition, according to Germany the measures concern long-term infrastructure investments which address the needs of the airport in view of the future increase of freight transport. Germany argues, without providing evidence, that the measures are neither disproportionate in size, nor disproportionately costly. In Germany's opinion, a further reduction of State financing is not possible as infrastructure of this magnitude cannot be financed from own resources of airport operators.
- (117) Germany has also raised the argument that revenues from the airport services do not cover the costs of building the infrastructure and substantiated this argument on the basis of a funding gap analysis and counterfactual assessment.
- (118) Hence, Germany is of the opinion that the aid will bring a material improvement for the investment project that the market itself cannot deliver and that there is a need for state intervention.

3.4.3. Appropriateness of the aid measure

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

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

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

3.4.4. Incentive effect

- (122) With regards to the incentive effect, Germany pointed out that the amount and intensity of State aid of the infrastructure measures at stake were justified. Germany claimed that the infrastructure measures would not have been carried out at all without the State financing (see section 3.4.3).
- (123) Contrary to the Commission's view, Germany pointed out that the fact that some of the investment projects had already been completed did not reduce the incentive effect since the financing commitments by the shareholders were already given before the start of implementing the infrastructure measures. According to Germany, the statement of the Commission that the infrastructure projects might yield any appreciable return on capital clearly mistakes the nature of the measures in question and is also in conflict with the Commission's previous decision-making practice. According to Germany, the Commission had already acknowledged on numerous occasions that measures of this type normally yield no appreciable return on capital.

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

- (124) According to Germany, the proportionality of the infrastructure measures could also be inferred from the fact that they help to reduce the congestion at other German cargo airports.
- (125) Furthermore, Germany stated that the amount and intensity of the financing was restricted to the absolute minimum required to carry out the infrastructure measures. According to Germany, the costs were determined in advance by obtaining cost estimates and preliminary plans. Moreover, Germany submitted that contrary to the Commission's claim, the airport was not able to increase its revenues by augmenting airport charges. In the view of Germany, this is the case because most of the investments relate to infrastructure measures for which no separate charge can be imposed.
- (126) Furthermore, Germany stated that it was generally not possible to cover investment costs for the construction of airport infrastructure by increasing charges for airport users. Germany argued that since the airport charges were approved by the relevant airport authority of the respective Land in which the airport concerned was located, investment costs for the construction of airport infrastructure could not be passed on to the users of the infrastructure at the discretion of the operator. According to Germany, any further increase of the airport charges of Leipzig/Halle airport would not be market conform and not enforceable vis-à-vis airlines using the airport. According to Germany, it has to be kept in mind that the charges at FLH are already above the usual market level.
- (127) Furthermore, Germany argues that the envisaged aid intensity was justified. According to Germany, only the envisaged extent of public funding could guarantee that investments can be carried out to the extent and within the time frame that is required. Germany stated that the impossibility of financing regional airport infrastructure measures of this kind privately is sufficiently demonstrated both by the Commission's decision-practice and by the fact that there is not a single known case in which private investors have funded such measures at their own costs.
- (128) Germany argued that the Commission has repeatedly and frequently approved aid intensities up to 100 %. According to Germany, for investments similar to the investments at stake, the Commission practice has shown that such investments have to have an aid intensity of at least 75 % in order to be carried out.
- (129) Germany stated that since FLH has been constructed in the public interest of Germany, the infrastructure measures were not based on any business plan, profitability calculation or financial statements.

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

Table 5

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

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

⁽¹⁾ The discount rate was established using the Capital Asset Pricing Model: $r_e = r_f + \beta_i$ (MRP)

R_f = Basis rate = [...] % on 30.12.2005

β_i = Beta factor = [...] on 1.1.2006

MRP = Markt Risk Premium before taxes = [...] % on 1.1.2006.

⁽²⁾ NPV of the funding gap/NPV of the investments = EUR 166,9 million/EUR 189,4 million = 88,10 %.

Table 6

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

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

⁽¹⁾ Investment time frame is identical with the financing through capital injections.

⁽²⁾ NPV of the funding gap/NPV of the investments = EUR 142,1 million/EUR 189,4 million = 75,00 %.

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

- (131) With regard to the avoidance of undue negative effects on competition and trade between Member States, Germany emphasised that the overall balance of infrastructure measures at Leipzig/Halle airport would be positive and the measures would not have an undue effect on trade and competition between the Member States. In this respect, Germany submitted that the infrastructure measures in question are of a non-expansionary nature and have no effect on traffic volume. Germany pointed out that the Commission had already acknowledged in other decisions that measures that were non-expansionary in nature have no material impact on competition between airports.
- (132) Germany divided the potential competitors of FLH into three main categories: (i) airports in the vicinity of Leipzig/Halle airport, (ii) other German cargo airports and (iii) major Union cargo airports.

- (133) Regarding airports in the vicinity of Leipzig/Halle, Germany noted that none of these airports specialise in air cargo transports. Furthermore, Germany submitted that none of the following airports, such as Altenburg-Nobitz, Berlin Brandenburg, Dresden, Erfurt, Hof, Magdeburg, Magdeburg-Cochstedt and Prague airport, were in real competition with Leipzig/Halle. To support this, Germany stated that for some of these airports the geographical distances were too large, the airports were located in different economic regions, the catchment areas were quite different or the airports were of a very small size.
- (134) Regarding the other German cargo airports, Germany stated that the competition of Leipzig/Halle airport was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with Leipzig/Halle, had capacity bottlenecks or restrictions on night flights.
- (135) According to Germany, there was also no competitive overlap with the other Union cargo airports, mainly Brussels and Vatry. In this respect, Germany stated that due to its central position in the middle of Europe, Leipzig/Halle airport uniquely served both Western and Eastern Europe, but that neither Brussels nor Vatry were in the position to guarantee sufficient access to the increasingly important Central and Eastern European markets. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was for instance more than 80 times larger than the air cargo volume at Vatry airport. Moreover, according to Germany, Vatry did not enjoy the same good connections to the rail and road network as Leipzig/Halle airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restriction on night flights and therefore competition was limited.
- (136) In addition, Germany stated that contrary to the Commission's view, all potential users had equal and non-discriminatory access to the airport infrastructure. According to Germany, individual users of the airport did not receive any unjustified volume based rebates. Moreover, in the view of Germany, the question of equal and non-discriminatory access to the airport was already addressed by the Commission in its previous decision regarding the financing of Leipzig/Halle airport ⁽²⁷⁾.
- (137) Consequently, Germany is of the opinion that the State aid, if any, can be deemed compatible with the internal market.

4. COMMENTS FROM THIRD PARTIES

4.1. MITTELDEUTSCHE AIRPORT HOLDING (MFAG)

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

4.1.1. Notion of economic activity and public policy remit

- (139) MFAG stated further that the construction of infrastructure at Leipzig/Halle airport does not constitute an economic activity. Hence, according to MFAG the financing in question does not fall within the ambit of Article 107(1) of the Treaty. In this regard, MFAG submitted that a private investor would not have carried out the measures in question and would still not carry them out. Therefore, MFAG stated that there is no market for airport infrastructure. In this context, MFAG stated further that airports are not able to finance their infrastructure investments themselves. MFAG was concerned that the application of State aid rules to airport infrastructure will lead to diminishing of investments in airport infrastructure.
- (140) MFAG stated also that Leipzig/Halle airport was developed in the public interest and that the MEO test is not applicable to the financing of airport infrastructure. In this regard, MFAG submitted that in the Union there was not a single case of a private investor building or substantially developing an airport from its own resources. Therefore, according to MFAG, instead of using the MEO test, the Commission has to assess whether the infrastructure is offered to all its users in an open and non-discriminatory manner. MFAG stated further that this is the case at Leipzig/Halle airport. Hence according to MFAG, the infrastructure measures had not been based on a business plan or long-term profitability prospects.

⁽²⁷⁾ Decision 2008/948/EC.

- (141) In addition, MFAG clarified further that the construction of the airport helped to pursue regional policy goals and to support an economically disadvantaged region. MFAG emphasised that this is a typical State responsibility which cannot be carried out by private investors, and can therefore not be assessed under the State aid rules.
- (142) MFAG argued further that even if — *quod non* — the financing of infrastructure in general constitutes an economic activity, the measures at stake fall within the public policy remit, and thus do not constitute State aid.
- (143) Regarding public policy remit activities, MFAG stated that the Commission has to distinguish between the protection of air transport against external threats, the protection of air traffic against operational risks, and the protection of third parties against operational dangers of the air traffic. In this respect, MFAG stated that the protection against operational threats and the protection of third party rights should be regarded as falling under the public policy remit. MFAG stated that in its decision-making practice the Commission had considered measures in the areas of fire protection, air navigation and air traffic control, particularly Deutscher Wetterdienst (German Meteorological Service) and Deutsche Flugsicherung (German Air Navigation) as falling within the public policy remit.

4.1.2. Market conformity of FLH's shareholder loans

- (144) According to MFAG, the shareholder loans were granted on market terms. MFAG stated that the ratings of MFAG by Nord LB and Deutsche Kreditbank AG should be taken into account. In this respect, MFAG clarified that Nord LB and Deutsche Kreditbank AG rated MFAG and FLH in the rating category [...] with an average probability of default of [...] %. MFAG clarified also that the rating category [...] is comparable with the external rating category of Standard & Poor's of [...] to [...] Moody's of [...] to [...] and Fitch of [...] to [...].
- (145) MFAG stated further that FLH's shareholder loans are also highly collateralised. Furthermore, MFAG clarified that FLH's loans will be used to finance sustainable infrastructure investments. MFAG clarified also that the assets of FLH are not pledged with any mortgages ('Grundpfandrechte'). Hence, MFAG is of the opinion that given the very good rating and high level collateralisation the risk margin should be set at maximum of [...] basis points.
- (146) As the risk margins of FLH's loans are set between [...] and [...] basis points, MFAG is of the opinion that the loans are on market terms and void of any State aid.

4.1.3. Compatibility of the aid

- (147) MFAG is of the opinion that in any case the capital injections would be compatible with the internal market.
- (148) MFAG stated that Leipzig/Halle airport has a major positive impact on employment in the region with 5 100 employees (including employees of MFAG, airlines, restaurants, catering undertakings, public authorities, and other undertakings) working directly at the airport and approximately 8 100 indirect employees.
- (149) Moreover, MFAG stressed that in view of the capacity bottlenecks and night flight restrictions at other airports (such as Frankfurt/Main, Munich, Berlin, Düsseldorf, and Hamburg), Leipzig/Halle airport plays an important role in terms of decongestion of these other German airports, and hence contributes to the security of supply for Germany as a whole.
- (150) With regard to the non-discriminatory nature of the airport charges, MFAG stated that the schedule of airport charges at Leipzig/Halle airport is not designed to favour only one airline and all airlines are charged with the same landing charges. Hence, according to MFAG, the infrastructure is used by all its users in a uniform and non-discriminatory manner.
- (151) Regarding the necessity of aid and its incentive effect, MFAG stated that the measures would not have been carried out without the shareholder loans or capital injections. According to MFAG, the total investment sum of EUR 225,6 million accounts for two or three times MFAG's average turnover and more than five times FLH's average annual turnover in the period in which the infrastructure projects were decided upon. According to MFAG, the fact that the measures have already been carried out in part does not exclude the presence of the incentive effect since these measures have only been carried out after receiving financing guarantees and decisions of the public shareholders, which also provided the interim financing through the shareholder loans.

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

4.2. ARBEITSGEMEINSCHAFT DEUTSCHER VERKEHRSFLUGHÄFEN (ADV)

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

4.3. DEUTSCHE FLUGSICHERUNG (DFS)

- (154) DFS submitted its comments by letter dated 28 October 2011.
- (155) DFS stated that infrastructure projects M3 to M8 and M10 (see Table 2) contribute to safe and smooth management of air traffic at Leipzig/Halle airport. In this respect, DFS stated that M3 helped to relieve the pressure on taxiways and traversing bridges, M5 was urgently needed to ensure that there were no obstacles to taxiing in the southern part of the airport, and M8 served as the basis for air rescue and emergency operations. DFS stated further that M10 would help DFS's work according to §29b (2) of *Luftverkehrsgesetz* (Air Transport Act, 'LuftVG') to work toward the protection of the public against unreasonable noise.

4.4. SHAREHOLDER OF MFAG OR/AND FLH

4.4.1. Landkreis Nordsachsen

- (156) Landkreis Nordsachsen submitted its comments by letter dated 27 October 2011.
- (157) Landkreis Nordsachsen stated that the airport was an important impetus for the economic development and employment in the region. In addition, Landkreis Nordsachsen pointed out that for historical reasons the airport has a greater need for further investments than other German airports. It stated that the concept of activities falling within the public policy remit must be interpreted more broadly.
- (158) Landkreis Nordsachsen stated further that the airport charges are not sufficient to finance the necessary investments. In its view the planned capital injections had an incentive effect. Landkreis Nordsachsen concluded its comments with the statement that without the financing the airport would not have been able to implement the infrastructure project.

4.4.2. Stadt Dresden

- (159) The City of Dresden, a minority shareholder in MFAG, submitted its comments on 28 October 2011. The comments of the City of Dresden were in line with comments of MFAG and Landkreis Nordsachsen.
- (160) The City of Dresden stated that the airport is the biggest employer in the region, employing directly 5 100 people. Hence, the City of Dresden underlined that the airport is an important economic stimulus for the region. Furthermore, the City of Dresden argued that due to the night flight permission, Leipzig/Halle airport plays an important role in decongesting other German airports.
- (161) The City of Dresden stated that the investments costs into airport infrastructure cannot be fully financed through airport charges by airport users. It stated further that historically the development of airports was generally publicly funded. Moreover, according to the City of Dresden, in Germany airport charges are not freely set by airport operators, but have to be officially approved by public authorities.
- (162) The City of Dresden also stated that the infrastructure measures at Leipzig/Halle airport did not unduly affect the internal market as all competing German and foreign airports were operating close to full capacity, while Vatry airport is hardly operated at all.

4.4.3. Stadt Leipzig

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

4.5. AIR CARGO FORWARDERS AND EXPRESS PARCEL DELIVERY COMPANIES

4.5.1. European Air Transport Leipzig (EAT)

- (164) On 27 October 2011 EAT, an air freight company based at Leipzig/Halle airport, submitted its comments on the opening decision. EAT stated that it is a 100 % subsidiary of Deutsche Post AG and uses Leipzig/Halle airport as its principal hub.
- (165) EAT stated that to its knowledge all potential users have an equal and non-discriminatory access to the infrastructure. EAT clarified further that this is in particular supported by the transparent pricing system that applies to all users.

4.5.2. Lufthansa Cargo

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

4.5.3. Emons Spedition

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

4.5.4. Spero Logistics Europe

- (168) Spero Logistics Europe submitted its comments on 28 October 2011. Spero's comments are fully in line with the comments of EAT and Emons Spedition.
- (169) Spero stated further that the permission to operate night flights is of a particular importance for air cargo transport. Spero clarified that it decided to base its operations at Leipzig/Halle because of its geographical location (in the centre of Europe, offering access to the biggest European market, and shorter flying time to Asia).

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

- (170) On 25 October 2011, Deutsch Russische Wirtschaftsallianz ("Wirtschaftsallianz") submitted that the development of the airport is essential for the economic growth in the region.
- (171) Wirtschaftsallianz stated that Leipzig/Halle airport was important in the context of the SALIS project set up for special transport necessary for NATO's operations in Afghanistan. Wirtschaftsallianz argued that the conditions for implementing this project were currently available only in Leipzig. Wirtschaftsallianz clarified further that this concerns in particular security requirements under NATO Directives, 24/7-operating licence, 3 000 metres runways, sufficient storage and loading areas, and technical maintenance capacity for the Russian aircraft used in the SALIS project.

4.5.6. Other freight forwarders and associations

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

4.6. PASSENGER AIRLINES AND TOURISM ASSOCIATIONS

4.6.1. Germanwings

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

- (174) Germanwings stated that the construction and development of airport infrastructure could not be fully financed from airport charges. Germanwings explained that a very large proportion of the measures identified in the opening decision were related to air safety measures or measures implementing safety rules. Germanwings stated further that these measures do not fall within the ambit of State aid rules.
- (175) Germanwings stressed that the Commission should take into account the specific situation of Leipzig/Halle airport and the backlog of investments in airport infrastructure due to the reunification of Germany.
- (176) Furthermore, Germanwings stated that the infrastructure at Leipzig/Halle airport is available to all potential users without any discrimination or a *de facto* preferential treatment of one airline.

4.6.2. Other airlines and tourism associations

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

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

4.7.1. BMW Werk Leipzig (BMW)

- (178) BMW submitted its comments by letter of 27 October 2011.
- (179) BMW stated that Leipzig/Halle airport is important for the local industry and has positive external effects on the region and undertakings established. BMW stated further that the Commission should take into consideration the investment backlog at Leipzig/Halle airport before the reunification of Germany. Given the importance of the airport for the region, BMW considers that the public funding should be deemed compatible.

4.7.2. EADS Elbe Flugzeugwerke (EADS)

- (180) EADS submitted its comments on the opening decision by letter of 27 October 2011.
- (181) EADS pointed out that Leipzig/Halle airport is very important for the region's economy and had been a major factor in EADS's decision to establish its subsidiary in this region.

4.7.3. European Energy Exchange AG (EEX)

- (182) EEX, an energy trading company with its headquarters in Leipzig, submitted its comments on 27 October 2011.
- (183) EEX stated that Leipzig/Halle airport was very important for the region and for EEX's employees. EEX stated further that it does not see any possibility of replacing FLH by using other European airports as an alternative.

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

- (184) IHK submitted its comments on 26 October 2014.
- (185) IHK stated that there are positive interdependencies resulting from the competition on the Union airport market. In this respect IHK stated that infrastructure improvements at one location also positively impacted other airports. In this sense, IHK stated further that the positive network effects of the infrastructure programme at Leipzig/Halle airport were predominant. In IHK's opinion the region's structural weakness and backlog of investments in Eastern Germany needs to be taken into account. Finally, IHK stated that without an initial public investment, extensive follow-up investments by the private sector were inconceivable.

4.7.5. Other associations

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

4.8. SCHKEUDITZ CITIZENS' 'ANTI-NOISE' INITIATIVE

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

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

5. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

- (189) Germany began its observations by stating that 34 third party comments supported the implementation of the notified measures.
- (190) Germany stated that the third party comments confirmed its view that the infrastructure measures in question fall within the public policy remit. In this context, Germany stressed that DFS emphasised that M3 to M8 and M10 constituted measures that were carried out in the exercise of governmental responsibilities. Germany also emphasised that numerous third parties argued that State aid rules were not applicable for the measures at stake.
- (191) Additionally, Germany pointed out that the comments clearly demonstrate that the public funding complies with the criteria pursuant to Article 107(3) of the Treaty. Germany stated that in particular the cities, local authorities and chambers of commerce as well as the undertakings located in the region emphasised the economic and regional importance of the airport. According to Germany, it was therefore undoubted, that the construction and the operation of the airport serve a clearly defined objective of common interest. Moreover, Germany argued that the third party comments also confirmed the necessity and proportionality of the public funding.
- (192) With regard to the possible undue negative impact on competition and trade, Germany pointed out that neither Vatry nor Brussels airport submitted comments on the opening decision. According to Germany, this showed that none of those airports was concerned by any negative impact of the measures at stake. Germany pointed out that this view was also supported by other third parties, such as Lufthansa Cargo, Austrian Airlines, Germanwings and Jade Cargo. Germany stated further that Alltours, Deutscher Reise Verband, BARING and Aircargo Club Deutschland also stated that there is no competitive overlap of catchment areas between Leipzig/Halle and Brussels or Vatry airports.
- (193) Regarding the requirement of an equal and non-discriminatory access to the airport, Germany pointed out that the third party comments confirm that the airport charges were determined in a non-discriminatory manner.

6. ASSESSMENT

- (194) By virtue of Article 107(1) of the Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'
- (195) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures at stake constitute State aid within the meaning of Article 107(1) of the Treaty, those measures need to fulfil the following conditions:
- (a) be granted by the State or through State resources,
 - (b) favour certain undertakings or the production of certain goods,
 - (c) distort or threaten to distort competition,
 - (d) affect trade between Member States.

6.1. NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

6.1.1. Notion of undertaking

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

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

- (197) In this regard, Germany submitted that the concept of ‘undertaking’ within the meaning of Article 107(1) of the Treaty does not apply to airports, at least with regard to financing of regional airport infrastructure. Germany was of the opinion that the construction of such infrastructure is not an economic activity, but a general measure pursuing transport, economic and regional policy considerations. Moreover, Germany asserted that the construction of airport infrastructure does not constitute an economic activity because a private investor would not engage in that activity. Germany stated further, in that regard, that airports have higher than average fixed costs relating to infrastructure, equipment and operation. In addition, their freedom of action is limited by strict legal obligations and conditions. Germany considered further that the references to the *Aéroports de Paris* judgment and to the *Leipzig/Halle* judgement are irrelevant for the measures at stake. With regard to the *Aéroports de Paris* judgment, Germany submitted that the judgment does not deal with the construction of airport infrastructures, but with the operation of an airport. Additionally, Germany considered that the *Aéroports de Paris* judgment does not deal with the interpretation of the concept of ‘undertaking’ within the meaning of Article 107(1) of the Treaty, but concerns an infringement of the prohibition on the abuse of a dominant position within the meaning of Article 102 of the Treaty. With regard to the *Leipzig/Halle* judgment, Germany considered that the judgment of the General Court does not have any effect as a precedent in case-law, as it is subject to an appeal.
- (198) With regard to the concept of ‘undertaking’, it must be pointed out, that the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed ⁽²⁹⁾. Any activity consisting in offering goods and services on a market is an economic activity ⁽³⁰⁾. The economic nature of an activity as such does not depend on whether the activity generates profits ⁽³¹⁾.
- (199) In *Aéroports de Paris* ⁽³²⁾, the Court held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity. In its judgment in the *Leipzig/Halle airport* case ⁽³³⁾, the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.
- (200) The Commission recalls that in its *Leipzig/Halle airport* judgment, the General Court held that, from 2000, the application of State aid rules to the financing of airport infrastructure could no longer be excluded ⁽³⁴⁾. Consequently, from the date of the judgment in *Aéroports de Paris* (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.
- (201) The General Court also held in its *Leipzig/Halle airport* judgement that it is not relevant whether the construction or the extension of an airport infrastructure pursues objectives of regional, economic or transport policy. According to established case law it is not relevant which purposes are followed by specific measures but rather what effects they cause ⁽³⁵⁾.
- (202) Moreover, the General Court has confirmed in its *Leipzig/Halle airport* judgment that the existence of a market for airport infrastructure is shown by the fact that Leipzig Halle Airport competed with other regional airports, in particular with Vatry (France) and Brussels (Belgium) to become DHL’s European air freight hub.

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

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

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

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

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

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

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

- (203) According to the case law it be also must considered that, for the purpose of assessing the economic nature of airport manager's activities in the context of the public financing of infrastructure development measures, there is no reason to dissociate the activity of building or enlarging infrastructure, from its subsequent use ⁽³⁶⁾.
- (204) Moreover, the General Court has held in its *Leipzig/Halle airport* judgment that: '[r]unways are essential elements for the economic activities engaged in by an airport operator. The construction of landing and take-off runways thus permit an airport to engage in its principal economic activity or develop that activity, where what is in question is the construction of an additional runway or the development of an existing runway.'
- (205) In the light of the case law cited in recitals 196 and 204, the Commission notes that the infrastructure, which is the subject of this Decision, will be either directly operated on a commercial basis by FLH, the airport manager, or will indirectly support and enable the commercial operation of the airport as a whole.
- (206) In this respect, the Commission observes that according to German law, in particular the [...] the charges have to be established by the airport operator and submitted for approval to the Federal Ministry for Transport. The Commission notes that the airport charges are set by the airport operators within the regulatory constraints to avoid any undue discrimination between the airport users and possible abuses of a dominant position of the airport manager. However, the Commission considers that this does not preclude airport managers from setting the level of airport charges taking into account the necessary investments and its costs. This is in particular confirmed by the requirements of [...] and [...] of the [...]
- (207) The Commission notes further that the construction and the development of the infrastructure subject to this Decision, will allow FLH to increase its capacity and its economic activity as operator of Leipzig/Halle Airport. FLH, the airport manager, provides airport services for money, resulting, in particular, from airport charges, but also from other revenue related to the exploitation of the infrastructure and the provision of ancillary services, such as for example renting out of hangars, which must be regarded as remuneration for the provision of services rendered.
- (208) Hence, the Commission considers that the infrastructure subject to this Decision is commercially exploitable infrastructure. FLH is therefore an undertaking within the meaning of Article 107(1) of the Treaty.

6.1.2. Activities falling within public policy remit

- (209) However, not all the activities of an airport are necessarily of an economic nature ⁽³⁷⁾. Since the classification of an entity as an undertaking is always in relation to a specific activity, it is necessary to distinguish between the activities of a given airport and to establish to what extent those activities are of an economic nature. If an airport carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.
- (210) The Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid ⁽³⁸⁾. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature ⁽³⁹⁾.

⁽³⁶⁾ Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, paragraph 88; and *Leipzig/Halle airport* judgment, paragraph 95.

⁽³⁷⁾ *Leipzig/Halle airport* judgment, paragraph 98.

⁽³⁸⁾ Case C-118/85 *Commission v Italy*, [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées*, [1988] ECR 2479, paragraph 18.

⁽³⁹⁾ See, in particular, Case C-364/92 *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission*, [2009] ECR I-2207, paragraph 71.

- (211) The public funding of such non-economic activities does not constitute State aid, but has to be strictly limited to compensating the costs to which they give rise and may not be used to finance other activities⁽⁴⁰⁾. Any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid. Moreover, if an airport is engaged in non-economic activities, alongside its economic activities, separated cost accounting is required in order to avoid any transfer of public funds between the non-economic and the economic activities.
- (212) Public financing of non-economic activities must not lead to undue discrimination between airports. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities⁽⁴¹⁾. Therefore, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature.
- (213) In the light of recitals 209 and 212, the Commission has therefore to analyse the nature of the infrastructure measures subject to this Decision which are carried out at Leipzig/Halle airport.
- (214) Germany asserted that the notified measures M1 to M11 concern activities falling within the public policy remit and that the financing of these activities is strictly limited to the extent of costs necessary for these measures. Hence, Germany was of the opinion that these costs do not fall within the ambit of State aid rules. In this respect, Germany asserted that the measures M1 to M11 fall within one of the following categories:
- (i) measures that safeguard civil aviation against acts of unlawful interference⁽⁴²⁾, which are subject to the German *Luftsicherheitsgesetz* (Air Security Law, 'LuftSiG'), in particular §8 thereof;
 - (ii) measures relating to operational safety, subject to §45 *Luftverkehrs-Zulassungs-Ordnung* (Air Traffic Licensing Regulation, 'LuftVZO'); or
 - (iii) measures relating to protection of third parties against operational risks of air transport (such as noise pollution).
- (215) With respect to measures relating to operational safety, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport⁽⁴³⁾. In this context, it needs to be noted, that costs related to regulatory requirements and standards also cannot be considered to fall within the public policy remit. Subject to a more detailed review with respect to individual activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate on a given market has to ensure the safety of the installations (for airports these are for example runways, taxiways and aprons), and has also to ensure compliance with regulatory standards.
- (216) With regard to runways, taxiways and aprons, the Commission considers that those are essential elements for the economic activities engaged in by an airport manager. The construction of runways, taxiways and aprons thus allows an airport manager to exercise its primary economic activity.
- (217) With regard to the measures pursuant to §8 LuftSiG, meaning air traffic control, meteorological services and the fire brigades can, in principle, be considered to constitute activities falling within the public policy remit.

⁽⁴⁰⁾ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova*, [1997] ECR I-1547. Commission Decision N 309/02 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001 (OJ C 148, 25.6.2003, p. 7). Commission Decision N 438/02 of 16 October 2002, Aid in support of public authority functions in the port sector (OJ C 284, 21.11.2002, p. 2).

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

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

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

- (218) As regards the applicable legal framework, Germany has submitted that for the fire brigade there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for a fire brigade falls within the legal competence of the Länder and that these costs are usually remunerated by the relevant regional authorities. The remuneration of these costs is limited to the extent necessary to cover these costs.
- (219) As regards air traffic control and meteorological services, the Commission notes that §27(d) and §27(f) LuftVG provides that the costs related to §27(c) LuftVG are covered by the State for a number of specific airports. Airports are eligible for cost coverage as 'recognised airports' pursuant to §27(d) and §27(f) LuftVG if the Federal Ministry for Transport has recognised a necessity due to safety reasons and transport policy related interests⁽⁴⁴⁾. German airports which have not been recognised are not eligible for cost coverage pursuant to §27(d) and §27(f) LuftVG and have therefore, in principle, to bear the costs related to the measures foreseen in §27(c) LuftVG themselves. These costs are inherent to the operation of the airports. Since some airports have to bear these costs themselves while other airports do not, the latter might be granted an advantage, even if control and air safety measures as well as meteorological services can be considered to be non-economic. Leipzig/Halle airport has been recognised to be such an airport and is hence eligible for cost coverage pursuant to §27(d) and §27(f) LuftVG. The other airports have to bear these costs themselves. Therefore, covering the costs of Leipzig/Halle airport related to air control and safety measures as well as to meteorological services pursuant to §27(d) and §27(f) LuftVG gives an advantage to Leipzig/Halle airport.
- (220) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FHL thus relieved this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules. In any case, regardless of the legal classification of those costs as falling within the public remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, where the State is to pay those costs, the airport operator would be relieved from a cost that it should normally have incurred.
- (221) In the light of the considerations in recitals 215 and 220, the Commission finds it appropriate to draw more specific conclusions regarding investment costs allegedly falling within the public policy remit.

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

- (222) Germany submitted that the measures M1, M2 and M10 fall within the public policy remit, because they are aimed to protect third parties against operational risks of air transport, such as protecting house owners and environment from the effects of noise pollution.
- (223) The Commission considers that the costs relating to measures M1, M2 and M10 constitute normal costs an undertaking would have to bear in order to construct installations that are in line with certain regulatory standards. Moreover, these measures cannot be dissociated from the economic activity of the airport. This is in particular exemplified by the fact that without these measures the airport would not be allowed to operate flights during the night and would not be allowed to concentrate on the air cargo business in relation with the planning approval decision for the construction of the southern runway at Leipzig/Halle airport and its expansion strategy.
- (224) Hence, the Commission considers that measures M1, M2 and M10 cannot be regarded as falling within the public policy remit.

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

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

- (225) In the present case the extension of the Northern runway is planned to ensure that freight aircraft with a high MTOW can take off without any payload restrictions, while the extension of the aprons should provide for better distribution of flight movements. Moreover, with regard to taxiways, the Commission notes that at an airport, taxiways connect runways with ramps, hangars, terminals and other facilities. These connections allow the aircraft to vacate the runway, allowing another to land or depart. Hence, taxiways and traversing bridges are intrinsically linked to runways for which the airport operator receives fees. In addition, the information given by Germany confirms that these measures are essential in view of the volume and flows of traffic. If the constructions were not be made, the airport would not benefit from the expected increase in traffic flows or the current volume of traffic flows would have to be decreased in order to ensure safe operation of the aircraft. The Commission considers that this does not contradict the fact that a certain number of taxiways and traversing bridges can only be used safely for a limited volume of traffic.
- (226) In this respect, the Commission recalls that runways, taxiways and aprons are essential elements for the economic activities in which an airport manager is engaged. The construction of runways, taxiways and aprons thus allows an airport manager to exercise its primary economic activity and cannot be disassociated from this economic activity.
- (227) The Commission observes that measures M3, M4, M5, M6, M12, M13, M14, M15 and M16 are taken on a commercial basis by the airport manager. They are therefore commercially exploitable infrastructure, and cannot be considered to fall within the public policy remit.

M11 Land side development of south eastern zone phase I

- (228) The Commission observes that measure M11 involves the equipment of existing buildings with electricity and water supply, waste water installations and rainwater drainage, as well as additional noise abatement measures.
- (229) In the light of the assessment carried out in recitals 215 and 220, these measures do not concern activities that normally fall under State responsibility in the exercise of its official powers as a public authority. Rather they contribute to the upgrading of infrastructure which is used for commercial purposes, and thus, involve an economic activity, and therefore they cannot be considered to fall within the public policy remit.

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

- (230) With regard to the fire station building and firefighting equipment, as stated in recital 218, this activity can in general be considered to fall within the public policy remit.
- (231) As regards the legal framework, Germany submitted that for the fire station building and the firefighting equipment there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the new fire station building and firefighting equipment falls within the legal competence of the Länder and that these costs are remunerated usually by the relevant regional authorities, as submitted by Germany. The remuneration of these costs is limited to the extent necessary to cover these costs.
- (232) Hence, the construction costs relating to the new fire station building and the costs for the purchase of firefighting equipment can be considered to fall within the public policy remit.

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

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

- (234) As regards the construction of the multi-purpose hangar at Leipzig/Halle airport, the Commission observes that this building can be used for different purposes. Furthermore, as already stated in recital 215, the costs of winter service equipment (M9.3) necessary for the safe operation of the airport are normal costs of running a business and cannot be considered to fall within the public policy remit. Consequently, the Commission considers that the construction costs of the multi-purpose hangar also do not fall within the scope of the public policy remit.
- (235) Nevertheless, this finding does not preclude Germany from entrusting the airport in emergency situations with specific tasks falling within Services of General Economy Interest.

M7 Additional de-icing areas

- (236) Germany argues that additional de-icing areas are necessary for the safe and timely operation of aircraft at the airport. According to Germany, the extension of the existing de-icing areas is necessary due to the increasing traffic at the airport in order to avoid delays of the scheduled flights. In addition, Germany emphasises that revenues from the de-icing services provided by the airport do not cover the costs of the establishment of the infrastructure.
- (237) First of all, the Commission notes that the fact whether an activity is profitable or not is not decisive for the notion of economic activity⁽⁴⁵⁾. Second, the Commission notes that the de-icing services are rendered against remuneration to air carriers. They are essential services that any airport provides as part of its economic activity. The more of those services are provided the more flights can depart from the airport, and thereby the airport can increase its revenues.
- (238) Consequently, the Commission considers that de-icing services are intrinsically linked with the economic exploitation of an airport, and cannot be disassociated from this activity, and hence must be considered as economic activities.

M8 Heliport

- (239) The measure covers the establishment of a helicopter parking space which will be used as a base for air rescue services only.
- (240) The Commission considers that the creation of a heliport facilitates air rescue. Therefore, the provision of a heliport for rescue services can be considered to fall within the public policy remit. The compensation must be strictly linked to the costs of these services.

M9 Additional infrastructure measures

- (241) The additional infrastructure measures include the rebuilding of checkpoint I, the construction of a functional security building to meet the needs of the federal and regional police, customs, animal farm and the airport perimeter fence (including digital video surveillance system and movement detectors). According to Germany these measures are necessary to safeguard civil aviation against acts of unlawful interference and fall therefore within the scope of §8 LuftSiG.
- (242) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FLH thus relieves this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.
- (243) With regard to the costs related to the use of the functional security building by German Meteorological Service, the Commission notes that §27(f) LuftVG regulates that the costs related to §27(c) LuftVG are covered by the State for a number of specific airports. Airports are eligible for cost coverage as 'recognised airports' pursuant to §27(f) LuftVG if the Federal Ministry for Transport has recognised a necessity due to safety reasons and transport policy related interests. German airports which have not been recognised are not eligible for cost coverage pursuant to

⁽⁴⁵⁾ Leipzig/Halle judgment, paragraph 115.

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

6.1.3. Conclusion

- (244) In the light of the finding in section 6.1.1, FLH is an undertaking within the meaning of Article 107(1) of the Treaty.
- (245) With regard to the finding in section 6.1.2, the financing of the following measures cannot be considered as falling within the public policy remit: M1 acquisition of land, relocation, noise abatement and accompanying landscape conservation planning, M2 engine testing structure, M3 taxiway and traversing bridge 'E7', M4 extension of northern runway (planning costs), M5 site clearance in readiness for construction of taxiway 'Victor', M5 multi-purpose hangar, M6 parallel taxiway 'Victor', M7 additional de-icing areas, M9.3 winter service equipment, M10 additional noise abatement, M11 land side development of south eastern zone phase I, M12 planning approval procedure for southern extension (runway and apron), M13 northern apron expansion, M14 eastern apron expansion, M15 infrastructure adaptation, and M16 additional infrastructure measures regarding the northern hangar extension and the construction of the new aviation terminal and small aircraft shed. The financing of these activities allows an airport manager to exercise its primary economic activity and cannot be dissociated from this activity.
- (246) With regard to M5 new fire station building, M9 firefighting equipment and M8 heliport, the Commission considers that these measures can be regarded as falling within the public policy remit (see section 6.1.2).
- (247) With regard to M9 additional infrastructure measures regarding the rebuilding of checkpoint I, the construction of a functional security building to meet the needs of the federal and regional police, customs, animal farm and the airport perimeter fence (including digital video surveillance system and movement detectors), the Commission considers that these activities may fall within the public policy remit. However, to the extent that these measures fall within §8(3) LuftSiG, according to this provision of the German law only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the listed activities pursuant to §5 LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FLH thus relieves this undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.
- (248) With regard to the costs related to the use of the functional security building by German Meteorological Service (related to M9), the Commission considers for the reasons in recital 243 that covering the costs of Leipzig/Halle airport related to meteorological services pursuant to §27(f) LuftVG gives an advantage to Leipzig/Halle airport, even if meteorological services can be considered to be non-economic.

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

6.2.1. Relation between the shareholder loans and the capital injections

- (249) Before assessing whether the shareholder loans in favour of FLH constitute State aid, it is necessary to determine whether the shareholder loans and the capital injections should be considered as separate measures or as a single measure.
- (250) The evidence shows that both operations were decided at the same time, as part of a wider plan to finance the improvements of the infrastructure of the airport, and that the shareholders of FLH had the intention to convert their loans into equity. However, Germany has declared that the capital injections have not been irrevocably granted and that FLH has no direct entitlement to the capital increase.
- (251) Under these circumstances, the Commission considers that the shareholder loans and the capital injections can be considered as separate measures.

6.2.2. Economic advantage

- (252) In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the '*market economy lender principle*'. According to that principle, debt capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be qualified as State aid ⁽⁴⁶⁾.
- (253) In the present case, the Commission has to assess whether the conditions of shareholder loans (see Table 3) provided to FLH confer an economic advantage to it, which the recipient undertaking would not have obtained under normal market conditions.
- (254) Germany is of the opinion that the '*market economy lender principle*' was fully respected as the shareholder loans were provided at market conditions. In order to justify the conditions of the loans at issue, Germany compares the conditions of the shareholder loans with the conditions provided from other banks (see the arguments given in sections 3.3.1 and 3.3.2).
- (255) According to its decision-practice, in order to determine whether the financing under assessment was granted at favourable conditions, the Commission may — in the absence of other proxies — compare the interest rate on the loan in question with the Commission reference rate. The Commission's reference rate is established pursuant to the methodology laid down in the 2008 Reference Rate Communication.
- (256) The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. However, because the Commission reference rate is a proxy, where the Commission has other indicators in a specific case of the interest rate that the borrower could obtain on the market, it may base its assessment on those indicators.

The credit rating of FLH

- (257) In order to be able to assess the conditions of the shareholder loans, the Commission has first to assess the credit-worthiness of FLH.
- (258) FLH is not rated by a credit rating agency. Germany however argues that due to the profit-and-loss transfer agreements concluded between FLH and MFAG, the rating of the mother companies should be taken into account.
- (259) The Commission observes that according to German law, MFAG remains liable for any loan contracted by the FLH during the time at which the profit-and-loss transfer agreement existed, even if the agreement is subsequently revoked.
- (260) On that basis, the Commission takes the view that the rating of FLH should be considered to be at least the rating of its parent company, MFAG.
- (261) Also MFAG has not been rated by credit rating agencies. Nevertheless Germany has provided some bank internal ratings for MFAG, as summarised in Table 4.
- (262) In view of recitals 257 to 261, the Commission considers that FLH has at least the lowest rating of MFAG, that is to say [...] on the Standard & Poor's rating scale in 2006 and [...] on the Standard & Poor's rating scale from 2007 to 2012.

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

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

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

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

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

- (264) As the loans were intended to be only a short-term bridge financing facility, they were not collateralised. Nevertheless, Germany argued that the LGD should be at least lower than 30 %, because the value of the assets of FLH (EUR [...] million in 2010), which are not pledged, exceeds the value of the liabilities (EUR [...] million in 2010).
- (265) In this regard, the Commission notes that the book value of the assets is not sufficient to estimate the liquidation value in case of insolvency or bankruptcy of the airport. In the paper published by the Basel Committee on Banking Supervision in June 2006 it is recommended to consider the LGD for senior claims on corporates not secured by recognised collateral to be around 45 %⁽⁴⁹⁾. Hence according to the 2008 Reference Rate Communication the shareholder loans at stake have a 'normal' level of collateralisation with a LGD in the middle category (30 % < LGD < 60 %).
- (266) Hence the Commission considers that the level of collateralisation is not sufficient in order to allow increasing the rating of the undertaking by one notch.

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

- (267) In order to assess whether FLH's shareholder loans were in line with market conditions, the Commission has performed a benchmarking with market proxies based on credit default swap (CDS) spreads.
- (268) In line with the methodology underlying the 2008 Reference Rate Communication, the Commission is of the opinion that loan interest rates can be deemed in line with market conditions when the loans are priced at a rate equal or higher than a benchmark rate defined by the following formula:

Benchmark rate = base rate + risk margin + fee

- (269) The base rate represents the cost for banks of providing liquidity (funding cost). In the case of fixed-rate funding (that is to say when the interest rate is fixed for the duration of the loan), it is appropriate to determine the base rate on the basis of swap rates⁽⁵⁰⁾ with a maturity and currency corresponding to the maturity and the currency of the debt. The risk margin compensates the lender for the risks associated with the specific debt financing, in particular the credit risk. The risk margin can be derived from an appropriate sample of CDS spreads⁽⁵¹⁾ relating to reference entities (such as company bonds) with a similar rating as the loans for FLH. Finally, it appears appropriate to add 10-20 basis points as an approximation for the bank fees companies usually have to pay⁽⁵²⁾.
- (270) The Commission considers that the financing measures under assessment do not represent a typical loan. For the purpose of the current assessment it is assumed that the loans are provided as a revolving credit facility, which is renewed each year with new interest rate conditions. Consequently, the maturity is assumed to be 1 year.
- (271) The loans are granted with a floating base rate taking the 1-year EURIBOR as a reference rate. The assessment of the risk margin can be made on the basis of a sample of CDS spreads for each relevant point in time. Table 7 summarises the number of observations (companies with a rating of FLH from all industries, excluding financial institutions and government) and the corresponding CDS spreads.

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

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

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

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

Table 7

Overview of observations of companies with rating of FLH

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

- (272) The risk margin of the benchmark rate is established on the basis of a weighted average CDS spreads of the 2nd Quartile (see Table 7).
- (273) Table 8 compares the actual interest rate that is charged for the shareholder loans under assessment and the benchmark rate.

Table 8

Comparative overview of FLH's actual and benchmark rate

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

- (274) According to the market practice the benchmark rate established on the basis of CDS spreads needs to take into account a bank fee of approximately [...] basis points ⁽⁵³⁾. In order to arrive at a conservative estimate, in the case at stake a bank fee of [...] basis points is added.
- (275) The Commission considers that the results in Table 8 provide an indication that the loans were indeed in line with market conditions. In this regard, the Commission notes that in all years — except 2009 — FLH's actual rate was above the benchmark rate. However, the lower actual interest rate in 2009 is offset by the higher rates in 2010 to 2012 on larger shareholder loan volumes.
- (276) Moreover, the Commission observes that these results were also confirmed by the benchmarking loans listed by Germany in sections 3.3.1 and 3.3.2.

6.2.3. Conclusion

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

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

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

6.3.1. State resources and imputability to the State

- (278) In order to constitute State aid, the measures in question have to be financed from State resources and the decision to grant the measure must be imputable to the State.
- (279) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it⁽⁵⁴⁾. Resources of local authorities are, for the application of Article 107(1) of the Treaty, State resources⁽⁵⁵⁾.
- (280) The Court has also ruled that whether a measure is granted directly by the State or by public or private bodies established or appointed by it to administer the measure is irrelevant to whether it is considered to be State aid⁽⁵⁶⁾.
- (281) In the present case, the relevant measures, namely capital injections in favour of FLH, will be granted in part directly from the budget of the local authorities (the Land Sachsen-Anhalt, Freistaat Sachsen and the relevant cities and municipalities) and in part through the funding granted from the budget of the local authorities, which will be channelled through MFAG, as an intermediary body, into FLH. In this context, the Commission notes that the funds channelled through MFAG were earmarked by the local authorities to be transferred into FLH.
- (282) Hence, at all material times the State exercised direct or indirect control on the resources under consideration. Thus, the Commission considers that the relevant measures are financed through State resources. The decision to grant these State resources is also imputable to public authorities, as FLH's public shareholder agreed to provide capital injections.

6.3.2. Economic advantage

- (283) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention⁽⁵⁷⁾. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention⁽⁵⁸⁾. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (284) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid'⁽⁵⁹⁾. In the present case, in order to determine whether the public financing of Leipzig/Halle airport grants FLH an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the direct investment grants and capital injections to that of a MEO who is guided by prospects of profitability in the long-term⁽⁶⁰⁾.
- (285) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO test is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question'⁽⁶¹⁾.
- (286) In *Stardust Marine* the Court stated that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation'⁽⁶²⁾.

⁽⁵⁴⁾ Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397.

⁽⁵⁵⁾ Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais*, [2011] ECR II-1999, paragraph 108.

⁽⁵⁶⁾ Case 78/76, *Steinike & Weinlig v Germany*, [1977] ECR 595, paragraph 21.

⁽⁵⁷⁾ Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

⁽⁵⁸⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

⁽⁵⁹⁾ Case C-482/99 *France v Commission* (*Stardust Marine*) [2002] ECR I-4397, paragraph 69.

⁽⁶⁰⁾ Case C-305/89 *Italy v Commission* (*ALFA Romeo*) [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.

⁽⁶¹⁾ Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

⁽⁶²⁾ *Stardust Marine*, paragraph 71.

- (287) Furthermore, the Court declared in the EDF case that, '[...] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen' ⁽⁶³⁾.
- (288) In order to be able to apply the MEO test, the Commission has to place itself at the time when each decision to provide public funds to FLH was taken. The Commission must also base its assessment on the information and assumptions, which were at the disposal of the relevant local authorities at the time, when the decision regarding the capital injections at stake was taken.
- (289) Germany also stressed that the infrastructure is necessary to create jobs (5 106 jobs depend directly on the airport). The Commission however, observes that the social and regional considerations cannot be taken into account when conducting the MEO test.
- (290) In this particular case in relation to the infrastructure and infrastructure-related investments Germany appears to call into question the applicability of the MEO test.
- (291) Germany argued that the MEO test cannot be applied to transport infrastructure because there are no comparable private investors. According to Germany, private investors have no interest in airports, especially where large investments are necessary. In this context, Germany submitted that this would mean that investments that private operators would not undertake would automatically fall outside the scope of State aid rules.
- (292) The Commission cannot agree with this view of Germany. The MEO test cannot be excluded just because the private sector would not be involved in financing airport infrastructure. An economically difficult situation does not absolve the public investor from acting as reasonably as a private investor in the same situation would have done. In this context, the Commission notes that the case-law of the Court of Justice of the European Union has clarified that investment in economic activities which would not be undertaken by private investors operating in a market economy can contain State aid elements ⁽⁶⁴⁾.
- (293) Germany is not of the opinion that FLH's shareholders acted as a MEO by deciding to increase the own capital of the airport and converting the shareholders loans into equity. The Commission notes that Germany stated that the capital increases were done without an underlying business plan and without long-term prospects for profitability.
- (294) Despite the inherent and significant uncertainties related to the project, such as the long-term nature of the investment project (around 50 years), there was neither an *ex ante* business plan, nor a sensitivity analysis nor any underlying profitability assumptions. This is not in line with the type of analysis that a prudent investor would have undertaken for a project of such magnitude.
- (295) On this basis, the Commission finds that the capital injections by the public shareholders and MFAG to FLH granted the latter an economic advantage (to the extent that the investment grants were not purely related to public policy remit activities as concluded in section 6.1.2).

6.3.3. Selectivity

- (296) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour '*certain undertakings or the production of certain goods*'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid.
- (297) In the case at hand, the capital injections only benefit FLH. Hence, the measure is selective within the meaning of Article 107(1) of the Treaty.

6.3.4. Distortion of competition and effect on trade

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

⁽⁶³⁾ Case C-124/10P *European Commission v Électricité de France (EDF)* [2012], not yet published, paragraph 85.

⁽⁶⁴⁾ *Leipzig/Halle* judgment, paragraph 115.

⁽⁶⁵⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

- (299) As assessed in section 6.1.1, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, the Commission underlines that notably with respect to freight forwarders, air cargo specialised airlines and also passenger airlines and charter operators, airports that are not located in the same catchment areas and in different Member States can also be in competition with each other to attract those airlines.
- (300) The General Courts confirmed that Leipzig/Halle airport is in competition with airports in other Member States, in particular Brussels (Belgium) and Vatry (France) airports notably as regards to cargo flights⁽⁶⁶⁾. In addition, Leipzig/Halle airport currently serves approximately 890 000 tonnes air cargo and is the second biggest freight airport in Germany.
- (301) Germany submitted that the competition of Leipzig/Halle airport with other German air cargo airports was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with the airport, had capacity bottlenecks or restrictions on night flights.
- (302) According to Germany, there was also no competitive overlap with the other European cargo airports, mainly Brussels and Vatry. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was more than 80 times larger than the air cargo volume at Vatry airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restriction on night flights and therefore competition was limited.
- (303) From the submission of third parties, the Commission observes that Leipzig/Halle airport is used by different international air cargo carriers, such as Wirtschaftsallianz for the SALIS project, Jade Cargo, Volga-Dnepr Group, Baring etc. Moreover, Leipzig/Halle airport is the European hub of DHL. The notified infrastructure measures involve a further extension of the airport's infrastructure to serve bigger planes without any MTOW restrictions. In this regard, the Commission further observes that the airport operates two runways (southern and northern runway with a length of 3 600 metres).
- (304) On the basis of what precedes, the Commission considers that the possible economic advantage which FLH might receive from capital injections to finance the different infrastructure development and extension projects at Leipzig/Halle airport strengthen its position vis-à-vis its competitors on the Union's market of providers of airport services, in particular as regards freight.
- (305) Therefore, the Commission considers that the public funding under examination distorts or threatens to distort competition and affects trade between Member States.

6.3.5. Conclusion

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

6.4. LAWFULNESS OF THE AID

- (307) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.
- (308) As the capital injections are subject to a Commission decision and were not yet put at the disposal of FLH, the Commission considers that Germany has respected the prohibition of Article 108(3) of the Treaty⁽⁶⁷⁾.

6.5. COMPATIBILITY OF AID

6.5.1. The applicable legal framework

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

⁽⁶⁶⁾ Leipzig/Halle airport, paragraph 93 and Decision 2008/948/EC, recital 8.

⁽⁶⁷⁾ Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

- (310) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. The aid in question can be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.
- (311) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.
- (312) According to the 2014 Aviation Guidelines, the Commission will apply the principles set out in these guidelines to all notified investment aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the projects were notified prior to that date ⁽⁶⁸⁾.
- (313) The Commission has already concluded in recital 308 that the direct and annual capital injections do not constitute unlawful State aid granted before 4 April 2014.
- (314) However, in the present case the Commission observes that Leipzig/Halle airport with more than 800 000 tonnes is a freight specialised airport. The Commission further observes that the measures at stake relate to the airport's expansion strategy to enter the freight market.
- (315) According to point 22 of the 2014 Aviation Guidelines, the Commission does not yet have sufficient experience in assessing the compatibility of aid to airports specialised in freight transport to summarise its practice in the form of specific compatibility criteria. Hence, for those categories of undertakings, the Commission will apply the common principles of compatibility as set out in section 5 of the 2014 Aviation Guidelines through a case-by-case assessment.

6.5.2. Compatibility assessment

- (316) To assess whether a State aid measure can be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, the Commission generally analyses whether the design of the aid measure ensures that the positive impact towards an objective of common interest exceeds its potential negative effects on trade and competition.
- (317) The Communication on State Aid Modernisation ⁽⁶⁹⁾ called for the identification and definition of common principles applicable to the assessment of compatibility of all aid measures carried out by the Commission. An aid measure will be considered compatible with the internal market pursuant to Article 107(3) of the Treaty provided that the following cumulative conditions are met:
- (a) contribution to a well-defined objective of common interest;
 - (b) need for State intervention;
 - (c) appropriateness of the aid measure;
 - (d) incentive effect;
 - (e) proportionality of the aid (aid limited to the minimum);
 - (f) avoidance of undue negative effects on competition and trade between Member States;
 - (g) transparency of aid: Member States, the Commission, economic operators, and the interested public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder as outlined in section 8.2 of the 2014 Aviation Guidelines.

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

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

⁽⁶⁸⁾ Point 173 of the 2014 Aviation Guidelines.

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

- (319) The capital injections subject to this Decision are aimed at financing infrastructure measures at Leipzig/Halle airport, an airport specialised in air freight. As submitted by Germany, the air freight sector, in particular express freight, is showing considerable growth rates. Germany stated further that the three main air-freight hubs in Germany, Frankfurt/Main, Munich and Köln/Bonn, are facing night flight capacity constraints. In this regard, Germany stated that according to the judgment of the German Federal Administrative Court of 4 April 2012, Frankfurt Main/Airport is not allowed to carry out any night flight operations anymore. As a consequence, Germany stated that FLH helps to counter a serious air-freight capacity crunch in Germany.
- (320) Germany stated further that the envisaged project forms part of the strategy for the development of the airport contained in the Trans-European Transport Network Outline Plan from 2004 valid up to 2020 as a *Community connecting point*. Leipzig/Halle airport is located in the region of Middle Germany (close to five major Trans-European transport axes and Pan-European corridors) between the axes from North to South Europe (that is to say Federal motorway A 9) and from the West to Eastern Europe (that is to say Federal motorway A 14) with an access to rail and road network.
- (321) Moreover, according to Germany, due to its location in the centre of Europe and its surrounding market of approximately 7 million persons within 100 km of the airport and its location next to road and rail infrastructure, the airport has large growth potential. As stated in recital 319, the air freight sector is showing considerable growth rates (that is to say an average growth rate in international passenger transport between 2007 and 2011 of approximately 5,0 % and on the freight side of 4,3 %) ⁽⁷⁰⁾. However, the current airport capacities are facing night flight constraints (see recital 319).
- (322) As mentioned in recital 319, it is expected that the airport will experience a gradual but significant increase in freight traffic. With regard to cargo volumes, Germany stated that in comparison to other airports, Leipzig/Halle is registering constant growth rates (whereas 101 364 tonnes of freight were processed in 2007, this figure rose to 442 453 tonnes in 2008, 524 084 tonnes in 2009 and 663 059 tonnes in 2010). In order to complement its statement, Germany pointed out that the air cargo volume rose by 18,5 % in 2009 and 26,5 % in 2010. According to Germany, a further increase in cargo volume was expected. In this respect Germany clarified that approximately 820 000 tonnes of air cargo were expected to be handled by 2020 ⁽⁷¹⁾. However, Germany submitted that, this forecast will be already met by 2015 ⁽⁷²⁾. Further increase is expected in the future in the freight traffic operations in particular with regard to further night flights restrictions at other German airports (that is to say Frankfurt Main and others).
- (323) The Commission notes that the implementation of the project will have a positive impact on the entire region and will positively influence its economic and social development. Germany submitted that currently 133 companies were present at the airport, employing a total of 5 106 people in 2010 (an increase by 14,4 % in comparison to 2009). Germany stated further that the investment project will in particular improve access to the region and increase its attractiveness for investors and visitors. The Commission notes that this was also supported by the observations of the third parties (see section 4). Moreover, this should have a positive impact on employment bearing in mind that unemployment is significantly higher in the Leipzig/Halle region (unemployment in the Sachsen region amounts to 10,3 %, in Saxony-Anhalt to 11,2 %) than the national average (of 6,9 %).
- (324) The Commission can therefore conclude that the construction and operation of the infrastructure meets a well-defined objective of common interest, being the development of an airport with a large air freight component in line with Union policy in this respect, due account being taken of regional aspects and that the criterion of compatibility is fulfilled in the present case.

6.5.2.2. Need for State intervention

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

⁽⁷⁰⁾ IATA, Passenger and freight forecasts 2007 to 2011, October 2007.

⁽⁷¹⁾ Based on estimates before 2011.

⁽⁷²⁾ Based on the 2011 estimates.

- (326) Germany submitted that Leipzig/Halle airport suffers from a historical investment backlog. Germany was of the view that the financing is limited to the necessary and legally foreseen minimum, both in terms of aid amount and aid intensity. In addition, according to Germany the measures concern long-term infrastructure investments which address the needs of the airport in view of the future increase of freight and passenger transport. Germany argued that the measures are not disproportionate in size nor disproportionately costly. Germany stated that the costs have been reduced to a minimum level following thorough advance planning and cost estimates. In Germany's opinion, a further reduction of State financing is not possible as infrastructure of this magnitude cannot be financed by airport operators from their own resources.
- (327) Germany has raised the argument that revenues from the services do not cover the costs of building the infrastructure and substantiated this argument on the basis of a funding gap analysis and a counterfactual assessment.
- (328) The Commission concludes that the aid will bring a material improvement for the investment project that the market itself does not deliver and that there is a need for State intervention.

6.5.2.3. Appropriateness of the aid measure

- (329) The aid measure must be an appropriate policy instrument to address the objective of common interest.
- (330) As explained in section 6.5.2.2, Germany has demonstrated that the funding of the project through capital injections is an appropriate instrument to improve the condition of the infrastructure at Leipzig/Halle airport. No other less distortive form of aid would assure the financing of the necessary infrastructure works.
- (331) The Commission concludes that the aid measure at stake is an appropriate policy instrument.

6.5.2.4. Incentive effect

- (332) The aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or which they would carry out in a restricted or different manner or location.
- (333) First of all, works on an individual investment can start only after an application has been submitted to the granting authority. If works start before an application is submitted to the granting authority, any aid awarded in respect of that individual investment will not be considered compatible with the internal market.
- (334) Germany submitted that the works have not started before the application for aid was submitted to the granting authority. Hence, the Commission can conclude that this criterion is met.
- (335) Second, an investment project at an airport may be economically attractive in its own right. Therefore, it needs to be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any State aid. If this is confirmed, the Commission will consider that the aid measure has an incentive effect.
- (336) The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid.
- (337) Where no specific counterfactual is known, the incentive effect can be assumed when there is a capital cost funding gap, that is to say, when on the basis of an *ex ante* business plan, it can be shown that there is a difference between the positive and negative cash flows (including investment costs into fixed capital assets) over the lifetime of the investment in net present value terms ⁽⁷³⁾.
- (338) In the present case, Germany has submitted a funding gap calculation identifying a funding gap of at least EUR 142,1 million (see Table 5 and Table 6). Moreover, a counterfactual scenario assessment shows that if the infrastructure investments would be entirely financed through loans, the airport would not be able to provide the necessary financing.
- (339) Hence, the Commission can conclude that the investment aid has an incentive effect.

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

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

- (340) The aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned.
- (341) In order to be proportionate, investment aid to airports must be limited to the extra costs (net of extra revenues) which result from undertaking the aided project/activity rather than the alternative project/activity that the beneficiary would have undertaken in the counterfactual scenario, that is to say, if it had not received the aid. Where no specific counterfactual is known, in order to be proportionate, the amount of the aid should not exceed the funding gap of the investment project (the so-called 'capital cost funding gap'), which is determined on the basis of an *ex ante* business plan as the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment. For investment aid the business plan should cover the period of the economic utilisation of the asset.
- (342) In any event, the aid intensity must not go beyond the actual funding gap of the investment project.
- (343) As stated in sections 6.5.2.2 and 6.5.2.3, Germany has submitted a complementary calculation of the funding gap for the notified project amounting to EUR 142,1 million justifying an aid intensity of 75 % (see Table 6) provided that the capital injections would have been injected simultaneously with the investments carried out. However, as the capital injections will only be carried out after the approval of the Commission in 2014, the funding gap identified by Germany amounts to EUR 166,9 million justifying an aid intensity of 88,1 % (see Table 5).
- (344) In the absence of a threshold for maximum permissible aid intensities at freight airports, the aid intensity is limited to the funding gap of the investment project. Hence, the Commission can conclude that the aid amount is proportionate and limited to the minimum.

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

- (345) The negative effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive.
- (346) In order to further limit any distortions, the airport, including any investment for which aid is granted, must be open to all potential users and must not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.
- (347) Germany submitted that the overall balance of the effects of the measures on competition and trade between Member States is positive. In this regard, Germany first confirmed that all potential users (airlines and air cargo carriers) will have access to the new infrastructure on an equal and non-discriminatory basis.
- (348) Secondly, Germany submitted that the infrastructure measures in question are of a non-expansionary nature. With regard to any potential effect on competitors of Leipzig/Halle airport, Germany stated that airports in the vicinity of Leipzig/Halle were not specialised in air cargo transports. Moreover, with regard to Altenburg-Nobitz, Berlin Brandenburg, Dresden, Erfurt, Hof, Magdeburg, Magdeburg-Cochstedt and Prague airport, Germany stated that for some of these airports the geographical distances were too large, the airports were located in different economic regions, the catchment areas were quite different or the airports were of a very small size.
- (349) Regarding the other German cargo airports, Germany stated that the competition of Leipzig/Halle airport was limited since the major German air cargo hubs (Frankfurt am Main, Munich and Cologne/Bonn), which were in competition with Leipzig/Halle, had capacity bottlenecks or restrictions on night flights.
- (350) According to Germany, there was also no competitive overlap with the other European cargo airports, mainly Brussels and Vatry. Concerning the Vatry airport, Germany pointed out that Vatry was a very small airport and that in 2010 the air cargo volume of Leipzig/Halle airport was more than 80 times larger than the air cargo volume at Vatry airport. Regarding Brussels airport, Germany argued that while Leipzig/Halle airport had experienced an increase in cargo volume in recent years, Brussels airport experienced a decrease over the same period. Moreover, according to Germany, Brussels airport was subject to significant restrictions on night flights and therefore competition was limited.

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

6.5.2.7. Transparency of aid

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

6.5.3. Conclusion

- (353) Therefore, the Commission considers that all common conditions for compatibility pursuant to Article 107(3)(c) of the Treaty have been satisfied in the present case.
- (354) In view of the assessment made, the Commission concludes that the measure is compatible with the internal market on the basis of Article 107(3)(c) of the Treaty to the extent that it is limited to the financing of the funding gap of the investment project.

7. CONCLUSION

- (355) In light of the finding in section 6.1.1, FLH is an undertaking within the meaning of Article 107(1) of the Treaty. According to the assessment in section 6.1.2, the Commission considers that the financing of the measures M5 new fire station building, M9 firefighting equipment and M8 heliport can be regarded as falling within the public policy remit. According to the assessment in section 6.1.2, the financing of all other measures cannot be exempted from scrutiny under Union State aid rules.
- (356) According to the considerations in section 6.2.1, the Commission considers that FLH's shareholder loans were granted on market terms, and thus do not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (357) In light of the considerations in section 6.3, the Commission considers that the public funding granted to FLH in the form of capital injections constitutes State aid within the meaning of Article 107(1) of the Treaty. As the capital injections are subject to a Commission decision and were not put at the disposal of FLH, the Commission considers that Germany has respected the prohibition of Article 108(3) of the Treaty.
- (358) According to the assessment in section 6.5, the Commission considers that all common conditions for compatibility pursuant to Article 107(3)(c) of the Treaty have been satisfied in the present case. Therefore, the Commission concludes that those measures are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty to the extent that they are limited to the financing of the funding gap of the investment project.
- (359) The Commission notes that on 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

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

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION (EU) 2015/1470**of 30 March 2015****on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013***(notified under document C(2015) 2112)***(Only the Romanian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By award of 11 December 2013 ('the Award'), an arbitration tribunal ('the Tribunal') established under the auspices of the International Center for Settlement of Investment Disputes ('ICSID') in the case *Micula a.o. v Romania* ⁽³⁾ awarded compensation in favour of the five claimants (the brothers Viorel and Ioan Micula and the companies S.C. European Food SA, S.C. Starmill S.R.L., and S.C. Multipack, all owned by the Micula brothers; collectively, 'the claimants') against Romania in the amount of RON 376 433 229 (ca. EUR 82 million ⁽⁴⁾) for Romania's failure to ensure a fair and equitable treatment of the claimants' investments, which amounted to a violation by Romania of Article 2(3) of the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments ('the BIT') ⁽⁵⁾. In addition, the Tribunal decided that interest should accrue on that sum until Romania's full implementation of the Award. By 11 December 2013, the total amount thus owed by Romania to the claimants amounted to RON 791 882 452 (ca. EUR 178 million ⁽⁶⁾).
- (2) By letter of 31 January 2014, the Commission services informed the Romanian authorities that any implementation or execution of the Award would constitute new aid and would have to be notified to the Commission.
- (3) On 20 February 2014, the Romanian authorities informed the Commission services that they had partially implemented the Award by offsetting a portion of the compensation awarded to the claimants by the Tribunal against taxes owed by one of the claimants, namely S.C. European Food SA, to the Romanian authorities. The tax debt that was thus offset amounted to RON 337 492 864 (ca. EUR 76 million ⁽⁷⁾). Romania further sought clarification from the Commission services as to the possibility of paying the outstanding amount to a natural person (the brothers Viorel and Ioan Micula or any other natural person to whom the claim may be assigned).
- (4) On 12 March 2014, the Commission services requested further information from Romania regarding the envisaged further implementation or execution of the Award, which Romania provided by letter of 26 March 2014.

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

⁽²⁾ OJ C 393, 7.11.2014, p. 27.

⁽³⁾ ICSID Case No ARB/05/20, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania*, final award of 11 December 2013.

⁽⁴⁾ Reference exchange rate of the European Central Bank on 11 December 2013: 1 EUR = 4,45 RON.

⁽⁵⁾ The BIT entered into force on 1 April 2003.

⁽⁶⁾ See footnote 4.

⁽⁷⁾ Reference exchange rate of the European Central Bank on 15 January 2014: 1 EUR = 4,52 RON.

- (5) On 1 April 2014, the Commission services alerted the Romanian authorities as to the possibility of issuing a suspension injunction to ensure that no further incompatible State aid would be paid out and sought Romania's comments thereon. By letter of 7 April 2014, Romania declared that it did not wish to comment on the possibility of the Commission issuing a suspension injunction.
- (6) By letter of 26 May 2014, the Commission informed Romania of its decision to issue a suspension injunction ('the suspension injunction') pursuant to Article 11(1) of Council Regulation (EC) No 659/1999 ⁽⁸⁾, obliging Romania to suspend any action which may lead to the implementation or execution of the part of the Award that had not yet been paid, as that would constitute payment of unlawful State aid, until the Commission has taken a final decision on the compatibility of that State aid with the internal market.
- (7) By letter dated 1 October 2014, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty ('the opening decision') in respect of the partial implementation of the Award by Romania that took place in early 2014 ⁽⁹⁾ as well as in respect of any further implementation or execution of the Award.
- (8) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁰⁾ on 7 November 2014. By that decision, the Commission invited interested parties to submit their comments.
- (9) Romania submitted its comments on the opening decision on 26 November 2014. The claimants submitted comments as an interested party on 8 December 2014, after the rejection, by the Commission, of their request to have a longer period of time available for submitting their comments. The claimants' comments were forwarded to Romania, which was given the opportunity to react; Romania's observations on the claimants' comments were received on 27 January 2015.
- (10) The claimants also requested access to all written correspondence between the Commission and Romania contained in the case file. The request was rejected on 19 December 2014 and the rejection was affirmed on 2 March 2015.
- (11) By letters of 9 and 11 March 2015 the Romanian authorities informed the Commission that in the period 5 February to 25 February 2015, the court-appointed executor seized an additional amount of RON 9 197 482 from the Ministry of Finance and that a voluntary payment of the remaining amount (i.e. RON 466 760 066) ⁽¹¹⁾ was made by the Ministry of Finance into a blocked account opened in the name of the five claimants.

2. BACKGROUND

The State aid law applicable in Romania before its accession to the Union

- (12) On 1 February 1995, the Europe Agreement ('EA') between the European Community (the 'Community') and its Member States, on the one hand, and Romania, on the other hand, entered into force ⁽¹²⁾. The aim of the EA was to prepare Romania for accession to the Union. Article 64(1)(iii) of the EA declared incompatible with the proper functioning of the EA any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as they may affect trade between the Union and Romania. According to Article 64(2) EA, any practices contrary to this Article had to be assessed 'on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community' (now Articles 101, 102 and 107 of the Treaty). This dynamic reference to 'criteria arising from the application of the rules' refers to all Union rules on State aid, including those governing the grant of regional State aid ⁽¹³⁾. In addition to the substantive obligation to comply with Union State aid law,

⁽⁸⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽⁹⁾ See recital 3.

⁽¹⁰⁾ See footnote 2.

⁽¹¹⁾ An additional RON 6 028 608 have been transferred on the blocked account as compensation for the execution costs.

⁽¹²⁾ OJ L 357, 31.12.1994, p. 2.

⁽¹³⁾ See also Article 2 of the Implementing Rules to Decision No 4/2000 of the EU-Romania Association Council of 10 April 2001 adopting the implementing rules for the application of the provisions on State aid referred to in Articles 64(1)(iii) and (2) pursuant to Article 64(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part, and in Article 9(1)(iii) and (2) of Protocol 2 on European Coal and Steel Community (ECSC) products to that Agreement (OJ L 138, 22.5.2001, p. 16).

Articles 69 and 71 of the EA obliged Romania to harmonise its domestic legislation with the *acquis communautaire*, expressly mentioning Union competition law and thus Union State aid law which forms part thereof. Accordingly, the EA obliged Romania, and Romania committed, to comply with the entire corpus of Union State aid law. Furthermore, the EA has been part of the domestic legal order after been ratified by law 20/1993 by the national Parliament and published in the national Official Journal on 12 April 1993 ⁽¹⁴⁾.

- (13) In order to comply with its harmonisation obligation under the EA, Romania passed Law No 143/1999 on State aid ('State aid law') in 1999, which entered into force on 1 January 2000. That law included the same definition of State aid as that contained in Article 64 of the EA and under Union law. That law also designated the Romanian Competition Council ⁽¹⁵⁾ and the Romanian Competition Office ⁽¹⁶⁾ as its national State aid surveillance authorities competent for assessing the compatibility of State aid granted by Romania to undertakings ⁽¹⁷⁾ and laid down the procedure to be followed for the notification and authorisation of State aid which was modelled on Article 108 of the Treaty.

The investment incentives scheme

- (14) On 2 October 1998, Romania enacted Emergency Government Ordinance 24/1998 ('EGO 24'), granting certain investors in disfavoured regions a series of incentives, inter alia:

— Article 6(1)(a): an exemption from payment of custom duties and value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation which are imported or manufactured domestically with the purpose of making investments in that region ('Machinery Facility'),

— Article 6(1)(b): refunds of customs duties on raw materials, spare parts and/or components necessary for achieving the investor's own production in that region ('Raw Materials Facility'),

— Article 6(1)(c): an exemption from payment of profit tax during the period for which the relevant area is designated as a disfavoured region ('Profit Tax Facility').

- (15) The Romanian Government determined which regions should be designated as disfavoured and for how long, up to a maximum of 10 years. By decision of 25 March 1999, the Government declared the mining area of Ștei-Nucet, Bihor county, to be a disfavoured region for 10 years, effective on 1 April 1999.

- (16) On 15 May 2000, the Romanian Competition Council adopted Decision No 244/2000, in which it found that several of the incentives offered under EGO 24 distorted competition. It considered that '[e]xemption from customs duty on raw materials are deemed State aid for operating purposes ... leading to distortion of competition' and decided that 'the reimbursement of customs duties on imported raw materials, spare parts and/or components necessary for own production purposes within an area ... shall be deleted'. That decision was adopted as a result of the notification by the national agency for regional development (the aid grantor under EGO 24) to the Competition Council, in accordance with Law No 143/1999, of envisaged modifications to EGO 24 included in the draft Emergency Government Ordinance 75/2000 ('EGO 75'). Amongst other modifications notified, the Romanian legislator envisaged replacing the reimbursement of custom duties under Article 6(1)(b) of EGO 24 (the Raw Materials Facility) with an exemption from custom duties on imported raw materials, spare parts and/or components necessary for own production purposes. In Decision No 244/2000, the Competition Council granted conditional authorisation to draft EGO 75, provided the following conditions were complied with: (i) the facilities under Article 6(1)(b) of EGO 24 should be repealed and the envisaged amendment to replace the reimbursement of custom duties with an exemption from custom duties should be withdrawn; and (ii) the envisaged amendments to Article 6(1)(c) of the EGO 24 (the Profit Tax Facility) would be limited only to the profit that is reinvested.

⁽¹⁴⁾ *Monitorul Oficial*, first part, No 73 of 12 April 1993.

⁽¹⁵⁾ The Competition Council was and is an autonomous administrative authority in the field of competition law and State aid law with regulatory and investigative powers, similar to the European Commission in the field of competition and State aid law.

⁽¹⁶⁾ The Competition Office was a specialised authority subordinate to the government. The main responsibilities of the Office were: (i) to carry out investigations and to survey the effective enforcement of legal provisions and the decisions of the Competition Council; (ii) to supervise the setting of prices by public entities and public companies; and (iii) to ensure transparency of State aid, and to monitor and report State aid expenditure.

⁽¹⁷⁾ By Article 1 of the implementing rules to Decision No 4/2000 the EU-Romania Association Council designated the Competition Council and Competition Office as the Romanian entities responsible for surveying and assessing the compatibility of State aid with the 1995 Europe Agreement.

- (17) On 1 July 2000, EGO 75 entered into force. EGO 75, as adopted, did not, however, comply with the Competition Council's conditions to repeal the Raw Materials Facility and withdraw the envisaged amendment thereto. Instead, it amended Article 6(1)(b) of EGO 24 by replacing the refund on customs duties under the Raw Materials Facility with an exemption on customs duties on imported raw materials in direct contravention of Decision No 244/2000.
- (18) The Competition Council challenged the failure to implement its decision before the Bucharest Court of Appeal, which however dismissed the application on 26 January 2001 as inadmissible⁽¹⁸⁾. The inadmissibility was grounded on the fact that EGO 75 was considered a legislative, not an administrative measure, the legality of which the Competition Council could not contest under Law No 143/1999 and that any conflicts between legal provisions had to be resolved by the government and parliament without interference from the courts. The High Court of Cassation of Justice of Romania rejected the Competition Council's appeal against the Court of Appeal's decision on 19 February 2002 as inadmissible on similar grounds⁽¹⁹⁾.
- (19) In February 2000, Romania began accession talks to the Union. Competition policy, including compliance with Union State aid rules, formed part of those negotiations. In the context of those negotiations, the Union Common Position of 21 November 2001 noted that 'there are a number of existing as well as new incompatible aid schemes which have not been brought into line with the *acquis*', including 'facilities provided under [EGO 24 and EGO 75]'⁽²⁰⁾.
- (20) On 31 August 2004, Romania repealed all the incentives provided under EGO 24, as amended by EGO 75, except the Profit Tax Facility. The revocation of the EGO 24 incentives took effect on 22 February 2005. The report accompanying the act repealing EGO 24, as amended by EGO 75, explained: 'In order to meet the criteria in the Community rules on State aid, and also to complete the negotiations under Chapter No 6 — Competition Policy it is necessary to eliminate all forms of State aid in national legislation incompatible with the *acquis communautaire* in this area and, in this respect, it is proposed to repeal [...] the provisions of Article 6 paragraph (1), letter (b), letter (d) and letter (e) of the Emergency Government Ordinance No 24/1998 on the disadvantaged areas [...]'⁽²¹⁾.

The claimants' investments and ICSID arbitration proceedings

- (21) The claimants made certain investments in area of Ștei-Nucet, Bihor County, Romania, in the early 2000s. On 1 June 2000, S.C. European Food SA obtained a permanent investor certificate, while S.C. Starmill S.R.L. and S.C. Multipack obtained their permanent investor certificates ('PICs') on 17 May 2002, thereby making those companies eligible to benefit from the scheme set up by EGO 24, as amended by EGO 75, for investments made by them from those dates onwards in the region of Ștei-Nucet, Bihor county, Romania.
- (22) In 2003, Romania and Sweden concluded the BIT, which granted each country's investors (including for investments entered into prior to the entry into force of the BIT⁽²²⁾) certain protections when investing in the other country. The BIT guaranteed, inter alia, the covered investments' fair and equitable treatment in the host state, which was interpreted to also include a protection of the investors' legitimate expectations. It also allowed the investors to institute proceedings before an international arbitration tribunal in case they believed their rights under the BIT were violated by the host state. As the Micula brothers hold Swedish citizenship, they claimed that their investments in Romania were covered by the BIT.
- (23) On 28 July 2005, and in reaction to the revocation of the investment incentives under EGO 24, the claimants requested the establishment of an arbitration tribunal pursuant to the dispute settlement provisions of the BIT. By decision of 24 September 2008, the Tribunal found that the claimants' claims were admissible. The claimants had initially requested the re-establishment of the EGO 24 investment incentives that had been revoked as of 22 February 2005. However, during the proceedings, the claimants partially withdrew their claim in 2009 and instead requested compensation for damages resulting from the revocation of the EGO 24 incentives. The

⁽¹⁸⁾ Civil Decision No 26; see Award, paragraph 219.

⁽¹⁹⁾ See Award, paragraph 224.

⁽²⁰⁾ European Union Common Position of 21 November 2001, CONF-RO 43/01, p. 4. During the accession process of an applicant country, the Commission regularly proposes and the Council adopts so-called common positions, in which the progress of the candidate country towards compliance with the accession criteria is evaluated.

⁽²¹⁾ Substantiation Report accompanying EGO 94/2004, 26 August 2004, pp. 12-13.

⁽²²⁾ Article 9(1) of the BIT.

claimants alleged that by revoking the incentives, Romania had infringed their legitimate expectations that those incentives would be available, in substance, until 1 April 2009. Thus, according to the claimants, Romania had violated its obligation of fair and equitable treatment owed to them as Swedish investors under Article 2(3) of the BIT.

- (24) In the course of the arbitration proceedings, the Commission intervened as *amicus curiae*. In its intervention, submitted on 20 July 2009, the Commission explained that the EGO 24 incentives were: ‘incompatible with the Community rules on regional aid. In particular, the incentives did not respect the requirements of Community law as regards eligible costs and aid intensities. Moreover, the facilities constituted operating aid, which is proscribed under regional aid rules’.
- (25) The Commission also observed that ‘[a]ny ruling reinstating the privileges abolished by Romania, or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the EC Treaty’. It also advised the Tribunal that the ‘execution of [any award requiring Romania to re-establish investment schemes which have been found incompatible with the internal market during accession negotiations] can thus not take place if it would contradict the rules of EU State aid policy’.
- (26) In the Award of 11 December 2013, the Tribunal found that by revoking the EGO 24 incentives, Romania ‘violated the Claimants’ legitimate expectations with respect to the availability of the EGO 24 incentives’ until 1 April 2009 ⁽²³⁾. The Tribunal further concluded that, with the exception of maintaining the investors’ obligations under EGO 24 after revocation of the relevant incentives, ‘Romania’s repeal of the incentives was a reasonable action in pursuit of a rational policy.’ ⁽²⁴⁾ However, the Tribunal went on to state that ⁽²⁵⁾: ‘[T]his conclusion does not detract from the Tribunal’s holding [...] above that Romania undermined the Claimants’ legitimate expectations with respect to the continued availability of the incentives until 1 April 2009. As a result, Romania’s actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable vis-à-vis the Claimants’.

The Tribunal concluded its analysis by stating that ⁽²⁶⁾: ‘[B]y repealing the EGO 24 incentives prior to 1 April 2009, Romania did not act unreasonably or in bad faith (except that [Romania] acted unreasonably by maintaining investors’ obligations after terminating the incentives). The Tribunal, however, concludes by majority that Romania violated the Claimants’ legitimate expectations that those incentives would be available, in substantially the same form, until 1 April 2009. Romania also failed to act transparently by failing to inform the Claimants in a timely manner that the regime would be terminated prior to its stated date of expiration. As a result, the Tribunal finds that Romania failed to “ensure fair and equitable treatment of the investments” of the Claimants in the meaning of Article 2(3) of the BIT’.

- (27) The Tribunal further decided that Romania had to pay damages to the claimants ⁽²⁷⁾. In total, the Tribunal awarded the claimants RON 376 433 229 plus interest. The damages are made up as follows: the Tribunal found that Romania had to pay the claimants RON 85,1 million ⁽²⁸⁾ in damages for the increased cost of sugar (for the import of which the claimants had to pay customs duties after the revocation of the Raw Materials Facility), RON 17,5 million ⁽²⁹⁾ in damages for the increased cost of raw materials other than sugar and PET ⁽³⁰⁾, RON 18,1 million ⁽³¹⁾ in damages for the loss of the ability to stockpile sugar at lower prices, and RON 255,7 million ⁽³²⁾ in damages for lost profit deriving from lost sales of finished goods. In addition, the Tribunal ordered Romania to pay

⁽²³⁾ Award, paragraph 725.

⁽²⁴⁾ Award, paragraph 827.

⁽²⁵⁾ See footnote 24.

⁽²⁶⁾ Award, paragraph 872.

⁽²⁷⁾ Award, paragraphs 875 et seq.

⁽²⁸⁾ This amount is calculated for imports made during 22 February 2005 and 31 March 2009.

⁽²⁹⁾ See footnote 28.

⁽³⁰⁾ The claimants asked for compensation for the increased cost of PET. However, the Tribunal rejected this claim on the basis that the claimants had never in fact benefited from the Raw Materials Facility with respect to PET imports.

⁽³¹⁾ This amount is calculated on the basis of custom duties charged on imported sugar and that would have been avoided, if the claimant had had the opportunity to stockpile sugar before the envisaged expiry of the EGO (i.e. 1 April 2009). The benchmark is based on stockpiles in 2004/2005.

⁽³²⁾ Lost profits are calculated over the period 2004-2008 for loss of market shares of soft drinks and other products that did contain sugar. The claim is that after the revocation of the EGO incentives, the costs increased leading to higher prices and thus to lower market shares.

interest (ROBOR plus 5 %), calculated from 1 March 2007 with respect to the increased cost of sugar and other raw materials, from 1 November 2009 with respect to loss of ability to stockpile sugar, and from 1 May 2008 with respect to lost profits. On the date of the Award, the principal and interest due to the claimants amounted to RON 791 882 452, as illustrated in the table.

Damages and interest as awarded to the claimants by the Award

| Damages awarded | Amount (in RON) | Interest calculated from |
|---|--------------------|---|
| Increased cost of sugar | 85 100 000 | 1 March 2007 |
| Increased cost of raw materials other than sugar or PET | 17 500 000 | 1 March 2007 |
| Lost opportunity to stockpile sugar | 18 133 229 | 1 November 2009 |
| Lost profits on the sale of finished goods | 255 700 000 | 1 May 2008 |
| TOTAL | 376 433 229 | Total including interest on 11 December 2013: RON 791 882 452 |

The ICSID annulment proceedings

- (28) On 18 April 2014, Romania filed an application for the annulment of the Award on the basis of Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 ('ICSID Convention') before an ad hoc committee. Due to the procedural rules applicable to those proceedings, Romania has not provided the Commission with its application. However, it has become clear that in its application, Romania also requested the ad hoc committee to order a stay of enforcement of the Award until the committee had ruled on the application for annulment. By letter of 18 August 2014, Romania informed the Commission that by order of 7 August 2014, the ad hoc committee granted a stay of enforcement of the Award under the condition that Romania deposit, within one month, the following assurances: 'Romania commits itself subject to no conditions whatsoever (including those related to [EU] Law or decisions) to effect the full payment of its pecuniary obligation imposed by the Award in ICSID Case No ARB/05/20 — and owed to Claimants — to the extent that the Award is not annulled — following the notification of the Decision on annulment'.
- (29) At the request of Romania, the Commission explained to Romania that it could not provide the unconditional commitment that it would pay the compensation awarded under the Award to the claimants even if that entailed a violation of its obligations under Union law and regardless of any decision of the Commission. Romania replied accordingly to the ad hoc committee which lifted the stay of enforcement of the Award as of 7 September 2014.
- (30) On 15 October 2014, the Commission submitted an application to the ad hoc committee for leave to intervene as a non-disputing party in the annulment proceedings. Leave to intervene was granted by the ad hoc committee on 4 December 2014 and the Commission submitted its *amicus curiae* brief in those proceedings on 9 January 2015.

The claimants' actions for recognition and execution of the Award in Romanian and US courts

- (31) The Romanian authorities further informed the Commission services about the national proceedings introduced by the claimants to enforce the award. In February 2014, Viorel Micula introduced first the court proceedings with a view to recognise the award on the basis of the New Procedural Civil Code (Articles 1124-1132) ⁽³³⁾. On 7 May 2014, the Commission intervened in those proceedings pursuant to Article 23a(2) of Regulation (EC) No 659/1999. However, Viorel Micula withdrew his action on 28 May 2014 and therefore no judgement has been rendered. Separately, on 18 March 2014 the other four claimants (S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, and Mr Ion Micula) initiated court proceedings in Romania with a view to enforcing the Award pursuant to Article 54 of the ICSID Convention requesting the payment of 80 % of the outstanding amount (i.e. RON 301 146 583) and the corresponding interest.

⁽³³⁾ Case No 3456/3/2014, Bucharest Tribunal.

- (32) On 24 March 2014, the Bucharest Tribunal allowed the execution of the Award as requested by the four claimants considering that, on the basis of Article 54 of the ICSID Convention which has been ratified by Romania and is part of the domestic legal order, the Award is a directly enforceable act and must be treated as a final domestic judgment, thus obviating the procedure to recognise the Award on the basis of the Romanian New Procedural Civil Code (Articles 1123-1132) ⁽³⁴⁾. On 30 March 2014, an executor started the enforcement procedure by setting the Romanian Ministry of Finance a deadline of 6 months to pay to the four claimants 80 % of the Award plus the interests and other costs.
- (33) Romania challenged the execution of the Award before the Bucharest Tribunal and asked for interim measures, i.e. a temporary suspension of execution until the case had been decided on the merits ⁽³⁵⁾. On 14 May 2014, the Bucharest Court temporarily suspended the execution of the Award until a decision on the merits of Romania's challenge and request to suspend the execution had been taken. On 26 May 2014, the Commission intervened in those proceedings pursuant to Article 23a(2) of Regulation (EC) No 659/1999. The Commission invited the Bucharest Tribunal to suspend and annul the forced execution of the Award. In the alternative, the Commission invited the Bucharest Tribunal to refer a preliminary question to the Court of Justice of the European Union ("CJEU").
- (34) On 23 September 2014, the Bucharest Tribunal, in the interim measure case, lifted the suspension and rejected Romania's request for a suspension of the execution of the Award. The primary reason for that rejection was the lifting of the stay of enforcement of the Award by the ICSID ad hoc committee on 7 September 2014 (see recital 29). On 30 September 2014, Romania decided to appeal the decision of Bucharest Tribunal of 23 September 2014 ⁽³⁶⁾. On 13 October 2014, the Bucharest Tribunal rejected the request to send preliminary questions to the CJEU on the basis of Article 267 of the Treaty. On 17 October 2014, against the backdrop of the Commission decision of 1 October 2014 to open the formal investigation procedure, in the context of the case No 15755/3/2014 before the Bucharest Tribunal, Romania again requested interim measures in the form of the suspension of the forced execution of the Award.
- (35) Despite the obligation of all Romanian authorities, including the judiciary, to comply with the Commission decisions of 26 May 2014 and 1 October 2014, the executor appointed by the Bucharest Tribunal issued orders on 31 October 2014 to seize the accounts of Romania's Ministry of Finance and seek the execution of 80 % of the Award. As a result of the letters of attachment issued by the executor, some parts of the Ministry of Finance's state treasury and bank accounts are currently frozen.
- (36) On 24 November 2014, the Bucharest Tribunal also rejected Romania's main action against the execution order of 24 March 2014, including the request for interim measures of 17 October 2014. On 14 January 2015, Romania has appealed the decision of the Bucharest Tribunal ⁽³⁷⁾. On 24 February 2015, the Bucharest Court of Appeal lifted the decision of the Bucharest Tribunal of 23 September 2014 and suspended the forced execution until the appeal against the decision of Bucharest Tribunal of 24 November 2014 is decided. The Commission has decided to seek leave to intervene in those appeal proceedings on the basis of Article 23a(2) of Regulation (EC) No 659/1999.
- (37) On 5 January 2015, the court-appointed executor seized RON 36 484 232 (ca. EUR 8,1 million ⁽³⁸⁾) from Romania's Ministry of Finance. Of this sum, the executor subsequently transferred RON 34 004 232 (ca. EUR 7,56 million) in equal parts to three of the five claimants, and kept the remainder as compensation for execution costs. Between 5 February and 25 February 2015, the court-appointed executor seized an additional RON 9 197 482 (ca. EUR 2 million) ⁽³⁹⁾ from the Ministry of Finance. On 9 March 2015 the Ministry of Finance voluntarily transferred the remaining amount of RON 472 788 675 (ca. EUR 106,5 million ⁽⁴⁰⁾) (including the costs of court appointed executor of RON 6 028 608) into a blocked account in the name of the five claimants in order to implement the Award. However, the five claimants can withdraw the money only if the Commission decides that the State aid granted on the basis of the Award is compatible with the internal market.

⁽³⁴⁾ Order issued by Bucharest Tribunal in Case No 9261/3/2014, Section IV Civil.

⁽³⁵⁾ Case No 15755/3/2014, Bucharest Tribunal, Section III Civil.

⁽³⁶⁾ Case No 15755/3/2014/a1, Bucharest Court of Appeal, Section IV Civil.

⁽³⁷⁾ See footnote 36.

⁽³⁸⁾ Reference exchange rate of the European Central Bank on 5 January 2015: 1 EUR = 4,49 RON.

⁽³⁹⁾ See footnote 38.

⁽⁴⁰⁾ Reference exchange rate of the European Central Bank on 9 March 2015: 1 EUR = 4,44 RON.

- (38) The Commission has furthermore discovered that Mr Viorel Micula also initiated an action for enforcement against Romania before the United States District Court for the District of Columbia ⁽⁴¹⁾. That case is pending. The Commission intends to apply for leave to file an *amicus curiae* brief in those proceedings. Mr Viorel Micula also initiated further enforcement proceedings against Romania before the Romanian courts on 3 October 2014, but that claim was rejected by the Bucharest Tribunal on 3 November 2014.

3. DESCRIPTION OF THE MEASURE AND GROUNDS FOR INITIATING THE PROCEDURE

Description of the measure

- (39) The measure under assessment is the payment of the compensation awarded to the claimants by the Tribunal by virtue of the Award, whether by implementation or execution of that Award, plus the interest that has accrued since the Award was issued.
- (40) As noted in recital 3, Romania already partially paid out that compensation in early 2014 by offsetting tax debts owed by one of the claimants, S.C. European Food SA, to the Romanian State. The tax debts thus offset amount to RON 337 492 864 (ca. EUR 76 million ⁽⁴²⁾).
- (41) As noted in recital 37, the court-appointed executor seized RON 45 681 714 (ca. EUR 10,17 million ⁽⁴³⁾) from Romania's Ministry of Finance in order to execute the Award. Furthermore, the Romanian authorities have transferred the remaining amount of RON 472 788 675 (ca. EUR 106,5 million ⁽⁴⁴⁾) (including the costs of court appointed executor of RON 6 028 608) into a blocked account in the name of the five claimants.
- (42) According to the Romanian authorities the arbitration award has been fully implemented.

Grounds for initiating the formal investigation procedure

- (43) In the opening decision, the Commission reached the preliminary conclusion that payment of the compensation awarded by the Tribunal to the claimants through the implementation or execution of the Award constitutes State aid within the meaning of Article 107(1) of the Treaty. This preliminary conclusion rests on the preliminary findings that:
- the five claimants constitute one economic unit that must be qualified as an undertaking,
 - payment of the awarded compensation would grant the claimants an economic advantage not otherwise available on the market,
 - the presence of an advantage is not precluded by the fact that the compensation awarded by the Tribunal is designated as compensation for damages, since the Award does not fall within the scope of the *Asteris* case-law distinguishing damages from State aid,
 - the advantage granted is selective, since only the claimants would benefit from the measure,
 - the advantage is granted from state resources, since the relevant payments would be made from the state budget, and the decision to grant the advantage is imputable to Romania, regardless of whether Romania implemented the Award voluntarily or on the order of a court,
 - payment of the compensation awarded to the claimants distorts competition and affects trade between Member States.
- (44) The Commission then determined that the application of the State aid rules in this case does not affect rights and obligations protected by Article 351 of the Treaty. The Commission further found that payment of the compensation awarded to the claimants would constitute new aid, since the implementation or execution of the Award would take place after Romania's accession to the Union, and that it did not matter that some of the costs which the measure would *de facto* reimburse were incurred by the claimants before accession. Finally, the Commission reached the preliminary conclusion that the payment of the compensation awarded by the Tribunal to the claimants through the implementation or execution of the Award would not be compatible with the internal market, since it would not fulfil the applicable compatibility conditions for regional aid.

⁽⁴¹⁾ Case No 1-14-cv-600 Viorel Micula v Government of Romania in the United States District Court for the District of Columbia — Petition to confirm ICSID award and enter judgment.

⁽⁴²⁾ See footnote 7.

⁽⁴³⁾ See footnote 38.

⁽⁴⁴⁾ See footnote 40.

4. COMMENTS FROM ROMANIA

- (45) Romania points out, first, that under Article 54(1) of the ICSID Convention, to which Romania became a party in 1975, each state party 'shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state'. Romania argues that the consequence of this clause is that every state party has an obligation to recognise and enforce an ICSID arbitral award the execution of which has not been stayed in accordance with the rules under the ICSID Convention, with there being no possibility of appeal against such an award before the national courts.
- (46) Second, Romania stresses that the Romanian government is bound to comply with the Romanian constitution, which bars it from unduly influencing national judges as regards the question of whether or not to enforce the Award. It stresses that the national court autonomously decided that the various acts issued by the Commission in 2014 could not suspend the enforcement of the Award under Romanian law. Romania argues further that, while according to the Romanian constitution Union law generally takes precedence over (ordinary) Romanian national law, Union law could not overrule the Romanian constitution itself.
- (47) Third, Romania submits that the compensation awarded to the claimants by the Tribunal should not be treated as new incompatible aid, but as compensation for damages within the meaning of the *Asteris* case-law. Romania objects, in particular, to the application of the *Lucchini* case-law to the present case, arguing that the factual background distinguishes the present case from that adjudicated upon by the CJEU in *Lucchini* ⁽⁴⁵⁾.
- (48) Finally, Romania repeatedly stresses the conflict borne out in the present case between Romania's obligations under the ICSID Convention and under Union law. It submits that until it has been determined at ICSID level whether the ICSID Convention or Union law should take precedence, the implementation or execution of an ICSID award should not be considered to constitute illegal State aid.

5. COMMENTS FROM INTERESTED PARTIES

- (49) The only interested party to submit observations on the opening decision was the claimants in the arbitration proceedings giving rise to the Award. The claimants contest the preliminary findings contained in the opening decision. In particular, they make observations regarding (i) the background of the case; and (ii) the allegedly incorrect description of the measure; they argue that (iii) there is no conflict between Union State aid rules and intra-EU BITs; they submit that (iv) the implementation or execution of the Award does not constitute State aid; or (v) at least not new aid; they assert that if characterised as aid; (vi) the implementation or execution of the Award would be compatible aid; they maintain that (vii) the protection of legitimate expectations precludes the Commission from adopting a negative decision; and finally they argue that (viii) the Commission must take steps to properly involve the claimants in the investigation procedure.

Regarding the background of the case

- (50) The claimants explain that after the collapse of the communist regime in 1989, Romania found itself in a state of dire economic deprivation. The situation was such that when Romania started the accession process to the European Union in 1995, it was far from meeting the Union's accession criteria. In order to accelerate economic development and reduce regional disparities, the Romanian government established a framework for regional development and shortly thereafter adopted EGO 24 to incentivise private sector investments in disfavoured regions. The EGO 24 incentives were aimed solely at investors creating jobs in the most disadvantaged regions in one of the poorest countries in Europe. In this context, the claimants stress in particular that EGO 24 did not only provide advantages to investors, but also imposed obligations, such as the duty to create jobs and employ previously unemployed workers, develop and produce new materials in a disfavoured region, maintain the head office of the newly established companies in the disfavoured region, and the obligation to apply for and receive a PIC.
- (51) The claimants further explain that their companies obtained PICs between 2000 and 2002 for investing in Bihor County. Under the terms of those PICs, which were valid until 1 April 2009, the claimants committed to maintaining their investments for 'twice the period of time in which [the claimants] enjoyed the advantages' put in place by EGO 24. Through their investments, the claimants claim to have created approximately 9 000 new jobs, of which 7 000 continue to exist to this day. The claimants further assert that their investments led to

⁽⁴⁵⁾ See opening decision, recital 39.

significant spillover effects in the region. The conclusion that the claimants draw from these observations is that through their investments they contributed to alleviating the hardship brought about by the dire economic conditions in the Bihor County region and have improved the quality of life in that region.

- (52) With respect to the State aid laws in place in Romania prior to Romania's accession to the Union, the claimants argue that since EGO 24 was set up before Law No 143/1999 entered into force, EGO 24 was existing aid for the purpose of that law and did not have to be authorised by the Competition Council. The claimants also recall that while the Competition Council attempted to challenge EGO 75 in Romania's courts, it did not contest the compatibility of EGO 24 with Law No 143/1999. The claimants also recall that, with the exception of the EU Common Position of 21 November 2001, no statement issued by the Union in the course of the accession process specifically identified EGO 24 as being problematic from a State aid perspective.
- (53) Finally, the claimants state that any failure to fully implement the Award, or the recovery of the part that has already been implemented by means of setting of the claimant's tax debts against the compensation owed, would be disastrous for the claimants and the region, jeopardising thousands of jobs and reversing the economic development that took place in the region.

Regarding the description of the measure

- (54) The claimants argue that the opening decision is not consistent when it comes to identifying the relevant measure. Referring to recitals 25 and 26 of the opening decision, the claimants stress that while the Commission claims to be investigating only the implementation or execution of the Award, in reality it is challenging the underlying EGO 24 scheme. The claimants also assert that, in any event, it has never been validly established that EGO 24 amounted to incompatible State aid.
- (55) Asserting further that the opening decision mischaracterises the Award, the claimants argue that the Award exclusively grants compensation for damages arising from Romania's violation of the BIT and does not replicate the EGO 24 benefits. Indeed, according to the claimants the Tribunal did not award compensation for the premature revocation of EGO 24 incentives per se, but rather that the measures found to be in breach of the BIT are that Romania acted unreasonably by: (i) maintaining as a whole the investor's obligation under EGO 24 despite having revoked virtually all the benefits thereunder; (ii) by undermining the claimants' legitimate expectations with respect to the continued availability of the EGO 24 incentives; and (iii) by being insufficiently transparent with the claimants.
- (56) The claimants furthermore put forward that the opening decision is based on the presumption that EGO 24 constituted incompatible aid, and that this presumption is flawed because EGO 24's compatibility as regional aid has never been validly determined.

Regarding the lack of conflict between the Union State aid rules and intra-EU BITs

- (57) Referring to recitals 51 to 55 of the opening decision, the claimants assert that provisions of Union law dealing with international law obligations of Member States are irrelevant in this case, as there is no conflict between Union State aid law and the BIT. Centrally, the claimants argue that any conflict is excluded by the fact that the arbitral proceedings in question were initiated before Romania acceded to the Union. Romania's obligation to implement the Award is said to stem from the point in time at which the alleged violation of the BIT occurred, i.e. before Romania's accession to the Union, and is thus unaffected by Union law.

Regarding the characterisation of the implementation/execution of the Award as State aid

- (58) The claimants submit that the implementation or execution of the Award by Romania does not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (59) First, while they do not dispute the qualification of S.C. European Food SA, S.C. Starmill S.R.L., and S.C. Multipack as undertakings, the claimants assert that Ioan and Viorel Micula cannot themselves be said to be engaged in economic activities. Particularly, the fact that the Micula brothers hold shares in various undertakings is said to be insufficient to qualify them as undertakings themselves. The claimants also maintain that the three aforementioned companies and the Micula brothers cannot be treated as a single economic unit, as the brothers' interests are not identical to those of the companies.
- (60) Second, the claimants emphasise that implementing the Award does not confer an advantage upon them. They argue that measures which serve to fulfil legal obligations, such as the payment of compensation for damages, do not constitute preferential treatment of undertakings. In this context, the claimants assert that the Commission cannot rely on Advocate-General Colomer's statement in *Atzeni*, since that case related to damages paid to a beneficiary in compensation for the recovery of incompatible aid that had already been paid out. The claimants

maintain that, in contrast, in the present case no State aid — much less unlawful State aid — had been paid out to them, thus distinguishing it from *Atzeni*. Similarly, the claimants maintain that the present case cannot be equated with the cases cited in the opening decision in which contract clauses indemnifying beneficiaries for recovery of incompatible State were judged to constitute State aid themselves.

- (61) The claimants further maintain that the implementation or execution of the Award would fall squarely under the *Asteris* case-law. They argue that the rationale behind the *Asteris* case-law, as well as such cases as *Denkavit* ⁽⁴⁶⁾ and *ThyssenKrupp* ⁽⁴⁷⁾, is that payment of damages is not within the discretion of Member States, so that it cannot qualify as State aid. Romania's commitments under the BIT are further claimed to be an expression of general rules of liability to which the *Asteris* case-law applies. Regarding the Commission's argument that *Asteris* does not apply to damages awarded on the basis of intra-EU BITs considered incompatible with Union law, the claimants maintain that any such incompatibility would not render the Award granted on the basis of such a BIT void. Implementation or execution of the Award could furthermore not be seen as granting State aid 'by the back door', as the Award does not reinstate the abolished EGO 24 scheme; rather, the Award is said to grant damages for Romania's autonomous decision to, inter alia, maintain an unreasonable burden imposed on the claimants.
- (62) The claimants further assert that the Commission's arguments regarding the incompatibility of the BIT with Union law are irrelevant, since the dispute leading to the arbitral proceedings and ultimately the Award arose before Romania's accession to the Union. Arguing that the Commission's argumentation in the opening decision is based on mistakenly linking the implementation/execution of the Award with the incompatibility of the EGO 24 scheme, the claimants reassert that in any event the Award did not grant damages on the basis of Romania's decision to comply with Union State aid rules.
- (63) The claimants further dispute that the CJEU's decision in *Lucchini*, which the Commission referred to in the opening decision, has any relevance for the present case. In their view, *Lucchini* establishes only that provisions of national law cannot frustrate the recovery of incompatible aid, and has no bearing on the implementation/execution of an arbitral award granting damages for the breach of a BIT.
- (64) Third, as regards the imputability of the implementation/execution of the Award to Romania, the claimants argue that the Commission's assessment cannot rely on the imputability of EGO 24 itself. They maintain further that the implementation/execution of an ICSID award is an automatic and involuntary consequence of Romania's obligations under the ICSID Convention. Any involuntary act is, according to the claimants, not imputable to the state and cannot constitute State aid. They stress further that ICSID awards are not open to review by national courts and their enforcement cannot be blocked for reasons of domestic *ordre public* or incompatibility with Union law.
- (65) The claimants further argue that Romania's obligations under the ICSID Convention were not affected by Romania's subsequent membership to the Union. They explain that since the alleged breach of the BIT and the institution of proceedings occurred before Romania acceded to the Union, EU law is not applicable to the present case.
- (66) Fourth, with respect to selectivity, the claimants claim that implementation/execution of the Award is not selective, since BITs and the ICSID Convention establish a system of general liability that is equally applicable to any investor. Damages awarded under this system are, accordingly, not selective. In this context, the claimants also quote a statement allegedly made by the Commission that 'BITs, although conferring a benefit by securing property rights abroad, technically cannot qualify as [S]tate aid prohibited by Article 107(1) [of the Treaty] since the benefit does not favour certain undertakings or the production of certain goods but is granted generally to all investors irrespective of the sector they operate in.'
- (67) Finally, the claimants deny that implementing the Award would be liable to distort competition and affect trade between Member States. They claim that the reasoning contained in the opening decision cannot apply to the Micula brothers, who are allegedly not engaged in any economic activity, with the consequence that any payments to them cannot distort competition or affect trade between Member States. More generally, the claimants argue that implementing the Award would not grant the claimants an advantage, so that any effect on competition or trade can be excluded.

⁽⁴⁶⁾ Case 61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana* EU:C:1980:100.

⁽⁴⁷⁾ Commission Decision 2008/408/EC of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of ThyssenKrupp, Cementir and Nuove Terni Industrie Chimiche (OJ L 144, 4.6.2008, p. 37).

Regarding the characterisation of the implementation/execution of the Award as new aid

- (68) The claimants further take issue with the characterisation of the implementation/execution of the Award as new aid. They note that the only events that took place after Romania's accession were the adoption of the Award itself and the execution thereof. Romania's execution in particular is said to be a mere automatic consequence of the Award, rather than the result of a distinct decision. The relevant points in time were, according to the claimants, the enactment of EGO 24, the issuance of PICs to the claimants, or at the latest the conclusion of the BIT. The claimants also rely on case-law and Commission practice on state guarantees (according to which the relevant point in time is when the guarantee is given, not when it is invoked or payments issued) to argue that where compensation is paid based on a commitment included in an international agreement, the date of the conclusion of that agreement should be considered decisive.

Regarding the compatibility of the implementation/execution of the Award

- (69) The claimants first claim that where the Commission is investigating non-notified aid, and the Member State concerned fails to bring forward any compatibility argument whatsoever, the Commission is under a duty to consider whether the aid may be compatible under any applicable rules or guidelines, if necessary by requesting further information from the Member State or the beneficiary.
- (70) As regards the preliminary compatibility analysis contained in the opening decision, the claimants maintain that it is conceptually flawed since it applies the current Regional Aid Guidelines ('RAG') to the implementation/execution of the Award, even though it is plainly obvious that the implementation/execution of the Award is not motivated by any regional development objective. In the claimants' opinion, and stressing again that the opening decision wrongly assumes that implementing the Award would retroactively reinstate EGO 24, the only aid that could have been granted were the benefits under the EGO 24 scheme. The EGO 24 should then have been assessed under the 1998 RAG, under which they should have been found compatible.
- (71) The claimants next assert that there has never been a valid formal decision establishing that EGO 24 constitutes incompatible State aid. The decision of the Romanian Competition Council (Decision No 244) denouncing EGO 24 was, according to the claimants, defective, as it did not assess compatibility and failed to provide reasoning for its findings. In addition, the claimants argued that the adoption of EGO 75, which reaffirmed EGO 24, by the Romanian Government overrode the Competition Council's decision. They further argue that the rejection of the Competition Council's challenges against EGO 75 before Romanian courts is further proof that EGO 24 and EGO 75 took precedence over the Competition Council's decision.
- (72) The claimants further assert that the Commission had and has no competence to review EGO 24, even incidentally. The relevant parts of EGO 24 were revoked before Romania's accession to the Union. In so far as the Award is seen as reinstating aid granted under EGO 24, the claimants thus assert that the Commission has no competence of review. In this context, they refer also to the Commission decision in State aid case N 380/2004, where the Commission found that implementing an arbitral award after accession which had been rendered before accession and related entirely to periods before accession did not constitute new aid.
- (73) Finally, the claimants argue that EGO 24 and individual incentives under EGO 24 were compatible with the internal market pursuant to the applicable 1998 RAG, given that all the compatibility conditions were fulfilled. In this context, they assert, first, that EGO 24 can in fact be seen as compatible investment aid, rather than operating aid, and, second, that even if perceived as operating aid, EGO 24 was still compatible.

Regarding legitimate expectations

- (74) The claimants claim that a Commission decision finding that the implementation or execution of the Award contravenes State aid rules would violate the claimants' legitimate expectations. They argue that the Union expressly encouraged Romania to conclude BITs with Member States prior to Romania's accession; that the Commission continues to support the conclusion of BITs; that the claimants relied on their expectation that the arbitral proceedings would allow them to receive compensation for the damage caused by Romania's decision to maintain all the investors' obligations under EGO 24; and that there is no overriding public interest in setting aside the claimants' legitimate expectations.

Regarding the claimants' procedural rights

- (75) Finally, the claimants assert that according to case-law interested parties 'have the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case' ⁽⁴⁸⁾. Arguing that Romania has failed to properly involve the claimants in the State aid procedure, which allegedly placed the claimants at a particular disadvantage, the claimants warn that failure on the part of the Commission to enable the claimants to properly defend their interests by involving them more fully in the procedure could vitiate the Commission's final decision. The claimants conclude by noting that the Commission's practice in State aid cases in general does not sufficiently safeguard the alleged beneficiaries' procedural rights, and is, by failing to provide an effective remedy, contrary to Article 6(1) of the European Convention on Human Rights and Article 47 of the EU's Charter of Fundamental Rights.

6. COMMENTS FROM ROMANIA ON THIRD PARTY COMMENTS

- (76) In its response to the comments submitted by the claimants, Romania first rejects the claim that Ioan and Viorel Micula could not themselves be considered to constitute undertakings for the purpose of the application of EU State aid law. Romania argues that the five claimants should rather be regarded as one economic unit, since the Micula brothers exert direct or indirect control over the corporate claimants. To underpin this assertion, Romania explains, *inter alia*, that during the negotiations between Romania and the claimants that took place after the Award was issued the Micula brothers took formal decision on behalf of the three corporate claimants.
- (77) Second, Romania rebuts the claimants' attempt to deny the connection between the revocation of the EGO 24 incentives and the granting of damages under the Award. It maintains that it is clear from the Award that the value of the damages was established by the Tribunal on the basis of the economic advantages that the claimants would have obtained if the incentives had been maintained.
- (78) Third, as regards the claimants' assertion that they had not been and are not being properly involved in the State aid investigation, Romania denies that it failed to immediately forward the opening decision to the claimants. It further asserts that Romania is under no legal obligation to involve the claimants more fully than is and has been the case.

7. ASSESSMENT

7.1. Existence of aid

- (79) Article 107(1) of the Treaty provides that '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'. Accordingly, a measure constitutes State aid if the following four cumulative conditions are met:

- the measure must confer a selective economic advantage upon an undertaking,
- the measure must be imputable to the state and financed through state resources,
- the measure must distort or threaten to distort competition,
- the measure must have the potential to affect trade between Member States.

- (80) The Commission stresses that the notion of State aid is an objective and legal concept defined directly by the Treaty. To establish whether a particular measure constitutes State aid depends not on the intentions or justifications of the Member States when granting it, but on the effects of the measure in question ⁽⁴⁹⁾.

Undertaking

- (81) The CJEU has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ⁽⁵⁰⁾. The classification of a particular entity thus depends entirely on the nature of its activities.

⁽⁴⁸⁾ Referring to Case T-68/03 *Olympiaki Aeroporia Ypiresies*, EU:T:2007:253, paragraph 42.

⁽⁴⁹⁾ Case C-487/06 P *British Aggregates v Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551, paragraph 51.

⁽⁵⁰⁾ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* EU:C:2000:428, paragraph 74.

- (82) Separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. As the CJEU has previously held, '[i]n competition law, the term "undertaking" must be understood as designating an economic unit [...] even if in law that economic unit consists of several persons, natural or legal.'⁽⁵¹⁾ To determine whether several entities form an economic unit, the CJEU looks at the existence of a controlling share or functional, economic or organic links⁽⁵²⁾.
- (83) The claimants in the arbitration proceedings giving rise to the Award are the brothers Ioan Micula and Viorel Micula and three companies owned by them (S.C. European Food SA, S.C. Starmill S.R.L., and S.C. Multipack). It is clear that the three companies are engaged in economic activities, as they specialise in industrial manufacturing of food products, milling products, and plastic packaging, respectively. The three companies therefore constitute undertakings. This characterisation is not disputed by the claimants.
- (84) The claimants maintain, however, that the Micula brothers themselves cannot, as natural persons, be considered to constitute undertakings for the purposes of Article 107(1) of the Treaty, and that accordingly funds paid out to them in implementation or execution of the Award would not constitute State aid. In particular, the interests of the Micula brothers are said not to coincide with those of the three corporate claimants.
- (85) The Commission finds, however, that the three companies and the Micula brothers together constitute a single economic unit for the purpose of the application of the State aid rules. This economic unit is therefore considered the relevant undertaking.
- (86) This finding relies, first, on the fact that the Micula brothers have, directly or indirectly, virtually exclusive ownership of the three corporate claimants, thus demonstrating a controlling interest over those companies.
- (87) Second, this finding takes into account that the corporate claimants form part of a larger group of companies, the European Food and Drinks Group ('EFDG'). During the arbitral proceedings, the Micula brothers also claimed compensation for other companies forming part of EFDG that allegedly suffered losses as a result of Romania's actions giving rise to the proceedings. In fact, rather than claiming and quantifying separate losses for each corporate claimant and the two individual claimants, the claimants based their application for compensation on the losses allegedly suffered by EFDG as a whole. After examining the ownership structure of EFDG and determining that the Micula brothers, directly or indirectly, owned at least 99,96 % of the all companies in EFDG for which the Micula brothers claimed damages (these are European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., West Leasing S.R.L), the Tribunal accepted this approach and allowed the claimants to seek compensation for the losses of EFDG as a whole⁽⁵³⁾. This behaviour of the claimants during the arbitral proceedings and the corresponding determinations of the Tribunal demonstrate that the Micula brothers and the three corporate claimants, as well as the aforementioned companies forming part of EFDG, form a single economic unit with a single economic interest.
- (88) Third, the characterisation of the Micula brothers and their companies as one economic unit is further reinforced by how the Award eventually awarded compensation to them. Rather than apportioning compensation individually to each of the five claimants, the Award awarded the compensation to them 'collectively' on the basis of a 'common entitlement'. The fact that the five claimants together (i.e., including the corporate claimants) asked the Tribunal to award all compensation only to the Micula brothers shows that the corporate claimants have no autonomy vis-à-vis the Micula brothers. The Tribunal finally allowed each claimant to recover the entire amount of compensation awarded, and then to allocate that compensation among the claimants however they deem fit, regardless of the damages actually sustained by each claimant.
- (89) The foregoing conclusion is not affected by the claimants' argument that the present case must be distinguished from the *Hydrotherm* judgment, as the natural person in that case was a partner personally liable for the financial obligations of the various companies with which he was considered to constitute a single economic unit, whereas the Micula brothers are not so personally liable. In response, the Commission recalls that in the relevant paragraphs of its *Hydrotherm* judgment the CJEU did not mention the personal liability of the natural person in question at all; rather, the CJEU limited itself to pointing out that the natural person in question 'has complete

⁽⁵¹⁾ Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

⁽⁵²⁾ Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

⁽⁵³⁾ See Award, paragraphs 935-936 and 943.

control' of the companies in question ⁽⁵⁴⁾. As already mentioned, by virtue of their ownership the Micula brothers similarly have complete control over the corporate claimants, and in fact the other relevant EFDG companies.

- (90) The Commission also considers, contrary to the assertions of the claimants, that the logic underpinning the *Cassa di Risparmio di Firenze* judgment is equally applicable in this case. In that judgment, the CJEU recognised that an economic activity can be exercised by an entity directly or indirectly, through controlling an operator as part of an economic unit which they form together. Although the CJEU acknowledges that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as the receipt of dividends, which are merely the fruits of the ownership of an asset, it is clear that the present situation is different. Indeed, according to the CJEU 'an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking.' ⁽⁵⁵⁾ The CJEU was also concerned to point out that 'simple separation of an undertaking into two different entities' cannot be sufficient to circumvent State aid rules ⁽⁵⁶⁾. This rationale also applies where one of the two entities concerned is a natural person. Otherwise granting aid to a natural person who is the controlling shareholder of an undertaking would not be considered to constitute State aid, even though the natural person could use that aid for the benefit of the undertakings which it controls. Indeed, in the present case, it cannot make any difference for the purposes of applying the State aid rules whether the compensation collectively awarded to all five claimants by the Tribunal is paid out to the Micula brothers or to the companies owned by them.
- (91) In conclusion, the Commission finds that the Micula brothers and the three corporate claimants together form a single economic unit that constitutes an undertaking for the purpose of applying Article 107(1) of the Treaty. The other EFDG companies for whose alleged losses the Micula brothers were awarded compensation by virtue of the Award (European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., West Leasing S.R.L.) ⁽⁵⁷⁾ likewise form part of this single economic unit. The final beneficiary of the aid measure is this single economic unit, made up of the five claimants and those EFDG companies.

Economic advantage (1)

- (92) An advantage, as required by Article 107(1) of the Treaty, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of the state intervention ⁽⁵⁸⁾. The precise form of the measure is irrelevant for establishing whether it confers an economic advantage on the undertaking. The notion of advantage includes, for example, all situations where undertakings are relieved of inherent costs of their economic activities.
- (93) By the Award, the Tribunal has awarded the claimants compensation of RON 376 433 229 plus interest against Romania. To fully understand why the implementation or execution of the Award grants the claimants an economic advantage, it is first instructive to examine on which basis the Tribunal determined that compensation should be paid out to the claimants in that Award.
- (94) After it had decided that Romania had breached the BIT, the Tribunal explained that damages had to be awarded on the basis of the principle that 'the claimant must be placed back in the position it would have been "in all probability" but for the international wrong' ⁽⁵⁹⁾. It further explained that only losses that are causally linked to the act constituting the international wrong could be compensated by means of damages, and that 'all of the violations of the BIT alleged by the Claimants arise from the same fact: the premature revocation of the [EGO 24] incentives or in direct connection with that premature revocation' ⁽⁶⁰⁾. In assessing the precise compensation due to the claimants, the Tribunal took into account whether losses were in reality incurred and whether they were directly related to the revocation of the incentive scheme. For instance, with regard to the damages awarded for the

⁽⁵⁴⁾ Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 10.

⁽⁵⁵⁾ Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

⁽⁵⁶⁾ Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 114.

⁽⁵⁷⁾ See recitals 87 and 88.

⁽⁵⁸⁾ Case C-39/94 *SFEI and Others* EU:C:1996:285, paragraph 60; Case C-342/96 *Spain v Commission* EU:C:1999:210, paragraph 41.

⁽⁵⁹⁾ Award, paragraph 917.

⁽⁶⁰⁾ Award, paragraph 928.

increased price of sugar, the Tribunal held ⁽⁶¹⁾: ‘Both the existence of the damage and the causal link between the revocation of the incentives and the damage suffered have been adequately proved. There is no dispute that, as a result of the revocation of the Raw Materials Incentive, the Claimants were required to pay an increased amount for the sugar they purchased after February 2005’.

- (95) In light of these considerations, it is clear that through the implementation or execution of the Award, Romania grants the claimants an amount corresponding exactly to the advantages foreseen under the abolished EGO 24 scheme from the moment it was repealed (22 February 2005) until its scheduled expiry (1 April 2009). More precisely, implementing or executing the Award *de facto* reimburses customs duties charged on imported sugar and other raw materials between 22 February 2005 and 31 March 2009, as well as the customs duties charged on imported sugar that the claimants would have avoided if they had had the opportunity to stockpile sugar before the schedule expiration of the EGO 24 facilities on 31 March 2009. In addition, to ensure that the claimants fully benefit from an amount corresponding to that of the abolished scheme and are ‘placed back in the position it would have been “in all probability”’, the Tribunal also awarded interest and compensation for the allegedly lost opportunity and lost profit ⁽⁶²⁾. In effect, the implementation or execution of the Award re-establishes the situation the claimants would have, in all likelihood, found themselves in if the EGO 24 scheme had never been repealed.
- (96) Accordingly, the implementation or execution of the Award grants the claimants an economic advantage not otherwise available on the market. First, the costs of raw materials, as inputs for final products, constitute ordinary operating expenses of undertakings, and relieving them of a part of their ordinary operating expenses grants them a distinct advantage. Second, granting the claimants compensation for lost profits because they had to bear their own operating expenses themselves likewise constitutes an economic advantage not available under normal market conditions and in absence of the Award; under normal market conditions, the undertaking would have had to bear itself the costs inherent in its economic activity and would therefore not have generated these profits. Third, paying interest to the claimants on payments that were allegedly due in the past, but which themselves must be qualified as conferring an advantage, confers a separate and additional advantage. Again, under normal market conditions and in the absence of the Award, the undertaking would have had to bear its ordinary operating expenses, would have not generated the allegedly lost profits, and would therefore not have been able to draw an interest on this capital. In fact, by repealing the EGO 24 scheme, Romania re-established normal conditions of competition on the market on which the claimants operate, and any attempt to compensate the claimants for the consequences of the revocation of the EGO 24 incentives grants an advantage not available under those normal market conditions.
- (97) The claimants’ attempts to separate the award of compensation from the revocation of the EGO 24 incentives are unconvincing. The claimants argue: ‘[I]n the present case the ICSID Tribunal concluded that the decision to comply with EU State aid rules complied with Romania’s obligations under the BIT and did not award damages to the Claimants on this basis. Instead, the ICSID Tribunal awarded damages for the Romanian state’s wrongdoing consisting in maintaining obligations imposed in relation to EGO 24 after the withdrawal of the scheme and non-transparent behaviour towards the investors’.
- (98) This description of the Award is inaccurate and in any event fails to consider the effects of implementing/executing the Award. It has been already pointed out that the Tribunal considered that the alleged breaches of the BIT all resulted from ‘the premature revocation of the incentives or in direct connection with that premature revocation’ ⁽⁶³⁾, and awarded damages for losses resulting directly from the revocation of the incentive scheme. The Tribunal was also already quoted as stating that ⁽⁶⁴⁾: ‘[B]y repealing the EGO 24 incentives prior to 1 April 2009, Romania did not act unreasonably or in bad faith (except that [Romania] acted unreasonably by maintaining investors’ obligations after terminating the incentives). The Tribunal, however, concludes by majority that Romania violated the Claimants’ legitimate expectations that those incentives would be available, in substantially the same form, until 1 April 2009. Romania also failed to act transparently by failing to inform the Claimants in a timely manner that the regime would be terminated prior to its stated date of expiration. As a result, the Tribunal finds that Romania failed to “ensure fair and equitable treatment of the investments” of the Claimants in the meaning of Article 2(3) of the BIT’.

⁽⁶¹⁾ Award, paragraph 953.

⁽⁶²⁾ See recital 27 for the description of the amounts due under the arbitration award.

⁽⁶³⁾ Award, paragraph 928.

⁽⁶⁴⁾ Award, paragraph 872.

- (99) In light of this conclusion, it cannot be maintained, as the claimants do, that the Tribunal found Romania's decision to comply with Union State aid rules by revoking EGO 24 not to have been in breach of the BIT, or that it did not award damages on that basis⁽⁶⁵⁾. The Commission notes that in justifying its decision to award compensation for increased prices and the loss of the ability to stockpile, as well as lost profits, the Tribunal referred only to damages incurred by the claimants as a result of the revocation of the EGO 24 incentives⁽⁶⁶⁾. Notably, the Tribunal did not refer to, or award additional damages on the basis of, its finding that Romania acted unreasonably in maintaining the investors' obligations under EGO 24 and failed to act transparently.

Economic advantage (2): damages and State aid

- (100) The presence of an advantage is, contrary to the submission of the claimants, furthermore not precluded by the fact that the payment of the compensation awarded to the complainants by the Tribunal through the implementation or execution of the Award entails a payment of compensation for damages. The central question in this regard is whether the principles laid down in the CJEU's *Asteris*⁽⁶⁷⁾ judgment are applicable to the case at hand. In its judgment in *Asteris*, the CJEU set out that State aid 'is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals.'⁽⁶⁸⁾ The claimants argue that the present case falls squarely under this case-law, and that any attempt by the Commission to distinguish the *Asteris* case from the one at hand is unconvincing. The Commission disagrees with this position.
- (101) The Commission observes, first, that the *Asteris* case arose out of a very different context than the present case. In the former case, the CJEU rendered a judgment in response to a reference for a preliminary ruling by a Greek court by which the CJEU was asked to pronounce itself on the jurisdiction of the courts of the Member States to entertain claims for damages brought by individuals against national authorities in respect of non-payment of aid under the Union's common agricultural policy. The non-payment of aid was not the result of a broken promise by the Greek authorities to grant that aid, but rather the consequence of the inclusion of technical errors by the Commission in a regulation. The affected undertakings had already brought an action for damages against the Commission before the CJEU, which had rejected it as unfounded. In response to the reference for a preliminary ruling, the CJEU specified in its judgment that since it had previously dismissed the action for damages against the Commission, any action for damages against the Greek state would have to be on different grounds from the action against the Commission it dismissed, that is to say a wrongful act of the Greek authorities themselves. Notably, the CJEU did not state that an award of damages equal to an amount of illegal State aid promised but not paid out would not amount to State aid itself. Thus, it does not follow from the *Asteris* judgment that every award of damages is automatically outside the scope of Union State aid law, as the claimants seem to argue. Rather, in cases of liability based on the wrongful conduct of national authorities, no advantage is granted to an undertaking where such liability merely ensures that the damaged party is given what it is entitled to, just as any other undertaking would be, under the general rules of civil liability in that Member State. Compensation granted under those general rules of civil liability differ from State aid to the extent that they cannot result in the damaged individual being better off after receiving compensation.
- (102) Second, for compensation to fall outside the Union State aid rules under the *Asteris* case-law it must be based on a general rule of compensation⁽⁶⁹⁾. In the present case, the compensation has been awarded to the claimants on the basis of an intra-EU BIT which the Commission considers invalid as of Romania's accession to the Union. The Commission has consistently taken the view that intra-EU BITs, such as the BIT upon which the claimants base their claim⁽⁷⁰⁾, are contrary to Union law since they are incompatible with provisions of the Union Treaties and

⁽⁶⁵⁾ The Tribunal concluded that the revocation of the EGO 24 incentives violated the claimants' legitimate expectations before it even considered the reasonableness or transparency of Romania's actions (Award, paragraphs 725, 726; reasonableness and transparency were only considered in paragraphs 727 et seq. and 837 et seq., respectively). There is thus no basis for maintaining, as the claimants suggest, that the Tribunal's finding of a breach of the BIT was conditioned on the unreasonableness of keeping in place the investors' obligations under EGO 24 or on the insufficient transparency of Romania's actions.

⁽⁶⁶⁾ Award, paragraphs 953, 961, 971, 984, 1 016, 1 020, 1 136.

⁽⁶⁷⁾ Joined Cases 106/87 to 120/87 *Asteris* EU:C:1988:457.

⁽⁶⁸⁾ Joined Cases 106/87 to 120/87 *Asteris* EU:C:1988:457, paragraph 23.

⁽⁶⁹⁾ See Commission Decision of 16 June 2004 on Dutch aid in favour of Akzo-Nobel in order to minimise chlorine transports (Case N 304/2003), summary notice in OJ C 81, 2.4.2005, p. 4; see also Commission Decision of 20 December 2006 on Dutch aid for relocation of car dismantling company Steenberghe (Case N 575/05), summary notice in OJ C 80, 13.4.2007, p. 1.

⁽⁷⁰⁾ For the same reasons, the Commission would also consider invalid the intra-EU BITs at the basis of the arbitral proceedings listed in footnote 53 of the application.

should therefore be considered invalid ⁽⁷¹⁾. The Commission has repeatedly made this view known to the Member States, including the Member States in question.

- (103) Third, the Commission notes that the purpose of the Award is to compensate the applicants for the incentives which Romania had promised them under EGO 24 (modified by EGO 75) but had been required to abolish by the Union to complete the negotiation process for its accession to the Union. Thus, in contrast to the *Asteris* case, the reason the applicants claim compensation in this case is because they were denied the incentives Romania promised to grant them in violation of its obligations under Article 64 of the Europe Agreement and Law No 143/1999 as interpreted by Decision No 244/2000 of the Romanian Competition Council not to grant unlawful State aid. However, as Advocate-General Ruiz-Jarabo Colomer has explained ⁽⁷²⁾, an award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of State aid found to be illegal and incompatible with the internal market. Following that line, the General Court has considered indemnification clauses for the recovery of State aid to constitute State aid ⁽⁷³⁾. Moreover, in the judgment in *Lucchini*, the CJEU held that a national court was prevented from applying national law where the application of that law would have the effect to 'frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law' ⁽⁷⁴⁾.
- (104) The attempts by the claimants to distinguish those cases from the present case are unconvincing. What matters is not that the precise facts underlying those cases differ from those of the present case, but the principle informing those cases, which is that national law, including liability arrangements under national law, cannot be applied where doing so would frustrate the application of Union State aid law and thus ultimately result in the grant of illegal State aid. In this light, the *Asteris* case does not exempt damages awarded as compensation for the recovery of illegal State aid or the failure to receive illegal State aid. The Commission considers that same principle to apply where the liability flows from an international law treaty concluded between two Member States (such as an intra-EU BIT) the application of which gives rise to the grant of State aid. Where giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law, that Member State must uphold Union law since Union primary law, such as Articles 107 and 108 of the Treaty, takes precedence over that Member State's international obligations.
- (105) The claimants' contention that there has never been a valid formal decision establishing that EGO 24 constitutes illegal State aid nor that those incentives were incompatible with the internal market is irrelevant in this respect, since it is the implementation/execution of the Award and not the investment incentives promised under EGO 24 which constitute the contested measure and form the basis of the present Decision. Indeed, considering EGO 24 was abolished on 22 February 2005 and no aid was disbursed under that legislation after that date, neither the Romanian Competition Council nor the Commission could conclude in a formal decision that EGO 24 gave rise to incompatible State aid in the period 22 February 2005 to 1 April 2009, which is the period for the which the Award grants compensation to the claimants.
- (106) For that very reason, there is also no need for the Commission to adopt a formal decision finding the existence of State aid in cases where a national court or an arbitral tribunal awards compensation against a Member State for the withdrawal of an aid measure. Article 107(1) of the Treaty contains a general prohibition on the grant of State aid 'in any form whatsoever'. The precise form of the measure is thus irrelevant in establishing whether it confers an economic advantage on the undertaking ⁽⁷⁵⁾. Thus, if the State aid is granted through the implementation or execution of a judgment or an award, which the Commission considers to be the case in relation to the Award, it

⁽⁷¹⁾ See response of Commissioner De Gucht to Parliamentary oral Question O-000043/2013/rev.1 in which he stated *The Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law*, debate of the plenary of 22 May 2013. See, further, Commission Staff Working Document of 3 February 2012 on capital movements and investments in the EU — Commission Services' Paper on Market Monitoring, SWD(2012)6 final, page 13. See also, Commission Staff Working Document of 15 April 2013 on the free movement of capital in the EU, SWD(2013)146 final, pages 11 and 14; Commission Staff Working Document of 18 March 2014 on the free movement of capital in the EU, SWD(2014)115 final, page 12; and European Commission, Monitoring activities and analysis, Bilateral Investment Treaties between EU Member States (intra-EU BITS) 2012; available at: http://ec.europa.eu/internal_market/capital/analysis/monitoring_activities_and_analysis/index_en.htm

⁽⁷²⁾ Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori* ECLI:EU:C:2005:256, paragraph 198.

⁽⁷³⁾ Case T-384/08 *Elliniki Nafpigoataskevastiki AE Chartofylakeiou v Commission* EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission* EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council* EU:C:2013:785, paragraph 44.

⁽⁷⁴⁾ Case C-119/05 *Lucchini* EU:C:2007:434, paragraph 59.

⁽⁷⁵⁾ Case C-280/00 *Altmark Trans* EU:C:2003:415, paragraph 84.

is in relation to that implementation or execution that the Commission must show that the cumulative conditions of Article 107(1) of the Treaty are fulfilled and that that aid is incompatible with the internal market.

(107) In any event, the Commission recalls that the Romanian Competition Council, several Union Common Positions and the Romanian Government upon repealing EGO 24 all concluded that EGO 24 gave rise to unlawful State aid under the Europe Agreement, Decision No 4/2000 of the EU-Romania Association Council, Law No 143/99 and the *acquis communautaire*. Moreover, Decision No 244/2000 of the Romanian Competition Council has never been challenged nor annulled, but only ignored by the Romanian legislator through the adoption of EGO 75 contrary to the provisions of Law No 143/1999 on State aid and thus in violation of its obligations under the European Agreement and Decision No 4/2000 of the EU-Romania Association Council. The Union then insisted Romania comply with that decision, its obligations under Europe Agreement and the *acquis communautaire* in the context of the accession negotiations, which the latter did by repealing EGO 24.

(108) For the foregoing reasons, the Commission concludes that payment of the compensation awarded to the claimants by the Tribunal through the implementation or execution of the Award constitutes an economic advantage in favour of the claimants that they would not have obtained under normal market conditions.

Selectivity

(109) Not all measures which grant an undertaking an economic advantage constitute State aid, but only those which confer an economic advantage in a selective manner upon certain undertakings or categories of undertakings or to certain economic sectors.

(110) The Award awards compensation only to the claimants. Therefore by paying that compensation, either through the implementation or execution of the Award, Romania grants an advantage only to the claimants. The measure is thus selective.

(111) Moreover, as follows from the *Asteris* judgment, compensation for damages will not selectively benefit an individual undertaking only insofar as that compensation follows from the application of a general rule of law for government liability which every individual can invoke, so that it excludes that any compensation granted confers a selective benefit on certain groups in society. The contested measure, which follows from the application of the provisions of the BIT, does not comply with this requirement for all of the reasons in the present case.

(112) First, the BIT only confers this right of compensation to a certain group of investors, that is, to investors of the two Member States covered by the intra-EU BIT, i.e. Sweden and Romania. Accordingly, not every similarly situated Union investor could rely on that BIT to claim damages corresponding to the incentives promised under the abolished EGO 24 aid scheme, but only investors of a certain nationality. Thus, to the extent that paying compensation awarded to an investor pursuant to a BIT amounts to granting an advantage, the advantage is selective. As regards the claimants' contention that the general character of the benefits provided by BITs has previously been recognised by the Commission (see recital 66), the statement cited by the claimants in support of that claim is not in fact a Commission statement at all, but an excerpt from a study prepared by an external contractor for the Policy Department of the European Parliament's Directorate-General for External Policies. Secondly, in order to discard any doubts about the ownership of the opinions expressed in this study, it contains a disclaimer specifying that the author bears the sole responsibility for them and that they do not reflect the official position of the European Parliament. The statement made in this report cannot be imputed to the Commission and is irrelevant for the case at hand.

(113) Second, the contested measure compensates the applicants for the repeal of investment incentives which themselves are selective in nature. Indeed, the incentives offered under EGO 24 were only available to undertakings investing in certain regions. Accordingly, the compensation awarded to the complainants by the Tribunal should in themselves be considered selective since they correspond to the advantages promised under the abolished EGO 24.

(114) In any event, the Commission considers the BIT upon which the Tribunal awarded compensation to the claimants to have been rendered invalid upon Romania's accession to the Union, so that it cannot be considered to form the basis for a general rule of law for government liability which every investor can rely upon.

(115) For all of the above reasons, the Commission concludes that the implementation or execution of the Award grants the claimants a selective advantage.

State resources

- (116) Only advantages granted directly or indirectly through state resources can constitute State aid within the meaning of Article 107(1) of the Treaty. In the present case, Romania has already partially implemented the Award by setting it off part of the compensation awarded to the claimants by the Tribunal against taxes owed by one of the claimants to the Romanian State. The court-appointed executor has furthermore seized funds from state accounts to satisfy the claimants' outstanding claims under the Award. Direct payments from the state budget, the foregoing of state income by writing off taxes owed, or the transfer of other state assets (such as shares in other undertakings or the transfer of seized assets) to the claimants, whether made voluntarily or through court-ordered execution, are all to be regarded as measures financed through state resources.

Imputability

- (117) For a selective advantage to constitute aid within the meaning of Article 107(1) of the Treaty, it must, *inter alia*, be imputable to the state ⁽⁷⁶⁾. In the present case, the claimants maintain that since the implementation of the Award is 'an automatic and involuntary consequence of Romania's obligations under the ICSID Convention, it is clearly not imputable to the State, and thus cannot constitute State aid'. The main thrust of the claimants' argument is that since Romania is under an international law obligation to implement the Award, doing so is not imputable to the State. The Commission disagrees with this line of reasoning and considers the measure imputable to Romania for the following reasons.
- (118) The Commission notes at the outset that the voluntary agreement of Romania to enter into the BIT, in particular Article 7 thereof, created the conditions for the selective advantage resulting from the Award as explained in recitals 110 *et seq.*
- (119) Moreover, if Romania voluntarily implements the Award by paying out the compensation awarded to the claimants by the Tribunal, there is no question that that action is imputable to the Romanian state. That is, in any event, the case for the portion of the compensation awarded to the claimants by the Award which Romania offset against taxes owed by one of the claimants, namely S.C. European Food SA, to the Romanian authorities. That is also the case when Romania decided to voluntarily pay out the outstanding compensation awarded by the Tribunal.
- (120) Finally, every act of Romania's state organs is imputable to Romania. Those state organs include the Member State's government and other public authorities. Notably, also domestic courts of a state and court-appointed executors and bailiffs are to be considered organs of that state and are thus bound under Article 4(3) of the Treaty on European Union by their duty of sincere cooperation *vis-à-vis* the Union. Accordingly, the actions of domestic courts and court-appointed executors and bailiffs are imputable to the Romanian state, so that if Romania is compelled to compensate the claimants under the Award by the action of its courts or court-appointed executors and bailiffs, that action is also imputable to the Romanian state. Union law recognises only a narrow exemption from this general principle of imputability: a measure is not imputable to a Member State if that Member State is under an obligation under Union law to implement that measure without any discretion. In that case, the measure stems from an act of the Union legislature and is not imputable to the State. It is, however, undisputed that Romania is not obliged by Union law to implement the Award. Any decision to implement or execute the Award, whether taken by the Romanian government or Romania's domestic courts, is thus imputable to the Romanian State.
- (121) In light of the above, the Commission concludes that the measure is imputable to Romania.

Distortion of competition and effect on trade

- (122) A measure granted by the state is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽⁷⁷⁾. For all practical purposes, a distortion of competition within the meaning of Article 107 of the Treaty is thus assumed as soon as the state grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. An advantage granted to an undertaking that distorts competition will normally also be liable to affect trade between Member States. Trade between Member States is affected where a measure strengthens the competitive position of the beneficiary undertaking as compared with other undertakings competing in intra-Community trade ⁽⁷⁸⁾.

⁽⁷⁶⁾ Case T-351/02 *Deutsche Bahn AG v Commission* EU:T:2006:104, paragraph 101.

⁽⁷⁷⁾ Case 730/79 *Phillip Morris* EU:C:1980:209, paragraph 11. Joined Cases T-298/97, T-312/97 *etc. Alzetta* EU:T:2000:151, paragraph 80.

⁽⁷⁸⁾ Case T-288/97 *Friulia Venezia Giulia* EU:T:2001:115, paragraph 41.

- (123) The Commission already concluded (see recitals 81 et seq.) that the claimants jointly form a single economic unit, which in turn constitute the relevant undertaking for the purpose of the application of Union State aid rules. That undertaking is active on a liberalised market, competing with other undertakings. The Commission has also concluded that payment of compensation to the claimants, whether by implementing or executing the Award, would improve their competitive position as compared to other undertakings with which they compete, who have not received similar compensation for the withdrawal of unlawful State aid. The compensation provided for by the Award is based on an amount corresponding to the customs duties charged on raw materials, lost profits and interest on the total sum of damages awarded. The costs of raw materials, as inputs for final products, constitute ordinary operating expenses of undertakings. Relieving the applicants of a part of their ordinary operating expenses grants them a distinct competitive advantage, as does compensating the applicants for lost profits and the payment of interest. The claimants are engaged in manufacturing food products, milling products, and plastic packaging. A liberalised market exists for all those products, so that any advantage granted to the claimants is liable to distort competition. Considering that the products primarily produced by the claimants can and indeed are widely traded between Member States, it is clear that any advantage granted to the claimants is also liable to affect trade between Member States.
- (124) The Commission notes that the claimants' arguments denying a distortion of competition merely repeat the assertions that the Micula brothers cannot be considered as undertakings and that the implementation of the Award would not grant the claimants any advantage. Both assertions were already extensively addressed above (see recitals 81 et seq. and 92 et seq.) and require no further comments.

Conclusion

- (125) For the foregoing reasons, the Commission considers that the payment of the compensation awarded to the claimants by the Tribunal amounts to State aid for the purposes of Article 107(1) of the Treaty.

7.2. The application of the State aid rules does not affect rights and obligations protected by Article 351 of the Treaty

- (126) Article 351 of the Treaty provides that '[t]he rights and obligations arising from agreements concluded [...] for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'. In the present case, the rights and obligations on which the claimants rely are those arising from the BIT.
- (127) It is clear from the wording of Article 351 of the Treaty that it does not apply in the present case, since the BIT is a treaty concluded between two Member States of the Union, Sweden and Romania, and not a treaty 'between one or more Member States on the one hand, and one or more third countries on the other'. Accordingly, the application of State aid law in the present case does not affect rights and obligation protected under Article 351 of the Treaty.
- (128) In this context, the Commission recalls that different rules apply under Union law to intra-EU BITs, on the one hand, and BITs concluded between a Member State of the Union and a third country, on the other. In the case of intra-EU BITs, the Commission takes the view that such agreements are contrary to Union law, incompatible with provisions of the Union Treaties and should therefore be considered invalid. By contrast, BITs concluded between a Member State of the Union and a third country are governed by Regulation (EU) No 1219/2012 of the European Parliament and of the Council ⁽⁷⁹⁾ which establishes transitional arrangements for bilateral investment agreements between Member States and third countries until those agreements are progressively replaced by agreements of the Union relating to the same subject matter, in light of the Union's exclusive competence with respect to the common commercial policy under which foreign direct investment falls ⁽⁸⁰⁾.
- (129) Romania is also a party to the multilateral ICSID Convention, to which it has acceded prior to its accession to the Union. However, because no third country Contracting Party to the ICSID Convention is party to the BIT involved in the present proceedings, Article 351 is not relevant for this case.

⁽⁷⁹⁾ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 20.12.2012, p. 40).

⁽⁸⁰⁾ Article 3(1)(e) of the Treaty.

7.3. New aid

- (130) Article 107(1) of the Treaty provides that State aid is, in principle, incompatible with the internal market. Unless an aid measure is declared to be compatible with the internal market by the Commission, the Member States are prohibited from putting State aid measures into effect. Under Article 108(3) of the Treaty, a Member State must notify any plans to alter or grant aid to the Commission and shall not put its proposed measure into effect until the Commission has taken a final decision on that measure's compatibility with the internal market.
- (131) The obligation not to put into effect any aid measure without a final decision from the Commission on the compatibility of that aid measure only applies, of course, to aid measures put into effect after the entry into force of the Treaty for the Member State concerned. For Romania, the Treaty entered into force on 1 January 2007.
- (132) The claimants dispute that the implementation or execution of the Award would constitute 'new aid' within the meaning of Article 1(c) of Regulation (EC) No 659/1999. They maintain that even if the Commission's assessment is correct *quod non* and the implementation or execution of the Award would constitute aid, the date of the grant of that aid would be the initial granting of benefits under EGO 24 to the claimants, which took place in 2000 and 2002 and thus before Romania's accession to the Union. According to the claimants, the very latest point in time which could be considered the granting date is the entry into force of the BIT, on which the Award is based, and which entered into force in 2003.
- (133) The Commission disagrees with the claimants and considers that payment of the compensation awarded to the claimants by the Tribunal, whether through the implementation or execution of the Award, amounts to new aid and is thus subject to the full State aid control mechanism set out in Articles 107 and 108 of the Treaty. According to the case-law of the CJEU, aid must be considered to be granted at the time that an unconditional right to receive it is conferred on the beneficiary under the applicable national rules⁽⁸¹⁾. Neither the adoption of EGO 24 on 2 October 1998, nor the designation of Ştei-Nucet, Bihor county, as a disfavoured region for 10 years (effective on 1 April 1999), nor the grant of permanent investor certificates to S.C. European Food SA (on 1 June 2000) and S.C. Starmill S.R.L. and S.C. Multipack (on 17 May 2002) conferred on the claimants an unconditional right to obtain the Raw Material Facility until 1 April 2009. Rather, a right to that Facility was only obtained by a company eligible for aid under the scheme set up by EGO 24:
- under the initial scheme set up by EGO 24: when the regional development agency approved the company's production sales documents attesting that an import of raw materials intended for integration into internal production had taken place, giving right to a reimbursement of customs duties paid⁽⁸²⁾, and
 - after the Raw Material Facility of EGO 24 was transformed into an exemption from customs duties under EGO 75: when a company eligible for aid under that scheme imported raw materials for integration into internal production and requested the exemption from the border control authorities on the basis of duly justified documents.
- (134) Since the scheme set up by EGO 24, as modified by EGO 75, was revoked on 22 February 2005, no right to aid could be obtained by any company after that date under the national regulatory framework by importing raw materials into Romania for integration into internal production. Thus, the applicants' claim for compensation from the Romanian state derives only from the Award in conjunction with Romanian domestic law giving it legal effect in Romania's domestic legal order. As the Award was rendered and risks being implemented or executed after Romania acceded to the Union, the unconditional right under Romanian domestic law to receive the compensation awarded by the Tribunal, arising from the ratification of the ISCID Convention integrating it in Romania's domestic legal order and thus giving the Award legal effect in Romania's domestic legal, was conferred on the claimants only after Romania's accession to the Union.

⁽⁸¹⁾ Case C-129/12 *Magdeburger Mühlenwerke* EU:C:2013:200, paragraph 40.

⁽⁸²⁾ An English-language translation of the initial provision providing for the Raw Materials Facility (which is the investment incentive the revocation of which led to damages being awarded to the applicants under the Award) can be found at paragraph 148 of the Award. According to that translation, Article 6(1)(b) provides that 'Privately held companies, Romanian legal entities, as well as small or family business, authorised pursuant to the Decree-Law No 54/1990 concerning the organisation and operation of free initiative-based economic activities that are headquartered and conduct business within the disadvantaged region, will be granted the following advantages for their new investments in the these regions: [...] refunds of customs duties on raw materials, spare parts and/or components necessary of achieving the investor's own production in that region. The refunds will be made based on the approval by the regional development agencies of the companies' production sales documents. The funds necessary for the refund of the customs duties will be provided to the Agency for Regional Development from the Regional development Fund. In case of unprivileged regions belonging to two or more administrative-territorial units, the funds necessary for the refund of the customs duties will be provided by the National Agency for Regional Development from the National Development Fund [the "Raw Materials Incentive" or "Raw Materials Facility"]'.

- (135) It is also important to note in this regard that the Award grants to the claimants compensation in an amount corresponding to the advantages foreseen under the abolished Raw Materials Facility of the EGO 24 scheme from the moment that that legislation was repealed (22 February 2005) until its alleged scheduled expiry (1 April 2009). That period comprises a little over 49 months, during the majority of which (27 months) Romania was a full member of the Union directly subjected to the State aid discipline laid down in the Treaty. In addition, the Award grants to the claimants compensation for the lost opportunity to stockpile sugar in 2009, assuming that the connected losses were incurred between 31 March 2009 and 1 July 2010. These alleged losses were thus incurred entirely after Romania had acceded to the Union in 2007. Finally, the Tribunal awarded compensation for lost profits, taking into account claimed losses incurred between 1 January 2005 and 31 August 2011. That period comprises 80 months, during the vast majority of which (56 months) Romania was a full member of the Union directly subjected to the State aid discipline laid down in the Treaty.
- (136) Finally, the EGO 24 incentive scheme is not mentioned in Annex V, chapter 2, n.1 of the Act of Accession of Romania to the Union which exhaustively lists the State aid measures which would be considered existing aid upon Romania's accession to the Union ⁽⁸³⁾ ⁽⁸⁴⁾.
- (137) The fact that neither the Act of Accession nor the Treaty were applicable to Romania at the time when Romania allegedly breached its obligations under the BIT by revoking the aid scheme established by EGO 24 or when the claimants brought their claims under the BIT before the Tribunal is irrelevant. At neither point did the claimants obtain an unconditional right to the payment of the compensation awarded by the Tribunal, which is the measure under consideration. It is only when the Tribunal established that there was a breach of Article 2(3) of the BIT by rendering the Award on 11 December 2013, in conjunction with Romanian domestic law giving legal effect in Romania's domestic legal order to the Award, that the claimants received an unconditional right to that compensation which they could enforce against Romania. That date was after Romania's accession to the European Union.
- (138) The claimants' case therefore is not comparable to the Commission's decision in Case N 380/04 to which they refer. Case N 380/04 concerned a contract concluded between the company Latvijas Gāze ('LG') and Latvia in 1997. When a dispute arose between LG and Latvia over the latter's obligations under the contract, commercial arbitration proceedings were initiated in Stockholm under Uncitral rules. The arbitration tribunal established for those proceedings decided, on 19 June 2003, that Latvia owed LG compensation for the period 10 January 2001 until 10 March 2003. Latvia did not comply with the arbitral award before it acceded to the Union on 1 May 2004 and notified the envisaged implementation of that award to the Commission after accession. In its decision, the Commission observed that the compensation obligation arose on the basis of the 1997 contract, that the compensation awarded by the arbitration tribunal related in its entirety to a period before Latvia's accession, and that the arbitral award itself was issued before Latvia's accession to the Union. On this basis, the Commission concluded that 'the payment [...] of the damages awarded by the Tribunal [...] constitute a mere act of implementation of a measure that crystallised entirely before accession' and that implementing the 2003 arbitral award could not be regarded as constituting 'new aid'. Furthermore, the Commission's decision in Case N 380/04 itself points out that it did not prejudice the analysis of possible future payments under the contract that related to periods after accession, thus narrowly limiting the approach chosen to the specific facts notified by Latvia.
- (139) By contrast, in the present case the compensation obligation arises from the Award, which was rendered in 2013, the compensation awarded to the claimants by the Tribunal relates for the most part to the period after Romania acceded to the Union and the Award itself was issued almost seven years after Romania acceded to the Union. Finally, the decision in Case N 380/04 differs most starkly to the present case in that there was no indication in the former case that by implementing or executing the 2003 arbitral award LG would obtain unlawful State aid which Latvia had promised to grant contrary to its State aid obligations as a candidate country acceding to the Union.

⁽⁸³⁾ The three categories of existing aid mentioned in the Act of Accession are:

- aid measures put into effect before 10 December 1994,
- aid measures listed in the Appendix to this Annex,
- aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in paragraph 2.

Any decision to execute the Award is not covered by any of these three categories. Even if it were considered that implementation of the Award merely reinstates the claimants' rights pursuant to EGO 24 as if the relevant incentives thereunder had not been repealed before their scheduled expiration, that retroactive reinstatement would still need to be considered as 'new aid' as of the accession of Romania to the Union.

⁽⁸⁴⁾ See also Joint Cases T-80/06 and T-182/09 *Budapesti Erőmű* EU:T:2012:65, paragraph 54.

- (140) The Commission therefore finds that the payment of the compensation awarded by the Tribunal to the claimants constitutes new aid and that that measure can only be put into effect if and after the Commission has authorised it under the State aid rules.

7.4. Illegality under Article 108(3) of the Treaty

- (141) The compensation awarded by the Tribunal has already been partially paid out by Romania to the claimants through the offsetting of certain tax debts owed by one of the claimants, S.C. European Food SA, to the Romanian state. Since that partial implementation of the Award was not notified to the Commission by Romania, the measure has unlawfully been put into effect in violation of Article 108(3) of the Treaty. Any further payment of the compensation awarded by the Tribunal, whether by implementation or execution of the Award, that the Commission is either unaware of or that might occur after the adoption of this Decision would, for the same reasons, also constitute a violation of Romania's obligation to comply with Article 108(3) of the Treaty.

7.5. Compatibility with the internal market

- (142) At the outset, the Commission recalls that when assessing the compatibility of a measure with the internal market under Articles 107(2) and 107(3) of the Treaty, the burden of proof is the principal responsibility of the Member State⁽⁸⁵⁾. In this context, the Commission also recalls that a State aid measure cannot be declared compatible with the internal market, if it entails a non-severable violation of other specific provisions of the Treaty⁽⁸⁶⁾. At present, Romania has presented no arguments that could justify the measure under Articles 107(2) and 107(3) of the Treaty. Nevertheless, for the sake of completeness, the Commission considers it appropriate to undertake a compatibility assessment of its own motion.
- (143) The claimants contend that the measure constitutes compatible regional aid. On the basis of Article 107(3)(a) and 107(3)(c) of the Treaty, the Commission may consider compatible with the internal market State aid to promote the economic development of certain disadvantaged areas within the Union. The conditions under which aid to promote regional development can be considered compatible with the internal market are set out in the Guidelines on regional State aid for 2014–2020 ('RAG 2014'). Recital 188 of those Guidelines explains that they apply for assessing the compatibility of all regional aid intended to be awarded after 30 June 2014. This means that regional aid awarded unlawfully or regional aid intended to be awarded before 1 July 2014 are to be assessed in accordance with the Guidelines on national regional aid for 2007–2013⁽⁸⁷⁾ ('RAG 2007').
- (144) As explained in recital 134, an unconditional right to the aid was granted to the claimants when the Award was issued on 11 December 2013, in conjunction with Romanian domestic law giving legal effect in Romania's domestic legal order to the Award, that is, before the entry into force of the RAG 2014. Therefore, the payment of the compensation awarded by the Tribunal to the claimants should be assessed under the RAG 2007.
- (145) In those guidelines, the Commission sets out that regional aid aimed at reducing the current expenses of an undertaking constitutes operating aid and will not be regarded as compatible with the internal market, unless it is awarded in exceptional circumstances to tackle specific handicaps faced by undertakings in disadvantaged regions falling within the scope of Article 107(3)(a) of the Treaty⁽⁸⁸⁾.
- (146) In the present case, the compensation awarded to the claimants by the Tribunal refers to the losses directly linked to the revocation of the EGO 24 incentives and are aimed at placing the beneficiary in the position in which it would 'in all probability' have found itself in had the EGO 24 incentives had not been revoked. In effect, the implementation of the award re-establishes the situation in which the claimants would have, in all likelihood, found themselves if EGO 24 had never been repealed by Romania. As the advantages granted under EGO 24 were connected to the recurrent costs of the claimants and were not linked to an initial investment, those advantages constituted operating aid. Therefore, placing the beneficiary in the position in which it would have been if the EGO 24 incentives had not been revoked and thus compensating the losses linked to this revocation constitutes operating aid. As explained in recitals 92 et seq., payment of the compensation awarded to the claimants by the Tribunal in reality retroactively reduces the operating expenses incurred by them pursuing their economic activity under normal market conditions.

⁽⁸⁵⁾ Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* EU:T:2007:253, paragraph 34.

⁽⁸⁶⁾ Case C-225/91 *Matra v Commission* EU:C:1993:239, paragraph 41.

⁽⁸⁷⁾ Guidelines on national regional aid for 2007–2013 (OJ C 54, 4.3.2006, p. 13).

⁽⁸⁸⁾ RAG 2007, point 76.

- (147) According to points 76, 77 and 79 of the RAG 2007, operating aid is normally prohibited, and can be granted only exceptionally in Article 107(3)(a) regions provided that:
- it is justified in terms of its contribution to regional development (targeted),
 - its nature and its level is proportional to the handicaps it seeks to alleviate,
 - it is temporary and reduced over time, and should be phased out when the regions concerned achieve real convergence with the wealthier areas of the EU,
 - in principle it is granted in respect of a predefined set of eligible expenditures or costs and limited to a certain proportion of those costs,
 - the Member State has committed itself to respect detailed reporting rules, as laid down in point 83 of the RAG 2007.
- (148) The economic activities benefitting from the implementation of the Award are located in an area falling within the scope of Article 107(3)(a) of the Treaty, as established by the Commission in the decision of the regional aid map for Romania for 2007-2013 ⁽⁸⁹⁾ and for 2014-2020 ⁽⁹⁰⁾.
- (149) However, the Commission fails to see how the payment of the compensation awarded to the claimants is justified in terms of its contribution to the regional development of the areas concerned. The operating aid resulting from that payment is not aimed at contributing to the common equity objective as required under Article 107(3)(a) of the Treaty, but merely at compensating the beneficiary for the losses incurred from the revocation of EGO 24 before its envisaged expiry date. This results in free money for the claimants without any positive impact on the development of the region.
- (150) It is not sufficient that the economic activity is located in 'an area' to assume that the measure is proportional to the handicaps it seeks to alleviate, since it must first be demonstrated what these handicaps are and, second, how they create an obstacle to the development of the region concerned. In the absence of any proof, the Commission could not identify the specific handicaps the aid measures would seek to alleviate.
- (151) The payment of the compensation awarded to the claimants by the Tribunal is temporary in nature, as it has no effects after the implementation or execution of the Award is completed. However, it is not limited to a certain portion of predefined costs, since that compensation is aimed at ensuring that all losses incurred by the claimants are covered.
- (152) In view of the above, the Commission considers that the payment of the compensation awarded to the claimants by the Tribunal does not comply with the RAG 2007 and can therefore not be declared compatible with the internal market. As no other basis of compatibility is otherwise applicable, the Commission considers that the compatibility of the aid measure has not been established.

7.6. Conclusion on the assessment of the aid measure

- (153) The foregoing analysis indicates that the payment of the compensation awarded by the Tribunal to the claimants amounts to the granting of incompatible new aid which is incompatible with the Treaty. The Commission regrets that Romania has already partially paid out that compensation by offsetting tax debts owed by one of the claimants, S.C. European Food SA, to the Romanian state against part of that compensation, as well as by the action taken by the court-appointed executor.

8. RECOVERY

- (154) In accordance with the Treaty and the CJEU's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽⁹¹⁾. The Court has 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 ⁽⁹²⁾. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors

⁽⁸⁹⁾ Commission Decision N 2/07, summary notice in OJ C 73, 30.3.2007, p. 15.

⁽⁹⁰⁾ Commission Decision SA 38364, summary notice in OJ C 233, 18.7.2014, p. 1.

⁽⁹¹⁾ Case C-70/72 *Commission v Germany* EU:C:1973:87, paragraph 13.

⁽⁹²⁾ Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* EU:C:1994:325, paragraph 75.

on the market, and the situation prior to the payment of the aid is restored⁽⁹³⁾. Following that case-law, Article 14(1) of Regulation (EC) No 659/1999 provides that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...].'

- (155) The claimants contend that they had a legitimate expectation that the incentives granted under EGO 24 were lawful and that they could benefit from those incentives until their scheduled expiry on 1 April 2009. The Commission observes, in that regard, that Article 14(1) of Regulation (EC) No 659/1999 further specifies that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of [Union] law.' The principle of the protection of legitimate expectations has been recognised by the CJEU to constitute such a general principle of Union law. The Commission does not consider, however, that the claimants can claim such a legitimate expectation.
- (156) According to the case-law of the CJEU, save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108(3) of the Treaty. The CJEU, in its more recent case-law, has declared that in the absence of sufficiently precise assurances arising from a positive action taken by the Commission, which has the exclusive competence to authorise the grant of State aid by the Member States of the Union, that lead the beneficiary to believe that the measure does not constitute State aid, no exceptional circumstances can warrant the application of the principle of the protection of legitimate expectations to prevent recovery if that aid measure was not notified to the Commission⁽⁹⁴⁾. Indeed, it is long-standing case-law that the principle of the protection of legitimate expectations cannot be relied upon against a precise provision of Union law and that the conduct of a national authority responsible for applying Union law, which acts in breach of that law, cannot give rise to legitimate expectations on the part of an economic operator that he will benefit from treatment which is contrary to that law⁽⁹⁵⁾. A diligent economic operator must be assumed to be able to determine whether that procedure has been followed⁽⁹⁶⁾.
- (157) The Commission notes that, as regards the compensation awarded by the Tribunal to the claimants, it should have been clear without any doubt to the claimants even before that aid was granted to them through the adoption of the Award, in conjunction with Romanian domestic law giving legal effect in Romania's domestic legal order to the Award, that the Commission considered payment of that compensation to give rise to unlawful and incompatible State aid. That position was expressly communicated to the Tribunal on 20 July 2009 and communicated to the claimants.
- (158) As regards the claimants' claim that they had a legitimate expectation that the EGO 24 were lawful and would remain in place until 1 April 2009, the Commission recalls, as a preliminary matter, that it is the payment of compensation awarded to the claimants by the Tribunal and not EGO 24 that form the basis for this Decision. Nevertheless, the Commission adds, for the sake of completeness, that the claimants cannot justifiably claim a legitimate expectation as to the validity and continued existence of that scheme until 1 April 2009. As regards that scheme, it was not the Commission, but the Romanian Competition Council, which, by virtue of Decision No 4/2000 of the EU-Romania Association Council and Romanian Law No 143/1999 on State aid, was responsible for the monitoring and authorisation of the grant of State aid prior to Romania's accession to the Union. The Commission notes in that regard that EGO 24 was notified to the Romanian Competition Council in light of the modifications envisaged by EGO 75 and that the Romanian Competition Council, by its Decision No 244/2000 of 15 May 2000, found those incentives to constitute incompatible State aid. It was after the adoption of that decision, on 1 June 2000, that S.C. European Food SA obtained its PIC, which made it eligible to obtain State aid under the scheme set up by EGO 24 as explained in recital 133. However, that does not mean the aid was granted on that date, as explained in recital 134.
- (159) It follows from that at the time S.C. European Food SA was granted the unlawful State aid provided by EGO 24, which is in any event after 1 June 2000, it must have been fully aware of the Romanian Competition Council's decision of 15 May 2000 declaring the EGO 24 incentives to be incompatible State aid. Moreover, it must also have been aware of the Europe Agreement, which entered into force on 1 January 1995, and Romanian Law No 143/1999 on State aid, which entered into force on 1 January 2000, both of which prohibited Romania from granting State aid and conferred the power on the Romanian Competition Council to authorise the grant of new State aid. Absent such an authorisation from the Competition Council and in line with the case-law of the CJEU, which applied by virtue of the Article 64 of the 1995 Europe Agreement, Article 1 of the Implementing Rules to Decision No 4/2000 of the EU-Romanian Association Council and the *acquis communautaire*, S.C. European Food

⁽⁹³⁾ Case C-75/97 *Belgium v Commission* EU:C:1999:311, paragraphs 64-65.

⁽⁹⁴⁾ Case C-148/04 *Unicredito Italiano* EU:C:2005:774, paragraphs 104 to 111.

⁽⁹⁵⁾ Judgment in Case C-217/06 *Commission v Italy* EU:C:2007:580, point 23 and the case-law cited.

⁽⁹⁶⁾ Case C-5/89 *Commission v Germany* EU:C:1990:320, paragraph 14.

SA could never have entertained a legitimate expectation that the incentives granted under EGO 24 constituted compatible State aid, regardless of the subsequent actions of the Romanian Government after Decision No 244/2000 was adopted. The same reasoning obviously applies to Multipack and Starmill, which only obtained their PICs on 17 May 2002, two years after Decision No 244/2000 was adopted. Thus, the claimants cannot even validly claim a legitimate expectation that the EGO 24 scheme constituted lawful State aid, which the Commission considers irrelevant for the purposes of the present Decision.

- (160) Therefore, any payment of the compensation awarded to the claimants by the Tribunal must be recovered by Romania since that payment constitutes unlawful and incompatible State aid. As the five claimants, together with the other relevant EFDG companies constitute a single economic unit (see recital 91), the five claimants and the other relevant EFDG companies shall be jointly liable to repay the State aid received by any one of them to the Romanian state. According to Article 14(2) of Regulation (EC) No 659/1999 the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. Article 14(3) of Regulation (EC) No 659/1999 provides that recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.
- (161) The Commission observes in this respect that Romania has already offset the amount of RON 337 492 864 (ca. EUR 76 million⁽⁹⁷⁾) against tax debts owed by one of the claimants, S.C. European Food SA. The Commission further observes that on 5 January 2015 the court-appointed executor seized RON 36 484 232 (ca. EUR 8,1 million⁽⁹⁸⁾) from Romania's Ministry of Finance and subsequently transferred RON 34 004 232 (ca. EUR 7,56 million) in equal parts to three of the five claimants, and kept the remainder as compensation for execution costs. Between 5 February and 25 February 2015, the court-appointed executor seized a further RON 9 197 482 (ca. EUR 2 million⁽⁹⁹⁾) from the bank accounts of the Ministry of Finance. In addition, the Commission takes note of the fact that the Romanian authorities have voluntarily transferred RON 472 788 675 (ca. EUR 106,5 million⁽¹⁰⁰⁾) (including the costs of court appointed executor of RON 6 028 608) into a blocked account in the name of the five claimants. Those sums, as well as any further payments to the claimants in fulfilment of the Award which have taken or will take place, must be recovered by Romania. Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Center for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 *Micula a.o. v Romania*⁽¹⁰¹⁾ to the single economic unit comprising Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., and West Leasing S.R.L. constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

Article 2

1. Romania shall not pay out any incompatible aid referred to in Article 1 and shall recover any incompatible aid referred to in Article 1 which has already been paid out to any one of the entities constituting the single economic unit benefiting from that aid in partial implementation or execution of the arbitral award of 11 December 2013, as well as any aid paid out to any one of the entities constituting the single economic unit benefiting from that aid in further implementation of the arbitral award of 11 December 2013 that the Commission has not been made aware of or that is paid out after the date of this Decision.

2. Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., and West Leasing S.R.L. shall be jointly liable to repay the State aid received by any one of them.

⁽⁹⁷⁾ See footnote 7.

⁽⁹⁸⁾ See footnote 38.

⁽⁹⁹⁾ See footnote 38.

⁽¹⁰⁰⁾ See footnote 40.

⁽¹⁰¹⁾ ICSID Case No ARB/05/20, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania*, Final Award of 11 December 2013.

3. The sums to be recovered are those resulting from the implementation or execution of the award of 11 December 2013 (principal and interest).
4. 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.
5. Romania shall provide the exact dates on which the aid provided by the state was put at the disposal of the respective beneficiaries.
6. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁰²⁾.
7. Romania shall ensure that no further payments of the aid referred to in Article 1 shall be effected with effect from the date of adoption of this Decision.

Article 3

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

Article 4

1. Within two months following notification of this Decision, Romania shall submit the following information:
 - (a) the total amount of aid received by each entity mentioned in Article 1 of this Decision;
 - (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. Romania 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 1 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 5

This Decision is addressed to Romania.

Done at Brussels, 30 March 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽¹⁰²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

ISSN 1977-0677 (electronic edition)
ISSN 1725-2555 (paper edition)



Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

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