The White Elephant in the Room…

Annotation on European Commission Decision of 3 August 2016: State aid SA.41342 (2016/N) – Germany. Financing of Berlin Brandenburg Airport

*Antigoni Lykotrafiti**

This annotation focuses on the latest (out of three) European Commission decisions on the financing of the new Berlin airport by its public shareholders. The decision is important because it deals with a case having a great impact on the Single Market. Moreover, it constitutes the first example of application of the private investor test in airport financing cases after the publication of the Commission Notice on the notion of State aid – the jewel in the crown of the State Aid Modernisation initiative. The commentary points to the link between politics, law and economics in high-profile State aid cases, questioning the effectiveness of EU State aid control.

Keywords: Market Economy Investor Principle; Airport Infrastructure; Airport Operator; Traffic Forecast; Severability; Predictability.

I. Introduction

In May 2016, the European Commission adopted the last part of its State Aid Modernisation initiative, its Notice on the notion of State aid, where it had the opportunity to elaborate on the market economy operator test, as well as on the public funding of infrastructure projects, including airport infrastructure.[1] A few months later, in August 2016, the Commission adopted its decision on the financing of the Berlin Brandenburg Airport (BBA),[2] where it had (or, in fact, missed) the opportunity to apply for the first time the guidance provided in the Notice in conjunction with the 2014 Aviation Guidelines.[3] The Commission decision is important not least because it deals with one of the larger (if not the largest) infrastructure financing operations in Europe, an airport whose construction started in the year 2006, which was due to open in October 2011 and is still in the making.[4] Considering that the overall purpose of the State Aid Modernisation initiative is to focus the Commission's resources on enforcing State aid rules in cases with the biggest impact on the Single Market, the Berlin Brandenburg Airport decision merits special attention.[5]

II. Background to the 2016 Commission Decision

Originally, Berlin had three airports: Tegel and Tempelhof in West Berlin and Schönefeld in East Berlin. The reunification of Germany in 1990 triggered the idea of a single airport for the Berlin-Brandenburg area. The new centralised Berlin airport would do away with the unbalanced capacity utilisation of the three Berlin airports and serve the forecasted increasing demand for air traffic. The planning procedure

* Antigoni Lykotrafiti, lecturer in Transport, Energy and the Law, Centre for Commercial Law Studies, Queen Mary University of London.
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1 European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 262/1, 19.07.2016.

2 European Commission, Decision State aid SA.41342 (2016/N) – Germany. Financing of Berlin Brandenburg Airport, C (2016) 4948 final, 03.08.2016.

3 European Commission, Guidelines on State aid to airports and airlines, OJ C 99/3, 04.04.2014.

4 See Flughafen Berlin Brandenburg (FBB) Press Release: "€2.4 billion for the airport – BBI funding set up", 30.06.2009, available at <http://www.berlin-airport.de/en/press/press-releases/2009/2009-06-30-bbi-funding/index.php> Last accessed on16 May 2017.

5 European Commission, EU State Aid Modernisation (EU SAM), COM(2012) 209 final, 08.05.2012 .

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was initiated in the 1990s and by 1999 Schönefeld was chosen as the location for the new airport. Construction works started in 2006 on a green field adjacent to the existing Schönefeld airport, with the opening of the new airport being envisaged for October 2011.

The European Commission was first involved in the case in March 2009, when Germany notified it of the measures that it had already taken to finance the expansion of the new airport. The case was also the subject of complaints from private individuals, alleging that the airport's public shareholders intended to grant illegal State aid to finance the airport's construction. Less than two months later, the Commission adopted a positive State aid decision,[6] finding the measures "not prejudicial to the common interest as [...] necessary and proportionate to reach objectives of Community interest", in line with the 2005 Aviation Guidelines.[7] Specifically, the Commission approved capital increases worth €654.5 million, a 100% guaranteed loan up to €2.4 billion and a €74 million infrastructure grant, all granted by the public shareholders of the airport operator.

Despite the State aid, the opening of the new airport was postponed first to June 2012 and then to October 2013 due to planning and construction problems and heightened noise protection measures ordered by a national court for the airport's neighbours. The additional costs were estimated at €1.2 billion and, as the airport operator was unable to finance them through internal resources, in November 2012 the Commission was notified of the airport public owners' plan to increase their equity by the same amount. Three weeks later, in December 2012, the Commission cleared the operation as in line with the market economy investor principle (MEIP),[8] stating that the "decision clarifies the application of EU state aid rules to airports, in particular the application of the MEIP test".[9]

Even though, at the time of the 2012 decision, the percentage of completion of the construction works stood at 95%, the airport was not opened in 2013, as planned.[10] Instead, in January 2016, the Commission was notified of the public shareholders' plan to grant to the airport operator a €1.1 billion loan and a shareholder guarantee covering additional debt financing of up to €1.1 billion to complete the works. Some six months later, in August 2016, the Commission cleared the public investment package as in compliance with the MEIP.[11] Since then, the opening of the airport has been postponed first until 2017 and then "for some time in 2018".[12]

III. The 2016 Commission Decision

1. Description of the Measure

The new Berlin airport is developed and will be operated by the holding company Flughafen Berlin Brandenburg GmbH (FBB). FBB was founded in 1991 to operate Berlin's three airports and is owned by the Länder of Berlin and Brandenburg (holding 37% of the shares each) and the Federal Republic of Germany (holding 26% thereof). Tempelhof airport was closed in 2008 and Tegel airport will follow suit once the new Berlin airport is open. For now, FBB operates both Tegel and Schönefeld.

The notified measure concerns investments contemplated by FBB's shareholders, amounting to €2.207 billion in total, composed of €1.107 billion to cover new costs for completing the airport and €1.1 billion to extend the capacity. The amount of €1.107 billion will be used to defray: (i) additional costs to improve noise protection following the judgments of the regional higher administrative court of April 2013 and May 2016, (ii) additional costs to improve the fire protection system and, (iii) certain "immediate measures" (like the refurbishment of the northern runway) and risk provisioning. The amount of €1.1 billion will be used for capacity upgrades in view of the ever-increasing demand for air traffic. The to-

6 Staatliche Beihilfe Nr. NN 25/2009 (ex N 167/2009) – Deutschland Finanzierung des Flughafens Berlin Brandenburg International. Commission decision available in the authentic German language, at: <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_NN25_2009> Last accessed on 16 May 2017.

7 See European Commission, Press Release IP/09/757, 13.05.2009.

8 European Commission, decision of 19 December 2012 in State Aid SA.35378 (2012/N) – Germany, Financing of Berlin Brandenburg Airport, C (2012) 9469 final.

9 European Commission, Press Release IP/12/1410, 19.12.2012.

10 See *2012 Commission decision* (n 8), [9].

11 *Commission Decision* (n 2) .

12 See Deutsche Welle of 21.01.2017, " Berlin's delayed Brandenburg Airport will not open in 2017", available at: <http://www.dw.com/en/berlins-delayed-brandenburg-airport-will-not-open-in-2017/a-37224178> Last accessed on 16 May 2017; Deutsche Welle of 06.03.2017, "Berlin's unfinished airport chief steps down", available at: <http://www.dw.com/en/berlins-unfinished-airport-chief-steps-down/a-37770830>, Last accessed on 16 May 2017.

tal financing of €2.207 billion is a combination of two financing instruments which are granted as a 'package': (i) €1.107 billion hybrid financing through a subordinate shareholder loan (quasi equity), and (ii) a 100% guarantee underwritten by the shareholders.

2. Rationale for the Measure

The Commission recalled that the equity injection of €1.2 billion which it authorised in its 2012 decision as a market economy operation was due to unforeseeable events. These were a preliminary injunction of the supreme administrative court of Berlin-Brandenburg requiring a level of noise protection exceeding the applicable legal standards; unexpected planning and construction errors affecting the fire safety system; and extra costs and foregone revenue due to the delayed opening of the airport. Some four years later, little seems to have changed as to the unforeseeable nature of these events.

Specifically, with regard to noise protection, two further judgments were issued by the same court in 2013 and 2016, increasing the applicable level of noise protection. The German authorities conceded that in 2012 a further tightening of noise protection standards could not have been excluded.[13] It is important in this regard that at the time of the Commission's decision (December 2012), the German court had only issued a preliminary injunction (June 2012) initiated by a number of citizens a few months earlier (April 2012). This suggests that the court's judgment was pending. However, they pointed out that FBB had to rely on the legal and administrative requirements existing at the time (as fleshed out in a letter from the Ministry of Infrastructure and Agriculture of the Land of Brandenburg addressed to FBB, dated 15 August 2012) in order to proceed with its works.

The court rendered its judgment in April 2013, heightening the applicable level of noise protection beyond the executive explanations on noise protection measures that were provided in the aforementioned letter from the Ministry. In February 2014, a further letter was addressed to FBB by the competent Ministry, informing it about the anti-noise ventilation systems that had to be installed in eligible households. The cost of these systems exceeded FBB's estimations. The need therefore arose for a new noise protection programme, notified to the Commission in January 2016. In May 2016, the German court adopted yet another judgment on the same issues, whose financial consequences had nevertheless been contemplated by the notified programme.

With regard to the planning and construction errors affecting the fire safety system, the scope of the technical inspection conducted in 2012, after the issues with the fire protection system had been detected, proved to be too narrow and comprehensive inspections revealed further technical flaws. A new survey and technical experiments were therefore conducted, accounting for the necessary modifications and rectifying planning inconsistencies. The notified measure reflects the actual costs to remedy the fire protection issue. In 2012, the technical mishaps that prevented the opening of the airport had been considered unforeseeable in 2009, when State aid was authorised, on the grounds that the construction planning devised by the consortium contracted by FBB had been approved by the German authorities. By the same token, in 2016, the shortcomings of the technical inspection were considered unforeseeable in 2012 on the grounds that the scope of that inspection was determined first by available technical documentation which only later proved "absolutely inadequate" and secondly by the degree of completion of the works, which at the time stood at 95%.

With regard to extra costs and foregone revenue due to the delayed opening of the airport, these pertained to capacity upgrades necessitated by the increase in air traffic, the refurbishment of Runway North and the extension of Taxiway Charlie. Based on updated traffic forecasts, the airport would have to cope with *circa* 32 million passengers per year upon opening in 2017, exceeding the initially planned capacity of 24 million passengers. The under-estimate of actual passenger numbers in 2012 was ascribed to the following unforeseeable factors: the assumed economic downturn that did not occur; the negligible effect on passenger traffic of the new air traffic tax; the expansion of airline hub and long-haul services; the increased feeder traffic; and the endurance of low-cost traffic. Even though the business

13 See *2016 Commission decision*, 6 [19]; *Commission Decision* (n 2) .

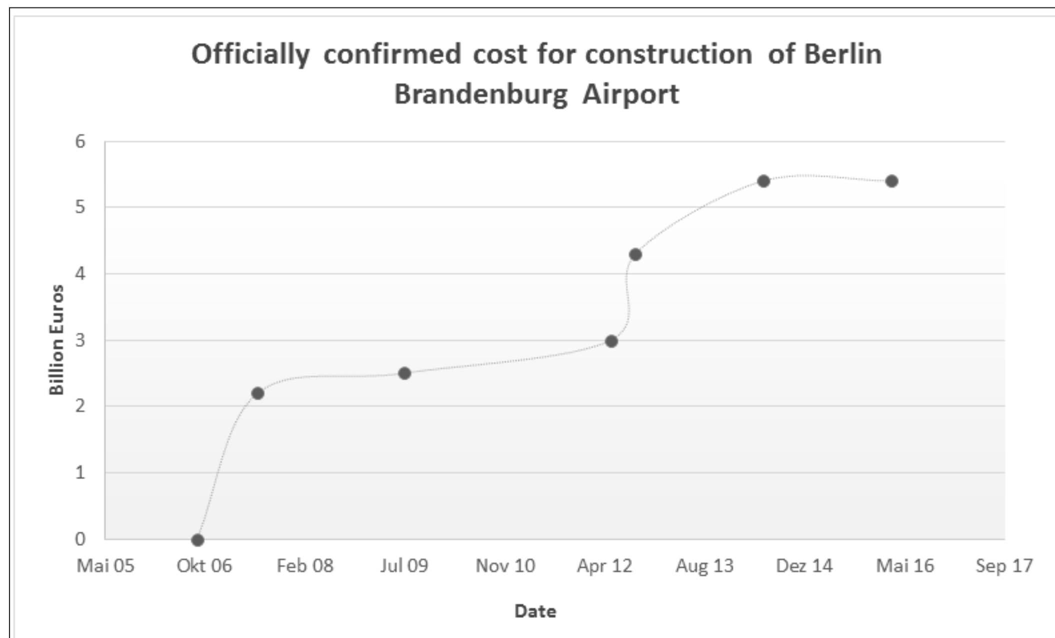

Figure 1: Berlin Brandenburg Airport- Budget
Source: Author's compilation, data extracted from <https://www.flughafen-berlin-kosten.de/> Last accessed on 15 May 2017).

plan of 2012 had anticipated capacity extensions after the opening of the airport, these were expected to be financed from the airport's accrued cash flow. The delay in the opening of the airport, in combination with the increase in air traffic, entailed additional costs, notified to the Commission. By the same token, the 2012 decision had ascribed the longer construction period and reduced revenues due to the delayed opening of the airport to the aforementioned noise protection and fire safety issues and deemed them unforeseeable.

3. Public Shareholders' Decision-Making Process

In February 2015, FBB's shareholders approved a new business plan, contingent on additional financing to the amount of €2.6 billion. As FBB was unable to fund interest and amortisation payment from its own resources, the shareholders considered providing only a guarantee so as to enable FBB to obtain the entire funding from external sources, and they notified the Commission accordingly. However, a month later, the shareholders decided to provide shareholder loans to the amount of €1.107 billion and instructed FBB to consider other options for the remaining €1.49 billion, making shareholder guarantees available if necessary.

The terms of the intended guarantee were set after a tender procedure, in which FBB approached 19 banks about providing a loan of €2.5 billion. None of them was willing to provide a loan without a 100% guarantee. Eventually, FBB's shareholders decided to take out a loan to the amount of €2.5 billion in order to refinance the existing consortium-loan of €1.4 billion, as well as to complete the funding needs identified in the business plan.

According to Germany, the whole funding package is aid-free. The quasi-equity character of the shareholder subordinated loan is a means to provide longer-term financial coverage for up to 20 years while emphasising the temporary character of the financing. The shareholder guarantee is a lesser burden on the liquidity of public shareholders than the outright provision of capital through equity or debt and allows FBB to benefit from loan interest rates being at an all-time low. It should be mentioned that,

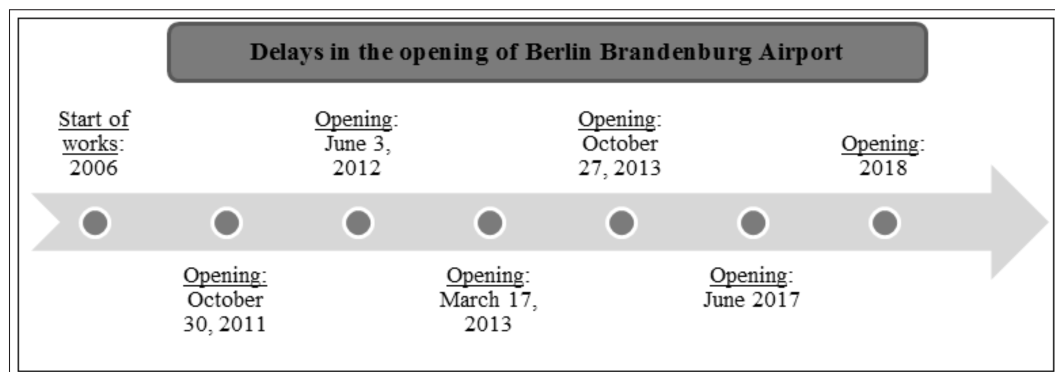

Table 1: Berlin Brandenburg Airport - Timeline
Source: Author's compilation.

in order to enhance project return, the shareholders did not increase the guarantee fee charged under the previous guarantee.

4. The Commission's Legal Assessment

The Commission first examined whether the notified measures could be severed from the State aid previously granted to FBB. Even though in its 2012 decision it found no State aid, it examined the severability of the 2016 measures from the 2009 State aid measures in the light of its reasoning in the 2012 decision. Thus, it found that the notified measures can be assessed separately from the 2009 measures given the lapse of time since 2009 and the fact that, between the 2009 aid measure and the notified measures a capital injection had been made which, pursuant to the 2012 decision, did not constitute State aid as it was related to costs and risks arising from unforeseeable events.

The Commission then moved on to apply the private investor test on the shareholder guarantee to refinance the €1.4 billion loan authorised in 2009. It found that the restructured loan was the economic continuation of the previous loan; the guarantee covering it constituted State aid without which the previous loan could not have been obtained; the same public bodies that underwrote the previous guarantee would also underwrite the new one; and the guarantee fee remained unaltered. The Commission next recalled the *ING* case, in which the Court found that, when a Member State agrees to amend the terms under which a measure of compatible aid has been granted, that amendment may not constitute aid if a market economy investor would also have agreed to such an amendment in similar circumstances. The Commission found, without further ado, that *ING* applies in the case at hand. Thus, the guarantee was found to be a new measure amending an existing compatible aid measure, which a rational private investor would take.

In applying the private investor test to the shareholder guarantee for new debt and the quasi-equity injection, the Commission considered that it would first have to examine the predictability of the cost increases, namely whether FBB, after the 2012 decision, faced unpredictable circumstances and responded in a manner similar to that of a market economy operator in similar circumstances. The Commission found in the affirmative regarding all technical and legal issues, aligning itself with the rationale of the German authorities.

Specifically, regarding the fire protection system, the Commission found that the technical flaws could not have been anticipated given that the risk provisions included in the 2012 business case seemed adequate at the time; the business case passed the Commission's sensitivity check; and FBB took the necessary measures to address the issues after they manifested themselves. Regarding noise protection, the Commission found that, although FBB and its shareholders were aware that their interpretation of the factual and legal situation could be challenged in the future, they could not be expected to anticipate the course of legal action and the judgments ultimately

rendered. Concerning capacity upgrades, the Commission found that neither the growth of Berlin air traffic beyond the forecasted levels nor the delay in the opening of the airport due to the unforeseeable technical problems could have been foreseen. Lastly, regarding runway and taxiway refurbishments, the Commission considered that these could not have been foreseen in 2012 since the need to advance these investments was a corollary to the delay in the airport opening and the unexpected traffic growth.

Having concluded that the necessity to grant the notified measures was not foreseeable in 2012, the Commission turned next to the compliance of the shareholder guarantee for new debt with the MEIP and in particular with the Guarantee Notice.[14] The Commission paid special attention to FBB's rating evaluation by Moody's in February 2016. The latter assigned it an issuer rating of A1 based on the expectation that the shareholders would continue to step in with financial support, the fact that more than 90% of its indebtedness would continue to be covered by guarantees from its shareholders, and FFB's very high indebtedness and weak financial profile reflected in a Baseline Credit Assessment of b3. In order to determine whether a market-oriented price was paid for the guarantee in the absence of close comparators, that is to say similar guarantees provided by a private party to FBB, the Commission followed the rate differential approach, in line with the Guarantee Notice. To estimate the risk margins of the loan with the State guarantee and without the guarantee, it considered, first, market data in the form of credit default swap (CDS) spreads, second, the loan margins published in its Reference Rate Communication and finally it performed direct benchmarking with CDS rates. All results were below the minimum guarantee premium charged by the public shareholders, rendering the transaction conform to the market.

Lastly, the Commission applied the private investor test to the shareholder loan, which it qualified as a quasi-equity instrument rather than a debt-financing one on the basis of the 20-year duration of the loan, the performance-related payment schedule, the absence of collateralisation, the level of subordination, and the possibility of a subsequent conversion into pure equity. Having regarded the loan as an equity injection, it then examined its effect on the equity value of FBB. The Commission structured its analysis around three main scenarios that a hypothetical private investor would consider, and examined the equity value of the company under each scenario. These were the following: a 'base scenario', whereby the new airport would be put into operation with augmented passenger capacity; a 'completion as planned' scenario, whereby capacity upgrades would be implemented only after opening; and a 'discontinuation of the project' scenario, whereby the project would be abandoned.

The Commission concluded that the equity value in the base scenario – the one preferred by FBB's shareholders - was significantly higher than the equity values in the counterfactual scenarios. To confirm that the base scenario was indeed the preferred one in terms of profitability, the Commission subjected it to sensitivity analyses, whereby it established that, even under the most pessimistic assumption, the equity value in the base scenario was still positive. On the basis of these results, the Commission concluded that the quasi-equity injection was market-conform.

IV. Commentary

1. General Remarks

Commenting on the Berlin Brandenburg Airport Commission decision is no easy task if one is a jurist. This is because there is little law in this decision. It suffices to mention that the only legal basis on which the Commission relied to carry out its analysis (apart from Article 107 TFEU and the Procedural Regulation[15]) is the Guarantee Notice.[16] The 2016 Notice on the Notion of Aid was only invoked once and this in passing, with no analysis conducted thereunder.[17] The 2014 Aviation Guidelines slipped the Commission's attention altogether.[18] The same applies to the case law of the European Union Courts with the invocation only of the *BP-Chemicals* judgment (stan-

14 European Commission, Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155/10, 20.06.2008.

15 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TEFU, OJ L 248/9, 24.09.2015.

16 *2008 Commission Notice* (n 15).

17 *2016 Commission Notice* (n 1).

18 2014 *Aviation Guidelines* (n 3).

dard as it may be in the context of severability)[19] and the *ING* judgment, a case with a completely different set of facts, time frame and overall philosophy.[20] The Commission seems to consider that the mere invocation of the *ING* judgment in particular is a sufficient substitute for its reasoning in the context of the issue discussed.

Another striking feature of the decision is that, arguably, it consists of two disjointed parts: Part 2 provides an accurate and objective description of the measure, which, however, raises a plethora of questions and counter-arguments that the reader expects to see addressed in due course; Part 3 is concerned with the assessment of the measure and it is at this very place that the Commission's analysis is deployed and where one expects to find the answers to the questions and counter-arguments raised earlier. However, when reading the decision one gets the feeling that the two parts are separate and no effort has been made to align them. This suggests that the Commission endorses the statements made in Part 2.

2. Specific Remarks

The aforementioned general remark about the weakness of the Commission's legal analysis can be seen, in the first instance, in its analysis of the concept of severability. In the section of the decision discussing the severability of the notified measures from the State aid measures approved in 2009, the Commission finds that the new notified measures can be assessed separately from the 2009 State aid decision.[21] To support this finding, it relies on its reasoning in the 2012 decision even for the refinancing of the €1.4 billion guaranteed loan authorised in 2009, a measure that did not exist at the time of the 2012 decision. Having broken the link with the 2009 decision, not by the application of the *BP-Chemicals* judgment (as it should have done),[22] but by applying its own reasoning in the 2012 decision, in the next section, discussing the application of the MEIP to the €1.4 billion guaranteed loan authorised in 2009,[23] it re-establishes that link via the *ING* case.[24] Thus, whilst on the one hand it considers that the new shareholder guarantee to refinance the 2009 loan can be severed from the 2009 guaranteed loan, on the other hand, it finds that the new measure amends the terms of the old measure and achieves more beneficial terms.

It is worth mentioning, in this regard, that the shareholder guarantee to refinance the 2009 loan is a new measure (to be distinguished from the concept of "new aid" under the Procedural Regulation),[25] whose object is "an existing aid" within the meaning of the Procedural Regulation.[26] This distinction seems to have been blurred by the Commission's wording. Thus, whilst in paragraph 45 it states that "the notified new measures can be assessed separately from the State aid measures that were approved by the 2009 decision", in paragraph 47, it states that "the restructured loan by nature is the economic continuation of the previous loan". Subsequently, in paragraph 49, by application of the *ING* case, it finds that "the guarantee provided by shareholders to cover the refinancing of the EUR 1.4. bn loan is a new measure amending an existing compatible aid measure" and that "it is rational for FBB's shareholders to grant a 'new' (sic.) 100% guarantee to cover the 'new' (sic.) EUR 1.4 bn loan resulting from the refinancing operation". Arguably, this wording and punctuation creates confusion, as it suggests that the guarantee for refinancing is both a new measure, which can be severed from the 2009 measure, and a new measure, which cannot be severed from the 2009 measure, but can be justified by application of the MEIP.

The Commission's anxiety to break the link with the 2009 State aid decision, but maintain it with the 2012 non-aid decision is manifest also in its MEIP analysis of the shareholder guarantee for new debt and the quasi-equity injection. Throughout the decision, the Commission relies on the false premise that the occurrence of unforeseeable events suffices for the private investor test to be passed. This presumption stems from its 2012 decision, where the costs and risks under consideration were deemed unforeseeable, justifying the shareholders' capital injec-

19 Case T-11/95 *BP Chemicals Limited v Commission* [1998] ECR II-3235.

20 Joined Cases T-29/10 and T-33/10 *Netherlands and ING v Commission,* judgment of 2 March 2012, ECLI-98.

21 See section 3.1.

22 *BP Chemicals* (n 20).

23 Section 3.2.

24 *ING* (n 21).

25 See Article 1(c) of *Regulation (EU) 2015/1589* (n 16).

26 See Article 1(b) of *Regulation (EU) 2015/1589* (n 16).

tions. By the same token, in its 2016 decision the Commission makes the application of the private investor test contingent on the issue of predictability of cost increases. It thus introduces a separate section on the issue of predictability - prior to applying the private investor test - to establish whether the cost increases were foreseeable or not, the suggestion being that, in the affirmative the MEIP is not met, whereas in the negative it is.[27]

The Commission's take on the issue of predictability is bizarre. It effectively suggests that private investors are shielded from unforeseeable events. This is a dangerous presumption since it opens the door to the provision of blanket risk capital. Looking at the Commission Notice on the notion of State aid, the issue of predictability is discussed in the context of severability.[28] Indeed, the private investor test is a rationality test rather than a predictability one. It is difficult to see how what was deemed unforeseeable at the time of the 2012 decision remained unforeseeable until the time of the 2016 decision. There is not a single issue tackled in the 2016 decision which was not manifest at the time of the 2012 decision. Whether the risks assumed in 2012 manifested themselves in 2016, affecting the profitability of the beneficiary, is equally irrelevant in the context of the private investor test, since the latter is also not a profitability test.[29]

Even though the Commission severed the 2016 measures from the 2009 State aid measures, it is interesting to compare the way it applied the private investor test to the shareholder guarantees authorised in 2009 and in 2016. In both cases, the law applicable is the Guarantee Notice.[30]

Looking first at the 2009 Commission decision, the Commission paid special attention to the cumulative conditions that have to be fulfilled under the Guarantee Notice to rule out the presence of aid and, in particular, the condition that the guarantee does not cover more than 80% of the outstanding loan or other financial obligation and the condition that a market-oriented price is paid for the guarantee.[31] The Commission established the presence of an advantage since the State guarantee covered 100% of the outstanding loan and the market price of the guarantee was not paid.[32] Subsequently, to authorise the guarantee as compatible State aid, it examined the specific nature of the transaction, in line with the Guarantee Notice, which provides that "in order to ensure that the lender has a real incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness, a percentage of at least 20% not covered by a State guarantee should be carried by the lender. Any derogation has to be duly justified by the Member State, for instance on the basis of the specific nature of the transaction".[33] The factors that mattered to the Commission's assessment were the large magnitude of the infrastructure project, the long amortisation period leading Germany to envisage 2036 in its return valuation and the 25-year duration of the loan. On this basis, the Commission authorised the guarantee as compatible State aid.[34]

Looking at the 2016 Commission decision, even though the shareholder guarantee for new debt covered 100% of the underlying loan, the Commission completely disregarded the 80% threshold set by the Guarantee Notice. Thus, it did not explain why a derogation was justified in this case. Instead, it stated that "the Guarantee Notice is based on the principle that the borrower obtains an advantage through State resources if it does not need to pay an appropriate premium to cover the risk associated with a guarantee that is provided by the State" and conducted its analysis in the light of the condition of a market-oriented price exclusively.[35] This discrepancy suggests that the guarantee granted in the year 2009 (some two and a half years before the envisaged opening of the airport and with no technical and construction faults discovered) was riskier than the guarantee granted in the year 2016 (some five years after the envisaged opening of the airport and amidst a maelstrom of problems), hence the qualification of the former as a State aid and the latter as a normal market operation. This finding, however, does not sit well with the fact that in 2009 FBS was able to borrow from the banks the total amount of the loan needed (€ 2.4 billion) without State guarantee, whereas in 2016 it was

27 See section 3.3.1.

28 See *2016 Commission Notice* (n 1), [81].

29 See *2016 Commission Notice* (n 1), [76].

30 *2008 Commission Notice* (n 15).

31 See section 3.2. (c) and (d).

32 See *2009 decision* (n 6), [55].

33 See section 4.1. (c).

34 See *2009 decision* (n 6), section 4.1.3.

35 See *2016 decision* (n 2), section 3.3.2.

unable to borrow more or less the same amount (€ 2.5 billion) without a 100% State guarantee.[36]

Examining more closely the treatment that the Commission afforded to the condition that a market-oriented price is paid for the guarantee in its 2009 decision and its 2016 decision, a number of differences can be discerned, the most notable being the length of the analysis. In the 2009 decision, the aid element of the guarantee was established in three brief paragraphs.[37] By contrast, in the 2016 decision, the aid-free character of the guarantee was established in three pages.[38] On the face of it, this is intelligible since, in 2009, the Commission was aware of the interest rate that the market would charge without the guarantee and all it had to do was to compare it with the interest rate that the market would charge with the guarantee to establish the difference (taking into account also the premium paid for the guarantee).[39] By contrast, in the 2016 decision, there was no close comparator for the market interest rate to consider, since no bank was willing to provide the loan without a 100% guarantee. As a result, the Commission had to conduct a thorough analysis in line with the Guarantee Notice.[40]

However thorough the Commission's analysis may be regarding the methodology followed, it is cryptic regarding the rates, risk margins and premiums considered, all relevant figures having been redacted as confidential. By and large, this is not an innovation of the 2016 decision, but a trait of all Commission decisions on BBA (2009, 2012 and 2016). Therefore, it is impossible to assess the validity of these figures. This notwithstanding, it may be worth focusing on the Commission's take on FBB's rating evaluation.[41] In the 2009 decision, the Commission stated that FBS was not rated, but, according to the German authorities, its credit worthiness was similar to a "BBB" rating.[42] In the 2012 decision, the rating of FBB was not disclosed, the Commission stating: "[T]he rating of FBB is between [...] and [...]. The chosen rating of FBB (i.e. [...]) is [...] than the rating of BBB, which was acknowledged in the 2009 Commission decision".[43] Six months before the 2016 decision, the rating agency Moody's assigned an issuer rating of A1 to FBB, reflecting: (i) the expectation that the shareholders will continue to step in with timely financial support, (ii) that more than 90% of its indebtedness will continue to be covered by guarantees from its shareholders, and (iii) FBB's very high indebtedness and weak financial profile on a stand-alone basis reflected in a Baseline Credit Assessment of b3.[44] In its analysis, the Commission took into account the rating of A1.[45] Even though it acknowledged that this rating is a "free ride", so to speak, [46] it assured itself that the envisaged fee would remain market conform even if a BBB+ rating had been considered.[47]

If the Commission is right in its assessment and FBB's rating has improved (or stayed the same) since 2009, this should be reflected in the profitability of the company. Comparing the application of the MEIP to the capital injection of € 1.2 billion and the qualified as quasi-equity injection of €1.1 billion authorised as market conform in the 2012 decision and the 2016 decision respectively, a number of differences emerge. Arguably, the most striking difference is that, whilst in the 2012 decision, the Commission disclosed a range of figures pertaining to the equity value of

36 See *2009 decision* (n 6), [60], providing that "without guarantee and on the basis of the proposal of different banks before the beginning of the financial crisis, FBS would have been able to borrow from banks at EURIBOR plus a risk premium of […] basis points for the same loan amount and collaterals (duration 25 years), which can therefore be considered as the specific market interest rate without guarantee" (translation in English provided by the European Commission following a request (in accordance with Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents) for an English language version of the authentic version of the Decision in the German language). See *2016 decision* (n 2), [29], providing that "the terms of the intended guarantee were set after a tender procedure, in which FBB approached 19 banks about providing a loan of EUR 2.5 billion under various possible alternative scenarios: no shareholder guarantee, an 80%, and a 100% guarantee. According to Germany, no creditor was willing to provide a loan without a 100% guarantee".

37 See *2009 decision* (n 6), [59-61],

38 See *2016 decision* (n 2), [64-81].

39 See *Guarantee Notice* (n 15), section 4.2.

40 See *Guarantee Notice* (n 15), section 3.2. (d).

41 *Ibid.*

42 See footnote 27 of *2009 decision* (n 6),

43 See footnote 12 of *2012 decision* (n 8).

44 See paragraph 69 and footnote 32 of *2016 decision* (n 2).

45 See *2016 decision* (n 2), [77].

46 See *2016 decision* (n 2), [70] providing: "As pointed out in the Moody's press release if the rating of any one shareholder deteriorates or the level of support provided by them through guarantees and expected cash injections changes, this will have a downward effect on the rating of FBB".

47 See footnote 27 of *2016 decision* (n 2) providing that "even considering a notching down of about three notches to take into account the expected future public support for FBB included in the A1 rating, the envisaged fee is market conform".

the company in the context of the various scenarios considered, in the 2016 decision, there was no such disclosure, all figures having been redacted. This is all the more peculiar considering the wideness of the range of figures disclosed in 2012, being € 2-7 billion in the basic scenario,[48] € 0.5-2 billion in the counterfactual scenario,[49] € 4-10 billion in the best case scenario of the sensitivity analysis[50] and € 1.2-5 billion in the worst case scenario of the sensitivity analysis.[51]

In addition, when comparing the various scenarios in the light of the MEIP, the Commission seems to have applied a different logic in its decisions. In the 2012 decision, it stated that the public shareholders act in line with the MEIP only if they select the option which maximises their shareholder (equity) value. Consequently, it compared whether the equity value in the basic scenario was larger than the injected amount and larger than the equity value under the counterfactual scenario.[52] Having established that that was the case, it declared the capital injection market conform.[53] By contrast, in the 2016 decision, although it established that even under the most pessimistic assumption, the equity value in the basic scenario would still be positive, it refrained from pronouncing on whether the quasi-equity injection was larger than the company's equity value.[54] Instead, it stated that "that comparison is to be seen in the light of the evolution of the underlying very large and complex project [...] characterised by a combination of technical and management issues that resulted in delays and cost overruns which in turn required shareholder intervention to remedy these issues".[55]

This differentiation can be seen also in the estimation of the cost of equity, and specifically in the 'beta coefficient' indicating the market risk a company is facing. In both decisions, the Commission deviated from its practice, whereby "in principle, the estimate of the beta coefficient is to be based on a forward looking basis".[56] Instead, it accepted FBB's historical beta coefficients, yet not on exactly the same grounds. Specifically, whilst in the 2012 decision it found that even when considering historical beta coefficients, "the equity value would be larger than the injected amount and larger than the equity value under the counterfactual scenario",[57] in the 2016 decision, it found that "the equity value of the company would still be higher than the equity value under the counterfactual scenarios".[58] This differentiation points to the fact that the quasi-equity injection of €1.1 billion cleared in 2016 was higher than FBB's equity value. Therefore, FBB's profitability must have declined since the time of the 2012 decision, when its equity value was estimated at € 2-7 billion.

One could question further the assumptions underlying the cost of equity. For example, even though in both business plans on which FBB's shareholders based their decisions (i.e. the 2012 business plan and the 2015 business plan),[59] the beta coefficient was based on historical beta coefficients, the German authorities ascribed the difference between the cost of equity in 2012 and the cost of equity in 2015 "to the capital market situation as of 1 January 2015, as well as a modified beta-coefficient, base rate and applicable tax rate".[60] Looking at the decision-making process leading to the financing measures, according to the German authorities, "the shareholders in essence planned that package to benefit from the current favourable climate on capital markets and to reach a long-term financing mix".[61] This seems to suggest that FBB's cost of equity has decreased since 2012. If this is the case, then FBB's profitability must have increased along with its equity value, which in turn raises the question why did not the Commission affirm in its 2016 decision that the quasi-equity injection was considerably lower than FBB's equity value.

Questioning further the assumptions endorsed by the Commission would probably amount to hairsplitting in the absence of concrete data to take into account. What is more, it could best and more safely be done by economic experts. From a legal perspective, even though the Commission has not invoked the 2014 Aviation Guidelines in its 2016 decision, it has stayed loyal to the requirement for economic

48 See *2016 decision* (n 2), [52, 59].

49 See *2016 decision* (n 2), [56].

50 See *2016 decision* (n 2), [62].

51 See *2016 decision* (n 2), [63].

52 See *2016 decision* (n 2), [66].

53 See*2016 decision* (n 2), [69-70].

54 See *2016 decision* (n 2), [120].

55 See *2016 decision* (n 2), [121].

56 See *2012 decision* (n 8), [48] and *2016 decision* (n 2), [100], both citing *the Ciudad da la Luz studios*.

57 *2012 decision* (n 8), [48].

58 See *2016 decision* (n 2), [101].

59 See *2012 decision* (n 8), [39] and *2016 decision* (n 2), [91].

60 See *2016 decision* (n 2), [99].

61 See *2016 decision* (n 2), [32].

analysis when applying the private investor test.[62] However, the Commission's economic analysis does not seem to provide legal certainty regarding the application of the Guidelines and in particular the requirements for "sound *ex ante* profitability prospects", "realistic traffic forecasts" and "reasonable sensitivity analysis".[63] What is "sound", "realistic" and "reasonable" is a matter of legal assessment that the European Union Courts should perhaps reinstate.

V. Conclusion

Since its inception in the 1984 Commission Communication on Government Capital Injections, the MEIP has evolved from a weak and relaxed mechanism of State aid compliance into a tool of rigorous legal and economic analysis.[64] It suffices to compare the application of the principle in the first airline restructuring cases of the late 1980s-early 1990s with its application in the most recent airport infrastructure cases. The State Aid Modernisation initiative culminated in the 2016 Commission Notice on the notion of State aid, an instrument that crystallises decades of experience in EU State aid control and illustrates in the clearest manner the efforts of the European Commission to shield itself from political pressure, endemic in State aid cases, and promote European integration.

The 2016 Berlin Brandenburg Airport decision presented the Commission with a unique opportunity to apply its rules on the MEIP, as summarised in its recent Notice, to a high-profile case that has attracted wide media coverage. Arguably, the Commission did not live up to the expectations that it created with its State Aid Modernisation programme. It is regrettable that, in the decision in question, transparency has been mixed up with professional secrecy, consistency with severability, predictability with risk capital, safe harbours with traffic forecasts, in short, a market economy operation with a State aid. Since judicial control is no longer possible, it is at least hoped that the decision will not be used by the Commission as a point of reference for its future decisional practice.

62 See *Aviation Guidelines* (n 3), [51].

63 *Ibid.*

64 See Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, Bulletin EC 9-1984, point 3.2.