

KEEP TEGEL OPEN

Legal and economic analysis commissioned by
Ryanair

June 2017



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KEY FINDINGS

- Growth projections used in the decision to close Tegel have proved very wrong
 - Planning forecast for 2015 was 23.2 mppa; actual number was 29.5 mppa
 - Planning forecast for 2023 was 30.6 mppa; in 2016, there were already 33 mppa
- Immediate capacity shortfall will result from the closure of Tegel
 - BER capacity is 28 mppa at most; in 2016 there were already 33 mppa
 - BER runway capacity is 62 peak movements; Tegel and Schönefeld combined handled up to 68 peak movements in 2016
- Berlin underperforms in aviation versus other European cities
 - Current passenger volumes could easily be 40 mppa benchmarked against other European cities
 - Traffic is suppressed by capacity constraints and airlines' strategies, most significantly Lufthansa's focus on Frankfurt and Munich and its use of Berlin as a spoke on their network.
 - London has 6 airports (traffic of 160m), Paris has 4 airports (traffic of 100m). Dublin (1.2m population, 28 mppa); Copenhagen (1.3m population, 29 mppa); Barcelona (3.2m population, 44 mppa); Madrid (3.2m population, 50 mppa); Berlin (3.5m population, 33 mppa)
- Berlin has huge potential to grow aviation further
 - 56 mppa achievable by 2030 if capacity constraints are removed and 90 mppa by 2050
 - Low-cost airlines will deliver connectivity if capacity available at competitive rates; new aircraft, B787 and A350, and new operating models (e.g. Norwegian, Level) open low-cost long-haul options
 - Tegel can support low cost long-haul in addition to BER
- London experience shows that competition between airports leads to more passengers, more jobs and more consumer benefits
 - Passengers in London grew 10% faster after monopoly break-up
 - Cost competitiveness, service quality, and connectivity improved. Capacity gain (without wasteful capex) and improved commercial engagement
 - Tegel and BER can compete without changing ownership structure
 - Existing price differential is beneficial to competition; BER monopoly means higher prices and disadvantage to low cost carriers
- Tegel can be kept open through 'revocation of revocation' decisions
 - 'Political landmark decision' required
 - Closure of Tegel is not a legal requirement of BER planning
- Massive job creation potential through aviation which is supported if Tegel were to be kept open
 - Growing traffic to 56m will generate in excess of 15,000 new airport jobs compared to today
 - Significant disruption to the 12,000 workers who currently work at Tegel if it closes
- No building development plans for Tegel have been decided upon
 - The alleged need to provide for additional construction sites was never an argument in favour of closing Tegel.

- Airlines show strong support in keeping Tegel open:
 - Airlines emphasise that Tegel can be used as a long-haul hub.
 - Norwegian could locate up to 5 long-haul aircraft at Tegel.
 - Ryanair has delivered 5m passengers in 2015/2016 and has committed to grow to 11m in next 3-5 years if Tegel is kept open.
 - Ryanair estimates that there would be €3bn additional tourism spend every year if Tegel remains open and traffic grows to 56m
 - Condor argues that BER is 'probably much too small... One has to be willing to rethink.'
 - IAG says: 'Closing Tegel would lead to a capacity crunch that would lead to a loss of services and connectivity for Berlin.'

EXECUTIVE SUMMARY

Background – the ‘single airport concept’

Berlin’s unique history has had an impact on how its system of airports has evolved over time. During its occupation by the four Allied powers, five different airports were in operation, primarily for military purposes. At the start of the present century three of these airports were still operating: Tempelhof (THF), Tegel (TXL) and Schönefeld (SXF).¹

However, following reunification in 1990 there was a desire for Berlin and the Brandenburg region to have a larger airport which could better handle future demands for commercial aviation. The ‘single airport concept’, decided upon in the so-called ‘consensus decision’ in 1996, envisaged that a new airport, an expansion at the Schönefeld site, would handle all commercial aviation in Berlin and that the city’s other airports would close. It was decided that Tempelhof would close once the expansion plans at Schönefeld were approved, and that Tegel would close once both runways at the Schönefeld site were opened.

Construction at the Schönefeld site began in 2006, with Tempelhof eventually closing in 2008. The new airport, Berlin Brandenburg International (BER), was originally scheduled to open in 2010. However, after a series of delays it has still not opened, and the eventual opening date is still unclear. For this reason, the conditions which would have led to Tegel closing – BER opening – have not yet materialised, and it remains open.

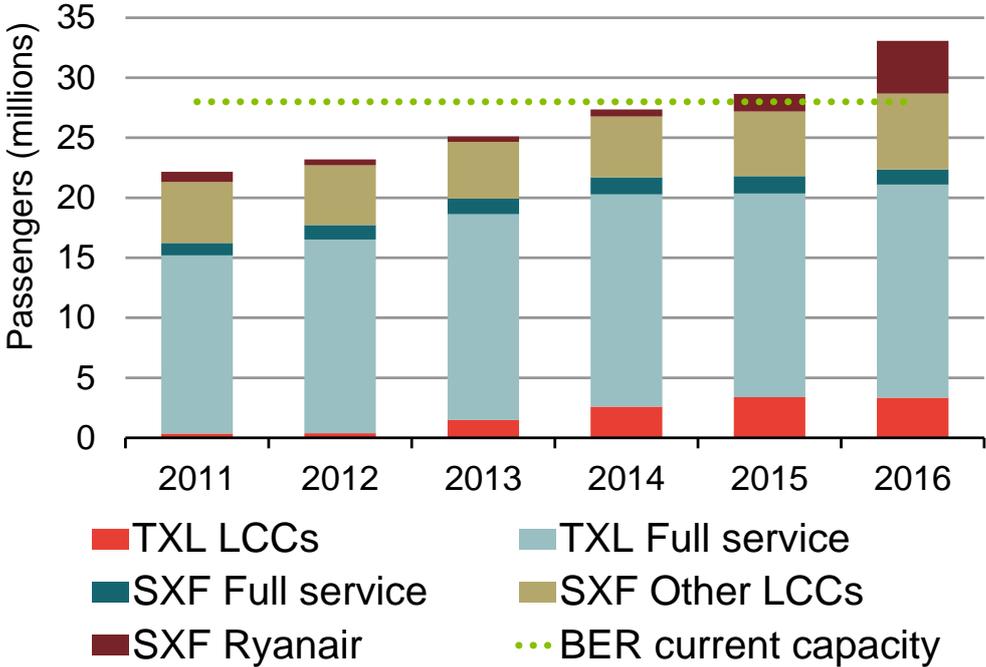
If BER were open today it would already be constrained

Berlin demand is now very different to what was envisaged when the idea for BER was originally conceived. In BER’s 2004 planning approval decision it was forecast that demand in Berlin would be around 23 million passengers in 2015 and around 30 million passengers in 2023. Built to satisfy this anticipated level of demand, BER currently has capacity for 27-28 million passengers per annum (mppa) at most, with further planned expansions that would increase capacity to 45 mppa.

However, in 2016, total demand at Tegel and Schönefeld combined was already more than 33 million passengers. In other words, if BER were open today and had to handle all of the city’s demand then in its current form it would already be constrained.

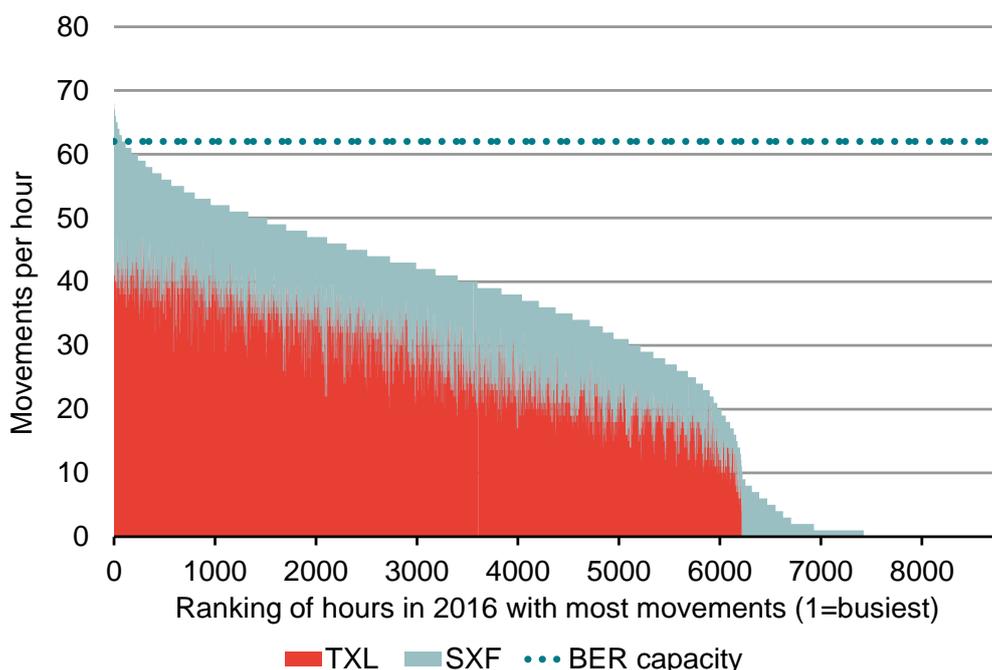
¹ These were located in the American, French and Soviet sectors respectively. Johannisthal Air Field was also located in the Soviet sector, but closed in 1952. The smaller Gatow airport was located in the British sector and was closed in 1995.

Figure 1 Demand has grown rapidly



Source: Frontier analysis based on OAG data. LCC = Low cost carrier

Also, considering capacity on a ‘passengers per annum’ basis overlooks the point that airports (like other networks) should be dimensioned to handle demand during peak hours. This includes having sufficient runway capacity, terminal capacity, gates, air bridges and remote stands, amongst other things. BER has runway capacity for 62 movements per hour. However, as the figure below shows, which ranks movements per hour in total at the Berlin airports from busiest to least busy, Tegel and Schönefeld combined already handle up to 68 movements per hour at their peak. This is a further indication that BER would already struggle to handle Berlin’s current demand – let alone its future demand.

Figure 2 Total movements already exceed capacity at BER

Source: Frontier analysis based on 2016 OAG data Notes: We have examined schedules data and ranked each hour from the busiest to the quietest in terms of the number of combined movements at TXL and SXF. In the busiest hour there were 68 movements in total (41 at TXL and 27 at SXF). In the 1,000th busiest hour, there were 52 movements in total (41 at TXL and 11 at SXF). In the 2,000th busiest hour, there were 47 movements in total (41 at TXL and 6 at SXF), etc.

Total passenger volumes have grown by 8% per annum on average since 2011 – considerably above what would have been expected at the start of the period if traditional demand forecasting techniques had been used. This growth has been driven by LCCs, which in turn has been facilitated to a significant extent by the fact that Berlin currently offers a differentiated airport market.

Although both Tegel and Schönefeld are now operated by Flughafen Berlin Brandenburg GmbH (FBB) (whose shareholders are the federal states of Berlin and Brandenburg and the Federal Republic of Germany), the two airports offer different facilities and a different level of departing passenger charge (DPC). Schönefeld charges are 25%-35% lower than the corresponding charges at Tegel. This situation means that there is currently some element of de facto competition between the Berlin airports which enables airlines to tailor their offerings and to target different customer segments.

Under the current legal requirement, the opening of BER would trigger the closure of Tegel by way of revoking both its operation permit and its planning approval decision. Under the current plans, there will be uniform charges at the older Schönefeld terminal building and the newer BER terminal, with charges at the older Schönefeld terminal rising to cross-subsidise those at the newer terminal. This would remove the de facto competition which exists between Schönefeld and Tegel today.

The rapid growth in passenger traffic in Berlin, in the context of a differentiated local airport market raises questions for the future if Tegel were to close. In particular:

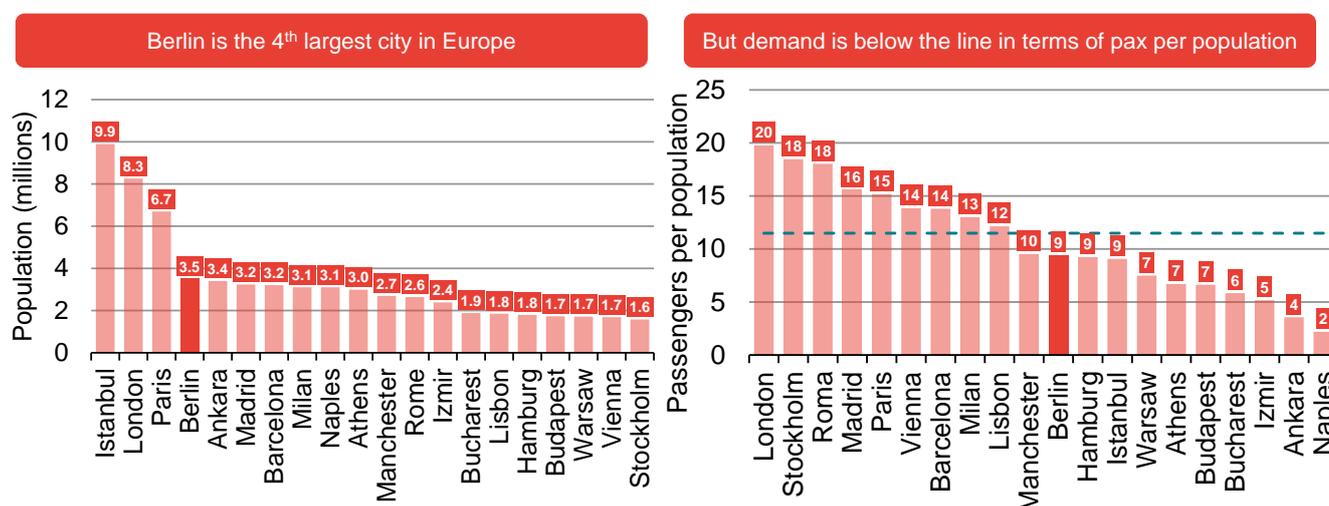
- Will BER alone have sufficient capacity to meet the growth potential that is present in the Berlin region?
- Would a one-size-fits-all approach to airport provision in Berlin best serve the interests of passengers and make the most of the existing growth potential?
- Could it restrict airline operating models, reduce choice and further exacerbate the pressure towards higher fares?

There is significant further growth potential

There is evidence to suggest that Berlin demand is significantly below what could be expected for a city of its size and importance. It is the capital city of Germany – Europe’s richest country in terms of total GDP – as well as the most populated city in Germany, and the fourth most populated city in Europe.

However, compared to the top 20 most populated cities in Europe, Berlin’s total demand for air travel is below what could be expected. There were around 9.4 passengers per capita in Berlin, compared to the sample average of around 11.5. If Berlin were to just move up to the sample average, then this would imply that it would handle around 40 mppa – 7 million greater than today, even after the growth of the last five years. And this would just bring Berlin demand in line with the sample average. For a city of its size and importance, it could realistically be expected to handle even more.

Figure 3 Berlin demand could be as high as 40 mppa



Source: Frontier analysis based on data from Eurostat Regional Yearbook 2015 and various sources including ACI for passenger volumes

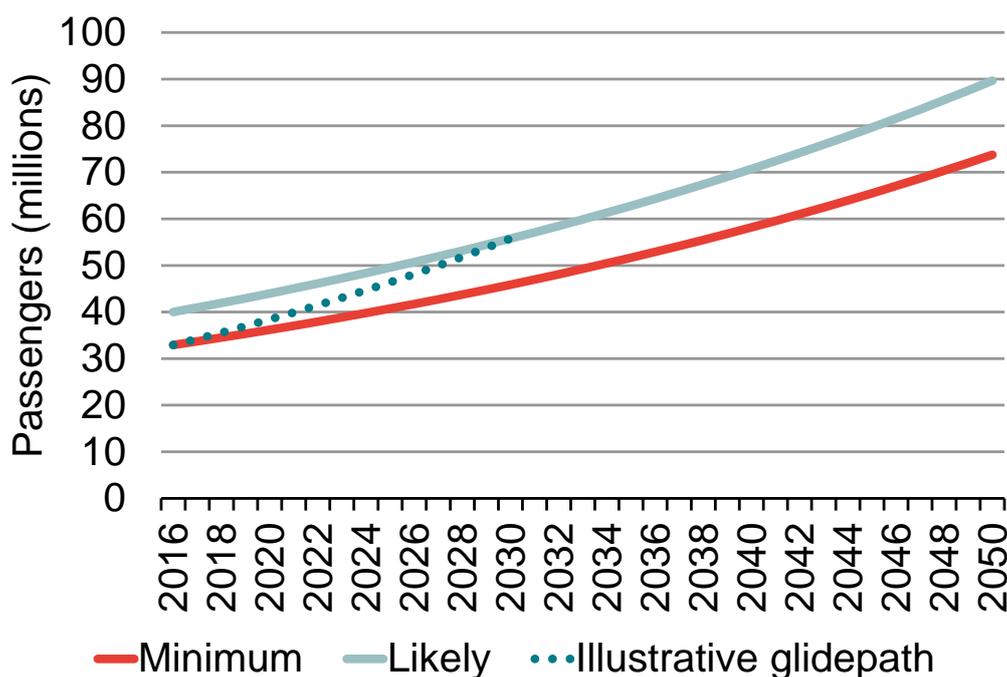
The recent growth in demand is indicative of the fact that the Berlin market is thriving. But it is also consistent with the view that Berlin is now ‘catching up’ to where it should be. This suggests that there is further scope for demand catch up, on top of the more general income-based organic growth which we would expect to happen anyway. This is important to take into account when forecasting future demand in Berlin. Otherwise, stakeholders may be underestimating the seriousness of capacity constraints going forward.

To consider the potential for capacity constraints going forward we have carried out congestion modelling based on two future demand scenarios:

- The **minimum case** scenario – this is a very conservative forecast where we extrapolate Berlin demand from current passenger volumes based on general income-based organic growth. This is the minimum growth that could reasonably be expected in Berlin, assuming that all catch up potential had already been fulfilled; and
- A **likely** scenario – in this scenario we add ‘demand catch up’ on top of the more general income-based organic growth. We believe that if Tegel remains open, enhanced airport and airline competition in the Berlin region will very likely be able to bridge the gap between today’s traffic levels and this higher figure.

Our forecasts are illustrated below, where overall demand converges on the higher trend line over a number of years. We have focussed on 2030 as the main year of our modelling analysis – where Berlin could be expected to handle as many as 56 mppa. (The exact shape of the glide path does not impact our modelling results).

Figure 4 Berlin demand could be as high as 56 mppa in 2030 and 90 mppa in 2050



Source: Frontier analysis

And looking forward to a longer time horizon, passenger growth is expected to continue and will likely rise to 90 mppa in 2050.

Enhanced airport competition would drive the higher growth

The likely scenario is extremely credible, in the absence of airport capacity constraints, because LCCs still have great scope to increase their presence in Berlin. While this outcome relies on their being enough airport capacity to meet

this latent demand, it is also much more likely to be achieved in an airport system with multiple airports that provides choice to passengers and airlines.

There is supporting evidence of this view from the UK. In 2009, the (then) UK Competition Commission (CC) completed a market investigation which found that there was ‘no competition’ between the seven UK airports owned by BAA. One of the CC’s remedies was to oblige BAA to sell off three of its airports. By 2014, BAA had sold off six airports including Gatwick and Stansted. A 2016 review by the CC’s successor, the Competition and Mergers Authority (CMA) reported that there had been considerable benefits.

BENEFITS FROM AIRPORT COMPETITION IN LONDON

- **Passenger growth:** Passenger numbers at the divested airports grew c10% faster since 2009 than comparable UK airports even controlling for airport specific factors;
- **Service:** There was a significant improvement in service quality at Gatwick, and Heathrow’s service quality has reached an historic high;
- **Route choice:** Airports have increased their efforts to attract additional airlines, routes and flight frequencies;
- **Airport charges:** Gatwick and Stansted agreed long term competitive deals for airport charges with their major customers and new charging structures including seasonal discounts and incentivising higher utilisation increased passenger volumes;
- **Airport community and stakeholder engagement:** Airports have developed stronger relationships with local communities.

These findings are illustrative of the types of dynamic benefits that arise from having competing airports. These are benefits that could be lost to Berlin if it centralises its airport provision at BER with a uniform set of airport charges and insufficient capacity. By contrast, keeping Tegel open, and further maintaining it as an independently managed airport could help to retain and enhance these benefits. Tegel would not necessarily need to be privatised for these benefits to be realised. Tegel and BER could continue being publicly owned, but operated independently.

Another reason which has limited Berlin demand to date has been Lufthansa’s strategy to focus its hub traffic on Frankfurt and Munich. It is doubtful whether focussing all Berlin traffic on BER will do anything to change Lufthansa’s current strategy. Indeed, if opening BER results in capacity constraints then any such change in strategy is very unlikely.

By contrast, LCCs have shown significant ambition to grow Berlin traffic. Ryanair has stated publicly that it will add a further 5mppa to the Berlin market if Tegel stays open. Furthermore, new generation aircraft like the B787 and the A350 are facilitating a new breed of low cost long haul services (such as those offered by Norwegian), which could also benefit from an open and independently controlled Tegel – as they have done at Gatwick in competition with Heathrow.

There is also significant concern that BER may not be operated on an even handed basis for all carriers. LCCs may be required to operate from the older Schönefeld terminal while Lufthansa will operate from the new facility. This would create a competitive disadvantage for the LCCs because the facility is of lower quality, and it would add up to 10 minutes of additional taxiing time in each direction, which raises the airlines' costs and reduces its competitiveness.

While we cannot know exactly what would develop at an independently managed Tegel, these are illustrations of the sort of new business models that are promoted in a more dynamic airport environment. Keeping Tegel open and independent would therefore secure the capacity needed to meet future demand in Berlin, and actually increase the likelihood that Berlin's current connectivity shortfall would be rectified in the future.

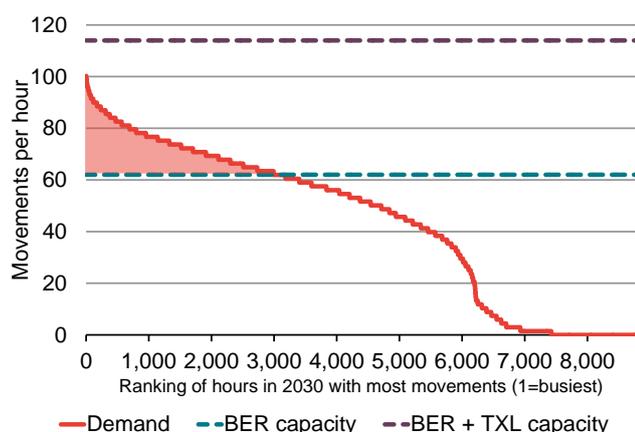
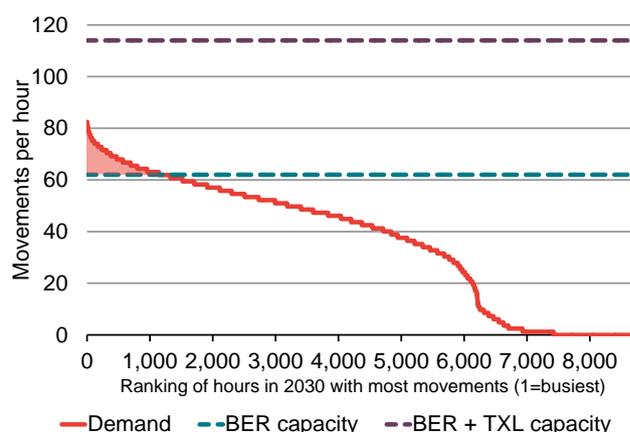
There is a strong economic case for keeping Tegel open

We have carried out congestion modelling to estimate the potential scale of capacity constraints in Berlin going forward. This analysis focusses on runway capacity – i.e. the number of landings and take-offs which can be handled per hour, which we consider to be the most appropriate measure of capacity. Whereas terminal capacity (measured in mppa) can be expanded more easily, e.g. using the old Schönefeld terminal alongside the newer BER terminal, runway capacity is ultimately more fixed and currently limited to two runways. We have chosen 2030 as the focus year of our analysis, and we have considered two capacity scenarios:

- BER only: Total Berlin demand would need to be accommodated at BER only with capacity for up to 62 movements per hour;
- BER + Tegel: Total Berlin demand can be accommodated at both BER and Tegel collectively, with capacity for up to 114 movements per hour (62 at BER and 52 at Tegel).

And we have repeated the analysis for both the minimum and more likely demand scenarios. The charts below illustrate the potential size of the constraints in 2030:

- Under the 'more likely' scenario, Berlin demand will be as high as 100 movements per hour in 2030, compared to capacity of only 62 movements per hour at BER. This means that in the busiest hour of the year, 38 movements per hour would not be able to fly. There would be nearly 3,000 hours in the year where demand would exceed supply – this is equal to around 8 hours per day. (This lost demand is illustrated by the shaded red area in the chart, where demand exceeds runway capacity). However, under the 'BER + Tegel' scenario, where capacity is equal to 114 movements per hour, all of this demand would be able to fly.
- Even under the 'minimum scenario', peak demand reaches 82 movements per hour, meaning that 20 movements would not be able to fly during these peak periods. There would over 1,000 hours in the year where demand exceeds supply – equal to around 3 hours per day. Again, all of this demand could be accommodated at BER and Tegel combined.

Figure 5. More likely scenario 2030**Figure 6. Minimum scenario 2030**

Source: Frontier analysis based on OAG data. The shaded areas in red represent movements that would not be able to take place at BER due to capacity constraints. However, they would be possible under the 'BER + TXL' scenario where BER and TXL are open and operational in parallel.

Capacity constraints lead to many negative impacts:

- Quality of service during peak hours decreases;
- Ticket fares rise – leading to a 'congestion premium';
- Many passengers are priced out of flying;
- Consumer surplus decreases;
- Employment is lower than it otherwise would be (in terms of there being fewer airport jobs, and fewer jobs associated with the reduction in consumer surplus and wider economic benefits); and
- Connectivity is significantly constrained. If demand exceeds supply, by as many as 38 movements per hour, then airlines will not be able to provide the level of connectivity that they would if there were no constraints. Many connections would have to be served with lower frequency, and some connections could potentially be squeezed out altogether. Our analysis has found that the busiest hours, where constraints bind the hardest, tend to occur in the morning between 8am-10am. These slots are especially important for long haul departures to the US and the Americas. This means that if Tegel closes, Berlin will struggle to improve its long haul connectivity.

The table below sets out our results:

Figure 7 Results of congestion modelling 2030 (BER only)

	Minimum	Likely
Total demand (movements)	315,000	383,000
Movements during busiest hour	82	100
Capacity – movements per hour	62	62
Congestion premium during busiest hour	35%	55%
Average number of hours above capacity per day	3	8
Average increase in ticket fares	3%	12%

Source: Frontier analysis

If Tegel remains open, because there would be no capacity constraints all of these negative outcomes could be avoided. More passengers could fly. Ticket fares would be lower.

Capacity constraints will impact negatively on many airports in Europe over the coming years. Eurocontrol reports that by 2035, the number of congested airports in Europe will rise to 30, with many airports experiencing significant delays during peak hours.

Figure 8 Many airports in Europe will become constrained

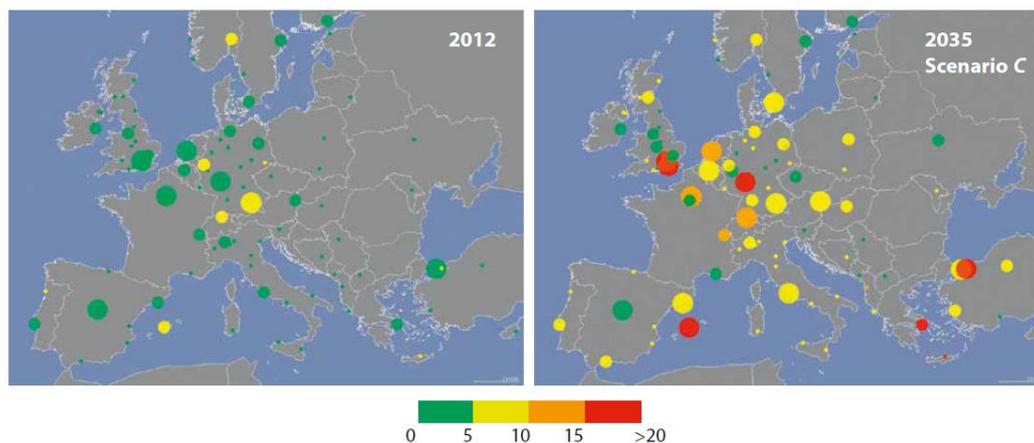


Figure 11. Increasing number of airports with Summer delay (in minutes/flight).

Source: Eurocontrol <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/201307-challenges-of-growth-summary-report.pdf>

Many European cities will either have to tolerate these negative impacts or attempt to add extra airport capacity. Airport expansion is a costly and politically sensitive issue and, as seen in the UK with the on-going debate about expansion in the South East, it can take decades just to get permission to expand, let alone to actually build and open a new runway. By contrast, Berlin finds itself in a unique situation: unlike many other European cities, it does not need to build an extra airport to expand its way out of capacity constraints. It can avoid future constraints by not closing Tegel. Therefore, we find that there is a significant economic case to keep Tegel open.

There are legal channels through which Tegel could be kept open

There is a long-standing misconception that BER's planning approval decision stipulates an obligation for Tegel to close, and that keeping TXL open could therefore potentially undo BER's planning approval. This is incorrect.

While there is indeed a legal obligation to close TXL within six months after BER has become operational, this obligation does not stem from BER's planning approval decision. Rather, it is based on two separate 'revocation decisions' (one referring to the TXL operation permit, the other to the TXL planning approval decision).

TXL can only remain open provided these ‘revocation decisions’ could themselves be removed by way of revoking or amending them. In our view, this is possible.

This applies even though BER’s planning approval decision – although not stipulating an obligation to close TXL – is still based on the assumption that the Berlin Brandenburg region would have one airport only. Permits relating to TXL are independent from permits relating to BER and vice versa.

Under German administrative law, even administrative decisions which – as the ‘revocation decisions’ – have become final and are no longer subject to judicial review may be revoked. In fact, this concept also applied when TXL’s (and THF’s) operation permit and planning approval were ‘revoked’ in the first place. These administrative acts allowing air traffic operations at TXL and defining the TXL site’s function and purpose as an airport respectively had become final and legally binding when the ‘revocation decisions’ were issued.

A ‘revocation’ or amendment of the ‘revocation decisions’ would need to contain a planning decision which weighs up all concerned interests / legal positions and all pros and cons. On top of that, a ‘political landmark decision’ (*politische Grundsatzentscheidung*) favouring keeping Tegel open would be required. In any case, ‘revoking’ and / or amending these decisions requires that the circumstances which led to the decision to close TXL (and to permit BER) have changed significantly in the meantime.

If the ‘revocation decisions’ were removed or amended by way of such decision, in our view TXL’s existing operation permit and planning approval decision would stay valid. This would, however and in contrast to the long-standing misconception, not undo BER’s planning approval decision as this has become final and legally binding and is independent from the permits relating to TXL. Therefore, we do not see any legal basis that BER faces a risk that construction works have to be stopped in case TXL is kept open.

Regardless of their legal feasibility, the legal measures necessary to keep TXL open would probably face declared opposition and resistance from governments and parliamentary majorities. In this regard, it has to be taken into account that:

- public authorities (most likely the Senate Administration for Urban Planning) which have to decide whether to ‘revoke’ or amend the ‘revocation decisions’ have discretionary powers;
- such decision would contain a planning decision and require weighing all concerned interests and legal positions and all pros & cons with the consequence that the exact content of such decision may not be predicted;
- such decision may have to comply with currently applicable law (e.g. flight noise protection requirements);
- other legal measures may have to be taken, including amending the binding regional planning.

Therefore, while there are complex challenges to remove the ‘revocation decisions’ relating to TXL’s operation permit and planning approval, these challenges could be overcome and TXL could be kept open.

1 INTRODUCTION

Over 33 million passengers flew to and from Berlin airports in 2016:

- Berlin Tegel Airport handled around 21 million passengers; and
- Berlin Schönefeld Airport handled around 12 million.

In 2006, construction began at the Schönefeld site to build Brandenburg airport (BER) which will have capacity for around 28 million passengers per annum (mppa) when it opens², potentially rising to around 45 mppa with planned expansions.³ It was originally scheduled to open in 2010, and then rescheduled to open in 2012. However, after a series of delays it has still not opened, and the eventual opening date is still unclear. There is a legal requirement for Tegel to close six months after BER opens. If Tegel closes:

- There would be a significant reduction in airport capacity in Berlin, making capacity constraints more likely going forward;
- There would also be a reduction in passenger choice. Berlin is one of the largest cities in Europe, with Tegel located in the northwest, and Schönefeld and BER both located in the south. Closing Tegel would therefore impact negatively on passenger choice; and
- There would be a reduction in the potential for airport competition. Flughafen Berlin Brandenburg GmbH (FBB) operates Tegel and Schönefeld, and it will be the future operator of BER. While it sets airport charges at all airports, it does set differential rates. For example, the departing passenger charges at Schönefeld are between 25%-35% lower than at Tegel. This differential pricing provides airlines with greater choice to tailor their offerings. This choice would be lost if Tegel were closed.

Ryanair is interested in keeping Tegel open, and has commissioned Frontier Economics and CMS to provide an independent report which answers the following questions:

- What is the legal case for keeping Tegel open?
- What is the economic case for keeping Tegel open?

In the rest of this report we summarise our findings. We find that there is a significant economic case to keep Tegel open, and that, while there may be some legal challenges, there are legal channels through which Tegel could be kept open:

- In **Section 2** we start by summarising the views of a number of airlines expressed to Frontier, and in the press, which give context to the idea that Tegel should remain open.

² It should be noted that the main terminal's passenger capacity has been amended various times between the construction contract has been signed and today. And while the official capacity numbers have increased from 20 mppa in 2004 to 27 mppa today, no substantial changes have been made to the terminal's architecture. Therefore, it is not clear whether BER will be able to handle 27 mppa when it opens.

³ It is yet uncertain when and how the planned expansions at BER will take place. Given the significant delay of the main terminal's opening, there is no indication when the construction of the additional terminal buildings will take place.

- In **Section 3** we summarise our legal analysis: Led by CMS, we have reviewed all relevant documents including BER's planning approval decision, and the 'revocation decisions' which require Tegel to close after BER opens. We have then provided our expert view on the extent to which Tegel can legally remain open and the process and legal instruments that this would involve; and
- In **Section 4** we summarise our economic analysis: Led by Frontier, we have analysed historical demand trends at Tegel and Schönefeld, and researched capacities at Tegel, Schönefeld and BER. We have then forecast demand under different capacity scenarios. This has enabled us to compare and contrast outcomes under the two scenarios.

For background information, we have also summarised various legal issues as annexes to this report, which we refer to in the main body of the report.

2 AIRLINE VIEWS

In this section we set out the views of various airlines. These summaries are based on interviews which we conducted as part of this project, and also comments which have appeared in the press.

These comments provide context for the remainder of the report. They demonstrate a widely held view in the airline community: that closing Tegel Airport is a wrong policy given the economic prospects for Berlin and the surrounding area. The views expressed here also demonstrate confidence in their ability to grow the local aviation market significantly and increase the range of services on offer.⁴

2.1 Norwegian Airlines

Norwegian shared the following views with Frontier with respect to the Berlin airport situation.

- Norwegian believes that BER will continue to be run for the benefit of Lufthansa and its alliance partners. For instance, after BER opens Norwegian and the other LCCs expect to be confined to Schönefeld for as long as possible, which as well as being poorer quality means 10 min longer taxiing in both directions, giving Lufthansa a cost advantage.
- Nevertheless, Norwegian expects to be operating long-haul point to point from Berlin in the near future. They agree that there is a lot of untapped potential in and around Berlin. Given the opportunity Norwegian would locate up to 5 long-haul aircraft at Tegel. Similar to what Norwegian is doing at Gatwick.
- Their experience of point to point long-haul is that 60% to 65% of passengers are incoming (e.g. US based). This is higher than for LC short haul, which tends to be 50/50. So encouraging LC long-haul in Berlin may help to further boost passenger numbers overall to the benefit of the local economy.
- However, Norwegian believes the catchment at Tegel is less affluent and more price sensitive than that around other hubs like Munich. This is partly because Berlin airports seek to draw passengers from Poland and Czech Republic. Because of price sensitivity Norwegian believes that demand could be particularly badly hit by anything that might drive up fares, e.g. capacity constraints.
- When the original plan for BER was created, Germanwings operated to an extent independently of Lufthansa. Since the merger with Eurowings Norwegian sees Lufthansa controlling route developments in a much more coordinated way. For this reason Norwegian believes Lufthansa will seek to

⁴ The views presented in this section represent the views of the airlines interviewed. They do not necessarily represent the views of Frontier Economics. They are presented here to provide completeness and context to our report.

dominate capacity at BER between itself and Eurowings to exclude low cost competition.

2.2 Ryanair

Ryanair shared its views at a recent CDU round table on the future of Tegel airport on 16th May 2017. This drew upon the Frontier / CMS report, but also reflected Ryanair's own views:

- **WRONG GROWTH PROJECTIONS USED IN DECISION TO CLOSE TEGEL**
 - Planning forecast for 2015 was 23.2m passengers; Actual was 28m
 - Planning forecast for 2023 was 30.6m; Actual for 2016 was 33m
- **IMMEDIATE CAPACITY SHORTFALL WILL RESULT FROM TEGEL CLOSURE**
 - BER capacity is 28m; Actual 2016 passenger volume was 33m
 - BER runway capacity of 62 peak movements; Current peak movements of 68 in Tegel and Schoenefeld
- **BERLIN UNDERPERFORMS IN AVIATION VERSUS OTHER EUROPEAN CITIES**
 - Current passenger volume should be 40m or higher based on comparisons
 - Traffic suppressed by Lufthansa policy to treat Berlin as regional airport
 - London has 6 airports (traffic of 160m), Paris has 4 airports (traffic of 140m)
 - Dublin – 1.2m population, 28m traffic; Copenhagen – 1.3m population, 29m traffic; Barcelona – 3.2m population, 44m traffic; Madrid – 3.2m population, 50m traffic; Berlin – 3.5m population, 33m traffic
- **56M PASSENGERS ACHIEVABLE BY 2030 IF CAPACITY CONSTRAINTS REMOVED**
 - Estimate based on independent economic modelling by Frontier
 - Ryanair growth of 5m in 2015/16 and offered to grow to 11m in the next 3-5 years if Tegel kept open
 - Demand could reach 90m by 2050 according to modelling by Frontier
- **BERLIN HAS POTENTIAL TO BE MAJOR LONG-HAUL HUB IF TEGEL RETAINED**
 - Huge increase in connectivity options for Berliners and visitors for business and pleasure
 - Low-cost airlines will deliver connectivity if capacity available at competitive rates; New aircraft, B787 and A350, and new operating models (e.g. Norwegian, Level) open low-cost long-haul options

- 2 long-haul hubs can operate in Berlin: one in BER + one in Tegel
- MASSIVE JOB CREATION IF TEGEL KEPT OPEN
 - Growing traffic to 56m will generate in excess of 15,000 new jobs (as per ACI multiplier)
 - Additional passengers Ryanair can deliver will generate an additional 4,000 new jobs in the next 3-5 years
- RETENTION OF TEGEL WILL SUPPORT TOURISM
 - €3bn additional tourism spend every year when traffic grows to 56m
 - Based on assumed half of new passengers being tourists and average spend of €600 per trip
- LONDON EXPERIENCE – COMPETITION BETWEEN AIRPORTS
 - Traffic in London grew 10% faster after monopoly break-up
 - Cost competitiveness, service quality, and connectivity improved
 - Capacity gain (without wasteful capex)
 - Tegel and BER can compete without changing ownership structure
 - Existing price differential beneficial to competition; BER monopoly will raise prices and stifle growth
- UNCERTAINTY OF ALTERNATIVE DEVELOPMENT – TEMPELHOF NOW REFUGEE CENTRE
 - No technology or residential development despite central location
 - Up to 13,000 refugees accommodated at peak
- TEGEL CAN BE KEPT OPEN THROUGH 'REVOCATION OF REVOCATION' DECISIONS
 - Confirmed by independent legal analysis
 - 'Political landmark decision' required
 - Closure of Tegel not a requirement of BER planning

2.3 Condor

The following quote is from an interview with Condor's CEO⁵:

Is your engagement (more aircraft / flights in Berlin) dependant on the completion of the new airport?

- The new airport is, when it finally opens, probably much too small. That is why I personally have a lot of sympathy with the thought of keeping Tegel open. It does not work as one has thought 10 years ago. One has to be willing to rethink.

⁵ <http://www.tagesspiegel.de/wirtschaft/tegel-soll-offen-bleiben-der-ber-ist-viel-zu-klein/19678552-all.html>

2.4 IAG

We discussed the question of whether Tegel should be kept open with IAG in May 2017. IAG supports keeping Tegel open for the following reasons:

- It appears that the current capacity of the new Brandenburg Airport is insufficient even to meet current (2017) demand, let alone the level of demand likely by the time it finally opens, which they do not anticipate for at least another two years. Closing Tegel would lead to a capacity crunch that would lead to a loss of services and connectivity for Berlin.
- IAG is generally concerned about airport dominance. Losing Tegel would be very unhelpful in this context. Without proper regulation IAG would be very concerned that cost to airlines and passengers would rise and the quality of service could suffer.
- Keeping Tegel open would future-proof the airport system in Berlin and facilitate competition, which in IAG's view is the best way to protect passenger interests.

3 LEGAL ANALYSIS

Not only the political question whether to keep TXL open is subject to intense discussion. Further, a number of complex legal issues arise in connection with the proposal to keep TXL open. Accordingly, there are a number of analyses on various legal aspects.⁶ In particular, there is an analysis provided by the Research Services of the German Federal Parliament on requirements for the continuation of TXL,⁷ which is routinely referred to in connection with the proposal to keep TXL open. However, as the Research Services highlights in its analysis, it does only assess the general legal framework⁸ and does not provide a comprehensive analysis on the legal aspects raised in connection with this project.

The following aspects are of relevance for the legal analysis:

- Investigating and summarizing legal framework to close TXL;
- Identifying grounds of challenge, process, timeline, assessment of probability of success as regards obligation to close TXL;
- Identifying of process to challenge and assessment of potential counter-claims;
- Review argument that new permit for TXL would be required;
- Assessment of pros & cons as regards keeping TXL open, including urban planning; and
- Assessment on parallel questions as regards SXF.

These legal aspects may best be condensed under three major headings:

- Firstly, it has to be assessed whether there is a legal obligation to close TXL and where such legal obligation stems from. This question reflects the basic assumption – and reason for this report – that TXL has to close not later than six months after BER has become operational. At that time, both TXL's operation permit and planning approval decision will cease to have effect.

In section 3.1 of this report, we will review the legal questions arising in this regard. In particular, we will review whether the legal obligation to close TXL stems from the planning approval decision for BER.

- Secondly, based on the assumption that a legal obligation to close TXL arises from the 'revocation decisions' by which TXL's operation permit and planning approval were removed, keeping TXL open requires a removal of these decisions.

⁶ E.g. *Kluckert*, DÖV 2013, p. 874; cf. Freie Demokraten Berlin, Rechtliche Argumentationshilfe für die Offenhaltung von TXL.

⁷ Deutscher Bundestag, Wissenschaftliche Dienste: Ausarbeitung "Voraussetzungen für die Weiterführung des Flughafens Berlin-Tegel" (*German Federal Parliament, Research Services: Academic Analysis: Requirements for the Continuation of Berlin-Tegel Airport*), WD 7 – 3000 – 066/13, 2013.

⁸ Cf. Berliner Zeitung, 20 March 2017.

Please note that the term ‘revocation decisions’ in the context of closing TXL is not used in a formal way, i.e. referring to a ‘revocation’ (*Widerruf*) within the meaning of German administrative law only. This also applies to the ‘revocation decisions’ themselves, as they were not only based on provisions allowing for such ‘revocation’ in this formal sense. Even in those decisions, it is used to describe the way of removing the operation permit and planning approval decisions regardless of its legal basis. Therefore, in the course of this study, we will use the term ‘revoke’ and ‘revocation’ not limited to its formal meaning but in a broader sense, thus including other possible ways of removing the operation permit and planning approval decision.

In section 3.2 of this report, we review the possibilities to remove the ‘revocation decisions’. The decisions are administrative acts within the meaning of Sec. 35 VwVfG. Even though they have become final in the meantime, German administrative law generally allows for their ‘revocation’ or amendment, however only under certain specified circumstances. In particular, there is no prohibition to ‘revoke’ or amend a ‘revocation decisions’.

However, the planning approval decision for BER⁹ contains a legal justification (*Planrechtfertigung*) for the plan to construct BER and a corresponding traffic prognosis which are both based on the assumption that TXL (and THF) will close and that BER will be the single airport for the Berlin Brandenburg region. Therefore, it has to be reviewed whether and to what extent the planning approval decision BER implicitly limits the possibility to revoke or amend the ‘revocation decisions’.

Finally, it has to be assessed which consequences such ‘revocation’ or amendment would have. We understand that a new operation permit and a new planning approval decision for TXL will almost be impossible to obtain. Therefore, it is crucial whether the revocation or amendment of the ‘revocation decisions’ may uphold the current applicable permits and approvals.

- Thirdly, the question arises which legal measures have to be taken to remove the legal obligation to close TXL. The revocation or amendment decisions yet to be taken would constitute planning decisions as they would *inter alia* be based on provisions of the Air Traffic Act.

In this context, a number of material and procedural considerations arise which will be reviewed in section 3.3 of this report. Firstly, considering that such revocation or amendment decision is a planning decision, the outcome is flexible. All pros & cons and all concerned interests and legal positions have to be taken into account and weighed against each other. However, there is the crucial requirement that such planning decisions have to comply with the requirements under (public) law. It has to be reviewed to what extent the current permits and approvals are final and to what extent compliance with the current applicable legal framework is required.

- In section 3.4 of this report, we summarize our conclusions of the legal impact analysis.

⁹ Originally, the planning approval decision referred to Berlin Brandenburg International – BBI. BBI later became BER, i.e. Berlin Brandenburg Airport. In this report, we use the abbreviated term BER only.

- In section 3.5 of this report, we briefly sketch the legal repercussions as regards keeping SXF open. We understand that SXF – i.e. the currently used airport facilities and terminal buildings – will remain open as part of BER for a limited period of time and that the site will be used for government facilities. We also understand that keeping these facilities open for a limited period of time is part of the planning approval decision BER and the corresponding (operation) permit under aviation law and thus has already been taken into account when approving BER.

If necessary, we will sketch out aspects of the historical framework of the Berlin airport system and put the respective legal issue into broader perspective.

This legal impact analysis – which can only provide a preliminary analysis and does not replace a comprehensive legal opinion (*Rechtsgutachten*) of all legal issues arising in the context of this project – is followed by the economic impact analysis.

3.1 Legal obligation to close TXL

There is a legal obligation to close TXL. This obligation follows from – firstly – the ‘revocation decision’ dated 29 July 2004 whereby the Senate Administration for Urban planning, upon application by the BFG,¹⁰ ‘revoked’ the operation permit for TXL and – secondly – the ‘revocation decision’ dated 2 February 2006 whereby the authority ‘revoked’ the planning approval decision for TXL, thus annulling the airport site’s purpose and function as an airport. As both ‘revocation decisions’ are linked to BER becoming operational (i.e. both runways are in operation), they have not yet become effective. However, both ‘revocation decisions’ have become final and are therefore no longer subject to judicial review.

On the other hand, the legal obligation to close TXL does neither follow from the planning approval decision BER nor from regional planning. However, both the planning approval decision BER as well as regional planning may limit the possibility to remove the legal obligation to close TXL (as regards the latter: cf. below 3.2.2 and 3.3.3).

3.1.1 Obligation to close TXL via ‘revocation decisions’

TXL was and still is operated on the basis of permits and approvals issued (either explicitly or implicitly) by the Allied powers. By virtue of provisions transferring federal law to Berlin, TXL was deemed to have been permitted and planning approved. After enactment of the consensus decision, these permits and approvals were ‘revoked’ by virtue of ‘revocation decisions’ effectively requiring closing down both THF (which later took place) as well as TXL. These ‘revocation decisions’ have become final, but in case of TXL its conditions have not been met yet. Thus, as to date, the obligation to close TXL has not become effective.

¹⁰ In connection with the unique history of Berlin’s airport system, the corporate structure is complex. Currently, the FBB (previously: FBS) operates SXF. Further, FBB owns the BFG which operates TXL. In the course of the unique history of Berlin’s airport system, a number of changes in company law took place. This has to be kept in mind when reviewing permits etc. issued in favour of a certain applicant.

Starting point: TXL deemed to have been permitted and planning approved

The legal basis for operations at TXL (the same applied to THF) stem from Allied powers and transferring law. According to provisions of the Sixth Act on the Transfer of Federal Law to Berlin (West) (*Sechstes Gesetz zur Überleitung von Bundesrecht nach Berlin (West)*), airports which were constructed and operated under Allied law,

"shall be deemed to have been granted a [operation] permit and shall be deemed to have been [planning] approved legally binding"

("gelten [...] als genehmigt und im Plan rechtskräftig festgestellt")

This provision "simulated" (*fingieren*)¹¹ both the operation permits as well as the planning approval decisions.¹² It applied to TXL as well as to THF and Gatow airport.

In addition, Art. 2 of the Agreement on the Settlement of Certain Matters relating to Berlin dated 25 September 1990 stated that

"all rights and obligations created or established by or under legislative, judicial or administrative action of the Allied Authorities in or in respect of Berlin are and shall remain valid for all purposes under German law whether or not their creation or establishment was in conformity with other legislation. [...]"

("alle Rechte und Verpflichtungen, die durch gesetzgeberische, gerichtliche oder Verwaltungsmaßnahmen der alliierten Behörden in oder in bezug auf Berlin oder aufgrund solcher Maßnahmen begründet oder festgestellt worden sind, sind und bleiben in jeder Hinsicht nach deutschem Recht in Kraft, ohne Rücksicht darauf, ob sie in Übereinstimmung mit anderen Rechtsvorschriften begründet oder festgestellt worden sind. [...]")

As a result, TXL operated and still operates on basis of permits and approvals under Allied law. Therefore, it was and is not necessary to obtain an operation permit and / or a planning approval decision in order to continue operations at TXL. Rather, TXL has to be treated as if a final operation permit and a final planning approval decision existed.¹³ Until operations at THF ceased, the same applied to THF.

The competent public authorities obviously share this view: There were claims requesting to close TXL immediately arguing that air traffic was beyond the airport's capacity. Interestingly, in the course of the administrative proceedings, the competent public authority emphasized that TXL is operated lawfully and that the "simulated" planning approval decision allows any type of air traffic which may be handled on both runways and which obeys the operation limitations. In particular, the authority stressed that the increased use of TXL since 3 October

¹¹ Cf. BVerwG, decision of 29 November 2007 – 4 B 22/07.

¹² Cf. BVerwG, decision of 19 August 1997 – 11 B 2/97.

¹³ Concisely: Research Services' analysis, p. 5.

1990 did not raise the questions as regards TXL's permitting situation anew.¹⁴ A corresponding later lawsuit was also dismissed, primarily on the grounds that the plaintiff did not establish that the requirements of Sec. 29 LuftVG as regards risks to the safety were fulfilled.¹⁵

Decision to 'revoke' operation permit

Firstly, the legal obligation to close TXL follows from the decision to 'revoke' the operation permit allowing operating TXL.

In order to implement the consensus decision of 5 June 1996¹⁶ and to comply with the request of the BER planning approval authority to ensure that TXL (and THF) would be closed in time before the new airport would be planning approved, the BFG applied for the 'revocation' of the operation permit for TXL¹⁷ (and THF).

Upon the application with regard to TXL, the Senate Administration for Urban Planning issued a 'revocation decisions' regarding the operation permit dated 29 July 2004, ruling as follows:¹⁸

"The operation permit for Berlin-Tegel airport (TXL) is hereby revoked.

This revocation decision becomes effective six months after the extension of the future runway 07L/25R (Northern and current Southern strip) to 3,600 meters and the new construction of the future runway 07R/25L (Southern strip) of Berlin-Schönefeld

¹⁴ Cf. OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14, para. 3.

¹⁵ OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14.

¹⁶ Not surprisingly, German re-unification and Berlin becoming the capital of re-unified Germany led to intense political discussions on the future of the Berlin airport system. At the time of German re-unification, THF and TXL in West Berlin and SXF in the German Democratic Republic serving East Berlin were used as airports for the Berlin region.

In the coming years, political discussions did not only address the question how many airports Berlin needed, but also where such airport(s) were to be located. However, it became clear that a new airport for Berlin should be built – and it was agreed that there should only be one single airport for Berlin.

This idea was reflected in the so-called consensus decision (*Konsensusbeschluss*) agreed upon on 5 June 1996 by the governments of the federal states of Berlin and Brandenburg and the federal government (the latter one represented by the Federal Minister for Transport) (cf. publication of the consensus decision as Annex 1 to the bill for information on the report about the airport concept in the Berlin Brandenburg Region, Parliament of Berlin official record 13/624). The consensus decision was a joint recommendation of the Federal Minister for Transport and the heads of the Berlin and Brandenburg governments. Prior to the consensus decision, i.e. in 1991, the parties already had agreed upon a consortium agreement providing for a single airport in the Berlin region. Brandenburg as one party of that agreement and one shareholder of (then) BBF favoured Sperenberg.

Due to changing demand and taking into account the BBF's limited (financial) resources, the parties then agreed on the consensus decision. They did not only agree on the construction of a single airport for Berlin (single airport concept), but also decided on the site: Schönefeld, thereby refusing other sites (such as Sperenberg or Jüterbog); Schönefeld was favoured due to its proximity to the city of Berlin and thus lower costs for the airport's connection to Berlin; further, Schönefeld was considered to allow modular expansion, allowing rather short- to midterm reaction to changing demand. By this agreement, the parties confirmed the single airport concept, i.e. the new Berlin airport should become the single commercial airport for civil aviation for Berlin and Brandenburg. As a consequence, it was planned to close all other airports in Berlin currently used for civil aviation and to ban commercial aviation from any other airport in Brandenburg:

THF should be the first airport to close down, as soon as the necessary planning approval decision for the new airport at Schönefeld was completed.

TXL should be closed no later than the inauguration of the new runway at the Schönefeld site.

¹⁷ Cf. Research Services' analysis, p. 8 et seq. The application to revoke the operation permit was clarified a number of times. In particular, the applicant stated that closing TXL requires BER becoming operational rather than BER's planning approval decision becoming final.

¹⁸ The revocation decision is provided on the website of a citizens initiative: <http://bi-gegen-das-luftkreuz-tegel.de/files/txl-bescheid-20040729.pdf>.

airport (SXF) with a length of at least 4,000 meters has been taken into functioning operation."

("Die Betriebsgenehmigung für den Verkehrsflughafen Berlin-Tegel (TXL) wird widerrufen.

Der Widerruf wird mit Ablauf von sechs Monaten wirksam, nachdem die Verlängerung der künftigen Start- und Landbahn 07L/25R (Nord- und heutigen Südbahn) auf 3.600 m Länge und der Neubau der künftigen Start- und Landebahn 07R/25L (Südbahn) des Verkehrsflughafens Berlin-Schönefeld (SXF) mit einer Länge von mindestens 4.000 m funktionsfähig in Betrieb genommen worden ist.")¹⁹

On this basis, operating TXL is linked to BER becoming operational: The 'revocation' itself will only become effective six months after both runways at BER have become operational; until then the operation permit for TXL remains valid.

Once the operation permit for TXL ceases to have effect, the airport operator is no longer allowed to operate the airport. Thus, the airport operator effectively has to close down the airport; however, the 'revocation decisions' does not explicitly obligate to close down TXL.

Shortly before, the competent Senate Administration had already granted a 'revocation' of the THF operation permit. On 2 June 2004, the authority ruled:²⁰

"The operation permit allowing to operate Tempelhof Airport (THF) hereby is revoked. This decision becomes effective at the point in time when a planning approval decision for the Southern expansion of Berlin-Schönefeld airport (SXF) has become final."

("Die Betriebsgenehmigung für den Verkehrsflughafen Berlin-Tempelhof (THF) wird widerrufen. Der Widerruf wird in dem Zeitpunkt wirksam, in dem ein Planfeststellungsbeschluss für die Süderweiterung des Flughafens Berlin-Schönefeld (SXF) [...] bestandskräftig ist.")²¹

Initially, that 'revocation' was supposed to become effective at the point in time when a planning approval decision for the Southern expansion of SXF would become final. However, the 'revocation decisions' was amended, and we understand that the 'revocation' took effect on 31 October 2008 (even though the planning approval decision BER was legally binding from the court's ruling on 16 March 2006).²² Further, the Senate Administration exempted the airport operator from the obligation to operate the airport.

¹⁹ Emphasis added. – This revocation decision is provided on the webpage of a citizens initiative (cf. here: <http://bi-gegen-das-luftkreuz-tegel.de/files/txl-bescheid-20040729.pdf>), but has not been made publicly available by the competent Senate administration.

²⁰ This revocation decision has not been available to us. The quote is drawn from OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 2.05.

²¹ As regards some details, the revocation decision was amended several times: cf. OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 2.05.

²² A number of airlines applied for quashing orders against that decision and also applied for interim injunctions. In a decision handed down on 23 September 2004, the then Higher Regional Administrative Court of Berlin (*Oberverwaltungsgericht Berlin*) ruled in an interim injunction proceeding that the applications for quashing orders had a suspensory effect and that flight operations had to be maintained until the courts has reached a decision in the main proceedings: cf. OVG Berlin, decision of 23 September 2004 – 1 S 45.04.

Decision to ‘revoke’ planning approval decision

In connection with the decision to ‘revoke’ the operation permit, the competent authority also ‘revoked’ the planning approval decisions for TXL (and THF).

As regards TXL, the competent authority ‘revoked’ the planning approval decision by virtue of a ‘revocation decisions’ dated 2 February 2006.²³ We understand that the ‘revocation’ becomes effective under the same conditions as the ‘revocation’ of the operation permit.²⁴ Thus, not later than six months after BER has become operational, the planning approval decision will be ‘revoked’.

As is the case with regard to the ‘revocation’ of the operation permit, the ‘revocation decisions’ itself does not obligate to close down TXL. However, in case its conditions are met and the planning approval decision ceases to have effect, the purpose and function of the TXL airport site will no longer lie in functioning as an airport. This means that the Tegel airport site may no longer be used as an airport which effectively requires the airport operator to cease operations.

Further, the competent authority ‘revoked’ the planning approval decision for THF (administrative decision dated 7 June 2007), thereby annulling the purpose and function of the THF airport site for the use as an airport.²⁵ In contrast to TXL, the conditions of that ‘revocation decisions’ were already met, thus the ‘revocation’ became effective as of 31 October 2008.

Finality of revocation decisions – not subject to judicial review any more

All ‘revocation decisions’ mentioned before, i.e.

- decision dated 2 June 2004 as regards operation permit THF,
- decision dated 29 July 2004 as regards operation permit TXL,
- decision dated 2 February 2006 as regards planning approval decision TXL and
- decision dated 7 June 2007 as regards planning approval decision THF,

have become final (*bestandskräftig*) and, insofar as they have been subject to judicial review proceedings, legally binding (*rechtskräftig*) as well. Generally, an administrative decision becomes final as soon as the time limit for legal redress has expired. Not surprisingly, the ‘revocation decisions’ have been subject to judicial review proceedings, but the courts eventually upheld the ‘revocation decisions’, confirming their legality:

- As regards the decision dated 2 June 2004 (operation permit THF), the Higher Regional Administrative Court of Berlin and Brandenburg dismissed

The Berlin public authorities then withdrew the original decision and issued a more substantiated decision, which was enacted in August 2006 and provided for an end of service obligation (*Betriebspflicht*) as of 31 October 2007, as we understand later amended to 31 October 2008. Cf. OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 1.05, para. 9 et seq.

²³ This revocation decision has not been available to us. Its contents are drawn from respective case law and others sources, including OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14.

²⁴ Cf. OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14, para. 3; cf. Research Services’ analysis, p. 9.

²⁵ Cf. OVG Berlin-Brandenburg, judgment of 17 December 2008 – 12 A 11.07, para. 2.

a lawsuit by judgment delivered on 12 February 2007.²⁶ By decision handed down on 29 November 2007, the Federal Administrative Court upheld the final decision to close THF.²⁷ Thus, this ‘revocation decision’ became legally binding.²⁸

As regards the ‘revocation decision’ of the THF planning approval decision dated 7 June 2007, applications for quashing order were dismissed.²⁹

- As regards the decision dated 29 July 2004 (operation permit TXL), the Higher Regional Administrative Court of Berlin and Brandenburg dismissed a lawsuit filed by a number of airlines.³⁰ The ‘revocation decisions’ became final and legally binding and thus incontestable; it is not subject to judicial review any more.³¹

As regards the ‘revocation decision’ of the TXL planning approval decision dated 2 February 2006, it became final after an application for quashing order was withdrawn.³²

Once an administrative decision has become final, it is no longer subject to judicial review proceedings;³³ further, possibilities to amend, modify or even annul such administration decision are limited by law.

But: as to date, obligation to close TXL not yet effective

As to date, the obligation to close TXL has not yet become effective.

Sec. 41 (1) VwVfG provides that an administrative act shall become effective vis-à-vis the person for whom it is intended or who is affected thereby at the moment he is notified thereof. Therefore, an administrative act generally becomes effective as soon as it has been notified. However, Sec. 41 (1) VwVfG also provides that the administrative act shall apply in accordance with its tenor as notified. This provision is of particular importance for the case at hand as both ‘revocation decisions’ are combined with additional stipulations within the meaning of Sec. 36 VwVfG, modifying the general rule under Sec. 41 (1) VwVfG.

As stated before, the tenor of the ‘revocation decision’ as regards the operation permit for TXL reads as follows (German original omitted here):

"The operation permit for Berlin-Tegel airport (TXL) is hereby revoked.

²⁶ OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 2.05.

²⁷ BVerwG, decision of 29 November 2007 – 4 B 22/07

²⁸ Cf. press release of the OVG Berlin-Brandenburg of 29 August 2008.

²⁹ Cf. OVG Berlin-Brandenburg, judgment of 17 December 2008 – 12 A 11.07; cf. press release of the OVG Berlin-Brandenburg of 29 August 2008 referring to cases 12 A 8.07 and 12 A 11.07, pending at that point in time.

³⁰ OVG Berlin-Brandenburg, judgment of 24 November 2005 – 12 A 3.05.

³¹ Cf. reply to the parliamentary inquiry, Parliament of Berlin official record 17/10635; reply to the written inquiry, Parliament of Berlin official record 17/18057; cf. press release of the OVG Berlin-Brandenburg of 29 August 2008.

³² Cf. OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14, para. 25 with reference to the court's press release of 29 August 2008.

³³ Just for the sake of completeness: Sec. 153 VwGO provides for the resumption of (court) proceedings, referring to the respective provisions of the Code of Civil Procedure. Reopening of (court) proceedings is strictly limited; proceedings terminated by a final judgment may only be opened by an action for annulment or an action for retrial. However, these actions refer to errors in the course of court proceedings. There are no reasons to argue that such resumption of court proceedings may take place.

This revocation decision becomes effective six months after the extension of the future runway 07L/25R (Northern and current Southern strip) to 3,600 meters and the new construction of the future runway 07R/25L (Southern strip) of Berlin-Schönefeld airport (SXF) with a length of at least 4,000 meters has been taken into functioning operation."

As stated before, we understand that the 'revocation decision' as regards the planning approval decision for TXL contains the same condition.

The stipulation to 'revoke' the operation permit is combined with two stipulations, one rather objective (i.e. a condition), the other one rather temporal (i.e. a time limit). The condition has the effect that the commencement of a burden (i.e. the 'revocation'), or in other words the ending of a privilege (i.e. the operation permit) depends upon a future occurrence which is uncertain (i.e. BER becoming operational). The time limit has the effect that such privilege or burden shall begin or end on a certain date or shall last for a certain period (i.e. six months after the condition has been met).

The conditions laid down in the 'revocation decision' have not yet been met, thus not "activating" the six-months' time limitation laid down therein as well. It is unclear when (and even whether) BER will become operational.³⁴ As stated before, "becoming operational" refers to both runways and not only to the terminal buildings or other facilities of the airport.³⁵

In this regard, the Research Services' analysis is instructive, clarifying that the legal effects (*Rechtswirkungen*) of these conditions occur only in case the conditions are met.³⁶

Against this background, operation of both runways contains the risk of triggering the unique mechanism as laid down in the 'revocation decision'. Therefore, until BER becomes operational, generally only the future Northern runway at SXF is operational in order to avoid triggering the above mentioned mechanism. The (new) Southern runway was only temporarily used from 6 May 2015 until 24 October 2015 in order to enable the renovation of the previous Southern (and new Northern) runway. The joint higher aviation authority for the states of Berlin and Brandenburg allowed renovation of the Northern runway (previously Southern runway of SXF) and, as a substitute, the partial commissioning of the (new) Southern runway for a limited period of time (administrative decision of 11 December 2014).³⁷ In this regard, operations at the (new) Southern runway were only allowed in a shortened area (3,600 meters instead of the length of the

³⁴ As mentioned before, construction work on the airport began on 5 September 2006. Since then the construction process has suffered from continued delays. The opening date has been postponed several times; long time, it was planned for 3 June 2012. It currently is still unclear when the airport will resume operations. On 27 September 2012 the Berlin parliament installed a committee of inquiry (*Untersuchungsausschuss*) to clear up the reasons for the delays and the transgression of planned costs. Cf. the (two-volume) report of the committee of inquiry, official record 17/3000.

³⁵ Cf. Research Services' analysis, p. 9 et seq. on the question under which circumstances such "becoming operational" takes place, in particular whether final acceptance of both runways is sufficient or whether BER's terminal building also has to be finally accepted. – In the course of this legal analysis, we do not address this aspect in more detail.

³⁶ Cf. Research Services' analysis, p. 9 et seq.

³⁷ Cf. permit dated 11 December 2014, available on the website of the Brandenburg Landesamt für Bauen und Verkehr (*Brandenburg State Office for Building and Transport, Brandenburg*): http://www.lbv.brandenburg.de/dateien/luftfahrt/Bescheid_Nordbahnsanierung11122014.pdf.

runway); on this basis and considering that the terminal building is not completed anyway, the authority sees no risk that the revocation decision may be triggered.³⁸

So far and as long as the conditions laid down in the 'revocation decision' are not met, the 'revocations' will not become effective. Until then, both the operation permit and the planning approval decision are the legal basis for operations at TXL and for the airport site's purpose and function as an airport. Most notably, in case BER will not become operational at all, the 'revocations' as provided for in the 'revocation decision' would not become effective at all.

3.1.2 No legal obligation to close TXL pursuant to planning approval decision BER

In contrast to long-standing allegations, neither the planning approval decision BER (including its various amendments / modifications) nor the (operation) permit under aviation law for SXF and BER regulate on the closing of TXL and / or THF.

However, in particular the planning approval decision BER is based on the single airport concept and the obligation to close TXL and THF. Still, the extent of this "basis" (or "fundament") is disputed and has not yet been explicitly decided upon by the courts (cf. in connection with removal of legal obligation below 3.2.2).

Planning approval decision does not contain regulations as regards closing TXL (and THF) down

The planning approval decision BER does not contain a stipulation requiring to close TXL (and THF).³⁹

In order to implement the consensus decision, the FBS applied for a planning approval decision (*Planfeststellungsbeschluss*) for the expansion of SXF to BER by modifying and amending the existing and deemed as having planning approved SXF, including⁴⁰

- expansion of the existing Southern runway,
- construction of a new runway including taxiways and apron,
- infrastructure measures and
- further sub-projects.

At the same time, the railway infrastructure operators (one for the railway network itself, one for the stations) applied for the approval of the planned railway development.⁴¹

The competent authority granted the planning approval decision on 13 August 2004.⁴² The planning approval decision BER provides for the construction of a

³⁸ Cf. permit dated 11 December 2014, p. 7.

³⁹ Cf. also *Kluckert*, DÖV 2013, p. 874 (876 et seq).

⁴⁰ For details of the planning approval decision BER's content, cf. below Annex A.

⁴¹ Cf. planning approval decision BER, p. 57.

⁴² On its website, the Brandenburg Landesamt für Bauen und Verkehr (*Brandenburg State Office for Building and Transport*, <http://www.lbv.brandenburg.de/3123.htm>) provides for general information on the planning

new airport in close vicinity of the existing SXF with new terminal buildings and the respective technical infrastructure including connection measures (railway, public transport etc.). It also provides for closing down the Northern runway of SXF and refurbishing the Southern runway which then will become the Northern runway of BER with a new Southern runway located south of the new terminal buildings. The planning approval decision links the start of operations of the new runway to the closure of the "old" Northern runway.

This planning approval decision was granted on the basis of a special regional planning instrument, the Regional Development Plan for Aviation in Berlin and Brandenburg (*Landesentwicklungsplan Flughafenstandortentwicklung*). It was considered that a planning approval decision may not be sufficient and that concentrating air traffic of a whole region at a single airport requires broader regional planning. The Development Plan was based on the assumption laid down in the consensus decision, i.e. that all other Berlin airports would close shortly after BER has become operational. This in turn was based on the argument that closing down the other airports would reduce the number of people affected by flight noise.

Shortly after the planning approval decision was handed down, a number of citizen initiatives applied for quashing orders, in particular based on flight noise in the neighbouring municipal communities of Großbeeren, Eichwalde, Schulzendorf and Blankenfeld-Mahlow. The planning approval decision thus became subject of the then largest administrative court lawsuit whereby some 10,000s affected persons applied for quashing orders.

In a historic judgment handed down on 16 March 2006,⁴³ the Federal Administrative Court (*Bundesverwaltungsgericht*) rejected the claims and generally upheld the planning approval decision, however ruling that the planning approval decision did partly not comply with the applicable legal framework, requiring the planning approval authority to amend its decision, in particular as regards flight noise protection. In the aftermath, the competent authorities amended the planning approval decision on numerous occasions, in particular as regards the concept to protect against flight noise during day and night.

In any case, the Federal Administrative Court accepted the basic ideas for the construction and operation of BER and held that this infrastructure project was legally justified. By virtue of the court's decision, the planning approval became final and is withdrawn from further judicial review.

The structure of the planning approval decision BER, inspired by common administrative procedure practice, is instructive:

- It comprises 1,171 pages, including two volumes (volume I: p. 1 to 706; volume II: p. 707 to 1171). Integral part of the planning approval decision BER are the "plans" itself, i.e. the planning approval application and amendments.
- The planning approval decision BER is separated into six main sections:

approval BER and provides for the planning approval decision as well as other decisions, case law and further documents. The website also contains a brief overview of BER and its main parts.

⁴³ Cf. only BVerwG, judgment of 16 March 2006 – 4 A 1075/04; the Federal Constitutional Court accepted the rulings of the BVerwG and rejected to decide on the merits as regards the planning approval decision BER: Cf. BVerfG, decision of 20 February 2008 – 1 BvR 2389/06.

- A: Verfügung (*decree / regulation*) (p. 57 to 204)
 - B: Sachverhalt (*facts / factual situation*) (p. 205 to 282)
 - C: Entscheidungsgründe (*decision-making rationale*) (p. 283 to 1162)
 - D: Abschließende Gesamtbetrachtung (*final conclusion*) (p. 1163 to 1168)
 - E: Kostenentscheidung (decision on costs of planning approval decision) (p. 1169 to 1170)
 - F: Rechtsbehelfsbelehrung (*instruction on means of legal redress*) (p. 1171)
- Only section A contains stipulations and regulations as regards construction of BER and related issues. The planning authority did not only approve the "plans" themselves⁴⁴ (section A I, p. 57 to 97), but also made further decisions with additional provisions and remarks, reserved decisions, exceptions and exemptions (section A II, p. 97 to 201). This is due to the fact that a planning approval decision contains all decisions under public law required for the respective project with the effect that only one decision – i.e. the planning approval decision itself – is needed (so-called concentration effect (*Konzentrationswirkung*)).⁴⁵ Again, these further decisions refer to a broad area of subjects such as aviation areas, functionality, structural facilities, air pollution control, emission control report, nature and landscape protection, water law, waste, residual contamination, monument protection, construction phase etc. Section A also contains promises by the project developer made in the course of the planning approval procedure (section A III, p. 202 to 204) and decisions on applications and objections (section A IV, p. 204).
 - Section B, however, does only describe the facts / factual situation relevant for approving the "plans", including a history of the SXF from 1934 to 2004 (section B I, p. 205 to 221), a description of the project subject to the application for planning approval (section B II, p. 222 to 229) and a description of the planning approval procedure which had taken place in that regard (section B III, p. 230 to 282).
 - Section C then contains the reasoning for granting the planning approval decision, i.e. the arguments why and on what (legal and factual) basis the planning approval authority approved the "plans" and why and on what (legal and factual) basis the planning approval authority rejected objections which were brought forward against the project in the course of the planning approval procedure. This section comprises 879 pages and addresses both procedural aspects (section C I, p. 283 to 326) as well as material aspects (section C II, p. 327 to 1086). Again, it covers a broad variety of material areas of law, including legal justification for the plan (*Planrechtfertigung*), public interest at air traffic, need for air traffic (*Luftverkehrsbedarf*), regional planning and state planning, alternatives,

⁴⁴ The "plans" do not only refer to the aviation areas themselves, but also to structural facilities and green spaces, exterior traffic connections (roads / railways), water-related issues (supply and discharge of water), supply with air fuels, acquisition of land etc.

⁴⁵ Cf. Sec. 75 (1) VwVfG.

expansion of the airport, traffic connections, noise pollution including flight noise, air pollution control, nature and landscape, private interests etc. Section C III (p. 1087 to 1162) then refers to the EIA and contains a summarizing description of the relevant facts.

- Section D (p. 1163 to 1168) then contains a final conclusion where the planning approval authority sums up the major considerations which led to its decision to approve the "plans".
- Sections E and F (p. 1169 to 1171) contain rather formal aspects.

As stated before, only section A of the planning approval decision BER contains stipulations and regulations as regards construction of BER and related issues. Only section A with its heading "Verfügung" (*decree / regulation*) does

"regulate an individual case in the sphere of public law and [is] intended to have a direct, external legal effect"

within the meaning of Sec. 35 VwVfG, thus containing the criteria constituting an administrative act; and it is only section A with its stipulations and regulation that is issued with stipulations and reservations within the meaning of Sec. 36 VwVfG, i.e. issued with additional provisions.

It is only the stipulations and regulations laid down in section A which constitute rights and obligations on the side of the airport operator or the persons affected and may be enforceable. In contrast, the other sections, in particular section C on the decision-making rationale and thus on the reasons for the decision, do not contain such stipulations and regulations.⁴⁶

Section A, however, does not contain an obligation to close TXL and THF.⁴⁷ In fact, there are stipulations on aviation areas, also referring to BER becoming operational. However, they only refer to the runways at SXF (and what is now BER); e.g., in section A II 1 para. 4) it is stipulated that

"At the latest at the time of commissioning the new runway 07R/25L, the existing runway 07L/25R (Northern runway) of the Berlin-Schönefeld airport including the taxiways leading to the runways is to be closed pursuant to the requirements of plan B 3-2 and to be reconstructed pursuant to the scheme as laid down in plan B 3-2 which is part of the application for planning approval decision. Upon application of the airport operator, closing down the existing runway 07L/25R may be authorized at an earlier date, provided the operation conditions allow such early closure. The [aviation] permit for Berlin-Schönefeld airport will be amended in due course according to Sec. 6 (4) 1 LuftVG."

"Spätestens zum Zeitpunkt der Inbetriebnahme der neuen Start- und Landebahn 07R/25L ist die bestehende Start- und Landebahn 07L/25R (Nordbahn) des Verkehrsflughafens Berlin-Schönefeld nebst den zur Start- und Landebahn führenden Rollbahnen nach Maßgabe des zur Planfeststellung beantragten Planes B 3-2 zu schließen und entsprechend den

⁴⁶ Cf. Research Services' analysis, p. 19 et seq.

⁴⁷ Cf. Research Services' analysis, p. 20 et seq.

Darstellungen des Planes B 3-2 zurückzubauen. Auf Antrag des Flughafenunternehmers kann die Schließung der bestehenden Start- und Landebahn 07L/25R zu einem früheren Zeitpunkt zugelassen werden, sofern die betrieblichen Verhältnisse dies zulassen. Die Genehmigung für den Verkehrsflughafen Berlin-Schönefeld wird zu gegebenem Zeitpunkt gemäß § 6 Abs. 4 Satz 1 LuftVG angepasst werden."

Thus, section A II 1 para. 4) provides that the existing runway 07L/25R (former Northern runway) including taxiways has to close down when BER has become operational at the latest, but that an application to close it down even earlier is possible. In fact, the operator of SXF applied for closing down that runway earlier, which was then demolished and gave way for constructing the motorway A 113.

In contrast to that and deviating from long-standing (political) allegations, the planning approval decision BER does not contain any stipulation or regulation to close down TXL or THF. Rather, section A does not refer to these airports at all. In particular, there is no stipulation

- to close TXL and THF or at least their runways or
- to revoke operation permits and / or planning approval decisions as regards TXL and THF.

Further, there is no condition that BER may only be operated in case TXL and THF (or at least their runways) have been closed down.

Thus, the planning approval decision BER does not explicitly obligate to close down TXL and THF. However, as will be shown further below, the planning approval decision BER (as well as the (operation) permit under aviation law) is "based" on an obligation to close TXL and THF.

No provision in (operation) permit under aviation law for SXF and BER

The same applies to (operation) permits under aviation law for both SXF and BER.

Only two weeks before German re-unification, the operator of SXF was granted a permit (dated 20 September 1990) for the construction and operation of SXF. This aviation permit was later renewed and amended in order to establish the legal base to develop BER out of SXF. Accordingly, the amendment permit dated 27 March 2012 (just two months before the planned inauguration of BER) was based on the planning approval decision BER in its then current version. Pursuant to that amended operation permit,⁴⁸ it is planned to incorporate part of SXF's existing infrastructure into BER.

The aviation permit under Sec. 6 LuftVG allows for the construction and operation of the airport with the name "Verkehrsflughafen Berlin Brandenburg". It contains a number of rather technical and aviation specific stipulations, including

⁴⁸ Ministerium für Infrastruktur und Landwirtschaft des Landes Brandenburg: Änderung und Neufassung der Genehmigung des Verkehrsflughafens Berlin-Schönefeld, zukünftig Verkehrsflughafen Berlin Brandenburg (*Brandenburg Ministry for Infrastructure and Agriculture: Amendment and new version, Operation permit Berlin-Schönefeld, soon-to-be Berlin Brandenburg airport*), 27 March 2012. Cf. Research Services' analysis, p. 7.

flight operation related limits. It also contains additional provisions, including reference to the planning approval decision BER.

However, the aviation permit does not refer to closing down THF and / or TXL at all. Consequently, it does not contain a legal obligation to close these airports, either.

Still, as the aviation permit also refers to the planning approval decision BER, it is also "based" on the obligation to close TXL (and THF). In other words, even though neither the planning approval decision BER nor the (operation) permits under aviation law for both SXF and BER do explicitly obligate to close TXL and THF, these decisions are "based" on an obligation to close these airports. To be precise: the planning approval decision BER is "based" on an assumption that these airports will be closed in time and may implicitly limit the possibility to remove the legal obligation to close TXL (cf. below 3.2.2).

3.1.3 No legal obligation to close TXL pursuant to regional planning

The question whether regional planning instruments do contain an obligation to close TXL cannot be answered uniformly.

The regional planning instruments provide for a single airport for the Berlin Brandenburg region at the Schönefeld site. However, in our view, the regional planning instruments do not independently require to close TXL at the moment.

In future administrative proceedings, on the other hand, the regional planning provisions would have to be complied with; e.g. a permit under aviation law may only be granted in case the respective project is in compliance with requirements of regional planning (*Erfordernisse der Raumordnung*) (cf. in connection with requirements to comply with (public) law framework below 3.3.3).

3.2 Removal of legal obligation required

As outlined before, this study is based on the assumption that BER will become operational at some point in the future and that this launch of operation will trigger the obligation to close TXL. If, on the other hand, BER would not become operational, TXL could theoretically remain open open-ended, as there would be

- an operation permit,
- a planning approval decision and, in connection with the latter,
- a dedication of the Tegel site as an airport,

which are cumulatively required to operate TXL.⁴⁹ However, based on this assumption, the legal analysis would become rather academic.

Further, as sketched out before, the legal obligation to close TXL follows from the decision to revoke the operation permit allowing operating TXL dated 2 June 2004 on the one hand and the decision to revoke the planning approval decision dated 2 February 2006 on the other hand.

⁴⁹ Cf. Research Services' analysis, p. 11.

Against this background, it is necessary to remove this legal obligation in order to keep TXL open. To achieve this goal, the above mentioned 'revocation decision' would have to be 'revoked' or amended themselves.⁵⁰

As stated before, it is important to remember that, for the purpose of this report, the term 'revocation' is not limited to a 'revocation' in a formal sense, i.e. within the meaning of German administrative procedure law. In this regard, 'revocation' means *Widerruf* as laid down in Sec. 49 VwVfG and similar provisions. Rather, we use the term 'revocation' in order to include other types of removal and to avoid an early restriction or dogmatic limitation of our review.

In our view, as a consequence of such 'revocation', the original operation permit and the planning approval decision would still be valid. This assumption is especially due to the fact that TXL still operates on the basis of the operation permit and planning approval decision. Therefore, these decisions would not have to be enacted anew, but could simply continue to apply.

The alternative would be to apply for a new operation permit and a new planning approval decision. We have not reviewed the feasibility to obtain a new operation permit and a new planning approval decision. However, we understand that it would be most unlikely and face severe difficulties to obtain such permits on the basis of the then applicable legal framework, in particular as regards nature protection, the requirement to conduct an EIA and considering the close vicinity of residential areas. It has to be kept in mind that existing infrastructure projects such as airports are protected by virtue of grandfathering rules (*Bestandsschutz*) and are generally exempted from the obligation to bring the project in line with evolving law.

3.2.1 'Revocation decisions' 'revocable'

'Revocation decisions' are 'revocable' within the above outlined meaning.

Firstly, administrative acts within the meaning of Sec. 35 VwVfG may be 'revoked' or amended in a technical sense. A 'revocation decision' also constitutes an administrative act and may thus be subject to such revocation itself.

Therefore, a "simple" revocation of the 'revocation decisions' may suffice in order to keep Tegel open.

However, by enacting the 'revocation decision' concerning the TXL operation permit, the competent public authority has actually not merely revoked the TXL operation permit. Rather, it has based its decision on a number of legal bases, including the provision to "amend" a permit under aviation law (Sec. 6 LuftVG), although it misleadingly only used the term 'revocation' in its decisions and even used that term as heading. The same applies to the 'revocation decision' concerning the TXL planning approval decision, which was, *inter alia*, based on Sec. 8 LuftVG according to which existing airports may only be amended if planning pursuant to Sec. 10 has been approved beforehand (which, as we understand, was assumed by virtue of the Sixth Act on the Transfer of Federal Law to Berlin (West)).

⁵⁰ Cf. Tagesspiegel, 6 October 2016.

Therefore, secondly, it is also possible that a further amendment permit under aviation law containing a planning decision is required in order to remove the ‘revocation decisions’ (cf. below 3.3). This is generally possible: a first amendment decision can be further amended.

Thirdly, it is also conceivable that the authorities, without actually ‘revoking’ the ‘revocation decisions’ in a technical sense, decide anew on the enactment of the ‘revocation decisions’ in the first place. This may also lead to an amendment of the ‘revocation decisions’ or to their factual revocation in a non-technical sense.

In any case, removing the legal obligation to close TXL may be implicitly limited by the planning decision BER as stated before. Apart from that, it is disputed what the consequences of removing the ‘revocation decisions’ would be, in particular whether such removal would or could uphold the currently applicable operation permit and planning approval decision or whether and to what extent compliance with currently applicable law is required.

‘Revocation decisions’ as administrative act within the meaning of Sec. 35 VwVfG ‘revocable’

Not only the (‘revoked’) TXL operation permit and planning approval decision were administrative acts within the meaning of Sec. 35 VwVfG. This also applies to the respective ‘revocation decisions’ themselves. They regulate an individual case in the sphere of public law, i.e. annulling the right to operate an airport and the right to use the site for an airport.

This also follows from the *actus contrarius* concept. According to this doctrine, an act may be suspended by an act to the contrary. Thus, an act and its removal generally share the same legal nature, i.e. in case the act is an administrative act, its removing act is an administrative act, too – as would be acts removing these ‘revocation decisions’.

Under German administrative law, public authorities have the power to withdraw / revoke administrative acts within the meaning of Sec. 35 VwVfG in a formal sense. Such withdrawal / revocation is generally even allowed in case the respective administrative decision has become final and is therefore no longer subject to judicial review. Whether a withdrawal or a revocation takes place depends on the lawfulness of the administrative act in question: the term withdrawal refers to the cancellation of an unlawful administrative act,⁵¹ whereas the term revocation refers to the cancellation of a lawful administrative act.

Generally, withdrawal and revocation of administrative acts in a formal sense require a legal basis (*Ermächtigungsgrundlage*), and the respective statutory requirements have to be met.⁵² A general clause for withdrawal and revocation is provided for in Sec. 48 and 49 VwVfG, however, special legislation for certain areas of law does also exist and precede.⁵³ Such special provision is e.g. laid

⁵¹ A withdrawal of the operation permit and the planning approval decision is not to be considered. It has to be assumed that both the operation permit and the planning approval decision were lawful, especially as they were issued on basis of Allied law and subject to law transferring federal law to Berlin (West). They were deemed to be final and not subject to judicial review any more.

⁵² As regards the material and procedural considerations, cf. below 3.3.

⁵³ Only in case special legal basis such as Sec. 48 LuftVZO are not applicable, Sec. 48 and 49 VwVfG allow to withdraw or revoke an administrative act. The requirements to withdraw or revoke an administrative act

down in Sec. 48 LuftVZO referring to a withdrawal and revocation of a permit under aviation law.

Further, there are provisions allowing for an amendment of airport operation permits (Sec. 6 (4) LuftVG), airport planning approval decisions (Sec. 8 (1) LuftVG) and planning decisions in general (Sec. 76 (1) VwVfG), which – as will be shown below – effectively can remove the former administrative act.

In particular: consistent with approach taken by Berlin authorities in 'revoking' operation permit and planning approval decision

This assessment is consistent with the approach taken by the Berlin public authorities in connection with the 'revocation' of the operation permits and the planning approval decisions for both THF and TXL. These decisions prove that the authorities consider the instrument of 'revocation' as suitable for airport operation permits and planning approval decisions. At the same time, the 'revocation decisions' and respective judgments, both as regards THF as well as TXL, are very instructive with regard to the legal basis for such decisions:

- The operation permit THF was 'revoked' by virtue of decision dated 2 June 2004. The Higher Regional Administrative Court of Berlin and Brandenburg dismissed a lawsuit filed by airlines against this decision on 12 February 2007.

In its judgment, the court emphasized that, in case 'revoking' the operation permit requires a legal basis, such legal basis may be found in Sec. 6 (4) 2 LuftVG, Sec. 6 (4) 2 LuftVG analogous and Sec. 49 VwVfG (with Sec. 1 Berlin VwVfG). By decision handed down on 29 November 2007, the Federal Administrative Court upheld this final decision to close THF, thereby establishing some basic principles relevant for this study:

"The decommissioning of an airport by way of a revocation of the aviation operating license upon application of the airport operator can be based on Sec. 6 IV 2 LuftVG. In the case of the revocation decision, the interests of airport-based airlines have to be taken into consideration appropriately."

("Die Stilllegung eines Flughafens durch den Widerruf der luftrechtlichen Betriebsgenehmigung auf Antrag des Flughafenunternehmers lässt sich auf § 6 IV 2 LuftVG stützen. Bei der Widerrufsentscheidung sind die Belange flughafenansässiger Luftfahrtunternehmen angemessen zu berücksichtigen.")

Therefore, as regards 'revoking' an operation permit, even though Sec. 49 VwVfG and Sec. 48 LuftVZO may have to be taken into account, the 'revocation' in question was primarily based on Sec. 6 (4) 2 LuftVG. In fact, following the wording, the provisions of Sec. 6 (4) 2 LuftVG only allows for an 'amendment' of an airport operation permit. However, the provision is

differ, depending on the lawfulness of the administrative act in question. Generally, it is easier to withdraw an administrative act than to revoke one as in the case of an unlawful act the rule of law regularly requires its annulment and the principle of legal certainty does not prevail. Furthermore, the withdrawal or revocation of a beneficial administrative act usually faces higher requirements than the withdrawal or revocation of a non-beneficial one, as the beneficiary may have relied on the benefit (legitimate expectations) in a way that deserves protection.

obviously understood as to not only allow amending a permit, but rather as to also allow the complete ‘revocation’ of an existing permit (thereby amending the existing permit and not allowing airport operations any more). Even though the Senate Administration considers the decisions as ‘revocations’ and even used this term as headline, these decisions primarily have to be considered as amendment permits within the meaning of Sec. 6 (2) 4 LuftVG.

- The operation permit TXL was ‘revoked’ by virtue of decision dated 29 July 2004. In its judgment of 24 November 2005, the Higher Regional Administrative Court of Berlin and Brandenburg dismissed a lawsuit filed by a number of airlines against this decision.

The court stated that there is no need for a legal basis in order to ‘revoke’ such operation permit (i.e. permit under aviation law); however, even in case a legal basis was required, the ‘revocation decision’ could be based on Sec. 49 VwVfG or Sec. 6 (4) 2 LuftVG (as later confirmed by the Federal Administrative Court in the judgment cited above). The court did not decide which legal basis is to be preferred.

- By virtue of decision dated 2 February 2006, the planning approval decision TXL was ‘revoked’. We understand that this decision was based on Sec. 8 LuftVG and Sec. 77, 72 (1) and 49 VwVfG. We understand that the same applies to ‘revoking’ the THF planning approval decision by virtue of administrative act dated 7 June 2007.

To sum up, with regard to the ‘revocation’ of the TXL and THF operation permits, the Senate Administration used the term ‘revocation’, e.g. as headline to these decisions. However, the decisions may not be considered merely as ‘revocations’ within the meaning of Sec. 48 LuftVZO and Sec. 49 VwVfG. Rather, as the decisions are based on Sec. 6 (4) 2 LuftVG, too, the authority also amended the respective permit.⁵⁴ By doing so, the Senate Administration did not decide whether there is only one legal basis to ‘revoke’ the permits and, if so, which provision may be considered as the legal basis.

The legal basis in question, however, contains similar requirements. This approach was upheld by both state as well as federal courts. According to the Higher Regional Administrative Court of Berlin, a specific legal basis for such ‘revocation’ is not needed, and even in case such legal basis was needed, the requirements of Sec. 6 (4) 2 LuftVG as well as those of Sec. 49 VwVfG would have been fulfilled.⁵⁵ The Federal Administrative Court confirmed this ruling stating that the decision to ‘revoke’ the operation permit may in any case be based on Sec. 6 (4) 2 LuftVG.⁵⁶

This approach seems to have been followed by the airport operator himself. With a view to the opening of BER (then) planned for 3 June 2012, FBG applied for an amendment of the ‘revocation decision’ aiming at a ‘revocation’ of the operation permit becoming effective on 3 June 2012 or, alternatively, exempting FBG from

⁵⁴ Cf. *Kluckert*, DÖV 2013, p. 874 (880).

⁵⁵ Cf. OVG Berlin-Brandenburg, judgment of 24 November 2005 – 12 A 3.05, para. 39.

⁵⁶ BVerwG, decision of 29 November 2007 – 4 B 22/07.

the obligation to operate the airport from 3 June 2012 onwards.⁵⁷ In other words: the operator of TXL wanted to cease operations at TXL at the same point in time when resuming operations at BER instead of keeping TXL open for another half-year. This application inevitably must have been based on the notion that the 'revocation decisions' are considered administrative acts within the meaning of Sec. 35 VwVfG and that they may be 'revoked' or amended. However, due to the fact that BER did not become operational on 3 June 2012, the Senate Administration for Urban Planning and Environment did not decide on this application.

In contrast, the 'revocation' of the planning approval decisions seems to have been based primarily on Sec. 49 VwVfG.

No prohibition to 'revoke' a 'revocation decision'

We do not see that the 'revocation' or amendment of the 'revocation decisions' is *per se* prohibited.⁵⁸

There is a legal dispute whether the 'revocation' of a 'revocation' is generally possible (assuming that such 'revocation' suffices and no amendment permit is required).⁵⁹ There is case law and legal literature arguing that the 'revocation' of a 'revocation' is not possible as it would be detrimental to the concept of legal clarity.⁶⁰ The authors argue that instead of 'revoking' a 'revocation', the public authority may enact the administrative act anew. In case the applicable legal framework does not allow to issue the administrative act again, the public authority cannot circumvent this legal framework by way of 'revoking' the 'revocation'. As a result, it would not be possible for the 'revoked' act to regain validity, requiring the respective public authority to issue the administrative act again which in turn would require compliance with the then applicable legal framework.

In our view, however, there are very good reasons to argue that the 'revocation' or amendment of a 'revocation decision' (based on Sec. 49 VwVfG and / or Sec. 48 LuftVZO and / or Sec. 6 (4) 2 LuftVG) is permissible, provided that the respective material and procedural requirements are met. Rather, it depends on the material and procedural requirements whether such 'revocation' or amendment is permissible in the individual case (cf. below 3.3).

Firstly, this view is due to the rather formal and conceptual, systemic argument that, as a 'revocation decision' is an administrative act within the meaning of Sec. 35 VwVfG, there is no legal ground to argue that such an act may not be amended or 'revoked' thus being treated differently than any other administrative

⁵⁷ Cf. reply to the parliamentary inquiry, Parliament of Berlin official record 17/10635. – Please note that this application is not publicly available.

⁵⁸ The following considerations are referring to the competence under Sec. 49 VwVfG to revoke an administrative act. It may well be argued that these considerations do not apply in case Sec. 48 LuftVZO apply or in case the "revocation" of the revocation decisions require an amendment permit under Sec. 6 (4) 2 LuftVG. In our view, however, and taken into account that the Senate Administration has based its decision on a number of legal basis including Sec. 49 VwVfG and Sec. 6 (4) 2 LuftVG, we base our assessment on the same – stricter – principles.

⁵⁹ Cf. *Ibler*, NVwZ 1993, p. 451.

⁶⁰ Cf. OVG Nordrhein-Westfalen, judgment of 20 August 1958 – III A 94/58, VerwRSpr. 13, 26; cf. *Maurer*, Allgemeines Verwaltungsrecht, § 11 para. 20.

acts. In particular, a ‘revocation’ of a ‘revocation decision’ usually does not amount to a loss of legal clarity.⁶¹

Secondly, this view may be confirmed with regard to the legal framework in the present case: as stated before, the ‘revocation’ of both the operation permit as well as the planning approval decision for TXL have not yet become effective, due to the fact that BER has not become operational so far. Therefore, we do not see that ‘revoking’ or amending the respective ‘revocation decisions’ would be detrimental to legal clarity. Rather, such ‘revocation’ or amendment would merely preserve the current legal situation. In other words: such revocation or amendment would merely result in a situation where neither the existing operation permit nor the existing planning approval decision were revoked at all. As the revocations have not yet become effective, it may well be argued that there is no question of “revoking a revocation” at all.

Thirdly, the decisive difference to the ‘revocation decisions’ as regards THF further confirm our judgment. These ‘revocation decisions’ have already become effective, as the conditions laid down in the respective decisions were met. Operations at THF ceased on 31 October 2008. It may well be argued that a ‘revocation’ or amendment of the respective ‘revocation decisions’ is not possible as they would not merely uphold the status quo. However, it may also well be argued that a ‘revocation’ or amendment is permissible, but that such ‘revocation’ or amendment would effectively result in a revival of the respective operation permit and planning approval decision, which in turn would effectively require a new operation permit and a new planning approval (which we consider not possible to obtain). TXL, on the other hand, would not face such situation, as operation permit and planning approval decision are still in place.

Further, it may well be the case that the airport operator (e.g. considering the delays in constructing BER) will hold the six months-period to close TXL after BER has become operational not to be sufficient in order to move all airport operations from TXL to BER. In our view, one can hardly argue that in such case it would be impossible to amend the ‘revocation decisions’ in order to keep TXL open longer and operate both TXL and BER. On the contrary, the purpose of the six months period was precisely to make sure that BER operates properly and is able to handle all of Berlin’s air traffic before closing TXL. We do not see a legal reference point to argue that such amendment, e.g. extending the six months-period to – randomly chosen – twelve or even 18 months transition period, is permitted. Rather, other amendments or even the ‘revocation’ of the respective ‘revocation decisions’ are not prohibited at all.

3.2.2 Planning approval decision BER as implicit limitation to ‘revoke’ ‘revocation decisions’?

As sketched out before, there is a legal obligation to close TXL. This legal obligation does only stem from ‘revocation decisions’, but neither from the planning approval decision BER nor from regional planning. However, the planning approval decision BER is “based” on the assumption that TXL will be closed, thus implementing the consensus decision and its single airport concept.

⁶¹ *Ibler*, NVwZ 1993, p. 451 (451 et seq.).

Against this background, it has to be reviewed whether and to what extent the planning approval decision BER implicitly limits the possibility to ‘revoke’ or amend the ‘revocation decisions’.⁶²

This is of particular importance as the Senate is of the opinion that the Federal Administrative Court has ruled that BER requires closing down THF and TXL. On this basis, it is argued, that keeping TXL open would pose risks to the planning approval decision BER,⁶³ since the legal justification for constructing and operating BER laid and still lies in closing down all other Berlin airports. Thus, it is argued, ‘revocation’ or amendment of the ‘revocation decisions’ would impair the legal justification and correspondingly might allow judicial review of the planning approval decision BER again.

Content of planning approval decision BER regarding closure of TXL

The planning approval decision BER itself does not link the construction and operation of BER to operations at TXL. Only part C – the reasons of decision – refers to TXL, stating that the closure of TXL (and THF) is an integral part of the legal justification for the plan to construct and operate BER. These statements on legal justification for BER are therefore of utmost importance.

The underlying application of FBG for planning approval of BER included a traffic forecast and all relevant application documents and also presumed the operation of a single airport at the Schönefeld location.

Accordingly, the planning approval decision BER highlights the importance to close down TXL (as well as THF) and the importance of the air traffic forecast which is also based on the assumption to close down THF and TXL.⁶⁴

- The planning approval decision is granted on the assumption that TXL and THF will be closed, at the latest after a transition period of six months after BER has become operational.
- Irrespective of the need for air traffic capacities, the applicants for BER argue that BER shall replace TXL (and THF). In this regard, apart from satisfying air traffic needs, BER's primary purpose is to replace all other airports, thus addressing issues under emission control law.
- According to the planning approval authority, the project (expansion of SXF to BER) is justified on the basis of the traffic forecast on the one hand and on the function to replace all others airports on the other.
- In order to approve expansion of SXF (to BER), it is necessary to close THF and TXL, due to the fact that expansion of SXF to a capacity of up to 30 mppa is appropriate (*sachgerecht*) only in case this demand for air traffic capacity is satisfied at this site only.
- Due to the fact that closing THF and TXL are an integral part of the legal justification for the project, the administrative decisions to close these airports had to exist before the plan to expand SXF was approved.

⁶² Cf. Research Services' analysis, p. 19 et seq.

⁶³ E.g. the Statement of the Senate on the plebiscite "Tempelhof remains airport!", official record 16/0524.

⁶⁴ Cf. planning approval decision BER, , p. 327 et seq.

Reference is made to the 'revocation decisions' as regards the operations permits. On this basis, the planning approval authority assumes that THF and TXL will be closed in time and will not impair the need for expanding SXF.

- According to the view of the planning approval authority, there are no indications that the Berlin Senate Administration will not enforce the closing orders, especially as the applicant (i.e. the airport operator) applied for the 'revocation' based on the argument to expand SXF. Taking into account that the expanded SXF (BER) will be able to satisfy the demand for air traffic of the Berlin Brandenburg region, keeping one or even both airports open would not be economically feasible.

Against this background, the planning approval authority also rejected claims to explicitly prescribe closing THF and TXL in the planning approval decision BER. The authority stressed that such decision would not be necessary, as the application for planning approval and the operation concept already ensured that THF and TXL would be closed in time.

To assess whether it could therefore be argued that the planning approval decision BER "provides" for the obligation to close TXL after all, it has to be examined what the scope of the planning approval decision BER is, i.e. which aspects are subject to the planning approval decision's legal binding. Further, it is of interest to what extent the deviating of later development is of relevance.

Legal justification for "plan"

A planning approval decision must be legally justified, especially as such plan gives the right to expropriate real estate needed for the project.

As sketched out before, in its judgment on the planning approval decision BER,⁶⁵ the BVerwG ruled on the claimant's allegation that the planning approval decision did not sufficiently safeguard the planned closing of THF and TXL and the BER's function as substitute airport. In this regard, the claimants argued that the legal justification (*Planrechtfertigung*) is not given:

"The claimants argue that expansion of Schönefeld airport [i.e. construction of BER] to the single airport of the region is fundamental element of its legal justification. Its replacement function has to be irrevocable. A planning approval decision required to close Tegel and Tempelhof airports does not exist. ... The revocations of the operating permits were, at the time the planning approval decision was issued, not yet final. Further, the revocation decisions are planning erroneous [i.e. did not weigh all interests correctly] and illegal."

("Die Kläger tragen vor, der Ausbau des Flughafens Berlin-Schönefeld zum einzigen Flughafen der Region sei tragender Bestandteil der Planrechtfertigung. Die Ersetzungsfunktion müsse rechtlich unumkehrbar sichergestellt sein. Es fehle der für die Schließung der Flughäfen Tegel und Tempelhof erforderliche Planfeststellungsbeschluss. Der Widerruf der

⁶⁵ Cf. only BVerwG, judgment of 16 March 2006 – 4 A 1075/04.

Betriebsgenehmigungen sei bei Erlass des Planfeststellungsbeschlusses nicht bestandskräftig gewesen. Außerdem seien die Widerrufsbescheide abwägungsfehlerhaft und rechtswidrig.")⁶⁶

The court rejected this argument, however stressing that

"... the planning approved expansion of Schönefeld airport [i.e. construction of BER] while retaining both inner city airports would not be legally justified under planning law."

("... der planfestgestellte Ausbau des Flughafens Schönefeld unter Beibehaltung der beiden innerstädtischen Flughäfen fachplanerisch nicht gerechtfertigt wäre.")⁶⁷

Against this background, it is said that keeping both inner city airports operational, an expansion of SXF to BER is legally not justifiable.⁶⁸

In our view, this argument is not sustainable and at least misleading.

Formal argument

Firstly, there is a formal argument whereby the planning approval decision's finality does not contain its reasoning but only its decision content.⁶⁹ This would mean that the planning approval decision does not implicitly limit the power to revoke or amend the revocation decisions as its binding effects are limited:

A planning approval decision is an administrative act in form of a general ruling. A written administrative act essentially consists of a part which is effective (*verfügend*) or ascertaining (*feststellend*) and a part containing the facts as well as the reasons for the decision. Therefore, the content of an administrative act is comparable to a court ruling with its distinction between the operative part of the judgment (i.e. its tenor) on the one hand and the facts and the reasons for the decision on the other.

With regard to the binding effect of an administrative act and thus also of a planning approval decision, it has to be differentiated: The binding effect can only involve the operative part of the administrative act, but neither the facts nor the justification nor the essential grounds of the decision. The justification of an administrative act or the planning justification of a planning approval decision can only be used to interpret the operative part of the judgment.

As stated before, as the planning approval decision BER does not contain any stipulations regarding the closure of TXL which may be open to interpretation, there are no provisions on the closure which may become final and legally binding.

This can further be underlined by the fact that a change of the reason for the planning approval decision does not constitute a change of the decision itself. Thus, an amendment to the planning approval decision requires the change of its

⁶⁶ BVerwG, judgment of 16 March 2006 – 4 A 1075/04, para. 192.

⁶⁷ BVerwG, judgment of 16 March 2006 – 4 A 1075/04, para. 193.

⁶⁸ Cf. reply to the written inquiry, Parliament of Berlin official record 17/18057.

⁶⁹ Cf. Research Services' analysis, p. 21 et seq.

effective component; however, an amendment to the reasons of a planning approval decision is not prescribed by law.

In other words: as long as the continued operation of TXL does not require to amend the effective component providing for the construction and operation of BER, there is no room for an adaption of the planning approval decision.⁷⁰

Material argument

However, apart from the rather formal argument on the scope of the planning approval decision's legal binding, in our view there is also a material argument whereby keeping TXL open would not impair on the legal justification for the plan to construct and operate BER.

As briefly sketched out before, the legal justification of the plan is primarily based on the air traffic forecast and, in connection with that, the function of expanded SXF to replace all other Berlin airports. At the time of the planning approval application, the air traffic forecast was deemed appropriate and sufficient to justify constructing BER.

According to long-standing and established practice, the effective date for the legality of a planning approval decision is the time of the issuance of the planning approval decision. In reference to that point in time, it is reviewed whether the planning approval decision is lawful; this also applies to a traffic forecast the planning approval decision is based on.

Generally, subsequent developments are not relevant. Even in case there turns out to be much lower or much higher traffic than expected, this does not affect or even invalidate the traffic forecast and in turn affect or even invalidate the respective planning approval decision. It may be the case that subsequent developments give rise to review whether such prognosis was methodologically correct in the first place; but in case the planning approval decision has become final and legally binding in the meantime, there is no way to successfully bring a complaint against the planning approval decision on the ground that the traffic forecast has become incorrect, e.g. due to deviating developments.

Therefore, we do not see a legal reference point whereby one could argue that a deviation from the assumptions (i.e. deviation from the assumption that all Berlin airports are closed) and from the traffic forecast impairs the legal justification for the planning approval decision BER. On the contrary, it may well be argued that both the planning approval decision BER as well as the 'revocation decisions' were for their part based on the assumption that the situation will develop as anticipated and allow to adjust the Berlin airport system in case another development takes place.

However, the fact that later deviations from the forecast do not have an impact on the legality of the planning approval decision has to be differentiated from the question whether such deviations allow for changes of the administrative act which is based on an outdated forecast. With regard to the rule of law and for mere logical reasons, it is required that the legality of a planning decision (and eventually an underlying forecast) is assessed on basis of the circumstances at

⁷⁰ Cf. *Kluckert*, DÖV 2013, p. 874 (877).

the date of the issuance of such decision. At the same time, from a material perspective, there is no legal ground to prohibit ‘revoking’ or amending the administrative decisions (provided the respective material and procedural requirements are met) in case the circumstances for the decision significantly change. The effective date for the legality of a decision cannot stay the reference point for possible future changes to that administrative act. Otherwise, the competent authority would be bound by outdated circumstances. This is of special interest considering the nature of the administrative acts at hand: public infrastructure projects (as the decision to construct and operate BER) need to be responsive to the developing needs of society. Urban development, population numbers and traffic data – to name just a few important aspects in this context – are subject to constant change. In turn, the state authorities must have the necessary flexible instruments at hand to react to such changes which have a significant impact on specific administrative decisions. It would not serve public interests if authorities were bound to final planning approval decisions leaving significant later developments out of consideration *per se*.

Therefore, German administrative law allows for modifications even to planning approval decisions. According to Sec. 76 (1) VwVfG, a modification of a "plan" is possible before the completion of the project; apart from that, amending a planning approval decision requires another planning approval procedure. In addition, as will be shown below in connection with procedural considerations, a subsequent change of the circumstances is a ground for the resumption of an (administrative) proceeding. The principle of protection of legitimate expectations can serve to counter inadequate consequences.

Yet, if there are in principal material and procedural means to amend the planning approval decision BER itself due to an outdated traffic forecast, this must – *a fortiori* – apply to the ‘revocation decisions’ as they are independent from the planning approval decision BER even though they also handle Berlin air traffic. Again, the planning approval decision BER does not limit the possibility to ‘revoke’ or amend the ‘revocation decisions’ if the reasons for that eventual limitation – the traffic forecast which requires TXL to close – are outdated, which would in principle empower the authority to change the planning approval decision itself for the exact same reason.

Risk of revocation of planning approval decision

It is routinely claimed that, in case TXL was kept open, the planning approval decision BER would be put at risk. However, in connection with the argument mentioned before, we do not see such risk.⁷¹

According to Sec. 49 (2) no. 3 VwVfG, a lawful, beneficial administrative act may, even when it has become final (i.e. non-appealable), be revoked in whole or in part with effect for the future only when the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest.

It may well be argued that continued operation of TXL could generally be considered a subsequent change within the meaning of Sec. 49 (2) no. 3 VwVfG;

⁷¹ Cf. also Kluckert, DÖV 2013, p. 874 (878).

it is important that the assumed continued operation of TXL (and not updated traffic forecasts) is the reference point in this context.

However, a revocation due to subsequent changes is only possible if the authority would be entitled not to issue the administrative act and if failure to revoke it would be contrary to the public interest. Also, there would need to be hypothetical causality between the changed situation (i.e. the continued operation of TXL) and the assumed decision not to adopt the planning approval decision BER. Thus, the continued operation of TXL would need to be a reason which could justify the non-adoption of the planning approval decision.

Considering these conditions for the application of Sec. 49 (2) no. 3 VwVfG, we do not see that the competent authorities would actually have the competence to revoke the planning approval decision BER under the given circumstances.

It is true that the closure of TXL (and THF) was an important factor in approving the expansion at the SXF, in particular as the new airport's purpose was to replace THF and TXL.

However, if the authority were to decide whether to enact the planning approval decision anew (assumed that TXL stays open), it would still have to consider the updated traffic forecast. Due to higher air traffic demand, there are good arguments that BER does not provide enough capacity and that a second airport is required. Thus, it becomes obvious that the question whether the planning approval decision BER may be revoked is interlinked with the material question at hand, i.e. whether there are good (legal and) economic reasons to keep TXL open. Even if the authority was deemed to be entitled not to issue the planning approval BER if TXL stayed open, it can – in our view – definitely not be argued that failure to revoke the approval would be contrary to the public interest under these circumstances.

In any case, it also has to be noted that the revocation under Sec. 49 VwVfG is part of the authority's discretionary powers. Circumstances which may narrow these discretionary powers, thus obliging the public authority to revoke, are not apparent. Additionally, revoking a planning approval decision is considered to be an *ultima ratio* only in case additional protection measures are not sufficient.

3.2.3 Consequences of revoking or amending revocation decisions

As stated before (cf. above 3.2.1), we do not see any legal argument that the general rules concerning the amendment and 'revocation' of administrative acts shall not apply in the case at hand. Thus, the 'revocation' or amendment of the 'revocation decisions' are generally possible if the respective material and procedural requirements are met, depending on the legal basis for such 'revocation' or amendment.⁷²

Apart from that, it is disputed what the consequences of such 'revocation' or amendment are. This in turn determines what material and procedural requirements have to be met.

⁷² Cf. below 3.3. As shown before, the public authorities have based their revocation decisions on a number of legal basis, partly applied analogously, especially as the respective legal basis are very similar.

- Firstly, it is argued that keeping TXL open requires a new operation permit and a new planning approval decision. This in turn would mean that revoking or amending the revocation decisions in question has no effect at all, in particular does not impact on the revocation of the existing operation permit and planning approval decision.
- On the other hand and opposite to the aforementioned statement, it can be argued that revoking or amending the revocation decisions annuls – or in the case of a mere amendment effectively comparable to a ‘revocation’ may annul – the respective revocations only. This in turn would mean that the existing operation permit and planning approval decision are upheld without the need to apply for an amended operation permit or planning approval decision and without the need to comply with the currently applicable legal framework. In this regard, it could be argued that the operation permit and the planning approval decision have been and still are final and legally binding. Compliance with the current legal framework is only required in case the respective law provides for subsequent adjustment.
- In between these two positions, there may also be some flexibility as regards the consequences of such revocation or amendment.

However, there is no conclusive (judicial) clarification of the consequences of such revocation or amendment.

In our view, there is no legal basis that a new operation permit and a new planning approval decision would be required in order to continue operating TXL. Otherwise, revoking or amending the revocation decisions would not have any legal impact at all. In this regard, it has to be kept in mind that the operation permit and the planning approval decision have not effectively been revoked yet, but that they are still the legal basis for operations at TXL. Therefore, revoking or amending the revocation decisions would not (other than in case of THF) allow resuming operations at TXL but rather allow their continuation.

There are good reasons to argue that revoking or amending the revocation decisions merely annuls the revocations. In this regard, the Federal Administrative Court has stated that the revocation generally may not be considered as planning decision, but – the same as the quashing in an administrative court proceeding – contains a return to the original legal state only.⁷³

In our view, only such an approach reflects the current status, i.e.

- TXL is deemed to have been permitted and approved finally due to law transferring federal law to Berlin (West),
- both the operation permit and the planning approval decision are final and legally binding, thus deprived from further judicial review,
- both the operation permit and the planning approval decision are the legal basis for operating TXL as to date and
- both the revocation of the operation permit as well as the revocation of the planning approval decision have not yet become effective.

⁷³ BVerwG, judgment of 31 July 2012 – 4 A 7001/11 and others, BVerwGE 144, p. 44 para 23: "Die Rücknahme stellt sich nicht anders als die Aufhebung im Anfechtungsverfahren nicht als planerisch-gestaltende Maßnahme, sondern lediglich als Rückführung auf den ursprünglichen Rechtszustand dar."

However, as stated before, there is no conclusive case law in this regard. In particular, there is no case law referring to the unique factual and legal situation at hand. Therefore, it cannot be assessed conclusively whether public authorities and administrative courts would follow the line of argument sketched out before, especially as regards the procedural and material considerations to remove the legal obligation to close TXL.

On this basis, as a precaution and assuming that

- even though it may be possible to revoke or amend the revocation decisions,
- such revocation or amendment upholds the existing operation permit and planning approval decision and does not require to apply for a new operation permit and a new planning approval decision (which would be impossible to obtain),

we base our further analysis on the approach that the revocation decisions may only be revoked or amended pursuant to an *actus contrarius* based on the legal basis on which the respective revocation decisions were based, too. Taking into account the public authority's administrative practice, we also assume that some form of planning element is needed and that compliance with certain (public) law requirements is needed.

3.3 Legal measures to remove legal obligation

As highlighted before, in order to keep TXL open it is necessary to revoke or amend the revocation decisions as regards the operation permit and the planning approval decision. As laid out before, there is no explicit prohibition nor an implicit limitation to such revocation / amendment by virtue of the planning approval decision BER.

As there is no conclusive case law on the consequences and as a precaution, we assume that the revocation or amendment of the revocation decisions will primarily have to be considered as planning decision, as the revocation decisions were, *inter alia*, based on respective provisions of the Air Traffic Act.⁷⁴ In our view, it may be necessary to revoke or amend the revocation decisions by way of issuing an *actus contrarius*, i.e. an act contrary to the revocation decisions; in this case, a number of legal basis have to be taken into account.

However, these different legal basis are very similar; therefore, even though there are a number of material considerations which have to be taken into account, for the sake of this analysis it is suitable not to differentiate the legal basis and to rather summarize the respective material considerations.

3.3.1 Material considerations: revocation as new planning decision

As shown before (see 3.2.1), the revocation decisions were based on a number of legal bases:

⁷⁴ Kluckert, DÖV 2013, p. 874 (880 et seq).

- The revocation decision as regards the planning approval decision (dated 2 February 2006) was based on an analogous application of Sec. 8 LuftVG and Sec. 77, 72 (1) and 49 VwVfG (in connection with the Berlin VwVfG).⁷⁵
- The revocation decision as regards the operation permit (dated 29 July 2004) was based on Sec. 6 LuftVG, Sec. 48 LuftVZO and Sec. 49 VwVfG (in connection with the Berlin VwVfG).⁷⁶ The administrative courts upheld this revocation decision and stated that the revocation would primarily be based on Sec. 6 LuftVG (in case a legal basis was required at all).

As the Senate Administration for Urban Planning emphasized in its revocation decision dated 29 July 2004, it did not decide on the question which legal basis is relevant. Rather, it decided that this question may be left open as the provisions contain similar requirements.⁷⁷

As explained before, the material considerations will therefore be summarized independent of the specific provisions. Further, as explained before, we assume that revoking or amending the revocation decisions implies some form of planning element – i.e. a decision based on use of discretionary powers and a decision based on weighing all interests.⁷⁸

As can be seen in connection with the revocation decisions themselves, such use of discretionary powers and weighing of all interests generally leads to some flexibility as regards the decision outcome. Taking all relevant legal positions and interests into account accurately, there are a number of possible decision outcomes making it impossible to predict what the competent public authority would decide within the limits of its discretionary powers.

This may, on the other hand, also favour keep TXL open. E.g. it may well be the case that certain aspects which have to be taken into account, in particular requirements under flight noise protection law, speak against continued operations under the same circumstances as to date; therefore, this aspect may be remedied on the decision outcome level, thus generally keeping TXL open but under amended conditions (rather than to not keeping TXL open at all).

3.3.2 In particular: obligation to take all concerned interests and legal positions into account and weigh them

In the course of this legal analysis, it is not possible to address and comprehensively assess all aspects which may come up in administrative proceeding to remove or amend the revocation decisions. However, considering the Senate Administration's administrative practice and on the basis of arguments raised in connection with the proposal to keep TXL open,⁷⁹ we

⁷⁵ Cf. Research Services' analysis, p. 9. – As noted before, the revocation decision has not been available to us.

⁷⁶ Cf. revocation decision, p. 9 et seq.

⁷⁷ Cf. revocation decision, p. 10: "Ob vorliegend & 6 Abs. 2 S. 4 LuftVG, § 6 Abs. 4, § 48 LuftVZO oder § 49 VwVfG einschlägig ist, kann dahinstehen, weil in den Normen materiell vergleichbare Prüfinhalte bestehen."

⁷⁸ Cf. revocation decision, p. 10: "... geht die Luftfahrtbehörde von einer Ermessens- bzw. Abwägungsentscheidung aus ..."

⁷⁹ Interestingly, in an interview with Remo Klinger, long-year legal advisor to the federal state of Berlin in connection with the Berlin airports (Berliner Zeitung, 20 March 2017), it is suggested that possible capacity restraints at BER do not require to keep TXL open, but may be remedied by creating additional capacities at

assume that the following aspects will be raised and, accordingly, will have to be considered:

Deviating development of circumstances, in particular higher demand than expected

In our view, the most significant aspect favouring keeping TXL open lies in the fact that there is higher air traffic demand at Berlin's airports than previously expected.

As will be shown in more detail in the course of the economic analysis (cf. below), not only does the current demand already exceed the demand predicted in the course of the planning approval proceedings as laid down in the traffic prognosis. Furthermore, increasing demand also exceeds the expected rate of growth. Additionally, there is a significant growth potential exceeding the air traffic predicted.

This deviation is not only relevant as regards the possibility to resume proceedings, i.e. to re-open the administrative proceedings which led to the revocation decisions (cf. below 3.3.4). In our view, this aspect also has to be taken into account when considering whether there are viable grounds to keep TXL open. In this regard, it may well be argued that far higher demand than expected may only be satisfied in case TXL is kept open.

Limited capacity at BER, also in connection with planned expansion

In this context, higher demand than expected is also relevant as regards BER's limited capacities, even in connection with its planned expansion. In our view, this aspect is a further central argument in favour of keeping TXL open.

As shown in more detail in the economic analysis (cf. below), there are capacity restrictions at BER, primarily due to the limited runway capacity.⁸⁰ However, there may be a demand for as much as 100 movements per hour during the busiest hours. Such air traffic demand cannot be handled by BER alone. Only BER and TXL combined would have sufficient runway capacity to handle air traffic demand. Operating BER alone would lead to severe capacity restraints.

It has to be noted, however, that there are plans to expand BER by way of two additional terminal satellites (West of the new terminal building). Currently, these plans have not advanced considerably, and it is unclear when their realisation may be expected. Moreover, as we understand there are serious difficulties in realising these satellites as they would require a connection to the main terminal building (unless they are only used for connecting passengers), either by way of a sky bridge or by way of a tunnel. According to our understanding, no preliminary works were conducted, thus realising such connection would affect air traffic at BER, in particular on the apron. In any case, we understand that such

other airports. This approach is clearly misleading; as the economic analysis will show in more detail, there clearly is a demand for air traffic at the Berlin Brandenburg region which may not be satisfied by connections to, e.g., Leipzig-Halle or other airports.

⁸⁰ Interestingly, in an interview with Remo Klinger, long-year legal advisor to the federal state of Berlin in connection with the Berlin airports (Berliner Zeitung, 20 March 2017), it is accepted that the capacity of the runways is crucial. However, in the same interview, it is said that the capacity suffices and will suffice for the foreseeable future. It is unclear, however, on what basis this assessment is drawn.

satellites would only expand the passenger capacity but would not remediate the limited capacity at BER (apart from taking away capacity as regards parking positions on the apron). They may expand the terminal capacity of up to 45 mppa, but they would not change the runway capacities. In other words: BER's capacities are primarily defined by its runway capacities.

At the same time, we do not see any capacity-related considerations speaking against keeping TXL open. Rather, the revocation decisions and the respective applications of the BFG may be understood to the contrary. E.g., according to the revocation decision as regards the operation permit TXL, BFG stated that sufficient capacity to handle all of Berlin's air traffic has to be ensured before the airlines using TXL should move to the new airport.⁸¹ Thus, it can be argued that the airport operator – as well as the Senate Administration when granting the application – assumed that BER has sufficient capacity to handle all of Berlin's air traffic.

Furthermore, all capacity-related considerations which have been made in connection with approving BER and closing TXL primarily relate to the possibility of extending TXL as single airport, thus as an alternative to constructing and operating another airport. This situation does not arise any more, and the respective considerations (e.g. TXL's limited terminal capacity and limited runway capacity due to low distance between the two runways)⁸² may speak against TXL as single airport, but may not be taken into account when discussing the possibility to keep TXL open.

Economic interests of stakeholders

The economic interests of stakeholders will have to be taken into account, too.

Operator of TXL / BER airport

The economic interests of the operator of TXL and BER, i.e. FBB and BFG as 100% subsidiary of FBB, are ambivalent.

On the one hand, keeping TXL open would give BFG the right to operate TXL, thus gaining turnover.

In this regard, the interests of FBB may also play a role. As the economic analysis will show in more detail, a closure of TXL would have a number of negative effects, including a decrease of service quality during peak hours, which falls under the direct responsibility of the operating companies.

On the other hand, the right to operate TXL also involves the obligation to operate the airport and to make it available to all users in a non-discriminatory way.

In this context, it also has to be taken into account that, as we understand, keeping TXL open would require renovating the airport and improving its facilities quite extensively. It is our understanding that substantial renovation and improvement measures were not conducted any more due to BER's planned

⁸¹ Cf. revocation decision, p. 14.

⁸² Cf. planning approval decision BER, p. 330, 332.

inauguration; as to date, only renovation and improvement measures absolutely necessary are conducted, therefore causing an investment backlog. In order to keep TXL open, this backlog would have to be remedied. This may also include flight noise protection measures (cf. below).

Berlin, Brandenburg and Federal government

The interests of the federal states of Berlin and Brandenburg as well as the Federal Republic of Germany are of special importance. This is due to the fact that they are the only shareholders of the operating companies FBB and consequently BFG.

As public entities they have to consider aspects of public interest including budgetary aspects and not only economic interests. This also explains why fundamental decisions by the airport operators generally have a special political dimension.

It is noteworthy that, in a reply to a written inquiry in the Parliament of Berlin, the Senate considered this political dimension as well as economic interests and came to the conclusion that it was in the shareholders' interest to close TXL as soon as possible. It stated:

"None of the shareholders of Flughafen Berlin Brandenburg GmbH (FBB) intends to operate BER and Berlin-Tegel in parallel over the [six-month] period mentioned."

("Keiner der Gesellschafter der Flughafen Berlin Brandenburg GmbH (FBB) beabsichtigt einen über den genannten Zeitraum [von sechs Monaten] hinausgehenden parallelen Betrieb von BER und Berlin-Tegel.")⁸³

Thus, it can fairly be assumed that the shareholders were – at the time of issuance of the statement – not favouring keeping TXL open.

Due to the change of the political and economic circumstances, however, it may well be the case that the shareholders re-evaluate their opinion once the probable negative effects of closing TXL are fully taken into account.

Airlines

The interests of airlines are ambivalent and highly controversial.⁸⁴

From an objective point of view, it should be assumed that keeping TXL open is in the interest of the airlines using either TXL and / or BER. This follows from the fact that a more differentiated airport market provides for a higher degree of competition.

As will be shown in the economic analysis in more detail, this is also the case at the moment. TXL and SXF offer different facilities and thus have a different level of airport charges. This may also lead to some form of competition between the Berlin airports which enables airlines to tailor their offerings and to target different customer segments.

⁸³ Cf. reply to the written inquiry, Parliament of Berlin official record 17/18057.

⁸⁴ Cf. Tagesspiegel, 19 April 2017.

However, the airlines are divided whether TXL should be kept open. Obviously it is in the interest of some airlines not to keep TXL open and to force all airlines to move to BER, thus subjecting them to the same airport charges. In effect, it may also be the interest of some airlines to use capacity restraints in order to push other airlines away.

Flight noise – need for further flight noise protection

As will be shown in more detail below (cf. below 3.3.3), flight noise protection issues are most likely the main aspect speaking against keeping TXL open. The 'revocation decisions' stress the flight noise impact on the neighbouring areas, and it is clear from the number of citizens' initiatives that the operation of an airport in such central location affects a great amount of people.

At the moment, flight noise protection at TXL does not meet the currently applicable legal standards. Rather, due to a special provision (so-called "Lex Tegel") TXL is effectively exempted from the obligation to comply with the currently applicable flight noise protection law and only has to be in line with provisions under former special Berlin flight noise law. This situation, however, will change, at the latest at the end of 2019, when the transition provision (Sec. 4 (7) of the Act on Protection against Flight Noise) expires, thus requiring to establish a noise abatement area at TXL. Such noise abatement area will require implementing further noise protection measures; the exact costs of such measures remain unclear but will most likely amount to some hundred million Euro.

Whereas it is obvious that closing down TXL would reduce the number of people affected by flight noise and effectively free the Northern districts of Berlin from any flight noise, keeping TXL open would not worsen the situation, however extending the status quo. Further, as air traffic at BER may be reduced, the number of people affected by flight noise in that area will be reduced.

In any case, it is clear that flight noise poses a multi-layered challenge. However, in our view this aspect does not *per se* speak against keeping TXL open, especially as this issue may be reflected in a decision to revoke or amend the revocation decision. In particular, claims against keeping TXL open on the basis of further flight noise pollution may be addressed by way of limiting air traffic at TXL to daytime.

Urban planning

It also has to be taken into account that only closing TXL opens up urban planning possibilities at the TXL site. In case TXL is kept open, the site would continue to be used as an airport.

In case TXL closes down, it is said that approx. 460 hectares space would become available for alternative usage. In preparation of the envisaged closure, the Senate Administration for Urban Planning identified the basics for potential future usages.⁸⁵ On this basis, post-utilization concepts were discussed and a

⁸⁵ Post utilization Tegel airport, Basic Evaluation, March 2009.

number of site conferences (*Standortkonferenzen*) held.⁸⁶ According to these concepts, the airport facilities are supposed to be used as a research and industrial park and for industrial and commercial purposes. Further, there are plans to construct 5,000 residential houses. The Tegel Projekt GmbH was founded, planning and promoting post utilization at the TXL site.

On the basis of the Masterplan TXL, the land-use plan (*Flächennutzungsplan*) was amended. Further, in order to allow the aforementioned building uses, the Senate Administration for Urban Planning initiated a number of building development plan (*Bebauungsplan*) proceedings, including

- building development plan 12-50 "Tegel airport" and
- building development plan 12-51 "partial area of Tegel airport in the area of both runways".

Thus far, these building development plans have not been decided upon and have not come into force. The urban planning law basis for future non-aviation uses has therefore not been created yet.

Especially the plans to construct thousands of residential houses are seemingly reasonable measures, as there is a considerable shortage of housing and industrial sites in Berlin. Using the current TXL site would therefore be an opportunity to establish such areas relatively close to the city centre.

Such non-aviation use as envisaged in post utilization concepts would of course not be possible in case TXL was kept open.

Even though urban planning considerations superficially speak against keeping TXL open, in our view this aspect and its weight are not to be overestimated. It is clear that urban planning has to be conducted once the current use of a site ends, in particular a site of this size is concerned. Not surprisingly, the planning authorities have considered what future use may and should be permitted on the site. In return, the mere fact that there are plans for future use on the site once airport operations cease does not at the same time provide for an obligation to actually make the site available in the first place. In this sense, it would mean to put the cart before the horse.

Accordingly, the alleged need to provide for additional construction sites was never an argument in favour of closing TXL.

Accessibility of airports / traffic connection to Berlin city centre

In our view, the accessibility of TXL and BER and their connection to Berlin city centre speak in favour of keeping TXL open. While the airport operator promised that a new railway connection – an airport express, connecting Berlin city centre with BER in approx. 20 minutes via a new train track – would be operational at the time BER becomes operational, construction works have not even begun even though BER becoming operational is at least five years late. Thus, there are currently no indications that this connection will be available in due time.

⁸⁶ E.g. Post utilization Tegel airport, 7th site conference, 20 January 2015.

Additionally, car traffic connection to BER will most likely be very troublesome as the major connection – motorway 113 and its feeder motorway 100 – are congested regularly.⁸⁷

All in all, keeping TXL open would equalise traffic.

Summary

There are a number of aspects which have to be taken into account when deciding on whether to keep TXL open or not. In our view, even though it may not be mandatory to keep TXL open as there are some arguments which speak against such proposal, we do see strong arguments favouring keeping TXL open.

3.3.3 In particular: requirement to comply with (public) law framework

As stated before, revoking or amending the revocation decisions will most likely require to contain a planning element as well. An (operation) permit under aviation law may not be issued in case it is detrimental to the public interest (Sec. 6 (3) LuftVG); further, before issuing the permit, it has to be reviewed whether the planned project is in compliance with the requirements under regional planning.

Thus, such revocation or amendment decision may need to comply with certain (public) law requirements.⁸⁸ We have limited our analysis to two aspects which are routinely addressed in connection with keeping TXL open: compliance with requirements under flight noise protection law and with requirements under regional planning law.

Compliance with requirements under flight noise protection law

Requirements under flight noise protection law stem from the Act on Protection against Flight Noise (*Gesetz zum Schutz gegen Fluglärm*) and subordinate legislation, such as the Ordinance on Noise Mapping (*Verordnung über die Lärmkartierung*, 34th Ordinance to the Federal Emission Control Act).

The "anti-noise" legislation originated in 1971 with the first version of the Act on Protection against Flight Noise. This version did not apply to Berlin due to limited applicability of federal German law in Berlin. Instead, Berlin was able to provide for its own legal regulation. By virtue of Berlin's own statute, however, the federal law was implemented, but yet adapted to the city's special situation. In the context of re-unification, Sec. 2 (8) of the Sixth Act on the Transfer of Federal Law to Berlin provided that Sec. 1 to 12 of the Act on Protection against Flight Noise from 1971 shall apply to Berlin (West), too, but with some modifications, namely that the Ordinance of the Berlin Senate on the Determination of the Noise

⁸⁷ In a report dated 26 April 2017, Der Tagesspiegel refers to a study commissioned by the FBB which anticipates high levels of traffic congestions once BER opens, mainly due to the closure of TXL and a higher number of passengers than originally forecast.

⁸⁸ Please note that the scope of the requirement to comply with the (public) law framework is unclear and subject of discussions. In case a new operation permit and a new planning approval decision were needed, they would have to comply with the then legal framework. However, in case the currently still valid operation permit and planning approval decision continue to be valid, it may well be argued that they do not have to be amended or aligned to currently applicable law at all. In our view, however, this does not apply to flight noise protection law as well as regional planning law.

Protection Area for Tegel airport from 4 June 1976 shall remain in full force and effect as a federal regulation.

When the anti-noise legislation of 1971 was no longer capable of meeting the current requirements due to enormous changes in air traffic, the Act on Protection against Flight Noise was partially reviewed. On 1 June 2007, a new version was enacted, effectively tightening the limits for noise protection zones and establishing night-protection zones (whereby the night-time is defined from 10 pm to 6 am). Sec. 1 of the Act defines its purpose:

"The purpose of this law is to ensure, in the vicinity of airfields, constructional restrictions of use and noise protection for the protection of the general public and the neighborhood from dangers, considerable disadvantages and considerable nuisances by aircraft noise."

("Zweck dieses Gesetzes ist es, in der Umgebung von Flugplätzen bauliche Nutzungsbeschränkungen und baulichen Schallschutz zum Schutz der Allgemeinheit und der Nachbarschaft vor Gefahren, erheblichen Nachteilen und erheblichen Belästigungen durch Fluglärm sicherzustellen.")

According to Sec. 4 of the Act, noise abatement areas (*Lärmschutzbereich*) have to be established. However, Sec. 4 (7) contains a special provision for the establishment of a noise abatement area at TXL; this provision is also referred to as "Lex Tegel":

"For an airfield referred to in (1), no noise protection area shall be determined or re-established if it is to be closed within a period of ten years after the assignment requirement according to (4) and (5) and if the administrative procedure for the closure has already begun. After the closure of an airfield, the existing noise protection area shall be abolished. The provisions of (1) and (2) shall apply accordingly to an airfield referred to in (1) if it permanently loses the characteristics referred to therein; (8) remains unaffected."

("Für einen Flugplatz nach Absatz 1 ist kein Lärmschutzbereich festzusetzen oder neu festzusetzen, wenn dieser innerhalb einer Frist von zehn Jahren nach Vorliegen eines Festsetzungserfordernisses nach den Absätzen 4 und 5 geschlossen werden soll und für seine Schließung das Verwaltungsverfahren bereits begonnen hat. Nach der Schließung eines Flugplatzes ist ein bestehender Lärmschutzbereich aufzuheben. Die Sätze 1 und 2 gelten entsprechend für einen Flugplatz nach Absatz 1, wenn dieser die dort genannten Merkmale in sonstiger Weise dauerhaft verliert; Absatz 8 bleibt unberührt.")

Therefore, according to the currently applicable flight noise protection law, a noise abatement area is not required for TXL, as it was supposed to be closed within ten years and the corresponding administrative procedures had already begun.⁸⁹

⁸⁹ OVG Berlin-Brandenburg, judgment of 11 June 2014 - OVG 6 A 10.14.

In fact, TXL does currently not meet the requirements of the above mentioned Ordinance enacted by the Senate of Berlin. However, in case TXL continues to be operated, the derogation in Sec. 4 (7) of the Act is understood to expire. There is a dispute whether this would take place in 2017 already or 2019, depending on whether the above mentioned provision makes reference to the point in time when the Act came into force (i.e. 7 June 2007) or whether reference is made to the time limit laid down in Sec. 4 (4) 1 of the Act (i.e. 2009).

In its judgment of 11 June 2014, the Higher Regional Administrative Court of Berlin and Brandenburg did not decide on the reference point for the ten-year time limit. The court also stressed that the condition in the revocation decision linking the revocation to BER becoming operational has no influence on the time limit:

"Based on this, the defendant is rightly of the opinion that he is not obliged to re-establish the noise protection area established for the first time in 1976 for Tegel Airport. Tegel Airport is to be closed within ten years. The closure of the airport has already been provided by the final decision on the revocation of the operation permit of 29 July 2004. It is irrelevant that the date on which the revocation becomes effective has been made conditional upon the date when the two runways of BER will have become operational. It is crucial that in accordance with the planning Tegel airport is to be closed within the ten year period.

Thereby it is irrelevant if the ten year period may have already begun with the entry into force of the flight noise protection law on 7 June 2007 or with the end of 2009, since the obligation to re-establish the noise protection area should have been implemented by that date at the latest.

If the later date is applied, the time limit would end on 31 December 2019. Even if the beginning of the deadline was set at the time of the entry into force of the flight noise protection law the deadline that ends in mid 2017 would not have expired yet because the closing procedure had already been concluded at this time. As only airfields for which the closing procedure has begun already are to be exempted from the requirement of the establishment of a noise protection area, this is even more true for airfields where, as at Tegel airport, the closing procedure has already been completed but has not yet been put into force.

In any case, the fact that the noise protection area is dispensable is due to the fact that within ten years Tegel airport will lose its characteristics as a transport airport in another way – by entering the condition of the revocation decision of launching the runways of BER – permanently. In addition, the simulated planning decision for Tegel airport according to the unchallenged discourse of the defendant has been repealed by the decision of 2 February 2006."

("Dies zugrunde gelegt, geht der Bekl. zu Recht davon aus, dass er für den Flughafen Berlin-Tegel nicht zu einer Neufestsetzung des erstmalig im Jahr 1976 festgesetzten

Lärmschutzbereichs verpflichtet ist. Der Flughafen Berlin-Tegel soll innerhalb von zehn Jahren geschlossen werden. Die Schließung des Flughafens ist bereits durch bestandskräftigen Bescheid über den Widerruf der luftrechtlichen Genehmigung vom 29. 7. 2004 verfügt worden. Dabei spielt es keine Rolle, dass der Zeitpunkt, an dem der Widerruf wirksam wird, davon abhängig gemacht worden ist, wann die beiden Start- und Landebahnen des Verkehrsflughafens Berlin Brandenburg in Betrieb genommen worden sind. Maßgeblich ist, dass die Schließung des Flughafens Berlin-Tegel nach den bisherigen Planungen noch innerhalb der Frist von zehn Jahren erfolgen soll.

Dabei kann dahinstehen, ob die Frist von zehn Jahren bereits mit Inkrafttreten des Fluglärmschutzgesetzes am 7. 6. 2007 oder mit dem Ende des Jahres 2009 zu laufen begonnen hat, da spätestens zu diesem Zeitpunkt die Verpflichtung zur Neufestsetzung des Lärmschutzbereichs umgesetzt gewesen sein sollte.

Wird der spätere Zeitpunkt zugrunde gelegt, würde die Frist am 31. 12. 2019 enden. Selbst wenn man für den Fristbeginn auf den Zeitpunkt des Inkrafttretens des Fluglärmschutzgesetzes abstellte, weil das Schließungsverfahren zu diesem Zeitpunkt bereits bestandskräftig abgeschlossen war, wäre die Mitte 2017 endende Frist noch nicht abgelaufen. Da nur Flugplätze von dem Festsetzungserfordernis ausgenommen werden sollen, für die das Verwaltungsverfahren über die Schließung bereits begonnen hat, muss dies erst recht für Flugplätze gelten, bei denen – wie bei dem Flughafen Berlin-Tegel – das Schließungsverfahren bereits abgeschlossen, die Schließung aber noch nicht vollzogen ist.

Im Übrigen folgt die Entbehrlichkeit der Neufestsetzung eines Lärmschutzbereichs jedenfalls daraus, dass der Flughafen Berlin-Tegel innerhalb der Frist von zehn Jahren seine Merkmale als Verkehrsflughafen in sonstiger Weise – hier durch Eintritt der im Widerrufsbescheid genannten Bedingung der Inbetriebnahme der Start- und Landebahnen des Flughafens Berlin Brandenburg – dauerhaft verlieren wird. Hinzu kommt, dass nach dem unwidersprochen gebliebenen Vortrag des Bekl. durch Bescheid v. 2. 2. 2006 die fiktive Planfeststellung für den Flughafen Berlin-Tegel aufgehoben worden ist.”⁹⁰

We understand that both the Berlin Senate as well as the airport operator are of the opinion that a noise abatement area will have to be established by December 2019 and not by June 2017 (which would be impossible to comply with). Accordingly, in case TXL was kept open after 1 January 2020, a noise abatement area has to be established.⁹¹

⁹⁰ OVG Berlin-Brandenburg, judgment of 11 June 2014 - OVG 6 A 10.14.

⁹¹ Allegedly, the Berlin Senate currently, as a precaution, calculates the flight noise areas applicable from 2019 onwards. This indicates that the Berlin Senate does not necessarily expect opening BER before 2019.

According to the Act on Protection against Flight Noise, noise abatement areas have to ensure that a certain noise limit is not exceeded (cf. Sec. 2 of the Act). Depending on the protection level for day- and night time, this may require sound isolation measures in order to ensure compliance with such noise limit values. Obviously, there are opposing calculations as regards the costs of such noise protection measures. We understand that the Berlin Senate currently, as a precaution, calculates the flight noise areas applicable from 2019 onwards. Not only does this indicate that BER does not open before 2019; moreover, it is said that such measures will not nearly as cost-intensive as claimed.

In any case, it is clear that the extent to which the TXL-area will be exposed to flight noise cause by air traffic at TXL depends on the volume of air traffic. In particular, extensive flight noise protection measures may well be reduced depending on whether air traffic is limited to daytime or not.

Compliance with binding regional planning

As stated before, Sec. 6 (3) LuftVG requires to review whether the planned project is in compliance with the requirements under regional planning. There is a popular argument that keeping TXL open is not possible due to contradicting requirements under regional planning. These requirements are of particular importance as both the federal states of Berlin and Brandenburg co-jointly have the competence on regional planning matters⁹² and considering that regional planning has been amended in order to safeguard construction and operation of BER.

In particular, the decision to locate the single airport for the Berlin and Brandenburg region at the SXF site was a regional planning decision which was only reproduced by the planning approval authority. The Federal Administrative Court accepted this approach⁹³ and stated that the choice of the airport site Schönefeld was a decision under regional planning which was taken on the level of state development planning (*Landesentwicklungsplanung*).

There are a number of regional planning stipulations which, according to regional planning law,⁹⁴ have a different legal effect:

- Firstly, Sec. 19 (11) of the Regional Development Program (*Landesentwicklungsprogramm*) from 2003 provides that national and international air traffic for Berlin and Brandenburg should preferably be concentrated at one single airport.⁹⁵ Interestingly, the Regional Development Program has the rank of a formal law and required ratification of both the Parliament of Berlin as well as of the Parliament of Brandenburg. However, concentrating air traffic at one site, thus closing all other airports is only the preferred option and not mandatory. The program is not legally binding, as it

⁹² Regional planning for Berlin and Brandenburg is conducted by the two federal states together and co-jointly on the basis of the Regional Planning Treaty (*Landesplanungsvertrag*) and corresponding legislation. The provisions of the Treaty provide for a commitment to enact a Regional Planning Program as well as regional development plans.

⁹³ Cf. BVerwG, judgment of 16 March 2006 – 4 A 1075/04.

⁹⁴ Cf. BVerwG, judgment of 16 March 2006 – 4 A 1075/04, para. 55 et seq. Cf. reply to the written inquiry, Parliament of Berlin official record 17/18057; Research Services' analysis, p. 13 et seq.

⁹⁵ "Dabei soll der nationale und internationale Luftverkehrsanschluss für Berlin und Brandenburg möglichst auf einen Flughafen konzentriert werden [...]".

contains principles of regional development only; however, such principles have to be taken into account.

- Secondly, the Regional Development Plan for Aviation in Berlin and Brandenburg (*Landesentwicklungsplan Flughafenstandortentwicklung*) specifically enacted in connection with the plan to concentrate an airport at the Schönefeld site was enacted pursuant to the Regional Planning Treaty in 2003 and in a revised version again in 2006. The development plan has the rank of a legislative decree. Both federal states enacted the development plan as an ordinance.

The development plan contains an obligation to close TXL and THF. Objective Z 1 states that in order

"to meet the national and international air traffic demand of the federal states of Berlin and Brandenburg the Berlin-Schönefeld airport is to be further developed. After the expansion of capacities at the Schönefeld site has become operational, the Berlin-Tegel and Berlin-Tempelhof airports are to be closed and the respective areas are to be converted for new usage."

("Zur Deckung des nationalen und internationalen Luftverkehrsbedarfes der Länder Berlin und Brandenburg ist der Flughafen Berlin-Schönefeld weiter zu entwickeln. Mit Inbetriebnahme der Kapazitätserweiterung am Standort Schönefeld sind die Flugplätze Berlin-Tegel und Berlin-Tempelhof zu schließen und ihre Flächen einer anderen Nutzung zuzuführen.")

Unlike the Regional Development Program, the Regional Development Plan for Aviation in Berlin and Brandenburg contains an objective (rather than a principle) of regional development, thus requiring public authorities to comply with such objective.

Accordingly, when approving the new airport (what later became BER) by virtue of the planning approval decision BER, the planning approval authority was prohibited from allowing an airport at another site than Schönefeld due to this objective under regional planning law.

- Further, there is also objective Z 6.6 in the Regional Development Plan Berlin-Brandenburg (*Landesentwicklungsplan Berlin-Brandenburg*) also requiring to concentrate air traffic for the Berlin and Brandenburg region at the BER.

Against this background, there is a valid argument that regional planning prescribes a single airport at the SXF site and requires closing down TXL and THF. According to the Federal Regional Planning Act, in connection with regionally significant plans (such as the BER) the objectives under regional planning law have to be complied with.

Accordingly, it is argued that the closure of TXL and THF is inseparably connected to regional planning objectives providing for the expansion of SXF to BER, and that therefore the revocation or amendment of the revocation decisions is detrimental to valid statutory requirements under regional planning.⁹⁶

⁹⁶ Cf. Statement of the Senate on the plebiscite "Tempelhof remains airport!", official record 16/0524.

Only when assuming that the obligation to comply with regional planning objectives not only applied to the enactment of airport operation permits and planning approval decisions, but also applies to the decision to revoke or amend such decisions (which in turn implies that such revocation or amendment is a regionally significant plan), the objectives requiring to close down THF and TXL may oppose such revocation or amendment.

However, it also has to be taken into account that the instruments of regional planning are not static and are subject to amendment. Both the Regional Development Plan for Aviation in Berlin and Brandenburg as well as the Regional Development Plan Berlin-Brandenburg, which require to close down TXL and THF, have the rank as a legislative decree and may be amended without requiring a parliamentary statute. Berlin and Brandenburg would have to decide on such amendment together as they co-jointly conduct regional planning.⁹⁷ Interestingly, there is an obligation to revise the regional development plans anyway, since Art. 8 (5) of the Regional Planning Treaty requires to review the joint regional development plans at the latest ten years after their enactment.⁹⁸ Taking into account the arguments in favour of keeping TXL open, in particular the deviating development of circumstances, it may well be argued that an amendment to the plans is appropriate.

As outlined, the Regional Development Program (which has the rank of a statute, thus requiring a parliamentary statute to amend this program), on the other hand, does not even require to close down TXL and THF.

In any case, assuming that the decision to revoke or amend the revocation decisions also has to comply with requirements under regional planning law, keeping TXL open would require an amendment to the respective regional development plans. This would require a political landmark decision of Berlin and Brandenburg.

Compliance with environmental law – obligation to conduct an EIA

Furthermore, as regards compliance with (public) law requirements, environmental law aspects may be relevant. E.g., Sec. 6 (2) LuftVG requires to review whether a permit takes into account the requirements of nature protection; additionally, in case construction and operation of an airport requires a planning approval decision, an EIA has to be conducted.

In the course of this legal analysis, we have not reviewed the requirements under environmental law in more detail. In our view, conducting an EIA would have an impact on the proceedings to be followed and require additional application documents, but we do not see that conducting an EIA would pose a material risk to keeping TXL open, especially as keeping TXL open would not change the status quo, thus would not cause further environmental burdens.

⁹⁷ Cf. Berliner Zeitung, 20 March 2017; Der Tagesspiegel, 6 October 2016.

⁹⁸ "Die gemeinsamen Landesentwicklungspläne sollen spätestens zehn Jahre nach ihrer Aufstellung überprüft werden."

3.3.4 Procedural considerations

Apart from the material considerations outlined above (cf. above 3.3.1 to 3.3.3), a number of procedural aspects arise when assessing the revocation and / or amendment of the revocation decisions. Even in case a revocation or amendment of the revocation decisions is possible based on material law, such approach is rather useless in case there is no procedural mechanism to enforce their implementation.

When it comes to revoking final administrative decisions, the dogmatic classification of different possible procedural means and the details thereof are complex and subject to different views in literature on administrative procedure law. We therefore consider it suitable to follow the case law of the Federal Administrative Court which generally assumes two different approaches.⁹⁹ However, in the case at hand, the complexity is further enhanced by the various legal basis the revocation decisions. Against this background, we have identified the following approaches:

Revocation of TXL operation permit

As concerns the revocation of the TXL operation permit:

- Firstly, the revocation decision may be made subject to a resumption proceeding within the meaning of Sec. 51 (1) to (4) VwVfG (resumption proceeding in a narrower sense). In course of such proceedings, the administrative proceeding which ultimately leads to the revocation decision in the first place can be re-opened and the case is re-assessed on its merits.

As regards the decision on whether to resume the proceeding (first step), a specific resumption reason under Sec. 51 (1) no. 1-3 VwVfG is required. In case such reason is given, the applicant is entitled to a resumption of proceeding. As regards the following decision on the merits itself (second step), the revocation of the operation permit and the planning approval decision would be re-assessed on basis of the provisions which lead to the decisions in the first place.

A resumption proceeding in a narrow sense may lead to an annulment or amendment of the administrative act in question. In the given context, an annulment may lead to a 'revocation' in a non-formal sense of the operation permit revocation. An amendment, on the other hand, may have the same consequences, but leaves room for mere changes to the revocation decision as well.

- Secondly, the revocation decision may be made subject to a resumption proceeding in a broader sense within the meaning of Sec. 51 (5) VwVfG in conjunction with Sec. 48 and 49 VwVfG (and according provisions from special administrative law). Public authorities can, within their general discretionary powers and irrespective of the existence of a resumption reason under sec. 51 (1) no. 1 to 3 VwVfG, resume proceedings.

⁹⁹ Cf. BVerwG, judgment of 22 October 2009 – 1 C 26/08, NVwZ 2010, 652, para. 19.

This power corresponds with an entitlement of the affected party to a lawful exercise of these discretionary powers with regard to the decision on the resumption of the proceeding (first step). With regard to an eventual new decision on the merits after having decided to resume the proceeding (second step), the authority re-assesses the case on basis of the provisions on revocation and withdrawal of administrative acts, i.e. the general provisions of Sec. 48 and 49 VwVfG and according provisions from special administrative law.

A resumption proceeding in a broader sense may thus lead to a 'revocation' of the operation permit in a formal sense.

- It could also be argued that – from a material and procedural point of view – the TXL operation permit may also be subject to a mere amendment procedure according to Sec. 6 (4) 2 LuftVG. However, the revocation decision as regards the TXL operation permit was enacted on basis of a number of legal bases, including Sec. 6 LuftVG and Sec. 49 VwVfG, summed up under the non-formal term 'revocation' (cf. 3.2.1).

Revocation of TXL planning approval decision

As concerns the revocation of the TXL planning approval decision:

- In contrast to the case of the TXL operation permit, a third party affected is not entitled for a resumption of proceeding in a narrower sense under Sec. 51 (1) to (4) VwVfG with regard to the revocation of the TXL planning approval decision. According to Sec. 72 (1) VwVfG, Sec. 51 VwVfG does not apply in case of planning approval decisions due to their enhanced legal binding; this does also apply to airport planning approval decisions.¹⁰⁰ It is unclear whether this also applies to the revocation decision at hand which was based *inter alia* on Sec. 8 LuftVG, thus indicating that it was considered to be a planning decision, too. Assuming the inapplicability as regards this revocation decision, a resumption of proceeding in a broader sense would not be a procedural option either, considering that such procedure is based, *inter alia*, on Sec. 51 (5) VwVfG which in turn does not apply by virtue of Sec. 72 (1) VwVfG.¹⁰¹ This does not mean, however, that the revocation of the planning approval decision cannot be removed at all. Rather, it has to be noted that the competent authority itself – in contrast to third parties – is entitled to resume planning decision proceedings and re-assess the case.¹⁰²
- For third parties affected, on the other hand, it is still possible to apply for a 'revocation' of the revocation of the planning approval decision in a formal sense under Sec. 49 VwVfG. However, such revocation through third parties is subject to strict conditions due to the enhanced legal binding of planning decisions and the special provisions for planning decisions such as Sec. 75 VwVfG. Pursuant to Sec. 75 (2) VwVfG, once the decision on planning approval has become non-appealable, no claims to stop the

¹⁰⁰ BVerwG, judgment of 28 April 2016 – 4 A 2/15, NVwZ 2016,1325, para. 41.

¹⁰¹ BVerwG, judgment of 28 April 2016 – 4 A 2/15, NVwZ 2016,1325, para. 41.

¹⁰² VG Freiburg, judgment of 21 October 2016 – 7 K 72/15, BeckRS 2016, 118383.

project, to remove or alter structures or to stop their use will be allowed. This in turn underlines that, as regards BER and due to the planning approval decision's finality and legal binding, there is no legal base to argue that construction works have to be stopped once TXL is kept open.

It is unclear whether Sec. 75 (2) VwVfG takes precedence over Sec. 49 VwVfG also as regards the revocation of a revocation decisions (and not as regards a revocation of a planning approval decision). In our view, the rationale lying behind the precedence does not apply to the revocation of a revocation; apart from that, Sec. 49 VwVfG would only apply as *ultima ratio* in case protection measures within the meaning of Sec. 75 (2) VwVfG do not provide remedy,¹⁰³ thus requiring to annul the planning approval rather than to enforce further protection.

The authority itself is further entitled to revoke the decision based on Sec. 49 (2) no. 5 VwVfG in order to prevent or eliminate serious unforeseeable harm to the common good (and not to third parties affected by the planning decision).

- Like the revocation of the operation permit, the revocation of the planning approval decision could in principle also be subject to a mere amendment procedure, as the revocation of the planning decision was also, *inter alia*, based on legal basis which allows for an amendment rather than for a revocation of an airport planning decision (Sec. 8 LuftVG).

Material requirement of changed material or legal situation

Thus, in our view, it is procedurally possible to revoke or amend the revocation decision. It is of course mandatory that the respective requirements are met. All approaches mentioned above are subject to specific and rather strict requirements. Regardless of the approach taken and the specific legal basis applicable, such revocation or amendment is only possible in case the material or legal situation on which the respective administrative act was based has subsequently changed. This, e.g., is exemplified by Sec. 51 (1) no. 1 VwVfG.

According to Sec. 51 (1) VwVfG, the authority shall decide on the resumption of proceedings when the material or legal situation the administrative act is based on has subsequently changed in favour of the applicant. Such change of the material situation is considered to be given when actual operations lead to a change of the decisive facts.

The updated traffic forecasts as regards Berlin air traffic demand may constitute a resumption reason within the meaning of Sec. 51 (1) no. 1 VwVfG:

The current capacity of BER is already trailing behind the city's total demand requirements. As the economic analysis will show in more detail, there are indications that as part of the planning approval process for BER, future demand was considerably underestimated: The decision to revoke TXL's operation permit forecasted that, by 2023, Berlin will have 30.6 million and, by 2015, have 23.2 mppa:

¹⁰³ BVerwG, judgment of 28 April 2016 – 4 A 2/15, NVwZ 2016,1325, para. 31; BVerwG, judgment of 21 May 1997 – 11 C 1/96, NVwZ 1998, 281.

"For the Berlin-Brandenburg region, including the Federal Capital of Berlin, a passenger volume of about 20 million per year will be expected in the long term starting 2010, and 30 million passengers will be expected from the year 2023 on (application form for the planning decision of [BER], volume M, chapter 1 January 1999). The forecast on air traffic volume for the Berlin-Brandenburg region corresponds with the economic growth of the region in conjunction with the fundamentals of the 2015 national traffic planning and thus also takes into account the current development."

(„Für die Region Berlin-Brandenburg einschließlich der Bundeshauptstadt Berlin wird langfristig etwa ab dem Jahr 2010 mit einem Passagieraufkommen von ca. 20 Mio./Jahr und nach dem Jahr 2023 von 30 Mio. Passagieren gerechnet (Antragsunterlage zur Planfeststellung [BER], Band M, Kapitel 1.1, 1999). Die Prognose des Luftverkehrsaufkommens für den Raum Berlin-Brandenburg entspricht dem Wirtschaftswachstum der Region in Verbindung mit den Grundlagen der Bundesverkehrswegeplanung 2015 und trägt damit auch der aktuellen Entwicklung Rechnung.“)¹⁰⁴

However, in 2015, Berlin already handled nearly five million more passengers per year than the forecast envisaged. This clearly highlights that Berlin's demand has grown significantly faster than it was originally anticipated.

In our view, this may justify to break the revocation decision's finality.

The same material requirement, i.e. changed material or legal situation, is applicable in case a resumption of proceeding is subject to discretionary powers of the authority. In this regard, it is established that the authority uses its discretionary powers within the legal limits in case it resumes proceeding based on changed material or legal situation.

Similarly, in case Sec. 49 (2) VwVfG applies, a revocation would, *inter alia*, be possible if the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest. In our view and as shown above, this may well be argued taking into account the updated traffic forecasts.

Further, in case the removal of the revocation decisions were to be based on provisions of the LuftVG again, thus on Sec. 6 and Sec. 8 LuftVG respectively, the corresponding amendment decision would require substantial changes of the circumstances as well. In this regard, e.g., the envisaged closure of TXL after BER has become operational constituted a substantial amendment of the airport operation within the meaning of Sec. 6 (4) 2 LuftVG which in turn in our view also applies to the *actus contrarius*.

¹⁰⁴ Emphasis added. – This revocation decision is provided on the webpage of a citizens initiative (cf. here: <http://bi-gegen-das-luftkreuz-tegel.de/files/txl-bescheid-20040729.pdf>), but has not been made publicly available by the competent Senate administration.

Conclusion: Political landmark decision required

To sum up, from a procedural point of view, every approach to revoke or amend the revocation decisions leads to a discretionary decision of the competent public authority. Further, as stated before, such decision is only possible in case significant new developments have taken place.

Taking into account these various discretionary powers of the public authorities, a political landmark decision (*politische Grundsatzentscheidung*) in favour of keeping TXL open will be required.

3.4 Conclusion

It has become clear that the long-standing assumption whereby TXL has to be closed anyway as keeping TXL open would risk the planning approval decision for TXL is too short-sighted.¹⁰⁵

Rather, we have come to the conclusion that

- there is a legal obligation to close TXL at the latest six months after BER has become operational due to the revocation decisions revoking firstly the ('simulated') operation permit and secondly the ('simulated') planning approval decision; the planning approval decision for BER itself does not provide for the obligation to close TXL, however it assumes that the Berlin Brandenburg region will only have one (single) airport at the Schönefeld site;
- in order to keep TXL open, this legal obligation has to be removed;
- removal of the legal obligation to close TXL requires revocation or amendment of the revocation decisions; under German administrative law, even administrative decisions which have become final may be revoked and amended;
- in this context, such revocation or amendment will need to contain a planning decision weighing all concerned interests / legal positions but does in our view neither require a new operation permit nor a new planning approval decision.

Apart from the rather detailed technical and legal issues sketched out before, however, it has also become clear in the course of our legal analysis that a political landmark decision (*politische Grundsatzentscheidung*) favouring keeping TXL open is required. Even though the long-standing assumption mentioned above is misleading at the least, removing the legal obligation to close TXL in order to keep TXL open requires a number of (discretionary) legal measures which may not be achieved against the declared opposition and resistance of the respective governments and parliamentary majorities. In this regard, it has to be taken into account that

- public authorities (most likely the Senate Administration for Urban Planning) which have to decide whether to revoke or amend the revocation decisions have discretionary powers;
- public authorities which have to decide on an (assumed) application to resume proceedings have discretionary powers as well;

¹⁰⁵ In this direction: Research Services' analysis, p. 22.

- a (further) revocation decision would be a planning decision and require weighing all concerned interests / legal positions with the consequence that the exact content of such planning decision may not be predicted;
- the revocation decision may have to comply with currently applicable law (e.g. flight noise protection requirements) and the operation permit's and planning approval decision's finality may be limited;
- other legal measures may have to be taken, including amendment of the binding regional planning.

Yet, it is important to recognize that there are ways to keep TXL open. Even though such measures may be burdensome and difficult to achieve, it has become clear that the (economic) need for keeping TXL open is central for arguing that the status quo has to be amended. In this regard, it will be of particular importance to prove that there is need for keeping TXL open and that concentrating air traffic at BER does not satisfy air traffic demand.

3.5 Brief outlook: keeping SXF open

In connection with keeping TXL open, not surprisingly the question whether and how to keep SXF open arises as well.

In the course of our legal analysis, however, we have come to the conclusion that the questions which are of relevance as regards TXL are not raised in the same way as regards SXF:

- Firstly, the currently used SXF airport facilities including terminal buildings will partially remain open as part of BER, however only for a limited time. According to our knowledge and with regard to capacity restraints at BER, once BER has become operational some airlines will continue to use SXF facilities which results in much longer taxiways.
- Secondly and in connection with the first aspect, keeping these facilities open is part of the planning approval decision BER and the corresponding (operation) permit under aviation law. Therefore, keeping some SXF facilities open has already been taken into account when approving BER.

However, even in case facilities currently used for airport operations at SXF will be closed once BER has become operational, this has only an impact on terminal capacity. Thus, keeping SXF open may expand terminal capacity but has no impact on the capacity restraints of the two runways at BER. In other word: even in case SXF facilities which were otherwise closed remain open, this would expand terminal capacity at best but would not expand runway capacity (as stated before, BER has runway capacity for 62 movements per hour).

Further, the Brandenburg Ministry for Infrastructure and Agriculture allowed construction and operation of "facilities for the federal government" by virtue of the 20th amendment to the planning approval decision BER.¹⁰⁶ By virtue of that decision, the planning approval decision BER was amended with regard to

¹⁰⁶ Brandenburg Ministry for Infrastructure and Agriculture: Amendment planning approval decision "facilities of the federal government", 20th amendment of the planning approval decision expansion Berlin-Schönefeld airport dated 13 August 2004 in the version of the planning supplement decision nature protection and landscape conservation, complex compensation measures "Zülowniederung" dated 4 August 2011, 15 September 2011.

installations for the political-parliamentary air traffic and air traffic according to the rules of protocol for the Federal Republic of Germany, including facilities from the Foreign Office as well as from the Ministry of Defence (such as prestigious terminal building, infrastructure required by the Special Air Mission Wing (*Flugbereitschaft*) including office building and facilities for technical purposes). Even though we have not reviewed this amendment planning approval decision in detail, we understand that the facilities for the federal government are located in the area currently used for SXF airport facilities, i.e. in the area of the currently used terminals and north of the (new) Northern runway (whereby the terminal buildings for BER are located between the two runways).

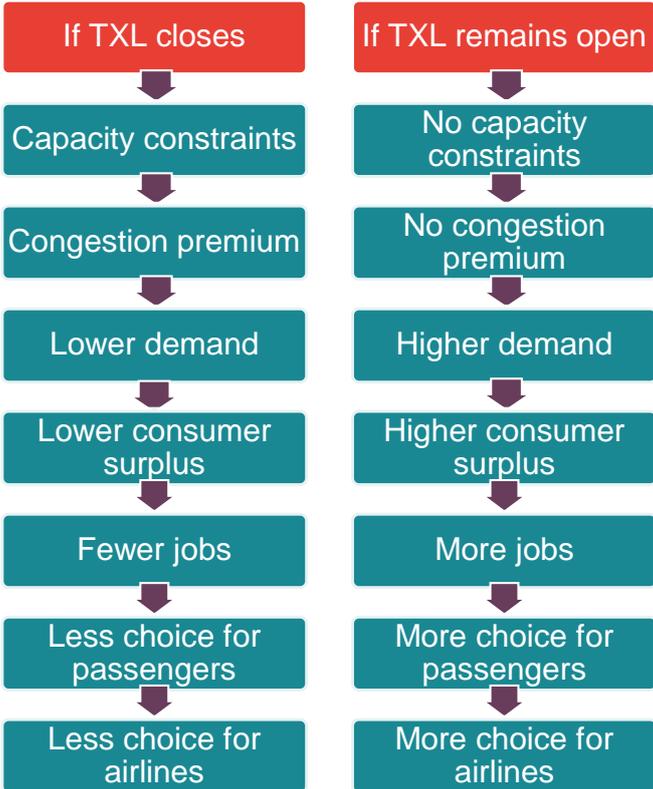
On this basis, the facilities for the federal government and the corresponding designation as restricted military area exclude future (unlimited in time) use of SXF facilities. In other words: even though use of SXF facilities may take place for a limited period of time, timely unlimited use is not possible due to the federal government installations which will move to that site. In case SXF is supposed to be used for a longer period of time, this would require locating the federal government facilities at another site, in turn requiring a new planning approval decision.

4 ECONOMIC ANALYSIS

4.1 Introduction

The purpose of this section is to set out how keeping Tegel open would have a positive impact on the Berlin economy. The overall rationale is as follows:

Figure 9 The economic case for keeping Tegel open



Our projections indicate that by 2030 Berlin could support at least 56m passengers per annum, up from 33mppa today. This raises questions about how the available capacity will cope if Tegel were to close.

Without extra capacity, the situation would continue to worsen over time. More and more passengers would be unable to fly, ticket fares would continue to rise, and consumer surplus would continue to be lost. If Tegel were to remain open, there would be sufficient airport capacity in Berlin to accommodate likely total demand in 2030 and beyond. Keeping Tegel open would mean that more passengers could fly, ticket fares would be lower, consumer surplus would be higher and the wider economy would benefit.

Capacity constraints, and the associated negative impacts, will be key issues facing many European airports going forward. Eurocontrol reports that by 2035,

the number of congested airports in Europe will rise to 30.¹⁰⁷ Airport expansion is a costly and politically sensitive issue and, as seen in the UK with the on-going debate about expansion in the South East, it can take decades just to get permission to expand, let alone to actually build and open a new runway. By contrast Berlin finds itself in a unique situation: unlike many other European cities, it does not need to build an extra airport to expand its way out of capacity constraints. It can avoid future constraints by retaining Tegel.

The rest of this section is structured as follows:

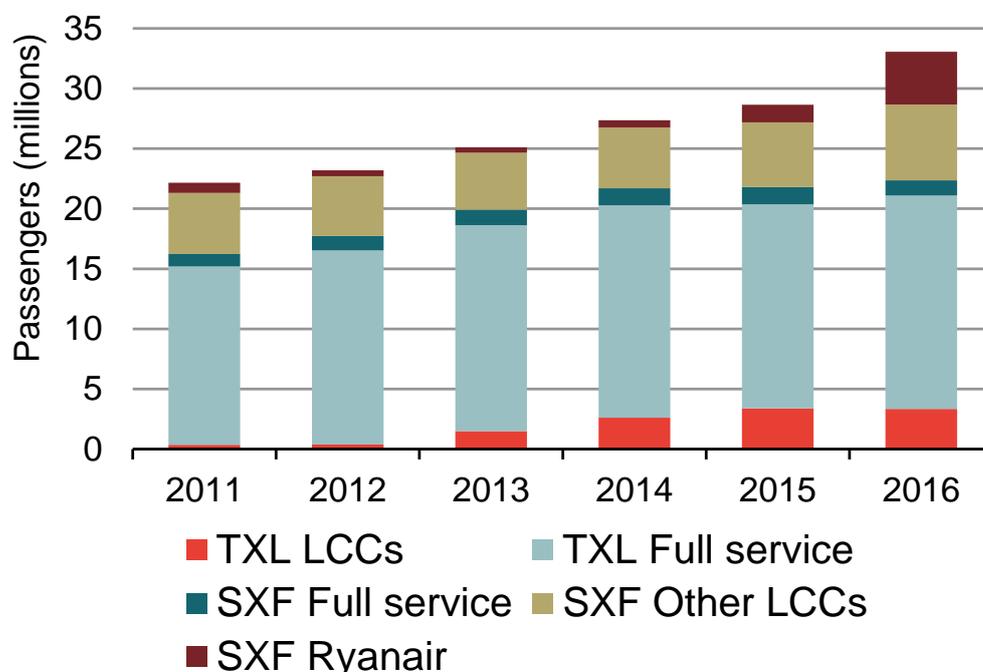
- First, we provide an overview of **historical demand trends** in Berlin;
- Second, we set out the details of our **demand forecasting** analysis;
- Third, we set out our **capacity assumptions**;
- Fourth, we summarise the results of our **congestion forecast modelling**; and
- Finally, we provide our overall **conclusions**.

4.2 Historical trends

4.2.1 Berlin demand is growing quickly

Since 2011 passenger traffic at Berlin airports has increased by 50%, rising from around 22 million passengers at Tegel and Schönefeld combined in 2011, to around 33 million in total by 2016.

Figure 10 Berlin demand has been growing quickly



Source: Frontier analysis based on OAG data. LCC = Low cost carriers

¹⁰⁷ <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/201307-challenges-of-growth-summary-report.pdf>

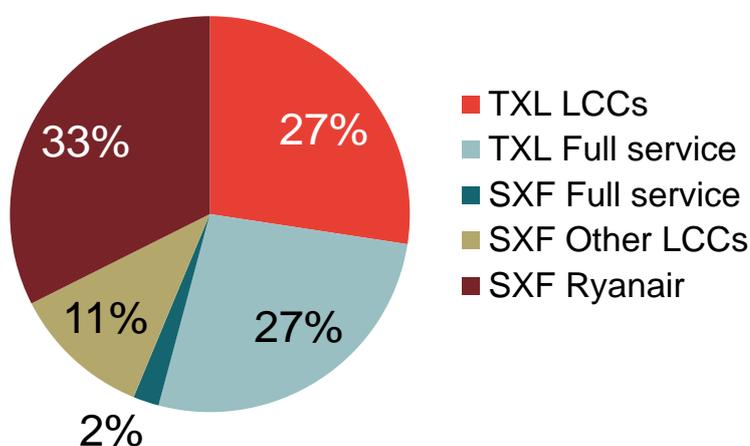
This is equal to an average growth rate of around 8% p.a., which significantly exceeds the rate of growth that would have been anticipated by applying expected income elasticities of demand to the rate of general economic growth:

- According to IMF data¹⁰⁸, German GDP increased by around 1.2% per annum over the period 2011-2016; and
- Researchers at the technical university of Chemnitz estimated an income elasticity of demand in Germany of 1.35 – i.e. where a 1% increase in income leads to a 1.35% increase in demand¹⁰⁹.

Together these factors might have accounted for growth in the region of 1.6% p.a. – considerably below the actual growth rate of 8% p.a.¹¹⁰

The chart below provides a breakdown of the growth over the period.

Figure 11 Breakdown of the extra 11m passengers over the period 2011-2016



Source: Frontier analysis of OAG data

Figure 11 gives us an indication that the growth in demand has been driven by the low cost market segment, which tends to encompass more price sensitive passengers:

- 71% of the growth was driven by LCCs; and
- 46% of the growth took place at Schönefeld.

We note that this growth has been facilitated to a significant extent by the fact that Berlin currently offers a differentiated airport market. Although both Tegel and Schönefeld are operated by Flughafen Berlin Brandenburg GmbH (FBB), the two airports offer different facilities and a different level of departing passenger charge (DPC). Schönefeld charges are 25%-35% lower than the corresponding

¹⁰⁸ World Economic Outlook Database, October 2016.
<http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/download.aspx>

¹⁰⁹ Thießen, F. Haucke, A. und A. Wosnitza (2012): Auswirkungen der Luftverkehrssteuer auf die Entwicklung des Luftverkehrs in Deutschland. Technische Universität Chemnitz

¹¹⁰ Berlin GDP growth was greater than German GDP growth (about 2.5% between 2005 and 2012 according to Gornig, M., Geppert, K., Hillesheim, I., Kolbe, J., Nestler, C., Siedentop, S. und C. Tertton (2013): Wirtschaftsentwicklung in Berlin: Szenario 2030, Politikberatung kompakt 77, DIW Berlin. However, even still, the 8% growth is significantly above what would have been expected.

charges at Tegel¹¹¹. This situation means that there is currently some element of de facto competition between the Berlin airports which enables airlines to tailor their offerings and to target different customer segments.

The rapid growth in passenger traffic in Berlin, in the context of a differentiated local airport market raises questions for the future if Tegel were to close. In particular:

- Will the new BER airport alone have sufficient capacity to meet the growth potential that is present in the Berlin region?
- Would a one-size-fits-all approach to airport provision in Berlin best serve the interests of passengers and make the most of the existing growth potential?
- Could it restrict airline operating models, reduce choice and further exacerbate the pressure towards higher fares?

4.2.2 There is significant further growth potential

Noting that passenger traffic in Berlin is already growing much faster than simple economic indicators might predict we find there is significant evidence of potential for rapid growth to continue well into the future.

Berlin is the capital city of the largest economy in Europe. It is the largest city in Germany, and the fourth largest city in Europe. Nevertheless, air travel demand is still relatively low and below what would be expected for a city of Berlin's size and importance.

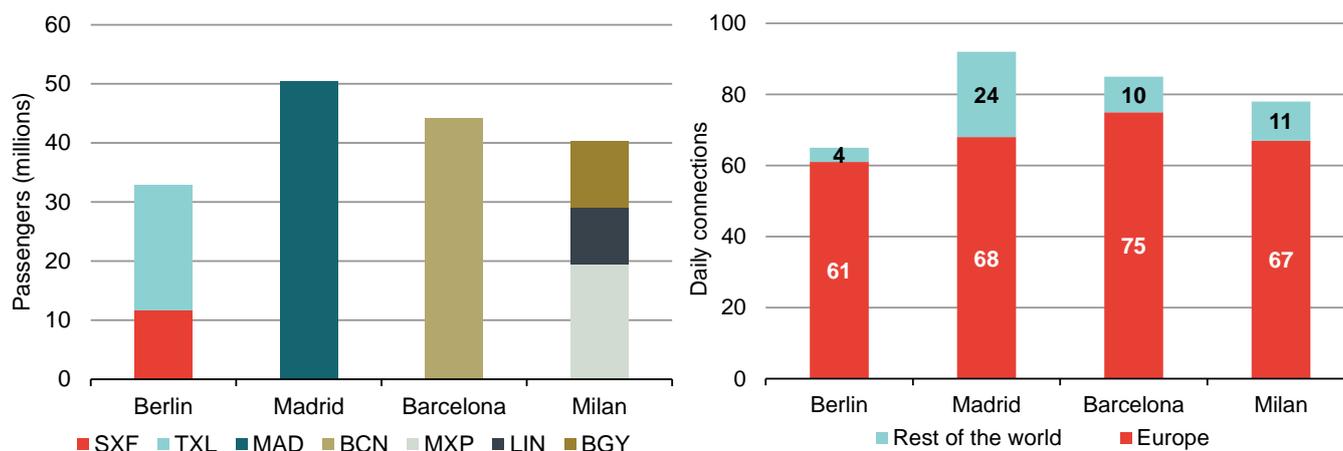
Berlin has a population of around 3.5 million inhabitants.¹¹² The three EU cities closest to Berlin in terms of population are:

- Madrid – 3.2 million;
- Barcelona – 3.2 million; and
- Milan – 3.1 million.

However, despite being the largest city in the sample, the charts below show that air travel to and from Berlin is the lowest by some margin, while long haul connectivity is especially poor.

¹¹¹ The DPC charge for passengers departing to destinations within the Schengen area is EUR 4 lower at Schönefeld than at Tegel and EUR 5 lower for destinations outside the Schengen area. Landing charges appear to be more similar. <http://www.berlin-airport.de/en/business-partners/charges-and-regulations/charges/airport-charges/index.php>

¹¹² This is based on a 2015 publication based on 2012 data. (Eurostat Regional Yearbook 2015, Chapter 15 — European cities, Map 1: Resident population in Urban Audit core cities, 1 January 2012.)

Figure 12 Berlin demand is relatively low

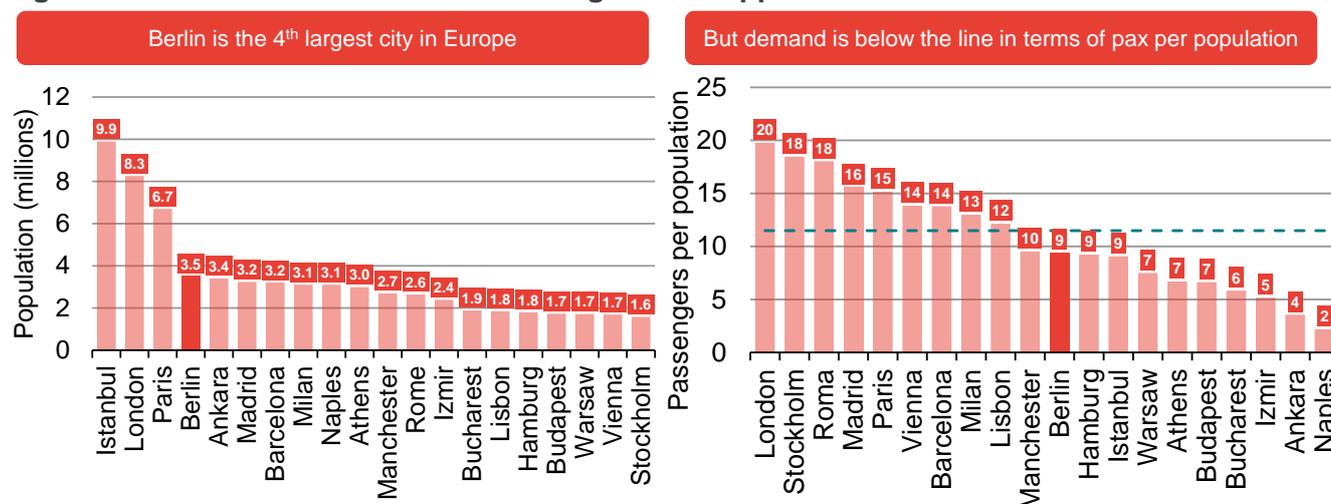
Source: Frontier analysis based on OAG data for connections and ACI, AENA & Assaeroporti for 2016 passengers.

Note: In this instance we define a 'connection' as a destination airport which was served with at least 365 departures in 2016. If the frequency threshold is lowered, then the number of 'connections' increases for all airports. Counting all long haul destinations served, Berlin has 11 long haul connections. .

Of course, all cities are different, and there are many factors which can explain why they have different passenger volumes, including their appeal as tourist destinations as well as the size of the local population and economic importance. But we note that, according to European Cities Marketing, Berlin is actually the third most popular tourist destination in Europe, only trailing behind London and Paris.¹¹³ In other words, demand in Barcelona and Milan is not higher because they are more popular tourist destinations than Berlin.

Widening the group of comparator airports to the 20 largest cities in Europe, there is further evidence that air passenger traffic in Berlin is still significantly lower than its overall potential, even taking into account the growth that has happened over the last few years. Berlin's total demand for air travel is below the sample average. There were around 9.4 passengers per capita in Berlin, compared to the sample average of around 11.5. If Berlin were to just move up to the sample average, then this would imply that it would handle around 40 mppa – 7 million greater than today, even after the growth of the last five years. And this would just bring Berlin demand in line with the sample average. For a city of its size and importance, it could realistically be expected to handle even more.

¹¹³ <http://www.europeancitiesmarketing.com/site-assets/uploads/2017/04/Top-10-Total-bednights-ok.png>

Figure 13 Berlin demand could be as high as 40 mppa

Source: Frontier analysis based on data from Eurostat Regional Yearbook 2015 and various sources including ACI for passenger volumes

The recent growth in demand is indicative of the fact that the Berlin market is thriving. But it is also consistent with the view that Berlin is now ‘catching up’ to where it should be. This suggests that there is further scope for demand catch up, on top of the more general income-based organic growth which we would expect to happen anyway. This is important to take into account when forecasting future demand in Berlin. Otherwise, stakeholders may be underestimating the seriousness of capacity constraints going forward.

4.2.3 BER will not be able to provide sufficient capacity

Flughafen Berlin Brandenburg GmbH (FBB) describes BER as having capacity for 27-28 mppa today, with planned expansions taking this to 45 mppa.¹¹⁴ This number is based on the original planning permission including the two extensions (“Ausbaumodule”) of this permission to build two additional terminals.¹¹⁵ At the expected opening of the airport in 2018, the capacity will be limited to the main terminal which can handle 27-28 mppa at most.¹¹⁶ Given that Tegel and Schönefeld already handled more than 33 million passengers in 2016, the current capacity at BER is already trailing behind the city’s current demand requirements, let alone its future needs.

To accommodate for the demand exceeding 27 mppa, Schönefeld airport will continue to operate and serve another 13m passengers through their old terminal using the same runways, at least until 2023.¹¹⁷ In contrast to Tegel, there is currently no legal obligation to close Schönefeld, and therefore this provisional two-airport concept could be maintained. However, Schönefeld airport was

¹¹⁴ <http://www.berlin-airport.de/en/ber/facts-figures/index.php>

¹¹⁵ It is yet uncertain when and how the planned expansions at BER will take place. Given the significant delay of the main terminal’s opening, there is no indication when the construction of the additional terminal buildings will take place.

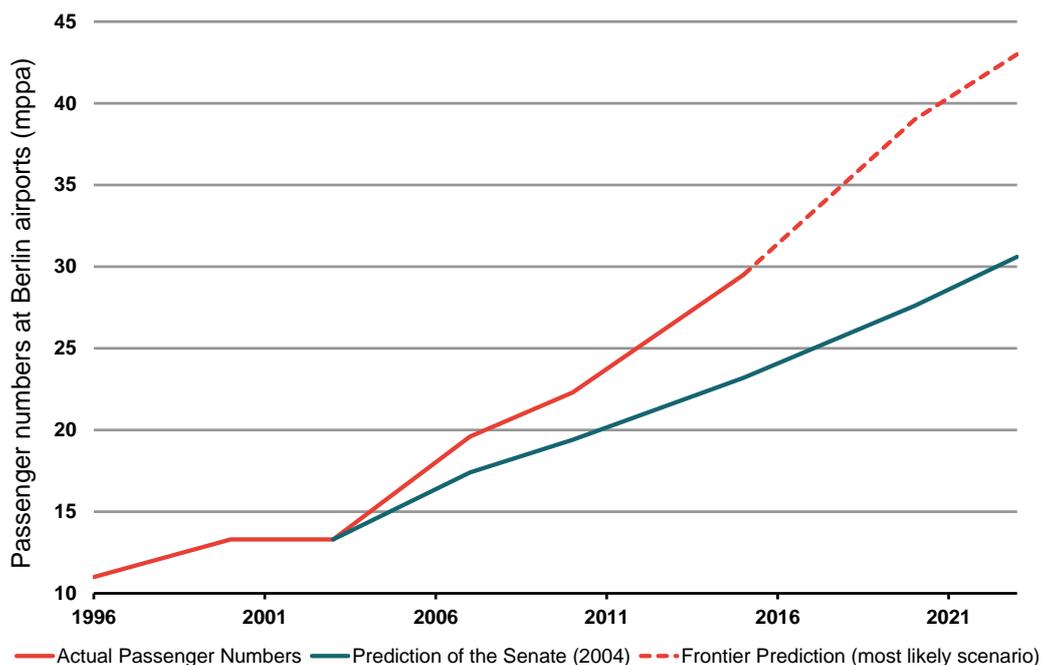
¹¹⁶ It should be noted that the main terminal’s passenger capacity has been amended various times between the construction contract has been signed and today. And while the official capacity numbers have increased from 20 mppa in 2004 to 27 mppa today, no substantial changes have been made to the terminal’s architecture. Therefore, it is not clear whether BER will be able to handle 27 mppa when it opens.

¹¹⁷ <http://www.berliner-zeitung.de/berlin/alter-flughafen-muss-ber-entlasten-schoenefeld-forever--22465184>

intended to be partly refurbished and operated as a governmental terminal, although it is not yet clear how and when these renovations will take place. If Schönefeld is operated as a governmental terminal then this will reduce the scope for it to handle commercial civil aviation. Also, it is still unclear where the Special Air Mission Wing of the Federal Ministry of Defence will be located.

The starting point for this seems to be that in the planning of BER both current demand and future potential were significantly underestimated.

Figure 14 Passenger predictions and actual passenger growth



Source: *Beschlusstext des Planfeststellungsbeschlusses, FBB* (<http://www.berlin-airport.de/de/presse/basisinformationen/verkehrsstatistik/index.php>), Frontier calculations.

For instance:

- BER's planning approval decision (in 2004) contained a table which forecast that there would be **30 million passengers by 2023**. This level was exceeded in 2016 – seven years ahead of the original forecast;¹¹⁸
- The decision to revoke Tegel's operations permit (also in 2004) forecast that by 2023 Berlin would have **30.6 million passengers**. And for 2015 it forecasted **23.2 million passengers**¹¹⁹, nearly 5 million fewer than were actually carried in that year.

Demand in Berlin has clearly outstripped the level anticipated when the original plan for BER was formulated. And there are solid reasons for believing that further significant growth can be achieved under the right conditions and with the right facilities.

In the analysis we present below we show that BER's projected maximum capacity of 45 mppa may also quickly become insufficient.

¹¹⁸ *Beschlusstext des Planfeststellungsbeschlusses vom 13. August 2004.* <http://www.lbv.brandenburg.de/3123.htm>

¹¹⁹ <http://bi-gegen-das-luftkreuz-tegel.de/files/txl-bescheid-20040729.pdf> Page 29 for 2013.

4.3 Passenger forecast

We believe that there is a high likelihood that demand for air travel to and from Berlin will continue to grow significantly. This is based on the economic size of Berlin and its surrounding catchment, its importance as a key European city and its attractiveness as a visitor destination.

Therefore in our modelling we have considered two future demand scenarios:

- The **minimum case** scenario – this is a conservative forecast where we extrapolate Berlin demand from current passenger volumes (33mppa at Tegel and Schönefeld combined in 2016). This is the minimum growth that could reasonably be expected in Berlin, assuming that all catch up potential had already been fulfilled.
- A **likely** scenario – based on the fact that a city of Berlin’s size could reasonably be expected to handle around 40mppa today. In this scenario we combine catch up to this reasonable base line with further general income-based organic growth, which would also be expected to continue. This is described in more detail below.

The rest of this subsection is structured as follows:

- We set out the details of our growth forecasts;
- We describe reasons as to why we consider the likely scenario to be a more realistic projection than the minimum scenario; and
- We discuss other demand considerations.

Also, 40 mppa would only bring Berlin in line with the average relationship observed across Europe’s 20 largest cities. It is not an upper bound. Demand could be greater – and given Berlin’s national and international significance, and the fact that it is the fourth largest city in Europe, it is not unreasonable to suggest that it could be expected to perform above average – e.g. through having a large hub which extracts significant volumes of transfer passengers and stimulate additional local demand.

4.3.1 Growth forecasts

We estimate that demand in Berlin may be expected to grow by around **2.4%** p.a. simply as a consequence of general economic growth, before we reflect any impact of a correction term for the under-provision of air services in Berlin. The details of this growth forecast are set out in the table below.

Figure 15 Income-based factors affecting demand growth

Input	Value	Comments	Source
Berlin GDP growth forecast	1.69%	Higher than German GDP growth (1.3%)	Based on DIW 2013 ¹²⁰
Destination country GDP growth	1.87%	E.g. a mix of UK, French, Spanish growth, weighted by traffic at Berlin airports	Based on World Economic Outlook Database, October 2016 and weighted by passenger volumes according to OAG data
Average GDP growth	1.78%	High level 50-50 inbound-outbound assumption	Calculation
Income elasticity of demand	1.35	Various studies estimate different elasticities	Based on review of German studies ¹²¹
Implied annual passenger growth	2.4%		Calculation

Source: Frontier analysis

However, for reasons already identified, we believe that current demand levels substantially understate the potential for traffic in Berlin. Indeed we have shown that adjusting for the relative size of the catchment it is reasonable to consider that Berlin could be serving 40mppa today.

We believe that enhanced airport and airline competition in the Berlin region, adopting a range of different business models will very likely be able to bridge the gap between today's traffic levels and this higher figure. In our view this is consistent with the strategies currently being followed by Ryanair, Norwegian and other low cost carriers.¹²² It is also consistent with the experience from other major cities with multiple airports supporting mixed models of airline services.

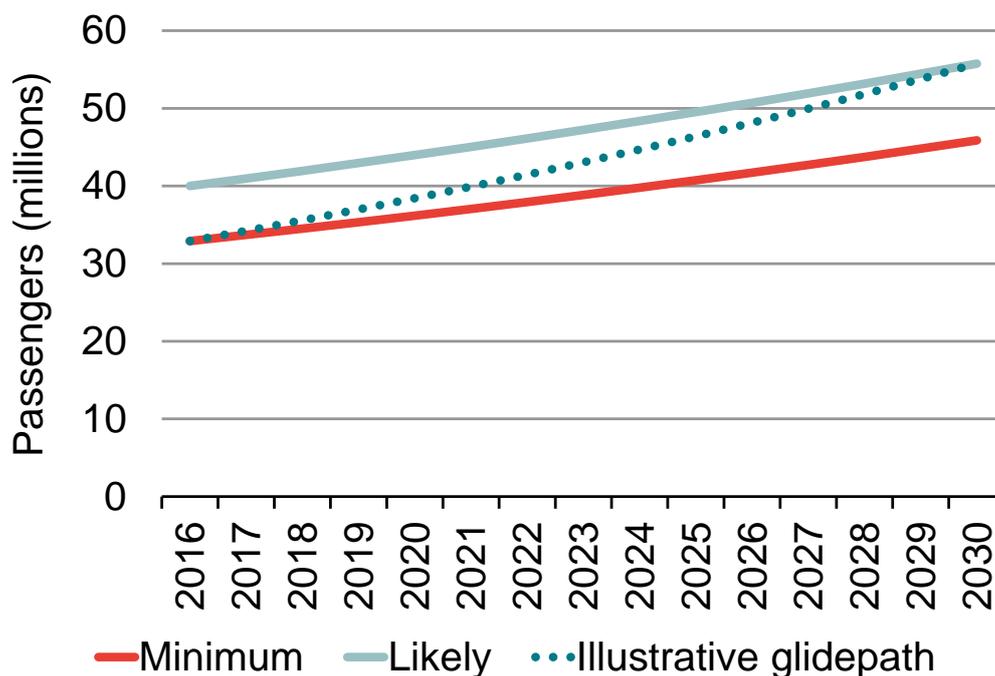
The growth created by this dynamic process would be in addition to the natural growth in traffic arising from general economic growth. This is illustrated in Figure 16, below, where overall demand converges on the higher trend line over a number of years.

¹²⁰ Gornig, M., Geppert, K., Hillesheim, I., Kolbe, J., Nestler, C., Siedentop, S. und C. Terton (2013): Wirtschaftsentwicklung in Berlin: Szenario 2030, Politikberatung kompakt 77, DIW Berlin.

¹²¹ Thießen, F., Haucke, A. und A. Wosnitza (2012): Auswirkungen der Luftverkehrssteuer auf die Entwicklung des Luftverkehrs in Deutschland. Technische Universität Chemnitz.

¹²² In **Error! Reference source not found.** we set out the views of various airlines.

Figure 16 Berlin demand could be as high as 56 mppa in 2030



Source: Frontier analysis

Our figures suggest that:

- Under the **minimum** scenario, total demand in Berlin will be around 46 mppa by 2030. This is in line with the estimations of the Senate of Berlin who assumed 46.8 million passengers for 2030 and the estimate by the previous CEO of BER, Karsten Mühlenfeld, who estimated that passenger volumes would be 43 million in 2025, around 47million in 2030 and more than 50 million in 2035.
- But under the **likely** scenario, we estimate total passenger demand in Berlin could be in the region of 56 mppa by 2030, i.e. 10 million more (22%) than under the base case scenario. A study referred to by the initiative “Berlin needs Tegel” predicts that total demand will growth by 2 million passengers per year, i.e. adding 28 mppa to the existing 33 mppa yielding to 61 mppa in 2030.¹²³

The speed with which demand will rise to meet our likely scenario is itself open to some judgement. For the purposes of modelling we have assumed a gradual, progressive convergence. But this is not critical for the results presented later in this report, which are based on congestion modelling in 2030. The exact shape of the glide path does not impact our 2030 results.

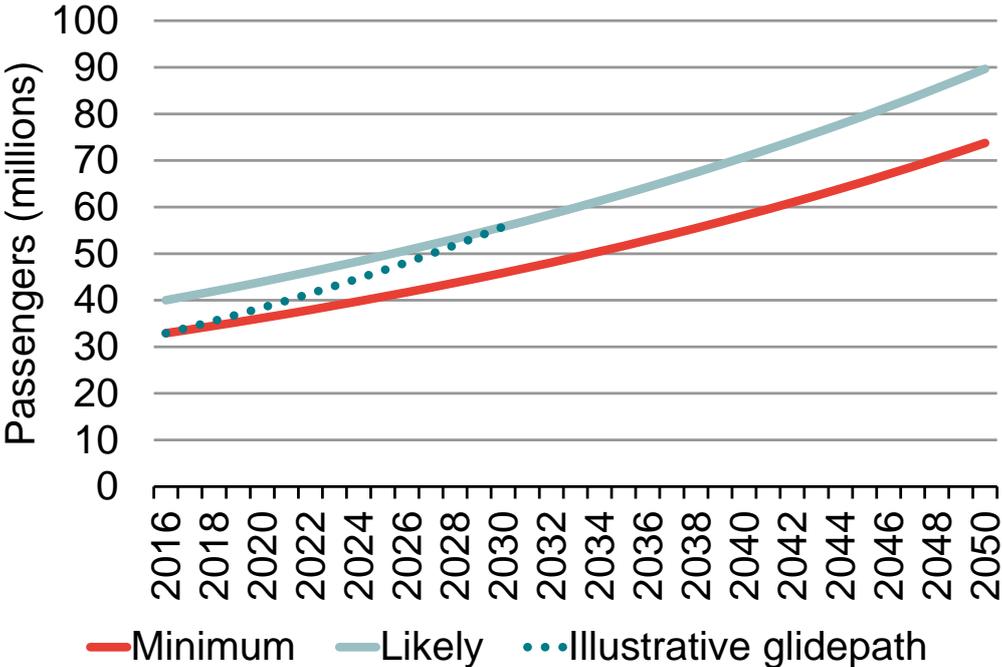
There is an inherent risk in underestimating the scope for demand growth in Berlin at the point where Tegel may be closed, as is demonstrated by the forecasts made in 2004 on which the decision was made to proceed with Brandenburg and close Tegel.

¹²³ Similarly, the independent air traffic expert Hans-Henning Romberg predicts an annual passenger growth of 4% leading to more than 60 mppa in 2030. This includes a one-off increase by 10% in 2018 when BER opens.

Growth from that point to today, combined with evidence of continued significant growth potential both suggest a high risk that closing Tegel could lead to major capacity constraints for Berlin in the foreseeable future.

And looking beyond 2030, continuing the same growth relationship as has been observed historically to a longer time horizon, Berlin demand could be around as high as 90 mppa in 2050.

Figure 17 Berlin demand could be as high as 90 mppa in 2050



Source: Frontier analysis

However, the focus of our modelling analysis is on 2030.

4.3.2 How will the likely scenario be achieved?

In our view the likely scenario is credible in the absence of airport capacity constraints because LCCs still have great scope to increase their presence in Berlin, while evolving low cost business models can increase inbound traffic significantly from current levels.

However, while this outcome relies on there being enough airport capacity to meet this latent demand, it is also much more likely to be achieved in an airport system that provides choice to passengers and airlines, and which therefore supports a variety of different competing airline business models.

There is supporting evidence of this view from the development of the London airport system. In 2009, the (then) UK Competition Commission (CC) completed a market investigation into BAA airports and found that there was ‘no competition’ between the seven UK airports owned by BAA. At that time, BAA’s airports controlled 81% of London’s runway capacity. One of the CC’s remedies was an obligation for BAA to sell off three of its airports. Between 2009 and 2014, BAA

sold off six UK airports including London Gatwick and Stansted.¹²⁴ In a subsequent 2016 review¹²⁵ by the CC's successor, the Competition and Mergers Authority (CMA) reported that there had been considerable benefits – which we set out below.

BENEFITS FROM AIRPORT COMPETITION IN LONDON

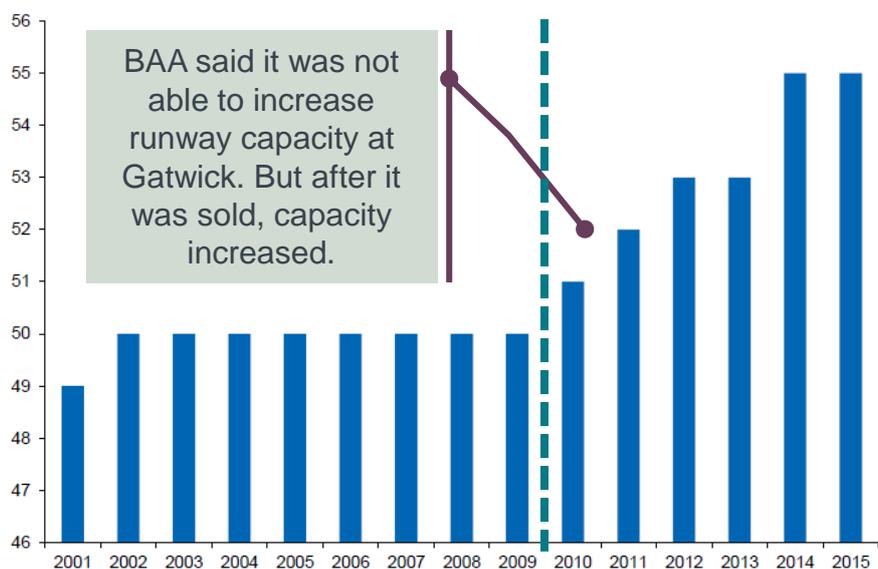
- **Passenger growth:** the CMA reported that passenger numbers at the divested airports grew 9% to 12% faster than at comparable UK airports between 2009 and 2015 – even after controlling for long term trends and airport specific factors;
- **Efficiency:** Divested airports increased their capex efficiency and improved their operational efficiency;
- **Service:** There was a significant improvement in service quality at Gatwick, and Heathrow's service quality has reached an historic high;
- **Route choice:** Airports have increased their efforts to attract additional airlines, routes and flight frequencies;
- **Level of airport charges:** Gatwick and Stansted agreed long term competitive deals for airport charges with their major customers. (The CMA commented that the fact that Heathrow, and Gatwick to a lesser extent, are constrained has limited the extent to which airlines can switch between London airports, which has therefore reduced their negotiating power);
- **Structure of charges:** Airports have altered their structure of charges. This includes applying seasonal discounts, and providing incentives to airlines to increase utilisation, and deploy higher capacity aircraft;
- **More efficient use of existing capacity:** The CMA commented that restructured airport charges attracted additional flights during quieter periods and increased the efficiency of aircraft utilisation. This has led to an increase in passenger volumes; and
- **Airport community and stakeholder engagement:** Airports have developed stronger relationships with local communities.

Before BAA sold Gatwick it maintained that it was not able to increase its runway capacity beyond 50 movements per hour. However, after it was sold, runway capacity increased to 55 movements per hour. This is set out below.

¹²⁴ Aberdeen Airport – sold in December 2014. Glasgow Airport – sold in December 2014. Southampton Airport – sold in December 2014. London Stansted Airport – sold in February 2013. Edinburgh Airport – sold in April 2012. London Gatwick Airport – sold December 2009.

¹²⁵ CMA (2016): "BAA airports: Evaluation of the Competition Commission's 2009 market investigation remedies"
https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa_market_investigation_remedies.pdf

Figure 18 Gatwick increased its capacity after it was sold off (movements per hour)



Source: *Evaluation of the Competition Commission's BAA airports market investigation. Oxera (2016)*

These findings are illustrative of the dynamic benefits that can be created by serving a major city from more than one airport and accommodating more than one airline business model. These benefits extend to efficiency of operation and greater flexibility in the structure of airport charges. But they also stem, to a significant extent from the incentive that independent airports have to make the best (and greatest) possible use of their available capacity.

These are benefits that could be lost to Berlin if it centralises its airport provision in one site with a uniform set of airport charges. Key among the historical factors that have limited traffic in Berlin up till now is that almost all airlines operating flights from and to Berlin offer these connections as point-to-point connections, e.g. Lufthansa's focus is its hub traffic on Frankfurt and Munich. It is doubtful whether focussing all Berlin traffic on BER will do anything to change the current strategy. Indeed, if opening BER results in imminent capacity constraints in the Berlin area then any such change in strategy is very unlikely.

There is significant concern that a single BER airport, acting as main base for Air Berlin, Lufthansa and its subsidiary Eurowings in the region, and as business destination for other large European airlines such as and may not be operated on an even handed basis for all carriers. Specifically, LCCs may be required to continue to operate from the old Schönefeld terminal for the time after the opening of BER while the above mentioned airlines will operate from the new facility. This would create a competitive disadvantage for the LCCs because the facility is of significantly lower quality, while it adds up to 10 minutes additional taxiing time in each direction, which raises the airlines' costs.

Under this arrangement it is also not clear what incentive Lufthansa would have to invest heavily in Berlin or rebase traffic from its major hubs in Frankfurt and Munich. By contrast, Ryanair have shown significant ambition to grow Berlin traffic (indeed it has stated publicly that it will add a further 5mppa to the Berlin market if Tegel stays open). Similarly, Condor is also in favour of keeping Tegel

open. Condor's CEO Ralf Teckentrup has publicly announced that "the new airport is, when it finally opens, probably much too small." Given the change of circumstances, he has "a lot of sympathy with the thought of keeping Tegel open."¹²⁶

This would stimulate competition between airports which could help to facilitate new and innovative business models. A new generation of aircraft like the B787 and the A350 are facilitating a new breed of low cost long haul services (such as those offered by Norwegian), which could also benefit from an open and independently controlled Tegel. While it is doubtful that such services would be encouraged by BER in competition to Lufthansa's services from FRA and MUC, Tegel would have strong incentives to encourage this traffic. We understand there is a particular benefit to the local host of such services in that they tend to generate unusually high proportions of inbound travellers compared to outbound; these travellers being a clear increment to total passenger numbers.

This is the experience that has been witnessed at London Gatwick, which has seen the development of additional low cost long haul services that complement the network carriers' services at Heathrow.

London Gatwick has also developed other innovative services such as products to facilitate connecting traffic between otherwise separate services. Keeping Tegel open, but further maintaining it as an independently managed airport could help to retain or even enhance passenger benefits. We note that Tegel would not necessarily need to be privatised for these benefits to be realised. Both Tegel and BER could continue being publicly owned, but operated by independent managements whose task would be to independently manage their airport most effectively. Another advantage of the separation is the reduction in dependence on one airport, e.g. with respect to industrial actions. Recent walkouts have affected airlines at both airports Tegel and Schönefeld simultaneously. If BER and Tegel were managed independently, travellers would still have short-term alternative options to travel from the other airport.

While we cannot know exactly what would develop at an independently managed Tegel, these are illustrations of the sort of new business model that is promoted in a more dynamic airport environment. As well as the benefits created directly by the entrants facilitated by the additional capacity, innovation and choice also bring the benefit that they place more pressure on incumbent operators to innovate and improve their services. So the likelihood is that we would see legacy carriers at BER forced to respond with better services and more innovations of their own if faced with additional pressure from Tegel. They are much less likely to innovate without the impetus of wider competition.

But all these trends point to the likelihood that maintaining an independent Tegel, as well as securing the capacity needed to meet future demand in Berlin, would actually greatly increase the likelihood that Berlin's current connectivity

¹²⁶ See his interview with Berlin-based newspaper "Der Tagesspiegel": <http://www.tagesspiegel.de/wirtschaft/tegel-soll-offen-bleiben-der-ber-ist-viel-zu-klein/19678552.html>

shortfall would be rectified in the future by increased activities in product and service innovations.¹²⁷

4.3.3 Other demand considerations

Berlin demand may also be affected by how the airport situation is eventually resolved. Clearly, as we set out in the rest of this section, if there is insufficient capacity in the future then some demand will not be able to travel. However, there are other considerations:

- Demand may not be ‘airport location neutral’; and
- Ticket fares may be different under the different capacity scenarios – and not just because there would be a congestion premium if Tegel were to close.

Demand may not be ‘airport location’ neutral

Berlin is one of the largest cities in Europe, with Tegel located in the northwest and BER located in the south, right next to the currently operating Schönefeld airport. Passengers located northwest of Tegel may find it less attractive to travel to and from BER and they may decide to scale back their demand – at least on the margin. Therefore, closing Tegel could have a negative impact on demand in certain geographic pockets.

One of Tegel’s main advantages is its central location and existing transport links. The average travel time by taxi from Berlin’s business and government district Mitte to Tegel is about 25 minutes, while the average travel time to Schönefeld is currently about 40 minutes. In terms of cost, the average taxi fare from Mitte to Tegel is about 25€, while the cost to get to Schönefeld is about 45€, an 80% price increase. In addition to the higher prices, it is likely that congestion on the highways A100 and A113 connecting Schönefeld and the city centre will increase significantly with the opening of BER. A recently published research report by Spreeplan, a consultancy specialised in the analysis of local transport in the Berlin-Brandenburg region, has predicted high levels of congestion during peak hours on the highway between Schönefeld and the city centre of Berlin. In their “Modal split Study” they suggest amongst others the introduction of a congestion charge for that part of the highway during peak hours.¹²⁸

In terms of public transport links, the picture is somewhat ambiguous. While Tegel is still closer to the city centre, one would need to take a bus to get there, at least for the “last mile”. By contrast, Schönefeld can be reached via local and regional train services directly. Along with the opening of BER, new public transport links are aimed to be available simultaneously, or the existing links will run at a higher frequency. Therefore, depending on the precise location in the city of Berlin, it might be faster to get to the new airport. In any event, the price will rise as Tegel is within zone B of the local transport network, and Schönefeld is

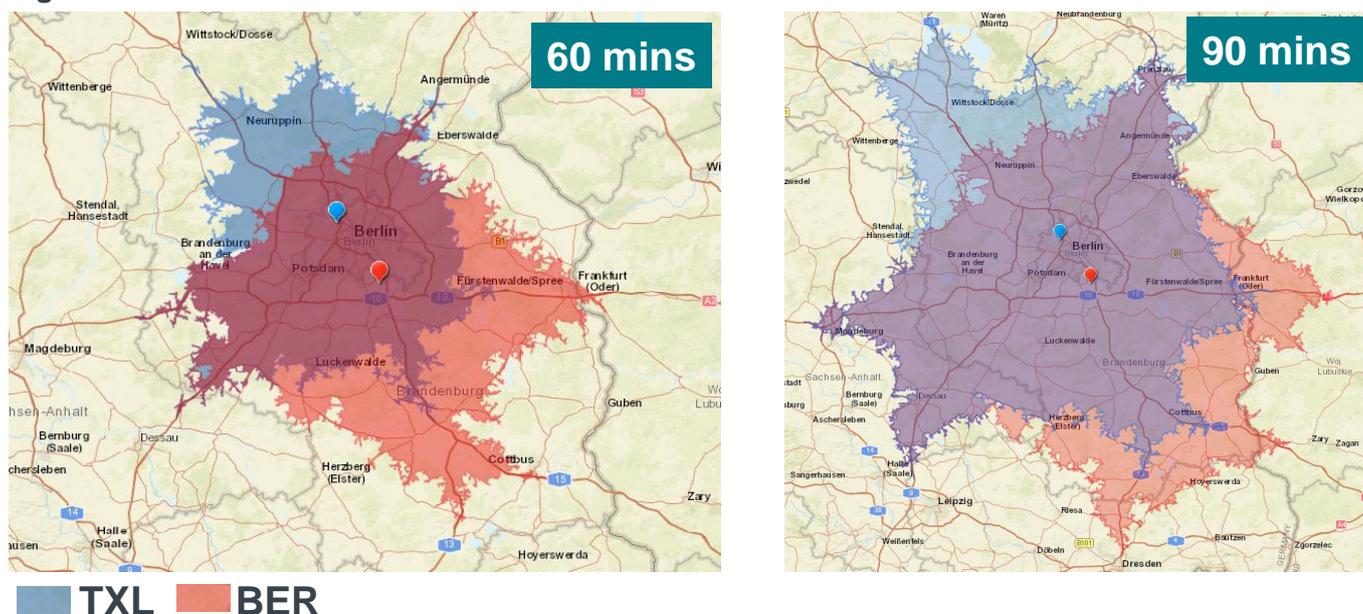
¹²⁷ Please refer to **Error! Reference source not found.** for the full information we received from several airlines.

¹²⁸ <http://www.tagesspiegel.de/berlin/neues-verkehrsgutachten-berliner-stadtautobahn-zum-ber-droht-der-kollaps/19716654.html>

just outside of Berlin in zone C. The single ticket fare will therefore increase from 2.80€ to 3.40€, a price increase of ca. 20%.

According to research from the technical university of Dresden, airport users tend to spend up to 60 minutes travelling to and from the airport, with more price-sensitive users willing to travel up to 90 minutes.¹²⁹ The chart below provides 60 and 90 minute drive time boundaries around both Tegel and BER.

Figure 19 Catchment areas



Source: Frontier analysis

The 60 minute drive time boundaries around both airports cover all of Berlin. And the population outside Berlin is relatively small (although we understand LCCs serving Berlin seek to target markets from further afield, including western Poland). Therefore, the catchment areas of Tegel and BER cover roughly the same number of people. As a result, while there may be some impact on demand on the margin we have chosen not to factor in differences in surface access into the demand forecasting. In other words, for simplicity and transparency we have assumed that demand is 'airport location neutral'. However, even if total underlying demand did not decrease if Tegel were to close, the fact that passengers would be more inconvenienced and have longer travel times to and from the airport can still be considered a cost in terms of their monetised value of time.

(Also, moving traffic from Tegel to BER would also impact on the c. 12,000 workers currently based at Tegel. While workers may be able to relocate to BER this would cause a disruption).¹³⁰

¹²⁹ <https://www.forschungsinformationssystem.de/servlet/is/188870/>

¹³⁰ <http://www.berlin-airport.de/de/presse/pressemitteilungen/2014/2014-11-06-PK-Arbeitsstaettenerhebung/index.php>

Ticket fares may be different under the different capacity scenarios

Airport charges could be different under the different future capacity scenarios. And as a result, ticket fares, and subsequently demand, could also be impacted. However, we have not modelled different airport charges and ticket fares under the different capacity and demand scenarios – with the exception of ticket fare increases related to capacity constraints, which is an output of the modelling analysis. This is to avoid having to make assumptions about Tegel’s ownership and competitiveness if it were to remain open, and how this would impact on charges at both airports. Also while we understand that airport charges would be the same at both BER terminals, this is not necessarily set in stone. Therefore, we assume that ticket fares remain constant in real terms under all scenarios. The results are therefore not driven by assumptions related to airport charges.

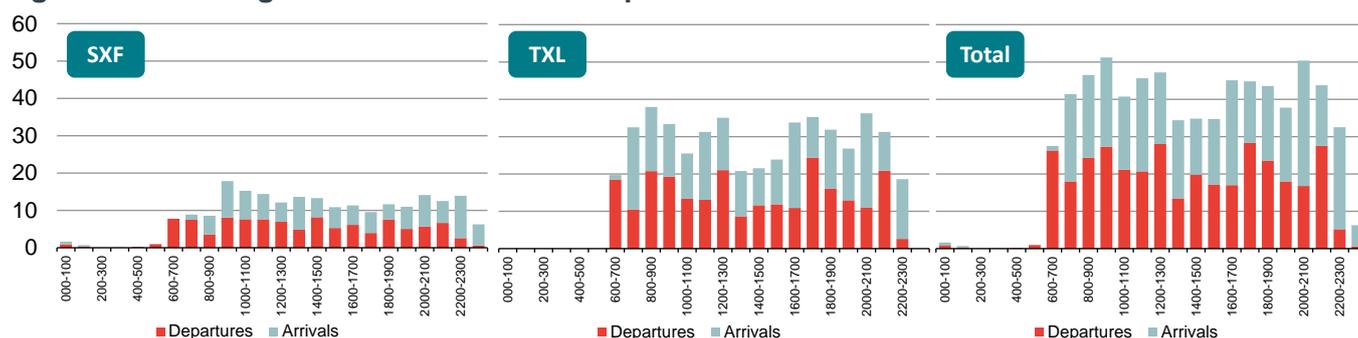
4.4 Capacity constraints and congestion premia

4.4.1 What does ‘capacity’ mean?

FBB describes BER as having capacity for 27-28 mppa today, rising to 45 mppa with planned expansions.¹³¹ Therefore, even under our minimum case scenario set out above, it is unlikely that BER alone would be able to satisfy total Berlin demand from 2030 onwards. And if demand follows our most likely scenario then there would almost certainly be insufficient capacity at BER alone.

However, considering demand on an annual basis overlooks the point that airports (like other networks) should be dimensioned on the basis of satisfying ‘busy hour’ traffic. The chart below reports the number of movements over the course of the average day in 2016 at Tegel and Schönefeld, and at both airports combined.

Figure 20 Average number of movements per hour 2016



Source: Frontier analysis of OAG data

Looking at the total, the data shows that there is a peak of movements between 09h00 and 10h00 and later between 20h00 and 21h00, with the early afternoon being relatively quieter. Airports need to have sufficient capacity to deal with traffic during these peak times. This includes runway capacity, terminal capacity, gates, air bridges and remote stands, but also check-in capacity and luggage

¹³¹ Please refer to section 4.2.3 for a detailed description of the capacity development at BER.

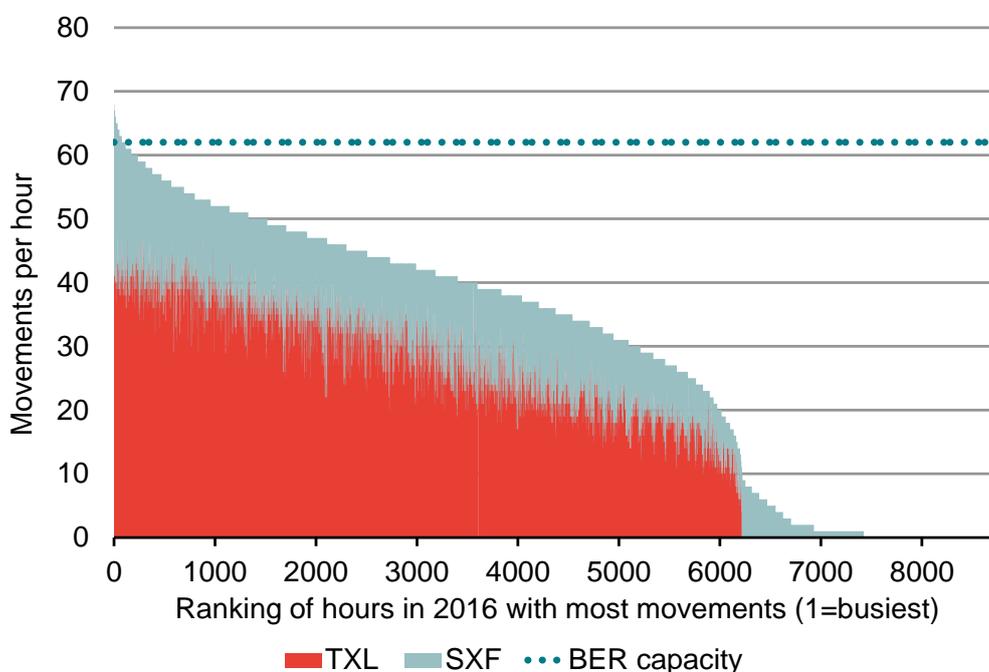
handling capacity. In other words, capacity is not just an annual total passenger threshold.

Having spare capacity during off peak hours is only an imperfect substitute for a lack of capacity during peak hours when passenger demand is highest. Therefore, the distribution of traffic is such that BER could be constrained during peak hours even if total passenger numbers are below the 45 mppa threshold.

4.4.2 Movements per hour

In the chart below we rank all hours in 2016 from the busiest to the quietest in terms of the number of movements at Tegel and Schönefeld combined. This can be considered a proxy for potential demand at BER if it had to handle all Berlin traffic.

Figure 21 Total movements already exceed capacity at BER



Source: Frontier analysis based on 2016 OAG data Notes: We have examined schedules data and ranked each hour from the busiest to the quietest in terms of the number of combined movements at TXL and SXF. In the busiest hour there were 68 movements in total (41 at TXL and 27 at SXF). In the 1,000th busiest hour, there were 52 movements in total (41 at TXL and 11 at SXF). In the 2,000th busiest hour, there were 47 movements in total (41 at TXL and 6 at SXF), etc.

Our analysis finds that, in their busiest hours:

- Tegel handled **49** movements per hour;
- Schönefeld handled **28** movements per hour; and
- Combined, Berlin had a peak of **68** movements per hour.¹³² In other words, if BER had to handle demand at Tegel and Schönefeld at the same time, it would have to handle up to 68 movements per hour.

Furthermore, according to Eurocontrol:

¹³² Please note that the maximum numbers at TXL and SXF are additive because they occurred at different times.

- Tegel has capacity for a maximum of **52** movements per hour¹³³; and
- Schönefeld has capacity for a maximum of **26** movements per hour.¹³⁴ (In three hours in 2016, Schönefeld marginally exceeded this capacity).

While as regards BER¹³⁵:

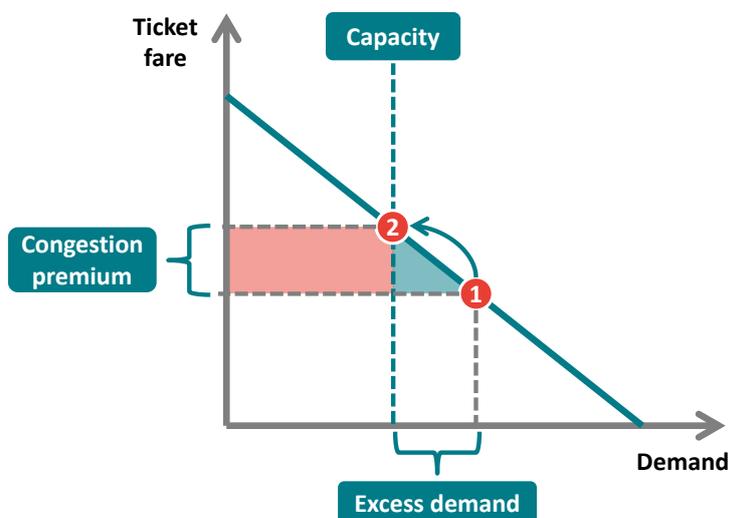
- BER has a technical runway capacity of 426,000 movements per year;
- Given night flight restrictions between midnight and 5am, this is equal to a maximum of **62** movements per hour.¹³⁶

Therefore, if BER alone had to handle Berlin demand, it would already today be constrained during peak hours, irrespective of whether the envisaged terminal extensions at BER take place or not and irrespective of whether Schönefeld airport continues its operations as both measures only reduce the terminal capacity limits.

4.4.3 Congestion premium

When demand exceeds the available supply, market prices rise to choke off the excess demand. This gives rise to a ‘congestion premium’ where passengers have to pay more to fly during these peak times. This is illustrated below.

Figure 22 Congestion premium



Source: Frontier illustration

Airlines may be able to deploy larger aircraft as a means to provide extra capacity. But it would generally not be economic to operate larger planes at peak times only for the same aircraft to be over-sized at all other times.

The congestion premium leads to a reduction in ‘consumer surplus’ because passengers end up paying more to fly. Passengers who accept the congestion premium and pay higher fares to travel at peak times now have less money left

¹³³ https://ext.eurocontrol.int/airport_corner_public/EDDT

¹³⁴ https://ext.eurocontrol.int/airport_corner_public/EDDB

¹³⁵ Planfeststellungsbeschluss zum Ausbau Verkehrsflughafen Berlin-Schönefeld 44/1-6441/1/101, page 384.

¹³⁶ 426,000 movements / 365 days / 19 operating hours per day

over to spend on other things. This is illustrated by the shaded red rectangle in the illustration above.¹³⁷

There are many studies which look at the impact of capacity constraints on ticket fares:

- In a 2014 report, we estimated that the due to capacity constraints, fares at Heathrow and Gatwick were 18% and 7% higher than at other London airports – and growing¹³⁸; and
- In a 2013 report, PWC found that when an airport becomes severely constrained, average fares increase by 18%¹³⁹.

Congestion also leads to a lower quality of service. Busy schedules mean that flights are more likely to be delayed, the terminal is more congested, queues are longer, and bags may be more likely to be misplaced.

4.5 Congestion modelling

We have carried out congestion modelling to estimate the potential scale of capacity constraints and the congestion premium in Berlin going forward.

This analysis focusses on runway capacity – i.e. the number of landings and take-offs which can be handled per hour, which we consider to be the most appropriate measure of capacity. Whereas terminal capacity (measured in mppa) can be expanded more easily, e.g. using the old Schönefeld terminal alongside the newer BER terminal, runway capacity is ultimately more fixed and currently limited to the existing two runways.

We have chosen 2030 as the focus year of our analysis, and we have considered two capacity scenarios:

- BER only: Total Berlin demand would need to be accommodated at BER only with capacity for up to 62 movements per hour;
- BER + Tegel: Total Berlin demand can be accommodated at BER and Tegel collectively, with capacity for up to 114 movements per hour.

And we have repeated the analysis for the two demand scenarios:

- The minimum scenario: Berlin demand is 46 million passengers in 2030; and
- The more likely scenario: Berlin demand is 56 million passengers in 2030.

Given that our modelling focuses on movements, we have converted our passenger forecast to movements. We have assumed that the average load will increase by 1% per year. This is based on analysis of average load at Heathrow since 2006 – when it first became constrained. This reflects that as congestion

¹³⁷ In addition, there is a net-negative effect on welfare due to lower demand. Passengers who decide to no longer fly because of the congestion premium miss out on the opportunity – even though in principle they would have been able to afford to fly if there were no constraints. This leads to a 'deadweight loss'. This is given by the shaded green triangle in the illustration above.

¹³⁸ Frontier (2014). Impact of airport expansion options on competition and choice

¹³⁹ PWC (2013). Fare differentials. Analysis for the Airports Commission on the impact of capacity constraints on air fares.

increases, airlines have a greater incentive to increase capacity per movement by deploying larger aircraft and operating with higher load factors. This means that over the period 2016-2030 we assume that the average number of movements increases at a slower rate than passengers. Applying a growth in load factors is therefore conservative, because not applying a growth factor would result in a higher number of movements in 2030, which would worsen congestion.

Applying this growth to the 2016 data on hourly movements produces the following results. The shaded areas in the charts below represent the movements that will not be able to take place due to capacity constraints.

Figure 23. More likely scenario 2030

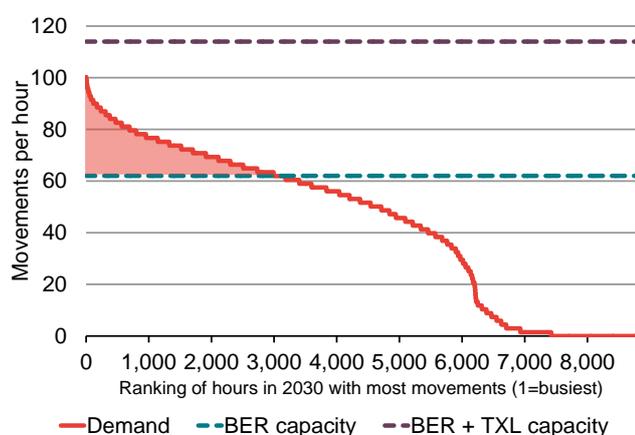
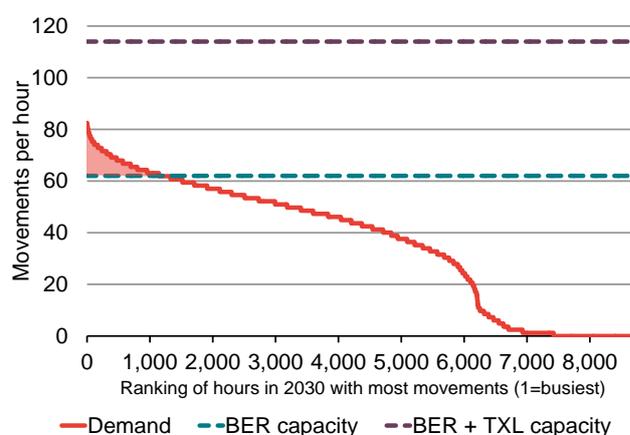


Figure 24. Minimum scenario 2030



The results show that by 2030:

- Under the ‘more likely’ scenario, Berlin demand will be as high as 100 movements per hour, compared to capacity of only 62 movements per hour at BER. This means that in the busiest hour of the year, 38 movements per hour would not be able to fly. There would be nearly 3,000 hours in the year where demand would exceed supply – this is equal to around 8 hours per day. (This lost demand is illustrated by the shaded red area in the chart, where demand exceeds runway capacity). However, under the ‘BER + Tegel’ scenario, where capacity is equal to 114 movements per hour, all of this demand would be able to fly.
- Even under the ‘minimum scenario’, peak demand would reach 82 movements per hour, meaning that 20 movements would not be able to fly during these peak periods. There would over 1,000 hours in the year where demand exceeds supply – equal to around 3 hours per day. Again, all of this demand could be accommodated at BER and Tegel combined.

The table below expands upon our results:

Figure 25 Results of congestion modelling 2030 (BER only)

	Minimum	Likely
Total demand (movements)	315,000	383,000
Movements during busiest hour	82	100
Capacity – movements per hour	62	62
Congestion premium during busiest hour	35%	55%
Average number of hours above capacity per day	3	8
Average increase in ticket fares	3%	12%

Source: Frontier analysis

We describe these results in more detail below.

These results are independent of the question whether and how to continue operations at the old Schönefeld airport. This is because our analysis focuses on movements, which only depends on runway capacity. As Schönefeld and BER would use the same runways, the capacity constraints and all the associated negative effects on consumers can only be resolved through higher runway capacity, i.e. construction of a new runway or by simply keeping the existing runway capacity in Tegel in operation.

4.5.1 Congestion premium

By 2030, during the busiest hour under our most likely scenario, we forecast that there will be 38% excess demand (even under the minimum scenario we estimate excess demand to be 24%). This means that ticket fares would have to rise.

To estimate the congestion premium, we have used a price elasticity of demand (PED) of -0.7 based on a literature review by the German Aerospace Centre (DLR). This is the more conservative lower magnitude estimate from the 'mixed' trip purpose category.

Figure 26 Price elasticities of demand

Mode	Range Surveyed		Most Likely Range	No. of Studies
	Market Demand Elasticities	Mode Choice Elasticities		
Air ^a :				
Vacation	-0.40 to -4.60	-0.38	-1.10 to -2.70	8
Non-Vacation	-0.08 to -4.18	-0.18	-0.40 to -1.20	6
Mixed ^b	-0.44 to -4.51	-0.26 to -5.26	-0.70 to -2.10	14

Source: Deutsches Zentrum für Luft- und Raumfahrt - DLR

http://www.dlr.de/dlr/Portaldata/1/Resources/documents/2015/Abschlussbericht_AviClim_Maerz_2015.pdf

To estimate the congestion premium we have divided the excess demand in each hour by the PED. For example, to reduce demand by 38% in the busiest hour under the likely scenario, ticket fares need to rise by 55%.

Under the likely case, nearly half of all hours are capacity constrained, with the average congestion premium rising to 12%. In the minimum case around 1-in-7

hours are capacity constrained, with an average congestion premium across all hours of 3%.

However, if Tegel were to remain open, there would be no adequate capacity in the peak hour and therefore no congestion premium.

4.5.2 Reduction in connectivity

Under the likely scenario, peak demand exceeds available capacity by 38 movements per hour. This means that frequencies will be lower than they otherwise would be, and some routes could potentially be squeezed out altogether at BER.

Analysis of 2016 schedules data suggests that 9am-10am tends to be the busiest hour in terms of movements in and out of Berlin. This time is especially important for long haul departures to the US. For example in 2016:

- There were around 300 departures from Berlin to Newark, and all of them took place between 9am-10am;
- There were around 300 departures from Berlin to Chicago, and all of them took place between 9am-10am; and
- There were nearly 100 departures from Berlin to Miami, and all of them took place between 9am-10am.

If Tegel closes, then BER will become significantly constrained during peak hours, and the scope for long haul connectivity – especially to the Americas – will be significantly reduced. Frequencies may be reduced, but also lack of available slots at relevant times may mean the loss of destinations altogether.

4.6 Conclusions

Capacity constraints will impact negatively on many airports in Europe over the coming years. Eurocontrol reports that by 2035, the number of congested airports in Europe will rise to 30, with many airports experiencing significant delays during busy hours.

Figure 27 Many airports in Europe will become constrained

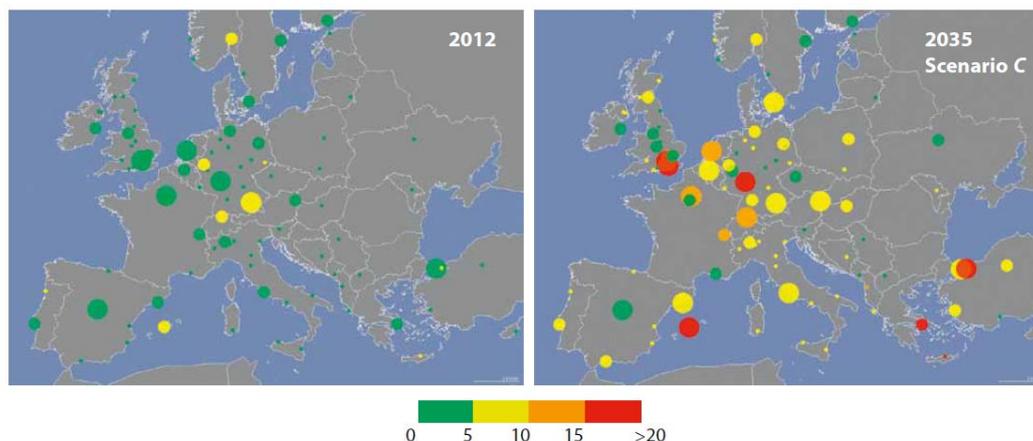


Figure 11. Increasing number of airports with Summer delay (in minutes/flight).

Source: Eurcontrol <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/201307-challenges-of-growth-summary-report.pdf>

Capacity constraints lead to many negative impacts:

- Quality of service during peak hours decreases;
- Ticket fares rise;
- Many passengers are priced out of flying;
- Consumer surplus decreases; and
- Employment is lower than it otherwise would be (in terms of there being fewer airport jobs, and fewer jobs associated with the reduction in consumer surplus and wider economic benefits).

Many European cities will either have to tolerate these negative impacts or attempt to add extra airport capacity, which can be a costly and lengthy process, if even possible at all.

If Tegel closes, Berlin will experience significant capacity constraints and it will have to tolerate the associated costs. However, unlike most other European cities, Berlin has the opportunity to avoid future capacity constraints not by building an extra airport, but by keeping an existing airport open. Therefore, we find that there are significant economic benefits to keeping Tegel open.

ANNEX A CHRONOLOGY¹⁴⁰

- 08/10/1923 Designation of THF as airport
- 21/04/1925 Final permit to operate THF as airport
- 08/05/1945 End of World War II, followed by implementation of four Berlin Occupation Zones
- 07/1945 Handing over of THF to US forces by Red Army
- 1946 Moving of Soviet air forces from Johannisthal to SXF, followed by construction of civilian airport and use by Aeroflot and later Interflug (GDR flag carrier)
- 06/1948 to 05/1949 Berlin Blockade
- THF became most important airfield for air transport to Berlin
 - Construction of TXL as French military airport
- 1951 Release of THF for civil air and freight traffic
- 07/07/1960 Agreement with French military government to operate civil aviation at TXL
- 03/12/1963 Granting of general permit to set up buildings at TXL
- 1965 to 1975 Construction of TXL airport buildings, including famous hexagonal structure
- 15/05/1975 Detailed understanding with French military government on the use of TXL
- 20/09/1990 Granting of permit for the construction and operation of SXF (with later amendments)
- 25/09/1990 Agreement on the Settlement of Certain Matters Relating to Berlin
- 03/10/1990 German re-unification effective
- Transfer of federal law to Berlin (West)
 - Existing Berlin airports including TXH and TXL deemed to have been permitted and planning approved by virtue of Sixth Act on the Transfer of Federal Law to Berlin (West) and by virtue of Art. 2 of the Agreement on the Settlement of Certain Matters Relating to Berlin
- 1991 Consortium agreement between governments of federal states of Berlin and Brandenburg and federal government
- Single airport concept for the Berlin Brandenburg region
 - Originally favoured site (at least by Brandenburg): Sperenberg
 - Privatisation of Flughafengesellschaft

¹⁴⁰ History of THF as well as the other Berlin airports is partly drawn from the Berlin airport's operators website <http://www.berlin-airport.de/en/company/about-us/history/tempelhof-airport/index.php> and from the description in the planning approval decision BER (section B, p. 205 et seq.); cf. press release of the OVG Berlin-Brandenburg of 29 August 2008. Cf. Research Services' analysis, p. 4 et seq.

- 1994 Handing over of last remaining rights re TXL by French military government
- 05/06/1996 Consensus decision between governments of federal states of Berlin and Brandenburg and federal government
- Single airport concept for the Berlin Brandenburg region
 - Berlin airport at Schönefeld site, thereby refusing other sites due to financial considerations, considering possibility of modular expansion and proximity to city, also considering lower demand than previously expected
 - Closing down of THF, as soon as necessary planning approval decision for SXF / BER granted
 - Closing down of TXL not later than inauguration of new runway at SXF / BER
- 02/06/2004 Revocation decision operation permit THF (with later amendments, in particular as regards timeline)
- 29/07/2004 Revocation decision operation permit TXL
- 13/08/2004 Planning approval decision BER (with later amendments)
- expansion of the existing Southern runway (in the future: Northern runway 07L/25R) by 600 meters to 3,600 meters;
 - construction of a new runway (in the future: Southern runway 07R/25L), 1,900 meters south of the existing Southern (and future Northern) runway with a length of 4,000 meters, in comparison to the future Northern runway moved by about 1,250 meters to the west;
 - construction of taxiways and apron;
 - closure of the existing Northern runway;
 - designation of areas for the construction of the planned airport facilities, in particular terminal buildings, parking garages, freight terminals, maintenance facilities, facilities for ground services and for technical installations, airport technics;
 - connection of the airport to the road network, in particular motorway, federal highway; restoration of separated connections;
 - connection of the airport to the railway network, including long distance, regional and commuter trains;
 - construction of an airport railway station below the central terminal building;
 - construction of the necessary technical infrastructure;
 - compensation measures under nature preservation law.
- 23/09/2004 Higher Regional Administrative Court Berlin's decision in interim proceedings with result that THF has to be operated until court decides on the merits (case 1 S 45.04)

- 24/11/2005 Higher Regional Administrative Court Berlin-Brandenburg's judgment on revocation decision operation permit TXL (case 12 A 3.05)
- 02/02/2006 Revocation decision planning approval decision TXL
- 16/03/2006 Federal Administrative Court's judgment on applications for quashing orders as regards planning approval decision BER, requiring amendments to planning approval decision BER
- 05/09/2006 Start of construction works at BER
- 12/02/2007 Higher Regional Administrative Court Berlin-Brandenburg's judgment on revocation decision operation permit THF (case 12 A 2.05)
- 07/06/2007 Revocation decision planning approval decision THF
- 29/11/2007 Federal Administrative Court's decision on revocation decision operation permit THF (case 4 B 22/07)
- 01/12/2007 Closure of SXF Northern runway, followed by dismantling
- 27/04/2008 Non-binding referendum for a petition against then impending closure of THF took place, but failed due to low voter turnout
- 31/10/2008 Revocation decisions THF (operation permit and planning approval) become effective – air traffic ceases
- 17/12/2008 Higher Regional Administrative Court Berlin-Brandenburg's judgment on revocation decision planning approval decision THF (case 12 A 11.07)
- 20/10/2009 Planning supplement decision to planning approval decision BER on flight noise protection
- 05/2010 Opening of former THF site as "Tempelhofer Freiheit"
- 27/03/2012 Amendment of SXF aviation permit (dated 20/09/1990)
- 23/04/2012 Expansion of SXF Southern runway (future BER Northern runway) operational
- 03/06/2012 Planned opening date of BER – cancelled
- Parallel application to revoke operation permit or, alternatively, exempt from operation obligation not pursued any more (original plan to move TXL to BER in the night 02/06/2012 to 03/06/2012 and ceasing operations at TXL immediately after moving)
- 18/09/2014 Higher Regional Administrative Court Berlin-Brandenburg's judgment on application for immediate closure of TXL (case 6 A 15.14)
- 11/12/2014 Administrative decision on renovation of SXF Southern runway (future BER Northern runway) and partial commissioning of BER Southern runway

06/05/2015 to 24/10/2015 Renovation of SXF Southern runway (future BER Northern runway) – partial commissioning of BER Southern runway

20/03/2017 Time limit for signing petition for a referendum "Tegel remains open"

In the future:

09/2017 ? Plebiscite "Tegel remains open" takes place

DAY X Construction of BER finished – BER becomes operational

DAY X+ DAY X plus six months: revocation decisions as regards operation permit TXL and as regards planning approval decision TXL become effective

- Right (and obligation) to operate TXL as an airport ceases to be effective
- Purpose / function of the Tegel site as an airport ceases to be effective

DAY X++ Tegel site used for other purposes

DAY X+++ Construction of BER expansion finished – new terminal building(s) become(s) operational

ANNEX B LIST OF REFERENCES

Please note that, while we have comprehensively reviewed relevant legislation, legal literature, case-law and other sources, we have focused the corresponding references to material specifically addressing closing TXL or keeping it open respectively.

B.1 Parliamentary acts, agreements under public international law

Berliner Gesetz über Volksinitiative, Volksbegehren und Volksentscheid – Abstimmungsgesetz – AbstG (*Berlin Act on Citizen Initiatives, Petitions for Referenda and Plebiscites*) of 11 June 1997, GVBl. p. 304, last amended by Art. 1 of the Act of 14 March 2016, GVBl. p. 90

Gesetz zum Schutz gegen Fluglärm (*Act on Protection against Flight Noise*) in the version of the promulgation of 31 October 2007, BGBl. I p. 2550

Luftverkehrsgesetz – LuftVG (*Air Traffic Act*) in the version of the promulgation of 10 May 2007, BGBl. I p. 698, last amended by Art. 4 of the Act of 23 February 2017, BGBl. I p. 298

Luftverkehrs-Zulassungs-Ordnung – LuftVZO (*Air Traffic Licensing Ordinance*) of 19 June 1964, BGBl. I p. 370, last amended by Art. 1 of the Ordinance of 12 December 2016, BGBl. I p. 2864

Raumordnungsgesetz – ROG (Federal Regional Planning Act) of 22 December 2008, BGBl. I p. 2986, last amended by Art. 124 of the Ordinance of 31 August 2015, BGBl. I p. 1474

Sechstes Gesetz zur Überleitung von Bundesrecht nach Berlin (West) – Sechstes Überleitungsgesetz (*Sixth Act on the Transfer of Federal Law to Berlin (West)*) of 25 September 1990, BGBl. I p. 2106, 2153, last amended by Art. 1 of the Ordinance of 31 October 2006, BGBl. I p. 2407

Übereinkommen zur Regelung bestimmter Fragen in bezug auf Berlin (*Agreement on the Settlement of Certain Matters relating to Berlin*) of 25 September 1990, BGBl. II 1994, p. 40

Verordnung des Berliner Senats über die Festsetzung des Lärmschutzbereichs für den Flughafen Berlin-Tegel (Ordinance of the Senate of Berlin on the Determination of the Noise Protection Area for Tegel airport) of 4 June 1976, GVBl. p. 1242

Verwaltungsgerichtsordnung (*Code of Administrative Court Procedure*) in the version of the promulgation of 19 March 1991, BGBl. I p. 686, last amended by Art. 17 of the Act of 22 December 2016, BGBl. I p. 3106

Verwaltungsverfahrensgesetz (*Administrative Procedure Act*) in the version of the promulgation of 23 January 2003, BGBl. I p. 102, last amended by Art. 20 of the Act of 18 July 2016, BGBl. I p. 1679

B.2 Court decisions

B.2.1 Federal Constitutional Court (*Bundesverfassungsgericht*)

BVerfG, decision of 20 February 2008 – 1 BvR 2389/06

B.2.2 Federal Administrative Court (*Bundesverwaltungsgericht*)

BVerwG judgment of 23 July 1980 – 8 C 90/79

BVerwG, decision of 19 August 1997 – 11 B 2/97

BVerwG, judgment of 16 March 2006 – 4 A 1075/04, BVerwGE 125, p. 116

BVerwG, decision of 29 November 2007 – 4 B 22/07

BVerwG, judgment of 31 July 2012 – 4 A 7001/11 and others, BVerwGE 144, p. 44

B.2.3 Higher Regional Administrative Court (*Oberverwaltungsgericht*) Berlin (until 30 June 2015) / Berlin-Brandenburg

OVG Berlin, decision of 23 September 2004 – 1 S 45.04

OVG Berlin-Brandenburg, judgment of 24 November 2005 – 12 A 3.05

OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 1.05

OVG Berlin-Brandenburg, judgment of 12 February 2007 – 12 A 2.05

OVG Berlin-Brandenburg, judgment of 17 December 2008 – 12 A 11.07

OVG Berlin-Brandenburg, judgment of 18 September 2014 – 6 A 15.14

B.3 Legal literature, legal commentaries etc.

Ibler, Martin: Kann der Widerruf eines Verwaltungsakts widerrufen werden? (*May the revocation of an administrative decision be revoked?*), NVwZ 1993, p. 451 et seq.

Kluckert, Sebastian: Rechtliche Perspektiven für den Weiterbetrieb des Verkehrsflughafens Berlin-Tegel (*Legal perspectives for continuation of Berlin-Tegel commercial airport*), DÖV 2013, p. 874 et seq.

B.4 Official documents, permits etc.

Abgeordnetenhaus von Berlin, Vorlage – zur Kenntnisnahme – über Bericht über das Flughafenkonzept in der Region Berlin-Brandenburg (*Parliament of Berlin, Bill for information on the report about the airport concept in the Berlin Brandenburg Region*), official record 13/624

Abgeordnetenhaus von Berlin, Vorlage – zur Kenntnisnahme – Stellungnahme des Senats zu dem Volksbegehren "Tempelhof bleibt Verkehrsflughafen!" (*Parliament of Berlin, Bill for information, Statement of the Senate on the plebiscite "Tempelhof remains airport!"*), official record 16/0524

Abgeordnetenhaus Berlin, Bericht des 1. Untersuchungsausschusses des Abgeordnetenhauses von Berlin – 17. Wahlperiode – zur Aufklärung der Ursachen, Konsequenzen und Verantwortung für die Kosten- und Terminüberschreitungen des im Bau befindlichen Flughafens Berlin Brandenburg Willy Brandt (BER) (*Parliament of Berlin, Report of the 1st committee of inquiry of the Parliament of Berlin – 17th election period – to clear up the reasons, consequences and responsibility for the cost and timeline excesses as regards the Berlin Brandenburg Willy Brandt airport (BER) currently under construction*), official record 17/3000

Abgeordnetenhaus Berlin, Kleine Anfrage: Betriebsgenehmigung für den Flughafen Tegel (*Parliament of Berlin, parliamentary inquiry: operation permit Tegel airport*), official record 17/10635

Abgeordnetenhaus Berlin, Schriftliche Anfrage: Ist die Schließung des Flughafens Tegel wirklich unabwendbar? (*Parliament of Berlin, written inquiry: Is the closure of Tegel airport really unavoidable*), official record 17/18057

Bundesregierung: Flughafenkonzept der Bundesregierung 2009 (*Federal Government, Airport Concept 2009*)

Deutscher Bundestag, Wissenschaftliche Dienste: Ausarbeitung "Voraussetzungen für die Weiterführung des Flughafens Berlin-Tegel" (*German Federal Parliament, Research Services: Academic Analysis: Requirements for the Continuation of Berlin-Tegel Airport*), WD 7 – 3000 – 066/13, 2013 (abbr. "**the Research Services' analysis**")

Gemeinsame Obere Luftfahrtbehörde Berlin-Brandenburg: Bescheid Sanierung der Nordbahn und ersatzweise befristete Teilbetriebnahme der Südbahn des künftigen Verkehrsflughafens Berlin-Brandenburg (*Joint Higher Aviation Authority Berlin-Brandenburg: Administrative decision on the renovation of the Northern runway and the commissioning, as a substitute, of the Southern runway of the soon-to-be Berlin Brandenburg airport for a limited period of time*), 11 December 2014

Landesentwicklungsplan Flughafenstandortentwicklung (*Regional Development Plan for Aviation in Berlin and Brandenburg*)

Ministerium für Infrastruktur und Landwirtschaft des Landes Brandenburg: Änderung und Neufassung der Genehmigung des Verkehrsflughafens Berlin-Schönefeld, zukünftig Verkehrsflughafen Berlin Brandenburg (*Brandenburg Ministry for Infrastructure and Agriculture: Amendment and new version, Operation permit Berlin-Schönefeld, soon-to-be Berlin Brandenburg airport*), 27 March 2012, Brandenburg Official Journal 2012, p. 614

Ministerium für Infrastruktur und Landwirtschaft des Landes Brandenburg: Änderungsplanfeststellungsbeschluss "Anlagen des Bundes", 20. Änderung des Planfeststellungsbeschlusses Ausbau Verkehrsflughafen Berlin-Schönefeld vom 13. August 2004 in der Fassung des Planergänzungsbeschlusses Naturschutz und Landschaftspflege, Komplexe Kompensationsmaßnahmen "Zülowniederung" vom 4. August 2011 (*Brandenburg Ministry for Infrastructure and Agriculture: Amendment planning approval decision "facilities of the federal government", 20th amendment of the planning approval decision expansion Berlin-Schönefeld*)

airport dated 13 August 2004 in the version of the planning supplement decision nature protection and landscape conservation, complex compensation measures "Zülowniederung" dated 4 August 2011), 15 September 2011

Ministerium für Stadtentwicklung, Wohnen und Verkehr des Landes Brandenburg: Planfeststellungsbeschluss Ausbau Verkehrsflughafen Berlin-Schönefeld (*Brandenburg Ministry for Urban Development, Housing and Transport: Planning approval decision expansion Berlin-Schönefeld airport*), 44/1-6441/1/101, 13 August 2004 (abbr. "**the planning approval decision BER**")

Oberverwaltungsgericht Berlin-Brandenburg: Zur luftverkehrsrechtlichen Situation der Berliner Flughäfen Tegel und Tempelhof (*Higher Regional Administrative Court Berlin-Brandenburg: To the situation of Tegel and Tempelhof airports from an aviation law perspective*), press release 21/2008, 29 August 2008

Senatsverwaltung für Stadtentwicklung: Nachnutzung Flughafen Tegel, Grundlagenermittlung (*Senate Administration for Urban Planning: Post utilization Tegel airport, Basic Evaluation*), March 2009

Senatsverwaltung für Stadtentwicklung: Bescheid über den Widerruf der Betriebsgenehmigung für den Flughafen Berlin-Tegel (*Senate Administration for Urban Planning: Administrative Decision on the Revocation of the Operating License for Berlin-Tegel Airport*), 29 July 2004

Senatsverwaltung für Stadtentwicklung und Umwelt: Nachnutzung Flughafen Tegel, 7. Standortkonferenz: Einblicke in die "Werkstatt Berlin TXL" (*Senate Administration for Urban Planning and Environment: Post utilization Tegel airport, 7th site conference: Insights into "Workshop Berlin TXL"*), Documentation of the conference on 20 January 2015

B.5 Press reports, other documents

B.5.1 Press reports

Berliner Zeitung, 20 March 2017, "Tegel-Volksentscheid: "Eine einzigartige demokratische Mogelpackung"

BZ Berlin, 4 October 2016, "Geheimpapier aufgetaucht: Flughafen-Experten warnen davor, den Tegel-Airport zu schließen"

Der Tagesspiegel, 14 March 2013, "Juristen: Mehdorns Idee ist abwegig"

Der Tagesspiegel, 4 June 2013, "Ausnahmeregelung für Tegel läuft 2017 aus"

Der Tagesspiegel, 6 October 2016, "TU-Professor: Tegel kann nach Start des BER offen bleiben"

Der Tagesspiegel, 22 November 2016, "Was mit dem Flughafen Tegel passieren soll"

Der Tagesspiegel, 21 March 2017, "Der Tegel-Entscheid ist durch, nun sind die Juristen gefragt"

Der Tagesspiegel, 19 April 2017, "Airlines sind gespalten in der Tegel-Frage"

Der Tagesspiegel, 26 April 2017, "Berliner Stadtautobahn droht der Kollaps zum BER"

Rbb, 30 March 2016, "Wie realistisch ist der Weiterbetrieb von Tegel?"

Rbb, 21 March 2017, "Tegel offen halten – geht das überhaupt?"

B.5.2 Other documents

Freie Demokraten Berlin, Rechtliche Argumentationshilfen für die Offenhaltung von TXL (*Legal arguments in favour of keeping TXL open*)

ANNEX C STATUTORY PROVISIONS – EXCERPTS

C.1 Administrative Procedure Act

Source of unofficial translation (provided on the website of the Federal Ministry of the Interior; translation as of 1 July 2004):

http://www.bmi.bund.de/SharedDocs/Downloads/EN/Gesetzestexte/VwVfg_en.pdf?__blob=publicationFile

C.1.1 Sec. 35 – Definition of an administrative act

An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

C.1.2 Sec. 36 – Additional stipulations to an administrative act

(1) An administrative act which a person is entitled to claim may be accompanied by an additional stipulation only when this is permitted by law or when it is designed to ensure that the legal requirements for the administrative act are fulfilled.

(2) Notwithstanding the provisions of paragraph 1, an administrative act may, after due consideration, be issued with:

1. a stipulation to the effect that a privilege or burden shall begin or end on a certain date or shall last for a certain period (time limit);
 2. a stipulation to the effect that the commencement or ending of a privilege or burden shall depend upon a future occurrence which is uncertain (condition);
 3. a reservation regarding annulment;
- or be combined with
4. a stipulation requiring the beneficiary to perform, suffer or cease a certain action (obligation);
 5. a reservation to the effect that an obligation may subsequently be introduced, amended or supplemented.

(3) An additional stipulation may not counteract the purpose of the administrative act.

C.1.3 Sec. 41 – Validity of an administrative act

(1) An administrative act shall become effective vis-à-vis the person for whom it is intended or who is affected thereby at the moment he is notified thereof. The administrative act shall apply in accordance with its tenor as notified.

(2) An administrative act shall remain effective for as long as it is not withdrawn, annulled, otherwise cancelled or expires for reasons of time or for any other reason.

(3) An administrative act which is invalid shall be ineffective.

C.1.4 Sec. 49 – Revocation of a lawful administrative act

(1) A lawful, non-beneficial administrative act may, even after it has become non-appealable, be revoked wholly or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons.

(2) A lawful, beneficial administrative act may, even when it has become non-appealable, be revoked in whole or in part with effect for the future only when:

1. revocation is permitted by law or the right of revocation is reserved in the administrative act itself;
2. the administrative act is combined with an obligation which the beneficiary has not complied with fully or not within the time limit set;
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest;
4. the authority would be entitled, as a result of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not received any benefits derived from the administrative act and when failure to revoke would be contrary to the public interest, or
5. in order to prevent or eliminate serious harm to the common good.

Section 48 paragraph 4 applies mutatis mutandis.

(3) A lawful administrative act which provides for a one-time or a continuing payment of money or a divisible material benefit for a particular purpose, or which is a prerequisite for these, may be revoked even after such time as it has become non-appealable, either wholly or in part and with retrospective effect,

1. if, once this payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;
2. if the administrative act had an obligation attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period.

Section 48 paragraph 4 applies mutatis mutandis.

(4) The revoked administrative act shall become null and void with the coming into force of the revocation, except where the authority fixes some other date.

(5) Once the administrative act has become non-appealable, decisions as to revocation shall be taken by the authority competent under section 3. This shall also apply when the administrative act to be revoked has been issued by another authority.

(6) In the event of a beneficial administrative act being revoked in cases covered by paragraph 2, nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act to the extent that his reliance merits protection. Section 48, paragraph 3, third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary courts.

C.1.5 Sec. 51 – Resumption of proceedings

(1) The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;
2. new evidence is produced which would have meant a more favourable decision for the person affected;
3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.

(2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.

(3) The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.

(4) The decision regarding the application shall be made by the authority competent under section 3; this shall also apply when the administrative act which is to be annulled or amended was issued by another authority.

(5) The provisions of section 48, paragraph 1, first sentence and of section 49, paragraph 1 shall remain unaffected.

C.2 Air Traffic Act

Own courtesy translation; please note that the headings to the sections are not part of the Act:

C.2.1 Sec. 6 – airports

(1) Airfields (airports, airstrips and gliderfields) may only be constructed or operated with a licence. The licensing procedure (*Genehmigungsverfahren*) for airfields requiring official planning permission (*Planfeststellung*) must incorporate an environmental impact assessment. This will not affect section 15 subsection 1 sentence 2 German Environmental Impact Assessment Act (*Gesetz über die*

Umweltverträglichkeitsprüfung). Conditions may be attached to the licence and made subject to a time limit.

(2) Before the licence is issued an examination must be conducted to determine whether the planned project is consistent with regional development needs and whether sufficient account has been taken of the needs of nature conservation and landscape conservation and urban development and protection from aircraft noise. This does not affect sections 4 and 5 German Regional Planning Act. The licence must be refused if the proposed land is unsuitable or there are facts justifying the assumption that public safety or order is at risk. The licence can be revoked if such facts emerge later.

(3) A licence for an airport which is to be used for general aviation purposes must also be refused if construction and operation of the airport for which the application has been made run counter to public interest in an unreasonable manner.

(4) The licence must be amended if necessary in the light of the outcome of the official planning procedure (*Planfeststellungsverfahren*) (sections 8 to 10). The licence must also be amended if the construction or operation of the airfield is to be materially extended or altered.

(5) to (7) [...]

C.2.2 Sec. 8 – planning approval

(1) Airports and airstrips with restricted building protection (*beschränkter Bauschutzbereich*) pursuant to section 17 may only be constructed and existing airports and airstrips may only be amended if planning pursuant to section 10 has been approved beforehand. Planning approval must take account of public and private interests affected by the project, including environmental impact. In so doing, the applicable values set out in section 2 subsection 2 German Protection from Aircraft Noise Act must be observed in order to protect the general public and the surrounding areas from harmful environmental impact of aircraft noise. The Environmental Impact Assessment and review of compatibility with the conservation objectives of Natura 2000 must cover the entire territory which the project could impact in a manner which is relevant to the decision. In so doing account must be taken of all areas in the area surrounding the airfields referred to in sentence 1 in which incoming and outgoing air traffic cannot be ruled out either for actual or legal reasons. If a project licence can only be justified if certain areas are spared considerable impairment by incoming and outgoing air traffic, the planning approval authority (*Planfeststellungsbehörde*) may prohibit incoming and outgoing traffic over such areas. The planning approval office can also impose conditions on permitting aircraft to fly over certain areas. Before any stipulation is included in the planning approval notice (*Planfeststellungsbeschluss*) the air safety organisation and the Federal Supervisory Authority for Air Safety (*Bundesaufsichtsamt für Flugsicherung*) must be given an opportunity to express a position on the effects the stipulation will have on air traffic management and air transport system operation in future. Sentences 3 to 5 must be applied accordingly to licences pursuant to section 6 subsections 1 and 4 sentence 2. Sections 72 to 78 German Administrative Procedure Act apply to official planning procedures subject to this Act.

(2) Section 9 subsection 1 applies accordingly to the planning permission.

(3) (Repealed)

(4) Planning approval decision (*Planfeststellung*) may address operating rules and the compliance of over-ground constructions on the airfield premises with construction planning law. Amendments to operating rules made in this way are only subject to section 6 subsection 4 sentence 2.

(5) [...]

(6) The licence pursuant to section 6 is not a prerequisite for official planning procedure (*Planfeststellungsverfahren*) or planning approval procedure (*Plangenehmigungsverfahren*).

(7) to (8) [...]

C.3 Air Traffic Licensing Ordinance

Own courtesy translation:

C.3.1 Sec. 45 – Obligation to preserve and operate the airport

(1) The airport operator must keep the airport safe for operation and operate it properly. It must report any occurrences which materially impair airport operation to the licensing authority without undue delay.

(2) Within the limits of its operating duty the airport operator may not treat aviation companies and entities licensed to engage in aviation differently, either indirectly or directly, without an objectively justified reason. It may prohibit entities which are licensed to engage in aviation and permitted to use airport installations from taking off, landing and parking aircraft to the extent that they do not fully discharge their obligations under section 43 subsection 2 and that such prohibition is commensurate.

(3) The licensing authority can release the airport operator from its duty to operate.

(4) to (5) [...]

C.3.2 Sec. 48 – Withdrawal and revocation of permit

(1) The licence must be withdrawn if the licensing criteria were not satisfied. It must be revoked if the licensing criteria are no longer satisfied and this is not temporary. It can be revoked if the conditions attached are not observed.

(2) Withdrawal, revocation or lapse of the licence for other reasons must be made known; Section 42 subsection 4 sentence 1 must be applied by analogy.

ANNEX D TABLE OF ABBREVIATIONS

BBF	Berlin Brandenburg Flughafenholding GmbH
BER	Berlin Brandenburg Airport (upcoming IATA code) <i>and</i> Berlin region airports (current IATA code)
BGBI.	Bundesgesetzblatt (<i>Federal Law Gazette</i>)
BVerfG	Bundesverfassungsgericht (<i>Federal Constitutional Court</i>)
BVerwG	Bundesverwaltungsgericht (<i>Federal Administrative Court</i>)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (<i>decisions of the Federal Administrative Court, authoritative law reports</i>)
DÖV	Die Öffentliche Verwaltung (title of a legal magazine)
EIA	Environmental Impact Assessment (<i>Umweltverträglichkeitsprüfung – UVP</i>)
FBB	Flughafen Berlin Brandenburg GmbH (since beginning of 2012, previously named FBS)
FBG	Berliner Flughafen-Gesellschaft mbH
FBS	Flughafen Berlin-Schönefeld GmbH (until end of 2011, change of name to FBB)
GVBl.	Gesetz- und Verordnungsblatt Berlin (<i>Berlin State Law Gazette</i>)
LuftVG	Luftverkehrsgesetz – LuftVG (<i>Air Traffic Act</i>)
LuftVZO	Luftverkehrs-Zulassungs-Ordnung (<i>Air Traffic Licensing Ordinance</i>)
mppa	million passengers per annum
NVwZ	Neue Zeitschrift für Verwaltungsrecht (title of a legal magazine)
OVG	Oberverwaltungsgericht (<i>Higher Regional Administrative Court</i>)
OVGE	Entscheidungen der Oberverwaltungsgerichte (<i>decisions of the Higher Regional Administrative Courts, authoritative law reports</i>)
SXF	Berlin Schönefeld Airport (IATA code)
THF	Berlin Tempelhof Airport (former IATA code)
TXL	Berlin Tegel Airport (IATA code)
VwGO	Verwaltungsgerichtsordnung (<i>Code of Administrative Court Procedure</i>)
VwVfG	Verwaltungsverfahrensgesetz (<i>Administrative Procedure Act</i>)

