

COMMISSION DECISION

of 19 December 2012

on state aid SA 26374 (C 49/08) (ex N 402/08) implemented by Poland for PZL Dębica S.A.

(notified under document C(2012) 9464)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2013/294/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾,

Whereas:

I. THE PROCEDURE

- (1) By letter of 13 August 2008, Poland informed the Commission of measures it planned to grant to support the restructuring of PZL Dębica S.A. ('PZL Dębica' or 'the company'). By letter of 3 October 2008 the Commission asked Poland to submit certain missing documents. These were provided on 20 October 2008.
- (2) By letter dated 19 December 2008, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty') in respect of the measures ('the opening decision').
- (3) The opening decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments. No interested third party commented on the opening decision.
- (4) The Polish authorities submitted additional information in reply to the opening decision on 12 February 2009, 9 July 2010, 16 May 2011, 7 June 2011, and 8 June 2011.
- (5) On 18 August 2011 Poland asked the Commission to refrain from assessing the notified aid until 31 October

2011. On 10 October 2011 Poland withdrew some of the notified measures i.e. a capital injection and a preferential loan which were both supposed to be awarded by the state-owned Industrial Development Agency.

- (6) On 2 November 2011 Poland submitted a report with a view to establishing that the remainder of the notification, i.e. deferral of social security debt, passed the private creditor test and therefore did not constitute state aid.
- (7) By letter of 26 July 2012 the Commission asked Poland to provide additional explanations on a number of points. Poland replied by letter dated 31 August 2012, in which it informed the Commission that an agreement on the deferral of the social security debt had been concluded on 1 March 2012 and that the outstanding debt to the local Office of the Marshall had been repaid on 14 August 2012.
- (8) Information was last provided by the Polish authorities on 6 December 2012.

II. THE BENEFICIARY AND ITS RESTRUCTURING PLANS

1. The Beneficiary

- (9) PZL Dębica has 212 employees. It is a medium-sized company active primarily in the production of refrigeration equipment such as compressors, units for ice water and chillers, air and liquid coolers, spray-and-evaporative condensers, vertical and horizontal shell-and-tube condensers, tank apparatus: liquid separators, horizontal tanks, inter-stage coolers, economisers, oil separators and refrigerating valves.
- (10) The company is located in Podkarpackie Province, a region covered by Article 107(3)(a) of the Treaty. It was founded in 1938 and has been a joint stock company since 1995. In 1999 the company's shares were held by the Treasury (25,08 %) and the employees (74,92 %). In 2006 the company was fully privatised: its shares were predominantly held by the current and former employees and their heirs. In 2010 a private investor, Eurotech, acquired a 16,7 % share in PZL Dębica.

⁽¹⁾ OJ C 53, 6.3.2009, p. 17.

⁽²⁾ OJ C 53, 6.3.2009, p. 17.

- (11) The company's market share on the Polish refrigerator equipment market is small (less than 1 % in 2006). Exports in 2006 accounted for 15,6 % of overall sales, of which 6,8 % went outside the European Union. On the Polish market the company faces strong competition from a number of companies, for instance York International, GEA GRASSO Refrigeration Division, Mycom International Refrigeration (Ltd), MOSTOSTAL Wrocław S.A., Aerzen Maschinenfabrik GmbH and Zakład Metalowy PILZNO.

2. The first restructuring plan

- (12) According to the Polish authorities, the company's financial difficulties date back to 2002. At that time a restructuring plan was adopted for 2002-07. The plan was updated in October 2003 and included the following measures:

- a) a write-off by the State Fund for Rehabilitation of Persons with Disabilities of PLN 2 358 689,41;
- b) a write-off by Dębica City Council of PLN 1 063 790,45;

- c) a preferential loan from the Enterprise Restructuring Fund of PLN 3 890 000 for the repayment of part of the social security debt to the Social Security Office;
- d) deferral by the Social Security Office of debt with a nominal value of PLN 1 364 600;
- e) a write-off by Dębica Tax Office of PLN 914 522,15;
- f) four measures identified as *de minimis* aid with a total value of PLN 17 055,81.

- (13) Due to budgetary constraints, the Enterprise Restructuring Fund was not able to grant PZL Dębica the promised loan (recital (12)c)). Consequently, the Social Security Office decided not to defer the remainder of the debt owed to it (see recital (12)d)). As a result, the financial restructuring at the heart of the plan was not achieved by PZL Dębica.

- (14) Despite this, the company succeeded in implementing the other elements of the restructuring plan, with the result that it recorded a modest profit as early as 2006. The financial results of the company between 2002 and 2011 are summarised in Table 1 below.

Table 1

Financial results of PZL Dębica 2002-11 (PLN million)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012 ⁽¹⁾
Net sales	11,5	13,1	15	11,6	15,9	14	15	15,2	14	15,9	21,5
EBIT	- 0,7	0,3	- 0,2	- 2	1,6	2	1,3	1,9	1,1	1,5	3,5
Net profit	- 2,1	- 0,9	- 1,2	- 3	0,5	1	0,01	0,5	0,01	0,2	2,7

EUR 1 = approx. PLN 4

⁽¹⁾ August 2012 forecast for 2012 as a whole, based on data for Q1 and Q2 of 2012.

3. The second restructuring plan

- (15) Following the non-implementation of financial restructuring in the first restructuring plan, the Commission was notified of a second restructuring plan in August 2008. To a large extent, this second plan was designed to implement financial restructuring of the company. It provided for the following measures:

- a) a capital injection by the Industrial Development Agency of PLN 4 965 800;
- b) a preferential loan from the Industrial Development Agency of PLN 5 534 200 for the repayment of part of the debt to the Social Security Office;

- c) deferral of further social security debt towards the Social Security Office with a nominal value of PLN 3 million;
- d) a write-off by the local Office of the Marshall of PLN 101 600.

III. THE OPENING DECISION

- (16) The opening decision expressed doubts as regards the compatibility with the internal market of the following aid measures forming part of the first restructuring plan:

- a) deferral by Dębica City Council of debt with a nominal value of PLN 1 164 900;

b) a write-off by Dębica Tax Office of PLN 914 522,15;

c) deferral by the Social Security Office of debt with a nominal value of PLN 1 364 600.

The Commission also queried the classification of the measures listed in Table 2 below as *de minimis* aid.

(17) In addition, the Commission expressed doubts as to whether the restructuring plan comprised all the elements necessary to restore PZL Dębica's viability and whether a restructuring period of 12 years were not too long in view of point 35 of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty ⁽³⁾ ('the R&R Guidelines').

(18) In view of the aid already awarded under the first plan (recitals (12)a) and (12)b)), the Commission also questioned the company's eligibility for new restructuring aid (see recital (15)) in the light of the one-time-last-time principle (laid down in Section 3.3 of the R&R Guidelines).

(19) In the opening decision the Commission stated that for the measures which Poland had classified as pre-accession measures (recitals (16)a) to (16)c)) no legally binding document had been presented to it by which the competent national authorities had undertaken to grant aid.

(20) As regards the actual amount of the aid already awarded to the company, the Commission also expressed its doubts as to whether the *de minimis* aid awarded in 2006 could be considered as such, as it had awarded it to a company in difficulty, which, according to Article 1(1)(h) of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid ⁽⁴⁾, did not qualify for such aid.

(21) Lastly, the Commission doubted that the proposed compensatory measures could be accepted as they were associated with the restoration of the company's long-term viability and as such could not be considered as compensatory measures. The Commission also stated that Poland had not demonstrated that the abandoned activities were not loss-making.

IV. COMMENTS OF THE MEMBER STATE

(22) This chapter contains only the comments of the Polish authorities relating to the measures which were not withdrawn in the course of the investigation.

1. The length of restructuring

(23) As regards the length of the restructuring process, the Polish authorities stated that both restructuring plans should be treated as a single plan as the failure of the first plan was not the fault of the company and the second restructuring plan essentially continued the incomplete financial restructuring of the first plan.

2. One-time-last-time principle

(24) Poland withdrew the aid measures listed under recitals (15)a) and (15)b) as, under the opening decision, granting these measures could potentially be incompatible with the one-time-last-time principle. The Polish authorities explained that the withdrawal was a consequence of the fact that PZL Dębica had lost large company status. As a company with fewer than 250 employees, PZL Dębica no longer qualified for financing from the Industrial Development Agency, which provides financing for large companies only. However, the deferral of the debt to the Social Security Office and write-off of debt to the Office of the Marshall were not withdrawn. Poland's arguments concerning these measures are set out below.

3. Aid promised before accession

(25) As regards the three measures classified in the opening decision as aid promised before accession to the EU (recitals (16)a) to (16)c) of this Decision), Poland provided documentary evidence to support its claim that the aid was awarded prior to accession and therefore did not constitute new aid.

Debt to Dębica City Council

(26) With regard to the debt to Dębica City Council, Poland submitted a notarial deed confirming that the debt had been settled on 31 May 2004 by way of a transfer of property to Dębica City Council. The deed referred to the settlement of principal of PLN 1 116 788,60 and interest of PLN 592 669,80 ⁽⁵⁾.

(27) Poland also explained that this measure had not been included in the first restructuring plan because the aid application submitted by PZL Dębica to Dębica City Council had been rejected.

Debt to the Tax Office

(28) With regard to the debt to the Tax Office of PLN 914 552,15, Poland submitted a decision dated 20 October 2003 on restructuring conditions signed by

⁽³⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁴⁾ OJ L 379, 28.12.2006, p. 5.

⁽⁵⁾ For this debt accumulated in 2001-2, interest varied between 14 % and 31 % in the deferral period 2001-4. See Table 3. The amount of the debt indicated in the opening decision (PLN 1 164 900) was corrected by Poland to PLN 1 116 788,60.

the Head of the local Tax Office. According to that decision PLN 636 729,85, plus interest of PLN 277 822,30, was to be written off.

- (29) Poland explained that the statement in the opening decision that this aid had been promised before accession but was not awarded was incorrect for a number of reasons.
- (30) First, Poland explained the aid award mechanism as provided for by the Restructuring of Businesses' Public-Law Liabilities Act of 30 August 2002 ⁽⁶⁾ ('the 2002 Act'). Under that Act, further to an application from a company in difficulty, an awarding authority (e.g. the Tax Office) can issue a decision on the restructuring conditions ('restructuring decision'). This decision confers on the beneficiary the right to receive aid. The actual payment or write-off (depending on the measure) takes place on the basis of an implementing decision in which the awarding authority acknowledges that restructuring has been completed ('implementing decision'). According to the Polish authorities, this implementing decision serves to confirm that the beneficiary (i) has submitted an updated restructuring programme together with information on the company's financial condition, (ii) has paid a restructuring fee and (iii) has not accumulated new debts vis-à-vis the awarding authority. The implementing decision is merely an administrative document which confirms that the terms of the restructuring decision have been complied with. Under the 2002 Act, the awarding authority checks compliance with the restructuring conditions not earlier than 15 months after the restructuring decision is handed down.
- (31) Second, Poland informed the Commission that the Tax Office had not issued an implementing decision for PZL Dębica. According to Poland, this was due to uncertainty on the part of some public authorities on how to interpret the state aid rules applicable as of 1 May 2004. As a result, some authorities had decided to wait until the Commission had adopted a position on these measures. Poland has submitted a declaration by the Head of the Tax Office in question confirming that was the case for PZL Dębica.
- (32) Third, Poland indicated that the decision of the Tax Office of 20 October 2003 had conferred the right to the write-off on PZL Dębica. Poland referred to the Commission decision of 6 November 2008 concerning the Gdynia shipyard ⁽⁷⁾ in support of its claim that the domestic legal order must be applied to determine whether the document in question conferred the right to aid. Poland also referred to the legitimate expectations

of the aid recipients and indicated that failure by the awarding authority to issue an implementing decision could be challenged by PZL Dębica in court. In that connection, Poland referred to rulings by the Supreme Court and the Supreme Administrative Court which confirmed that restructuring decisions placed an obligation on the state and that implementing decisions could not affect that obligation as they were mandatory i.e. not subject to administrative discretion ⁽⁸⁾.

- (33) In addition, Poland submitted a declaration by the Head of the local Tax Office confirming that PZL Dębica fulfilled the necessary legal requirements for the implementing decision (mentioned in recital (30)) to be issued, but stating that the Tax Office was awaiting the outcome of the Commission's investigation.
- (34) The measure referred to in recital (16)c) is dealt with under Title 5 below - Deferral of debt to the Social Security Office.

4. De minimis

- (35) The Polish authorities informed the Commission that all the *de minimis* measures had been awarded to the company in 2006 when Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid was in force ⁽⁹⁾ (Regulation (EC) No 1998/2006 did not enter into force until 1 January 2007); under Regulation (EC) No 69/2001 it was not prohibited to award *de minimis* aid to companies in financial difficulty.
- (36) Referring to the doubts raised by the Commission concerning the calculation mechanism, the Polish authorities explained the formula used to calculate the aid elements indicated in the Polish Regulation of 11 August 2004 ⁽¹⁰⁾. The formula takes into account the difference between the reference rate and the rate used to calculate the late payment charge. An updated calculation of the *de minimis* aid element was provided (see Table 2).

⁽⁶⁾ Journal of Laws No 155, item 1287, as amended.

⁽⁷⁾ Commission Decision of 6 November 2008 on state aid C 17/05 (ex N 194/05 and PL 34/04) granted by Poland to Stocznia Gdynia (OJ L 33, 4.2.2010, p. 1).

⁽⁸⁾ Judgment of the Supreme Administrative Court of 22 February 2005 in case I FSK 630/05 and judgment of the Supreme Court of 12 March 2007 in case I UK 288/06.

⁽⁹⁾ OJ L 10, 13.1.2001, p. 30.

⁽¹⁰⁾ Regulation of the Cabinet of 11 August 2004 on the specific method of calculating the value of state aid awarded in various forms (Journal of Laws No 194, item 1983).

Table 2

De minimis aid – according to Poland

Awarding authority	Type of measure and decision date		Duration	
Mayor of Dębica	Deferral decision of 7.4.2006	PLN 264 186	84 days	PLN 35,00
Mayor of Dębica	Deferral decision of 7.4.2006		14 days	PLN 52,84
Head of Dębica Tax Office	Deferral decision of 8.9.2006	PLN 614 520	7 days	PLN 6,06
Mayor of Dębica	Write-off decision of 5.10.2006	PLN 20 772	—	PLN 20 772
Mayor of Dębica	Deferral decision of 5.10.2006	PLN 83 704	72 days	PLN 7,75
TOTAL:				20 873,65

- (37) Poland informed the Commission that only the Tax Office had provided security for the purposes of the deferral. This covered 100 % of the nominal value of the deferral. Poland also pointed out that even if 600 base points were added to the rate, in line with the Commission notice on the method for setting the reference and discount rates of 1997 ⁽¹¹⁾, the value of the *de minimis* aid would still be far below the threshold of EUR 100 000.

5. Deferral of debt to the Social Security Office

- (38) As regards the deferral of debt in the form of social security liabilities, which increased in both restructuring plans, the Polish authorities recalled first that this debt increased as a consequence of the failure of the financial restructuring envisaged in the first restructuring plan. Under that plan the debt to the Social Security Office was to be settled in the form of: (i) repayment of PLN 3 890 000 using the loan from the Enterprise Restructuring Fund and (ii) deferral of a further PLN 1 364 600. As stated above (see recital (13)) financial restructuring of this debt failed.
- (39) In addition, the Polish authorities noted that the Social Security Office had decided to participate in the second restructuring plan, which provided for (i) repayment of PLN 5,5 million from a loan to be granted by the Industrial Development Agency and (ii) deferral of an additional PLN 3 million. As indicated above (see recital (5)) PZL Dębica did not obtain the promised loan and Poland withdrew the corresponding part of the notification.
- (40) Poland informed the Commission that PZL Dębica's debt to the Social Security Office, like all funds owed to public authorities, had attracted interest calculated by the formula described in Article 56 of the Polish Tax Code of 29 August 1997 ⁽¹²⁾. The interest rate is equivalent to 200 % of the base rate published by the National Bank of Poland, plus 2 % (200 base points) (see Table 3 below). The rate may not be lower than 8 %; in the present case it was between 10 % and 46 %.

Table 3

Changes in interest rates from 2000 to 2012

Interest rate	Period of application	Interest rate	Period of application	Interest rate	Period of application	Interest rate	Period of application
41 %	from 18.11.1999 to 23.02.2000	20 %	from 26.09.2002 to 23.10.2002	13 %	from 30.06.2005 to 27.07.2005	13 %	from 24.12.2008 to 28.01.2009

⁽¹¹⁾ OJ C 273, 9.9.1997, p. 3.

⁽¹²⁾ Journal of Laws No 137, item 926, as amended.

Interest rate	Period of application	Interest rate	Period of application	Interest rate	Period of application	Interest rate	Period of application
43 %	from 24.02.2000 to 30.08.2000	18 %	from 24.10.2002 to 27.11.2002	12,5 %	from 28.07.2005 to 31.08.2005	11,5 %	from 28.01.2009 to 26.02.2009
46 %	from 31.08.2000 to 28.02.2001	17,5 %	from 28.11.2002 to 29.01.2003	12 %	from 01.09.2005 to 31.01.2006	11 %	from 26.02.2009 to 26.03.2009
44 %	from 01.03.2001 to 28.03.2001	17 %	from 30.01.2003 to 26.02.2003	11,5 %	from 01.02.2006 to 28.02.2006	10,5 %	from 26.03.2009 to 25.06.2009
42 %	from 29.03.2001 to 27.06.2001	16 %	from 27.02.2003 to 26.03.2003	11 %	from 01.03.2006 to 25.04.2007	10 %	from 25.06.2009 to 09.11.2010
39 %	from 28.06.2001 to 22.08.2001	15,5 %	from 27.03.2003 to 24.04.2003	11,5 %	from 27.04.2007 to 26.06.2007	12 %	from 09.11.2010 to 20.01.2011
37 %	from 23.08.2001 to 25.10.2001	14,5 %	from 25.04.2003 to 28.05.2003	12 %	from 28.06.2007 to 29.08.2007	12,5 %	from 20.01.2011 to 06.04.2011
34 %	from 26.10.2001 to 28.11.2001	14 %	from 29.05.2003 to 25.06.2003	12,5 %	from 30.08.2007 to 28.11.2007	13 %	from 06.04.2011 to 12.05.2011
31 %	from 29.11.2001 to 30.01.2002	13,5 %	from 26.06.2003 to 30.06.2004	13 %	from 29.01.2007 to 31.01.2008	13,5 %	from 12.05.2011 to 09.06.2011
27 %	from 31.01.2002 to 25.04.2002	14,5 %	from 01.07.2004 to 28.07.2004	13,5 %	from 31.01.2008 to 28.02.2008	14 %	from 09.06.2011 to 10.05.2012
25 %	from 26.04.2002 to 29.05.2002	15 %	from 29.07.2004 to 25.08.2004	14 %	from 28.02.2008 to 27.03.2008	14,5 %	from 10.05.2012
24 %	from 30.05.2002 to 26.06.2002	16 %	from 26.08.2004 to 30.03.2005	14,5 %	from 27.03.2008 to 26.06.2008		
23 %	from 27.06.2002 to 28.08.2002	15 %	from 31.03.2005 to 27.04.2005	15 %	from 26.06.2008 to 27.11.2008		
21 %	from 29.08.2002 to 25.09.2002	14 %	from 28.04.2005 to 29.06.2005	14,5 %	from 27.11.2008 to 24.12.2008		

- (41) Poland submitted detailed tables setting out changes in the debt to the Social Security Office. A summary of changes until 31 August 2012 is set out in Table 4. Poland indicated that in spite of the debt, which was mainly accumulated in 2000-05, the company made significant current payments to the Social Security Office, i.e. more than PLN 16 million between 2000 and August 2012.

Table 4

Changes in the debt to the Social Security Office

Social Security Office				
Year in which the debt was incurred	Amount of debt	Interest accrued on the amount until deferral	Paid debt (sale of assets, seizure, other)	Current payments
2000	858 316,96	1 620 527		716 640,45
2001	316 419	459 493		1 488 486,33
2002	865 163	1 047 139		660 324,32
2003	895 884	934 062	85 778,2	605 518,54
2004	901 451	811 765	1 693 035,91	746 285,3
2005	864 702,91	649 609	359 747,06	434 477,93

Social Security Office				
Year in which the debt was incurred	Amount of debt	Interest accrued on the amount until deferral	Paid debt (sale of assets, seizure, other)	Current payments
2006				1 296 650,17
2007	52 576,90	28 202	2 143 961,82	1 537 920,23
2008	733,03	262	860 347,5	2 173 711,58
2009	605,51	159	61 677,5	1 709 954,28
2010	585,2	104	1 943 231,85	1 933 300,65
2011			1 281 171,85	1 998 651,89
2012			996 249,84	1 229 480,82
Total on 15.8.2012	4 756 437,51	5 551 322	9 425 201,53	16 531 402,49

(42) The Polish authorities also provided information on the other measures taken by the Social Security Office to secure and recover the debt.

In its reply of 16 January 2007 the Social Security Office informed PZL Dębica that it had decided not to file for bankruptcy but would continue with the seizure and sale of the company's assets.

a) Firstly, in 2001-07 the Social Security Office had a mortgage covering 100 % of the value of the debt. As the amount of the debt grew, new assets were added to the mortgage to cover the new debt.

d) Lastly, Poland explained that the PLN 9 million recovered by the Social Security Office in 2003-12 included voluntary repayments by the company, made possible by the profits generated since 2006 and the capital injected by a private investor in 2010.

b) Secondly, as of 2003 the Social Security Office took debt recovery action, obtaining almost PLN 9 million from the controlled sale of the company's assets and the seizure of PZL Dębica's accounts. Poland provided detailed information on the sale of PZL Dębica's assets thanks to which the company managed to reduce its debt to the Social Security Office by about PLN 7 million between 2004 and 2008 (see Table 5). Poland explained that PZL Dębica intended to continue selling its assets; however, since 2009, as a result of the economic crisis, it has not been able to find a buyer prepared to offer a market price.

c) Thirdly, Poland submitted evidence from that time indicating that in 2006 the Social Security Office had considered filing for PZL Dębica's bankruptcy. Poland provided a letter dated 20 November 2006 in which the Social Security Office informed the company of its intention to file for PZL Dębica's bankruptcy. In reply, on 12 December 2006, PZL Dębica provided the Social Security Office with details of the first restructuring plan, its financial situation and future prospects, indicating *inter alia* that in 2006 the company would record a profit for the first time. PZL Dębica asked the Social Security Office to refrain from filing for bankruptcy and not to seize any more of its assets, which, it argued, hampered the ongoing restructuring process.

Table 5

Sale of PZL Dębica's assets

Plot No	Asset type	Date of sale	Sale price (PLN)
430/51 430/52 430/14	galvanising line	17.02.2004	[...] (*)
430/144	undeveloped plot	19.10.2006	[...]
430/104	undeveloped plot	31.01.2007	[...]
430/141	compressor building	5.07.2007	[...]
430/44	developed plot	15.11.2007	[...]
430/10	industrial building	12.12.2007	[...]
430/113	developed plot		
430/114	developed plot		
430/115	developed plot		
430/156	road		

Plot No	Asset type	Date of sale	Sale price (PLN)
430/49 430/140 430/155 430/157 430/159	developed and undeveloped plots, road	16.01.2008	[...]
430/162	warehouse	09.07.2008	[...]
430/164 430/166	undeveloped plots	16.12.2008	[...]
Total:			7 171 500

(*) Business secret

(43) In October 2011, following the withdrawal of some of the notified measures i.e. the capital injection and preferential loan, Poland informed the Commission of its assessment that the deferral of social security debt (see recital (15)c) as part of the notified restructuring plan) passed the private creditor test and therefore did not constitute state aid.

(44) For that purpose, a study was commissioned by PZL Dębica in 2011 from 'Consulting', an independent company based in Katowice. The report presented an analysis of the private creditor test based on a comparison between the following two scenarios:

a) Option 1 – enforcement of all financial claims by the Social Security Office. According to the study this would oblige PZL Dębica to file for bankruptcy. In this scenario, the Social Security Office would recover between 60 % and 70 % in 3 to 4 years.

b) Option 2 - settlement of debt to the Social Security Office by deferring the total amount owed. In that scenario, the Social Security Office would receive the full amount owed plus a deferral fee of PLN 1,6 million in 96 instalments. In addition, the Social Security Office would receive PLN 2 million per year in current payments by virtue of the company's continuing operations.

(45) In August 2012 Poland informed the Commission that a debt deferral agreement based on the private creditor test had been concluded between PZL Dębica and the Social Security Office on 1 March 2012. Poland explained that the Social Security Office had considered the advantages of each option with a view to maximising debt recovery. The agreement covers the amount owed on that day of PLN [7-13 million], comprising debt of PLN [3,5-6,5 million] and interest of PLN [3,5-6,5 million]. A deferral fee of PLN [1-1,7 million] was added to that amount. The deferral provides for repayment in 96

monthly instalments, of which 9 have already been paid. Poland submitted the following comparison of the options available to the Social Security Office in 2012 (Table 6).

Table 6

Comparison of recovery options for PZL Dębica's debt to the Social Security Office (in PLN)

	Option 1 - deferral	Option 2 - liquidation
Proportion of debt settled	[7-13 million]	[4-8 million]
(principal + interest)	100 %	between 60 % and 70 %
Additional amounts	[1-1,7 million] deferral fee	No interest from the time of liquidation
Current payments until the debt has been recovered in full	15,2 million	2,9 million
Total amount received	[23,2 – 29,9 million]	[6,9 – 10,9 million]
Due date	by 2020 Earlier recovery possible if additional mortgaged assets sold at the market price before 2020	after 2016

(46) Poland has pointed out that the Social Security Office still holds a mortgage on the company's assets worth a total of PLN 6 243 002,55. Under the agreement, any sale of assets automatically decreases the deferred amount, thereby enabling repayment to be made more quickly than in the 96 months provided for.

6. Debt to the Office of the Marshall

(47) Poland confirmed to the Commission that the debt to the local Office of the Marshall referred to in the second restructuring plan had been settled on 14 August 2012. It comprised a debt of PLN 61 104,97 incurred between 1999 and 2001 and interest of PLN 103 566,29 which had accrued since then.

V. ASSESSMENT

(48) According to Article 107(1) of the Treaty, state aid is aid awarded by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

(49) The conditions laid down in Article 107(1) of the Treaty are cumulative and therefore for a measure to be qualified as state aid all the conditions must be fulfilled.

(50) On the basis of the opening decision, the Commission will assess the following measures:

a) the withdrawn measures;

b) the pre-accession measures;

c) the debts settled by PZL Dębica;

d) the measures awarded after Poland's accession to the EU:

(i) *de minimis* aid;

(ii) deferral of debt to the Social Security Office.

1. The withdrawn measures

(51) According to Article 8 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty ⁽¹³⁾, a Member State may withdraw the notification after the opening of the formal investigation procedure in due time before the Commission has taken a decision on the aid character of the notified measure and the procedure is closed accordingly.

(52) The Polish authorities have withdrawn two of the measures to be implemented under the second restructuring plan, namely a capital injection and a preferential loan totalling PLN 10,5 million (see recitals (15)a) and (15)b)). Thus, pursuant to Article 8 of Council Regulation (EC) No 659/1999, the Commission's investigation into these measures must be closed.

2. The pre-accession measures

(53) The aid measures that were awarded before and are not applicable after the accession of Poland to the EU cannot be examined by the Commission, either under the procedures laid down in Article 108 of the Treaty or under the interim mechanism. That mechanism neither requires nor empowers the Commission to review aid measures which are not applicable after accession.

(54) Aid awarded by Poland is deemed to have been awarded before accession if the competent authority adopted a legally binding deed before 1 May 2004 by which it undertook to award the aid. Individual aid is not applicable after accession if the precise economic exposure of the state was known when the aid was awarded.

(55) If, on the other hand, the measures were awarded after accession, they would constitute new aid and their compatibility would be assessed by the Commission under the procedure laid down in Article 108 of the Treaty.

(56) In addition to two measures referred to in the opening decision as pre-accession measures (see recitals (12)a) and (12)b)) Poland claims that a write-off decision issued by the local Tax Office in 2003 covering an amount of PLN 914 522,15 should also be treated as pre-accession aid.

Write-off by Dębica Tax Office

(57) Responding to the concerns raised by the Commission in the opening decision in connection with the fact that no aid award document had been provided, Poland supplied an aid award document dated 20 October 2003 and clarified the mechanism for awarding aid under the 2002 Act (see recital (30)).

(58) The Polish authorities have provided the Commission with an analysis of Polish law indicating that the restructuring decision of 2003 constitutes a legally binding document on the basis of which the Tax Office is obliged to write off tax arrears. A number of objectively verifiable conditions were attached to the restructuring decision (see recital (28)). The Polish authorities have confirmed that PZL Dębica complies with those conditions. In the absence of any indication to the contrary, the Commission therefore considers that the write-off was granted before Poland acceded to the EU.

3. The debts settled by PZL Dębica

(59) In the course of the investigation Poland informed the Commission that PZL Dębica had settled the following debts:

a) a debt to Dębica City Council with a nominal value of PLN 1 116 788,60, plus interest of PLN 592 669,80, settled on 31 May 2004;

b) a debt to the local Office of the Marshall with a nominal value of PLN 61 104,97, plus interest of PLN 103 566,29, settled on 14 August 2012.

(60) Poland provided confirmation that these debts had been settled.

Debt to Dębica City Council settled on 31 May 2004

(61) Poland informed the Commission that as part of restructuring negotiations with public creditors which led to the first restructuring plan being updated in October 2003, PZL Dębica had asked Dębica City Council to include in

⁽¹³⁾ OJ L 83, 27.3.1999, p. 1.

the restructuring plan an amount of PLN 1 116 788,60 which it owed to the Council. Dębica City Council refused and the company managed to settle the debt on 31 May 2004, one month after Poland acceded to the European Union.

- (62) The Commission notes that the debt had been subject to compound interest at a high rate ranging from 44 % to 13,5 % (see Table 3). The accumulated interest settled by PZL Dębica on 31 May 2004 amounted to PLN 592 669,80.
- (63) The recovery rate that would have been applied by the Commission to aid made available unlawfully to a company in Poland between 1 and 31 May 2004 was 7,62 % ⁽¹⁴⁾. That is a much lower rate than the interest rate applied to the debt by Poland.
- (64) On the basis that the debt was repaid in full and the interest rate of 13,5 % applied to the debt between 1 and 31 May 2004 was much higher than the recovery rate of 7,62 % applied by the Commission, the Commission concluded that recovery was completed in accordance with the Notice from the Commission 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible state aid' ⁽¹⁵⁾ ('the recovery notice'). The amount of interest actually repaid exceeds the amount of interest that would have had to be repaid in the event of a negative decision, calculated according to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁶⁾. The Commission therefore simply takes note of the settlement of the debt, without prejudice to the classification of this measure in the future for the application of the one-time-last-time principle.

Debt to the local Office of the Marshall settled on 14 August 2012

- (65) The Commission notes that the local Office of the Marshall decided in 2007 to write off the debt, which was therefore included in the second restructuring plan. The restructuring plan was notified to the Commission.
- (66) At the same time, the Commission notes that the debt was subject to compound interest at a rate ranging from 46 % to 10 % (see Table 3). The total interest settled by PZL Dębica on 14 August 2012 amounted to PLN 103 566,29, nearly double the amount of the original debt of PLN 61 104,97.

- (67) The Commission considers that a *de facto* deferral took place between 1999 (when the first part of the debt was incurred) and 2012 (when the debt was repaid) and that the local Office of the Marshall thereby conferred an advantage on the company, already in serious financial difficulty, by mitigating the burden associated with normal business activities, which includes repayment of debts to public authorities.
- (68) The recovery rate that would have been applied by the Commission to aid unlawfully made available to a company in Poland after Poland's accession to the EU until settlement of the debt was between 5,26 % and 7,62 % ⁽¹⁷⁾. That is a much lower rate than the interest rate actually applied to the debt by Poland.
- (69) On the basis that the debt was repaid in full and the interest rate of between 10 % and 16 % applied to PZL Dębica's debt between 1 May 2004 and 14 August 2012 was much higher than the recovery rate applied by the Commission of between 5,26 % and 7,62 %, the Commission concludes that, irrespective of the legality of the aid, recovery was completed in compliance with the Commission's recovery notice. The amount of interest actually paid exceeds the amount of interest that would have to be paid pursuant to Regulation (EC) No 794/2004.

4. Measures awarded after Poland's accession to the EU

4.1. *De minimis*

- (70) Poland informed the Commission of five measures to a total value of PLN 20 873,65 which, it argued, should be treated as *de minimis* aid (listed in Table 2). These measures fall within the scope of application of Regulation (EC) No 69/2001.
- (71) The Commission acknowledges that Regulation (EC) No 69/2001, which allowed the award of up to EUR 100 000 (approx. PLN 400 000), did not explicitly exclude companies in difficulty. That said, the Regulation did specifically envisage that loans, which can be compared to deferrals, should be 'backed by normal security and [...] not involve abnormal risk' (recital 6). In this case, the Commission takes the view that only the deferral of the Tax Office of 8 September 2006 complied with that requirement.
- (72) First, the Commission considers that Poland did not provide sufficient information to allow verification of the calculation mechanism of the *de minimis* aid and the amount of aid presented by Poland as the 'amount of aid' in Table 2. In particular, detailed information was

⁽¹⁴⁾ For the applicable recovery rate see: http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

⁽¹⁵⁾ OJ C 272, 15.11.2007, p. 4.

⁽¹⁶⁾ OJ L 140, 30.4.2004, p. 1.; see in particular Articles 9 and 11.

⁽¹⁷⁾ See footnote 14.

not provided on the applicable reference rates and the rates used to calculate the late payment charge, which would have enabled the calculations made according to the formula applied by Poland to be checked (see recital (36)). Therefore the Commission considers the nominal amount of the three deferrals granted by the Mayor of Dębica on 7 April, 28 July and 5 October 2006, for which no security was provided, as the amount to be taken into consideration for *de minimis* purposes. An amount of PLN 264 186 was the subject of two deferral decisions by the Mayor of Dębica. Since these decisions concerned the same subject, the amount will be taken into consideration only once.

400 base points to the applicable reference rate of 5,56 %, as provided for by the Commission notice on the method for setting the reference and discount rates of 1997 ⁽¹⁸⁾. The aid in this case amounts to PLN 1 126.

- (73) In case of the 7-day deferral granted by the Tax Office on 8 September 2006, for which security had been provided covering 100 % of the deferred amount of PLN 614 550, the Commission calculated the aid element by adding

- (74) As for the write-off decision issued by the Mayor of Dębica on 5 October 2006, it amounts to a cash grant and should therefore be counted in full.

- (75) In the light of the above, the total value of the aid is PLN 369 788 (approx. EUR 93 437 ⁽¹⁹⁾) (see Table 7). The total being less than EUR 100 000, these measures are covered by Regulation (EC) No 69/2001. Poland confirmed that PZL Dębica had not received any other *de minimis* aid.

Table 7

De minimis aid

Awarding authority	Type of measure and decision date	Nominal amount	Duration	Amount of aid
Mayor of Dębica	Deferral decision dated 7.4.2006	PLN 264 186	84 days	PLN 264 186
Mayor of Dębica	Deferral decision dated 28.7.2006	EUR 66 604	14 days	EUR 66 604
Head of Dębica Tax Office	Deferral decision dated 8.9.2006	PLN 614 520 EUR 154 236	7 days	PLN 1 126 EUR 282
Mayor of Dębica	Write-off decision dated 5.10.2006	PLN 20 772 EUR 5 279	—	PLN 20 772 EUR 5 279
Mayor of Dębica	Deferral decision dated 5.10.2006	PLN 83 704 EUR 21 272	72 days	PLN 83 704 EUR 21 272
TOTAL				PLN 369 788 EUR 93 437

4.2. Deferral of debt to the Social Security Office

- (76) Article 107(1) of the Treaty covers interventions in various forms which reduce a company's normal costs and which, without being subsidies in the strict sense of the word, are similar in character and have the same effect. It is established case-law that the conduct of a public body with responsibility for collecting social security contributions which tolerates late payment of those contributions confers on an undertaking experiencing serious financial difficulty a commercial advantage by mitigating the burden associated with the normal application of the social security system which cannot be wholly removed by the interest and default surcharges applied to the late payment ⁽²⁰⁾.

⁽¹⁸⁾ OJ C 273, 9.9.1997, p. 3.

⁽¹⁹⁾ For conversion purposes the Commission used the average exchange rates of the National Bank of Poland on the date of the aid award decision. See <http://www.nbp.pl/home.aspx?c=/ascx/archa.ascx>

⁽²⁰⁾ Case C 256/97 DMT [1999] ECR I-3913, paragraph 30; Case T-36/99 *Lenzing v Commission* [2004] ECR II-3597, paragraph 137.

- (77) In this case the Social Security Office allowed PZL Dębica to accumulate significant amounts of debt in 2000-05. Changes in the total debt, including interest, are set out in Table 4.
- (78) As a preliminary remark the Commission points out that state aid to PZL Dębica may have been awarded by virtue of the failure to enforce in full PZL Dębica's public debt to the Social Security Office ⁽²¹⁾.
- (79) Poland argues that the deferral of debt by the Social Security Office does not involve state aid as the Social Security Office acted like a private creditor when it agreed in March 2012 to a deferral of the total amount owed, which was to be paid in accordance with a repayment schedule in 96 instalments. Poland submitted an analysis of the private creditor test, carried out in October 2011 and confirming, in its view, that the Social Security Office would be better off deferring its claims on PZL Dębica rather than enforcing them. Poland also claims that the Social Security Office, which participated in both restructuring plans, always had ample information on PZL Dębica's financial condition and prospects and that it always acted in full knowledge of the company's position. Lastly, Poland referred to a number of actions undertaken by the Social Security Office to secure and enforce the debt. According to Poland, this confirms that the Social Security Office acted like a private creditor and sought to recover its claim.
- (80) Under established case-law, the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 of the Treaty are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through state resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test (in this case, the private creditor test) ⁽²²⁾. If a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure does indeed pass that test ⁽²³⁾. With a view to establishing whether an advantage was granted that could be classified as state aid within the meaning of Article 107(1) of the Treaty, Poland must therefore provide evidence demonstrating that the public authorities acted in the same way as a hypothetical private creditor, who would not tolerate non-payment and would take effective action to enforce the debt even if this resulted in insolvency proceedings.
- (81) The hypothetical private creditor would closely monitor the economic situation of the debtor; the lack of a restructuring plan and poor prospects for a return to viability would hasten debt recovery.
- (82) It follows that in order to determine whether any state aid was awarded by the public authorities, it must be established that in this case the Social Security Office sought to recover all the monies owed to it without incurring financial losses and that by deciding not to file for the company's bankruptcy the Social Security Office intended to maximise recovery of the amounts owed to it as the hypothetical private creditor would ⁽²⁴⁾.
- (83) The Commission will analyse the report submitted by Poland on the decision taken in 2012 to sign the deferral agreement. However, the Commission notes that the Social Security Office had allowed debt to accumulate for a number of years. Indeed, the information provided by Poland relates to the entire period from the end of the first restructuring period (and even before) to the commissioning of the study in October 2011 with a view to concluding a deferral agreement. In view of the notification in 2008 of a second restructuring plan, the company did not actively seek an agreement with its creditors. The Commission must therefore also check that the behaviour of the Social Security Office between the end of the first restructuring period and the signing of the deferral agreement passes the private creditor test.
- (84) In the following recitals the Commission will refer to (i) the Social Security Office's involvement in the first restructuring plan, (ii) partial enforcement of the debt by the Social Security Office between 2007 and 2012 following the failure of the first restructuring plan, and (iii) the deferral agreement of 1 March 2012. The first restructuring plan was approved by the competent national authority before Poland acceded to the EU and mainly covers the pre-accession period. The assessment of points (ii) and (iii) is decisive for the conclusion concerning the behaviour of the Social Security Office. The Commission's assessment will nevertheless focus again on changes in PZL Dębica's situation under the first restructuring plan, as it is vital to understand how this situation evolved.
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- ⁽²¹⁾ Cf. C-342/96 *Tubacex* [1999] ECR I-2459, paragraph 46, C-256/97 *DMT* [1999] ECR I-3913, paragraph 21, C-480/98 *Magefesa* [2000] ECR I-8717, T-152/99 *HAMSA* [2002] ECR II-3049, paragraph 167.
- ⁽²²⁾ Case C-124/10 *Électricité de France v Commission*, judgment of 5.7.2012, not yet published, paragraph 78 citing (see, to that effect, Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 20; Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraphs 68 to 70; and *Comitato 'Venezia vuole vivere' and Others v Commission*, not yet published, paragraph 91 and the case-law cited).
- ⁽²³⁾ Case C-124/10 *Électricité de France v Commission*, judgment of 5.7.2012, not yet published.
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- ⁽²⁴⁾ Case C-256/97 *DM Transports* [1999] ECR I-3913, paragraph 30.

Social Security Office involvement in the first restructuring plan

- (85) As mentioned above, the Social Security Office decided to participate in the first restructuring plan prepared and approved in 2002, i.e. before Poland acceded to the EU. The plan included restructuring of financial debt to the Social Security Office. On the basis of that restructuring plan, the Social Security Office agreed to defer PLN 1 364 600 in debt, while a larger amount of PLN 3 890 000 was to be settled by way of a loan from the Enterprise Restructuring Fund. As explained above (see recital (13)) PZL Dębica did not receive financing from the Fund. Consequently the Social Security Office decided not to defer the remaining part of the debt and in 2006 it threatened to institute proceedings to have the company declared bankrupt.
- (86) The Commission notes that despite the failure of the financial restructuring and the financial arrears at the end of the first restructuring period, PZL Dębica managed to record a modest profit in 2006 (see Table 1). This confirms that the company's organisational and technological restructuring efforts had borne fruit.
- (87) In addition, from 2001 onwards the Social Security Office established security on a number of PZL Dębica's assets to cover the growing debt. The value of the mortgage reached PLN 11,6 million in 2007, covering 100 % of the debt.
- (88) Lastly, the Commission notes that as of 2003 the Social Security Office began enforcing the debt through the sale of PZL Dębica's assets (as illustrated in Table 5). The Social Security Office decided, however, not to proceed with a fire sale, which usually generates lower amounts than would normally be the case. Indeed, in the context of reduced demand for industrial assets as a result of the current economic climate, this phenomenon could only be exacerbated. Instead, the Social Security Office agreed to a controlled sale organised by the company. The Social Security Office had to consent to the sale on the basis of an offer from a third party and the net profit from the sale was then transferred to the Social Security Office. The evidence provided by Poland leads to the conclusion that although the sale conducted by PZL Dębica generated market values, the sales process was slower than a fire sale. Between 2004 and 2006 the Social Security Office recovered over PLN 1,6 million through the controlled sale of PZL Dębica's assets.

Enforcement of the debt by the Social Security Office between 2007 and 2012

- (89) The failure of financial restructuring in the first restructuring plan and the mounting debt of PZL Dębica resulted in the Social Security Office giving serious consideration to the bankruptcy scenario at the end of 2006. As explained above (see recital (42)c)) on 20 November 2006 the Social Security Office informed

the company of its intention to file for the bankruptcy of PZL Dębica. Following the information provided to the Social Security Office by PZL Dębica on 12 December 2006, that threat was not carried out. The Commission has assessed whether the Social Security Office acted like a hypothetical private creditor between 2007 (when the first restructuring period ended) and 2012 (when the deferral agreement was concluded).

- (90) The Commission first assessed the information provided by PZL Dębica to the Social Security Office on 12 December 2006. The company put forward a thorough analysis of its economic and financial situation and details of its future prospects. The Commission notes that the following points presented by the company to the Social Security Office would be important for a hypothetical private creditor to assess the debtor's situation and determine the appropriate course of action in order to maximise recovery of the debts, and would therefore be monitored by the creditor:
- a) the company's growing sales and reduced production costs, which were achieved as a result of the restructuring measures undertaken by PZL Dębica under the first restructuring plan;
 - b) the forecast profits for 2006 and an explanation that it was the failure to achieve profits before 2006 that led to the increase in the debt and PZL Dębica's incapacity to repay quicker;
 - c) the overall positive revenue trend forecast for the coming years, which would allow continuous repayment of the debt and would guarantee that no new debt would accrue;
 - d) the company's marketing and innovation efforts and the new markets on which, as a result of its new marketing strategy, the company had started selling its products (coal and copper mining and new contracts with partners in Ukraine and China);
 - e) the lack of other significant debts towards any other public authority or private creditor;
 - f) an undertaking by the company to settle current and future social security payments on time.

- (91) The Commission notes that on the basis of the comprehensive information set out above indicating a growth path for PZL Dębica and tangible revenue for the Social Security Office, it was reasonable to assume that more would be recovered by allowing the company to continue to operate than by forcing it into liquidation. That said, the Commission notes that, as a matter of

prudence, the Social Security Office did not agree to suspend enforcement proceedings which, according to PZL Dębica, were stifling the restructuring process. The Social Security Office therefore acted like a private creditor, which would choose the course of action that would allow it to maximise recovery of the debt.

(92) The Commission notes that in 2008 the Social Security Office adhered to the second restructuring plan and thereby signed up to deferral of part of the debt. The remainder of the debt was to be settled as a result of an injection of funds by the state-owned Industrial Development Agency. However, the standstill obligation was respected and the measures were not implemented. The Commission notes that the Social Security Office did not rely on implementation of the second restructuring plan as a solution to the outstanding debt, but continued with the course of action embarked upon in 2007, as described above.

(93) In 2007 and 2008 thanks to the controlled sale of PZL Dębica's assets, in addition to the monies referred to in recital (88), the Social Security Office recovered over PLN 5,4 million (see Table 5). According to Poland, the lack of sales of company assets after 2008, despite the fact that the Social Security Office held a mortgage on three real estate properties worth more than PLN 6 million in total, must be seen in the economic context in which the sale of PZL Dębica's assets took place. Poland claimed that the economic crisis and reduced scale of business activity in the region had contributed to a lack of interest in PZL Dębica's assets and had made it difficult to sell them at a price considered acceptable by the Social Security Office.

(94) On the other hand, as noted above, the Social Security Office had maintained the seizure of PZL Dębica's account, which brought it a further PLN 475 369 between 2007 and 2010.

(95) Indeed, ongoing enforcement brought the Social Security Office more than PLN 7 million in the period under review (see recital (96)b)); the fact that the debt recovery process took longer was addressed by the compound interest applied to the debt.

(96) The Commission also analysed whether between 2007 and 2012 PZL Dębica had respected the pledges made when the Social Security Office decided in January 2007 not to institute insolvency proceedings against it. The Commission notes that:

a) PZL Dębica has been a profitable company since 2006 and managed to attract a private investor in 2010 (see recital (10)); at the same time, its net results were hampered by its ineligibility for public tenders and inability to obtain credit on the market as a result of its outstanding debt;

b) The company has managed to reduce its debt by PLN 7 million since 2006; in addition to the controlled sale of assets and seizure mentioned above, the company met its repayment commitment each year and used its profits and a capital injection of 2010 by a private investor to reduce its debt;

c) The company has been keeping up with current payments to the Social Security Office and other public authorities since 2006 and therefore, leaving aside a marginal debt of PLN 1 900, no new debt has accrued since then.

(97) The Commission concludes that PZL Dębica's return to profitability in 2006, the good prospects for long-term viability and ongoing fulfilment of its current financial obligations since 2006, as well as the entry of the private investor in 2010, are important factors which a private creditor would take into account when deciding whether the course of action adopted in 2007 continued to be the best way to maximise recovery.

Deferral agreement of 1 March 2012

(98) Poland submitted an analysis of the private creditor test conducted by an external consultant in October 2011, i.e. prior to the deferral transaction of 1 March 2012. The report compares two options: (i) enforcement of all financial claims by the Social Security Office and (ii) settlement of debts to the Social Security Office by way of deferral of the total amount owed. The test concludes that the Social Security Office should opt for deferral, which guarantees recovery of the full amount of the debt, whereas the liquidation scenario would lead to recovery of some 60 %-70 % of the debt.

(99) The Commission has critically analysed the report and the assumptions made therein.

(100) First, the Commission notes that the test conclusions are based on the analysis of (i) PZL Dębica's actual economic and financial situation, (ii) the company's assets and all its liabilities, (iii) the company's market position, (iv) the results of restructuring and (v) the legal rules and practice applicable to insolvency proceedings in Poland.

(101) In the liquidation scenario, the Social Security Office would be able to recover only about 60 % to 70 % of the debt in 3 or 4 years ⁽²⁵⁾. The reduction in the amount that it is possible to recover results mainly from the high costs of liquidation and the low liquidation value of the company's assets. As regards the liquidation value, the Commission notes that in the bankruptcy scenario the value of these assets in a fire sale is reduced by about

⁽²⁵⁾ On the basis of data on the length of insolvency proceedings provided by the Supreme Audit Office.

50 % due to the fact that they will be sold separately and will not be used as a going concern. The figure is also affected by reduced demand for industrial assets in the context of crisis in the real economy, but remains above the average revenue from sales of assets in bankruptcy in Poland, which is 26,86 % of their fair value.

(102) In the deferral scenario described in recital (44), the report considers the following elements to be important from the perspective of a private creditor seeking to maximise the recovery of the amounts owed to him:

- the return to profitability by PZL Dębica in 2006 as a result of restructuring;
- the portfolio of current orders with PZL Dębica and its sales network in Poland and abroad;
- the entry of a private investor – Eurotech - in 2010, which acquired 16,7 % of the newly issued shares of PZL Dębica;
- a letter of intent of 2011 from Eurotech declaring that it wished to inject additional capital and acquire a further 15 % of the company's shares, subject to the Commission decision;
- the prospect of much better financial results when the company regains access to public tenders and external financing, which is subject to the signature of the deferral agreement;
- the fact that between 2006 and 2011 PZL Dębica settled its current contributions vis-à-vis all public bodies on time (on average PLN 5 million per year) and
- the fact that thanks to the deferral the Social Security Office will receive an additional PLN 18 million in current social contributions over the eight years in which the debt is repaid.

(103) The Commission cannot agree to take the final element into account as the compulsory future payments cannot be compared to the revenue a private company could expect from an economic activity. Indeed, collecting compulsory social payments is not an economic activity.

(104) The Commission notes that the signed agreement provides for the recovery of the full amount of the debt due on 1 March 2012 i.e. PLN [7-13 million], comprising debt of PLN [3,5-6,5 million] and interest of PLN [3,5-6,5 million]. A deferral fee of PLN [1-1,7 million] was added on top of that amount. The debt is to be repaid in 96 monthly instalments.

(105) The Commission also notes that the Social Security Office maintained a pledge on PZL Dębica's assets of PLN 6 243 002,55, which the Social Security Office intends to sell in a similar controlled procedure as in

the case of the previous assets. Any income from the sale of these assets would be used to reduce PZL Dębica's debt to the Social Security Office.

(106) The Commission also notes that the report does not contain a comparison of the present values of inflows in Option 1 and Option 2, which would allow the private creditor to determine which of the two options is more beneficial. The Commission calculated these present values for several discount rates, using conservative assumptions, i.e. 3 years in the case of the company's liquidation and 8 years in the case of deferral. Future gains by the Social Security Office originating from current payments were not included in the Commission's calculation. For all meaningful discount rates a private investor is better off under the deferral scenario than in the case of liquidation.

(107) Lastly, the Commission also notes that until November 2012 PZL Dębica paid the nine instalments provided for by the deferral on time.

(108) On that basis, the Commission considers that by agreeing to the deferral in March 2012, the Social Security Office behaved like a private creditor seeking to obtain the payment of sums owed to it by a debtor in financial difficulty. Therefore, the public creditor did not confer an advantage on PZL Dębica. Accordingly, settlement of the outstanding debt on the basis of the deferral laid down in the agreement signed between the company and the Social Security Office in March 2012 does not constitute state aid within the meaning of Article 107(1) of the Treaty.

VI. CONCLUSION

(109) The Commission considers the aid measures referred to in recital (52) as having been withdrawn. Thus, pursuant to Article 8 of Regulation (EC) No 659/1999, the Commission's investigation into these measures must be closed.

(110) The Commission considers the aid measures referred to in recital (56) as having been granted before Poland acceded to the EU and not applicable after that date. They may not be investigated by the Commission under the procedure laid down in Article 108 of the Treaty or under the interim mechanism.

(111) As regards the measures referred to in recital (59), the Commission notes that any aid made available unlawfully would be considered to have been recovered in accordance with the recovery notice.

(112) The aid measures referred to in Table 7 fall within the scope of application of Regulation (EC) No 69/2001 and do not exceed the threshold laid down in that Regulation.

(113) Lastly, the Commission considers that the measure referred to in recitals (76) to (108) does not constitute aid within the meaning of Article 107(1) of the Treaty,

constituting unlawful aid pursuant to Article 7(5) of Regulation (EC) No 659/1999. The aid was recovered on 14 August 2012 by Poland in line with the recovery notice ⁽²⁶⁾;

HAS ADOPTED THIS DECISION:

Article 1

The procedure laid down in Article 108(2) of the Treaty instituted by the Commission Decision of 19 December 2008 concerning state aid C 49/08 (ex N 402/08) — Restructuring aid to PZL Dębica is closed in respect of the following measures for PZL Dębica:

- a) two measures amounting to PLN 4 965 800 and PLN 5 534 200, which Poland notified on 13 August 2008 and withdrew on 10 October 2011 pursuant to Article 8 of the Procedural Regulation;
- b) a measure amounting to PLN 914 522,15 with regard to which a decision of the Tax Office was issued on 20 October 2003, on the basis that it was granted before Poland acceded to the EU and is not applicable after that date;
- c) a measure with a nominal value of PLN 61 104,97, plus interest of PLN 103 566,29, settled on 14 August 2012,

- d) the five measures for PZL Dębica listed in Table 7, on the grounds that they were *de minimis* aid within the meaning of Article 2 of Regulation (EC) No 69/2001;
- e) the deferral of PLN [7-13 million] awarded to PZL Dębica on the basis of the deferral agreement of 1 March 2012 with the Social Security Office, pursuant to Article 7(2) of Regulation (EC) No 659/1999, on the grounds that the measure does not constitute aid within the meaning of Article 107(1) of the Treaty.

Article 2

This decision is addressed to the Republic of Poland.

Done at Brussels, 19 December 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽²⁶⁾ OJ C 272, 15.11.2007, p. 4.