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(1) Text with EEA relevance

EN

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

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1582

of 17 July 2013

on the measures SA.30704 — 12/C (ex NN 53/10), which Latvia has implemented for Latvian Mortgage and Land Bank SA — 'commercial segment'

(notified under document C(2013) 4406)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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:

1. PROCEDURE

(1) On 19 November 2009, the Commission approved two recapitalisation measures in favour of 'The Mortgage and Land Bank of Latvia' ([2]) ('MLB' or 'the bank') for a total amount of LVL 72,79 million (EUR [102,5-103,6] million), which were granted to the bank in January and November 2009 ([3]) respectively ('the November 2009 decision').

(2) On 1 April 2010, the Latvian authorities notified a further recapitalisation in the amount of LVL 70,2 million (EUR 100 million), which had been implemented on 23 March 2010. The notification was registered on 6 April 2010. The Latvian authorities provided the Commission with further information between May 2010 and January 2012 ([4]).

(3) On 26 January 2012, the Commission decided ([5]) to temporarily approve the recapitalisation measure of LVL 70,2 million granted on 23 March 2010, a recapitalisation measure of LVL 50 million granted to the bank at the

([1]) OJ C 130, 4.5.2012, p. 42.
([2]) In Latvian, Latvijas Hipoteku un zemes bankas.
([3]) Commission Decision in State aid case NN 60/09, *Recapitalisation of 'The Mortgage and Land Bank of Latvia'* of 19 November 2009 (OJ C 323, 31.12.2009, p. 5).
([4]) For further details see recitals 3-21 of the opening decision.
([5]) Commission Decision in State aid case SA.30704 (12/C) (ex NN 53/10) — Additional aid measures to the Latvian Mortgage and Land Bank of 26.1.2012 (OJ C 130, 4.5.2012, p. 42).

end of 2011 (granted as a liquidity measure to be converted into capital), a standby liquidity facility of up to LVL 250 million for the bank, guarantees to international creditors of the commercial segment of MLB of up to LVL 32 million and liquidity support of up to LVL 60 million for the solvent liquidation of the bad assets within HipoNIA, an asset management company owned and financed by MLB, and 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 those measures in so far as they were needed for the restructuring of the commercial segment of MLB ('restructuring measures') and benefitted its development segment and in respect of the transformation plan of MLB ([1]) ('the opening decision').The Commission had doubts as to the compatibility of the restructuring measures with the internal market in the light of the Commission's Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current financial crisis under the State aid rules ([2]) ('the Restructuring Communication').

(4) The Commission invited interested parties to submit their comments on the restructuring measures. The Commission did not receive any comments from interested parties.

(5) On 22 March 2012, a meeting between the Latvian authorities and the Commission took place.

(6) On 5 April 2012, Latvia submitted its comments on the opening decision.

(7) Between May 2012 and June 2013, Latvia and the Commission exchanged information regularly. Latvia kept the Commission informed of the progress made with regard to a privatisation process for the commercial part of the bank by way of several submissions of information.

(8) On 23 May 2013, the Commission requested additional information. By letter dated 3 June 2013, Latvia replied to the request for information, except for the questions on the development segment of the bank. At the same time, Latvia provided various supporting documents, including an update on the sale of MLB's commercial part.

(9) On 21 June 2013, the Latvian authorities informed the Commission that they exceptionally accept that this Decision be adopted in the English language.

(10) On 28 June 2013, Latvia informed the Commission that it had in fact lent HipoNIA LVL 70,98 million, and had thereby exceeded the amount of the measure temporarily authorised in the opening decision by approximately LVL 11 million.

2. **FACTS**

2.1. **The beneficiary — MLB**

(11) On 19 March 1993, MLB was established by the Latvian government as a State-owned bank. The Ministry of Finance of the Republic of Latvia is the holder of 100 % of the bank's shares.

(12) MLB is a medium-sized bank in Latvia offering retail bank services. MLB has a dual role, meaning that it operates both as a development bank and a universal commercial bank ([3]).

([1]) In particular, the Commission expressed doubts as to the remuneration of aid instruments, the discontinuation of MLB's commercial activities, the restoration of long-term viability of the economic activities of the MLB group, the orderly wind-down of unsold commercial activities and compensatory measures.

([2]) OJ C 195, 19.8.2009, p. 9.

([3]) For further details about MLB see recitals 22-42 of the opening decision.

(13) MLB and its subsidiaries make up the MLB group. All of the bank's subsidiaries are involved in activities of commercial nature. The main ones are as follows:

— SIA 'Riska investiciju sabiedriba', a special purpose vehicle ('RIS');

— SIA 'Hipolizings' ('Hipolizings'), which provides leasing services (primarily vehicle leases) with a market share of 5 % as of 30 June 2011, financed exclusively by MLB through a loan facility of LVL 49 million;

— IPS 'Hipo Fondi' [1] ('Hipo Fondi'), which is an asset management company that manages a State-compulsory funded-pension scheme (second pillar) fund with LVL 34 million under management (approximately 4 % market share), 51 % owned by the bank's subsidiary RIS; Hipo Fondi operated as a standalone entity, but benefited from MLB's branch network, sales force and IT support;

— SIA 'Hipoteku bankas Nekustama Ipasuma Agentura' ('HipoNIA'), which is a non-performing asset [2] management company managing an asset portfolio, financed exclusively by MLB.

(14) In line with the transformation plan described in recitals 45 to 95 of the opening decision, MLB is being transformed into a full development bank (i.e. a bank supporting structural, economic and social policies on behalf of the State, in accordance with its public mission). To that end, it is being stripped of its commercial activities.

(15) Latvia appointed an independent external advisor to prepare a concept for development institutions in Latvia. On 11 February 2011, the first draft 'Report on Optimization of the System of Development Financial Institutions in Latvia' was submitted to the Commission and the International Monetary Fund (IMF).

(16) The draft report recommends, amongst other matters, the creation of a single development institution ('SDI') while recognizing the need to ensure its independence by establishing it by a special law and by creating independent decision-making bodies. In that context, the draft report identifies the need to design the functional structure of the SDI from scratch, based on a full review of existing programmes and their functional and staffing needs, in particular in respect of risk assessment and management functions.

(17) Furthermore, it emphasises the need for State interventions through indirect instruments (individual and portfolio guarantees, venture capital, mezzanine funds etc.), while moving away from large direct lending and leaving direct interventions only as an option for a few very specific and justified cases (micro-lending, farmers, etc.).

(18) According to the draft report, indirect channelling of State-supported lending would increase access to the potential beneficiaries of such programmes and improve both distribution cost-efficiency and cooperation with the commercial banking sector.

2.2. **The restructuring strategy: sale by MLB of its commercial activities**

(19) In line with the July 2010 Supplemental Memorandum of Understanding ('sMoU'), an independent advisor was to draw up the MLB transformation plan. That advisor was instructed to prepare scenarios on transforming the bank in order to allow either for assets and liabilities related to development financing to be split off and for the

[1] Hipo Fondi is a standalone asset management company with independent accounting and management. A sizable share of the company ([42-43] %) belongs to active shareholders.
[2] They primarily consist of loans and real estate.

bank with its commercial activities to be privatised or for the bank to be transformed so that commercial activities could be sold leaving the development segment behind.

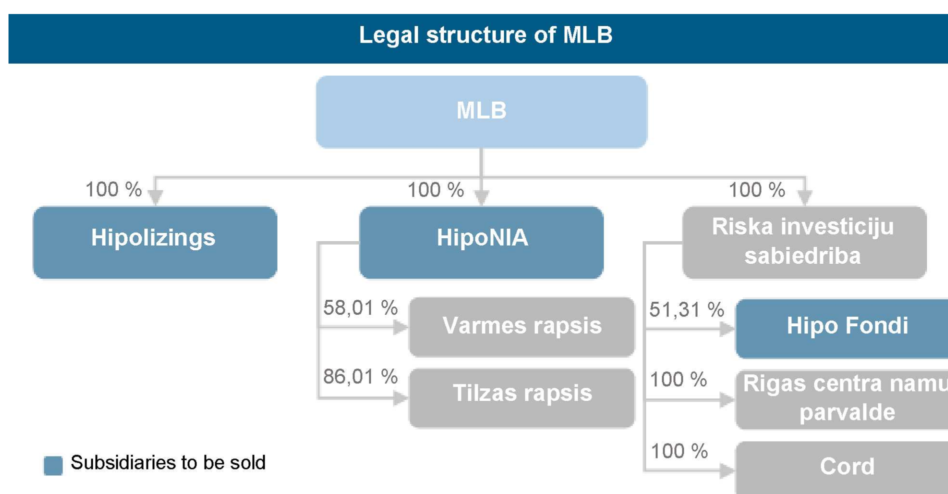
(20) After having analysed the financial situation of the bank, the independent advisor concluded in transformation plan produced in April 2011 ('the April 2011 transformation plan') that the best scenario would be to sell MLB's commercial assets in bundles in a timely manner.

(21) On 1 November 2011, the Latvian government endorsed the sale strategy recommended in the April 2011 transformation plan, and specifically the sale of MLB's commercial segment in six bundles.

(22) The entities belonging to the MLB group which were to be sold by means of a share deal as legal entities are shown in Chart 1.

Chart 1

Overview of legal entities belonging to MLB group [1]



Source: Latvian authorities

(23) As at 31 August 2011, the assets and liabilities of MLB's commercial segment to be sold included:

— A commercial loan portfolio and shares in subsidiaries (HipoNIA, Hipolizings, and Hipo Fondi) of LVL 283,8 million;

— Deposits amounting to LVL 356,1 million.

(24) The sale process was carried out with the aid of a reputable external advisor. Initially, 121 potential purchasers were contacted. 98 of them received a teaser, of which 18 signed a non-disclosure agreement, 51 were not interested and 29 provided no answer. By 16 December 2011, at the end of the first phase of the sales process, nine initial offers were received. By 11 January 2012, during the second phase of the sales process, three potentials purchasers submitted an improved offer, six maintained their initial offer and one new offer was received. All those potential investors were granted access to the data room. During that stage of the process, three potential purchasers withdrew from the process and one merely expressed an interest in parts of two

[1] Only subsidiaries with more than 50 % share are shown.

bundles (Bundles 2 and 3), but did not submit a specific offer. As a result, by 16 March 2012, final offers had been received from four potential investors, mostly for one of the bundles though one potential purchaser submitted an offer for three bundles.

Bundles

(25) The sales strategy endorsed by the Latvian authorities on 1 November 2011 was to divide MLB's assets and liabilities initially into six separate bundles, in accordance with tested market interest. During the sales process Bundle 3 was further split into two separate bundles, 3A and 3B. The bundles were sold to separate buyers, with the remainder of MLB's assets and liabilities transferred to the development segment. The process has been completed and all the bundles were divested by 30 June 2013. The bundles are made up of:

1. Bundle 1 ([1]) and Bundle 2 ([2]) containing the majority of commercial loans and deposits, which have been sold. The process was materially completed on 24 November 2012. The remaining commercial terms will be settled during 2013 (compensation from the buyer […] (*) (LVL […]) and […] in accordance with the terms of sales agreement (LVL […]) with […]);

2. Bundle 5 which consists of Hipolizings, the leasing subsidiary of MLB, and which was sold on 1 August 2012, and Bundle 6 made up of second pillar pension plans, managed by Hipo Fondi, which was sold in November 2012. The sale of Hipo Fondi, which is the remaining shell company, will take place in 2013;

3. Bundle 3 consists of corporate performing loans related to real estate developers and construction. It was split into Bundles 3A and 3B in order to facilitate the divestment process, as it did not receive adequate market interest. Bundle 3A was sold to a private investor on 18 June 2013, and Bundle 3B was sold to the Latvian Privatization Agency (LPA) on 28 June 2013;

4. Bundle 4 ([3]) relating to HipoNIA was sold to the LPA on 28 June 2013.

(26) As regards the various sale options for Bundles 3B and 4, the Latvian authorities believed that the offers submitted by investors for them were inadequate and did not reflect the real intrinsic value of the assets they contained (as estimated by an independent reputable expert). To minimise the losses, the State decided to sell Bundles 3B and 4 to the LPA.

(27) As regards Hipo Fondi, given the offers received from investors it could have been sold either by means of a sale of a legal entity as a going concern, with all the assets managed by it, or by means of an asset sale. According to Latvia, the second option was chosen, since, amongst other reasons, a better price was offered for an asset deal. As a result almost all of the economic activity of Hipo Fondi was sold, namely, three pension plans 'Rivjera', 'Safari' and 'Jurmala'. Apart from those pension plans, Hipo Fondi also managed several private portfolios and closed-end funds. Some of them have already been closed and the remainder are being terminated. Hipo Fondi will remain purely as a shell company with no active actual business to manage. That remaining shell could have been liquidated or sold. A sales process was undertaken for that legal entity and the minority shareholder of Hipo Fondi ([4]) expressed interest in acquiring the shares […]. The Latvian authorities decided to proceed with the sale to the minority shareholder because of the better financial outcome and faster resolution compared to liquidation. The Hipo Fondi sale is almost complete. The agreement on sale has been signed, but closing has not

([1]) Bundle 1 consists of retail and small corporate performing loans, excluding exposure to real estate developers and construction, of approximately LVL 94,6 million in terms of net book value together with all retail and small corporate term and demand deposits of LVL 244 million.
([2]) Bundle 2 consists of large corporate performing loans, excluding exposure to real estate developers and construction, of approximately LVL 27,4 million in terms of net book value with all large corporate term and demand deposits of LVL 103 million.
(*) Confidential information; the omissions are shown as […].
([3]) Bundle 4 consists of HipoNIA shares and intra-group loan from MLB to HipoNIA of LVL 41,3 million; upon the sale, the assets of HipoNIA will mainly consist of non-performing loans ('NPLs').
([4]) The minority shareholder of Hipo Fondi which is acquiring the shell company is not related to the buyer of the assets formerly managed by Hipo Fondi.

yet taken place as the acquisition is being reviewed by the Latvian supervisor, the Financial and Capital Market Commission ('FCMC'). Hipo Fondi does not hold registered intellectual rights, and the registered trademark 'hipo' and related rights are held by MLB. MLB as a part of agreement with the buyer has not objected to the use of term 'hipo' in the HipoFondi name.

(28) As regards the sale of HipoNlA, MLB transferred capital amounting to LVL […] to HipoNIA on 20 June 2013. That recapitalisation was needed because the transfer of HipoNlA from MLB to the LPA took place at […] to book value, with the difference amounting to LVL […]. That difference was […] by MLB as it was a precondition both for the State treasury to grant the loan to HipoNlA and for the LPA to acquire HipoNIA's shares. The total net […] to MLB from the transaction is LVL […] (i.e., […] to net book value, after provisions, at the moment of initiation of the transaction).

Table 1

Overview of Bundles and the terms of their sale

in LVL 000	Content	Current Status	Investor	Gross Book value	Net Book value	Final Price/ Long Term Economic Value	Gross Disc-ount	Net Disc-ount	Gross Loss	Net Loss
Bundle 1	Retail and small corporate performing loans	Sold	SwedBank	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Bundle 2	Large corporate performing loans	Sold	Swedbank	[…]	—	—	[…]	—	[…]	—
Bundle 3A	Corporate performing loans related to real estate developers and construction	Sold	Investor 2	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Bundle 3B		Under process	Privatization Agency	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Bundle 4	HipoNIA: non-performing asset management company	Under process	Privatization Agency	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Bundle 5	Hipolizings: leasing company (vehicles…)	Sold	Swedbank	[…]	—	[…]	[…]		[…]	—
Bundle 6	Hipo Fondi: asset management for State compulsory pension fund	Sold	SEB Bank	—	—	[…]	—	—	[…]	[…]

Source: Latvian authorities

(29) The total amount generated by the sales process has been marginally better than foreseen in the base scenario at base case discounts in the sales strategy, if gross discounts from the sales strategy are applied to the gross book values. There has been a loss of LVL 53,1 million compared to the expected loss of LVL 56,8 million.

Securities business termination

(30) MLB is terminating custody service agreements with its clients. It will dismantle related IT infrastructure and reallocate or lay off employees.

(31) MLB will also in practice fully terminate its securities business. It will retain only the accounts of approximately 100 clients, none of whom can be reached (mainly because most are dead). As the bank cannot legally sell off immediately securities of those inactive clients, MLB intends to 1) obtain a licence to operate those clients' securities accounts and 2) revoke the full banking licence that also covered custody services.

2.3. **The restructuring strategy: creation of the SDI**

(32) The remaining commercial activities after the sale are expected to be transferred to the development segment: they include, amongst others, liquid assets of LVL 20,3 million; other assets of LVL 7,6 million; demand deposits of LVL 5,9 million and term deposits of LVL 1 million; other liabilities of LVL 1,7 million; and outstanding equity of LVL 19,2 million.

(33) After the sale of the commercial activities, as of 30 June 2013 MLB is expected to consist solely of development activities. It will hold assets of around LVL 222,3 million.

(34) In the sMoU, Latvia provided the following commitments to the Union and the IMF:

(a) After divesting the commercial assets of MLB, Latvia will merge the development part of MLB with other State institutions to create the SDI. The SDI would implement State aid programmes through financial instruments currently handled by the MLB, the Latvian Guarantee Agency, the Rural Development Fund and the Environment Investment Fund [1].

(b) The SDI will not be permitted to attract private deposits. It will avoid direct lending, except where concessional programmes are already approved, or in instances where the lending is: (i) associated with the delivery of products not offered by the commercial banks or non-bank financial institutions; (ii) dependent on highly specialized knowledge that commercial banks or non-bank financial institutions do not possess; or (iii) of too small a volume or too risky to be of interest to commercial banks or non-bank financial institutions.

(c) MLB will not start any new direct loan programmes until the action plan for the SDI is approved; all funding that MLB has been allocated for the implementation of national financial engineering instruments has to be safeguarded and transferred fully to the SDI once it is set up. To improve professional monitoring and transparency once the SDI is set up, a Consultative Council chaired by the Ministry of Finance and comprised of members from key Ministries, social partners, the Association of Commercial Banks and renowned international financial institutions with expertise in development activities will be established.

(d) Once the commercial parts of MLB have been sold or transferred to the LPA, the bank will not be allowed to attract any new private deposits. The FCMC will ensure compliance with that commitment.

[1] Pursuant to the sMoU, the Latvian authorities had to present an action plan by 30 June 2013 regarding that merger. However, progress has been slow, especially as the Economics and Finance Ministries were unable to agree which institution would be responsible for overseeing the SDI.

2.4. **Description of the measures covered by the present decision**

(35) As regards MLB's development activities, the Commission notes Latvia's intention to optimise the system of development financial institutions by consolidating them in the SDI. In the opening decision, it was anticipated that MLB would carry out development activities only until the set-up of the SDI which was to take place by 31 December 2012. However, that process has been delayed and it is still on-going. Since the Latvian authorities have not finalised the SDI project, this decision only covers the commercial part of MLB. As a consequence, the development part of MLB will be assessed in a separate final decision.

(36) In the opening decision the following measures granted by Latvia to the commercial part of MLB were approved temporarily as rescue aid:

(a) a recapitalisation measure of LVL 70,2 million granted on 23 March 2010,

(b) a recapitalisation measure of LVL 50 million granted at the end of 2011 (granted as a liquidity measure to be converted into capital),

(c) a standby liquidity facility of up to LVL 250 million,

(d) guarantees to international creditors of the commercial segment of MLB up to LVL 32 million, and

(e) liquidity support of up to LVL 60 million for the solvent liquidation of the bad assets within HipoNIA.

(37) Latvia submitted information on the use of that State support for the liquidation of the commercial segment of MLB, amended so as to take into account the implementation of the sales strategy.

(38) The overall amount of capital needed from the measure described in point (b) of recital 36 was lower than initially planned, at LVL 25 million instead of LVL 50 million, as the Latvian authorities decided that MLB would operate without a banking licence, which diminished the amount of required capital. The LVL 25 million capital increase took place in June 2012 ([1]).

(39) The standby liquidity facility of up to LVL 250 million described in point (c) of recital 36 was temporarily approved and made available to MLB as from 1 January 2012 until the completion of the sale process, to be available in case of emergency liquidity events. As of 30 May 2013, the liquidity support used had been substantially lower than the maximum amount foreseen (LVL 50 million), because there was no run on deposits and the transformation process had gone smoothly. There is currently an outstanding balance of LVL 25 million, which is expected to be repaid by 31 December 2013.

(40) The guarantees of up to LVL 32 million described in point (d) of recital 36 were to be provided to international creditors of MLB in relation to its commercial segment. As the sale of the commercial segment and transformation of MLB into a development bank could have been considered as a default event according to their contracts, that measure was needed to guarantee liabilities in case those international creditors had required the prepayment of loans to MLB. However, the amount of guarantees required for the commercial part has been lower than the LVL 32 million expected as only some international creditors required additional safety measures. As of 30 May 2013, the level of guarantees forecast to be needed was LVL 12,4 million.

(41) The liquidity support to HipoNIA described in point (e) of recital 36 has turned out to be higher than the amount temporarily approved by the Commission, at LVL 71 million instead of LVL 60 million. The increase was required as a part of Bundle 3 was not sold in the market but instead was transferred to HipoNIA, thus increasing the necessary amount of funding. That liquidity support is expected to be repaid by 31 December 2018.

([1]) The total recapitalisation of 2010 and 2012, respectively, amounts therefore to LVL 95,2 million (70,2 million plus LVL 25,0 million).

(42) Latvia has thus asked the Commission to approve the increase of the liquidity support by LVL 11 million. In that context, Latvia argued that the overall amount of the aid needed for phasing out the commercial segment of MLB is lower than the amount of aid temporarily approved.

Table 2

Overview of State aid approved vs. State aid granted

(situation as at May 2013)

Liquidity support to MLB	
Amount preliminarily approved by the Commission on 26 January 2012	**LVL 250,0 million**
Amount granted in December 2011	**LVL 50,0 million**
Liquidity support to HipoNIA	
Amount preliminarily approved by the Commission on 26 January 2012	**LVL 60,0 million**
Amount granted in June 2013	**LVL 71,0 million**
Guarantees	
Amount preliminarily approved by the Commission on 26 January 2012	**LVL 32,0 million**
Amount granted in June 2012	**LVL 12,4 million**
Capital	
Amount preliminarily approved by the Commission on 26 January 2012	**LVL 70,2 + 50,0 million**
Amount granted in June 2012	**LVL 70,2 + 25,0 million**
Total State aid	
Amount preliminarily approved by the Commission on 26 January 2012	**LVL 462,2 million**
Current estimation of the amount of the aid measures	**LVL 228,6 million**

2.5. **Grounds for initiating the procedure**

(43) The Restructuring Communication ([1]) sets out the State rules applicable to the restructuring of the financial institutions in the current crisis. According to the Restructuring Communication, in order to be compatible with Article 107(3)(b) of the Treaty, the restructuring of a financial institution in the context of the current financial crisis has to:

— include sufficient own contribution by the beneficiary (burden-sharing);

— contain sufficient measures limiting the distortion of competition;

([1]) Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, (OJ C 195, 19.8.2009, p. 9).

— lead to a restoration of the viability of the bank or demonstrate how it can be wound-up in an orderly fashion.

(44) In the opening decision, the Commission temporarily approved the rescue aid, considering that the measures described in recital 36 were appropriate as they aimed at eliminating the threat to the Latvian economy stemming from the problems of MLB. The Commission also considered that those measures were necessary and were the best value options for the Latvian government to phase out the commercial activities of the bank. Nevertheless the Commission had doubts that the aid was proportionate and requested further information in that respect.

Safeguards against undue distortion of competition — Discontinuation of commercial activities

(45) According to the sales strategy, most of the economic activities of the commercial segment of MLB were to be discontinued and sold in bundles and the subsidiaries Hipolizings and Hipo Fondi were to be sold separately from the bank, which the Commission viewed positively.

(46) As regards winding down in an orderly fashion, the Commission concluded that more information was needed on the compatibility of the aid for discontinuation of the commercial activities of MLB. In particular, the Commission requested the Latvian authorities to provide precise milestones envisaged for the sale of activities as well as further information regarding the activities that could not be sold.

(47) As regards the economic activities that were to be continued, only two entities, namely Hipolizings and Hipo Fondi, were to be sold as standalone legal entities. Nevertheless, in light of their limited market presence ([1]) and their timely sale by the bank, the Commission preliminarily concluded that the aid measures were adequate.

Restoring long-term viability of economic activities of MLB group

(48) In the opening decision, the Commission requested the Latvian authorities to provide additional information to ensure that entities that would remain on a stand-alone basis (Hipolizings and Hipo Fondi) would be viable after the sale. More specifically, the Commission wanted to know who would provide the infrastructures or funding they required in the place of MLB after the sale.

Orderly wind down of unsold commercial activities

(49) Although the sales strategy provides information about the conditions for an orderly winding down of commercial activities, the Commission raised doubts in the opening decision that sufficient safeguards had been put in place against undue distortion of competition.

(50) The Commission in particular invited the Latvian authorities to terminate the sales in a timely manner and to propose additional measures to ensure that the bank priced its commercial products in an unattractive fashion and capped advances on existing loans.

3. **COMMENTS FROM INTERESTED PARTIES**

(51) The Commission did not receive any comments from interested parties.

([1]) Hipolizings has a market share of 5 % in the leasing market and Hipo Fondi has a market share of 4 % in the second level pension management market.

4. COMMENTS ON THE OPENING DECISION BY LATVIA

(52) On 5 April 2012, Latvia submitted comments on the opening decision and later complemented its position through regular submissions of information until June 2013 ([1]).

(53) Overall, Latvia is of the opinion that all criteria for compatible State aid have been met with regard to MLB because: (i) the commercial segment has been liquidated; (ii) the remaining development segment operates within a strict product range (remit), and (iii) the remaining institution will have its licence revoked and thus not compete with commercial banks on funding.

(54) As regards *MLB's development segment*, Latvia submitted extensive information ([2]). Nonetheless, Latvia clarified that no definitive agreement had been reached as yet on the creation of the SDI, which is supposed to take over MLB's development segment. Latvia stated that a joint action plan on the establishment of the SDI by the Ministries concerned and the external expert was due on 2 August 2013, and that the work would continue throughout 2013. However, the final date for SDI's creation is still unclear.

(55) For that reason, Latvia requested that the State aid assessment of the creation of the SDI be treated in a separate procedure and not within the procedure on MLB's commercial segment.

(56) As regards *safeguards against undue distortions of competition*, Latvia believes that the arrangements put in place ensure that there is no direct competition between MLB's commercial segment and other commercial banks. MLB stopped new lending activity as of November 2009. On the deposit side, active management of the deposit base was originally needed to avoid additional State aid in the form of liquidity support until the completion of the sale. Deposits related to MLB's commercial segment were eventually sold as a part of Bundles 1 and 2, while payment card operations and the automatic teller machine network have been dismantled.

(57) HipoNIA, which has acquired loan portfolios from MLB, does not provide additional financing to any of its clients. In particular, given the state of those loans (almost all are overdue by more than 90 days and restructuring attempts had already been made) almost all cases result in HipoNIA repossessing the property.

(58) As regards the *commercial segment*, Latvia submitted a full timetable for the sale or liquidation of assets, set out the key milestones of the process and informed the Commission of progress made and the actual dates of sales agreements. Latvia submitted that all balance sheet positions related to the commercial segment will have been eliminated by January 2014.

(59) Latvia provided a detailed overview of the State aid amounts actually granted to MLB's commercial segment (namely, liquidity support to MLB of LVL 50 million, State guarantees of LVL 12,4 million, capital measures of LVL 95,2 million and liquidity support of LVL 71 million to HipoNIA). Latvia underlined that the total aid needed by MLB for its commercial part is lower than originally assumed (and approved on a temporary basis in the opening decision).

(60) According to Latvia, none of the aid measures directly benefits the commercial activities which will be continued by Hipolizings and Hipo Fondi after they have been sold. MLB's core business was split up into three bundles and sold in the form of an asset sale. None of those bundles constitutes an undertaking within the meaning of Article 107(1) of the Treaty; hence Latvia considers that the economic activity is not continued after the sale, nor will the bundles benefit from the State aid received prior to the sale.

(61) Latvia takes the view that only the sale of Bundle 4 (Hipolizings) may constitute a continuation of economic activity. However, Hipolizings will form a very small part of the group to which its buyer belongs (less than 0,1 %) and […]. […]. The sale will ensure the entity's long-term viability and will not endanger the viability of the buyer. Moreover, Hipolizings has only a very small market share of 5 %. In addition, it only profited to

([1]) Main submissions received on 15 April 2013 and 3 June 2013.
([2]) The information on the development segment is not reproduced in detail because it is not the subject of the present decision.

a limited extent and indirectly from the aid granted to MLB: its existing contractual arrangements did not have to be terminated unexpectedly and, like the other companies owned by the bank, it did not have to be sold by a distressed owner. Considering the very limited amount of aid for Hipolizings, Latvia believes that after the sale and full integration with its buyer Hipolizings will not benefit from aid.

(62) As regards the shell company Hipo Fondi sold to a private investor, Latvia undertakes that […].

(63) Regarding the transfer of assets from MLB to HipoNIA and its subsequent sale, Latvia agrees with the Commission's preliminary findings, set out in the opening decision, that the transfer does not involve aid.

(64) With regard to the 2012 capital increase for the commercial segment, Latvia clarified that that increase took place in two parts: the first one was linked to the sale of Bundles 1, 2, 3, 5 and 6 while the second one was linked to the sale of Bundle 4. The amount of capital was kept to the minimum and calculated to ensure regulatory capital adequacy for the commercial segment following the losses from the sale.

(65) As regards the standby liquidity facility granted in the context of restructuring, Latvia submitted that the support to the commercial segment was of a temporary nature to ensure the orderly sale. Its small scale and temporary nature reduced the potential distortions of competition to the minimum, according to Latvia.

(66) Finally, Latvia undertook to submit monitoring reports on MLB's restructuring, including the wind-down of unsold commercial activities and an *ex post* valuation of the liquidation.

5. ASSESSMENT OF THE MEASURES

5.1. Existence of aid within the meaning of Article 107(1) of the Treaty

(67) As set out in Article 107(1) of the Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market, save as otherwise provided.

Beneficiaries of aid

(68) As set out in recital 145 of the opening decision, when assessing the measures in order to determine whether they constitute State aid, it is necessary to distinguish between the present and future development bank activities of MLB, on the one hand, and the residual commercial activities pursued by MLB during the transition (phasing-out) period, on the other hand. Latvian authorities submitted the data demonstrating how the measures benefitted one segment or the other.

(69) The scope of the present decision only covers measures granted to the commercial part of MLB. The terms of operation of the development part of MLB, which is expected to be continued by an as yet still to be established development institution will be assessed in a separate final decision.

(70) As a result, the present decision will assess only the measures granted by Latvia benefitting the commercial part of MLB in so far as they are needed for the restructuring of the commercial segment of MLB.

(71) It is recalled that to assess the measures benefitting the commercial segment of the bank, it is important to ascertain whether and to what extent the economic activity is continued or dissolved after the sale of the commercial assets and liabilities ([1]). In that respect, the Commission finds that, with the sale of bundles 3A (to a private investor), 3B and 4 (to the LPA for gradual work out) by 30 June 2013, those economic activities of the former commercial part of MLB have been dissolved. It is also noteworthy that a large share of assets formerly managed by Hipo Fondi was sold separately from that company by means of an asset sale. The Commission considers that the sale in bundles, which allowed different buyers to bid for separate parts of commercial assets and liabilities of MLB, effectively contributes to the liquidation of the commercial activities of MLB. It is noteworthy that the bank attempted more than once to sell the unsold assets which are ultimately to be transferred to the LPA, repackaging the bundles and renegotiating the offers with the potential investors. Hence, MLB seems to have exhausted all available opportunities in the market to sell those worst quality assets at a reasonable price, i.e. a price higher than their long-term economic value as estimated by an external reputable consultant.

(72) As regards MLB's ancillary activities of a commercial nature, Latvia also provided sufficient information that they have already been or will be terminated in the near term. The shell company Hipo Fondi, which will remain after the sale of the assets it managed, will be sold in the coming months, the securities business will be terminated, and RIS, which is a pure holding company currently holding shares in Hipo Fondi and two companies in insolvency, will be liquidated. It is planned that MLB's banking licence will be revoked by 31 December 2013.

(73) As regards Hipolizings, it was sold as a legal entity by means of a share deal. Latvia submitted that Hipolizings did not directly benefit from any of the support granted to its parent company, MLB ([2]). As regards the potential asset relief measure described in recitals 165 to 170 of the opening decision, it is recalled that before the sale of Hipolizings the worst assets of MLB were internally transferred to HipoNIA. In the opening decision the Commission concluded that such an internal transfer of assets could only constitute an asset relief measure in favour of Hipolizings and Hipo Fondi, if and to the extent that they benefitted from such transfers. Given Latvia's confirmation that no assets were transferred from Hipolizings to HipoNIA, it can be concluded that Hipolizings did not receive any asset relief directly benefitting its activities. However, as acknowledged by Latvia, it cannot be excluded that Hipolizings profited to a limited extent from the aid granted to MLB insofar as the existing contractual arrangements of Hipolizings did not have to be terminated unexpectedly, and it did not have to be sold by a distressed owner. Therefore, the Commission concludes that Hipolizings benefitted from the aid granted to MLB, albeit indirectly and hence to a very low degree.

(74) As regards Hipo Fondi, the Commission notes that when it was sold to its minority shareholder it was merely a shell company. Latvia has confirmed that the remaining private portfolios and closed-end funds managed by Hipo Fondi have already been closed, are in the process of termination or will be wound up. Furthermore, Latvia has committed that […].

(75) In light of the foregoing, it can be concluded that Hipo Fondi will remain purely as a shell company with no actual business to manage at least for some time. Given that the shell company ends the activities formerly carried out by Hipo Fondi as MLB's subsidiary and does not undertake any new economic activities immediately, it can be concluded that there is no continuity between Hipo Fondi as an undertaking which was part of MLB group and the new entity, i.e. Hipo Fondi owned by new owner(s) and carrying out new economic activities, if any. Therefore, the shell Hipo Fondi company cannot be considered as benefitting from the aid previously granted to MLB.

(76) As regards HipoNIA, it will contain assets of the former commercial segment of MLB in run-down mode and will operate only for a limited time. However, in line with the established case practice, measures aimed at winding down commercial activities may still constitute aid ([3]).

([1]) See recital 153 of the opening decision.
([2]) See recital 60.
([3]) See, for instance, Commission decisions of 25 October 2010 in case N 560/09 Aid for the liquidation of Fionia Bank (OJ C 76, 10.3.2011, p. 3) of 23 April 2010 in case N 194/09 Liquidation aid to Bradford & Bingley (OJ C 143, 2.6.2010, p. 22) and of 5 November 2008 in case NN 39/08 Liquidation aid to Roskilde bank (OJ C 12, 17.1.2009, p. 3).

(77) As regards the undertakings which are buyers of the bundles, the Commission notes that, based on information submitted by Latvia, the sale process was carried out in an open and non-discriminatory manner, on market terms and with the aim to maximize the price for specific bundles.

(78) As regards HipoNIA transfer at below market value, the Commission confirms the preliminary conclusion of the opening decision that its buyer, the LPA, cannot be considered as a beneficiary of the aid, since it does not carry out economic activities and is merely an agency of the Latvian State ([1]).

(79) On that basis, the Commission considers that no aid was granted to the undertakings which are buyers of MLB's commercial assets and liabilities.

(80) In conclusion, after the sale of all the bundles consisting of the former commercial activities of MLB, which has been concluded by now, the aid measures only benefit those commercial activities of MLB continued after the sale by HipoNIA and Hipolizings.

Aid measures

(81) As stated in recital 73, Hipolizings has benefitted (albeit only to a limited extent) from the aid granted to MLB. As mentioned above, its contractual arrangements did not have to be terminated unexpectedly and the company did not have to be sold by a distressed owner, which could have possibly led to a fire sale. The limited character of the advantage or the fact that it cannot be quantified does not alter the Commission's assessment in that respect.

(82) Given that Hipolizings is active in the financial sector, any advantage from State resources benefitting its activities could affect intra-Union trade and distort competition. Therefore, the measures benefitting its activities must be regarded as liable to distort competition and affect trade between Member States. The advantage was provided through State resources and is selective since it only benefits one financial group.

(83) In the light of the foregoing, the Commission concludes that the indirect advantage conferred on Hipolizings from the aid measures granted to MLB constitutes State aid within the meaning of Article 107(1) of the Treaty.

(84) With regard to the liquidity measure granted to HipoNIA, which is maintained during the restructuring phase, albeit for a higher amount, it has already been established in the opening decision that the measure constitutes State aid. The Commission has no reason to change its previous assessment in light of the increased amount of liquidity support. The changed amount of the measure does not affect its qualification as aid. The Commission, therefore, concludes that the liquidity support of LVL 71 million to HipoNIA constitutes State aid.

(85) As regards other aid measures granted to HipoNIA's parent company, MLB, the advantage stemming from them does not benefit HipoNIA. All those other aid measures granted to MLB had the aim and the effect of sustaining the activities of MLB for a longer period of time than would have been possible in the event of immediate insolvency and liquidation. When they were granted to MLB, HipoNIA was performing as the bad asset management company within the MLB group. Given that HipoNIA's activities were limited to the liquidation of assets without delay without any advances granted to the clients, it was an integral part of the liquidation process. Therefore, the indirect aid from other aid measures granted to MLB's commercial segment can be excluded in the case of HipoNIA.

5.2. **Compatibility of the aid with the internal market**

(86) As it was found in section 5.1 that the liquidity measure to HipoNIA and the indirect advantage conferred on Hipolizings from the aid measures granted to MLB constitute State aid within the meaning of Article 107(1) of the Treaty, their compatibility with the internal market should be assessed.

([1]) See recital 158 of the opening decision.

5.2.1. *Legal basis for the assessment of compatibility*

(87) It has already been established in recitals 177 to 180 of the opening decision that the aid measures benefiting the commercial activities of MLB are to be assessed under Article 107(3)(b) of the Treaty and in particular Commission's Restructuring Communication.

5.2.2. *Compatibility of the aid measure under the Restructuring Communication*

Restoration of long-term viability of economic activities of MLB continued by Hipolizings after its sale

(88) Point 17 of the Restructuring Communication confirms that a sale of (part of) the financial institution to a third party can help to restore its long-term viability.

(89) Hipolizings has been sold to Swedbank Lizings, which is the largest leasing company in Latvia (22 % market share). It is closely integrated with general banking operations of Swedbank. As of 31 May 2013, Swedbank has its rating upgraded by Moody's to A1. The group's operations have a track record of adequate profitability (with return on equity ratio of 16,9 % at YE2012 and of 13,8 % at 1Q2013 ([1])) with a core Tier 1 capital ratio exceeding 15 %. Hipolizings' activities make up a very small share of the assets of the Swedbank group (ca. 0,05 %).

(90) In light of the foregoing, the Commission concludes that the economic activities of MLB continued by Hipolizings after its sale to Swedbank Lizings, as integrated into the Swedbank group, are viable.

Orderly wind-down of unsold commercial activities

(91) Latvia confirmed that HipoNIA, which has acquired loan portfolios from MLB, does not provide additional financing to any of its clients. It further undertook to submit monitoring reports on the wind-down of unsold commercial activities and an *ex post* valuation of the liquidation.

(92) The Commission notes positively the efforts undertaken by Latvia and MLB to sell all sellable commercial activities, unless to do so was less economically advantageous than running them down over time, as evaluated by a reputable external advisor.

(93) In light of the foregoing, the Commission concludes that doubts raised in the opening decision have been allayed and the requirements of the Restructuring Communication in respect of orderly wind-down of business are met in the present case.

Aid limited to the minimum necessary/own contribution

(94) It has already been concluded in the opening decision that the base case scenario contained in the sales strategy ensures the limitation of the aid needed for the phasing-out of the commercial activities of MLB to the minimum ([2]). The actual execution of that plan does not change that assessment.

(95) Further, it has also been concluded in the opening decision that, by means of a sale, the commercial activities of MLB are discontinued, which ensures that the bank contributes to the restructuring as much as possible with its own resources ([3]).

([1]) Source: http://www.swedbank.com/idc/groups/public/@i/@sbg/@gs/@ir/documents/financial/cid_900555.pdf.
([2]) See recital 210 thereof.
([3]) See recitals 211-212 thereof.

Avoidance of undue distortions of competition

(96) As already set out in the opening decision, timely divestitures of MLB's subsidiaries separately from the bank as well as the splitting of the bank in several bundles prior to their sale mitigate undue distortions of competition caused by the aid. Therefore, they are viewed positively ([1]).

(97) As the sale has been concluded, the doubts raised in the opening decision as regards the pace of the sale have been allayed.

(98) Since Latvia confirmed that no advances will be granted on the existing loans by HipoNIA, the doubts raised in the opening decision in that respect have also been allayed.

(99) As regards Hipolizings, the Commission had preliminarily concluded in the opening decision that the measures to limit distortions of competition caused by the aid granted to it were adequate. Given Latvia's confirmation that Hipolizings has not benefitted from any direct aid, those preliminary finding of the Commission can now be confirmed. Moreover, Hipolizings […]. […]. Indeed, in light of the limited market presence of Hipolizings (market share of 5 %) and limited aid granted to it, which is only indirect, the measures to limit distortions of competition mainly consisting of its timely sale by MLB are adequate.

5.2.3. *Conclusion on compatibility*

(100) In the light of the foregoing, the Commission finds that the MLB's transformation plan and its implementation to date in respect of commercial activities of MLB meet all the conditions laid down in the Restructuring Communication.

6. **CONCLUSION**

(101) The Commission finds that liquidity support in the amount of LVL 71 million granted in June 2013 by Latvia for MLB (in the legal person of HipoNIA) and the indirect advantage conferred on Hipolizings from the restructuring measures granted to MLB constitute State aid within the meaning of Article 107(1) of the Treaty.

(102) The Commission finds that Latvia has unlawfully implemented the additional liquidity support of LVL 11 million, in breach of Article 108(3) of the Treaty. However, the Commission finds that the measure together with the original liquidity support of LVL 60 million to HipoNIA is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty.

(103) The Commission also finds that the indirect advantage conferred on Hipolizings from the restructuring measures granted to MLB is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Latvia granted to MLB in the form of liquidity support for HipoNIA amounting to LVL 71 million and the indirect advantage conferred on Hipolizings from the restructuring measures granted to MLB are compatible with the internal market.

([1]) See recital 219 of the opening decision.

Article 2

This Decision is addressed to the Republic of Latvia.

Done at Brussels, 17 July 2013.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION (EU) 2015/1583

of 4 August 2014

on the aid scheme SA.18859 (11/C) (ex 65/10 NN) implemented by United Kingdom Relief from Aggregates Levy in Northern Ireland (ex N 2/04)

(notified under document C(2014) 5466)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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]), and having regard to their comments,

Whereas:

1. PROCEDURE

(1) The United Kingdom notified the Commission of its intention to introduce a tax relief in Northern Ireland, applied to virgin aggregate extracted in Northern Ireland and commercially exploited there and processed products from virgin aggregate extracted in Northern Ireland commercially exploited there from a levy on aggregates set-up in the United Kingdom ('the measure') by letter of 5 January 2004, registered on 9 January 2004.

(2) The measure was notified as a modification of the original relief from the Aggregates Levy in the Northern Ireland ([2]) which was approved by the Commission in its decision of 24 April 2002 in case N863/01 ([3]) (Decision N863/01).

(3) On 7 May 2004, the Commission adopted a 'no objections' decision with respect to the measure ([4]) (Decision of 7 May 2004).

(4) On 30 August 2004, the British Aggregates Association, Healy Bros. Ltd and David K. Trotter & Sons Ltd launched an appeal against the Decision of 7 May 2004 (the action was registered under Case T-359/04).

(5) On 9 September 2010, the General Court annulled the Decision of 7 May 2004 ([5]). According to the judgment, the Commission was not entitled to adopt lawfully the decision not to raise objections as it had not examined the question of a possible tax discrimination between the domestic products in question and imported products originating from Ireland. The Commission did not appeal that judgment.

(6) On 15 December 2010 and 21 December 2011, the United Kingdom submitted additional information concerning the measure, including documents concerning the suspension of the implementation of the measure as from 1 December 2010 by revoking the Aggregates Levy (Northern Ireland Tax Credit) Regulations 2004 (S.I. 2004/1959).

(7) The Commission requested additional information by letter of 2 February 2011. The United Kingdom submitted further information by letters of 7 March 2011 and 10 June 2011.

([1]) OJ C 245, 24.8.2011, p. 10 with a Corrigendum in OJ C 328, 11.11.2011, p. 11.
([2]) The phased introduction of the aggregates' levy.
([3]) OJ C 133, 5.6.2002, p. 11.
([4]) OJ C 81, 2.4.2005, p. 4.
([5]) Case T-359/04 *British Aggregates a. o. v Commission*, judgment of 9 September 2010, 2010 II-04227.

(8) By letter dated 13 July 2011, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid.

(9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([6]) (the 'Opening Decision'). The Commission invited interested parties to submit their comments on the aid.

(10) The Commission received two comments from interested parties both on 23 September 2011. It forwarded them to the United Kingdom on 10 November 2011, which was given the opportunity to react; the United Kingdom's comments were received by letter dated 25 November 2011.

(11) The United Kingdom submitted further information on 17 September 2012 and 10 October 2012. The Commission requested further information on 23 January 2014 and 7 February 2014, which the United Kingdom provided on 1 April 2014 and, respectively, on 4 June 2014.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Aggregates Levy

(12) The Aggregates Levy (the 'AGL') is an environmental tax on the commercial exploitation of aggregates and is applied to rock, sand or gravel. It was introduced by the United Kingdom with effect from 1 April 2002 for environmental purposes in order to maximise the use of recycled aggregate and other alternatives to virgin aggregate and to promote the efficient extraction and use of virgin aggregate, which is a non-renewable natural resource. The environmental costs of aggregate extraction being addressed through the AGL include noise, dust, damage to biodiversity and to visual amenity.

(13) The AGL is applied to virgin aggregate extracted in the United Kingdom and to imported virgin aggregate on its first use or sale in the United Kingdom ([7]). The rate at the time of the original notification was GBP 1,60 per tonne ([8]). The AGL is also applied to the commercial exploitation of virgin aggregate used in the manufacture of processed products. It does not apply to processed and recycled aggregates and to virgin aggregates exported from the United Kingdom.

2.2. The original AGL relief in Northern Ireland

(14) In its Decision N863/01, the Commission considered that the phased introduction of the AGL in Northern Ireland was compatible with Section E.3.2 of the Community Guidelines on State aid for environmental protection ([9]) ('the 2001 Environmental Aid Guidelines'). The approved aid took the form of a five year degressive scheme of tax relief, starting in 2002 and ending in 2007. The original AGL relief in Northern Ireland covered only the commercial exploitation of aggregate used in the manufacture of processed products.

2.3. The modified AGL relief in Northern Ireland

(15) This decision concerns exclusively the modified AGL relief in Northern Ireland, which was applied to virgin aggregate extracted in Northern Ireland and commercially exploited there and processed products from virgin aggregate extracted in Northern Ireland commercially exploited there.

2.3.1. *Modification*

(16) As explained in recitals 12 to 14 of the Opening Decision, the United Kingdom considered that the special circumstances in Northern Ireland called for the enlargement of the scope of the relief from the AGL in Northern Ireland.

([6]) Idem [1].
([7]) The AGL is applied to imported raw aggregate, but not to aggregate contained in imported processed products.
([8]) On 2 April 2008, i.e. the day from which the 2008 Environmental Aid Guidelines were applicable, the level of AGL was GBP/tonne 1,95.
([9]) OJ C 37, 3.2.2001, p. 3.

(17) The original relief scheme (phased introduction of the AGL) was modified. The relief applied to all types of virgin aggregate, i.e. not only to aggregates used in the manufacturing of processed products, as it was the case for the original relief in Decision N863/01, but also to virgin aggregates used directly in the raw state ([10]).

(18) The relief was set at 80 % of the AGL level otherwise payable, and was intended to be a transitional arrangement. It came into effect on 1 April 2004 and was supposed to continue until 31 March 2011 (i.e. 9 years from the start of the AGL on 1 April 2002).

(19) The relief scheme was suspended on 1 December 2010.

2.3.2. *Environmental agreements*

(20) In order to more effectively achieve the intended environmental objectives, the United Kingdom made the relief conditional upon claimants formally entering into and complying with negotiated agreements with the United Kingdom, committing the claimants to a programme of environmental performance improvements over the duration of the relief.

(21) The key criteria for entry into the scheme were that:

(a) the requisite planning permission(s) and environmental regulatory permits, etc. had to be in place for each eligible site; and

(b) the site operator was required to 'sign-up' to a regime of environmental audits. The first audit had to be commissioned and submitted within 12 months of the date of entry to the scheme and updated every 2 years, thereafter.

(22) Each agreement was individually tailored to the circumstances of the quarry, taking into account, for example, current standards and scope for improvement. The areas of performance covered were: air quality; archaeology and geo-diversity; biodiversity; blasting; community responsibility; dust; energy efficiency; groundwater; landscape and visual intrusion; noise; oil and chemical storage and handling; restoration and aftercare; use of alternatives to primary aggregates; surface water; off-site effects of transport; and waste management.

(23) The Department of Environment in Northern Ireland was responsible for monitoring those agreements, and the relief was withdrawn for those firms having significant shortcomings.

2.3.3. *Aggregates production costs, selling price and price elasticity of demand*

(24) As regards the aggregates production costs, the United Kingdom explained that they varied significantly from quarry to quarry and that the same would be valid for the prices ([11]). The average selling price ex quarry for different classes of aggregates was summarised in Table 1 ([12]). Profit margins were again variable, but the industry estimated that 2 % to 5 % was a typical level.

Table 1

Selling price

Type of rock	Price ex-quarry before tax (GBP/tonne)
Basalt	4,21
Sandstone	4,37

([10]) The aggregates extracted in Northern Ireland and shipped to any destination in Great Britain were liable to the AGL at the full rate. That was also the case for aggregate extracted in Northern Ireland that was used in the manufacturing of processed products shipped to Great Britain. That ensured that aggregates and processed products from Northern Ireland did not enjoy a competitive advantage in the market of Great Britain.

([11]) The information was submitted by the United Kingdom for the purposes of an assessment of the measure on the basis of the 2008 Environmental Aid Guidelines. DETI Minerals Statement 2009.

([12]) Distribution costs depend on haulage distances, with haulage costs in the range of GBP 0,15 – 0,20 per tonne per mile, with aggregate being delivered within 10 to 15 miles, depending on local circumstances.

Type of rock	Price ex-quarry before tax (GBP/tonne)
Limestone	3,72
Sand & Gravel	4,80
Other	5,57
Weighted average price	4,42

(25) Following the Opening Decision, the United Kingdom provided further information as regards the productions costs of the aggregates in Northern Ireland and Great Britain. There are higher costs of electricity and planning permission in Northern Ireland compared with Great Britain. Electricity costs a small/medium sized firm in Northern Ireland an average of around 14p/kWh and 11p/kWh for similarly sized firms in the United Kingdom as a whole. Large and very large consumers of electricity in Northern Ireland will pay, on average, 10p/kWh, compared with around 8p/kWh in the United Kingdom as a whole. Estimates provided by the industry suggest that electricity and fuel costs would make up between 30-46p for each tonne of aggregate produced. In addition, Northern Ireland quarries face significantly greater planning costs than their counterparts in Great Britain and the Republic of Ireland. The United Kingdom provided cost comparisons in support of that statement.

(26) As regards, in general, the difference in price levels between Northern Ireland and Great Britain, the United Kingdom had explained that suppliers in Northern Ireland have never been able to charge the same price as in Great Britain. The United Kingdom had illustrated this by way of average aggregates prices in Northern Ireland and Great Britain between 2001 and 2008. The levy at the full rate would therefore have represented a much higher proportion of the selling price in an already suppressed market. This inability to pass on costs to customers has been a significant historic factor in the lack of investment in environmental improvement and is explained by economic (fragmentation of the market) and geological factors.

(27) Following the Opening Decision, the United Kingdom provided more detailed information in regard to the average aggregates prices. Apparently, except in the case of highly valuable, specialist aggregate materials, it is not economical to transport aggregates from Northern Ireland to Great Britain or even within Great Britain from Scotland, for example, for use in London. Table 2 shows average ex-quarry prices in Northern Ireland and in Great Britain between 2006 and 2011, in the case of Northern Ireland, and 2012 in the case of Great Britain.

Table 2 ([13])

Average ex-quarry prices

Year	Price per tonne in Northern Ireland (GBP)		Price per tonne in Great Britain (GBP)	
	sand and gravel	crushed rocks	sand and gravel	crushed rocks
2006	3,81	3,60	9,18	7,34
2007	4,68	4,07	9,08	7,01
2008	3,74	4,84	10,05	8,11
2009	4,80	4,30	10,04	8,03
2010	3,38	4,25	10,47	7,90
2011	2,93	4,30	10,70	7,77
2012			10,02	8,28

([13]) Data for Northern Ireland from Annual Minerals Survey Department of Enterprise, Trade and Investment Northern Ireland and data for Great Britain from ONS data collected through the Annual Minerals Raised Survey.

(28) The more detailed information regarding pricing point to the same conclusion the UK had previously reported (recital 26), i.e. that the AGL at the full rate would therefore have represented a much higher proportion of the selling price in an already suppressed market. The data shows that sand and gravel or crushed rock aggregate material from Northern Ireland would be unable to compete with average prices in Great Britain once the GBP […] (*) tonne costs of transporting it over by sea are taken into account. The low price of aggregate in general precludes its sale in far-away markets as, even at GBP […] a tonne, a journey of […] miles would add almost […] % to the ex-quarry price. It is likely, in most instances, that a closer quarry would be able to offer a more competitive price.

(29) As regards the price elasticity of demand, the United Kingdom had explained, that the price elasticity of demand for aggregates ranges from 0,2 to 0,5. The United Kingdom' examination of aggregates quantity and price data for Great Britain and Northern Ireland suggested that for most types of aggregates the price elasticity ranged from close to zero to about 0,52. Following the Opening Decision, the United Kingdom showed that estimates of the price elasticity of demand for the mainland of the United Kingdom cannot, be applied to Northern Ireland due to the differences between the two markets. Therefore, the figures initially provided are not relevant for the Northern Ireland market. The United Kingdom indicated that they tried to determine the elasticity applicable solely for Northern Ireland, but that relevant data for the calculation were missing.

(30) Following the Opening Decision, the United Kingdom provided information showing how price differences affect demand on the Northern Ireland market. Information was received for such purposes from four out of the five largest firms in the quarrying industry in Northern Ireland. As transportation costs tend to limit the market into which quarries can sell products at competitive prices, a direct correlation between prices and market shares was difficult to establish. Demand and market share are more likely to respond to the commencement or completion of large construction projects in the local area than nationwide price differences. Moreover, those companies which have the largest share of the market in Northern Ireland also sometimes sell higher quality, specialist products thus a comparison between producers for determining a market trend would not be accurate. Nevertheless, the United Kingdom shows that price differences do affect demand, but rather on a more local basis. Companies that operate near the border with the Republic of Ireland, i.e. within approximately 23 miles of the border, showed that they experienced significant reductions in sales when they increased their prices. Specific data were provided in regard to […] and […]. Table 3 shows the impact of price changes at […] and […]'s […] site between 2009 and 2013 showing significant reduction in sales volumes and revenues following the removal of the suspension of the relief in 2010. When attempting to pass on the levy in full, […] and […]'s […] site lost […] % of its sales — a significant reduction.

Table 3

The impact of price changes at […] and […]'s […] site between 2009 and 2013

Year	Tonnes	Sales	Avg Price
2009	[…]	[…]	[…]
2010	[…]	[…]	[…]
2011	[…]	[…]	[…]
2012	[…]	[…]	[…]
2013	[…]	[…]	[…]

(31) Processed product sites close to the border with the Republic of Ireland also experienced significant reductions in their sales when attempting to pass on the costs of the aggregates levy in full. For example, […]'s […] in […], which is only a mile from the border, saw its production fall from […] m^3 in 2005 to only […] m^3 in 2013, following an increase in the prices of its materials.

(*) Business secret.

(32) Moreover, the United Kingdom provided information showing the evolution of infrastructure and other public sector work between 2000 and 2012. The evolution shows an increase in public work output in the period 2007 to 2009 followed by a decrease and a slight increase in 2012. However, the Commission notes that construction works in general have been influenced by the economic downturn, therefore, such trends cannot be taken into consideration on a stand-alone basis as they may be due to the economic environment and trends in the construction market.

(33) The United Kingdom also provided tender prices for the period 2007 to 2013 for aggregates purchased by the Northern Ireland Roads Procurement Department (Table 4) including the costs of transportation to the local Roads Department depots. The data clearly shows that after 2010, when the AGL relief was suspended, the prices either decreased, sometimes dramatically, or slightly increased, but to a much lesser extent than the amount of the full rate AGL, GBP 1,95. That shows that even as regards public sales the Northern Ireland aggregates producers could not pass on the AGL to their customers. This is more evident as the public sector is less likely to have been affected by the economic downturn and public sector construction work, such as that carried out by the Roads Department, increased its share of the overall demand for aggregates.

Table 4

Tender prices for the period 2007 to 2013 for aggregates purchased by the Northern Ireland Roads Procurement Department

Year	10 mm chippings (GBP)	Sand for concrete (GBP)	Type 3 stone (GBP)
2007	8,43	9,52	4,67
2008	8,49	9,52	4,70
2009	[…]	[…]	[…]
2010	[…]	[…]	[…]
2011	[…]	[…]	[…]
2012	[…]	[…]	[…]
2013	[…]	[…]	[…]

2.3.4. *Northern Ireland Aggregates Market*

(34) As only Northern Ireland quarries benefited from the AGL relief and not the rest of the United Kingdom, the United Kingdom provided information on why the aggregates market of Northern Ireland is a different geographical market than the United Kingdom's general market and where the differences lie.

(35) The United Kingdom shows that the markets for aggregates in Northern Ireland and in Great Britain are separate and distinct from each other, with very little interplay. The market for aggregates tends to be local in nature due to the relatively high cost of transporting the material in relation to its selling price. Using data available from the Department for Transport, the United Kingdom calculated that the average cost of transporting a tonne of aggregate by road amounts to GBP 0,855 per tonne per mile. The low price of aggregates products means that lengthy journeys will make aggregate products less competitive than material sourced from quarries which are more local to the customer. Moreover, exporters of aggregate material have estimated that the cost of transporting aggregate by sea between Northern Ireland and Great Britain would be approximately GBP[…] per tonne. The sea freight would then be supplemented with the necessary road freight from the quarry to the port and from the wharves of arrival to the place of use. The United Kingdom further shows that the transportation of aggregate between the two regions is uneconomical except in the case of more specialist coloured stone or higher priced aggregate materials. It is estimated that even for those materials, there is likely to be a further GBP […]-[…] per tonne cost of road haulage from a wharf in Great Britain to the nearest asphalt plants.

(36) The supply of aggregates differs greatly between Northern Ireland and Great Britain due to both the availability of materials and the number of different quarry operating companies. Owing to its geological nature, Northern Ireland is able to boast the widest variety of rock types of any comparably sized region of the United Kingdom. Quarries are relatively evenly spread out across Northern Ireland. Whilst different counties have greater deposits of certain rock types, crushed rock aggregates are largely interchangeable, ensuring an abundance of rock suitable for use as aggregate throughout the entire area. On the contrary, the British mainland does not have the same geological variety. Due to the diverse and rich deposits of rock, spread evenly around the country and close to all major markets, Northern Ireland has a far greater supply of interchangeable products than the market in Great Britain. That leads to greater levels of competition in Northern Ireland and reduces the margins Northern Irish aggregate producers have for increasing their prices.

(37) As indicated by the United Kingdom, the far greater proportion of independent quarries and the higher number of quarries per square mile in Northern Ireland also ensures greater competition amongst aggregate suppliers. In Great Britain, upwards of 75 % of all aggregates are supplied by the five major firms ([14]). In contrast, the top five firms in Northern Ireland make up only an estimated 39 % of total aggregate production there.

(38) The United Kingdom show that the two markets are characterised by different demand trends as the fall in demand for aggregates during and since the economic downturn has been far greater in Northern Ireland than in Great Britain. Moreover, as construction output and demand for aggregates decrease, competition amongst quarry operators for the remaining demand intensifies.

(39) Northern Ireland has a far greater disposition towards stand-alone operations, with vertical integration between aggregates, cement and concrete production far less common within the market in Northern Ireland when compared with Great Britain. In Great Britain, as indicated in recital 37, the five largest companies control as much as 75 % of the aggregates output. Those same companies also control 70 % of all ready-mix concrete output, and a large proportion of all asphalt plants, both key markets for aggregate sales. Thus, when construction output decreases and demand for concrete and asphalt is reduced, the five largest companies in Great Britain have control over the reduction in their aggregates output capabilities. In effect, the supply of aggregates will adjust more readily to the demand in Great Britain, limiting the downward pressure on prices. Northern Ireland differs due to the lack of vertical integration of the market, as construction output and demand for aggregates decreases, competition amongst quarry operators for the remaining demand intensifies. That makes the Northern Ireland market far more competitive than Great Britain's, with a higher number of quarries per square mile and per capita and a greater proportion of independent quarries trying to sell their products to independent, stand-alone, processed product plants.

(40) Moreover, the United Kingdom showed that the Northern Ireland aggregates market and the Republic of Ireland aggregates market are very similar.

2.3.5. *Trade exposure*

(41) After the Opening Decision, the United Kingdom provided information on the trade exposure of the Northern Ireland aggregates industry between 2002 and 2013. Official statistics could supply only amalgamated bi-annual figures due to disclosure rules of Her Majesty's Revenue and Customs (HMRC). They do not allow for a breakdown of trade exposure by type of aggregate and for some years' trade statistics are not available at all. Further difficulties were encountered due to the lack of official data on the production of processed concrete and processed asphalt products. In those instances, the United Kingdom has used estimates ([15]) of the market provided by the Quarry Products Association Northern Ireland ('QPANI'). Due to the non-existence of national

([14]) The concentration of a small number of large firms and the vertical integration of their operations were given as some of the reasons for the Office of Fair Trading referring the aggregates, cement and concrete markets to the Competition Commission in August 2011. In the same referral, the Office of Fair Trading distinguishes the Northern Ireland market from the United Kingdom's general market due to its characteristics. Moreover, the Office of Fair Trading considered that the Northern Ireland aggregates market does not pose the same competition concerns as the United Kingdom's general market.

([15]) These mostly draw upon figures from Grant Thornton's InterTradeIreland report, published in 2012, and project the data forward and backwards according to annual percentage changes in overall construction output in Northern Ireland. The figures have also been verified as being fair estimates by key operators within the industry.

statistics for other categories of products, the United Kingdom has provided best guess estimates of the trade exposures of crushed rock, processed concrete products, sand and asphalt. Nevertheless, even given those limitations, the United Kingdom is of the opinion that the data on trade exposure shows the degree of trade between the Republic of Ireland and Northern Ireland. The trade exposure is detailed in Table 5. The figures are based on annual or bi-annual figures for imports and exports and for the annual outputs which were also provided to the Commission.

Table 5

Trade exposure

Crushed Rock Aggregate (GBP)						
	2006-2007	2008-2009				
Imports	13 699 717	5 986 891				
Exports	28 519 715	19 938 824				
Estimated value of domestic sales	160 426 000	143 524 581				
Trade exposure (Imports+Exports)/(Imports+Sales)	24,25 %	17,34 %				
Processed concrete products (GBP)						
	2008	2009	2010	2011	2012	2013
Imports	10	10	9	7	7,5	7,5
Exports	70	35	28	21	16	15
Estimated value of domestic sales	325	276	210	210	216	226
Trade exposure (Imports+Exports)/(Imports+Sales)	23,9 %	15,7 %	16,9 %	12,9 %	10,5 %	9,6 %
Processed asphalt products and sand [1] (GBP)						
	2007-2008	2009-2010	2011-2012			
Imports asphalt products and sand	1 540 633	1 909 210	4 489 366			
Exports asphalt products and sand	12 382 394	6 220 782	4 670 559			
Estimated value of domestic sales of asphalt products and sand	384 518 301	310 666 790	293 343 700			
Trade exposure (Imports+Exports)/(Imports+Sales)	3,61 %	2,60 %	3,08 %			

(1) The United Kingdom showed that the importation of asphalt products and sand rose sharply in the years 2011-2012 following the suspension of the AGL in 2010. However, as a result of the HMRC disclosure rules, it is difficult to disentangle how much of that increase is due to sand and how much is due to processed asphalt products. Nevertheless, it is probable that a large proportion of that increase is attributable in processed asphalt products imported from the Republic of Ireland. Whilst sand would still be subject to the AGL when it is imported into the United Kingdom, processed asphalt products would not and would therefore be able to benefit from lower production costs and be more competitive on the same market in Northern Ireland than local asphalt.

(42) The numbers in Table 5 show that the Northern Ireland aggregates industry is subject to a significant degree of trade exposure in its crushed rock sales. The United Kingdom shows that undeclared imports of aggregates into Northern Ireland increased significantly following the introduction of the AGL in 2002. This undeclared level of importation is likely to have accelerated once again following the suspension of the AGL relief in 2010. A survey undertaken in 2002 by the University of Ulster counted the number of trucks bringing aggregates into Northern Ireland at eight of the more important border crossings. The results of that survey showed that up to 89 trucks were transporting aggregate a day. The annual total of all officially declared imports would have needed only 243 trucks all year. That suggested that the real level of aggregate imports could have been as high as 133 times that recorded by the official statistics in 2002 meaning that the estimated trade exposures are likely to greatly underestimate the actual degree of trade exposure.

2.3.6. *Pass-on and sales reductions*

(43) As regards the pass-on of increased production costs to final customers and potential sales reductions, the United Kingdom had provided information showing that, following the introduction of the levy in 2002, the average price of aggregate in Northern Ireland had increased by much less than would have been expected if the AGL had been passed on in full, and that this was linked to a fall in legitimate sales, which was proportionally much larger than the fall recorded in Great Britain.

(44) The United Kingdom had also explained that the sales of low-grade aggregate and fill, fell in the year ending 31 March 2003 compared with the levels experienced in the two pre-AGL years. The production from legitimate quarries in calendar year 2002 was significantly below the established trend in aggregate sales (generally, over the last 30 years, there had been a rising trend in aggregate sales in Northern Ireland). In Great Britain aggregate production fell in 2002 by 5,7 %, compared with a slight increase the previous year (however, trend analysis showed that, in Great Britain, the production had generally been in a declining trend over the previous 10 years).

(45) The United Kingdom had also explained that once the levy had been introduced at GBP/tonne 1,60, the average price of aggregates in Northern Ireland had risen by about GBP 0,25-0,30/tonne in 2002 compared with 2001, whereas in Great Britain the price had risen by GBP/tonne 1-1,40. Even allowing for the fact that aggregate used in processed products, which benefited from an 80 % relief under the original 2002 degressive credit scheme in Northern Ireland, is included in that average, that implies that quarry operators in Northern Ireland were having to absorb a substantial proportion of the levy. On the assumption that processed products used half of the aggregate production in Northern Ireland, and that their price was unaffected by the levy in 2002, that still implies according to the United Kingdom that, on average, over GBP/tonne 1 of the levy had to be absorbed on each tonne of aggregate sold for use in its raw state.

(46) Following the Opening Decision, the United Kingdom provided further explanations for their assertion in recital 45 that, once the AGL was introduced, the average price in Northern Ireland increased by much less than the rate of the levy, whereas in Great Britain it increased by GBP/tonne 1-1,40 given that manufacturers of processed products from aggregates had never paid the full rate of the AGL. The United Kingdom shows estimates that between a third and half of all aggregate produced in Northern Ireland is used in the manufacture of processed products. Even if, for the sake of argument, one were to take the higher figure and apply the full 100 % relief that applied to processed products during the first year of the levy, and accordingly assume there was no increase in production costs as a result of the levy on 50 % of aggregates, then this only doubles the price increase on the remaining 50 %. Such a doubling would indicate that the increase in price obtained was GBP 0,50-60/tonne, which is still significantly lower than that obtained in Great Britain, and does not come close to passing on the full additional GBP 1,60/tonne cost imposed by the levy in the first of application.

(47) Furthermore, the United Kingdom provided data collected from representative samples of the Northern Ireland aggregates industry as regard the trends in aggregates production, turnover and profits. However, the trends shown are linked and cannot be dissociated from the trends of the constructions market and the economic recession starting in 2008.

(48) The data showed that profitability and prices were already so low before the suspension of the relief scheme that a complete absorption of the tax would not have been financially viable. Companies instead showed that they passed on the tax, and, in return, had to accept further losses in sales, on top of those already caused by the challenging economic circumstances. In order to continue to operate their businesses, the industry delayed critical capital investments, and dismissed personnel. Survey returns indicate that passing the GBP 1,95 per tonne levy on to customers was challenging as prices to customers would increase by between 50 % and 66 %. Due also to

the economic climate, customers are reluctant to pay higher prices and instead either defer investment or look to competitors for alternative materials or a more competitive price. This is damaging to the Northern Ireland aggregates business resulting in a loss of customers, a reduction in sales volumes and pressure to reduce profit margins further.

(49) Therefore, although the data collected from the representative samples of the Northern Ireland aggregates industry are a good indication of the evolution of the turnover and profits of the Northern Ireland aggregates industry, they cannot be dissociated from the economic context and are not conclusive to assess the effects of the full AGL on a stand-alone basis.

2.3.7. *Other information*

(50) The estimated annual budget of the relief scheme (State resources foregone) varied at the time of the original notification between GBP 15 million (2004-2005) and GBP 35 million (2010-2011).

(51) As regards the number of beneficiaries, it was estimated that approximately 170 quarry operators would be eligible for the relief.

(52) The granting authority of the AGL relief in Northern Ireland was HMRC.

2.3.8. *Grounds for initiating the formal investigation procedure*

(53) As explained in recitals 47 to 54 of the Opening Decision, the Commission doubted whether the modified AGL relief applicable in Northern Ireland complied with the Treaty, in particular its Article 110. Those doubts precluded the Commission from finding the measure compatible with the internal market at that stage.

(54) The Commission considered that the AGL amounted to internal taxation within the meaning of Article 110 of the Treaty. It went on to find that there was a distinction in the application of the AGL between producers in Northern Ireland and producers from other Member States that could not be justified.

(55) As explained in recital 56 of the Opening Decision, the Commission considered, based on the relevant case-law, as a result of the annulment of the Decision of 7 May 2004, that the measure as applied since that date (and until its suspension on 1 December 2010) must be viewed as being unlawful. Moreover, the Commission has stated that it will always assess the compatibility of unlawful State aid with the internal market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted ([16]). As the aid is to be considered unlawful and it was granted during the period covering the applicability of the 2001 Environmental Aid Guidelines as well as after the publication of the 2008 Environmental Aid Guidelines ([17]), the Commission assessed the compatibility of the AGL relief scheme under the instrument in force at the time when the aid was granted as follows:

(a) the 2001 Environmental Aid Guidelines; and

(b) the 2008 Environmental Aid Guidelines as from 2 April 2008.

(56) On the assessment of the measure under the 2001 Environmental Aid Guidelines, the Commission concluded that the compatibility conditions laid down therein may be considered as being fulfilled. However, it recalled that in view of the doubts expressed in relation to Article 110 of the Treaty, it was precluded from finding the measure compatible with the internal market on the basis of the 2001 Environmental Aid Guidelines at that stage.

(57) As regards the compatibility of the measure under the 2008 Environmental Aid Guidelines the Commission concluded:

(a) that the AGL relief in Northern Ireland contributes at least indirectly to an improvement in environmental protection and that it does not undermine the general objective pursued by the AGL in accordance with point 151 of the 2008 Environmental Aid Guidelines;

([16]) Commission Notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).
([17]) Community Guidelines on State aid for environmental protection of 2008 (OJ C 82, 1.4.2008, p. 1).

(b) that the beneficiaries of the relief are defined using criteria that are objective and transparent in accordance with point 158(a) of the 2008 Environmental Aid Guidelines;

(c) that the tax without reduction leads to the substantial increase in production costs required by point 158(b) of the 2008 Environmental Aid Guidelines;

(d) that the condition of proportionality of the aid as provided by point 159 of the 2008 Environmental Aid Guidelines is complied with as the beneficiaries of the AGL relief in Northern Ireland still pay 20 % of the tax.

(58) Although the information provided by the United Kingdom showed a very significant increase of the production costs due to the AGL, which would normally make it likely that such increase could not have been passed on without important sales reductions, the Commission at that stage could not conclude in the light of the information provided, in particular the insufficiently detailed information, that the compatibility condition in point 158(c) of the 2008 Environmental Aid Guidelines was met.

(59) Under point 158(c) of the 2008 Environmental Aid Guidelines compliance with the necessity criteria requires that the substantial increase in production costs referred to in recital 58 cannot be passed on to customers without leading to important sales reductions. In that respect, the Member State may provide estimations of, inter alia, the product price elasticity of the sector concerned in the relevant geographic market as well as estimates of lost sales and/or reduced profits for the companies in the sector or category concerned.

(60) The Commission noted in this context that the arguments of the United Kingdom that the increase in production costs could not be passed on without leading to important sales reductions were based on a comparison between the increase in price due to the introduction of the AGL (about GBP 0,25-0,30/tonne in 2002 compared with 2001 in Northern Ireland, whereas in Great Britain the price had risen by GBP/tonne 1 – 1,40). As regards the reduction in (legitimate) sales in Northern Ireland, the Commission noted that they varied in total for all types of aggregates between – 17,6 % (2001-2003) and – 22,8 % (2002-2003) and were proportionally much larger than those recorded in Great Britain. The Commission considered that those arguments could be considered as an indication of the difficulties encountered in passing on the increased production costs in Northern Ireland.

(61) The Commission nevertheless pointed out that the United Kingdom had not provided sufficiently detailed data demonstrating and quantifying the impact on those arguments of the fact that the manufacturers of processed products from aggregates had never paid the full AGL as its introduction in the Northern Ireland had been phased.

(62) Furthermore, with respect to the demonstration of sales reductions, the United Kingdom had not provided explanations concerning the development of the aggregates markets in Northern Ireland after 2002. Figure 2 of the Quarry Products Association Northern Ireland Report to the Office of Fair Trading Market Study into the UK Aggregates Sector [18] as submitted by the United Kingdom showed an increase in production from 2004 to 2007.

(63) The United Kingdom had stated in their submission that the 'costs increase affected operators' turnover and reduced their profits'. Nevertheless, no data supporting that statement had been provided.

(64) To demonstrate its compliance with the compatibility condition under point 158(c) of the 2008 Environmental Aid Guidelines, the United Kingdom had submitted only data on the overall industry level, no representative samples of individual beneficiaries based, for instance, on their size had been provided.

(65) Finally, the Commission noted that the United Kingdom's observations suggested that for most types of aggregates the price elasticity ranged from close to zero to about 0,52, i.e. appearing to be relatively inelastic. In principle that would mean that the increase in production costs could have been passed on to final customers. The United Kingdom had not provided any further explanations nor calculations concerning specifically the impact of the relative inelasticity as concluded on the arguments provided with respect to (the inability to) pass on the production costs increase to final customers.

[18] See: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/markets-work/aggregates/, accessed on 18 July 2014.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments received from QPANI on 23 September 2011

(66) QPANI submitted that the aggregate producers in Northern Ireland entered the relief scheme in good faith relying on the fact that the United Kingdom had sought the approval of the Commission and that the Commission issued a positive decision. In addition, they entered into environmental agreements which meant significant investments on their side.

(67) The applicants that challenged the Commission decision approving the relief scheme never proved with examples that there was actual discrimination against imported aggregates.

(68) QPANI alleges that any recovery of the State aid would breach the legitimate expectations of the quarry operators in Northern Ireland that the aid was lawful. Since the quarry operators already invested to deliver environmental improvements, a recovery order would actually mean that those companies bear the costs twice. In addition, recovery would be contrary to the principle of legal certainty.

(69) QPANI goes on to mention that imported aggregates into Northern Ireland have always been minimal. They show that after the introduction of the AGL imports actually increased as private housing development increased and public sector construction spending increased.

(70) As regards the impossibility for the AGL to be passed on to customers, QPANI puts forward that the significant increase in production costs, already acknowledged by the Commission, could not be passed on due to the over capacity of the aggregates sector and the much more competitive market in Northern Ireland. In addition, in Northern Ireland there is a sizeable volume of material exempt from the AGL, such as shale, which is used both in public and private construction projects and by farmers. A QPANI survey of monthly private stone sales (September 2001-September 2002) showed a considerable drop in business from April 2002 compared to the previous year. The statistics branch of the Department of Enterprise Trade and Investment (NI) in the 2002 annual minerals statement revealed a drop of approximately 2,7 million tonnes in aggregate production in Northern Ireland representing some 11 % of production.

(71) QPANI submits that the Northern Ireland Affairs Committee enquiry, 'Introduction of the Aggregates Levy — One Year On, third report of session 2003 – 2004' brings clear evidence showing the impact on aggregate sales and employment levels by the introduction of the AGL.

(72) QPANI argues that the reason for the increase in aggregate production in Northern Ireland from 2004 to 2007 was a result of increased construction activity within the province.

(73) QPANI further argues that increasing costs affected operators' profit margins as demonstrated by the fact that price increases were only rising by GBP 0,25 to 0,30 as stated in recital 81 of the Opening Decision. Thus they were absorbing the bulk of the increased production costs caused by the AGL and, given the capital intensive and high overhead nature of the industry, it became evident that operators' narrow profit margins were further reduced.

(74) QPANI argues that the data on price elasticity relates to the aggregates market in Great Britain and did not reflect the situation in Northern Ireland.

3.2. Comments received from the British Aggregates Association ('BAA') on 23 September 2011

(75) BAA submits that it would be impossible for the United Kingdom to retroactively rectify the tax discrimination of products imported from other Member States. It is claimed that even if the United Kingdom were to pay back any amounts paid as aggregates levy for products imported into Northern Ireland from other Member States, this could not remove the severe dissuasive effect of the tax discrimination. Therefore, the retroactive approval of the relief scheme would not be possible.

(76) BAA alleges that the AGL relief scheme does not comply with the 2001 Environmental Aid Guidelines. Allegedly the AGL does not have an appreciable impact on the environment as required by point 51(2)(a) of the 2001 Environmental Aid Guidelines; the 2004 relief scheme was not approved when the AGL was adopted as required by point 51(2)(b) of the 2001 Environmental Aid Guidelines; 20 % is not a significant proportion of the tax as required by point 51(1)(b) of the 2001 Environmental Aid Guidelines.

(77) BAA goes on to state that the relief scheme does not comply with the 2008 Environmental Aid Guidelines either. The AGL relief undermines the environmental objective pursued by the AGL, contrary to point 151 of the 2008 Environmental Aid Guidelines, as it has given rise to significant 'importation' of aggregates from Northern Ireland into Great Britain since 2004. That would suggest that the rules requiring aggregate extracted in Northern Ireland, but used in Great Britain, to be taxed at the full rate were being circumvented.

(78) In addition, BAA puts forward that the AGL relief does not comply with point 158(c) of the 2008 Environmental Aid Guidelines as the impossibility of passing on the substantial increase in production costs has not been proven. Specifically, the economic data put forward by the United Kingdom, referred to in recitals 21 to 23 of the Opening Decision, are implausible and possibly misleading. The average prices submitted by the United Kingdom are, allegedly, meaningless, as there are many different types of aggregate and, correspondingly, a large number of prices. In addition, the ex-quarry price also depends on the location of the quarry and the distance from construction sites. Thus, a comparison of the average price for Northern Ireland (a relatively small and rural area) and an average price for the entirety of Great Britain would not be relevant. Allegedly, if indeed ex-quarry prices in Northern Ireland were 50 % lower than the prices in Great Britain, there would have been a huge demand for Northern Irish aggregate in Great Britain. BAA claims that transportation costs from Northern Ireland to London are not higher than transportation costs from Scotland to London.

4. **COMMENTS FROM THE UNITED KINGDOM RECEIVED ON 25 NOVEMBER 2011**

(79) The United Kingdom argues that the aid should not be considered unlawful aid and that, in assessing compatibility of the measure with the internal market, only the 2001 Environmental Aid Guidelines may be applied.

(80) The United Kingdom argues that the Commission should take into account the fact that its Decision of 7 May 2004 approving the aid was declared void due to the Commission's unlawful failure to open the formal investigation. The measure was notified to the Commission and was approved prior to any tax relief being granted. When the aid was granted, it was not unlawful aid.

(81) The United Kingdom allege that since the Decision of 7 May 2004 was void, the Commission did not actually take a decision in accordance with Article 4 of Council Regulation (EC) No 659/1999 ([19]) (the 'Procedural Regulation'), within the time limit of two months. Thus, the measure should be considered as authorised. If Article 4(6) of the Procedural Regulation is applied to the initial notification, then the aid was deemed approved in 2004, and the Commission has no competence to adopt a fresh decision pursuant to Article 4. Instead, the measure is to be treated as existing aid, which is subject to review only as to its future effects and which cannot be the subject of a retrospective recovery order. However, a decision in accordance with Article 4(3) was taken, albeit unlawfully and despite being subsequently declared void, in which case Article 4(6) of the Procedural Regulation is no longer applicable. The United Kingdom claims that it should also be entitled to rely on the fact that an approval decision pursuant to Article 4(3) of the Procedural Regulation was taken prior to the tax relief being granted, so that the grant of aid was not unlawful in the sense of being granted without Commission approval.

(82) The United Kingdom claim that, in this case, the reason the aid is regarded as unlawful is solely that the Decision of 7 May 2004 was declared void in that it failed to open the formal investigation in 2004. It is not the case that the United Kingdom was, at the time the measure was put into effect, in breach of Article 108(3) of the Treaty. In assessing compatibility of the measure with the internal market, only the 2001 Environmental Aid Guidelines should be applied. The Commission should proceed to assess the aid on the basis of the notification in 2004 and apply the rules applicable at that time.

([19]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 of the Treaty] (OJ L 83, 27.3.1999, p. 1).

(83) Since the United Kingdom claims the aid is not unlawful, it alleges that the Commission is not entitled to divide the aid granted between the periods when the 2001 Environmental Aid Guidelines and the 2008 Environmental Aid Guidelines were respectively in force. It follows that, since the Commission has found that the measure was consistent with the 2001 Environmental Aid Guidelines, all aid granted under the scheme should be declared compatible with the internal market.

(84) The United Kingdom rejects the arguments put forward by the British Aggregates Association ('BAA') in its response to the Opening Decision, in which BAA argues that the measure, as notified in 2004, did not comply with the 2001 Environmental Aid Guidelines. The United Kingdom highlights the fact that the Commission already found as stated in recital 63 of the Opening Decision that the AGL had appreciable environmental effects and that BAA does not dispute the Commission's finding that the environmental agreements concluded with aggregates companies in Northern Ireland benefiting from the 80 % AGL relief have positive environmental effects and do not undermine the objectives pursued by the AGL. In addition, the United Kingdom demonstrates that the measure approved by the Commission in 2004 was an extension of the relief scheme that was originally introduced at the same time as the tax. Point 51(2)(b) of the 2001 Environmental Aid Guidelines does not require that every single aspect of the derogation must have been fixed or implemented at the time the tax was introduced. If that were the case it would never be possible to introduce a modified derogation and point 51(2) would be a redundant provision. Moreover, the United Kingdom puts forward that point 51(1)(b) of the 2001 Environmental Aid Guidelines is met and, as the Commission already acknowledged in recital 67 of the Opening Decision, the requirement to pay 20 % of the AGL represents a requirement to pay a significant proportion of the tax. The question whether that proportion is significant must also take into account that quarry operators who are eligible for the relief must bear the costs of making improvements in environmental performance and that aggregate prices are generally lower in Northern Ireland than in the rest of the United Kingdom. In absolute terms, the monetary value of 20 % of the national tax payable is therefore greater than in the rest of the United Kingdom.

(85) The United Kingdom asserts that the notion that the relief scheme could constitute discriminatory taxation contrary to Article 110 of the Treaty is incorrect. Imports from Ireland into the United Kingdom are taxed in an equivalent manner to production within the United Kingdom, including production in Northern Ireland where the conditions for the relief are not satisfied. There is, therefore, no discrimination between products imported from Ireland into the United Kingdom and products produced in the United Kingdom. Northern Ireland is not a Member State, so that it is not appropriate to apply Article 110 of the Treaty to determine that a specific tax treatment of certain producers within that area constitutes discrimination against products imported from other Member States and sold within that area. The United Kingdom alleges that discrimination should be assessed having regard to national products, and, that since the national products in the United Kingdom are subject to the full AGL, there can be no discrimination. Moreover, the fact that certain producers in a given area of a Member State are afforded a tax relief is a matter for State aid control under Article 107 of the Treaty, not Article 110. Only Article 107(3) of the Treaty should be applicable to fiscal aid measures granted to producers and not Article 110. Otherwise all fiscal aid to producers would have to be extended to products from other Member States. Moreover, there is no rule of Union law that requires aid granted by way of a tax relief to producers in a part of a Member State to be made available equally to importers of similar products from other Member States.

(86) The United Kingdom does not accept that the aid is unlawful, but were it to be deemed so by the Commission, they believe that a recovery order is not appropriate. A recovery order would infringe the legitimate expectations of the recipients and would be disproportionate.

5. ASSESSMENT OF THE MEASURE

5.1. State aid within the meaning of Article 107(1) of the Treaty (ex Article 87(1) EC)

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

(88) The AGL relief was granted through State resources, in the form of a tax rate reduction, to companies situated in a defined part of the territory of the United Kingdom (Northern Ireland), favouring them by reducing the costs that they would normally have to bear. The recipients of the aid are involved in the extraction of aggregates or in the manufacturing of processed products, which are economic activities involving trade between Member States.

(89) Accordingly, the Commission concluded in recital 39 of the Opening Decision that the notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty (ex Article 87(1) of the Treaty Establishing the European Community).

5.2. **Assessment of the State aid**

5.2.1. *Legal basis*

(90) As described in recital 55, the Commission concluded that as the aid is to be considered unlawful aid, and, considering the environmental objective of the measure, the Commission should assess the compatibility of the measure according to Article 107(3)(c) of the Treaty based on the legal basis in force at the moment the aid was granted, as follows:

(a) the 2001 Environmental Aid Guidelines; and

(b) the 2008 Environmental Aid Guidelines as from 2 April 2008.

(91) The United Kingdom considers, for the reasons described in recitals 79 to 83, that the aid should not be considered unlawful aid and that it should be assessed only on the basis of the 2001 Environmental Aid Guidelines.

(92) In addition to its findings in this regard in the Opening Decision, given the position expressed by the United Kingdom, the Commission points out that the Court of Justice has consistently held that where a positive Commission decision is challenged within the prescribed time-limits and annulled by the Court, the general principles of Union law, and in particular the principles of legal certainty and protection of legitimate expectations, do not preclude the Commission from declaring that a given aid measure constitutes unlawful and incompatible aid and from ordering recovery. In CELF I ([20]), the Court stated that 'aid implemented after the Commission's positive decision is presumed lawful until the Community court decides to annul that decision. Subsequently, on the latter decision, the aid in question is deemed, in accordance with the first paragraph of Article 231 EC, not to have been declared compatible by the annulled decision, with the result that its implementation must be regarded as unlawful.' In CELF II ([21]) the Court confirms its findings that 'a positive decision of the Commission cannot give rise to a legitimate expectation on the part of the aid recipient, first, where that decision has been challenged in due time before the Community judicature, which annulled it, or, secondly, so long as the period for bringing an action has not expired or, where an action has been brought, so long as the Community judicature has not delivered a definitive ruling'.

(93) The Commission, therefore, maintains its view that the AGL relief should be considered unlawful aid. Consequently, aid granted after 2 April 2008 is subject to the 2008 Environmental Aid Guidelines. Nevertheless, even, as the United Kingdom claims, the AGL relief were to be considered as existing aid, it would still have had to be adapted to the 2008 Environmental Aid Guidelines as per point 200 therein.

5.2.2. *Breach of Article 110 of the Treaty*

(94) As explained in recitals 53 and 54, the Commission considered that the AGL relief not being granted to products imported into Northern Ireland from other Member States could breach Article 110 of the Treaty.

(95) The first paragraph of Article 110 of the Treaty appears to preclude a national scheme such as the AGL relief scheme applicable in Northern Ireland which provides for a reduction of the AGL rate as regards virgin aggregate extracted in Northern Ireland by producers having entered into environmental agreements, whereas identical products imported from other Member States are excluded from the reduced rate scheme and are thus taxed at

([20]) C-199/06 — CELF and ministre de la Culture and de la Communication, paragraph 63, 2008 I-00469.
([21]) C-1/09 — CELF and ministre de la Culture and de la Communication, paragraph 45, 2010 I-02099. See also T-116/01 — P & O European Ferries (Vizcaya) v Commission, paragraph 205, 2003 II-02957.

the full AGL rate [22]. Contrary to the submission of the United Kingdom described in recital 85, the fact that the reduced rate scheme is to apply to a defined area solely, does not change this interpretation. Indeed if provisions, such as the UK relief scheme, were allowed, Member States could easily circumvent the non-discrimination principle laid down in Article 110 of the Treaty.

(96) The Court of Justice has found [23], as the United Kingdom themselves claim, that 'Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 90 EC'. Such differentiation is, however, compatible with Union law, 'only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products'. In respect of the AGL relief, the different treatment of imported aggregates is manifestly not compliant with the requirements for differentiation as laid down by the Court.

(97) The guiding principle in respect of Union law is that the Treaty principles should be interpreted and applied in a way that gives effect to their aims. Article 110 of the Treaty sets out specific provisions in respect of international taxation, which prohibit Member States from imposing internal taxation of a discriminatory nature. In order for a tax measure, which constitutes aid, to be valid the Commission must, therefore, be satisfied that the measure in question, firstly, does not infringe Article 110 of the Treaty, and secondly, satisfies all the relevant conditions set out in Articles 107 and 108 [24]. There is no reason to consider that an aid measure in the form of a tax relief that is applied only in a part of a Member State should constitute an exception from that interpretation.

(98) Nevertheless, the Commission takes note that United Kingdom undertook by way of their letter from 1 April 2014 to rectify the incompatibility of the AGL relief with Article 110 of the Treaty by reimbursing the amounts collected that are incompatible with the internal market in accordance with the criteria described in recitals 99 to 103. The scope of the remedy is to enable acquisitions of aggregate into Northern Ireland from other Member States, and that paid the full rate of the AGL during the period in which AGL relief scheme operated between 2004 and 2010, to benefit from the 80 % aggregates levy credit that was available to Northern Ireland quarry operators participating in the AGL relief. The aim of introducing the proposed scheme would be to address any inequity that may have occurred.

(99) The Commission notes the impossibility, alleged by the United Kingdom in its letter of 17 September 2012, of identifying the foreign quarries that sold aggregates subject to the AGL that were imported and used in Northern Ireland. The Commission further notes that the actual entities paying the AGL were not the foreign quarries, but the importers registered for the payment of the tax. Therefore, it appears appropriate and consistent with the Commission's case practice [25] that the entities actually paying the tax and that caused the aggregates to pass the tax point are the ones entitled to reimbursement. The retroactive scheme proposed ensures that anyone who provides evidence that they accounted to HMRC for the AGL at the full rate on acquisitions of aggregate that were imported into Northern Ireland from other Member States between 1 April 2004 and 30 November 2010 ('the relevant period'), and met specific environmental criteria and specified conditions, would be eligible to claim an 80 % credit on the levy paid.

(100) As the retroactive scheme needs to ensure that only the imports of aggregates from quarries that meet the same environmental standards as the Northern Ireland quarries that were eligible for the relief, benefit from the reimbursement mechanism, the United Kingdom had to provide for a verification mechanism. The Commission acknowledges that for the retroactive scheme to be actually applicable and not unnecessarily burdensome, the United Kingdom will not verify if the foreign quarries met the exact standards imposed on Northern Ireland quarries, as in reality they would have had no incentive to do so, but at least the environmental standards provided at the time by the Union relevant legislation transposed in the respective national legislations. The Department of Environment (DoE) Northern Ireland would assure the environmental standards of any potential claimant and would run a year-long registration period starting from the publication of the draft retroactive relief legislation in the United Kingdom.

(22) See Case C-221/06, Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten, paragraphs 56-73, 2007 I-09643.
(23) Idem 22.
(24) E. Szyszczak, Research Handbook on European State Aid Law, Edward Elgar Publishing Limited, UK, 2011, p. 287.
(25) C-43/02 (ex NN 75/01) — Luxembourg, C-7/05 — Slovenia, NN 162/A/2003 and N 317/A/2006 — Austria, C-4/09 (ex N 679/97) — France.

(101) In order to be entitled to the relief, the claimant would have to show the quarry outside of the United Kingdom from which the aggregate originated and apply to the DoE in Northern Ireland for a certificate that environmental standards compliant with Union legislation were met by the quarry at the time. The DoE would then consult authorities in other Member States to ascertain the applicable standards and their compliance. If satisfied, the DoE would then issue a compliance certificate that would be available to HMRC ([26]) ensuring it had the necessary information to process claims for repayment of levy. For applications regarding the same quarry the same certificate would be applicable.

(102) Claims for reimbursement would have to contain the following documentary evidence: the aggregates have been acquired from a quarry from another Member State during the relevant period; the quarry has been certified by the DoE; the full rate AGL was paid; and no relief for other purposes has been claimed. Proof of acquisition could consist of appropriate commercial documentation showing the date of transaction and the origin of the aggregate. The registered taxpayers' aggregates levy account could serve as proof that the full rate AGL was paid and that no other relief was claimed. This is part of the taxpayers own records as the authorities are only provided with the total amount of the levy due on taxable aggregate commercially exploited. The Commission acknowledges the difficulties that possible claimants could have in providing such documentation due to the long period of time elapsed since the introduction of the AGL relief ([27]). However, it takes note that the United Kingdom is only requiring reasonable proof available for the retroactive relief, in view of the fact that there are no public records with all such information.

(103) The retroactive remedy proposed by the United Kingdom has the following main characteristics:

(a) It will be widely publicised, including through advertisement in the national press in Northern Ireland and the Republic of Ireland. As the tax point for the levy on aggregate originating from a site outside the United Kingdom is when the aggregate is commercially exploited, i.e. subject to an agreement to supply in the United Kingdom, used for construction purposes or is mixed with anything other than water, possible eligible entities could be identified most accurately by relying on aggregates levy registration information in Northern Ireland. Therefore, publicising the retroactive scheme will include, amongst others, letters to each aggregates levy business registered in Northern Ireland, including anyone that might have been registered during the relevant period but who has since deregistered.

(b) It will be legislated for at the next feasible Finance Bill after the Commission's decision. The United Kingdom informed the Commission that work on the draft piece of legislation has already started in April 2014 while already providing the Commission with a specimen of the AGL return form. It is envisaged that the retroactive scheme could enter into force in April or May 2015.

(c) It will provide for a 1 year registration period with the DoE from the point at which draft legislation is published, ensuring that DoE has enough time to investigate the relevant quarries.

(d) It will run for 4 years from the point at which legislation is passed (i.e. after Royal Assent to the relevant Finance Bill).

(e) It will not be limited in terms of the fund's size.

(f) It will include interest payments within the retrospective reimbursement of the levy. The interest rate would be calculated in accordance with Article 9 of Commission Regulation (EC) No 794/2004 ([28]).

(g) It will ensure payments are processed as quickly as possible (the exact period would be dependent upon the time taken by authorities in other Member States to verify the environmental credentials of quarries from which aggregate was imported into Northern Ireland).

(104) The Commission therefore considers that the United Kingdom have undertaken to establish an appropriate instrument to remedy any discrimination which may have occurred in the past.

([26]) HMRC administered the levy and the relief scheme.
([27]) Businesses in the United Kingdom are normally required to keep tax records for six years for aggregates levy purposes.
([28]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

5.2.3. *Assessment under the 2001 Environmental Aid Guidelines*

(105) As indicated in recital 56, the Commission could not positively conclude on its assessment of the AGL relief under the 2001 Environmental Aid Guidelines due to the doubts it had in relation to Article 110 of the Treaty. As the United Kingdom will establish an appropriate instrument to remedy any discrimination stemming from the measure, the Commission can now conclude that the measure is compatible with the internal market on the basis of the 2001 Environmental Aid Guidelines.

(106) The Commission notes the comments submitted by BAA in respect of the assessment of the measure in the Opening Decision and the comments from the United Kingdom in this respect. The Commission finds that no new arguments have been brought forward that had not already been taken into account by the Commission and that there are no reasons why its assessment in the Opening Decision should be altered.

5.2.4. *Assessment under the 2008 Environmental Aid Guidelines*

(107) The Commission assessed in the Opening Decision the compatibility of the measure with the internal market on the basis of the 2008 Environmental Aid Guidelines. The Commission's assessment was positive in all respects except for the compliance with point 158(c) of the 2008 Environmental Aid Guidelines, i.e. with the necessity criteria which requires that the substantial increase in production costs caused by the AGL could not have been passed on to customers without leading to important sales reductions by the beneficiaries of the AGL relief in Northern Ireland.

(108) In the Opening Decision the Commission pointed out that the United Kingdom had not taken into account properly the impact of the fact that the manufacturers of processed products from aggregates had never paid the full AGL on the average price increases in Northern Ireland as compared to price increases in Great Britain in 2001 and 2002 following the introduction of the AGL. The United Kingdom has now provided an estimate on the impact of such processed products on the data showing that, indeed, the level of the price increases points towards the impossibility to pass on the AGL (see recital 46).

(109) Furthermore, with respect to the demonstration of sales reductions, the Commission noted that United Kingdom had not provided explanations concerning the development of the aggregates markets in Northern Ireland after 2002. The data that had been provided showed increase in production as from 2004 to 2007. As indicated in recitals 47 to 49, data from a representative sample of the aggregates producers in Northern Ireland have been provided, including production trends. However, those appear to have followed closely construction trends and were greatly affected by the economic recession starting in 2008 and thus would not be fully relevant in demonstrating sales reductions due to the introduction of the AGL.

(110) The Commission further noted in the Opening Decision that no data had been presented in support of the submission that costs increase affected operators' turnover and reduced their profits. Despite great difficulties in collecting relevant information, the United Kingdom did provide information in support of that allegation, as described in Sections 2.3.4 to 2.3.7. In addition, the United Kingdom provided information showing the high competition which Northern Ireland aggregates producers are facing and their small margins for price increases due to the greater supply of interchangeable products, lack of vertical integration of the market, large number of producers with small market shares (see recitals 34 to 40).

(111) The Commission also noted, in the Opening Decision, that the price elasticity of demand data pointed to the fact that the demand would be inelastic. The United Kingdom has now shown that the respective data referred to the entire United Kingdom and could not be relevant for Northern Ireland alone. The Commission acknowledges the United Kingdom's explanations that the specific elasticity for the Northern Ireland market cannot be calculated.

(112) The Commission notes that, following BAA's comment that the economic data put forward by the United Kingdom, indicated in recitals 21 to 23 of the Opening Decision are implausible and possibly misleading, the United Kingdom provided further, more detailed data (recital 27) as regards the prices of aggregates in Northern Ireland and in Great Britain. The data shows that the AGL at the full rate would have indeed represented a much higher proportion of the selling price in an already suppressed market.

(113) The Commission further considered why it is that the AGL could be passed on to consumers in Great Britain, but not in Northern Ireland. In this respect, the Commission acknowledges the assessment of the United Kingdom as described in recitals 34 to 40, confirmed by the Office of Fair Trading (OFT) in its report on Aggregates ([29]) that the Northern Ireland aggregates market is a different geographical market than that of Great Britain and that there may be less leeway for Northern Irish aggregates producers to pass on the full levy to their customers.

(114) The Commission also notes that the scope for price increases in Northern Ireland is also, apparently, limited to a great extent by the higher production costs they face in many areas. The United Kingdom showed that data provided by four of the top five companies within the industry revealed that profit margins are already extremely tight, with many quarries running at a loss for some years, due also to the higher costs with electricity and planning permissions (see recital 25).

(115) The Commission notes that, although not spread by years and by type of aggregates, the data provided by the United Kingdom and described in Section 2.3.6, do show that the aggregates industry in Northern Ireland was faced with a high trade exposure, in general exceeding 10 % and reaching even 24,25 %. As pointed out by the United Kingdom, due to undeclared imports from Northern Ireland, the trade exposure could possibly even be much higher. In previous practice ([30]), the Commission considered that already a trade exposure above 10 % would constitute a risk to the competitiveness of the respective industry. Moreover, the Commission acknowledged that a high trade exposure in combination with low market shares makes it impossible to pass a substantial extra cost on to consumers ([31]) without losing sales volumes.

(116) The Commission however notes that the data for asphalt and sand do not follow that trend and have a much lower trade exposure. However, sand and asphalt do not follow the same trends as the other virgin or processed aggregates. In general, the figures show a decrease in imports and exports. However, sand and asphalt imports appear to have doubled in recent years. That, of course, affects the calculation of the trade exposure. Mention should be made that imported processed aggregates were never liable for the AGL, meaning that after the suspension of the AGL relief, when Northern Irish asphalt became subject to the full AGL, imported asphalt became automatically much cheaper. Therefore, the imports trend could have been influenced by that price difference.

(117) Moreover, the Commission notes that the aggregates market for all types of virgin aggregates represents a single product market. This is due to the interchangeability of different raw aggregates and has been confirmed by the OFT in its 2012 report ([32]) when it assessed the markets for aggregates (virgin aggregates), cement and ready-mix concrete and did not split the aggregates market. Therefore, the Commission concludes that the different trade exposure levels for sand and asphalt by comparison with the other types of aggregates are not relevant for its assessment as firstly, sand and asphalt are taken together, whereas they are in different product markets, sand belonging to the first category of crushed rock aggregate and asphalt being a processed aggregate, and, secondly, the figures are influenced by imports trends, probably relating to asphalt.

(118) To conclude, the Commission finds that the United Kingdom has now shown that the significant increase of the production costs due to the AGL could not have been passed on without important sales reductions and that the compatibility condition provided by point 158(c) of the 2008 Environmental Aid Guidelines is met.

(119) The Commission can thus positively conclude on the assessment of the compatibility of the measure with the Article 107(3)(c) of the Treaty on the basis of the 2008 Environmental Aid Guidelines.

6. **CONCLUSION**

(120) As explained in recital 40 of the Opening Decision, the Commission found that the United Kingdom had unlawfully implemented the modified relief from the AGL in Northern Ireland in breach of Article 108(3) of the of the Treaty. However, the Commission, in view of the obligations for retroactive remedy undertaken by the United Kingdom, has found that the modified relief from the AGL is compatible with Article 107(3)(c) of the Treaty on the basis of the 2001 Environmental Aid Guidelines and of the 2008 Environmental Aid Guidelines.

([29]) Aggregates — The OFT's reason for making a market investigation reference to the Competition Commission from January 2012.
([30]) N 327/08 — Denmark, recital 64.
([31]) Idem 30, recital 66.
([32]) Idem 28.

HAS ADOPTED THIS DECISION:

Article 1

The modified relief from the Aggregates Levy which the United Kingdom has implemented between 1 April 2004 and 30 November 2010 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union, on condition that the United Kingdom fulfils the undertakings set out in Article 2.

Article 2

1. To remove the discrimination suffered by companies that imported aggregates into Northern Ireland paying the full Aggregates Levy without the possibility of benefiting from the modified relief from that levy applied in Northern Ireland, the United Kingdom authorities shall implement a mechanism to retroactively reimburse 80 % of the full levy collected from importers of aggregates into Northern Ireland between 1 April 2004 and 30 November 2010.

2. The reimbursement mechanism shall provide for a one year registration period with the Department of the Environment Northern Ireland from the date of publication of the draft legislation. The reimbursement mechanism shall run for four years from the date of its entry into force.

3. The reimbursement shall be legislated for at the next feasible Finance Bill after this Decision.

4. The reimbursement mechanism shall not be limited in terms of the fund's size and will include interest payments at a rate calculated in accordance with Article 9 of Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999.

5. The United Kingdom shall widely publicise the reimbursement mechanism, including through advertisement in the national press in Northern Ireland and the Republic of Ireland.

Article 3

Within one year of the date on which this Decision is notified, the United Kingdom shall inform the Commission of the measures taken to comply with it.

It shall send the Commission yearly reports concerning the reimbursement procedure referred to in Article 2, starting from the date on which this Decision is notified until the end of the four year period referred to in Article 2(2).

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 4 August 2014.

For the Commission

Joaquín ALMUNIA

Vice-president

COMMISSION DECISION (EU) 2015/1584

of 1 October 2014

on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. and various air carriers operating at Alghero airport

(notified under document C(2014) 6838)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) On 22 December 2003 the Commission received a complaint from the Italian air carrier Air One S.p.A. ('Air One'), alleging that managers of several Italian airports had granted unlawful aid to Ryanair Ltd ('Ryanair') by means of several agreements setting up operating conditions at the airports. The airports concerned were Alghero, Pescara and Rome, managed respectively by Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. ('So.Ge.A.AL'), SAGA S.p.A. and Aeroporti di Roma S.p.A., as well as the airports of Pisa, Treviso and Bergamo ('Orio al Serio').

(2) By letter of 11 June 2004 Air One called upon the Commission to define its position with regard to its complaint in accordance with Article 265 of the Treaty and introduced an application for failure to act before the General Court. The Court dismissed the action [2].

(3) By letter of 9 July 2004 the Commission forwarded a non-confidential version of the complaint to Italy. After the Commission agreed to an extension of the deadline, Italy's comments on the complaint were submitted by letters of 5 October 2004 and of 5 November 2004.

(4) Additional information was requested by the Commission by letter of 14 March 2005. After the Commission agreed to an extension of the deadline, Italy submitted the requested information by letter dated 17 June 2005. By letter of 30 June 2005 Italy submitted further information to the Commission.

(5) By letter of 21 November 2005 Air One requested the Commission to extend its investigation to Bari and Brindisi airports. By letter of 18 May 2006 Air One formally called upon the Commission to define its position under Article 265 of the Treaty. The Commission replied by letter of 14 July 2006.

(6) By letters of 26 October 2006 and 10 January 2007 Air One limited its objections to the presumed aid granted under the agreements signed between the Alghero airport manager, So.Ge.A.AL, and Ryanair. On 12 February 2007 Air One called upon the Commission to comply with Article 265 of the Treaty.

[1] OJ C 38, 12.2.2008, p. 19 and OJ C 40, 12.2.2013, p. 15.
[2] Judgment of 10.5.2006 in case T-395/04, *Air One SpA v Commission of the European Union* [2006], ECR II — 1347.

(7) By letters of 27 June 2006 and of 30 November 2006 the Commission requested further information from Italy. That request was partially addressed by Italy's letter of 17 January 2007. The Commission requested additional information from Italy by letter dated 19 February 2007. Italy replied to that request by letters dated 16 March 2007 and 26 March 2007.

(8) Having examined the information supplied by Italy, on 12 September 2007 the Commission decided to open the investigation procedure laid down in Article 108(2) of the Treaty ('the 2007 Decision'). The 2007 Decision was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measures under investigation.

(9) By letters dated 15 October 2007 and 22 October 2007 Italy requested the Commission to extend the deadline to submit its observations on the assessment in the 2007 Decision. The Commission granted an extension of the deadline by letter of 23 October 2007. Italy submitted its observations on the 2007 Decision on 14 November 2007.

(10) The Commission published a corrigendum to the 2007 Decision on 12 February 2008 [4].

(11) On 18 February 2008 Ryanair submitted its observations on the assessment in the 2007 Decision. So.Ge.A.AL submitted its observations on the same date. Further information was submitted by So.Ge.A.AL by letter dated 16 June 2008. On 20 February 2008 Italy forwarded to the Commission the observations of the Sardinian Region ('RAS').

(12) The observations of Ryanair and So.Ge.A.AL were forwarded to Italy by letter dated 28 February 2008.

(13) By letter of 20 June 2008 Air One supplemented its original complaint. The Commission sent that submission to Italy for comments on 10 December 2008. By letter dated 15 January 2009 the Italian authorities requested an extension of the deadline to submit comments on Air One's submission. The Commission agreed to extend the deadline by letter dated 20 January 2009. On 13 February 2009 Italy submitted its observations to the Commission.

(14) On 1 September 2008 the Commission contacted Ecorys Netherlands BV ('Ecorys') to carry out an economic valuation in relation to several on-going State aid investigations, including the one concerning Alghero airport. The analysis addressed, inter alia, the behaviour of the airport manager So.Ge.A.AL and the local authorities with respect to the agreements concluded between So.Ge.A.AL and air carriers and the extent to which the arrangements with the air carriers operating at Alghero airport were compliant with the Market Economy Operator Principle ('MEOP'). Ecorys submitted its final report on 30 March 2011 ('the Ecorys Report').

(15) By letter of 5 March 2010 Ryanair submitted to the Commission further information concerning all on-going State aid investigations involving Ryanair, among which the one related to Alghero airport.

(16) On 30 March 2011 the Commission sent a request for additional information to Italy. By the same letter, the Commission forwarded to Italy the English version of the Ecorys Report.

(17) The Commission sent a request for information to Ryanair on 8 April 2011. Ryanair replied to that request by letter dated 22 July 2011.

(18) By letters dated 23 May 2011 and 30 May 2011 Italy requested an extension of the deadline to provide the information requested by the Commission on 30 March 2011. By the same letter, Italy requested the translation into Italian of the English version of the Ecorys Report. On 1 June 2011 Italy confirmed the translation request. On 1 August 2011 the Commission sent to Italy the translation into Italian of the Ecorys Report.

(19) By letters dated 31 August 2011 and 9 September 2011, Italy (both RAS and the Italian Ministry of Transport) replied to the Commission's request for information of 30 March 2011.

(20) By letter dated 19 October 2011 the Commission forwarded Ryanair's reply of 22 July 2011 to Italy. By letter dated 16 November 2011 Italy asked for an extension of the deadline for comments. By the same letter Italy

(3) OJ C 12, 17.1.2008, p. 7.
(4) See footnote 1.

asked for the translation into Italian of the Economic Market Economy Investor Principle Assessment Report (the '2011 MEOP Report') attached to Ryanair's reply. By letter of 17 November 2011 the Commission agreed to extend the deadline. On 23 January 2012 the Commission sent the Italian version of the 2011 MEOP Report to Italy. On 15 February 2012 Italy submitted its comments on Ryanair's observations, notably on the 2011 MEOP Report.

(21) On 17 February 2012 the Commission sent a request for information to Ryanair concerning a series of on-going State aid investigations, including the one on Alghero airport. Ryanair replied to this request by letter of 16 April 2012.

(22) On 27 June 2012 the Commission extended the formal investigation procedure to include additional measures taken by Italy that were not subject to Air One's complaint ('the 2012 Decision') ([5]). The 2012 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation.

(23) Italy submitted its observations on the 2012 Decision on 31 August 2012, 3 October 2012, 19 October 2012, 22 October 2012 and 20 February 2013. The Commission received comments from four interested parties: So.Ge.A.AL, Ryanair, Airport Marketing Services Ltd ('AMS') and Unioncamere. Ryanair's submission included an updated MEOP report ('the 2013 MEOP report'). The Commission forwarded the comments from interested parties to Italy, which was given the opportunity to react. Italy's observations on the comments submitted by interested parties were received on 6 September 2013 and 13 November 2013.

(24) Several submissions were received from Ryanair on 20 December 2013, 17, 24 and 31 January 2014. The Commission forwarded all submissions relevant to Alghero airport to Italy on 9 January 2014 and 5 February 2014. On 24 February 2014 Italy asked for the translation into Italian of the submissions from Ryanair forwarded to it by letter of the Commission of 5 February 2014. By letter of 8 April 2014 the Commission forwarded to Italy the Italian version of Ryanair's submissions as requested.

(25) By letter dated 23 December 2013 the Commission requested additional information from Italy on the measures subject to the investigation. After an extension of the initial deadline set, Italy provided a partial reply to the Commission's request on 18 February 2014. On 4 March 2014 Italy was reminded of its obligation to provide a comprehensive reply to all questions addressed to it in the Commission's letter of 23 December 2013. Italy provided the information requested by letter of 25 March 2014.

(26) On 14 March 2014 the Commission informed Italy and the interested parties to the procedure that the Commission guidelines on State aid to airports and airlines ('the 2014 Aviation Guidelines') ([6]) were adopted on 20 February 2014 and invited Italy to submit comments within 20 working days of the publication of the 2014 Aviation Guidelines. Italy did not reply to the Commission's letter 14 March 2014.

(27) The Commission requested further information from Italy by letter of 21 March 2014. After an extension of the initial deadline set, Italy provided the information requested on 25 April 2014 and 8 May 2014.

(28) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports ('the 2005 Aviation Guidelines') ([7]).

(29) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within one month of the publication date. So.Ge.A.AL submitted its comments on 8 May 2014. So.Ge.A.AL's comments were forwarded to Italy on 22 May 2014.

(30) The Commission requested further information from Italy by letter of 26 May 2014. Italy provided the information requested on 10 June 2014, 28 July 2014, 20 and 27 August 2014, 1 and 19 September 2014.

([5]) See footnote 1.
([6]) OJ C 99, 4.4.2014, p. 3.
([7]) OJ C 312, 9.12.2005, p. 1.

(31) By letter of 11 September 2014, Italy informed the Commission that it exceptionally accepts that this Decision be adopted in English only.

2. GENERAL INFORMATION ON ALGHERO AIRPORT

(32) Alghero airport is situated in the North-West of the Italian island of Sardinia. Alghero was initially set up as military airport and opened to civilian traffic in 1974. Airport infrastructures and facilities are owned by the State through the *Ente Nazionale Aviazione Civile* ('ENAC'), which is the Italian National Civil Aviation Authority.

(33) As regards the distance between Alghero airport and the other Sardinian airports, Alghero airport is located 128 km from Olbia airport, 133 Km from Oristano airport, 225 Km from Tortolì — Arbatax airport and 235 km from Cagliari airport ([8]). According to Italy, due to its geographical position and the specific features of the transport network (road and rail modes), Alghero airport is not substitutable with any of those neighbouring airports.

(34) Passenger traffic at the airport increased from 663 570 in 2000 to over 1 million in 2005 and nearly 1,6 million in 2013.

Table 1

Passenger traffic at Alghero airport

Year	Passengers
2000	663 570
2001	680 854
2002	803 763
2003	887 127
2004	997 674
2005	1 078 671
2006	1 069 595
2007	1 299 047
2008	1 379 791
2009	1 506 080
2010	1 387 287
2011	1 513 245
2012	1 512 954
2013	1 563 020

(35) Ryanair has been the main airline using the airport since 2000. However, other airlines, including other low-cost carriers, have also operated at the airport since 2000 (Germanwings, Air Italy, Air Dolomiti, Air Vallée, Meridiana, Alpi Eagles, bmibaby, easyJet, Air One, Volare, Alitalia) ([9]).

([8]) See http://servizi.aci.it/distanze-chilometriche-web.
([9]) In the course of the investigation Italy informed the Commission that the legal successor of Volare is CAI Second S.p.A., a subsidiary of Alitalia — Compagnia Aerea Italiana S.p.A. Likewise, Air One S.p.A. merged with Alitalia — Compagnia Aerea Italiana S.p.A.

(36) At Alghero airport, fees charged to airlines are usually set on the basis of a published schedule of airport charges which includes the following items: take-off and landing charge, passenger charge, security charge, baggage screening charge and ground handling service charge.

3. **MANAGEMENT OF ALGHERO AIRPORT**

3.1. So.Ge.A.AL

(37) So.Ge.A.AL was established in 1994 as the manager of Alghero airport. The company had an initial capital of ITL 200 million (EUR 103 291,4), entirely subscribed by local public bodies. The majority of the capital was held (directly or indirectly through Società Finanziaria Industriale Regione Sardegna — SFIRS S.p.A ('SFIRS') by the RAS. SFIRS was set up as investment company of RAS ([10]).

(38) Although the composition of So.Ge.A.AL's capital varied in the course of the years, since 1994, the company has always been wholly owned by public bodies: the Chamber of Commerce of Sassari, the Province of Sassari, the Municipality of Sassari, the Municipality of Alghero, RAS and SFIRS S.p.A.

(39) In 2010 So.Ge.A.AL's shares were held 80,20 % by RAS and 19,80 % by SFIRS.

3.2. THE MANAGEMENT CONCESSION

(40) On 28 May 2007 So.Ge.A.AL signed with ENAC a Convention for the forty-year 'comprehensive' management concession ([11]) of Alghero airport ('the Convention') ([12]). Prior to 2007, Alghero airport was managed by So.Ge.A.AL on the basis of a 'temporary' management concession awarded to it on 11 February 1999.

(41) In Italy the concession for the management of an airport is awarded by ENAC based on the assessment of the sustainability of a business plan, which includes an action plan, an investment plan and an economic-financial plan. In the action plan the airport manager outlines its economic programming strategies as well as the organisational structure. The investment plan consists of a brief report on the planned actions and their technical, economic and administrative feasibility. The economic-financial plan illustrates the financial balance of the airport management.

(42) According to Article 8 of the Convention, So.Ge.A.AL's proceeds consist of:

(a) user fees of airports as per Italian Law No 324 of 5 May 1976 and subsequent modifications;

(b) loading and unloading fees for goods transported by air as per Italian Law No 117 of 16 April 1974;

([10]) RAS holds 100 % of the share capital of SFIRS. SFIRS prepares plans and programmes and drafts guidelines targeting the region's economic and social development.

([11]) Airport infrastructure is owned by ENAC, which either operates it directly or assigns it to third parties via concessions. Traditionally, four types of airport management models existed in Italy: (i) airports managed directly by the State, which was responsible for the construction and maintenance of all airport infrastructure, incurred all costs and retained all revenue; (ii) airports managed under a *temporary* concession, in which case the airport manager, on the basis of a temporary authorisation, could operate the airport infrastructure and retain the revenues from commercial activities; (iii) airports managed under a *partial* concession, in which case the airport manager retained all revenues resulting from the use of passenger and freight terminals and main airport services (e.g. handling), while the State through ENAC retained all revenue from airport charges (landing and departure fees, aircraft parking fees and passenger embarking fees); (iv) airports managed under a *comprehensive* concession, in which case the airport manager was responsible for the management of all infrastructure (including airside) and the provision of all airport services and collected all revenues derived from airport operations for a duration of up to forty years. As of 2007 ENAC may provisionally entrust holders of *partial* concessions (including those only *temporarily* entrusted with the management of the infrastructure) with the management of the airport under a *comprehensive* management regime, by limiting the right to use revenues from user rights to the urgent measures required for the airport manager to perform its activity, as laid down in an action plan (*Piano di interventi*).

([12]) The Inter-Ministerial Decree 125 T for the award of the concession to So.Ge.A.AL was issued on 3 August 2007.

(c) concession fees for security services determined in accordance with Italian Law 248/2005 and subsequent modifications;

(d) revenues deriving directly or indirectly from running the airport, as well as from the use of airport areas and facilities by third parties, provided for in the Italian Legislative Decree No 18/1999.

(43) Airport managers must pay an annual concession fee to ENAC for the right to manage the airport, in the amount and according to the procedures defined by the relevant laws in force (for details on the setting of concession fees see recitals 155 to 157).

(44) Based on Article 12 of the Convention, each year beginning with the year of award of the concession, the airport manager must submit to ENAC a report on the status of implementation of the action plan. In addition, the airport manager must submit to ENAC for approval, no longer than six months prior to the expiry of each four-year period of the concession, the business plan (including the investment plan and the action plan) for the following four-year period. Penalties apply in case of non-compliance by the airport manager with those obligations.

(45) According to Article 14*bis* of the Convention, the concession will be revoked and the Convention legally terminated in the event of: (i) non-implementation within the set deadlines of the measures described in recital 44; (ii) delay of more than 12 months in paying the concession fee owed by the airport manager; (iii) bankruptcy or (iv) non-achievement of economic-financial balance by the end of the first four-year period.

3.3. THE PUBLIC POLICY REMIT

(46) By letter of 18 February 2014 Italy claimed that So.Ge.A.AL does not carry out activities falling within the scope of the public policy remit ([13]).

(47) So.Ge.A.AL would however make available airport premises for the purpose of the provision of certain services by the State in its exercise of public powers and bear the costs for the maintenance and administration of the areas in question.

(48) By letter of 10 June 2014 ([14]) Italy reconsidered its position and claimed that the costs incurred in the administration of those airport premises would fall within the public policy remit. As regards the legal framework, Italy submitted that there are legal rules strictly imposing those costs on airport managers. In particular, the airport manager is bound to make available to ENAC and other public entities (the Air Border Police, the Customs Agency, the Finance Guard, the Office of Maritime, Air and Border Health, the Italian Red Cross, the Fire service, the Police) certain airport areas and bear the corresponding administration and maintenance costs ([15]). The obligation on airport managers to make available to public entities airport premises and to bear the respective costs was laid down by the Framework Convention for the award of the management of Italian airports referred to by the Italian Disposition No 12479 of 20 October 1999 of the Ministry of Transport and Navigation, adopted in application of Ministerial Decree No 521 of 1997. The relevant provisions were transposed in the Convention, which lays down in its Article 4(1)(c) the obligation on the airport manager 'to carry out the activities required to support the activities within the responsibility of the State, of the emergency and health services, within airport premises'. According to Italy the total operating costs incurred by So.Ge.A.AL in the maintenance of those areas in the period 2000-2010 amounted to EUR 2 776 073 ([16]).

(49) In addition, Italy submitted that EUR 1 284 133 of the total costs of investment in the new terminal would represent the costs of construction of areas which So.Ge.A.AL is bound to make available to public entities and would therefore also qualify as costs incurred in the provision of activities falling within the public policy remit (see also recital 86).

([13]) In that respect, the Commission recalls that the Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid. See in this sense Case C-118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8, Case C-30/87 *Bodson/Pompes funèbres des régions libérées*, [1988] ECR I-2479, paragraph 18, Case C-364/92 *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission*, [2009] ECR I-2207, paragraph 71.

([14]) In reply to Commission's request of information of 26 May 2014.

([15]) Paragraphs 7 and 8 of Article 4 and Article 11 of the 2007 Convention.

([16]) Annex 22 of letter of Italy of 10 June 2014.

3.4. CONCESSION FEES PAID BY So.Ge.A.AL

(50) The (management and security) concession fees paid by So.Ge.A.AL between 2000 and 2010 are shown in Table 2 ([17]).

Table 2

Concession fees paid by So.Ge.A.AL during 1998-2010 (EUR)

Description	1998	1999	2000	2001	2002	2003	2004
Management concession fee to the Ministry	139 572	166 505	243 880	266 205	312 950	371 912	418 358
Security concession fee	—	—	—	—	—	—	—
Total	**139 572**	**166 505**	**243 880**	**266 205**	**312 950**	**371 912**	**418 358**
Description	2005	2006	2007	2008	2009	2010	Total
Management concession fee	473 836	119 197	171 019	232 130	267 009	171 005	2 643 514
Security concession fee	7 092	37 324	45 439	48 205	52 618	48 571	239 249
Total	**480 928**	**156 539**	**216 458**	**280 335**	**319 627**	**219 575**	**2 882 763**

3.5. FINANCIAL SITUATION OF So.Ge.A.AL

(51) So.Ge.A.AL's financial results were negative during the period 2000 - 2010. According to Italy, the poor performance of the company was the result of the delay in the award of the 'comprehensive' concession for the management of the airport. Following the award of the concession, the economic crisis resulted in a sharp downturn in passenger numbers which affected negatively the airport activity.

(52) In August 2011 Italy submitted to the Commission a report assessing the financial situation of Alghero airport during the period 2000-2010 ('the Accuracy Report') ([18]). Based on the Accuracy Report So.Ge.A.AL's annual financial results were as follows:

Table 3

Financial results of So.Ge.A.AL 2000 – 2010 (in thousand EUR)

Year	Result
2000	(32,2)
2001	(790,7)
2002	(47,3)
2003	(951,0)
2004	(2 981,7)

([17]) In addition to the concession fee paid for the management of the airport, as of 2005 So.Ge.A.AL also paid a 'security concession fee', for the right to provide security services at the airport and charge fees for security services.

([18]) 'Project Nuraghe — Il caso So.Ge.A.AL', 29 August 2011, prepared by Accuracy, submitted to the Commission by letter of Italy of 31 August 2011, Annex 1.

Year	Result
2005	(2 064,7)
2006	(1 108,2)
2007	(1 800,8)
2008	(4 577,3)
2009	(12 404,1)
2010	(1 847,2)

(53) In the course of the investigation Italy submitted to the Commission So.Ge.A.AL's annual reports ('Relazione sulla gestione del bilancio') for the period 2000 – 2010 ([19]).

(54) So.Ge.A.AL reported a loss of ITL 1 530 960 048 in 2001. So.Ge.A.AL reported negative figures in 2002 and 2003 as well.

(55) So.Ge.A.AL closed 2004 with a EUR 2 981 688 loss. It continued to mark up losses in 2005 and 2006. It further recorded a EUR 1 801 000 loss in 2007 despite being awarded the 'comprehensive' concession for the management of the airport on 3 August 2007. Based on the 2007 annual report, unforeseen events worsened So.Ge.A.AL's financial performance in 2007.

(56) So.Ge.A.AL reported losses worth EUR 4 577 000 in 2008 and EUR 12 404 126 in 2009.

(57) In its 2009 annual report, So.Ge.A.AL took note that based on the 2007 Convention it had to break-even within four years from the award of the concession. Considering its poor financial situation in 2009, So.Ge.A.AL proposed the preparation and adoption of an updated business plan which it described as necessary to bring forecasts more in line with market developments. In that sense the business plan prepared by Roland Berger (see recitals 64-70) was considered insufficiently reliable.

(58) A EUR 1 847 165 loss was further reported for 2010. Reportedly traffic figures continued to develop positively, even in what was a difficult economic environment impacted by the volcanic ash crisis, which had led to the temporary closure of European air space.

4. **THE BUSINESS PLANS**

(59) Since 1999, So.Ge.A.AL has drawn up several business plans, which are briefly summarised in recitals 60 to 75.

4.1. THE 1999 BUSINESS PLAN

(60) The 1999 business plan covers the period between 1999-2007 in two successive phases:

(a) 1999-2001: over that period, So.Ge.A.AL planned in particular a capital increase, the launch of its privatisation, the award of the 'comprehensive' concession, investments in airport infrastructure, the start-up of new scheduled flights by two airlines and the definition of a marketing and commercial development plan;

(b) 2002-2007: this phase was due to be devoted to the development of the business based on the improved airport infrastructure.

(61) The business plan assumed the award of the 'comprehensive' concession in 1999, following an increase in So.Ge.A.AL's capital to ITL 6 billion.

([19]) Letters of Italy of 26 October 2012 and 18 February 2014.

(62) The business plan assumed a diversification of airline connections by attracting two fast growing low-cost airlines as major growth driver. One air carrier was to take up operations from Alghero airport on the Alghero — Milan route in 1999 and a second one to start-up the Alghero — London route in 2000, with three flights per week operated at discounted promotional fees for the first year.

(63) The traffic forecasts showed Alghero airport reaching 1 million passengers in 2004 up to 1,1 million in 2007 as a result of the start-up of new routes by the two air carriers mentioned in recital 62, which at the time the business plan was prepared were negotiating airport services agreements with So.Ge.A.AL.

4.2. THE ROLAND BERGER PLAN

(64) The 2004 plan prepared for So.Ge.A.AL by consultancy Roland Berger ('the Roland Berger Plan') provided for a detailed forecast for the period 2004-2008. The main elements of the business plan were:

(a) Increase in low-cost traffic from 20 to 44 % of the overall traffic at the airport, up to 620 000 passengers in 2008;

(b) Growth in non-aeronautical revenues from 2,2 EUR/pax to 5 EUR/pax ([20]);

(c) Growth in aeronautical revenues from 6,8 EUR/pax in 2003 to 7,47/7,75 EUR/pax in 2008;

(d) EUR 42,6 million of investments in infrastructure and equipment, of which EUR 41,3 million would be covered by public funding.

(65) In order to understand how Alghero airport performed against the market, its performance was benchmarked against that of comparable airports:

(a) handling revenues and revenue from non-aeronautical sources such as parking, rental cars, fuel flow, and retail and food concessions were reportedly below sector average; spend per passenger varied from half to one third of that recorded by small airports, and was less than one fifth of that of larger airports;

(b) poor revenue performance was confirmed by the spend per passenger in line with that of Puglia airport, which recorded a negative net operating result;

(c) operating costs were however aligned with the best performing Italian airports.

(66) The projections developed in the Roland Berger Plan depicted future operating revenues and expenses of the airport manager based on two scenarios: development of the airport under a 'temporary' concession scenario versus a 'comprehensive' concession scenario. Under the first scenario the airport was expected to continue to mark up losses until 2008, whereas under the second, the airport would breakeven already in 2005 based on annual revenues higher by 7 % on average in a 'comprehensive' concession scenario as compared to the 'temporary' scenario (largely due to higher non-aeronautical revenues — a more efficient advertising business, car park operation and fuel sales were expected to drive commercial income upwards). Financial outcomes for aeronautical activity were expected to be negative even in a 'comprehensive' concession scenario.

(67) The Roland Berger Plan showed underperforming handling income largely on account of low-cost traffic. Handling was expected to continue generating losses on the medium term even in an optimistic approach. It was estimated that the foregone revenues deriving from the handling of low-cost traffic would equal EUR 3,2 million in 2008.

([20]) Airports have two key elements of income: aeronautical income, which is derived from charges levied on airlines for their use of the facilities by both aircraft and passengers, and commercial income derived from commercial activities at the airport site including retailing, car parking, catering and office/property rentals.

(68) Based on the Roland Berger Plan, the airport's primary focus in order to reverse previous declines and reach breakeven point was to drive commercial revenue, until the point where spend per passenger was brought in line with that of comparable airports (from EUR 2,2 to EUR 5 per passenger). Low-cost traffic was expected to be the main non-aeronautical revenue generator for the period 2004-2008 and to mitigate losses in aeronautical business. The projections showed 620 000 low-cost passengers in 2008.

(69) The Roland Berger Plan also noted that a continuation of the management of the airport under a 'temporary concession' could require the recapitalisation of So.Ge.A.AL to cover operational losses.

(70) The Roland Berger Plan was updated twice, in 2007 and 2008, to take into account developments in the sector. The updates proposed concrete actions for the development of the airport in the period 2008-2011, by increasing both aeronautical revenues — notably from the handling business, and non-aeronautical revenues.

4.3. THE BUSINESS PLAN FOR THE AWARD OF THE CONCESSION

(71) So.Ge.A.AL's business plan drawn up in view of the award of the comprehensive concession was approved in September 2005 and provided for a forecast of revenues and costs for the forty-year duration of the concession for the management of the airport, on the assumption that the concession would be granted to So.Ge.A.AL in 2006.

(72) Forecasts of annual traffic showed a steady year-on-year increase of 4,5 % until 2010, 2,6 % from 2011 to 2025 and 3,78 % during 2006-2025, to around 2 800 000 million passengers approaching 2045. Non-aeronautical revenue was budgeted to increase from an annual EUR 2 929 000 in 2006 to EUR 8 814 000 in 2045. Likewise, aeronautical revenues were expected to increase from EUR 9 288 000 in 2006 to EUR 29 587 000 at the end of the forty-year period. The forecasts assumed a 20 % reduction in aeronautical revenues upon the airport reaching the 2 million passengers ceiling and the consequent entry on the market of an additional provider of ground handling services in accordance with the EU rules on ground-handling at European airports ([21]).

(73) EUR 143,3 million of capital expenditure were foreseen between 2006 and 2045. The plan included a detailed programme of capital investments per year during 2006 – 2045 and listed the sources of financing (private or public) for these investments.

4.4. THE 2010 REORGANISATION AND RESTRUCTURING PLAN

(74) The 2010 reorganisation and restructuring plan was endorsed by RAS in September 2010. The plan provided for a comprehensive analysis of the economic situation of So.Ge.A.AL for the period 2000-2010 and projected the company's return to viability in 2012, also taking into account a recapitalisation of the company envisaged for 2010.

(75) According to the 2010 reorganisation and restructuring plan, So.Ge.A.AL's poor performance until 2010 was the result of inadequate management, inefficient ground handling activity, infrastructure deficiencies and insufficient aeronautical and non-aeronautical revenues.

5. **MEASURES SUBJECT TO INVESTIGATION**

(76) The following measures are subject to the investigation opened and extended by the 2007 and 2012 Decisions respectively:

(a) Measures in favour of the airport manager So.Ge.A.AL:

— Capital injections by RAS and other public shareholders;

— Contributions for 'fittings and works' from RAS;

— Financing of airport infrastructure and equipment by the State.

(b) Potential aid in various agreements concluded with airlines using the airport as of 2000.

([21]) Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36).

5.1. MEASURES IN FAVOUR OF So.Ge.A.AL

5.1.1. **Measure 1 — Capital injections**

(77) Italian law requires airport managers to maintain a minimum level of capital depending on traffic volumes ([22]): for airports with traffic between 300 000 and 1 million passengers, the minimum capital required was set at EUR 3 million, whilst for traffic between 1 million and 2 million, the threshold was set at EUR 7,5 million. In the course of the investigation Italy maintained that the capital injections carried out by So.Ge.A.AL's public shareholders primarily aimed at restoring the company's capital eroded by losses to the level imposed by national law.

(78) Based on the information provided by Italy, between 2000 and 2010, So.Ge.A.AL's public shareholders injected fresh capital in the company on several occasions as follows ([23]):

Table 4

Operations on So.Ge.A.AL's capital

Year	Description	Meeting of So.Ge.A.AL's Shareholders Assembly	Capital injection (EUR)
2003	Injection to restore capital eroded by losses and increase capital to EUR 7 754 000	9 May 2003	5 198 000
2005	EUR 3 933 372,17 injection to restore capital eroded by losses	29 April 2005	3 933 372,17
2007	EUR 3 797 185 injection to restore capital eroded by losses	31 October 2007	3 797 185
2009	EUR 5 649 535 injection to restore capital eroded by losses	26 January 2009	5 649 535
2010	EUR 12 508 306 injection to restore capital eroded by losses	21 May 2010	12 508 306

5.1.2. **Measure 2 — Financing of 'fittings and works'**

(79) According to the information provided by Italy, from 1998 to 2009, So.Ge.A.AL received contributions from RAS for 'fittings and works' for a total amount of EUR 6 540 269.

(80) In its comments on the 2012 Decision Italy clarified that the main objective of the 'fittings and works' measures was to upgrade airport infrastructure. Italy referred to the general definition of public works ('lavoro pubblico') provided in Article 2, paragraph 1 of the Italian Law No 109 of 11 February 1994 ('Legge quadro in materia di lavori pubblici') ([24]), namely the 'activities of construction, demolition, restoration, renovation and maintenance of works and installations, including defence of the environment and bioengineering' ([25]). Italy clarified that the funding in question was eventually used for the financing of the works on the passenger terminal, upgrading of the external road connections, upgrading of the aircraft parking areas as well as equipment necessary for the operation of the airport.

([22]) See in particular Article 3 of Ministerial Decree 521/1997.
([23]) Letter of Italy of 31 August 2011, Annexes 7 and 23. For the breakdown of the public financing between the public shareholders, including contributions by SFIRS for 2007, 2009 and 2010, see Annex 1 (Accuracy Report) of that letter, p. 40.
([24]) Letter of Italy of 22 October 2012.
([25]) This definition was implemented by Article 3, paragraph 8 of the Legislative Decree No 163 of 12 April 2006 ('Codice dei contratti pubblici relativi ai lavori, servizi e furniture').

(81) Based on those clarifications, in the assessment conducted in this Decision, the Commission analysed the financing of ‘fittings and works’ (Measure 2) and the subsidies for infrastructure investments (Measure 3) together, as a series of measures financing the creation and upgrading of infrastructure and equipment.

5.1.3. **Measure 3 — Financing of airport infrastructure and equipment**

(82) Table 5 details the infrastructure investments carried out during 2000-2010, which were partly financed by public funds ([26]).

Table 5

Infrastructure investments 2000-2010

Investment	Date of binding commitment for the public financing	Investment costs (EUR)	Public financing (EUR)	Source of the public financing
New departures area	1994	109 773,59	109 774	RAS
Restructuring of the arrivals area (‘Ristrutturazione zona arrivi’)	1996	1 442 990,23	1 350 812	RAS
New terminal	1997	17 325 483,05	15 012 344,72	ENAC
Upgrading of the pavement of the taxiway	1997	4 175 608,09	3 861 392	ENAC
Lateral safety zones	1998	429 894,54	417 102	RAS
TOTAL	**n.a.**	**23 483 749,5**	**20 751 424,72**	**ENAC**
X-ray baggage control system	2003	208 782,99	191 082,99	ENAC
Restructuring of the old passenger terminal (‘Ristrutturazione vecchia aerostazione passeggeri’)	2003	2 406 862,57	1 623 967	ENAC
Upgrading of the apron	2003	7 499 177,02	6 905 599	ENAC
Upgrading of the taxiway	2003	7 287 065,75	6 755 162	ENAC
Upgrading of the runway	2003	6 702 055,64	6 323 883	ENAC
Perimeter control system	2003	6 073 054,61	5 951 919	ENAC
Anti-explosive equipment (‘Carrello antideflagrante’)	2004	76 001,29	76 000	ENAC
TOTAL	**n.a.**	**53 736 749,37**	**48 579 036,23**	**n.a.**

([26]) Letter of Italy of 8 May 2014.

(83) In addition, in the period 2000-2010 RAS granted to So.Ge.A.AL direct grants for the acquisition of equipment (internal communication devices, software, vehicles, etc.) for a total amount of EUR 4 680 281,44.

(84) According to Italy ([27]), an amount of EUR 25 431 706,16 of the public financing had been legally committed before 2000, namely the date of the *Aéroports de Paris* judgment ([28]). In particular:

(a) State financing laid down by the CIPE ([29]) Decision of 29 August 1997: the funding was used for the construction of the new passenger terminal and upgrading of the taxiway;

(b) Regional financing granted to So.Ge.A.AL based on the Framework Agreement between RAS and the Ministry of Transport of 5 August 1996, Italian Regional Laws No 2 of 29 January 1994 and No 9 of 15 February 1996: the funding was directed towards the restructuring of the old terminal and the construction of lateral safety zones. In addition, pursuant to those Regional Laws, regional financing was granted to So.Ge.A.AL for the financing of equipment.

(85) According to Italy before the award of the 'comprehensive' concession in 2007, the State retained responsibility for infrastructure investments while the airport manager was a mere executor of the infrastructure works approved by the State.

(86) By letter of 10 June 2014 ([30]) Italy also submitted that, out of the total costs of investment in the new terminal, EUR 1 284 133 would qualify as costs incurred in the provision of activities falling within the public policy remit, as corresponding to the costs of construction of the terminal areas which So.Ge.A.AL is bound to make available to public entities (see also recital 49).

5.2. MEASURES IN FAVOUR OF AIRLINES USING THE AIRPORT

(87) The investigation covers several agreements entered into by So.Ge.A.AL with various airlines flying from Alghero airport, which, in the 2007 and 2012 Decisions, were considered by the Commission as possibly constituting State aid to the airlines concerned.

(88) According to Italy the agreements with air carriers were negotiated by the Director-General of So.Ge.A.AL, who reported to the Board of Directors on the status of the negotiations and the content of the agreements. So.Ge.A.AL's Board of Directors approved the terms of the agreements prior to their signature ([31]).

5.2.1. **Measure 4 — Agreements signed by So.Ge.A.AL with Ryanair/AMS**

(89) Since 2000, Ryanair has been the main airline operating at Alghero. Two types of agreements have been signed between Ryanair and its subsidiary AMS on the one hand, and So.Ge.A.AL, on the other.

(i) Airport Services Agreements ('ASAs')

(90) The Airport Services Agreements ('ASAs') signed from 2000 onwards between Ryanair and So.Ge.A.AL, laid down Ryanair's operating conditions at Alghero airport and the level of airport charges due by the airline. Ryanair committed to meeting pre-defined flight/passenger targets against a success fee to be paid by So.Ge.A.AL. Penalties were laid down in case such targets were not fully met.

(ii) Marketing Services Agreements

(91) The marketing services agreements relate to the advertising of the Alghero destination on the official website of Ryanair. Since 2006, they were signed with Ryanair's 100 % subsidiary AMS and concluded on the same dates as the ASAs signed by Ryanair.

([27]) Letter of Italy of 8 May 2014.
([28]) Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929
([29]) *Comitato interministeriale per la programmazione economica*.
([30]) In reply to Commission's request of information of 26 May 2014.
([31]) Letter of Italy of 18 February 2014, Annex A.

(92) In recitals 93 to 109, the Commission summarises the main provisions of the agreements (the ASAs and the marketing services agreements) signed by So.Ge.A.AL and Ryanair/AMS.

5.2.1.1. *The 2000 ASA with Ryanair*

(93) The first ASA between Ryanair and So.Ge.A.AL was agreed on 22 June 2000 for a period of 10 years.

(94) Based on the 2000 ASA, Ryanair was to operate at least one return flight per day between London and Alghero and to pay So.Ge.A.AL an amount of ITL […] (*) per turnaround. Ryanair was also to submit annually a sales and marketing plan and indicate results obtained in the operation of the route, as well as development prospects.

(95) So.Ge.A.AL undertook to provide terminal and handling services to Ryanair. The airport manager was to 'pay or credit' a monthly amount equivalent to the amount payable by Ryanair for handling fees, with a cap for the first year of the agreement. So.Ge.A.AL also undertook to pay annually to Ryanair a fixed amount and an additional amount should a second return flight be added to its schedule.

5.2.1.2. *The 2002 ASA and marketing agreement with Ryanair*

(96) Ryanair signed a second ASA with So.Ge.A.AL on 25 January 2002, which superseded the 2000 ASA and covered the period between 1 January 2002 and 31 December 2012. Based on that agreement Ryanair was to pay So.Ge.A.AL EUR […] per turnaround for handling services. Ryanair was to pay airport fees and security charges as per the published schedule of charges.

(97) On the same date, a marketing agreement was signed between So.Ge.A.AL and Ryanair, which covered the same period as the 2002 ASA. Ryanair undertook to carry out advertising and promotional activities on its web page and other media at its discretion to promote the connection Alghero — London in consultation with So.Ge.A.AL. Based on this agreement So.Ge.A.AL was to pay marketing contributions of EUR […] for the first daily year round rotation on each route and EUR […] for the second daily summer-only rotation on each route.

5.2.1.3. *The 2003 ASA and marketing agreement with Ryanair*

(98) On 1 September 2003, So.Ge.A.AL signed with Ryanair a new ASA, for a period of eleven years (with the possibility of an extension for an additional period of 10 years), superseding the 2002 ASA.

(99) Based on the 2003 ASA, Ryanair was to continue to fly to London and depending on the success of previous agreements in terms of traffic flows, Ryanair was to set up a new daily flight to Frankfurt-Hahn or to any other points on the Ryanair network. Ryanair was to pay So.Ge.A.AL EUR […] per turnaround for handling services. In turn, the airline was to pay airport fees and security charges as per the published schedule of charges.

(100) On 1 September 2003, a marketing services agreement was also signed, which covered the same period as the 2003 ASA. Based on that agreement So.Ge.A.AL was to pay marketing contributions of (i) EUR […] per annum for the first daily year-round rotation on each international route, (ii) EUR […] for the second daily summer-only rotation on each route, and (iii) a one-off introductory marketing contribution of EUR […] in respect of the first year of operation of each international route other than the London route and a further EUR […] for each of the second and third years of operation of such new route.

(101) Ryanair was to continue its daily scheduled passenger air services between Alghero and London and inaugurate additional daily passenger air services between Alghero and Frankfurt Hahn and/or any other points on the

(*) Covered by the obligation of professional secrecy.

Ryanair network ('the Services'). Ryanair was also to carry out, in consultation with So.Ge.A.AL, any service and activity customarily offered by advertising, sales promotion and public relations companies, acting in the same field, such as (but not limited to):

— design, arrange, produce, develop, test, implement, maintain and update web links and the Ryanair website and undertake any other measures which are deemed appropriate by Ryanair as being capable of generating, maintaining and/or promoting the advertising efforts with respect to bookings by customers through the internet to and from Alghero airport;

— design advertising in English or other language (if appropriate) adapted to the internet medium and undertake sales promotion and public relations as being capable of generating, maintaining and/or promoting the awareness of the Services by customers through the internet;

— design, arrange and produce advertising material or any other relevant method of promoting the Services;

— design, arrange and produce advertising material or any other relevant method of promoting Alghero airport in the United Kingdom and in any other country in which Ryanair inaugurates a route of the Services;

— educate the press about the Services and thereby influence the general public, make them more familiar with the region surrounding Alghero airport and encourage them to fly on the routes in question;

— arrange to link one website proposed by So.Ge.A.AL and agreed with Ryanair to Ryanair's internet website subject to such website not containing any direct on-line hotel or car hire reservation function.

5.2.1.4. *The 2006 ASA with Ryanair and marketing agreement with AMS*

(102) On 3 April 2006, a new ASA was agreed between So.Ge.A.AL and Ryanair, which replaced the 2003 ASA and was effective from 1 January 2006 to 31 December 2010, with the possibility of a five-year extension.

(103) Associated with that agreement was a supplemental agreement signed on 3 April 2006 for the period 1 January 2006-31 December 2010, which stipulated the overall passenger targets to be achieved by Ryanair and the success fee payable by So.Ge.A.AL. It also provided for penalties to be incurred by Ryanair in case of non-fulfilment of the passenger targets.

(104) The 2006 marketing agreement was signed with AMS (rather than Ryanair) on 3 April 2006 and covered the same period as the ASA. The agreement was rooted in Ryanair's commitment to operate certain EU routes and to meet certain targets as to the level of passengers. AMS offered So.Ge.A.AL online advertising services in exchange for EUR […] per year.

5.2.1.5. *The 2010 ASA with Ryanair and marketing agreement with AMS*

(105) In the early part of 2010, So.Ge.A.AL and Ryanair expressed their intention to renew the terms of their existing relationship by negotiating a new agreement and signed a Memorandum of Understanding (MoU) on 10 March 2010. The MoU states that 'starting from March 2010 Ryanair and So.Ge.A.AL shall negotiate in good faith in order to redefine the terms and the provisions of their partnership'.

(106) On this basis, a new ASA was subsequently signed between So.Ge.A.AL and Ryanair on 20 October 2010, which replaced the 2006 ASA. This agreement laid down new fees and incentive structure for the period between 1 January 2010 and 31 December 2013, with the possibility for a five-year extension upon expiry of the initial term of the agreement.

(107) So.Ge.A.AL undertook to pay success fees for targeted numbers of flights and certain levels of passenger traffic, while Ryanair undertook to pay for handling fees and airport charges, and to carry out sales promotion and public relations activities.

(108) A marketing agreement was signed on the same day for a four-year duration with a possibility to extend it for a further four years. AMS offered So.Ge.A.AL a package of online advertising services in exchange for the following annual rates: EUR […] for 2010; EUR […] for 2011; EUR […] for 2012; EUR […] for 2013. As in 2006, the marketing agreement was rooted in Ryanair's commitment to operate certain EU routes and to meet certain passenger targets.

(109) Upon request by the Commission, Italy reconstructed the *ex ante* profitability analysis of the agreements with Ryanair based on the incremental costs and revenues that could be reasonably expected by a market economy operator acting in lieu of So.Ge.A.AL at the time of the conclusion of each of these agreements during the period under investigation, i.e. 2000-2010 (the '2014 MEOP Report') ([32]). According to Italy, So.Ge.A.AL expected the agreements with Ryanair to be profitable for the airport at the time they were concluded.

5.2.2. **Measure 5 — Agreements with other carriers**

(110) At the time the 2012 Decision was adopted, the Commission noted that So.Ge.A.AL appeared to also have granted discounts on airport charges to carriers other than Ryanair. Although the Commission was aware that So.Ge.A.AL had concluded marketing agreements with other carriers as well, insufficient information on those agreements were provided to the Commission at that stage.

(111) By letter dated 18 February 2014 Italy provided the Commission with a profitability analysis based on *ex post* data of the arrangements with Alitalia, Meridiana and Volare in order to demonstrate that it was economically justified from the airport's perspective to conclude the agreements with these airlines. No analysis of the agreement with Germanwings had been provided at that date.

(112) Subsequently, by letter dated 25 March 2014, Italy provided to the Commission an analysis of the profitability of the agreements concluded by So.Ge.A.AL with Air One/Alitalia, Meridiana, Volare and Germanwings which sought to demonstrate that these agreements were expected to be profitable for So.Ge.A.AL on an *ex ante* basis.

(113) Finally, on 10 June 2014 Italy submitted to the Commission an analysis of the expected profitability of the handling agreements concluded by So.Ge.A.AL with bmibaby, Air Vallée and Air Italy.

(114) The agreements concluded by So.Ge.A.AL with carriers other than Ryanair subject to the investigation in this case are presented in recitals 115 to 132.

5.2.2.1. *Agreements with Germanwings, Volare, Meridiana and Alitalia*

(115) So.Ge.A.AL concluded handling and marketing agreements with Germanwings, Volare, Meridiana and Alitalia.

(i) Germanwings

(116) The handling agreement between Germanwings and So.Ge.A.AL was signed on 19 March 2007 and was set to apply as of 25 March 2007. Based on this agreement Germanwings was to pay So.Ge.A.AL EUR […] per turnaround for handling services.

(117) On 25 March 2007, a marketing agreement was signed between Germanwings and So.Ge.A.AL by which the carrier undertook to operate certain EU routes and to meet certain passengers and frequency targets. The agreement was to apply from 25 March 2007 to 31 October 2009. However, Germanwings only operated from Alghero airport in 2007. According to Italy the carrier decided to stop operations from Alghero airport as it could not generate sufficient traffic to break even from a financial perspective.

(118) The marketing agreement laid down a 'start-up' contribution amounting to EUR […] to be paid by So.Ge.A.AL to Germanwings 'in order to promote Alghero airport in increasing the volume of departing passengers by opening a new route'.

([32]) Letter of Italy of 18 February 2014.

(119) The marketing agreement also set out success fees to be paid by So.Ge.A.AL to Germanwings if the airline met the stipulated traffic targets. The agreement also specified penalties to be paid by Germanwings to So.Ge.A.AL in the event that the airline either cancelled over 10 % of its flights or did not meet the stipulated traffic targets.

(ii) Volare

(120) On 29 November 2007, Volare signed a handling and a marketing agreement with So.Ge.A.AL.

(121) The handling agreement set out goals to be met by the carrier in terms of number of passengers and flights per year, and the corresponding success fees to be paid by So.Ge.A.AL.

(122) The marketing agreement laid down an annual marketing fee of EUR […] to be paid by the airport manager as 'advertising support for the first year of activity'. The marketing agreement applied during from 28 October 2007 to 31 October 2010.

(iii) Meridiana

(123) Meridiana operated from Alghero airport in 2000, 2001 and 2010.

(124) In 2000 and 2001, Meridiana did not operate scheduled services from Alghero airport, and only provided flight services based on charter demands. As such, no formal handling agreements were signed between So.Ge.A.AL and Meridiana. The carrier paid So.Ge.A.AL published airport charges for all airport services.

(125) Meridiana did not operate from the airport between 2002 and 2010. In 2010, Meridiana took up operations from the airport and signed a marketing agreement as well as a handling agreement with So.Ge.A.AL.

(126) The handling agreement was signed on 28 April 2010 and covered the period between April 2010 and April 2011. Based on this agreement Meridiana was to pay So.Ge.A.AL EUR […] per turnaround for handling services.

(127) The marketing agreement was signed on 20 October 2010 and covered the period between June 2010 and October 2010. The agreement specified a one-off payment of EUR […] (excluding VAT) to be paid by So.Ge.A.AL to Meridiana relating to the start-up of routes to/from Milan, Verona and Bari in summer 2010. The payment was conditional on Meridiana meeting certain traffic targets. According to Italy, during the time for which the agreement with Meridiana applied retrospectively, So.Ge.A.AL had been negotiating with the carrier similar terms which were eventually included in the signed agreement. In this sense, Italy provided to the Commission a draft agreement which was being negotiated at the time by Meridiana and So.Ge.A.AL dated 7 June 2010.

(iv) Air One/Alitalia

(128) Until 2010, Air One/Alitalia did not sign any formal agreement with So.Ge.A.AL and paid So.Ge.A.AL published airport charges for all airport services. Until 2010, So.Ge.A.AL did not provide ground-handling services to Air One/Alitalia.

(129) In 2010, So.Ge.A.AL started to provide ground-handling services to Air One/Alitalia. This led to Air One/Alitalia signing a handling agreement with So.Ge.A.AL. The two parties also entered into a marketing agreement relating to Air One/Alitalia's start of international routes from Alghero airport.

(130) The marketing agreement was signed on 20 October 2010 and covered the period from 7 June 2010 to 30 September 2010. Italy provided to the Commission the draft agreement which had been negotiated at the time by Alitalia and So.Ge.A.AL in May 2010. The signed agreement specified a one-off marketing payment of EUR […] to be received by Air One/Alitalia for providing marketing services to So.Ge.A.AL in that period, with the possibility of the agreement being extended to 2011 and 2012.

(131) The handling agreement was signed between Air One/Alitalia and So.Ge.A.AL on 30 November 2010 for a period of six years and specified handling charges to be paid by Air One/Alitalia to So.Ge.A.AL for domestic and international routes.

5.2.2.2. *Handling agreements with other carriers*

(132) The Commission also investigated the ground handling agreements concluded by So.Ge.A.AL with Air Italy, Bmibaby and Air Vallée. The agreements were concluded for a duration between one month (Air Vallée) and more than two years (Air Italy) and specified handling charges to be paid by the carriers.

Table 6

Handling agreements with Air Italy, Bmibaby and Air Vallée

Date of conclusion	Carrier	Duration
28.5.2008	Air Italy	1.6.2008-31.12.2010
29.7.2010	Bmibaby	29.5.2010-30.9.2010
2010	Air Vallée	9.8.2010-30.8.2010

6. THE ECORYS REPORT

(133) In the course of the investigation, the Commission asked Ecorys to produce a report on the financial performance of So.Ge.A.AL and to establish whether the airport manager behaved like a market economy operator when concluding agreements with air carriers. The Ecorys Report was delivered on 30 March 2011.

(134) The Ecorys Report concluded that So.Ge.A.AL's conduct was MEOP-compliant. Ecorys considered that the business strategy pursued by So.Ge.A.AL bore fruit. Such strategy implied that the airport manager submitted an application for the 'comprehensive' concession for the management of the airport, that the capacity of the terminal was extended, and that agreements were signed with low-cost carriers aimed at incentivising international traffic flows. Ecorys concluded that from a MEO's perspective the conclusion of the agreements with Ryanair was a rational decision in that those agreements ensured a considerable increase in traffic which was expected to drive both aeronautical and non-aeronautical income. According to Ecorys, So.Ge.A.AL could reasonably expect that in the long run the benefits derived by such agreements would outweigh incremental costs.

7. GROUNDS FOR INITIATING THE PROCEDURE

7.1. EXISTENCE OF AID TO So.Ge.A.AL

(135) As concerns potential aid to the airport manager, the Commission noted that prior to the *Aéroports de Paris* judgment, the development and operation of airport infrastructure did not qualify as economic activity within the meaning of Article 107(1) of the Treaty [33]. Since part of the measures under assessment was decided before 2001, the Commission noted that it would have to assess whether they stemmed from legally binding commitments taken before the *Aéroports the Paris* ruling was issued, namely 12 December 2000 [34] and hence fell outside the scope of State aid rules.

[33] *Aéroports de Paris* judgement cited. See also Commission guidelines on the Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 5.

[34] See Commission Decision of 21 March 2012 in case C76/2002 *Avantages consentis par la Région Wallonne et Brussels South Charleroi Airport à la companie aérienne Ryanair* and Commission Decision of 25 April 2012 in case SA.33961 *Plainte Air France — Aéroport de Nîmes*.

(136) The Commission also recalled that, to the extent financing of activities which normally fell within the responsibility of the State in the exercise of public powers was limited to cover costs and was not used to finance other economic activities ([35]), such financing was not subject to State aid rules. At the time of adoption of the 2012 Decision, the Commission did not have sufficient information on the nature (economic or not) of the activities carried out by So.Ge.A.AL and of infrastructure related costs financed by the measures subject to the investigation, nor whether certain costs were inherently linked to activities within the public policy remit. The Commission invited Italy to clarify which activities must be considered as non-economic in nature and which costs linked to such activities, if any, had been financed by the measures covered by the Commission's investigation.

7.1.1. **Measure 1 — Capital injections**

(137) The Commission expressed serious doubts that the capital injections would be MEOP-compliant. It noted that So.Ge.A.AL had constantly operated at a loss since 2000 and that its financial performance seemed to worsen following the award of the 'comprehensive' concession. This seemed to contradict Italy's claim that the poor results of the company were primarily justified by the impossibility to exploit fully airport related activities based on the partial/temporary concession.

(138) The Commission further noted that Italy had at that time only provided *ex post* considerations in support of its claims that the measures were guided by profitability prospects. Such analysis in addition seemed to relate to the overall benefit derived by RAS from an increase in air traffic levels and therefore to revenues that a private investor would not take into account in the analysis of the profitability of its investment. On that basis the Commission took the preliminary view that the capital injections provided the airport manager with an advantage and constituted operating aid to the latter.

(139) The Commission finally noted that, even if So.Ge.A.AL met the conditions to qualify as a firm in difficulty under the Guidelines on State aid for rescueing and restructuring firms in difficulty ([36]), no element had been submitted to the Commission by Italy to support the conclusion that such aid would comply with the compatibility requirements of those guidelines.

7.1.2. **Measure 2 — Contributions for fittings and works**

(140) Insufficient information was provided to the Commission on the contributions for fitting and works worth EUR 6 540 269 granted to So.Ge.A.AL by RAS between 1998 and 2009. Italy was invited to specify the exact nature of the costs subsidised by RAS.

7.1.3. **Measure 3 — Investments in airport infrastructure and equipment**

(141) The Commission noted that between 2001 and 2010 So.Ge.A.AL paid EUR 3 042 887 to the State in fees for the use of the airport infrastructure, whilst the State financed infrastructure investments for EUR 46 940 534 and equipment for EUR 284 782 during 2004 to 2010.

(142) The Commission further noted that the award of the comprehensive concession to So.Ge.A.AL in 2007 did not appear to have led to an increase in the level of the concession fees. On that basis the Commission took the preliminary view that the concession fee was manifestly disproportionate to the public funding made available by the State in relation to infrastructure investments. The Commission therefore preliminarily considered that So.Ge.A.AL might have received an advantage by paying a concession fee below market price.

([35]) See judgment of 18 March 1997 in case C-343/95, *Calì & Figli/Servizi ecologici porto di Genova* [1997] I-1547; Commission Decision of 19 March 2003 in case N309/2002 *Sûreté aérienne — Compensation des coûts à la suite des attentats du 11 septembre 2001* and Commission Decision of 16 October 2002 in case N438/2002 *Subventions aux régies portuaires pour l'exécution de missions relevant de la puissance publique*.

([36]) OJ C 244, 1.10.2004, p. 2.

(143) Italy was invited to provide any *ex ante* business plan which would demonstrate the profitability prospects of infrastructure investments carried out by public entities at Alghero airport which could support the claim that such investments were MEIP-compliant.

7.2. PRELIMINARY VIEWS ON COMPATIBILITY OF AID TO So.Ge.A.AL

(144) The Commission expressed doubts as to the compatibility under Article 107(3) of the Treaty of aid to So.Ge.A.AL under the 2005 Aviation Guidelines.

(145) Although the measures seemed to meet an objective of general interest which was clearly defined, insufficient information was provided to the Commission to assess whether the infrastructure at Alghero airport was necessary and proportional to the objective set. Nor did the Commission have sufficient elements to assess the perspectives for the use of such infrastructure in the medium term. The Commission also had doubts whether the airport infrastructure was made available to air carriers on non-discriminatory terms.

(146) Finally, given that certain infrastructure investments appeared at that stage to result from So.Ge.A.AL's contractual obligations towards Ryanair, the Commission had doubts on the necessity of any aid to finance such investments.

7.3. POTENTIAL AID TO THE AIRLINES

(147) The Commission took the preliminary view that the decisions concerning airlines' operating conditions at Alghero airport were likely to involve State resources and be imputable to the State.

7.3.1. **Measure 4 — Agreements signed by So.Ge.A.AL with Ryanair/AMS**

(148) The Commission noted first that AMS is a 100 %-owned subsidiary of Ryanair, set up with the specific aim of supplying marketing services via the website of Ryanair, and which does not provide other services. On that basis the Commission took the preliminary view that in order to assess the presence of a selective advantage, Ryanair and AMS had to be considered as one single entity. The Commission also took the view that, when assessing whether the measures in relation to Ryanair/AMS were market conform, the behaviour of So.Ge.A.AL had to be assessed together with the behaviour of RAS and/or other public shareholders of So.Ge.A.AL during the period under investigation. The Commission considered that, for the purpose of the MEOP assessment, the ASAs and the marketing agreements and their financial consequences could not be severed and must therefore be subject to a joint assessment.

(149) The Commission recalled that regional development considerations could not be taken into consideration for the application of the MEOP. It also observed that according to the information at its disposal at that stage no business plan or *ex ante* analysis of the agreements signed with Ryanair/AMS had been prepared as the basis for So.Ge.A.AL's decision to enter such arrangements.

(150) On that basis, the Commission expressed doubts that So.Ge.A.AL and RAS behaved as a market economy investor in their relationship with Ryanair/AMS.

7.3.2. **Measure 5 — Agreements with air carriers other than Ryanair**

(151) The Commission noted that substantial discounts on airport charges were applied by So.Ge.A.AL to air carriers other than Ryanair, for instance depending on the start-up of new routes and increase in traffic levels. The Commission invited Italy to provide any *ex ante* business plans, studies or documents assessing the profitability for the airport manager of each of the agreements with the airlines operating at the airport or, should such documents be unavailable, So.Ge.A.AL's latest budget forecasts prepared prior to the conclusion of those agreements. On this basis, the Commission expressed doubts that So.Ge.A.AL and RAS behaved as a market economy investor in their relationship with the carriers operating at the airport.

8. **COMMENTS FROM ITALY**

(152) The Commission notes that, in addition to the replies to the requests for information by the Commission, Italy has in the course of the investigation made various submissions. However, although the Commission accepted a one-month extension of the deadline laid down by Article 6(1) of the Procedural Regulation ([37]) for Member States to submit their comments following a decision opening the formal investigation by the Commission, only one of Italy's submissions was made within this extended deadline, namely Italy's letter of 31 August 2012. Italy's submissions of 3 October 2012, 19 October 2012, 22 October 2012 and 20 February 2013 were submitted after the expiry of the deadline.

(153) This section therefore deals only with the observations provided by Italy in its letter of 31 August 2012. The arguments put forward in Italy's subsequent letters which are of relevance to the assessment in this case were presented in Sections 3 – 5.

8.1. POTENTIAL AID TO THE AIRPORT

(i) On the repayment of losses and capital injections

(154) Italy recalled that airport managers are required by law to observe certain capital thresholds. According to Italy the capital injections under assessment in this case aimed to restore So.Ge.A.AL's capital to the required standards.

(ii) On the public financing for fittings and works

(155) Italy explained that prior to 2003, the concession fees to be paid by airport managers having obtained the 'comprehensive' concession was set at 10 % of the user fees as per Italian Law No 324 of 5 May 1976 as subsequently amended, and the fee for loading and unloading goods transported by air as per Italian Law No 117 of 16 April 1974.

(156) As of 2003 the annual concession fees were determined with reference to the airport's Work Load Units (WLU, or units of load corresponding to one passenger or one hundred kilograms of goods or mail), which were in turn determined on the basis of traffic data published yearly by the Ministry of Infrastructure and Transport-ENAC.

(157) By virtue of Italian Law 296 of 27 December 2006, the annual concession fee for airport managers was increased so as to guarantee revenues of EUR 3 million in 2007, EUR 9,5 million in 2008 and EUR 10 million in 2009 respectively to the Italian Treasury.

8.2. POTENTIAL AID TO THE AIRLINES

(158) Italy did not comment on the potential aid to the airlines operating at Alghero airport within the deadline laid down by Article 6(1) of the Procedural Regulation for Member States to submit their comments following a decision opening the formal investigation by the Commission.

9. **COMMENTS FROM INTERESTED PARTIES**

(159) The Commission notes that the comments of interested parties cover a wide range of arguments. For instance, in its numerous submissions to the Commission Ryanair detailed the underlying principles and assumptions which it considers should serve as the basis for the Commission's MEOP analysis of the agreements with airlines. So.Ge.A.AL claimed that there exist numerous grounds on the basis of which the measures subject to the assessment in its favour could be declared compatible with the internal market.

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

9.1. COMMENTS FROM So.Ge.A.AL

9.1.1. **Potential aid to the airport manager**

(i) On economic activity

(160) So.Ge.A.AL underlines that the public funding granted to it to cover costs incurred in the provision of services falling within the public policy remit does not constitute State aid. So.Ge.A.AL did not detail the nature or amount of such costs.

(161) So.Ge.A.AL considers that all measures under assessment in this case concerning the financing of infrastructure, equipment and 'fittings and works' had been legally committed before the *Aéroports de Paris* ruling and should therefore be excluded from State aid scrutiny. As concerns the period after 12 December 2000, So.Ge.A.AL recalls that Italy had already submitted evidence of the non-economic character of certain activities carried out by the airport manager. On that basis the Commission should attribute part of the public financing in question to costs incurred in the provision of non-economic activities.

(162) So.Ge.A.AL further notes that the 2012 Decision is not clear as to the nature and scope of the presumed aid to the airport manager. In particular, it would be unclear whether the intention of the Commission was to qualify the totality of the financing for infrastructure works as State aid or, in the alternative, to consider that only the difference between the market based concession fee, which So.Ge.A.AL would have had to pay to the State for the improved infrastructure and the concession fee actually paid by the airport manager would qualify as aid. It argued that the first option could not be reconciled with the fact that the State retained at all material times ownership of the airport infrastructure. So.Ge.A.AL cannot therefore be considered as beneficiary of investment aid. At any rate, So.Ge.A.AL submits that it had not benefitted from any undue economic advantage even if the second option was favoured.

(ii) On non-distortion of competition

(163) So.Ge.A.AL underlines that no distortion of competition can arise as a result of public financing granted to it. Given the remote location of Alghero airport, its catchment area ([38]) does not overlap with that of any other airport in Italy or other Member States. Neither is the airport competing with other airports on the island, given the distance between them and the absence of reliable land connections. So.Ge.A.AL adds that the three Sardinian airports handle different types of traffic. Furthermore, air transport would not compete with other transport means for the traffic to and from the island.

(164) So.Ge.A.AL does not accept the argument brought forward by the Commission in the 2012 Decision that several airport managers compete for the management of airport infrastructure. So.Ge.A.AL was awarded the first 'partial' concession ([39]) for the management of the airport in 1995 and therefore long before the *Aéroports de Paris* ruling. As from 1995 So.Ge.A.AL would merely act as manager of the infrastructure at Alghero airport, and its activity would therefore not be in competition with that of any other airport manager.

(iii) On absence of any economic advantage to So.Ge.A.AL

(165) So.Ge.A.AL submits that the capital injections would be MEIP-compliant. According to So.Ge.A.AL, the economic rationale of the measures should be assessed separately and distinctly for two periods: prior and following the award of the 'comprehensive' concession to So.Ge.A.AL in 2007.

(166) So.Ge.A.AL claims that the recapitalisations undertaken prior to 2007 were guided by the need to safeguard its business, in view notably of the award of the 'comprehensive' concession which it had already on 18 January 1999. Based on information available at the time the decisions to inject capital into the company were taken, the

([38]) Defined by the 2014 Aviation Guidelines as the area within a radius of 100 kilometres or around 60 minutes travelling time by car, bus, train or high-speed train from the airport.

([39]) On 10 May 1995 So.Ge.A.AL was awarded the first 'partial' concession for the supply of handling services, based on contracts to be signed with air carriers. A second 'partial' concession was awarded to So.Ge.A.AL for catering services on 20 October 1995. On 11 February 1999 So.Ge.A.AL was awarded the temporary right to manage the airport under a 'comprehensive' concession.

perspective of being awarded the 'comprehensive' concession was of crucial importance to So.Ge.A.AL's shareholders, to the extent it would have allowed the airport manager to fully capitalise on airport activities and therefore increase aeronautical and non-aeronautical revenues. Public shareholders would have had no viable alternative but to recapitalise the company and were justified in doing so given that the delay in the award of the concession was caused by external events which could not be imputed to the company. So.Ge.A.AL argues that the Commission must take that into account in its MEOP assessment. So.Ge.A.AL adds that the measures would also be justified based on the forecasted increase in passenger volumes as a result of low-cost strategy followed as of 1999.

(167) The capital injections carried out in 2009 and 2010 were driven by the need to safeguard the operability of the airport manager, notably in view of the improved viability perspectives resulting from the award of the 'comprehensive' concession. The fact that So.Ge.A.AL did not recover its profitability after the award of the concession was due to a market scenario that differed significantly from what had been forecasted, which affected considerably the development of air traffic in that period, namely the economic downturn and the consequent economic challenges faced by international airlines. In that sense So.Ge.A.AL suffered a 1,8 % drop in traffic levels. In addition, So.Ge.A.AL claims that traffic could not develop as it had been projected due to the delay in the execution of infrastructure works (which should have started already in 2004 but had not yet been initiated in 2009). Finally, the failure by ENAC to revise the airport charges upwards, irrespective of the formal request introduced in that sense by So.Ge.A.AL, has to be taken into account.

(168) It was in that context that So.Ge.A.AL developed corrective actions in view of reaching economic balance, such as the reorganisation of its activities, the cut in operating costs and investment measures in infrastructure. Those actions are assessed in detail in the 2010 reorganisation and restructuring plan.

(169) So.Ge.A.AL rejects the argument of the Commission that no *ex ante* analysis was carried out before the measures were put into effect. So.Ge.A.AL's public shareholders presumably undertook the measures in question on the basis of business plans developed *ex ante*. Evidence to that effect would be the documents submitted to the Commission in the course of the investigation, in particular:

(a) So.Ge.A.AL's business plan of 15 March 1999;

(b) the minutes of So.Ge.A.AL's Board of Directors meeting of 8 April 2000;

(c) the business plan for the award of the forty-year concession of September 2005;

(d) the Roland Berger Plan, as updated in 2007 and 2009;

(e) the reorganisation and restructuring programme 2010-2012;

(f) the Accuracy report.

(170) So.Ge.A.AL further recalls that the conformity of the capital injections with the MEOP principle were already established by the Ecorys Report, the Accuracy Report and the Roland Berger Plan.

(171) The Commission would have failed to give proper consideration to the specific character of the air traffic sector in Italy in light of the applicable Italian regulations. In its assessment of the situation prior to and following the award of the comprehensive concession to So.Ge.A.AL, the Commission should have taken into account the fact that the recapitalisations resulted from a legal obligation, whose non-observance would have triggered the revocation of the concession. So.Ge.A.AL's shareholders thus favoured the most cost-efficient option in deciding to recapitalise the company.

(172) So.Ge.A.AL considers that, in carrying out the capital injections, its public shareholders have acted in the same way a MEO would have acted in similar circumstances in that the injections guaranteed the public investors a positive return in the medium to long term. According to So.Ge.A.AL, the airport activities generate tax income in an amount superior to that of the public financing granted to it.

(173) So.Ge.A.AL also claims that the capital injections would not confer the airport manager an economic advantage within the meaning of the Altmark jurisprudence ([40]). The overall management of the airport would qualify as service of general economic interest ('SGEI') given the need to guarantee accessibility of the island and therefore the capital injections in question would amount to compensation for the provision of an SGEI by the airport.

(174) So.Ge.A.AL would have been entrusted with the provision of the SGEI by the Convention. The partial concessions awarded to So.Ge.A.AL prior to 2007 may equally be considered as entrustment acts. So.Ge.A.AL further notes that from a purely legal point of view airport managers are compelled to observe certain obligations in respect of the management of airports, which inevitably take into account the public interest. Such obligations refer to the guarantee of a sufficient quality of the services, the observance of security standards, continuity and regularity of the services.

(175) The second and third conditions deriving from the Altmark ruling would be observed given that So.Ge.A.AL has only been compensated to the level required to offset losses, more specifically to the level required to bring capital back in line with legal requirements after such losses had been covered. So.Ge.A.AL further adds that airport managers are by law required to keep separate accounting between core and non-core activities.

(176) Finally, So.Ge.A.AL claims that the fourth Altmark criterion would also be complied with, without however providing any material evidence in that respect.

(iv) On compatibility

(177) According to So.Ge.A.AL the compatibility of potential aid to the airport should be assessed by the Commission under:

(a) the Regional Aid Guidelines;

(b) the Rescue and Restructuring Guidelines;

(c) Article 106(2) of the Treaty;

(d) the 2014 Aviation Guidelines.

(178) First, So.Ge.A.AL submits that the measures in question were granted to Alghero airport to compensate for the disadvantage stemming from the insularity of the Sardinian region. On that basis the Commission should declare the aid compatible with the internal market under Article 107(3)(a) of the Treaty.

(179) Second, So.Ge.A.AL claims that all measures under assessment were granted to allow So.Ge.A.AL to undergo restructuring, in order to ensure its return to viability. In that sense So.Ge.A.AL submitted that, as concerns the 2009 and 2010 capital injections, So.Ge.A.AL prepared a restructuring plan, namely the 2010 reorganisation and restructuring plan, which identified the factors having had a negative impact on the company and which proposed corrective actions aiming at a reduction in costs and a revision of the business policy. That plan envisaged a significant own contribution from So.Ge.A.AL to the restructuring.

(180) Third, as concerns compatibility of the aid under Article 106(2) of the Treaty, So.Ge.A.AL argues that the compensation granted to it for the provision of SGEIs was constantly below the ceiling laid down by Article 2(1)(a) of the 2005 SGEI Decision ([41]), namely EUR 30 million per annum, and its turnover was below EUR 100 million. So.Ge.A.AL adds that prior to 2004 the 1 million passengers ceiling in Article 2(1)(d) of the 2005 SGEI Decision was also observed. The provisions in Articles 4, 5, 6 of the 2005 SGEI Decision would also be observed given that the compensation was granted to the company in connection with correctly defined SGEIs and entrusted to So.Ge.A.AL by one or more entrustment acts, and that such compensation did not exceed what was necessary for the provision of the SGEIs.

([40]) Case C 280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I 7747.

([41]) Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

(181) Fourth, So.Ge.A.AL submits that aid to the airport for infrastructure investments, equipment, fittings and works should be deemed compatible on the basis of the 2005 Aviation Guidelines. The infrastructure in question would be proportional to the objective pursued and would have medium term prospects for use in the meaning of the 2004 Aviation Guidelines. The infrastructure was also put at the disposal of airlines on non-discriminatory terms. Furthermore, trade was not affected to an extent contrary to the common interest and the public financing was necessary and proportionate.

9.1.2. **Measures in favour of the airlines operating at the airport**

(182) The Commission would be correct in considering So.Ge.A.AL and RAS together for the purpose of the application of the MEOP principle. In adopting the measures in question RAS and So.Ge.A.AL behaved in the same way an MEO would have in similar circumstances. So.Ge.A.AL would have derived no economic advantage from marketing contributions granted by RAS in favour of airlines using Alghero airport. The contributions in question have only transited through the airport manager to be eventually granted to airlines.

(183) So.Ge.A.AL submits that any aid to airlines operating at Alghero airport in the form of lower airport charges or marketing contributions should be deemed compatible with the internal market under Article 107(3)(a) or (c) of the Treaty and the 2005 Aviation Guidelines.

(184) To support that conclusion, So.Ge.A.AL puts forward that the potential aid was granted to companies licenced to provide air transport services by a Member State, for routes linking a regional airport falling within the C or D category as defined by the 2005 Aviation Guidelines, with another Union airport. The funding did not concern routes subject to public service obligations ('PSOs') within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council ([42]) and the agreements concluded with the airlines laid down penalties to be applied in case of non-observance of their commitments by the airlines.

(185) Whilst admitting that the grants in question were granted to airlines for a longer period and with a higher intensity than permitted under the 2005 Aviation Guidelines, So.Ge.A.AL underlines that the agreements with airlines did not have a duration longer than three years, and that the 2005 Aviation Guidelines allow derogations concerning intensity levels in the case of disadvantaged regions.

9.1.3. **Applicability of the 2014 Aviation Guidelines**

(186) In its comments on the applicability of the 2014 Aviation Guidelines, So.Ge.A.AL recalls that none of the measures under assessment in favour of the airport amounts to State aid. However, should the Commission conclude that any of those measures constitute operating aid to So.Ge.A.AL, it submits that all compatibility conditions laid down by the 2014 Aviation Guidelines are observed.

10. **COMMENTS FROM OTHER INTERESTED PARTIES**

(187) Ryanair, AMS and Unioncamere provided their observations in the course of the investigation.

10.1. COMMENTS FROM RYANAIR

(188) Ryanair submitted its comments on the 2012 Decision on 12 March 2013. Ryanair referred to its previous submissions in this case before the adoption of the 2012 Decision, as well as to several other submissions concerning a number of State aid investigations concerning potential aid to Ryanair.

(189) Ryanair's main comments as they result from those submissions are summarised in recitals 190 to 226.

([42]) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

(i) On AMS

(190) Ryanair rejects the preliminary conclusion of the Commission that Ryanair and AMS must be considered as a single entity, and that the ASAs and the marketing services agreements as well as their financial consequences should be assessed jointly for the purpose of assessment of the economic advantage.

(191) Neither the ownership structure of AMS nor its purpose would support that approach. The ASAs concluded with Ryanair and the marketing services agreements concluded with AMS would be separate and independent, they would relate to different services and would not be subject to any contractual or other link between them justifying their consideration as a single set of measures.

(192) The marketing services agreements benefitted So.Ge.A.AL as purchaser of advertising services. Those agreements constituted an investment to enhance the brand of the airport and would have led to an increase in the number of inbound passengers, and consequently in non-aeronautical income. They were not intended to improve the load factor or yield on Ryanair routes nor contingent on any assumed benefit such airport advertising on Ryanair.com provides to Ryanair.

(193) In addition, the conclusion of a marketing services agreement with AMS is not a condition for the operation of routes by Ryanair to and from an airport. Indeed, many airports served by Ryanair do not conclude agreements with AMS. In general, the need for specific marketing aimed at building the brand of an airport and influencing the proportion of inbound passengers arises at less well-known airports where the brand of the airport is not visible and inbound traffic needs to be stimulated.

(194) It would thus be perfectly rational for such an airport to spend funds for such a purpose, and the fact that Ryanair may or may not also benefit through that advertising would be commercially irrelevant to the airport. A private investor will not abstain from an investment simply because other parties may also gain from a growth of its business.

(195) Ryanair's agreements with So.Ge.A.AL were normal commercial agreements compliant with the MEOP, and the same applies with regard to AMS's agreements with So.Ge.A.AL, since AMS concludes marketing agreements at the same rates and in respect of comparable volumes with both public and private airports, tourism bodies, car rental groups, hotel reservation websites, insurance companies, telecommunications service providers ([43]).

(196) That approach is consistent with the line taken by Ryanair in other submissions sent to the Commission in the course of the investigation. In those other submissions Ryanair disagrees with the Commission's assessment of payments to AMS as costs to the airport. According to Ryanair that approach would disregard the value of AMS' services to the airport ([44]). By buying advertising space, airports can increase the proportion of incoming passengers on Ryanair flights, who tend to spend more than outgoing passengers on non-aeronautical goods and services. Doing this makes commercial sense for the airports ([45]). Ryanair believes that the purchase of marketing services at market rates should be severed from any other airport-airline contractual arrangements for the purposes of an MEOP assessment. Should the Commission insist on including AMS arrangements and Ryanair airport services arrangements in a joint MEO test, the value of AMS services to the airport should not be disregarded.

(ii) On imputability/State resources

(197) Ryanair considers that the Commission's view that the public authorities were involved in the adoption of the measures under review involving Ryanair and AMS is not supported by evidence. It could not be assumed — and it has yet to be shown — that the public authorities were actually involved in the adoption of the measures.

([43]) Letter of Ryanair of 22 July 2011.
([44]) Letter of Ryanair of 20 December 2013.
([45]) Letter of Ryanair of 15 September 2009.

(198) The argument that 'So.Ge.A.AL is wholly owned by public authorities which "interfered in the decisional process of So.Ge.A.AL"' would be insufficiently evidenced inasmuch as it is solely based on the sole organic criterion of appointment of the Board of Directors of So.Ge.A.AL by its public shareholders. Neither would the 2002 agreement, wherein Sardinia undertook to cooperate with Ryanair with the aim of developing tourism and the employment rate in the region prove that public authorities were involved, in one way or another, in the adoption of the measures taken by So.Ge.A.AL towards Ryanair or AMS after the signature of that agreement. Furthermore, the circumstance that So.Ge.A.AL and Sardinia signed subsequent agreements in 2004, 2005, 2006 and 2007 for co-marketing contributions would only support the position that Sardinia was financing So.Ge.A.AL, but not that it was directing So.Ge.A.AL's action towards Ryanair or AMS.

(199) Ryanair is not aware of or responsible for agreements between So.Ge.A.AL and RAS, has not prompted or demanded such agreements, and therefore the arrangements Ryanair and AMS have with So.Ge.A.AL should not be affected by arrangements between So.Ge.A.AL and RAS.

(200) Neither would Ryanair qualify as an indirect recipient of State aid. The Commission cannot simply presume that State aid has been granted to the airlines operating at the airport without evidence establishing the actual existence of an advantage through State aid. As long as the terms of the commercial relationship between Ryanair and an airport can be justified under the MEOP, any recovery obligation cannot extend to Ryanair. Ryanair criticizes the Commission's consideration that any incentive granted by a public airport to an airline automatically qualifies as State aid even if only part has been financed through public resources. Ryanair submits that the Commission's reluctance to investigate the issue of imputability of measures to the State does not reflect the 2005 Aviation Guidelines, which imply that the decision to redistribute public resources to an airline should be imputable to the public authorities in order to constitute aid ([46]).

(iii) On comparator analysis

(201) Ryanair argues that according to the case law ([47]), a comparator analysis should be the primary test used to verify the presence of aid to airlines and the cost-based test should only be used if it was impossible to compare the situation of the alleged grantor of aid with that of a private group of undertakings. Ryanair further states that when assessing the agreements concluded by airport managers with the airlines, the network externalities resulting from the agreements should also be considered. In a different submission Ryanair agreed that both comparator and cost-based methods of analysis are standard business practice ([48]).

(iv) On ex ante profitability

(202) Ryanair essentially argues that the Commission's entire reasoning in the 2012 Decision was vitiated by an erroneous application of the MEO test, which would have derived from an inaccurate presumption that an *ex ante* business plan was required to conclude that the MEOP was complied with. Business plans are not a *sine qua non* for the commercial actions of private investors ([49]). Whilst such plans may prove beyond doubt that a public body was acting as a private investor, the absence of such plan would not suffice to conclude that a public body was not acting as a private investor.

(203) In any event, in this case the Commission would have already admitted in the 2012 Decision that Alghero airport provided a basic *ex ante* analysis, which should be considered sufficient. The Commission is not in a position to assess what constitutes an 'acceptable' business plan and should not try to do so.

(204) Ryanair further notes that the Commission obtained an MEOP analysis from Ecorys, which concluded that the Ryanair agreements were MEOP-compliant, and that So.Ge.A.AL's losses arose due to the significant and unforeseeable delays of the State in awarding the 'comprehensive' concession. Unforeseeable inefficiencies and delays

([46]) Letter of Ryanair of 15 December 2009.
([47]) Letters of Ryanair of 12 March 2013 and 15 December 2009.
([48]) *Assessing State aid to low cost carriers*, 26 October 2011, prepared for Ryanair by Simon Pilsbury, Managing consultant at Oxera.
([49]) Letter of Ryanair of 22 July 2011.

should be neutralized in an MEOP analysis since they can also be faced by private airports during the normal course of business, whether due to State failures or the acts of other private enterprises upon which the airport relies.

(205) Furthermore, Ryanair submitted a series of notes prepared by Oxera, and an analysis prepared by Professor Damien P. McLoughlin.

Oxera Note 1 — Identifying the market benchmark in comparator analysis for MEO tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013

(206) Oxera believed that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed.

(207) Oxera argued that market benchmark prices obtained from comparator airports are not polluted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEO tests.

(208) This is because:

(a) comparator analyses are widely used for MEO tests outside of the field of State aid;

(b) companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;

(c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face limited competition from State-owned airports within their catchment area (< 1/3 of commercial airports within the catchment area of comparator airports is fully State owned, and none of the airports within the same catchment area as comparator airports was subject to on-going State aid concerns (as of April 2013);

(d) even where comparator airports face competition from State-owned airports within the same catchment area, there are reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);

(e) MEO airports will not set prices below incremental cost.

Oxera Note 2 — Principles underlying profitability analysis for MEO tests. Ryanair state aid cases, prepared for Ryanair by Oxera, 9 April 2013

(209) Oxera argued that the profitability analysis undertaken by Oxera in its reports submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents.

(210) The principles underlying the profitability analysis are:

(a) the assessment is undertaken on an incremental basis;

(b) an *ex ante* business plan is not necessarily required;

(c) for an uncongested airport, the single till approach is the appropriate pricing methodology;

(d) only those revenues associated with the economic activity of the operating airport should be considered;

(e) the entire duration of the agreement, including any extensions, should be considered;

(f) future financial flows should be discounted in order to assess profitability of the agreements;

(g) incremental profitability of Ryanair agreements to the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV).

Analysis of Professor Damien P. McLoughlin — Brand building: why and how small brands should invest in marketing, prepared for Ryanair, 10 April 2013

(211) The paper aimed to set out the commercial logic underlying regional airports' decisions to buy advertising on Ryanair.com from AMS.

(212) The paper argued that there are a large number of very strong, well known, and habitually used airports. Weaker competitors must overcome static buying behaviour of consumers to grow their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

Oxera Notes 3 and 4 — How should AMS Agreements be treated within the profitability analysis as part of the market operator test? 17 and 31 January 2014

(213) Ryanair submitted further reports by its consultant Oxera. In those reports, Oxera discussed the principles which, according to the airline, should be taken into account in the profitability analysis of, on the one hand, ASAs between Ryanair and the airports and, on the other hand, the marketing agreements between AMS and the same airports as part of the MEO test ([50]). Ryanair emphasised that those reports do not in any way change its position presented earlier that the ASAs and the marketing agreements should be analysed under separate MEO tests.

(214) The reports indicated that the profits generated by AMS should be included as revenues in a joint analysis regarding profitability while the expenses of AMS would have to be incorporated in the costs. To do this, the reports suggested the application of a cash-flow-based methodology to the joint profitability analysis, meaning that the expenditure by airports on AMS could be treated as incremental operating expenses.

(215) The reports emphasised that marketing activities contribute to the creation and support of the brand's value, which is able to generate effects and benefits, not only for the duration of the agreements with an airline, but also after its termination. That would especially be the case if, due to the fact that Ryanair has concluded an agreement with an airport, other airlines establish themselves at the airport, which will in turn attract more shops to install themselves there and therefore bring in more non-aeronautical revenues for the airport. According to Ryanair, if the Commission proceeds to undertake a joint analysis of profitability, those benefits have to be taken into account by treating the expenses of AMS as incremental operating costs, net of AMS payments.

(216) Furthermore, Ryanair was of the opinion that a terminal value would have to be included in the projected incremental profits at the end of the airport services agreement in order to take into account the value generated after the termination of the agreement. The terminal value could be adapted on the basis of a 'renewal'-probability, measuring the expectation that profits will persist after the termination of the agreement with Ryanair or if similar conditions would be agreed with other airlines. Ryanair considered that it would then be possible to calculate a lower limit for benefits generated jointly by the agreement with AMS and the airport service agreement, reflecting the uncertainties of incremental profits after the termination of the airport services agreement.

([50]) Oxera paper, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?' prepared for Ryanair, 17 January 2014.

(217) In support of that approach, the reports presented a synthesis of the results of studies on the effects of marketing on the value of a brand. Those studies recognise that marketing can support the value of a brand and can help to build a customer base. According to the reports, for an airport marketing on Ryanair.com especially increases the visibility of the airport's brand. Moreover, the reports stated that especially smaller regional airports wishing to increase their air traffic could therefore increase the value of their brand by concluding marketing agreements with AMS.

(218) The reports lastly indicated that a cash-flow-based approach was to be preferred over the capitalisation approach, in which the expenses of AMS would be treated as capital expenditure of an intangible asset (that is, the value of the brand) ([51]). The capitalisation approach would only take into account the proportion of marketing expenditure that is attributable to the intangible assets of an airport. The marketing expenses would be treated as intangible assets, and then depreciated for the duration of the agreement, taking into consideration a residual value at the foreseen termination of the ASA. That approach would not take into account the incremental profits brought by the conclusion of an ASA with Ryanair. It is also difficult to calculate the value of the immaterial asset due to the expenses of the brand and the time period of use of the asset. The cash-flow method is more appropriate than a capitalisation approach, since the latter would not capture the positive benefits to the airport that are expected to arise as a result of signing an ASA with Ryanair.

(v) The 2011 and 2013 MEOP reports

(219) Oxera was asked by Ryanair to undertake a test based on the MEOP which was submitted to the Commission on behalf of Ryanair in July 2011 (the '2011 MEOP Report') ([52]). The 2011 MEOP report presented results of a profitability analysis of the 2000 and 2010 ASAs between So.Ge.A.AL and Ryanair, based on information which, according to Ryanair, would have been available to So.Ge.A.AL at the time these agreements were concluded. The 2011 MEOP Report did not include an analysis of the expected profitability of the 2002, 2003 and 2006 ASAs.

(220) Building on the 2011 MEOP Report, an updated report was submitted to the Commission in March 2013 (the '2013 MEOP Report') ([53]), which estimates the expected profitability of the ASAs not considered in the 2011 MEOP Report (namely, the 2002, 2003 and 2006 ASAs).

(221) According to Ryanair, the *ex ante* assessment of the profitability of the 2000, 2002, 2003, 2006 and 2010 ASAs would suggest that all of these agreements were expected to be profitable for the airport at the time when they were signed. The expected profitability of each agreement between So.Ge.A.AL and Ryanair was assessed taking into account expected incremental cost and incremental revenue forecasts, including aeronautical and non-aeronautical revenues and the costs of the financial incentives offered to Ryanair. The fact that the resulting NPVs are all positive would presumably confirm that it was rational to conclude the agreements with Ryanair.

(222) When applying the MEO test in relation to the ASAs, the 2011 and 2013 MEOP Reports do not consider the agreements between So.Ge.A.AL and AMS for the provision of marketing services. According to Ryanair the agreements with AMS are separate from Ryanair's ASAs with the airport, in that the former concern the provision of marketing services to airports (rather than flights/passengers) at a market price and should therefore not be considered.

(vi) On non-selectivity of airport charges to Ryanair

(223) Ryanair rejects the Commission's view that any discount granted by Alghero airport should be treated as State aid, even where all airlines could benefit from the discounts. First, according to Ryanair, if all airlines get discounts, then the appropriate counterfactual price may be the lowest level of discount, rather than the published charges. Second, that approach fails to take into account any element of differential costs and benefits of serving the different airlines. An assessment of cost-reflectivity is a necessary step to assess whether a discount

([51]) Oxera paper, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test? — Practical application' prepared for Ryanair, 31 January 2014.
([52]) Oxera's report, 'Economic MEOP assessment, Alghero Airport', prepared for Ryanair, 22 July 2011.
([53]) Oxera's report 'Economic MEOP Assessment: updated profitability analysis — Alghero Airport', prepared for Ryanair, 12 March 2013.

to a particular airline is State aid. Relatively low charges, by themselves, do not necessarily constitute State aid, and, consistent with the findings of Ecorys, the lower charges reflect lower levels of service requested by Ryanair.

(224) In this case the discounts that Ryanair received were offered in recognition of the significant commercial risk that Ryanair took when establishing scheduled year-round operations at an airport that was unknown at the time ([54]).

(vii) On distortion of competition

(225) The Commission appears not to exclude competition between Alghero and Cagliari or Olbia airports, despite respectively 235 and 128 kilometres of mountainous relief separating these airports, and the absence of motorways in Sardinia. According to Ryanair, it would be uncertain whether any State aid at Alghero airport could result in a distortion of competition, and what the Commission believes to be the scope of such distortion.

(viii) On compatibility

(226) Ryanair considers that the arrangements between Ryanair and the airport did not involve State aid. In that sense Ryanair considers the potential applicability of the 2005 Aviation Guidelines in this case as irrelevant.

10.2. COMMENTS FROM AMS

(i) On AMS and the Ryanair website

(227) AMS supports the comments submitted by Ryanair regarding AMS. The Commission's assumption that the marketing fees paid to AMS in return for marketing services constitute aid (to Ryanair) and treating AMS and Ryanair as one beneficiary of State aid would be flawed. AMS offers marketing services that are justified by their own separate purpose and priced at their market value.

(228) Furthermore, Ryanair's decision to engage an intermediary to sell advertising space on its website would not be unusual. AMS has been successful in promoting and selling advertising space to numerous companies throughout Europe, both private and public.

(229) Ryanair's website presents particularly desirable characteristics for marketing: it is one of the most popular travel websites in the world; the average duration of each visit to Ryanair's website is extremely long; advertising for an airport on the Ryanair website uniquely targets potential passengers to that airport, ensuring that very little or no advertising spend is wasted, contrary to advertising in newspapers, radio, TV and other less focused media targeted at the general public.

(ii) On the absence of advantages to AMS or Ryanair

(230) AMS concludes marketing agreements with both public and private airports, tourism bodies, car rental groups, hotel reservation websites, insurance companies, telecommunications service providers.

(231) The rates at which advertising space is provided by AMS, and the volumes in which it is acquired, do not discriminate between public and private advertisers. Ryanair and AMS do not force airports to buy marketing services, and many airports in fact choose not to advertise on the Ryanair website. No State aid can arise from AMS's arrangements with public airports or their managers such as So.Ge.A.AL, when AMS could just as easily sell the website space to a private company, at a comparable price.

([54]) Letter of Ryanair of 22 July 2011.

(232) AMS presented several reasons which would justify SO.GE.A.AL purchasing marketing services from AMS to advertise on Ryanair.com, which are summarised in what follows.

(233) First, advertising on Ryanair's website is an investment in brand recognition. Airport managers of peripheral airports face significant challenges in getting their 'brand' recognised by passengers, airlines and non-aviation commercial managers, all of whom constitute potential sources of income for airports. Increased brand recognition can benefit the airports in a number of mutually inclusive and complementary ways, notably it may attract (i) inbound passengers from the airline on whose site the airport is advertising; (ii) potential customers browsing one airline's website on which an airport is advertising to fly to that airport on another airline that has routes to the airport; (iii) another airline to fly to that airport, and (iv) commercial managers (such as, airport retail chain stores).

(234) Second, advertising on Ryanair's website increases the proportion of inbound passengers. There is a trend among airports towards generating almost half of their revenue from non-aeronautical operations. From a regional airport's perspective, inbound passengers arriving to, and then departing from, the airport are much more likely to generate non-aeronautical income for the airport than local passengers using the airport to fly to foreign destinations.

(235) Third, marketing and advertising on the website of all airlines has become mainstream practice. Ryanair's website has exceptional value as a marketing venue for a wide range of travel-related products and services. It has become general practice for airports to carry out a portion of their brand promotion on the websites of airlines. In this case Alghero airport appears to have purchased advertising services not only from AMS, but also from Meridiana and Alitalia.

(236) Fourth, AMS' services are priced at their market value. A number of non-airport private customers from a range of industries purchase marketing services from AMS. Ryanair routes are not offered to those customers, yet they are happy to provide consideration in return for AMS's services. Those private customers, acting as market economy investors, clearly attach commercial value to AMS' services on a standalone basis, as do public and private airports throughout the Union. Those private comparator elements would be by themselves sufficient to demonstrate that AMS's prices are real market prices.

(iii) On the financing of So.Ge.A.AL by Sardinia

(237) The Commission regards So.Ge.A.AL as a mere conduit through which regional financing is channelled to Ryanair/AMS to be ostensibly used for marketing purposes. However, according to AMS the Commission failed to adduce evidence that So.Ge.A.AL had no autonomy as regards the use of the funds made available by RAS, and could therefore not use them for other purposes.

(238) So.Ge.A.AL appears to have been paying a fixed concession fee to the State, and did not share its revenues with the State. So.Ge.A.AL's owner, RAS, had a direct interest in increasing So.Ge.A.AL's long term profitability for instance by financially supporting its marketing efforts in order to enhance its brand image. Such conduct would be in line with the MEO test and would benefit RAS.

(239) AMS adds that it would be possible that part of the funding to So.Ge.A.AL could be considered a compensation for the provision of SGEIs. Alghero airport facilitates the provision of air services in a region that is isolated and otherwise difficult to reach.

(iv) Conclusion

(240) AMS concluded that it has not been the beneficiary of State aid and that So.Ge.A.AL and RAS acted in line with the MEOP towards AMS.

10.3. COMMENTS FROM UNIONCAMERE

(241) Unioncamere underlines that, without questioning the concept of economic activity in the Court of Justice's case-law, an activity that is *per se* economic cannot always be considered provided *on* a market, in the sense that such activity is or could realistically be provided in competition with other operators.

(242) Unioncamere admits that in similar circumstances a private investor would likely not have undertaken the measures under scrutiny in favour of the airport. The Commission should nonetheless take into account the fact that a public investment in an airport is often driven by considerations which are not similar to those of a private investor. A public investor has different expectations from those related to the profitability of the investment, and pursues at the same time objectives of a more general nature, such as the safeguard of the economy and regional development. While admitting that based on the case law of the Court such considerations cannot be taken into account for the purpose of MEOP analysis, Unioncamere submits that the public funding to Alghero airport did not aim to maintain afloat an undertaking which would not otherwise be competitive, but rather to support regional development. Given the specific geography of Sardinia, the presence of a dedicated airport is a priority for the public authorities.

(243) Unioncamere concludes that the Commission should apply the MEOP taking into account the objective of the measure to support regional and economic development, 'in other words should consider the measures as undertaken in the exercise of public powers'.

(244) Unioncamere considers that the compatibility of the measures under assessment in favour of So.Ge.A.AL should be assessed under Article 107(3)(c) of the Treaty.

11. **COMMENTS FROM ITALY ON INTERESTED PARTIES COMMENTS**

(245) Italy only commented on Ryanair's and Unioncamere's observations.

11.1. ON COMMENTS FROM RYANAIR

(246) As concerns the measures in favour of Alghero airport, Italy submitted that the airport operates in a remote region and therefore an overall SGEI mission to the airport 'could not be excluded'.

(247) Italy supports Ryanair's claim that smaller airports have no choice but to invest in their image so as to ensure viability prospects. In that sense, advertising on the websites of low cost companies would be common practice. Italy also underlines that the airport has acquired similar services from other airlines such as Germanwings, Volare, Meridiana and Alitalia.

(248) Italy confirms that AMS's services are priced at market rates. Prices are made available on the AMS website and rates applicable to So.Ge.A.AL were in line with those published.

(249) Italy concludes that AMS did not benefit from State aid and that So.Ge.A.AL and RAS acted in line with the MEOP.

11.2. ON COMMENTS FROM UNIONCAMERE

(250) Italy agrees that public investment in an airport is often justified by considerations which are not similar to those of a private investor as public investors also pursue objectives of a more general nature, such as economic and regional development.

12. **ASSESSMENT**

12.1. MEASURES IN FAVOUR OF SO.GE.A.AL

12.1.1. **Existence of aid within the meaning of Article 107(1) of the Treaty**

(251) According to Article 107(1) of the Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(252) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures under investigation constitute State aid within the meaning of Article 107(1), all the conditions mentioned in recital 251 need to be fulfilled. Namely, the financial support should:

(a) be granted by a Member State or through State resources,

(b) favour certain undertakings or the production of certain goods,

(c) distort or threaten to distort competition,

(d) affect trade between Member States.

12.1.1.1. *Economic activity and concept of undertaking*

(253) According to settled case law, the Commission must first establish whether So.Ge.A.AL is an undertaking within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([55]). Any activity consisting in offering goods or services on a given market is an economic activity.

(254) In its *Leipzig/Halle Airport* judgment, the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity ([56]). Once an airport manager engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport manager ([57]).

(255) Regarding the moment in time from which the construction and operation of an airport became an economic activity, the Commission recalls that the gradual development of market forces in the airport sector does not allow for a precise date to be determined. However, the European Courts have recognised the evolution in the nature of airport activities and in *Leipzig/Halle Airport*, the General Court held that from the date of the judgment in *Aéroports de Paris* (12 December 2000), the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from 12 December 2000 onwards, the operation and construction of airport infrastructure must be considered as an activity falling within the scope of State aid control. Conversely, the Commission cannot now put into question, on the basis of State aid rules, financing measures granted to airport managers before 12 December 2000 ([58]).

(256) The Commission therefore finds that from 12 December 2000 onward, So.Ge.A.AL was engaged in an economic activity and that it constitutes an undertaking in the sense of Article 107(1) of the Treaty. Consequently, in what follows the Commission assesses the State aid qualification and, for those measures which qualify as State aid, the compatibility with the internal market, of the measures granted as of 12 December 2000. The Commission will not however put into question measures that were decided before 12 December 2000 and thus need not assess those measures in this Decision.

([55]) Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637, paragraph 17; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36.

([56]) Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] not yet reported; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 and case T-196/04 *Ryanair v Commission* [2008] ECR II-3643.

([57]) Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

([58]) 2014 Aviation Guidelines, point 29.

(257) Italy has provided data on capital expenditure (including financing of infrastructure, equipment and 'fittings and works') committed before 12 December 2000 (see recital 84). On this basis, the Commission concludes that it is not entitled to examine and call into question an amount of EUR 25 431 706,16 decided before that date.

12.1.1.2. *Public policy remit*

(258) While So.Ge.A.AL must be considered to constitute an undertaking in the sense of Article 107(1) of the Treaty at least as of 12 December 2000, it must be recalled that not all activities of an airport manager are necessarily of an economic nature ([59]).

(259) The Court of Justice has held that activities that normally fall under the State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid.

(260) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid ([60]). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are generally considered to be of a non-economic nature ([61]).

(261) However, public financing of non-economic activities must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case-law that an advantage is present when public authorities relieve undertakings of the costs inherent to their economic activities ([62]). Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic ([63]).

(262) As mentioned at recital 49, by letter of 10 June 2014 Italy claimed that So.Ge.A.AL carried out certain activities falling within the public policy remit. In particular, Italy submitted that the costs (investment costs or operating expenses) arising from the obligation on airports to make available to ENAC and other local public entities (the Air Border Police, the Customs Agency, the Red Cross, the Fire Brigade, the Police) airport premises and to bear administration/maintenance costs of those premises are to be considered as falling within the public policy remit. Such obligation is laid down in the national legislation and applies to all airport managers in Italy. According to Italy the total costs incurred by So.Ge.A.AL in the maintenance of those areas in the period 2000-2010 amounted to EUR 2 776 073 ([64]).

(263) The Commission is of the view that, generally, such costs can be considered as relating to activities that fall within the public policy remit. However, in this case the Commission notes that the national legislation does not lay down any entitlement of airport managers of compensation for the costs borne for such activities. Therefore, under the applicable legal system, Italian airports normally have to bear the relevant costs themselves. Consequently, costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities listed in recital 262 should be considered to constitute normal operating expenses of airport managers ([65]). Therefore operating costs (referred to in recital 48) and investment costs (referred to in recital 49) related to the provision and maintenance of premises reserved for the activities mentioned in recital 262 do not qualify as public policy remit costs and the financing of those costs by the public authorities is capable of constituting State aid to So.Ge.A.AL.

([59]) Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43; 2014 Aviation Guidelines, point 34.
([60]) Commission Decision of 19 March 2003 in case N 309/2002, cited.
([61]) See, in particular, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71; 2014 Aviation Guidelines, point 35.
([62]) See Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.
([63]) 2014 Aviation Guidelines, point 37.
([64]) Letter of Italy of 10 June 2014, Annex 22.
([65]) See 2014 Aviation Guidelines, point 37.

12.1.1.3. *State resources and imputability to the State*

(264) As the Court established in its *Stardust Marine* ruling, the concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it ([66]). Resources of intra-state entities (decentralised, federated, regional, local, or other) of the Member States are, for the purpose of application of Article 107 of the Treaty, State resources ([67]). In addition, the measures adopted by such entities, whatever their legal status and description, fall, in the same way as measures taken by the central authority, within the ambit of Article 107 ([68]).

(265) In this case, the subsidies from RAS for 'fittings and works' (Measure 2) were granted to So.Ge.A.AL directly from the regional budget and therefore amount to State resources and are imputable to the State. Likewise, the co-financing by the State of airport infrastructure and by RAS of equipment at Alghero airport (Measure 3) was financed directly through State resources.

(266) As to the five capital injections which took place in the period 2000-2010, for a total amount of EUR 31 086 398 (Measure 1), since they were carried out and thus financed by So.Ge.A.AL's public shareholders, namely the Chamber of Commerce of Sassari, the Province of Sassari, the Municipality of Sassari, the Municipality of Alghero, RAS and SFIRS, they ought to be regarded as financed through State resources.

(267) A separate issue to be explored is whether those transfers of State resources are also imputable to the State. Decisions taken by the Chamber of Commerce of Sassari, the Province of Sassari, the Municipality of Sassari, the Municipality of Alghero and RAS — as public authorities or local autonomous public bodies governed by public law which considers them part of the public administration and which are entrusted with public policy tasks (such as the Chamber of Commerce of Sassari) — are imputable to the State.

(268) As regards SFIRS, it is settled case law that the imputability to the State of a measure taken by a public undertaking can be established either by 'organic' or 'structural' indicators or by indications that the State has been involved, or was unlikely to be absent, from the decision that lead to the concrete measure. The Court established a non-exhaustive set of possible indicators relevant for the question of state imputability, such as ([69]):

(a) the fact that the undertaking through the intermediary of which the aid has been granted had to take into account directives issued by governmental bodies;

(b) the integration of the public undertaking into the structures of the public administration;

(c) the nature of the undertaking's activities and the exercise of the latter on the market in normal conditions of competition with private operators;

(d) the legal status of the undertaking (public law or ordinary company law);

(e) the intensity of the supervision exercised by the public authorities over the management of the undertaking; and

(f) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content, or the conditions which it contains.

(269) The investigation in this case confirmed the initial assessment of the Commission that the capital injections are to be considered the result of conduct imputable to the State and that SFIRS did not engage in the capital injections under investigation only out of profit-maximising considerations.

(270) SFIRS was set up as investment company of RAS, with the task to prepare plans and draft guidelines targeting the region's economic and social development. The main objective of SFIRS is thus not to maximise profit but rather to act as an instrument of RAS to foster the economic development of Sardinia. Also, in a meeting of So.Ge.A.AL's Shareholder Assembly of 30 April 2004, the RAS representative discarded the operating loss

([66]) Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397.
([67]) Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], not yet published, paragraph 108.
([68]) Judgment of the Court of 6 March 2002, joint cases T-127/99, T-129/99, T-140/99 *Diputación Foral de Álava and others v Commission*, Rec 2002, p. II-1330, paragraph 142.
([69]) *Stardust Marine* judgement, cited.

recorded by the airport manager in 2003 in the light of the 'strategic role assumed by the airport at regional level.' ([70]). This indicates that RAS attached particular importance to the development of the airport, an objective which it pursued through its investment vehicle SFIRS together with So.Ge.A.AL's other public shareholders. In addition, SFIRS intervention was concomitant with that of the other public shareholders.

(271) Therefore, the Commission concludes that the capital injections involve State resources and are imputable to the State. The Commission also notes that Italy has not contested this finding in the investigation.

12.1.1.4. *Economic advantage*

(272) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, namely in the absence of State intervention ([71]). In this regard, financing of costs incurred in the provisions of SGEI does not confer an economic advantage on the recipient to the extent that the conditions laid down by the Court in the Altmark case ([72]) are observed (see recitals 273-278). Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of State intervention ([73]). In what follows, the Commission first assesses whether the measures at issue (Measures 1, 2 and 3) comply with the Altmark conditions, and second, analyses whether they were granted in normal market conditions in accordance with the MEOP.

12.1.1.4.1. Non-observance of the Altmark criteria

(273) During the investigation So.Ge.A.AL claimed that it was entrusted with the provision of an SGEI. So.Ge.A.AL claims it discharged PSOs, enshrined in the Convention (see recitals 173-176).

(274) Conversely, in its observations on the 2012 Decision Italy had not claimed that the overall management of the airport, or part of its activities, would qualify as SGEI and therefore that the measures under scrutiny would constitute compensation for the discharge of PSOs. In response to the observations submitted in the course of the investigation by Ryanair, Italy had merely confirmed that 'it could not be excluded that the airport manager provided a public service' (see recital 246). Late in the investigation procedure, in reply to a request for information from the Commission, Italy — on behalf of RAS — stated that So.Ge.A.AL would in fact provide SGEIs which would have been entrusted to it:

(a) as concerns the management of the airport, by means of the different Conventions signed by So.Ge.A.AL with the State;

(b) as concerns the airport infrastructure, by means of the different acts laying down its financing by public funds.

(275) In case of undertakings entrusted with the provision of an SGEI, in order to conclude whether or not the measures under assessment constitute an advantage within the meaning of Article 107(1) of the Treaty, the Commission must examine observance of the conditions set out by the Court in its judgement in the Altmark case. Those conditions may be summarised as follows:

(a) the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined ('Altmark 1');

(b) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('Altmark 2');

(c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations ('Altmark 3');

([70]) Letter of Italy of 18 February 2014, Annex 17.
([71]) Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.
([72]) *Altmark* judgement, cited.
([73]) Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

(d) where an SGEI mission is not entrusted to an undertaking pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations ('Altmark 4').

(276) The Commission first assesses observance of the Altmark 2 criterion. Given that the Altmark criteria have to be complied with cumulatively, non-observance of either one of those conditions would lead to the conclusion that the presence of an advantage cannot be excluded on the basis of this test, even if the services provided by So.Ge.A.AL qualify as SGEIs.

(277) In this case the parameters for the calculation of the compensation to the airport manager for the provision of SGEIs were not established in advance. In fact, no explicit reference to any compensation to be granted by the State to the airport manager for the provision of airport services is made in the Convention. This alone suffices to conclude that the Altmark 2 criterion is not met in this case.

(278) Giving that the four Altmark conditions are not cumulatively observed in this case, the Commission concludes that the presence of an advantage cannot be excluded on the basis of this test, even to the extent the services provided by So.Ge.A.AL would qualify as SGEIs.

12.1.1.4.2. Compliance with the MEOP

(279) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' ([74]).

(280) In this case, in order to determine whether the public financing of Alghero airport conferred So.Ge.A.AL an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the funding in question to that of a market economy investor who is guided by prospects of profitability ([75]).

(281) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, beyond those affecting the profits expected by the public entities granting the measures. Indeed, the Court has clarified that the relevant question for applying the MEOP is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ([76]).

(282) In *Stardust Marine*, the Court stated that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' ([77]).

(283) Furthermore, the Court declared in the EDF case that, '[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.' ([78]).

(284) Therefore, in order to be able to apply the MEOP, the Commission has to place itself at the time when each decision to provide public funds to So.Ge.A.AL was taken. Also, the Commission should in principle base its

([74]) *Stardust Marine* judgement, cited, paragraph 69.
([75]) Case C-305/89 *Italy v Commission* ('ALFA *Romeo*') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.
([76]) Case 40/85 *Belgium v Commission* [1986] ECR I-2321.
([77]) *Stardust Marine* judgement, cited, paragraph 71.
([78]) Case C-124/10P *European Commission v Électricité de France* ('*EDF*') [2012], not yet published, paragraph 85.

assessment of the profit-driven character of investment decisions on the information and assumptions which were at the disposal of the public authorities at the time when the decisions to provide So.Ge.A.AL with funding were taken. Point 63 of the Aviation Guidelines provides that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* perspective, to the profitability of the airport. While this criterion reflects the logic of the MEO test, it has been spelt out only recently and refers to individual arrangements rather than to the overall business, as is more often the case when applying the MEO test. Therefore, the Commission recognises that it may be difficult for the relevant Member State and for the operators concerned to provide full contemporaneous evidence in respect of arrangements concluded many years ago and will take that into account when applying the criterion at stake in the present case.

(i) Financing of airport infrastructure (including 'fittings and works') and equipment

(285) As mentioned in recital 81, in the assessment conducted in this Decision, the Commission analysed the subsidies for infrastructure and equipment (Measure 3) and the financing of 'fittings and works' (Measure 2) together, as a series of measures financing the creation and upgrading of infrastructure and equipment.

(286) Costs related to the construction and operation of an airport, including investment costs, are normally borne by the airport operator so that covering a part of those costs relieves it of a burden that it would normally have to bear.

(287) It should be determined whether, when providing investment grants to finance infrastructures, equipment, fittings and works at Alghero airport, the public authorities could reasonably expect a return on investment in any form and to an extent that would make their investments profitable for them.

(288) Italy did not explicitly argue that the investment grants complied with the MEOP. Nor did Italy present a business plan with calculations regarding the expected profitability of the investment grants, whether done *ex ante* or reconstructed on the basis of information available and foreseeable developments at that time.

(289) As regards grants provided by the State, it should be noted that in exchange for the right to manage the airport infrastructure, So.Ge.A.AL pays a concession fee to the State. Italy submitted that the concession fees owed by airport managers are set in reference to traffic volumes and do not therefore aim to remunerate State investments in airport infrastructure. There is no indication that, when financing certain investments at Alghero airport, the State could expect an increase in the traffic and a related increase in the concession fees that would be of a sufficient magnitude to make its expenses profitable.

(290) The Commission considers that, given the inherent and significant uncertainties related to the infrastructure projects, the State's investment grants are not in line with the type of analysis that a prudent investor would have undertaken for such projects. Since there is no indication that the financing in question was expected to yield a normal return, the Commission considers that the financing granted by the State after 12 December 2000 did not comply with the MEOP and conferred an advantage to the airport manager.

(291) The public funding for equipment is not MEOP-compliant either since there was neither an *ex ante* business plan, nor a sensitivity analysis of any underlying profitability assumptions showing what financial return RAS could reasonably expect to draw from the investment subsidies that it granted to So.Ge.A.AL. It is not even clear that RAS could expect any return since unlike the State, it does not receive any concession fee from So.Ge.A.AL.

(292) Furthermore, even if one were to assume that the dividends that it might receive and the potential increase in the value of the shares that it owns in So.Ge.A.AL, as its main shareholder, could be considered as a possible source of financial returns that can be taken into account in the application of the MEOP in this context ([79]), it is

([79]) The Commission does not take a definitive view on this point in this Decision.

sufficient to note that So.Ge.A.AL had generated significant losses in every year in the period subject to investigation (starting in 2000). Hence, neither the State nor RAS could reasonably expect its funding of infrastructure or equipment at Alghero airport in this period to improve the financial situation of So.Ge.A.AL to such an extent that the latter would pay sufficient dividends, or that the value of So.Ge.A.AL's shares would increase as a result of this funding to such an extent as to make the public funding 'profitable'. Neither Italy nor third parties have provided elements which would suggest that this is the case.

(293) Therefore, Measure 2 and Measure 3 do not comply with the MEOP and have conferred an economic advantage on So.Ge.A.AL.

(ii) Capital injections between 2000 and 2010

(294) Both Italy and So.Ge.A.AL have claimed that the capital injections carried out by So.Ge.A.AL's public shareholders in the period 2000 — 2010 would comply with the MEOP. Even though the airport manager had consistently recorded losses since 2000, it would be legitimate to assume that the activity would yield a return, notably given the imminent award to So.Ge.A.AL of the 'comprehensive' concession. When adopting each of the measures in question, public shareholders would have acted as prudent market economy investors.

(295) Given that at the time the capital injections were decided So.Ge.A.AL was in a precarious financial situation, it was the Commission's preliminary view in the 2012 Decision that a market economy investor would have required the implementation of a plan to restore the company's viability. The Commission considered that a private investor would only inject fresh capital in a company whose capital had dropped below the level that is legally required, as was the case for So.Ge.A.AL, if he could expect the company to return to viability within reasonable timescales. No such plan had at that time been provided to the Commission and, as explained in recitals 301 to 311, the various business plans prepared by or for So.Ge.A.AL over the period during which the capital injections were carried out did not form a sound basis which shareholders guided by profitability prospects would have found sufficient to expect a reasonable return.

(296) In the course of the investigation Italy provided the Commission with several documents it claimed should be considered as the business plans on which the decisions to recapitalise So.Ge.A.AL were based. Italy also claimed that from the perspective of a private investor, the compensation of So.Ge.A.AL's losses might be validly justified not only by the presence of a strategic restructuring programme with good long-term profit prospects, but also by considerations other than mere financial profitability, notably more general public interest objectives such as regional development. The business plans submitted by Italy are detailed in recitals 59-75.

(297) In that regard the measures implemented by the State, RAS and SFIRS, are not in line with the behaviour of a market economy investor guided by profitability prospects. Throughout the period 2000 to 2010, the State, RAS and SFIRS constantly provided the financial support necessary to keep So.Ge.A.AL alive. The Commission considers that So.Ge.A.AL's financial situation was such that no private operator would have covered its losses over such a long duration, without a credible and realistic prior assessment showing that it would be more cost-effective to continue covering losses instead of restructuring the company.

(298) The Commission cannot accept either Italy's argument that public interest objectives should be taken into account when assessing the business rationale of a public investor. Based on settled case law, if the public shareholders were acting as a private market investor, they would not be guided by public interest objectives and the investment would have to be profitable in itself.

(299) Since in the course of the investigation So.Ge.A.AL claimed that the economic rationale of the measures should be assessed separately before and after the award of the comprehensive concession in 2007, the Commission assesses in turn the capital injections carried out in the period 2000-2007 and 2008-2010.

Capital injections in the period 2000 - 2007

(300) So.Ge.A.AL stated that the recapitalisations undertaken prior to 2007 were guided by the need to safeguard the business of the company, in view notably of the imminent award of the comprehensive concession. Based on information available at the time the decisions to inject capital into the company were taken, the perspective of the comprehensive concession being awarded was of crucial importance to So.Ge.A.AL's shareholders.

(301) In that sense the Commission considers that So.Ge.A.AL's business plans cannot be considered as a realistic basis for predicting the company's future performance in the period 2000 — 2010. Those plans made isolated reference to capital injections which would be required to bring capital back in line with legal requirements. In addition, they do not contain any indications that at the time the capital injections under investigation were decided, So.Ge.A.AL's public shareholders expected the company's return to viability and a return on their investment (in terms of dividends paid or increase in the value of the company's shares) which would outweigh the amount of the capital invested in the company. Nor do the plans contain an analysis of alternative scenarios that a diligent private investor would require before undertaking such substantial capital injections into the company.

(302) The Commission notes that only one of the documents referred to by Italy as business plans predates the date of the first capital injection decision. Although the 1999 business plan mentions that So.Ge.A.AL would need to be recapitalised, it does not provide for an assessment showing that it would be more cost-effective for the company's shareholders to cover losses of the airport manager instead of adopting restructuring measures aimed at increasing the efficiency of the airport manager within a timeframe acceptable to a private investor. Moreover, the 1999 business plan does not indicate that So.Ge.A.AL would become profitable following the capital injections.

(303) In addition, the 1999 business plan was based on the assumption So.Ge.A.AL would be awarded the comprehensive concession that same year. The Commission considers that a prudent private investor would have reassessed the strategy and considered restructuring options when it became evident that award of the concession would be delayed and the objective of a return to profitability was not going to be achieved.

(304) No measures were proposed to restructure So.Ge.A.AL in the Roland Berger plan either, the only business plan assessing So.Ge.A.AL's financial situation under two scenarios — 'comprehensive' versus 'temporary' concession. The Roland Berger plan concluded that So.Ge.A.AL would continue to record losses in a temporary concession scenario without however proposing any remedial measures. Such lack of information would have dissuaded any private investor from pursuing the strategy in question, in particular giving the lack of any certainty in respect of the actual date of award of the comprehensive concession to So.Ge.A.AL. The Commission also notes that the Roland Berger plan was considered to be insufficiently reliable by So.Ge.A.AL itself (see recital 57).

(305) The 2005 business plan was drawn up in view of the award of the comprehensive concession. While it provided for a forecast of revenues and costs for the forty-year duration of the concession for the management of the airport, on the assumption that the concession is granted to So.Ge.A.AL in 2006, the plan did not propose measures to address the weaknesses of the underperforming handling business, which was considered in the 2004 Roland Berger plan as below sector average and was expected to continue generating losses on the medium term.

(306) On this basis, the Commission considers that none of the above-mentioned plans forms what a prudent market economy operator would have considered as a reliable basis to carry out the investments in question.

Capital injections in the period 2008-2010

(307) A private investor would in any event have re-assessed the strategy in the 2010 business plan, in particular given that by virtue of Article 14*bis* of the Convention, the concession was to be revoked if So.Ge.A.AL did not reach viability within four years from the date such concession entered into effect, namely by 2011. The 2010 plan however projected the company's return to viability only one year later than 2011, i.e. in 2012, also taking into account a recapitalisation of the company envisaged for 2010.

(308) The shareholders' decision to continue covering So.Ge.A.AL's losses with no restructuring programme in place even when economic performance following the award of the comprehensive concession showed that an upturn in profitability within the timelines imposed by the Convention was unlikely, cannot be equated to the conduct of a private investor.

(309) Furthermore, So.Ge.A.AL stated that unforeseen events had a negative impact on its results after 2007 and referred in particular to the effects on its turnover of the economic downturn as a consequence of which the company would have recorded a 1,8 % fall in passenger traffic. In addition, So.Ge.A.AL claimed that traffic did not develop as it had been forecasted due to the delay in the execution of infrastructure works at the airport and the lack of a revision by ENAC of the level of airport charges.

(310) In that respect the Commission notes that Italy did not provide any means of evaluating the effects of the unforeseen events in question. There is no evidence that the 1,8 % drop in traffic could be imputed to the economic crisis.

(311) On that basis, the decisions to recapitalise So.Ge.A.AL do not appear to have been based on economic evaluations comparable to those which, in the relevant circumstances, a rational private market investor in a similar situation would have carried out, before making such investments, in order to determine their future profitability.

(312) The Commission also notes that both Italy and So.Ge.A.AL confirmed that the capital injections were primarily agreed so as to satisfy regulatory requirements. However, the Commission considers that compliance with regulatory capital requirements cannot by itself justify that a private market investor injects further capital into the company. Investors are often obliged by law to contribute additional equity to firms whose capital base has been eroded by continuous losses to below a predetermined level. Private investors faced with such a situation would also consider all other options — including the liquidation or run-down ([80]) — and choose the one which is financially the most advantageous.

(313) Consequently, the Commission concludes that the capital injection decisions So.Ge.A.AL did not comply with the MEOP and therefore provided So.Ge.A.AL with an economic advantage.

12.1.1.5. *Selectivity*

(314) In order to fall within the scope of Article 107(1) of the TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way may qualify as State aid.

(315) In the case at hand, the Commission notes that Measures 1, 2 and 3 have only been provided to So.Ge.A.AL and are therefore selective within the meaning of Article 107(1) of the TFEU.

12.1.1.6. *Affectation of trade and distortion of competition*

(316) In order to be qualified as State aid, a financial measure must affect trade between Member States and distort or threaten to distort competition. In its assessment of those two conditions, the Commission is not required to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable given the circumstances to affect such trade and distort competition ([81]). When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.

(317) As assessed in recitals 253-257, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. In this respect, the Commission underlines that notably with respect to low-cost carriers and charter operators, airports that are not located in the same catchment areas and in different Member States may also be in competition with each other to attract those airlines.

([80]) See Commission communication to the Member States (OJ C 307, 31.11.1993, p. 3), paragraph 36.
([81]) See for instance Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44.

(318) As mentioned in point 40 of the 2005 Aviation Guidelines and reaffirmed in point 45 of the 2014 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the Treaty on the grounds that their financing by public authorities could not distort competition or affect trade between Member States. Furthermore, point 45 of the 2014 Aviation Guidelines explicitly states that 'the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected.'

(319) Alghero airport currently serves ca. 1,5 million passengers per year. The 2005 business plan provided by Italy foresaw passenger numbers to steadily increase by 4,5 % until 2010, 2,6 % from 2011 to 2025 and 3,78 % during 2006-2025, to around 2 800 000 million passengers approaching 2045. Furthermore, since 2000 Alghero airport has been serving a number of international destinations. In light of these facts, it must be considered that the economic advantage conferred on So.Ge.A.AL through the various measures at issue distorted or threatened to distort competition and were at least liable to affect trade between Member States.

12.1.1.7. *Conclusion on the existence of aid*

(320) Therefore, the Commission considers that the capital injections and the public financing for infrastructure, including 'fittings and works', and equipment constitute aid to So.Ge.A.AL.

12.1.2. **Lawfulness of the aid**

(321) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(322) The measures at issue have all been put into effect without being authorised by the Commission. Furthermore, based on the assessment in recitals 323 to 327 the aid measures under investigation in favour of So.Ge.A.AL cannot be considered as exempted from the notification requirement on the basis of the 2005 SGEI Decision, applicable to aid granted before 31 January 2012.

(323) The 2005 SGEI Decision exempted from the notification requirement State aid in the form of public service compensation granted to undertakings in connection with SGEIs which comply with the conditions stipulated therein. In particular, the 2005 SGEI Decision declared compatible State aid in the form of public service compensation to airports (i) for which the annual traffic does not exceed 1 000 000 passengers, (ii) with an annual turnover before tax of less than 100 million during the two financial years preceding that in which the SGEI was assigned, which receive annual compensation of less than EUR 30 million.

(324) The 2005 SGEI Decision only applied to aid in the form of public service compensation for a genuine SGEI. In order to benefit from an exemption, public service compensation for the operation of an SGEI had to also comply with the conditions set out in Articles 4, 5 and 6 thereof.

(325) Article 4 of the 2005 SGEI Decision required that the SGEI be entrusted to the undertaking concerned by way of one or more official acts, setting out, inter alia, the nature and duration of the public service obligations, the parameters for calculating, controlling and reviewing the compensation, and the necessary arrangements for avoiding and repaying any overcompensation. Article 5 of the 2005 SGEI Decision laid down that the amount of compensation had to be limited to what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, Article 6 of the 2005 SGEI Decision required Member States to carry out regular controls to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5.

(326) According to Italy and So.Ge.A.AL, in this case the SGEI qualification of the management of Alghero airport should be inferred from the Convention. However, no explicit definition of the alleged SGEI mission entrusted to So.Ge.A.AL nor the rules governing So.Ge.A.AL's right to compensation were laid down in the Convention. Nor has So.Ge.A.AL made available to the Commission any other document outlining the scope of the presumed PSOs it had to discharge. Therefore, the Commission considers that the alleged entrustment act has not imposed genuine PSOs on the airport manager. Nor has it laid down the parameters for calculating, controlling and reviewing the compensation, and the necessary arrangements for avoiding and repaying any overcompensation. The requirements of Articles 4, 5 and 6 of the 2005 SGEI Decision relating to the content of the entrustment acts are therefore not met.

(327) The Commission considers that on this basis it cannot be concluded that the aid to So.Ge.A.AL was exempted from the notification requirement on the basis of the 2005 SGEI Decision.

(328) Therefore, the Commission concludes that Italy did not respect the stand-still obligation laid down by Article 108(3) of the Treaty and the measures at issue thus constitute unlawful State aid.

12.1.3. **Compatibility of the aid**

(329) Given that Measures 1, 2 and 3 constitute State aid within the meaning of Article 107(1) of the Treaty, their compatibility can be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article and Article 106(2) of the Treaty.

12.1.3.1. *Applicability of the Aviation Guidelines*

(330) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) that State aid is not compatible with the internal market. The aid in question can be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.

(331) The 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.

(332) According to the 2014 Aviation Guidelines, the Commission considers that the 'Commission notice on the determination of the applicable rules for the assessment of unlawful State aid' ([82]) applies to unlawful investment aid to airports. In that respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission applied the principles set out in the 2005 Aviation Guidelines in the case of unlawful investment aid to airports granted before 4 April 2014. For unlawful investment aid granted before the entry into force of the 2005 Aviation Guidelines, when no compatibility criteria for investment aid to airports existed, the Commission must assess compatibility directly based on Article 107(3)(c) of the TFEU, also taking into account its decision practice. In this regard, the Commission considers that, for the purpose of assessment of the compatibility of investment aid granted to So.Ge.A.AL before the entry into force of the 2005 Aviation Guidelines, the criteria laid down by those guidelines should be applied by analogy.

(333) According to the 2014 Aviation Guidelines, the Commission considers that the provisions of the 'Commission notice on the determination of the applicable rules for the assessment of unlawful State aid' should not apply to pending cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission applied the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid to airports (pending notifications and unlawful aid) even if the aid was granted before 4 April 2014.

([82]) OJ C 119, 22.5.2002, p. 22.

12.1.3.2. *Investment or operating aid*

(334) According to point 25(r) of the 2014 Aviation Guidelines, investment aid is defined as 'aid to finance fixed capital assets; specifically, to cover the "capital costs funding gap"'. According to point 25(r) of the Guidelines, investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).

(335) Operating aid means covering all or part of the operating costs of an airport, defined as 'the underlying costs of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit' ([83]).

(336) In the course of the investigation ([84]) Italy claimed that the public financing of airport infrastructure investments could generally be assessed:

(a) as investment aid at the level of the full amount of the funding made available to So.Ge.A.AL to cover investment costs, or alternatively

(b) as operating aid, amounting to the difference between a market based concession fee, if any, and the concession fee effectively due by the airport manager for the right to manage the airport.

(337) Italy claimed that in this case the public financing in question must not be qualified as investment aid to So.Ge.A.AL. This is first because the State retained ownership of the infrastructure in question and second because prior to the date of award of the comprehensive concession in 2007, the airport manager was not responsible for investments in infrastructure at Alghero airport, but rather acted on behalf of the State for the maintenance of the airport infrastructure.

(338) In the light of the position taken by Italy and the definitions provided for in the 2014 Aviation Guidelines, it can be considered that:

(a) the capital injections after 12 December 2006, which were used to cover annual operating losses of So.Ge.A.AL, constitute operating aid in favour of So.Ge.A.AL;

(b) the State financing for infrastructure, 'fittings and works', and equipment until the award of the comprehensive concession in 2007 constitutes operating aid in favour of So.Ge.A.AL. Indeed, prior to this award it was not for So.Ge.A.AL to finance investments at Alghero airport, but for the State as owner of the airport. Therefore, State financing for infrastructure, 'fittings and works', and equipment did not relieve So.Ge.A.AL of investment costs it should have normally borne. In order to act in accordance with the MEOP, the State should have required an increase in the concession fee due by So.Ge.A.AL to ensure the profitability of their investments. It follows that the aid takes the form of a concession fee (which for an airport manager such as So.Ge.A.AL constitutes an operating cost) that was lower than it should have been. Since following the award of the comprehensive concession for the management of the airport infrastructure investments fell within the responsibility of So.Ge.A.AL, the public financing of such investment constitutes investment aid. However, in any event, in what follows the Commission has assessed the compatibility with the internal market of the financing of infrastructure investments at Alghero (i) under the assumption that it would constitute investment aid (see recitals 339-367) as well as (ii) under the assumption that they would constitute operating aid (see recitals 368-374). As part of its assessment under (ii), the Commission also analysed the compatibility with the internal market of the capital injections (Measure 1), which clearly constitute operating aid.

12.1.3.3. *Compatibility of the aid for infrastructures and equipment (Measure 2 and 3) under the assumption that it is investment aid*

(339) The Commission first notes that according to the 2005 Aviation Guidelines, eligible costs of investments in an airport must be limited to construction of airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security or safety equipment). Eligible

([83]) Point 25(v) of the 2014 Aviation Guidelines.
([84]) Letter of Italy of 8 May 2014.

costs must exclude costs not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks.

(340) In this case the public funds were directed to the financing of the new passenger terminal, the renovation of the old terminal, the upgrading of the taxiway, the expansion of aircraft parking areas, the upgrading of the runway, the realisation of the baggage control system and the implementation of a system of perimeter control. Those investment costs are eligible for financing under the 2005 Aviation Guidelines.

(341) As concerns compatibility with the internal market of the public financing under investigation, in accordance with point 61 of the 2005 Aviation Guidelines, the Commission examines in particular whether:

(a) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);

(b) the infrastructure is necessary and proportional to the objective which has been set;

(c) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

(e) the development of trade is not affected to an extent contrary to the Union interest.

(342) In addition to the requirement to satisfy specific compatibility criteria specified in the 2005 Aviation Guidelines, State aid to airports, as any other State aid measure, should have an incentive effect and be necessary and proportional in relation to the aimed legitimate objective in order to be cleared as compatible ([85]). Therefore, in addition to the criteria listed in recital 341, the Commission assessed the incentive effect as well the necessity and proportionality of the aid in question.

(i) Clearly defined objective of general interest

(343) The measures under assessment aimed, inter alia, at financing the construction of a new terminal with a capacity of 2 000 000 passengers because the old terminal (capacity of 800 000 passengers) was congested already in 2003 ([86]). In addition, the investment aid was used to finance a number of measures that helped adapting the airport to new safety and security requirements with a view to keeping it fully operational.

(344) According to Italy, the overall aim of the financing of the infrastructure at Alghero airport was the development of safe and viable transport infrastructures and regional connectivity. According to Italy, regional airports have an instrumental role to play in promoting accessibility to catchment areas and the investments at issue improve airport safety, security and efficiency, whilst contributing towards the achievement of wider regional development objectives.

(345) Besides, Italy underlines that the GDP per capita in Sardinia is, on average, much lower than in Italy, and the unemployment rate is substantially higher than the Italian average. For example, between 2003 and 2012, the average unemployment rate in Sardinia was 13,3 % compared with 7,9 % in Italy. Therefore, any increase in traffic flows arising from the development of infrastructure at Alghero airport is likely to produce associated social and economic benefits for Sardinia, in terms of both economic and social cohesion, as well as the development of the island.

(346) Those comments are consistent with the conclusions of the Accuracy Report, which acknowledged that the development of the air transport sector in Sardinia is particularly important for the area's regional development. The Accuracy Report highlights an example of the potential magnitude of the positive economic benefits arising from developing aviation infrastructure in Sardinia. According to a study mentioned in the Accuracy Report, the development of air transport infrastructure at Cagliari Airport (based in Sardinia) led to positive economic effects of approximately EUR 140 million per year.

([85]) See for instance Commission Decision in case SA.34586 — *Greece — Chania Airport Modernisation*, recital 49.
([86]) The 'reconstruction' of the old terminal mentioned in Table 5 above relates to the expansion/construction of the new terminal and is therefore included in the description of the aid for the new terminal.

(347) In addition, the only convenient mode of transport to/from Sardinia is air travel, apart from ferry services, which however involve considerably higher travel times. For example, although Sardinia is served by ferry routes from Spain and mainland Italy, the average duration of a ferry journey is in excess of nine hours.

(348) The development of infrastructure at Alghero airport was therefore part of Sardinia's plans to improve connectivity through the development of regional airports. Accordingly, the Commission can conclude that the public funding provided for infrastructure upgrading at Alghero airport meets the clearly defined objectives of improving safe and viable transport infrastructure and regional accessibility. Therefore, the development of infrastructure at Alghero airport was in the common interest, as the investments were expected to generate positive external effects in terms of economic and social development.

(ii) Necessary and proportionality of the infrastructure to the set objective

(349) Investment aid can only be declared compatible when it is necessary and proportionate to the set objective of general interest. That is in particular the case when the investment does not constitute a duplication of an existing under-utilised infrastructure.

(350) The State aid to fund the investments at Alghero airport was required in order to increase the airport's capacity and therefore ensure its long-term viability. Before the investments were undertaken, Alghero airport's capacity was only 800 000 passengers. Alghero airport had reached capacity constraints in 2003 and 2004, and, therefore, investments were required to enable it to handle more passengers. In addition, certain improvements required to meet safety standards were implemented, which facilitated a better use of the existing airport infrastructure and thereby contributed to the regional development and connectivity of the airport's catchment area.

(351) The investments led to an increase in the airport's capacity from 800 000 passengers in 2003 to 2 000 000 passengers in 2004. As of 2011, passenger traffic at the airport reached approximately 70 % of the airport's capacity. According to Italy, it is foreseeable that passenger traffic would have been at higher levels if the financial crisis had not occurred.

(352) The Ecorys Report acknowledges that the development of tourism required the expansion of Alghero airport's terminal capacity in order to accommodate the anticipated growth in traffic. As mentioned above, according to the Ecorys Report, prior to the investments being undertaken at Alghero airport, the development of the tourism sector was impeded by a lack of international connectivity. Indeed, So.Ge.A.AL's business plan from 2004 predicted that total passenger numbers at the airport would increase by approximately 30 % in 2008 compared to levels prior to the expansion of the airport's capacity in 2004. This level of passenger traffic could not have been accommodated without the investments.

(353) In addition, the new investments did not constitute a duplication of existing non-profitable infrastructure since the three closest airports are not located in the same catchment area (see recital 33). Although Alghero airport is one of three airports on Sardinia (together with Cagliari and Olbia) that serve commercial airlines, neither of the other two airports is located in the same catchment area. Olbia and Cagliari are located, respectively, 128 km and 235 km away from Alghero airport. In its 2007 Decision, the Commission concluded that Alghero airport is not substitutable with these other two airports, due to its location and the features of the transport network in Sardinia. The investments did not therefore constitute a duplication of existing non-profitable infrastructure.

(354) The Commission can therefore conclude that the supported investments were necessary and proportional to the objectives of connectivity and regional economic development, the furtherance of which the measures at issue effectively contribute to.

(iii) Medium-term prospects for use, in particular as regards the use of existing infrastructure

(355) The investments allowed Alghero airport to be compliant with airport safety requirements and to adapt to the transport needs of its catchment area.

(356) Upon award of the ‘comprehensive’ concession for the management of Alghero airport, So.Ge.A.AL was rolling out an investment program to adapt airport infrastructure and equipment in order to deal with the growth in numbers of passengers carried. In total, based on the 2005 business plan the planned investments at Alghero airport over the period of the concession amounted to EUR 143,3 million ([87]).

(357) So.Ge.A.AL's business plan from 2004 predicted that total passenger numbers at Alghero airport would increase by approximately 30 % in 2008 compared to levels prior to the expansion of the airport's capacity in 2004. That level of passenger traffic could not have been accommodated without the investments under assessment in this case. Later developments by and large confirm these expectations. Indeed, So.Ge.A.AL has been able to achieve a significant growth in its traffic in line with its expectations. As of 2011, passenger traffic at the airport reached approximately 70 % of the airport's capacity. According to Italy, passenger traffic would have been at higher levels if the financial crisis had not occurred.

(358) Therefore, the Commission concludes that in the medium term, the upgraded infrastructure offered good perspectives for use.

(iv) Equal and non-discriminatory access to the infrastructure

(359) According to the information submitted by Italy, and notwithstanding any justified price differentiation applied in individual airline agreements, the infrastructure has always been open to all potential users without discrimination.

(v) The development of trade is not affected to an extent contrary to the Union interest

(360) Until 2005 Alghero qualified as category D airport as defined by point 15 of the 2005 Aviation Guidelines. The 2005 Aviation Guidelines laid down that funding to category D airports is unlikely to distort competition or affect trade to an extent contrary to the common interest. On that basis, in the 2012 Decision the Commission considered that before 2005 the aid did not affect trade to an extent contrary to the common interest. Neither Italy nor interested parties have contested this preliminary finding in the course of the investigation.

(361) Besides, no other airport is located in the same catchment area. As shown in recital 33, the closest airport is situated more than 120 km away, in a region where road connections are mediocre, which reinforces the finding that Alghero airport is not substitutable to any significant extent by the other Sardinian airports from the passengers' perspective.

(362) Consequently, the Commission concludes that funding granted for the upgrading of the infrastructure (including ‘fittings and works’) and equipment of Alghero airport did not distort competition to an extent contrary to the Union interests.

(vi) Incentive effect, necessity and proportionality of the aid

(363) The Commission must also establish whether the State aid granted to Alghero airport changed the behaviour of the beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that (i) it would not carry out without the aid, or (ii) it would carry out in a more restricted or different manner. In addition, the aid is considered to be proportionate only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.

(364) In this case the investment grants mainly related to the upgrading of the aprons, runway and taxiway, as well as the terminal. Long payback periods associated with investments in infrastructure, combined with the significant complexities and risks associated with large projects, imply that there may be difficulties attracting private capital. Smaller airports, such as Alghero airport, may face particular difficulties attracting private capital at the appropriate price to be able to undertake the necessary infrastructure projects.

([87]) As laid down by the ‘*Programma di Intervento “Investimenti” of the Programma di sviluppo per l'affidamento della gestione quarantennale*’ approved in September 2005.

(365) According to the information submitted by Italy, absent the aid these investments could not have been carried out. Indeed, in view of the financial situation of So.Ge.A.AL, which accumulated losses throughout the 2000-2010 period under investigation to an extent that required a number of capital injections by the public authorities, it is clear that So.Ge.A.AL was not in a position to contribute significantly more to the financing of these investments than it actually did and had no possibility to obtain outside funding on the market. It can therefore be considered that the aid measures at stake were necessary and proportional to the need to meet the expected demand of airlines and passengers in the catchment area.

(366) The Commission therefore considers that the aid is limited to the minimum necessary for the aided activity to take place.

(vii) Conclusion

(367) The Commission considers that should the measures under scrutiny, which provide for public support for infrastructure investments at Alghero airport, be regarded as investment aid, they are compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

12.1.3.4. *Compatibility of the aid to So.Ge.A.AL (Measures 1, 2 and 3) under the assumption that they constitute operating aid*

(368) Operating aid granted before the entry into force of the 2014 Aviation Guidelines, that is before 4 April 2014, may be declared compatible provided that the following conditions are met:

(a) Contribution to a well-defined objective of common interest: this condition is fulfilled, inter alia, if the aid increases the mobility of Union citizens and connectivity of the regions or facilitates regional development [88];

(b) Appropriateness of State aid as a policy instrument: the Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid [89];

(c) Need for State intervention: the aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver [90];

(d) Existence of incentive effect: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced [91];

(e) Proportionality of the aid amount (aid limited to the minimum necessary): in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place [92];

(f) Avoidance of undue negative effects on competition and trade [93].

(369) The various operating measures granted to So.Ge.A.AL, which included in particular several capital injections, were aimed to allow the company to have enough capital to continue operating viably, both from an economic and a legal point of view. Similarly, the decisions of the public authorities to finance certain investments without requiring a corresponding increase in the concession fees paid by So.Ge.A.AL also contributed to maintaining the company afloat since higher concession fees would have translated in higher operating costs further worsening the financial situation of the company. Therefore, all these measures contributed to keeping Alghero airport up and running. In view of the role played by the airport in the accessibility of the region and regional economic development, as explained in recitals 343-348, the Commission considers the operating aid to So.Ge.A.AL contributed to the achievement of an objective of common interest.

[88] Paragraphs 137 and 113 of the 2014 Aviation Guidelines.
[89] Paragraphs 137 and 120 of the 2014 Aviation Guidelines.
[90] Paragraphs 137 and 116 of the 2014 Aviation Guidelines.
[91] Paragraphs 137 and 124 of the 2014 Aviation Guidelines.
[92] Paragraphs 137 and 125 of the 2014 Aviation Guidelines.
[93] Paragraphs 137 and 131 of the 2014 Aviation Guidelines.

(370) Since Alghero airport was loss-making in the period under investigation (see Table 3), it was the operating aid which enabled the airport to continue operations ensuring connectivity of the Sardinia region. Therefore the Commission considers that the operating aid granted to Alghero airport was an appropriate instrument to achieve the objective of common interest.

(371) As regards necessity, the 2014 Aviation Guidelines require that the operating aid brings about a material improvement that the market itself cannot deliver. The Commission considers this to be the case as, absent the aid in question, So.Ge.A.AL would likely have been forced to exit the market, depriving Sardinia of a transport infrastructure which plays a significant role in its accessibility and development (tourism).

(372) Moreover, absent the aid the activity of the beneficiary would have been significantly reduced if not terminated altogether. The measures under investigation were limited to the minimum necessary to offset losses and allow So.Ge.A.AL to observe capital requirements and continue to operate viably. Such measures were necessary to keep the company afloat even once the effects of all the other (operating and investment) aids under investigation are taken into account. Therefore, the Commission concludes that all operating aid to So.Ge.A.AL was necessary and limited to the minimum necessary for the aided activity to take place.

(373) As stated in above, no other airport is located in the same catchment area. Moreover, Italy has confirmed that the airport infrastructure is made available to all airlines on non-discriminatory terms.

(374) On that basis, the Commission concludes that the compatibility conditions laid down by the 2014 Aviation Guidelines are complied with and therefore the measures are compatible with the internal market under Article 107(3)(c).

12.2. MEASURES IN FAVOUR OF AIRLINES OPERATING AT THE AIRPORT

12.2.1. **Existence of aid within the meaning of Article 107(1) of the Treaty**

(375) In this section, the Commission assesses whether the various agreements between So.Ge.A.AL and several airlines that fall within the scope of the investigation, constitute State aid to the airlines concerned within the meaning of Article 107(1) of the Treaty.

12.2.1.1. *State resources and imputability to the State*

(376) Any economic advantage involved in the contractual relations with the airlines operating at Alghero airport was not granted directly by the State, but by the state-owned airport manager So.Ge.A.AL. Assuming that such an economic advantage is present in any of the agreements under investigation, it is necessary to establish whether this advantage was financed through State resources and is imputable to the State.

(377) According to an established case-law, the resources of public undertakings (namely, undertakings on which the public authorities can exercise, be it directly or indirectly, a dominant influence), also qualify as State resources because these resources 'constantly remain under public control, and therefore [are] available to the competent national authorities' ([94]). In line with that case law, as So.Ge.A.AL is a public undertaking, its resources have to be considered as State resources for the purposes of Article 107(1) of the Treaty. Indeed, according to Article 2 of the Transparency Directive, a dominant influence by the public authorities shall be presumed when public authorities hold a major part in the company's subscribed capital, control the majority of the votes attaching to shares issued by the company, or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory board. In the case of So.Ge.A.AL it appears that all three of these noncumulative criteria for presuming dominant influence by the State are met.

(378) So.Ge.A.AL and Ryanair contest the imputability to the State of the agreements with the airlines, while Italy and Unioncamere confirm it.

([94]) See for example case C-278/00 *Greece v Commission* [2004] I-03997, C-482/99 *France v Commission* [2002] I-04397 and joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] I-04035, paragraph 33.

(379) Both So.Ge.A.AL and Ryanair have in the course of the investigation claimed that the agreements concluded by Alghero airport with the airlines could be imputed to the State only based on an objective finding showing that the State had intervened in So.Ge.A.AL's decision to enter the agreements in such a way as to determine or influence them, in the sense that So.Ge.A.AL would have adopted a different behaviour had it been able to make an independent decision; they contended that this was not the case for either of So.Ge.A.AL's public shareholders. Based on case-law, the agreements concluded by So.Ge.A.AL with the airlines operating at the airport may be found to contain State aid pursuant to Article 107(1) of the Treaty only if the State was in a position to control So.Ge.A.AL and if the public authorities have 'been involved, in one way or another, in the adoption of those measures'. However, 'it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question.' ([95]). In order to conclude whether a specific measure can be imputed to the State the Commission may base its reasoning on any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved ([96]).

(380) As the Court established in Stardust Marine, the imputability of a measure to the State can be established either by 'organic' or 'structural' indicators or by indications that the State has been involved, or was unlikely to be absent, from the decision that led to the concrete measure. In the same judgment the Court established a non-exhaustive set of possible indicators relevant for the question of state imputability, as detailed in recital 268: the fact that the undertaking through the intermediation of which the aid has been granted had to take into account directives issued by governmental bodies; the integration of the public undertaking into the structures of the public administration; the nature of the undertaking's activities and the exercise of the latter on the market in normal conditions of competition with private operators; the legal status of the undertaking; the intensity of the supervision exercised by the public authorities over the management of the undertaking; and any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content, or the conditions which it contains.

(381) The investigation in this case has confirmed that the conclusion of the agreements with the airlines is imputable to the State.

(382) First, the public ownership of So.Ge.A.AL, which translates into the entirety of the votes in the Shareholders Assembly and Board of Directors, implies that the State must be regarded as having an influence on So.Ge.A.AL's decision-making processes and being involved in the decisions taken by the company. Sardinia, given its participation in So.Ge.A.AL, has a majority of votes in the shareholders meeting. According to So.Ge.A.AL's Statutes, each nominal share entitles to one vote in the shareholders general meeting. The members of the Board of Directors are appointed to represent proportionally the majority shareholders' and the minority shareholders' participations.

(383) Second, the Commission notes that at no time has Italy claimed that the decision to enter the agreements with the airlines was taken by So.Ge.A.AL autonomously with no involvement of its shareholders. On the contrary, by letter of 18 February 2014, Italy submitted that:

— the agreements with the airlines have been negotiated by the Director-General of So.Ge.A.AL;

— the Director-General informed the Board of Directors on the status of the negotiations, the content of the agreements and the development prospects of the agreements in question;

— the Board of Directors approved generally with unanimity of the votes, the terms of the agreements with airlines prior to their signature.

(384) Moreover, Italy clarified that the conclusion of the agreements with the airlines operating at the airport for the promotion or start-up of new routes from Alghero was carried out in agreement with Sardinia and was an integral part of Sardinia's strategy to increase tourist flows to and from the island ([97]). In addition, the Commission considers that the nature of So.Ge.A.AL's activities (airport management) is another indication that the measures at stake are imputable to the State given that regional airports are often seen by local and regional authorities as an important tool for fostering local economic development.

(385) Third, in what follows the Commission shows that sufficient indications exist to the effect that the regional authorities have in fact incited the conclusion of the agreements in question, in particular — but not limited to — the agreements with the main airline operating at the airport, Ryanair. Those indications constitute evidence of imputability to the State in the sense of the *Stardust Marine* case-law ([98]).

([95]) *Stardust Marine* judgement, cited, paragraphs 52 and 53.
([96]) *Stardust Marine* judgement, cited, paragraph 56.
([97]) Letter of Italy of 18 February 2014, Annex A.
([98]) Case C-482/99 *France v. Commission*, cited.

(i) Regional authorities were informed of and were expected to contribute to the costs resulting from the agreements with the airlines

(386) The minutes of the meetings of the Board of Directors submitted by Italy in the course of the investigation demonstrate that Sardinia was informed of and consulted on the negotiation and agreed to the conclusion of contracts with the airlines operating at Alghero airport.

(387) By way of example, the minutes of the Board of Directors of 9 March 2000 indicate that the Board of Directors unanimously approved the agreements with airlines proposed by So.Ge.A.AL. So.Ge.A.AL reported in particular on the negotiations with Volare, Ryanair, Italair, Alpi Eagles, Air Dolomiti, Azzura and Gandalf Air. As concerns Volare, it was reported that a new agreement under negotiation laid down a fixed payment of 4 550 000 per air traffic movement ('ATM') and EUR 3 000 per passenger for a load factor of 60 %. The minutes of the Board of Directors of 18 December 2006 demonstrate that the Board of Directors was informed of the progress of the negotiations of the 2007 agreement with Germanwings.

(388) The consultation and agreement of the public authorities on the agreements concluded with the airlines operating at the airport was therefore not limited to Ryanair. For instance, based on the minutes of the Management Board of 10 February 2002, the start-up by French carrier Auris of a route to Paris was decided only subject to explicit agreement by the shareholders including their commitment to cover any resulting financial obligations.

(389) The involvement of the public authorities in the decision to conclude agreements governing the operations of various carriers at Alghero airport as detailed in recitals 382 to 388 is a strong indication that the public authorities were generally involved in the conclusion of such agreements, even for carriers not mentioned in the evidence detailed in recitals 382 to 388.

(ii) When concluding the agreements with the airlines, So.Ge.A.AL acted on mandate from the public authorities

(390) The Commission considers that sufficient indications exist that the conclusion of the agreements with the airlines was incited and coordinated by the State. For example, according to the minutes of the Shareholders Assembly meeting of 5 October 2001 So.Ge.A.AL was negotiating, 'in agreement with the shareholders', the start-up of an important route for Sardinia, namely the Alghero–London route, and temporarily bore the resulting costs, 'which should have been borne by the public entities'.

(391) The minutes of the Board of Directors meetings also demonstrate that, in concluding the agreements with the airlines, the management had to take the requirements of the public authorities into account. By way of example, in the meeting of the Board of Directors of 30 July 2004 the President of the Board informed of a meeting between different regional entities on the potential development of Ryanair's activities at the airport. Assurances were required from Sardinia as concerns the financing by regional funds of the costs connected with traffic development initiatives.

(392) The fact that, when concluding the agreements in question, So.Ge.A.AL acted under the influence of Sardinia is also evident in the 2000 ASA signed with Ryanair, which lays down that 'So.Ge.A.AL, having interested the territory's institutional bodies, among which the Autonomous Regional government, and having received ample interest and consent regarding the initiative in question, is concluding with the aforementioned [i.e. Ryanair] for the payment of an economic contribution sufficient to cover the entire undertaking of the present Agreement' (Preamble).

(393) According to the minutes of the meeting of the Board of Directors of 17 July 2009 it is clear that So.Ge.A.AL considered the co-marketing contributions to Ryanair as the result of political choices at regional level. Consequently, So.Ge.A.AL considered that the required financial means had to be ensured by the regional authorities. The company also inquired on the negotiating margin with the carrier, if any, 'given that So.Ge.A.AL's shareholders had not given the Board a mandate to terminate the agreement with the airline'.

(394) In the course of the investigation Ryanair claimed that the public authorities' interference in the decisional process of So.Ge.A.AL would have been insufficiently proven by the Commission. The circumstance that 'So.Ge.A.AL and Sardinia signed agreements in 2004, 2005, 2006 and 2007 for co-marketing contributions' would only support the position that Sardinia was financing So.Ge.A.AL, but not that it was directing So.Ge.A.AL's action towards Ryanair or AMS.

(395) The Commission cannot accept Ryanair's argument. First, as mentioned in recital 384, in the course of the investigation Italy explicitly confirmed that the conclusion of the agreements with the airlines was an integral part of Sardinia's strategy to increase tourist flows to and from the island. The references to the discussions between So.Ge.A.AL and its public shareholders underlying the regional and economic development objective pursued by RAS in respect of the agreements concluded by So.Ge.A.AL with carriers operating at Alghero airport show that So.Ge.A.AL implemented regional policies within the instructions and guidelines received from the public entities.

(396) Therefore, the Commission concludes that the agreements entered into by So.Ge.A.AL and various carriers operating at Alghero airport and which are subject to the formal investigation procedure are imputable to the State.

12.2.1.2. *Economic advantage*

(397) In the course of the investigation Italy claimed that, when concluding each of the agreements with airlines that fall within the scope of this investigation, So.Ge.A.AL acted as a prudent MEO guided by profitability perspectives would have done in a similar situation, such that the measures under assessment do not confer any economic advantage that the airlines would not have obtained under normal market conditions.

12.2.1.2.1. General considerations

(398) According to the 2014 Aviation Guidelines, by virtue of the MEOP, aid to an airline using an airport can, in principle, be excluded where:

— the price charged for the airport services corresponds to the market price, or

— it can be demonstrated through an *ex ante* analysis, namely an analysis based on the data which would have been available at the moment the measures in question were decided, that the airport/airline arrangement could be expected to lead to a positive incremental profit contribution for the airport ([99]).

(399) In addition, according to the 2014 Aviation Guidelines, 'when assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.' ([100]).

(400) As concerns the first approach mentioned at recital 398 (comparison of the price charged for airport services with the market price), the Commission has strong doubts that an appropriate benchmark can be defined so as to establish the market value of the services provided by airports. At present the Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines ([101]).

(401) It is worth noting in this sense that in general the application of the MEOP in reference to an average price observed on comparable markets may be reliable to the extent a market price may be identified or deducted from other market indicators. However, that method is in general unreliable in the case of airport services. Indeed, the structure of costs and revenues tend to differ quite significantly from one airport to another. Those costs and revenues depend on the development of the airport, the state of the airport infrastructure, the number or aid carriers operating at the airport, the airport's capacity, the regulatory framework at national level, which may be different from one Member State to another, as well as the deficits and obligations incurred by the airport in the past.

([99]) 2014 Aviation Guidelines, point 53.
([100]) 2014 Aviation Guidelines, point 66.
([101]) 2014 Aviation Guidelines, points 59 and 61.

(402) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations are very varied. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and adapting the spread of risks during the term of the agreements. Consequently, one transaction cannot easily be compared with another based on a turnaround price or price per passenger.

(403) In the course of the investigation Ryanair has claimed that in order to exclude an economic advantage that would not be obtained under normal market conditions the charges in the agreements with the airlines operating at Alghero airport have to be compared with charges paid by Ryanair at similar airports over an appropriate timeframe. […] Airports have been selected by Ryanair as the most relevant comparators for the purposes of this analysis ([102]).

(404) […] is ultimately owned by […], which is in turn owned by various local authorities from the […] area. Ryanair noted that […]'s annual reports do not provide any indication of State funding, and that the airport has made profits every year since at least […]. Ryanair's operations at […] Airport started in […]. The airport has consistently been privately owned, which in Ryanair's view would suggest that the airport can be used as a comparator in the application of the MEO test.

(405) According to Ryanair, the results from comparing the data on charges paid by Ryanair at Alghero airport with charges at comparable airports are mixed. If it is assumed that no municipal tax is returned to the region, the charges payable by Ryanair at Alghero airport are, on average, lower than those at comparators on both a per-passenger and a per-aircraft basis. However, if it is assumed that a proportion of the municipal tax — specifically, 66 %, based on information provided by Ryanair — is returned to the region, average charges paid by Ryanair at Alghero airport are higher than at those paid at […] Airport, although still lower than those paid at […] Airport. Ryanair suggests that this could be partly explained by the lower GDP in Sardinia, compared with the GDP in […] and […].

(406) Hence, Ryanair acknowledges that the results from the comparison of charges paid by Ryanair at Alghero airport with those paid at […] Airports are mixed and that the differences in the results may be due to a number of reasons, such as the choice of comparator airports.

(407) The Commission agrees that a benchmarking of airport charges cannot be excluded outright as a possible approach to assess the presence of aid to airlines. However, the identification of a benchmark requires that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected. According to paragraph 54 of the 2014 Aviation Guidelines, an appropriate benchmark among airports whose managers behave as MEO has to be identified on the basis of available and relevant market prices. This benchmark should take into account indicators such as traffic volumes, type of traffic, the importance of freight and the relative importance of revenue stemming from the non-aeronautical activities of the airport, type and level of airport services provided, proximity of the airport to a large city, number of inhabitants in the catchment area of the airport, prosperity of the surrounding area (GDP per capita), and the different geographical areas from which passengers could be attracted.

(408) In that respect the Commission notes that, even if some airports are privately owned or managed without social or regional considerations, the prices charged by these airports might be strongly influenced by the prices charged by other publicly subsidized airport managers as these latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

(409) In this case, the Commission notes that Ryanair itself considered that as Alghero airport is located on an island, with not many large cities or airports in proximity, it is difficult to find comparators with nearly identical characteristics. Ryanair further noted that the mixed results of the benchmarking exercise could be explained by the difference in GDP in Sardinia, compared with the GDP in the areas where potential comparator airports are located.

([102]) The 2011 MEOP Report.

(410) Finally, the Commission notes that even if reliable comparators were available, a benchmarking exercise would in any event not have been possible in the present case. Indeed, the arrangements under investigation include airport services and marketing agreements which lay down different 'prices', namely different airport charges, handling charges and the marketing fees. Some of those charges depend on the number of passengers, some on the number of turnarounds, whilst others are fixed. Therefore each of those agreements imply complex financial flows between the airport manager and the airlines (and their subsidiaries) operating at the airport, namely airport charges, handling fees and marketing fees.

(411) Therefore the Commission considers that a comparison between the airport charges charged by So.Ge.A.AL to the airlines operating at Alghero airport with the airport charges payable at comparator airports would not provide any useful indication for the purpose of applying the MEOP. In order for such a benchmarking exercise to produce reliable results, it would be necessary that at least comparable arrangements are found at the comparator airports, which should include in particular similar marketing payments and handling fees. Given the specificity and complexity of the arrangements at stake, the Commission considers that such benchmarking exercise cannot be carried out, notably also given that the prices charged for handling services and marketing services are rarely made public and would therefore not be readily available for the purpose of such exercise. Neither has Ryanair provided such data for the two comparators.

(412) In any event, even if it would be assumed that a benchmarking exercise could be carried out with similar arrangements in force at comparable airports, which would lead the Commission to conclude that the 'prices' in question are equivalent or even superior to the 'market price', the Commission could not conclude on this basis that the arrangements under investigation are market-conform if it would turn out that at the moment the arrangements in question were entered into by the airport manager, the later could have reasonably expected that they would result in incremental costs in excess of incremental revenues. Indeed, a MEO would not have had any interest in offering its goods or services at 'market price' if this was expected to result in incremental losses.

(413) Therefore the Commission considers that the airline arrangements at airports put forward by Ryanair as allegedly relevant comparators cannot constitute an appropriate benchmark to establish the market price for services provided by So.Ge.A.AL to the different airlines at Alghero airport. In the absence of an identifiable market benchmark, the Commission considers that the *ex ante* incremental profitability analysis is the relevant criterion for the assessment of arrangements concluded by the airport with individual airlines.

(414) In this analysis, all the relevant incremental revenues and costs associated with the transaction must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) must not be assessed separately. Indeed, as stated in the *Charleroi* judgment: 'It is […] necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context […]' ([103]).

(415) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement, and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred absent the agreement such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport as well as the costs of the marketing grants and other financial incentives. On the contrary, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEOP assessment.

(416) The Commission also notes in this context that price differentiation (including marketing support and other incentives) is a standard business practice. There can be various reasons for not offering the same conditions to all airlines. In particular, it can be rational to offer specific financial incentives (including in the form of marketing grants) and specific discounts to the published airport charges to airlines that bring a high number of passengers to the airport. Those favourable conditions can be objectively justified by the expected additional

([103]) *Charleroi* judgment, cited, paragraph 59.

traffic, in view of the non-aeronautical revenues brought about by that additional traffic ([104]) and also because, even if the margin per passenger generated by the airport charges paid by the airline is reduced by the discounts and financial incentives, this margin may be significant in absolute terms in light of the numbers of passengers at stake. For the purposes of assessing whether such discounts and financial incentives confer an economic advantage, it must be determined whether, when the airport manager took the decision to offer them, it could reasonably expect this decision to be profitable, or in other words, to lead to a higher profit (or lower losses) than would be achieved in the counterfactual situation.

(417) Besides, the Commission notes that the agreements concluded by So.Ge.A.AL with the airlines operating at the airport were part of the long term strategy of the airport. It is evident from So.Ge.A.AL's business plans (see recitals 59-75) that it relied on low-costs airlines as major growth driver and that it was expected to reverse previous declines and return to viability once it was awarded the comprehensive concession for the management of Alghero airport. Therefore, the condition mentioned at recital 399 is satisfied by all contracts under assessment. It results from all that precedes that for each agreement under investigation, if it can be established that at the time when it was concluded, a MEO guided by profitability prospects and acting in lieu of So.Ge.A.AL could have expected the future incremental costs to be generated by the agreement to be offset by future incremental revenues, then this agreement complies with the MEOP and does not constitute State aid.

12.2.1.2.2. On the joint assessment of the ASAs with Ryanair and marketing agreements with AMS

(418) In the 2012 Decision, the Commission considered that for the purpose of application of the MEOP, the ASAs with Ryanair and the marketing services agreements with Ryanair and AMS and their financial consequences had to be assessed together as one single measure. Ryanair did not dispute that the marketing agreements concluded directly between Ryanair and So.Ge.A.AL in 2002 and 2003 should be assessed together with the 2002 and 2003 ASAs.

(419) However, Ryanair rejected the preliminary conclusion of the Commission that Ryanair and AMS must be considered as a single entity and a given ASA entered into by So.Ge.A.AL and Ryanair, and a marketing service agreement entered into by So.Ge.A.AL and AMS at the same time should be assessed jointly for the purpose of assessment of the existence of an economic advantage. According to Ryanair, the ASAs concluded with Ryanair and the marketing services agreements concluded with AMS would be separate and independent, they would relate to different services and would not be subject to any contractual or other link between them justifying their consideration as a single set of measures. That view was supported by AMS.

(420) In that sense, the Commission notes that there are several indications clearly pointing towards the fact that the agreements are to be evaluated as one single measure since they were concluded within the framework of a single transaction.

(421) First, the agreements were concluded by the same parties at the same time:

(a) For the purpose of the application of State aid rules, AMS and Ryanair are considered to be a single undertaking, in the sense that AMS acts in the interest and under the control of Ryanair. For the present agreements, this can also be inferred from the fact that the respective marketing agreement states in its preamble that 'AMS has the exclusive license to offer marketing services on the travel website www.ryanair.com, the website of the Irish low fares airline Ryanair.' Therefore, if So.Ge.A.AL intended to promote a Ryanair destination and the surrounding regions, then this can only be done via AMS;

(b) The respective agreements in all cases were concluded on the same dates.

(422) Second, the preambles of the 2006 and 2010 marketing agreements with AMS state that the 'website www.ryanair.com provides a unique opportunity for targeting millions of potential Ryanair passengers and presents extensive information about airports, cities and regions that Ryanair operates to'. This indicates that the purpose of the marketing agreement is not generally to promote Sardinia, but more specifically to maximise ticket sales

([104]) This refers to revenues flowing to the airport manager as a result of the additional business of car parks, shops, restaurants etc. generated by the additional passengers.

for the Ryanair destination Alghero. Indeed, the preambles state that So.Ge.A.AL is to target Ryanair passengers in order to promote tourism and business opportunities in the region, and in particular Alghero airport as a destination.

(423) Third, the marketing agreements with AMS state in their first section, entitled ‘Purpose of the Agreement’, that they are ‘rooted in the Ryanair's commitment to operate on routes between Alghero and EU destinations’ (the 2006 agreement mentions London-Stansted, Barcelona Gerona, Frankfurt Hahn, Pisa, Liverpool and Rome). This wording establishes an unambiguous direct link between the airport service agreements and the marketing agreements in the sense that one would not have been concluded without the other. The marketing agreements are based on the conclusion of the airport services agreements and the services provided by Ryanair.

(424) Fourth, the marketing agreements state in their preamble that So.Ge.A.AL has decided to ‘actively promote the city of Alghero and the region as a holiday destination for international air travellers and also as an attractive business centre.’ This is an indication that the conclusion of the marketing agreements has as its primary and specific purpose to promote specifically Alghero airport and the surrounding region and is therefore linked to the conclusion of the airport services agreement by Ryanair.

(425) Fifth, the marketing agreements can be terminated immediately by So.Ge.A.AL in the event that Ryanair stops operating the abovementioned routes. This demonstrates again that the marketing agreements and the ASAs are inseparably linked.

(426) Finally, the Commission notes that it is clear from the analysis of So.Ge.A.AL's 2000 annual report that the marketing support had been asked by Ryanair as a condition for the operation of the London route at the time the 2000 ASA was entered into. This reading is also confirmed by the fact that the marketing support costs were considered by So.Ge.A.AL an operational cost of the Ryanair route, rather than an investment in brand development as claimed by Ryanair and AMS.

(427) In conclusion, the marketing service agreements concluded by So.Ge.A.AL and AMS are indivisibly linked to the ASAs signed by Ryanair and So.Ge.A.AL. The considerations in recitals 421 to 426 demonstrate that without the ASAs, the marketing services agreements would not have been concluded. For those reasons, the Commission concludes that the ASAs and the marketing services agreements are not severable and therefore finds it necessary to analyse each marketing service agreement together with the ASA that was concluded at the same time, with a view to determining whether such a transaction constitutes State aid.

12.2.1.2.3. On the benefits that an MEO could have expected to gain from marketing service agreements and the price that it would have been willing to pay for these services

(428) For the purpose of application of the MEO test in this case the conduct of RAS and So.Ge.A.AL has to be compared with that of a prudent MEO entrusted with the management of the Alghero airport, guided by profitability prospects. This assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO test is whether ‘in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question’ ([105]).

(429) When analysing the measures in question, it is necessary to examine the benefits that this hypothetical MEO, motivated by the prospect of profits, could gain from purchasing marketing services. This analysis should not take into account the general impact of such services on tourism and the region's economic performance. Only the impact of those services on the airport's profitability should be taken into account, as this would be the only concern for a hypothetical MEO.

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

(430) Marketing services have in principle the potential to stimulate passenger traffic on the air routes covered by marketing service agreements and the ASAs, as the marketing services are designed to promote those air routes. Although this impact will mainly benefit the airline concerned, it may also be of benefit to the airport manager. In addition, an increase in passenger traffic may lead to an increase in revenues generated by certain airport charges for the airport manager, as well as an increase in non-aeronautical revenues, in particular from car parks, restaurants and other businesses located at the airport, and whose turnover fully or partly accrue to the airport manager.

(431) Therefore, an MEO operating Alghero airport instead of So.Ge.A.AL and RAS would have taken this possible positive effect into account when considering entering into a marketing service agreement and the corresponding ASA. The MEO would have taken into account the impact of the air route in question on future revenues and costs by, in this case, estimating the increase in the number of passengers using those routes, which would have reflected the possible positive effect of marketing services in the form of a higher expected load ratio (or load factor) ([106]) for those air routes. Moreover, this effect would have been evaluated for the entire term of operation of the air routes in question, as set out in the airport service agreement and the marketing service agreement.

(432) The Commission agrees with Ryanair on this issue, namely that marketing service agreements do not just generate costs for the airport manager, they can also be expected to bring benefits with them.

(433) In addition, it has to be determined whether other benefits such as brand image could reasonably be expected and quantified for a hypothetical MEO operating Alghero airport, that is to say, other than the benefits from the positive effect on passenger traffic on the air routes covered by the marketing service agreement during the term of operation of these routes, as set out in the marketing service agreement or the airport service agreement.

(434) Ryanair supports this argument, in particular in its study of 17 January 2014. The study is based on the theory that marketing services acquired by an airport manager will help to improve the airport's brand image and, as a result, to sustainably increase the number of passengers using this airport and not just the numbers on the air routes covered by the marketing service agreement and the airport service agreement for the term of operation set out in these agreements. In particular, Ryanair argued in its study that these marketing services will have sustainable positive effects on passenger traffic in the airport even after the marketing service agreement has expired. This view is shared by Italy and the benefits of the marketing services have been taken into consideration in the reconstructed *ex ante* profitability analysis of the agreements with Ryanair as summarised in Table 8 below.

(435) It should first be noted that there is nothing to suggest that, when the marketing service agreements covered by the formal investigation procedure were entered into, the airport manager or RAS ever considered, still less quantified, the marketing service agreements' possible beneficial effects on air routes additional to those covered by the agreements, or the possibility of such effects continuing after the agreements had expired.

(436) In addition, the sustainable nature of those effects cannot be assessed based on the information available. It is possible that advertising Alghero airport and the Sardinian region on Ryanair's internet site may have encouraged people visiting this site to buy Ryanair tickets to Alghero airport as long as the advertising was posted or just thereafter. However, it is highly unlikely that the effect of this advertising on visitors lasted or had an influence on plane ticket purchases for more than a few weeks after its being posted on the Ryanair internet site. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more advertising media to which the consumers are regularly exposed over a given period. For example, an advertising campaign involving general TV and radio stations, popular internet sites and/or various advertising posters displayed outside or inside public places could have a sustainable effect if consumers are regularly exposed to these media. However, promotional activities limited to just Ryanair's internet site are highly unlikely to have an effect that lasts much past the end of the promotion.

(437) In fact, it is very likely that most people do not visit Ryanair's internet site frequently enough for the advertising there alone to leave them with a clear recollection of the region concerned. This argument is well supported by

([106]) The load ratio or load factor is defined as the proportion of places filled in the aircraft in operation on the air route in question.

two factors. Firstly, under the terms of the marketing service agreements, the promotion of Alghero and the Sardinian region on the homepage of the Ryanair internet site was limited to one paragraph of 150 words under 'Top Five Things To Do' on the Alghero destination page and the presence of a link on the www.ryanair.com homepage leading to a site made available by So.Ge.A.AL. The Commission considers that the type of promotional activities (a simple link with a limited marketing value) severely reduced the effect of these activities after the end of the promotion, in particular as these activities were limited to just the Ryanair internet site and were not supported by any other media. Secondly, the marketing activities set out in the agreements entered into with AMS largely related to the internet page for the destination of Alghero airport. It is very likely that most people do not visit this page often; if and when they do, it is probably only because they are already interested in this destination.

(438) Thus, even if the marketing services did increase passenger traffic on the air routes covered by the marketing service agreements for their period of implementation, it is very likely that this effect was zero or negligible after this term.

(439) It also follows from the Ryanair studies of 17 and 31 January 2014 that the generation of benefits going beyond the air routes covered by these agreements or lasting after the term of operation for these routes, as set out in the marketing service agreements and airport service agreements, was extremely uncertain and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.

(440) Thus, for example, according to the study of 17 January 2014, 'future incremental profits beyond the scheduled expiry of the airport service agreement are inherently uncertain'. Moreover, this study suggests two methods for evaluating *a priori* the positive effects of marketing service agreements: a 'cash flow' methodology and a 'capitalisation' methodology.

(441) The 'cash flow' methodology involves evaluating the benefits of marketing service agreements and airport service agreements by assessing the future revenues which may be generated by the airport manager through marketing services and the airport service agreement, minus corresponding costs. In the 'capitalisation' methodology, improvement of the brand image of the airport through marketing services is treated as an intangible asset, acquired for the price laid down in the marketing service agreements.

(442) However, the study of 17 January 2014 highlights the major difficulties presented by the 'capitalisation' approach and shows that the results produced by this method may be unreliable; it suggests that the 'cash flow' approach would be better. In particular, the study finds that 'the capitalisation approach should only take into account the proportion of marketing expenditure that is attributable to the intangible asset base of an airport. However, it may be difficult to identify the proportion of marketing expenditure that is targeted towards generating expected future revenues for the airport (namely an investment in the intangible asset base of the airport) as opposed to generating current revenues for the airport.' It also stresses that 'in order to implement the capitalisation-based approach, it is necessary to estimate the average length of time that an airport would be able to retain a customer due to the AMS marketing campaign. In practice, it would be very difficult to estimate the average period of customer retention following an AMS campaign due to insufficient data.'

(443) The study of 31 January 2014 proposes a practical application of the 'cash flow' approach. Under this approach, the benefits of marketing service agreements and airport service agreements which last even after the marketing service agreement has expired are expressed as a 'terminal value' that is calculated on the agreement's expiry date. The terminal value is calculated from the airport's incremental profits (net of AMS payments) in the last year of the ASA, adjusted to take into account the growth rate for the air transport market in Europe and the probability factor designed to reflect the airport service agreement's and marketing service agreement's capacities to contribute to the airport's profits after they have expired. The same method of calculating the 'terminal value' has been proposed by Italy in the 2014 MEOP report (see recital 471).

(444) According to the study of 31 January 2014, the capacity for producing lasting benefits depends on various factors 'including greater prominence and a stronger brand, alongside network externalities and repeat passengers', although no details are given about these factors.

(445) The study of 31 January 2014 suggests a probability factor of 30 %, which it considers prudent. However, the study does not provide any serious evidence for this factor, neither quantitatively nor qualitatively. It does not base itself on any facts relating to Ryanair's activities, air transport markets or airport services to substantiate this rate of 30 %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are supposed to extend the benefits of the airport service agreement and market service agreement beyond their expiry dates. Finally, it does not in any way base itself on the specific content of marketing services provided for in the various agreements with AMS when analysing to what extent these services could influence the factors mentioned in recital 444.

(446) Moreover, it does not prove that there is any likelihood that, on expiry of the ASA and the marketing service agreement, the profits generated by those agreements for the airport manager in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport service agreement and a marketing service agreement for a given airport.

(447) A 'terminal value' calculated using the method suggested by Ryanair and Italy would therefore be highly unlikely to be taken into account by a prudent MEO when deciding whether or not to enter into an agreement. The study of 31 January 2014 therefore shows that a 'cash flow' approach would only lead to very uncertain and unreliable results, as would the 'capitalisation' method.

(448) Moreover, the marketing services clearly target persons likely to use the route covered by the marketing service agreement. If this route is not renewed on expiry of the airport service agreement, it is unlikely that marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport manager to assess the likelihood of an airline continuing to run a route on expiry of the term to which it has committed itself in the airport service agreement. Low-cost airlines, in particular, have shown that, when it comes to opening and closing routes, they are very responsive to market conditions which, more often than not, change very quickly. For instance, in the present case Italy submitted that Germanwings decided to stop operations from Alghero airport after only one year and therefore its agreement with So.Ge.A.AL did not run its full duration (the carrier had concluded a three-year agreement with the airport) as it could not generate sufficient traffic to break even. It also results from the documents in the case file that Ryanair had at least once (in 2009) re-evaluated its operations from Alghero airport. Therefore, when entering into a transaction such as the one being examined in this case, a prudent MEO would not rely on an airline company extending the operation of the route in question on expiry of the agreement.

(449) Last but not least, the Commission notes that this approach of including a 'terminal value' followed by Italy in the reconstruction of the *ex ante* profitability analysis of the 2006 and 2010 agreements, has not been applied by Italy when considering the profitability of agreements signed with other airlines operating at the airport, although marketing agreements have been concluded with the airport manager. Italy's argumentation on this point relies on the fact that the number of potential visitors to the websites of airlines other than Ryanair is significantly lower than the audience of ryanair.com. Given this far lower popularity, it would not be relevant to quantify a terminal value in the analysis of the profitability of the agreements with other airlines. Nevertheless, the Commission notes that up to 2006 marketing agreements had been signed by So.Ge.A.AL with Ryanair rather than AMS. A terminal value has not been considered to account for the future benefits derived after the end of the term of the marketing agreements concluded by So.Ge.A.AL with Ryanair in 2002 and 2003.

(450) To conclude, it is clear from recitals 428 to 449 that the only benefit that a prudent MEO would expect from a marketing service agreement, and which it would quantify when deciding on whether or not to enter into such an agreement, together with an airport service agreement, would be that the marketing services would have a positive effect on the number of passengers using the routes covered by the agreements in question for the term

of operation of these routes, as set out in the agreements. The Commission considers that any other possible benefits are too uncertain to be quantified and taken into account.

12.2.1.2.4. Assessment of Incremental Costs and Revenues

(451) In view of the considerations in recitals 398 to 450, for the purpose of application of the MEOP principle, the Commission must (i) analyse each of the ASAs jointly with the marketing agreements if there is one, including when such agreement was signed with AMS, and (ii) determine the incremental costs and revenues that could have reasonably been expected from each joint transaction, taking into account the effect of the marketing agreements on the expected load factors.

Agreements with Ryanair

(452) The ASAs concluded by So.Ge.A.AL with Ryanair are presented in Table 7:

Table 7

The ASAs concluded by So.Ge.A.AL with Ryanair

Agreement (date of signature)	Period during which the agreement was set to apply
2000 ASA (22 June 2000)	22 June 2000-21 June 2010
2002 ASA (25 January 2002)	1 January 2002-31 December 2012
2003 ASA (1 September 2003)	1 September 2003-1 September 2014
2006 ASA (3 April 2006)	1 January 2006-31 December 2010
2010 ASA (20 October 2010)	1 January 2010-31 December 2013

(453) Italy asserts that So.Ge.A.AL has drawn up several business plans relating to the overall development of the airport at various points in time between 2000 and 2010. Those business plans include some forward looking estimates on the passenger numbers and revenues, as well as some information on costs. However, none of those business plans is specific to a particular agreement signed between So.Ge.A.AL and the airlines operating at Alghero airport or AMS. Furthermore, they do not cover the entire period of So.Ge.A.AL's agreements with those airlines.

(454) As mentioned above, Italy prepared reconstructed *ex ante* profitability analyses of the agreements with Ryanair based on the incremental costs and revenues that could be reasonably expected by a MEO acting in lieu of So.Ge.A.AL at the time of the conclusion of each of these agreements during the period under investigation, i.e. 2000-2010, as summarised in Table 8. Based on these analyses, So.Ge.A.AL could reasonably expect the agreements with Ryanair to be profitable for the airport at the time they were concluded.

(455) The 2000 business plan of So.Ge.A.AL has been used in the reconstructed analysis of the expected profitability of the 2000, 2002 and 2003 ASAs, whilst the 2004 and 2009 business plans have been used in the reconstructed analysis of the 2006 and 2010 ASAs.

(456) However, it has not been possible to infer all of the incremental revenues and costs associated with each agreement with Ryanair from So.Ge.A.AL's business plans. For those categories of incremental revenues and costs which could not have been inferred from the business plans, Italy based its analysis of the incremental profits of the agreements concluded by So.Ge.A.AL with Ryanair on the provisions of the ASAs and marketing agreements.

(457) Table 8 sets out the NPVs of the cash flows expected from the Ryanair agreements based on the 2014 MEOP Report. The fact that those NPVs are all positive would confirm that it was rational for the airport manager to conclude the agreements with Ryanair.

Table 8

NPVs of the cash flows expected from the Ryanair agreements — 2014 MEOP Report (1)

Agreement	NPV over the duration of the agreement (million EUR) (2)
The 2000 ASA	[4–8] (*)
The 2002 ASA	[3–6]
The 2003 ASA	[9–12]
The 2006 ASA	[6–9]
The 2010 ASA	[9–12]

(1) The analysis includes a 'terminal value' to account for future benefits for So.Ge.A.AL arising after the expiry of the 2006 and 2010 agreements (see recital 471) and excludes the period for which the 2006 and 2010 agreements applied retrospectively (see recital 485).
(2) Commission's reference rates have been applied to discount the expected cash flows.
(*) Covered by the obligation of professional secrecy.

(458) The assumptions taken into account for the purpose of the reconstructed profitability analysis are detailed in recitals 459-471.

(i) Aeronautical revenues

(459) Italy took into account different categories of aeronautical revenues, notably revenues from charges such as landing, ground handling and ticketing. Where available, the charges laid down in the ASAs were used. For those charges not specified in the ASAs, assumptions have been based on invoice data provided by Ryanair. Italy however explained that Ryanair's invoice data on charges is consistent with So.Ge.A.AL's published charges for all airport services, apart from handling. A discount on handling charges, reflecting the scale of the carrier's operations at the airport, was granted to Ryanair, which was reflected in the ASAs.

(460) In order to derive incremental aeronautical revenues, So.Ge.A.AL supplemented the information on Ryanair passengers and turnarounds from the ASAs, with information derived from the business plans.

(461) The 2000, 2002 and 2003 ASAs did not stipulate any traffic projections. Therefore, traffic forecasts underpinning the analysis of the 2000, 2002 and 2003 ASAs have been derived from So.Ge.A.AL's 2000 business plan, which contained projections for Ryanair's traffic at the airport. Although the 2006 and 2010 ASAs did stipulate certain traffic targets for Ryanair, Italy explained that these targets did not reflect So.Ge.A.AL's expectations of the overall level of Ryanair traffic at the airport. Rather, So.Ge.A.AL considered the targets represented minimum contractual commitments from Ryanair. Therefore, for the 2006 and 2010 ASAs, traffic

projections have been based on the business plans drawn up by So.Ge.A.AL at the closest point in time prior to the 2006 and 2010 ASAs being signed (namely, traffic projections are based on So.Ge.A.AL's 2004 and 2009 business plans).

(462) Given that So.Ge.A.AL's business plans do not cover the entire period of its contractual agreements with the airlines, in order to extend the profitability analysis over the entire life of the Ryanair agreements, forecasts of air traffic (rotations) and passenger departures have been developed for the years not covered by the business plans in two steps. First, the number of Ryanair turnarounds was forecast by updating the number of turnarounds for the last year contained in the business plan, assuming an annual growth in turnarounds of 19 %. This growth factor is based on the average expected growth from the 2000 business plan over the period between 2004 and 2006. Second, the number of departing passengers for the remaining period was derived from the annual seat capacity, implied by the number of turnarounds, assuming a load factor of 82 %, i.e. Ryanair's network wide average load factor at the time the agreements were signed.

(ii) Non aeronautical revenues

(463) The assumptions for non-aeronautical revenues have been based on the business plans drawn up by So.Ge.A.AL at the closest point of signing each ASA, as set out in Table 9:

Table 9

Assumptions on expected non-aeronautical revenue

Agreement	Non-aeronautical revenue per departing passenger (EUR)	Source
2000 ASA	1,96–2,38	2000 business plan
2002 ASA	2,17–2,38	2000 business plan
2003 ASA	2,17–2,38	2000 business plan
2006 ASA	4,31–4,64	2004 business plan
2010 ASA	6,02–6,47	2009 business plan

(464) For the period of each ASA not covered by the respective business plans, the last available forecast of non-aeronautical revenues per departing passenger has been carried forward in each year until the end of the agreement. For example, in the 2000 business plan, the last year for which a forecast is available is 2006. According to the business plan, in 2006 non-aeronautical revenues per departing passenger were EUR 2,38. For each remaining year of the 2006 ASA, the same level of non-aeronautical revenues per departing passenger has been assumed.

(iii) Incremental costs

(465) In the absence of information about the expected incremental costs associated with serving Ryanair at the time each of the ASAs was signed, incremental costs were estimated by Italy based on the relationship between the airport's operating costs and passenger numbers.

(466) A regression approach was followed to identify how operating costs vary as passenger numbers change, in order to estimate the incremental costs that could have been reasonably expected by So.Ge.A.AL at the time of signing

the ASAs with Ryanair. In the first step, regression analysis was carried out to identify the impact of a change in the airport's passenger numbers on the airport's operating costs. In the second step, the estimate of the additional operating costs as a result of the Ryanair agreements was derived from the results in the first step combined with forecasts of the number of Ryanair passengers.

(467) The following components of costs were considered:

(a) incremental staff costs

(b) incremental costs of goods and services, security, inventories and materials

(c) payments towards new route incentives, marketing, and/or success fees to Ryanair or AMS

(d) concession costs

(468) *Staff costs*: So.Ge.A.AL's business plan of 2000 includes the costs of additional staff required as a result of the agreements with Ryanair up to 2006. Therefore, for the purposes of the assessments of the 2000, 2002 and 2003 ASAs, incremental staff costs have been obtained from So.Ge.A.AL's 2000 business plan. The 2004 and the 2006 business plans however do not provide data on incremental costs. To derive estimates of staff costs that are incremental to the Ryanair agreements beyond 2006, statistical analysis was carried out based on data on the airport's aggregate staff costs, in order to determine the proportion of costs that varied with changes in passenger numbers ([107]). The estimate of the additional staff costs was then derived from the regression results combined with the estimated number of Ryanair passengers.

(469) *Other costs*: Similarly, regression analysis has been carried out to estimate the incremental costs of goods and materials ([108]), services ([109]), security, inventories, as these costs were not mentioned in the business plans. New route incentives, marketing and/or success fees payable to Ryanair have been included as a cost to the airport. Incremental concession costs ([110]) have been based on per-unit costs at the airport level, multiplied by the traffic forecasts for Ryanair.

(470) According to Italy, So.Ge.A.AL did not aim to recover the cost of the new passenger terminal from charges paid by Ryanair. In other words, the investment costs connected to the new terminal are not imputable to any of the Ryanair agreements and therefore are not part of the incremental costs.

(471) Marketing payments to AMS have been taken into account as costs to the airport. At the same time, a 'terminal value' was added as revenue to the airport to account for the benefits of the marketing service agreements and airport service agreements which in Italy's view last even after the expiry of the marketing service agreement. The 'terminal value' is calculated based on the same approach followed by Ryanair and detailed in recitals 443-446.

(472) Table 10 presents the NPV ([111]) of the cash flows which could have been expected from the Ryanair agreements based on the assumptions detailed in recitals 459 to 471.

([107]) The incremental cost data used in the regression pre-date the conclusion of the 2006 and 2010 agreements which would have been available to So.Ge.A.AL at the date the airport manager entered the agreements in question. However, since costs data are only available for the period 1998–2010, if a similar approach was followed for the 2000, 2002 and 2003 agreements there would be only two, three and four points available respectively to conduct the regression analysis, which is insufficient to obtain robust results. Consequently, for these agreements the regression is based on costs data for the period 1998–2010.

([108]) Costs of materials, advertising, stationary, fuel, boarding passes, assistance notes, luggage labels, uniforms for employees.

([109]) Costs of vehicle insurance, maintenance and repair of equipment and vehicles, other vehicle expenses, radio frequencies, maintenance of check-in equipment.

([110]) As of 2003 the annual concession fees paid by airport managers are determined on the basis of traffic data published yearly by the Ministry of Infrastructure and Transport-ENAC. See in this sense recital 156 of this Decision.

([111]) The NPV of a time series of expected cash flows, both incoming and outgoing, is defined as the discounted sum of the individual expected cash flows over the relevant period. The NPV is a standard tool used by undertakings to assess the profitability of a project.

Table 10

NPVs of the cash flows expected from the Ryanair agreements — 2014 MEOP report

Agreement (date of signature)	Period during which the agreement was set to apply	NPV over the duration of the agreement (million EUR) ([1])
2000 ASA (22 June 2000)	22 June 2000 — 21 June 2010	[4 – 8]
2002 ASA (25 January 2002)	1 January 2002 — 31 December 2012	[3 – 6]
2003 ASA (1 September 2003)	1 September 2003 — 1 September 2014	[9 – 12]
2006 ASA (3 April 2006)	1 January 2006 — 31 December 2010	[6 – 9]
2010 ASA (20 October 2010)	1 January 2010 — 31 December 2013	[9 – 12]

([1]) Commission's reference rates have been applied to discount the expected cash flows.

(473) The Commission takes note that for the purpose of the profitability analysis of the 2006 and 2010 ASAs, Italy considered a duration of 10 years for the 2006 ASA and nine years for the 2010 ASA, rather than the period during which the agreement was set to apply initially, namely five and four years respectively. Italy did however also provide to the Commission the results of the profitability analysis when taking into account the initial duration of the 2006 and 2010 ASAs as strictly defined in those agreements.

(474) In defence of its position, Italy argued that at the time of signing each of the agreements with Ryanair, So.Ge.A.AL had reasonable expectations that these would be renewed on similar terms. In particular, based on the explicit provision in the 2006 ASA that the agreement could be extended for an additional five-year term until 1 January 2016, So.Ge.A.AL expected this agreement to be renewed on similar terms. Similarly, the 2010 ASA was expected to cover the period between 1 January 2010 and 31 December 2013, with the potential for the ASA to be extended for an additional five-year term until 31 December 2018.

(475) The Commission cannot accept this argument.

(476) First, neither the 2006 nor the 2010 agreement lays down its automatic prolongation once the agreement has run its full duration.

(477) The 2006 ASA rather lays down that So.Ge.A.AL undertakes, upon expiry of the term of the agreements, to renegotiate a suitable airport use service package with Ryanair for an additional five-year term, provided that certain conditions are met, notably the carrier meets its obligations in terms of marketing services in full and So.Ge.A.AL obtains the concession to operate the airport beyond 1 January 2011. The Commission considers that based on that provision alone, in 2006 So.Ge.A.AL could not have relied on an extension, not the least on similar terms, such extension being hypothetical and depending in particular on Ryanair's willingness to accept it. Indeed, the above-mentioned provision does not legally bind Ryanair to the conclusion of a new agreement with the airport manager, nor does it provide any certainty in respect of the observance by either party of the conditions in question, notably in view of the significant uncertainty surrounding the award of the comprehensive concession to the airport operator at that time.

(478) The Commission considers that the 2010 ASA provides even less certainty as to its potential extension. Article 2 — 'Term' reads: 'the agreement may be extended for an additional five-year period under the conditions and terms set forth herein, or as amended by the parties, provided that prior written consent can be reached by both parties at least six months prior to the expiry of the initial term. (…) Any subsequent renewal of this agreement shall be negotiated between the Parties, at least six months before the expiry of the additional term.' It is therefore evident that any extension of the agreement would have been subject to negotiations between the parties and could not therefore have been assumed by So.Ge.A.AL at the time the 2010 ASA was signed.

(479) Second, the Commission notes that there is evidence in the case file that in 2009 tensions between So.Ge.A.AL and Ryanair put the contractual relation with the carrier at risk. At that time Ryanair had conditioned the continuation of its operations at Alghero airport on the conclusion of a supplemental agreement. In fact, it is apparent from the minutes of So.Ge.A.AL's Board of Directors of 7 July 2009, 9 September 2009 and 23 February 2010 provided by Italy that the decision of the airport manager to eventually sign the new ASA with Ryanair for a five-year period took into account the fact that the latter agreement did not lay down penalties for the early termination of the agreement. In particular:

— Ryanair had been forcefully asking for the conclusion of a supplemental agreement, which 'will certainly result in the increase of the value of co-marketing contributions'. Should such agreement not be signed immediately, the carrier would cease operation of all routes from Alghero airport ([112]);

— a document outlining the evolution of the arrangements with Ryanair and the current state of the relations with the airline, putting forward what in Ryanair's view would be the following steps, which included the cancellation or the reduction of the frequency of intra EU flights and their replacement with national routes was discussed ([113]);

— the Board inquired on the negotiating margin, if any, in respect of the contractual relation with Ryanair, 'given that the shareholders had not given the Board a mandate to terminate the agreement with the carrier' ([114]).

(480) It also results from the minutes of So.Ge.A.AL's Shareholders Assembly of 26 October 2001 that the company considered the termination of the 2000 ASA before its expiry and that this generated long debates among the shareholders.

(481) On this basis the Commission concludes that at the time the 2006 and 2010 Ryanair ASAs were concluded, So.Ge.A.AL could not have expected that those agreements are prolonged, or at least could not have expected that they are prolonged under the same contractual terms.

(482) The Commission also notes that based on the information submitted by Italy, the agreement with another airline subject to the investigation, Germanwings, did not run its full duration and the carrier only operated from the airport in 2007. Italy has in the course of the investigation clarified that the airline had decided to cease operations from the airport as it could not generate sufficient traffic to break even from a financial perspective.

(483) The Commission therefore concludes that for the purpose of the profitability analysis of the 2006 and 2010 ASAs, only the period laid down by the ASAs, namely five years for the 2006 ASA and four years for the 2010 ASA should be taken into account (the NPVs in Table 10 were calculated based on the initial duration of the agreements, as set out in the ASAs).

(484) Besides, the Commission notes that the 2006 and the 2010 ASAs and marketing services agreements signed between So.Ge.A.AL, Ryanair and AMS, applied retrospectively, as follows:

(a) the 2006 ASA and the marketing services agreement were signed on 3 April 2006, but applied retrospectively from 1 January 2006;

(b) the 2010 ASA and the marketing services agreement were signed on 20 October 2010, but applied retrospectively from 1 January 2010.

([112]) Minutes of So.Ge.A.AL's Board of Directors of 7 July 2009.
([113]) Minutes of So.Ge.A.AL's Board of Directors of 9 September 2009.
([114]) Minutes of So.Ge.A.AL's Board of Directors of 23 February 2010.

(485) The Commission also notes that, according to So.Ge.A.AL, the terms of the agreements that were being discussed with Ryanair and AMS in the periods to which the 2006 and 2010 agreements applied retrospectively (i.e. January 2006 to April 2006, in the case of the 2006 agreements, and January 2010 to October 2010, in the case of the 2010 agreements) were similar to the terms of the agreements that were eventually signed in April 2006 and October 2010. In other words, the agreements concluded in April 2006 and October 2010 simply formalised terms which were agreed before, ahead of the period during which these agreements applied retrospectively. On that basis the Commission considers that considering each agreement over its scheduled duration is in line with an *ex ante* approach and that therefore in the analysis of the profitability of the 2006 and 2010 agreements, the period for which the agreements applied retrospectively should not be excluded.

(486) However, based on the grounds detailed above, the Commission considers that the benefits a prudent MEO would expect from a marketing service agreement would be strictly limited to the term of operation of the carrier at the airport, as set out in the airport service agreement. On this basis the Commission considers that any 'terminal value' aiming to reflect future benefits of the marketing services beyond the term of application of those agreements should be left out from of the analysis. The Commission also notes that Italy has not considered a 'terminal value' to account for benefits derived after expiry of the term of the agreements concluded by So.Ge.A.AL with Alitalia, Meridiana, Volare and Germanwings (see recital 528).

(487) Furthermore, the Commission finds that the approach taken by Italy in estimating the passenger numbers, and calculating on that basis the expected incremental aeronautical and non-aeronautical revenues (without prejudice to the assessment in the previous recital concerning the 'terminal value'), is sound. Although the Commission considers that the assumptions concerning the traffic projections should normally be exclusively based on the route frequencies and passenger targets stipulated in the ASAs and the load factor that could have been reasonably expected by So.Ge.A.AL at the time each ASA with Ryanair was concluded, given that at the time the 2006 and 2010 ASAs where signed So.Ge.A.AL expected Ryanair traffic to exceed the minimum targets set out in the agreements, the Commission agrees that So.Ge.A.AL's expectations at the time the agreements were signed, as set out in the business plans, represent the most accurate source for inferring So.Ge.A.AL's forecasts of Ryanair traffic at the time of signing the 2006 and 2010 ASAs.

(488) The Commission in addition considers that So.Ge.A.AL's expectations of Ryanair's load factor, at the time of signing each of the agreements, as reasonable, since they were based on its experience and knowledge of the airline's business model.

(489) The Commission notes that, according to Italy, So.Ge.A.AL did not aim to recover the cost of the new passenger terminal from charges paid by Ryanair. In this respect, it indeed appears that it was the development of tourism in general which required the expansion of Alghero airport's terminal capacity in order to accommodate anticipated growth in traffic. Prior to the investments being undertaken at Alghero airport, despite significant potential, the development of the tourism sector was impeded by a lack of international connectivity. Alghero airport had reached capacity constraints in 2003 and 2004, and, therefore, investments were required to enable the airport to handle more passengers. So.Ge.A.AL's business plan from 2004 predicted that total passenger numbers at the airport would increase by approximately 30 % in 2008 compared to levels prior to the expansion of the airport's capacity in 2004. While it is clear from the business plans drawn up by So.Ge.A.AL at various times in the period under investigation that the airport manager relied on low-costs airlines as major growth driver (and that the company would return to viability once it was awarded the comprehensive concession), this objective was not linked to the relationship with any specific airline. Indeed, none of the ASAs with Ryanair mentions any investments to be carried out by the airport manager. In this sense, the Commission notes that the investment in the expansion of the terminal was approved by CIPE in 1997 and therefore long before Ryanair started operations at Alghero airport. The application to ENAC for the comprehensive concession was part of So.Ge.A.AL's strategy with the objective to enhance the tourism sector by attracting low cost carriers. This strategy required the expansion of the terminal capacity to accommodate the anticipated traffic growth, a 'comprehensive' concession to ensure efficient and effective operations of the airport and contracts with low cost carriers. On this basis, the Commission accepts that the investment costs connected to the new terminal are not imputable to any of the Ryanair agreements and therefore are not part of the incremental costs.

(490) The Commission further notes that expected incremental costs have been estimated by Italy following a bottom-up approach. A regression analysis has been followed to identify how operating costs vary as passenger numbers change, in order to estimate incremental costs which could have expected by So.Ge.A.AL at the time of signing the ASAs with Ryanair. In the first step, a regression analysis has been carried out to identify the impact of a

change in the airport's passenger numbers on the airport's operating costs. In the second step, the estimate of the additional operating costs as a result of the Ryanair agreements has been derived from the results of the first step combined with forecasts of the number of Ryanair passengers.

(491) For the 2006 and 2010 ASAs, the incremental cost data used by Italy in the regression pre-date the conclusion of the agreements which would have been available to So.Ge.A.AL at the date the airport manager entered the agreements in question. However, since costs data are only available for the period 1998 – 2010, if a similar approach was followed for the 2000, 2002 and 2003 agreements there would be only two, three and four data points available respectively to conduct the regression analysis. The Commission agrees that this would be insufficient to obtain robust results. Absent sufficient *ex ante* data to allow to reconstruct the profitability analysis based on data which would have been available to So.Ge.A.AL at the time the agreements in question were signed, the Commission exceptionally (see recital 284) considers that for these agreements a regression based on outturn data for the whole period 1998-2010 is an acceptable proxy to what the reasonable expectations of a MEO would have been.

(492) Based on the assumptions detailed above, the Commission has reconstructed the *ex ante* profitability analysis of the agreements with Ryanair based on the incremental costs and revenues that could be reasonably expected by a market economy operator acting in lieu of So.Ge.A.AL at the time of the conclusion of each of the agreements under investigation in the present case. Indeed, it is clear from the various business plans drawn up by So.Ge.A.AL that the airport manager forecasted traffic growth based on its strategy to enhance the tourism sector by attracting international low-cost traffic, which was considered to produce a considerably higher passenger turnover than domestic activities ([115]).

(493) The table below presents the NPV of the cash flows expected from the Ryanair agreements based on the assumptions detailed above.

Table 11

NPVs of the cash flows expected from the Ryanair agreements

Agreement	Period during which the agreement was set to apply	NPV over the duration of the agreement (million EUR) ([1])
2000 ASA	22 June 2000–21 June 2010	[4–8]
2002 ASA	1 January 2002–31 December 2012	[3–6]
2003 ASA	1 September 2003–1 September 2014	[9–12]
2006 ASA	1 January 2006–31 December 2010	[3–6]
2010 ASA	1 January 2010–31 December 2013	[2–4]

([1]) Commission's reference rates have been applied to discount the expected cash flows.

(494) As the expected discounted result is positive for each of the Ryanair agreements, the Commission is satisfied that each of the ASAs with Ryanair was expected to be profitable at the time they were concluded and therefore in concluding the agreements in question So.Ge.A.AL did not grant an economic advantage to Ryanair and therefore do not constitute State aid.

([115]) Although this strategy bore fruit and So.Ge.A.AL has been able to achieve a significant growth in traffic volumes in line with its expectations, the airport manager has not been able to match the traffic growth with increasing profitability despite financial support from the public authorities. This was largely due to the significant delays in the award of the 'comprehensive' concession.

Agreements with carriers other than Ryanair

Agreements with Alitalia, Volare, Meridiana and Germanwings

(495) The Commission investigated So.Ge.A.AL's handling and marketing agreements with Alitalia, Volare, Meridiana and Germanwings, detailed in Table 12:

Table 12

So.Ge.A.AL's agreements with Alitalia, Volare, Meridiana and Germanwings

Alitalia		
30.11.2010	Handling agreement	1.12.2010–1.12.2015
20.10.2010	Marketing agreement	7.6.2010–30.9.2010
Volare		
29.11.2007	Handling agreement	28.10.2007–31.10.2010
29.11.2007	Marketing agreement	28.10.2007–31.10.2010
Meridiana		
28.4.2010	Handling agreement	4.2010–4.2011
20.10.2010	Marketing agreement	6.2010–10.2010
Germanwings		
19.3.2007	Handling agreement	25.3.2007–31.10.2009
25.3.2007	Marketing agreement	2007–2009

(i) On the joint assessment of the handling and marketing agreements

(496) The Commission first notes that in each case, there are strong indications that those agreements were negotiated and concluded as part of a single transaction and are therefore to be evaluated as one single measure. In particular:

(a) the marketing agreement with Meridiana, which applied retroactively for the period June–October 2010 laid down in Article 1 — 'Purpose of the Agreement' that: 'Meridiana undertakes to operate the abovementioned routes [Milan, Verona, Bari] according to the predefined operational programmes and therefore to operate a Communication and Marketing programme in agreement with So.Ge.A.AL'. Furthermore, the agreement lays down the possibility for renewal of the agreement subject to Meridiana meeting certain passenger targets;

(b) under the marketing agreement, which applied retroactively for the period June–September 2010, Alitalia was to define a Communication and Marketing Programme having as object the promotion of the region, also by means of the start-up of the new routes (Barcelona, Paris and Brussels);

(c) the handling and marketing agreements with Volare were concluded on the same date. The marketing agreement with Volare lays down: 'This Supplemental Agreement represents a substantial part of the Standard Ground Handling Agreement. Therefore, it will remain in force until the Standard Ground Handling Agreement is terminated, for whichever reason, at which time this Supplemental Agreement and all rights and obligations provided hereby shall also terminate.' The marketing agreement also sets passenger targets which the carrier undertakes to achieve;

(d) the marketing agreement with Germanwings 'lays down the goals and targets to be achieved by Germanwings according to AHO's [Alghero's] requests. The parties confirm that the parameters used for the objective statement of the reaching of the above-mentioned goals and targets will be represented by the yearly number of passengers and flights operated by Germanwings to/from AHO [Alghero]'. The agreement lays down success fees and a one-off contribution to be paid by So.Ge.A.AL.

(497) Therefore, the Commission considers that there is a clear link between the airport service agreements and the marketing agreements in that the latter were based on the conclusion of the airport services agreement and the services provided by the carriers.

(ii) On the approach followed to estimate incremental costs and revenues

(498) No *ex ante* analysis of the profitability of the agreements with those airlines was carried out by So.Ge.A.AL prior to their conclusion. As mentioned above, by letter dated 25 March 2014 Italy provided to the Commission a reconstructed *ex ante* analysis of the profitability of the agreements concluded with Air One/Alitalia, Meridiana, Volare, Germanwings based on the data which would have been available to a MEO acting in lieu of So.Ge.A.AL at the time the agreements in question were concluded as well as foreseeable developments at that time.

(499) According to Italy, the approach followed for the reconstructed analysis reflects the methodology that would have been adopted by a MEO and the results from the profitability assessment of those agreements would demonstrate that these agreements were also expected to be profitable for So.Ge.A.AL on an *ex ante* basis.

(500) The analysis is based on the approach set out in recitals 501 to 524.

(501) *Incremental aeronautical revenues* were derived by applying the relevant airport charges expected to be paid by each airline, combined with the traffic forecasts for the respective airline for all services other than ground handling. Aeronautical revenues from ground handling are based on charges negotiated between So.Ge.A.AL and each airline. The traffic forecasts are based on either the airline's traffic levels in the year prior to signing the agreement or the traffic targets stipulated in the relevant agreements.

(502) *Incremental non-aeronautical revenues* are based on So.Ge.A.AL's expectations at the time the 2007 and 2010 agreements with the airlines were signed concerning non-aeronautical revenues of around EUR 5,00–6,00 per departing passenger as a result of the development of the new terminal (see also Table 9).

(503) *Incremental operating costs* have been derived by taking into account the categories of incremental costs that So.Ge.A.AL expected at the time of signing each agreement with Air One/Alitalia, Volare, Meridiana and Germanwings and included: incremental staff costs, incremental handling costs, incremental costs of goods, services and materials, incremental concession costs, and the one-off marketing payments relating to new routes and success fees.

(504) Regression analysis was carried out on passenger numbers and costs at the airport-level to identify the impact of a change in Alghero airport's passenger numbers on the airport's total costs.

(505) For the purpose of the profitability analysis of the 2010 agreements with Alitalia and Meridiana, Italy has run the regression on cost data for the period pre-dating the signature of the agreements, i.e. 1998–2009, which would have been available to So.Ge.A.AL at the date it entered the agreements in question.

(506) However according to Italy the number of available data points prior to the signing of the 2007 agreements with Germanwings and Volare (1998–2006) is very low. The resulting estimates of incremental staff and materials costs are EUR 2,7 and EUR 9,3 per departing passenger respectively, which is considered as unusually high. The addition or deletion of a single data point has in this case a material impact on the results. On this basis the profitability analysis yields a negative NPV for Germanwings while the NPV of the Alitalia agreement remains positive. According to Italy the estimates from the cost regressions become more stable as the number of data points increases and therefore for the 2007 agreements with Germanwings and Volare the regression should cover the full period 1998–2010.

(507) In the second step, the estimates of total additional costs as a result of the specific agreements between So.Ge.A.AL and the respective airlines were derived based on the results in the first step combined with the respective forecasts of each airline's passenger numbers.

(a) Expected incremental costs of handling, goods, services and materials over the duration of each agreement are based on average handling costs per ATM and the average costs of goods, services and materials per passenger at the airport level in the year immediately prior to the signing of the agreement. These unit costs are uprated by expected inflation in each year and are multiplied by the respective traffic forecasts for each airline;

(b) Concession costs vary with the number of passengers. Incremental concession costs are based on average concession costs per passenger at the airport level in the year before each agreement was signed, multiplied by traffic forecasts for the respective airline and uprated by inflation.

(508) The load factors assumed in the profitability analysis of the agreements concluded with Alitalia, Germanwings, Volare and Meridiana are based on So.Ge.A.AL's prior knowledge and experience of each airline's operations and business model ([116]), as detailed in Table 13.

Table 13

Load factors assumptions

Airline	Load factor
Air One/Alitalia	n.a.
Germanwings	60
Volare	50
Meridiana	65

— Air One/Alitalia

(509) Traffic projections for Air One/Alitalia over the duration of the handling agreement were derived in the following manner:

(a) traffic projections associated with the start of the three international routes to/from Barcelona, Brussels and Paris are based on the marketing agreement. It was assumed that Air One/Alitalia would operate three flights per week for each route;

(b) traffic projections for domestic flights are based on the number of flights operated by Air One/Alitalia in 2009, uprated by an assumption that domestic traffic would increase by 1 % per year.

([116]) For Germanwings and Meridiana the load factor is specified in the agreements with So.Ge.A.AL. For Volare, the load factor is based on So.Ge.A.AL's prior knowledge of the airline's operations. As Volare operated a number of domestic routes, a lower load factor was assumed. In case of Alitalia, the traffic forecasts have not been derived from a particular assumption for the load factor as Alitalia operated different models of planes (with the maximum number of seats per plane varying from 90 to 180), depending on the day of the week and the season. Traffic forecasts have been derived based on prior experience and knowledge of the airline's operations.

(510) The traffic projections were used to derive expected incremental revenues and expected incremental costs. Expected incremental aeronautical revenues are based on the traffic projections and the published airport charges for all services apart from handling. The handling charges are based on the 2010 handling agreement. Expected non-aeronautical revenues were derived as detailed in recital 502.

(511) Expected incremental costs were derived based on the assumptions detailed in recitals 503–508 and include the one-off marketing payment from So.Ge.A.AL to incentivise Air One/Alitalia's launch of international routes from Alghero airport.

(512) Based on those assumptions, the NPV of the cash flows expected from the 2010 agreements with Air One/ Alitalia, as calculated by Italy is presented in Table 14.

Table 14

NPVs of the cash flows expected from the 2010 Air One/Alitalia agreement (million EUR)

Year	2010	2011	2012	2013	2014	2015
Incremental profits	[0–1]	[3–6]	[3–6]	[3–6]	[3–6]	[3–6]
NPV (1) (over the duration of the agreement)	[10–14]					

(1) Using a discount rate of 2,45 %.

— Volare

(513) The traffic forecasts for Volare are based on the ATMs set out in the marketing agreement, namely 28 flights in 2007, 207 flights for 2008 and 2009 and 180 flights for 2010.

(514) Incremental aeronautical revenues were based on the published airport charges and the handling agreement, combined with the traffic projections. Incremental non-aeronautical revenues were estimated in line with the approach described in recital 502.

(515) Incremental costs were based on the average per-unit charges and the traffic projections based on the assumptions detailed in recitals 503-508 and include the one-off payment of EUR […] for the first year of activity.

(516) In the calculation of the NPV shown in Table 15 the regression analysis was based on cost data pre-dating the signing of the agreement, namely 1998-2006.

Table 15

NPVs of the cash flows expected from the 2007 Volare agreement (thousand EUR)

Year	2007	2008	2009	2010
Incremental profits	[13–18]	[50–100]	[100–125]	[100–125]
NPV (1) (over the duration of the agreement)	[250–300]			

(1) Using a discount rate of 6,42 %.

— Meridiana

(517) The traffic forecasts for Meridiana underpinning the assumptions on expected incremental revenues and incremental costs are based on the number of ATMs on the routes to/from Milan, Verona and Bari, as specified in the 2010 marketing agreement.

(518) Incremental aeronautical revenues were based on the published airport charges and the handling agreement, combined with the traffic projections. Incremental non-aeronautical revenues were estimated in line with the approach described in recital 502.

(519) Incremental costs were based on the average per-unit charges and the traffic projections as detailed in recitals 503-508 and include the one-off payment of EUR […].

(520) The Commission notes that the marketing agreement with Meridiana was set to apply for one year, in the period between June 2010 and October 2010 and laid down that it could be extended to cover the years 2011 and 2012 if the number of passengers carried by the airline exceeded certain minimum thresholds. Italy explained that at the time of signing the agreements, So.Ge.A.AL expected that Meridiana would deliver the required minimum level of passenger traffic, and therefore that Meridiana would renew the marketing (and consequently the handling) agreement with So.Ge.A.AL on similar terms.

(521) Based on those assumptions, the NPV of the cash flows expected from the 2010 agreements with Meridiana is presented in Table 16. As shown in Table 16, for the purpose of the profitability analysis, Italy took into account the period 2010-2013.

Table 16

NPVs of the cash flows expected from the 2010 Meridiana agreement for the period 2010-2013 (thousand EUR)

Year	2010	2011	2012	2013
Incremental profits	– [150–200]	[400–450]	[400–450]	[400–450]
NPV ([1]) (over the duration of the agreement)	[950–1 100]			

([1]) Using a discount rate of 2,24 %.

— Germanwings

(522) The traffic forecasts for Germanwings are based on the target ATMs stipulated in the 2007 agreement and underpin SO.GE.A.AL's expectations of incremental revenues and incremental costs at the time the agreement was entered into.

(523) Incremental aeronautical revenues were based on the published airport charges and the 2007 agreement, combined with the traffic projections. Incremental non-aeronautical revenues were estimated in line with the approach described in recital 502.

(524) Incremental costs were based on the average per-unit charges and the traffic projections and include the one-off payment of EUR […] in the first year, as well as the success fees (the analysis assumes that Germanwings would have met the passenger targets). In the calculation of the NPV shown in Table 17 the regression analysis has been based on cost data pre-dating the signing of the agreement, namely 1998–2006.

Table 17

NPVs of the cash flows expected from the 2007 Germanwings agreement (thousand EUR)

Year	2007	2008	2009
Incremental profits	– [130–150]	– [20–30]	– [5–10]
NPV [1] (over the duration of the agreement)	– [150–200]		

[1] Using a discount rate of 6,42 %.

(iii) Assessment

(525) The Commission agrees to the soundness of the approach taken by Italy in estimating the passenger numbers, and calculating on that basis the expected incremental aeronautical and non-aeronautical revenues.

(526) The same holds true with respect to the calculation of incremental costs, which include marketing payments. However, the Commission considers that the regression analysis should be based on data which would have been available to So.Ge.A.AL at the moment the agreements were entered into, and should therefore only be run for the period predating the signature of those agreements, namely, in this case 1998 — 2006 for the agreements with Germanwings and Volare and 1998–2009 for the agreements with Alitalia and Meridiana.

(527) As opposed to the 2000, 2002 and 2003 agreements with Ryanair, for which the Commission accepted that no meaningful regression can be run on the basis of *ex ante* cost data and therefore, cost data for the period 1998 - 2008 was used as proxy to what a reasonable MEO would have expected at the time those agreements were concluded (see recital 491), in the case of the 2007 agreement with Germanwings and the 2010 agreement with Meridiana more data points are available to conduct the regression on *ex ante* cost data, which would have been available to So.Ge.A.AL at the time it entered into the agreements in question. In addition, the Commission also notes that a similar approach was accepted by Italy for the analysis of the 2006 Ryanair agreements, which pre-date the signing of the 2007 agreement with Germanwings.

(528) Furthermore, the Commission takes note of Italy's approach of not considering a 'terminal value' to account for benefits derived after expiry of the term of the agreements concluded by So.Ge.A.AL with Alitalia, Meridiana, Volare and Germanwings. That approach is in line with the Commission reasoning as developed in recitals 445–450.

(529) The Commission also notes that, similarly to the 2006 and 2010 ASAs with Ryanair, the marketing agreements with Meridiana and Alitalia applied retrospectively between June 2010 and October 2010. So.Ge.A.AL explained that during that period, So.Ge.A.AL had been discussing terms similar to the agreement that was later signed with Meridiana and Alitalia on 20 October 2010. The Commission therefore agrees that this approach is consistent to that of a MEO.

(530) Finally, the Commission takes note that the marketing agreement with Meridiana (applicable in the period between June 2010 and October 2010) laid down that it could be extended to cover the years 2011 and 2012 if the number of passengers carried by the airline exceeded the minimum thresholds stipulated therein. Italy explained that at the time of signing the agreements, So.Ge.A.AL expected that Meridiana would deliver the required minimum level of passenger traffic, and therefore that Meridiana would renew the marketing (and consequently the handling agreement) with So.Ge.A.AL on similar terms.

(531) The Commission cannot accept that argument. First, the handling agreement with Meridiana did not lay down any explicit provision on its possible renewal. Such clause was only included in the marketing agreement. Whilst the Commission agrees that the possible extension of the marketing agreement assuming Meridiana met traffic targets, would result in the extension for a similar duration of the handling agreement with the carrier, the fact remains that at the time the handling agreement was signed, no legal obligation bound Meridiana to continue operations from the airport beyond the initial terms of the agreement, namely April 2011. In addition, the marketing agreement was signed on 20 October 2010, i.e. more than six months after the handling agreement

was signed. The Commission considers that in April 2010, when the handling agreement was signed, So.Ge.A.AL could not rely on the renewal of either of the agreements on similar terms, such renewal being hypothetical. Therefore, the Commission considers that the profitability analysis Therefore, the Commission considers that the profitability analysis should only take into account the initial duration of the agreement of one year.

(532) At the same time, the Commission takes note of Italy's approach to justify So.Ge.A.AL's expectations in respect of the renewal of the handling agreement simply based on the possibility of an extension of the marketing (rather than the handling) agreement. The Commission considers that that approach makes the argument expressed in the course of the investigation by Ryanair and AMS that the marketing and airport services agreements can be easily severable as difficult to accept.

(533) The Commission has re-constructed the analysis based on the considerations in recitals 525 to 532. The resulting NPVs for those agreements at the time when they were concluded, over the period during which they were set to apply, are presented in Table 18.

Table 18

NPVs of the agreements between So.Ge.A.AL and Air One/Alitalia, Meridiana, Volare and Germanwings

Airline	Period during which the agreement was set to apply	NPV over the duration of the agreement (thousand EUR)
Volare	2007–2010	[250–300]
Air One/Alitalia	2010–2015	[12 500–13 000]
Meridiana	2010–2011	– [150–200]
Germanwings	2007–2009	– [150–200]

(534) As the expected discounted result is negative for the Meridiana and Germanwings agreements, the Commission finds that So.Ge.A.AL did not act like a MEO in concluding those agreements. The airport manager could not have expected to cover at least the incremental costs brought about by any one of those contracts. As So.Ge.A.AL thus did not behave like a MEO, its decision to conclude the agreements on those terms granted Germanwings and Meridiana an economic advantage.

(535) The overview of the incremental costs and revenues that could have been expected at the time the agreements with Meridiana and Germanwings were concluded is summarised in Table 19.

Table 19

Incremental profitability of agreements with Germanwings and Meridiana

Germanwings	2007	2008	2009
Expected Passengers	15 000	15 000	15 000
Expected Incremental Aeronautical Revenue	[…]	[…]	[…]
Expected Incremental Non-Aeronautical Revenue	[…]	[…]	[…]
Expected Incremental Costs	[…]	[…]	[…]
Costs Marketing Support	[…]	[…]	[…]
Expected Nominal Result	**– 140 482**	**– 24 616**	**– 8 745**

Meridiana	2010
Expected Passengers	59 631
Expected Incremental Aeronautical Revenue	[…]
Expected Incremental Non-Aeronautical Revenue	[…]
Expected Incremental Costs	[…]
Costs Marketing Support	[…]
Expected Nominal Result	**– 175 174**

(536) In contrast, the agreements with Volare and Alitalia could have been expected to lead to a positive discounted result. Therefore, in concluding those agreements, So.Ge.A.AL did not grant an economic advantage to those carriers.

(iv) Conclusion

(537) Based on the profitability analysis submitted by Italy of the agreements concluded by So.Ge.A.AL with Alitalia and Volare, the Commission is satisfied that it would have been rational for a MEO guided by profitability prospects to accept the terms of those agreements at the date at which they were signed. Therefore those agreements do not involve aid to the air carriers.

(538) However, based on the assessment in recitals 525 to 536, the Commission concludes that it was not rational for So.Ge.A.AL to conclude the agreements with Meridiana and Germanwings. Each of those agreements involves an economic advantage to the air carrier concerned.

Agreements with bmibaby, Air Italy and Air Vallée

(539) As mentioned above, by letter of 10 June 2014, Italy provided the Commission with the *ex ante* analysis of the profitability of the agreements concluded by So.Ge.A.AL with the other airlines subject to the investigation, i.e, bmibaby, Air Italy and Air Vallée.

(540) The relevant handling agreements signed between So.Ge.A.AL and Air Italy, Air Vallée and bmibaby are summarised in Table 20:

Table 20

Handling agreements with bmibaby, Air Italy and Air Vallée

Airline	Expected duration of the agreement	Handling charge per turnaround
Air Italy	1 June 2008 – 31 December 2010	600
Air Vallée	9 August 2010 – 30 August 2010	300
Bmbaby	29 May 2010 – 30 September 2010	700

(541) The methodology followed by Italy to examine the incremental profitability of the agreements concluded between So.Ge.A.AL and Air Italy, Air Vallée and bmibaby is detailed in recitals 542 to 545.

(542) Incremental aeronautical revenues include revenues from landing charges, baggage handling fees, passenger fees, aircraft handling and ticketing. All charges, other than handling, were based on the airport's published scheme of charges. Incremental non-aeronautical revenues have been estimated in line with the approach described in recital 502.

(543) Expected incremental costs include costs relating to staffing ([117]), handling, goods, services and materials, as well as an allocation of So.Ge.A.AL's concession costs. As the relevant agreements signed between So.Ge.A.AL with Air Vallée and bmibaby did not concern marketing services, the analysis does not consider payments for marketing. A regression analysis was carried out on passenger numbers and costs at the airport-level based on *ex ante* data which would have been available to So.Ge.A.AL at the moment the agreements in question were entered into, namely 1998–2007 for the agreement with Air Italy and 1998–2009 for the agreements with Air Vallée and bmibaby.

(544) Table 21 summarises the incremental profits expected to accrue to So.Ge.A.AL from the agreement with Air Italy. The NPV of the incremental profits that So.Ge.A.AL could have expected from the agreement with Air Italy amounts to EUR 99 330 ([118]).

Table 21

NPVs of the cash flows expected from the 2008 Air Italy agreement (EUR)

Year	2008	2009	2010
Incremental profits	[30 000–40 000]	[30 000–40 000]	[30 000–40 000]
NPV ([1]) (over the duration of the agreement)	[90 000–110 000]		

([1]) Using a discount rate of 6 %.

(545) Table 22 summarises the incremental profits expected to accrue to So.Ge.A.AL from the agreements with Air Vallée and bmibaby. The NPVs of the incremental profits that So.Ge.A.AL could have expected from the agreements with Air Vallée and bmibaby amount to EUR 3 399 and EUR 25 330 respectively ([119]). According to Italy the estimates of the NPV are relatively low because the agreements concluded between So.Ge.A.AL, Air Vallée and bmibaby were expected to cover a period of one year (or less than one year) only.

Table 22

NPVs of the cash flows expected from the agreements with Air Vallée and bmibaby (EUR)

	Air Vallée	Bmibaby
Incremental profits	[3 000–3 500]	[25 000–26 000]

(546) The Commission notes that the approach taken by Italy in estimating the passenger numbers, and calculating the expected incremental aeronautical and non-aeronautical revenues, and incremental costs of the agreements concluded by So.Ge.A.AL with Air Italy, Air Vallée and bmibaby is the same as the one employed for the agreements with the other carriers. Consequently, the Commission concludes that those agreements were expected to be profitable for So.Ge.A.AL at the time they were signed.

12.2.1.3. *Selectivity*

(547) The economic advantage identified in recital 534 was granted on a selective basis, as only Meridiana and Germanwings benefited from it. The advantage derives from airport services and marketing agreements negotiated individually by the two carriers which have not been concluded with the other carriers operating at

([117]) Due to low traffic commitments, no additional personnel was required to serve Air Vallée or bmibaby.
([118]) Using a discount rate of 5,55 %.
([119]) Using a discount rate of 2,24 %.

the airport under the same terms. Indeed the Commission notes that all agreements subject to the investigation in this case are substantially different and result in different cash flows between So.Ge.A.A.AL and the carriers operating from Alghero airport.

12.2.1.4. *Distortion of competition and effect on trade*

(548) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ([120]). For all practical purposes, a distortion of competition can thus be assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is (at least potential) competition. The case law of the European Courts has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States ([121]).

(549) Since the entry into force of the third package on the liberalisation of air transport on 1 January 1993 ([122]), air carriers can freely operate flights on intra-European connections. As the Court of Justice observed,

'where an undertaking operates in a sector in which […] producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share and reduces their chances of increasing exports.' ([123]).

(550) The Commission has found that So.Ge.A.AL granted a selective advantage to Germanwings and Meridiana. Those airlines are active on a liberalised, competitive market and the advantage they received was liable to improve their competitive position on the market for air transport services to/from Alghero airport to the detriment of other Union air carriers. In this light, the Commission finds that the advantage granted to Germanwings and Meridiana is liable to distort competition and affect trade between Member States.

12.2.1.5. *Conclusion on the agreements with the airlines*

(551) Therefore, the Commission concludes that the measures adopted by So.Ge.A.AL pursuant to the 2010 agreement with Meridiana and the 2007 agreement with Germanwings involved State aid to those airlines, amounting to approximately EUR 175 174 and EUR 140 482, respectively. Since the aid involved in each of these agreements was put into effect without being authorised by the Commission, it constitutes unlawful State aid.

12.2.2. **Compatibility of aid to the airlines**

(552) As regards start-up aid, the 2014 Aviation Guidelines state that:

'the Commission will apply the principles set out in these guidelines to all notified start-up aid measure in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014.'

([120]) Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 267, paragraph 11 and joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* [2000] ECR II-2325, paragraph 80.

([121]) Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980], ECR 2671, paragraphs 11 and 12 and Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* [1998] ECR II-717, paragraphs 48-50.

([122]) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

([123]) Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

(553) The 2005 Aviation Guidelines, in turn, stipulate that:

'the Commission will assess the compatibility of […] start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty [now Article 108(3) of the Treaty], on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*.'

(554) As the agreements with Meridiana and Germanwings were concluded after the publication of the 2005 Aviation Guidelines in the Official Journal on 9 December 2005, those guidelines constitute the applicable legal basis for the assessment of their compatibility with the internal market.

12.2.2.1. *Compatibility assessment pursuant to 2005 Aviation Guidelines*

(555) The 2005 Aviation Guidelines set out in point 79 several conditions to be complied with in order for start-up aid to be found compatible with the internal market under Article 107(3)(c) of the Treaty.

(i) The aid is paid to air carriers with a valid operating licence issued by a Member State pursuant to Regulation (EEC) No 2407/92

(556) In this case the beneficiaries are air carriers as defined by Regulation (EC) No 1008/2008 ([124]). The first condition set forth by the 2005 Aviation Guidelines is therefore fulfilled.

(ii) The aid is paid for routes linking a regional airport in category C or D to another EU airport

(557) As of 2005 Alghero airport qualified as a category C regional airport pursuant to the 2005 Aviation Guidelines. The aid was granted to airlines opening new routes from Alghero airport to other airports located in the Union. The second condition is thus observed.

(iii) The aid will apply only to the opening of new routes or new schedules, which will lead to an increase in the net volume of passengers. This aid must not encourage traffic simply to be transferred from one airline or company to another. In particular, it must not lead to a relocation of traffic which is unjustified with regard to the frequency and viability of existing services leaving from another airport in the same city, the same conurbation ([125]) or the same airport system ([126]), which serve the same or a similar destination under the same criteria

(558) The aid was granted to encourage airlines to launch new routes from Alghero airport to one or more Union destinations, thereby leading to an increase in the net volume of passengers. There is no other airport in the same city or conurbation. In addition, none of the routes in question was served by a high-speed rail service. The third condition set forth by the 2005 Aviation Guidelines is thus fulfilled.

(iv) The route receiving the aid must ultimately prove profitable, namely it must at least cover its costs, without public funding. For this reason start-up aid must be degressive and of limited duration

(559) Aid to Germanwings and Meridiana was limited to the duration of the agreements concluded with So.Ge.A.AL, namely one and three years respectively However, no condition was imposed in the agreements by which the routes operated by the carriers from Alghero airport had to be ultimately profitable on a stand-alone basis. The Commission further notes that, while the amount of aid received by Germanwings as listed in Table 19 was degressive, Germanwings ceased operations at Alghero airport in 2007 and therefore never operated without public funding.

([124]) Following the entry into force of Regulation (EC) No 1008/2008, Regulation (EEC) No 2407/92 has been repealed and, according to Article 27 of Regulation (EC) No 1008/2008, references to the repealed Regulation shall be construed as references to Regulation (EC) No 1008/2008.

([125]) Regulation (EEC) No 2408/92.

([126]) As defined under Article 2(m) of Regulation (EEC) No 2408/92.

(v) The amount of aid must be strictly linked to eligible costs

(560) Eligible costs are defined in the 2005 Aviation Guidelines as the 'additional start-up costs incurred in launching the new route or frequency […] which the air operator will not have to bear once it is up and running'. Italy has not claimed that the financing to Germanwings and Meridiana was limited to cover eligible costs and that regular operating costs would not be subsidised. This condition is therefore not complied with.

(vi) The degressive aid may be granted for a maximum period of three years. The amount of aid in any one year may not exceed 50 % of total eligible costs for that year and total aid may not exceed an average of 30 % of eligible costs

(561) The agreements with the airlines in question make no reference to the costs of the airlines and do not lay down that the aid must be limited to a certain percentage of the eligible costs. The Commission therefore finds that this condition is not fulfilled.

(vii) The period during which start-up aid is granted to an airline must be substantially less than the period during which the airline undertakes to operate from the airport in question

(562) The Commission notes that no condition was imposed that the routes opened by the carriers be viable after the period when their operation is subsidised.

(viii) The aid payments must be linked to the net development of the number of passengers transported

(563) The Commission notes that there is a clear link between the number of passengers carried and the amount of aid. In particular, the agreements with Germanwings and Meridiana set out success fees to be paid by So.Ge.A.AL if the airlines met the stipulated traffic targets.

(ix) Any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services. The notification must in particular include the description of the route as well as the objective criteria in terms of the amount and the duration of the aid

(564) In the course of the investigation Italy claimed that the airport's intention to conclude agreements with airlines interested in opening new routes departing from Alghero airport had been sufficiently advertised among the potential interested carriers. However, no evidence was provided in that respect. In particular, no indication exists that Alghero airport made its intention to grant aid to the airlines, and the conditions of the granting of such aid, known in good time and with adequate publicity. The procedure for selection of the air carriers was therefore not sufficiently clear to ensure the non-discriminatory treatment of applicants of interested carriers.

(x) When submitting its application, any airline which proposes a service to a public body offering to grant start-up aid must provide a business plan showing, over a substantial period, the viability of the route after the aid has expired. The public body should also carry out an analysis of the impact of the new route on competing routes prior to granting start-up aid

(565) Neither Italy nor interested parties have provided evidence in the investigation that carriers had to provide a business plan for the routes in question beforehand to demonstrate the viability of the route in question on a standalone basis after a certain period. Neither has So.Ge.A.AL claimed to have carried out an assessment of the impact of the new routes in question on other routes. This condition is therefore not observed.

(xi) States must ensure that the list of routes receiving aid is published annually for each airport, in each instance indicating the source of public funding, the recipient company, the amount of aid paid and the number of passengers concerned

(566) There is no indication that Alghero airport published yearly the list of routes receiving public financing, indicating the source of financing, the air carrier, the amount of aid actually paid and the number of passengers carried. This condition is therefore not complied with.

(xii) Where applicable, appeal procedures must be provided for at Member State level to ensure that there is no discrimination in the granting of aid

(567) Italy has not claimed that appeal procedures were in place to deal with complaints regarding the granting of the aid to carriers operating routes from Alghero airport. This condition is therefore not observed.

(xiii) Penalty mechanisms must be implemented in the event that a carrier fails to keep to the undertakings that it gave in relation to an airport when the aid was paid. A system for recovering aid or for seizing a guarantee initially deposited by the carrier will allow the airport to ensure that the airline honours its commitments

(568) The Commission notes that the agreements with the carriers lay down a system of penalties in case the airlines to not observe the traffic targets stipulated therein. This condition is thus fulfilled.

(xiv) Start-up aid cannot be combined with other types of aid granted for the operation of a route, such as aid of a social nature granted to certain categories of passengers and compensation for discharging public services. In addition, such aid cannot be granted when access to a route has been reserved for a single carrier under Article 4 of Regulation (EEC) No 2408/92, and in particular paragraph 1(d) of that Article. Also, in accordance with the rules of proportionality, such aid cannot be combined with other aid granted to cover the same costs, including aid paid in another State

(569) Italy confirmed that the aid in question was not granted for the start-up of routes subject to PSOs under Regulation (EC) No 1008/2008. However, Italy has not confirmed that the aid was not combined with other aid to cover the same costs.

(570) Therefore, the aid to the airlines cannot be found to constitute compatible start-up aid under the 2005 Aviation Guidelines. The State aid implemented for Meridiana and Germanwings therefore constitutes unlawful and incompatible State aid that must be recovered.

12.3. CONCLUSION

(571) Therefore, the Commission finds that:

(a) Italy implemented investment aid to Alghero airport in violation of Article 108(3) of the Treaty. The investment aid is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty;

(b) The subsidies referred to in recital 257 granted to the manager of Alghero airport before 12 December 2000 fall outside the scope of this Decision;

(c) Italy implemented operating aid to Alghero airport in violation of Article 108(3) of the Treaty. The operating aid is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty;

(d) The airport services (or handling) agreements and the marketing agreements concluded by So.Ge.A.AL with Ryanair, Air One/Alitalia, Volare, bmibaby, Air Vallée and Air Italy do not constitute State aid;

(e) The handling and marketing agreements concluded by So.Ge.A.AL with Meridiana and Germanwings constitute unlawful and incompatible State aid.

13. **RECOVERY**

(572) In accordance with the Treaty and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ([127]) when it has found that it is incompatible

([127]) Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([128]). In that context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([129]).

(573) Following that case-law, Article 14 of Council Regulation (EC) No 659/99 ([130]) laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(574) Therefore, the State aid mentioned in Table 19 implemented for Meridiana and Germanwings must be reimbursed to Italy insofar as it has been paid out.

(575) Regarding the amounts to be recovered, the Commission will consider the *ex ante* analysis of expected incremental costs and revenues of the agreements as set out in Table 19, with the following additional considerations:

a) For each agreement or combination of agreements at stake, the annual aid amount to recover should correspond to the annual negative incremental cash flow at the time when the decision was taken to sign the agreement, for each year of application of the contract. Those negative cash flows correspond to the amount of financing needed for the net present value of the agreement to be positive, thus for the agreement to be market conform.

b) The Commission considers that the timeframe to take into consideration for the profitability analysis for Germanwings is 2007. As mentioned in recital 117, Germanwings operated from Alghero airport only in 2007. Indeed, the effective advantage received by the airline company is limited to the effective duration of the agreements at stake, as once the agreement has been terminated, Germanwings has not received any more advantage from the airport.

(576) Table 23 indicates the indicative recovery amounts (negative incremental flows) with the corresponding reductions for the Germanwings agreement which has not run its full duration.

Table 23

Information about the indicative amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total indicative amount of aid received (in EUR)	Total indicative amount of aid to be recovered (in EUR) (Principal)	Total amount already reimbursed (in EUR)	
			Principal	Recovery interest
Germanwings	140 482	140 482		
Meridiana	175 174	175 174		

(577) To take account of the actual advantage received by the airlines and its subsidiaries under the agreements, the amounts indicated in Table 23 may be adjusted, according to the supporting evidence provided by Italy, based on (i) the difference between, on the one hand, actual payments as presented *ex post*, that were made by the airlines with regard to the airport charges and, on the other hand, the forecasted cash flows (*ex ante*) on these items of income and shown in Table 19, and (ii) the difference between, on the one hand, the actual marketing payments as presented *ex post* which were paid to the airlines under marketing agreements and, other the other hand, the marketing costs as foreseen *ex ante*, corresponding to the amounts indicated in Table 19.

([128]) Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-04103, paragraph 75.

([129]) Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64-65.

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

(578) In addition, Italy has to add to the aid amount the recovery interests, calculated from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery ([131]), according to Chapter V of Commission Regulation (EC) No 794/2004 ([132]). As in the case at stake cash flows corresponding to the aid amounts are complex and were paid at different dates throughout the year, and both contracts only ran for one year each, the Commission considers that it is acceptable for the calculation of the recovery interests to consider that the time of payment of the aid to Germanwings and Meridiana is the date of (early) termination of the respective agreements.

HAS ADOPTED THIS DECISION:

Article 1

1. The direct grants for infrastructure, fittings and works and equipment which Italy granted to Alghero airport constitute State aid within the meaning of Article 107(1) of the Treaty. The State aid was granted by Italy in violation of Article 108(3) of the Treaty.

2. The State aid referred to in paragraph 1 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty.

Article 2

1. The capital injections which Italy implemented for Alghero airport constitute State aid within the meaning of Article 107(1) of the Treaty. The State aid was granted by Italy in violation of Article 108(3) of the Treaty.

2. The State aid referred to in paragraph 1 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty.

Article 3

The measures which Italy implemented for Ryanair, Air One/Alitalia, Volare, bmibaby, Air Vallée and Air Italy do not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 4

1. The measures which Italy implemented for Meridiana and Germanwings constitute State aid within the meaning of Article 107(1) of the Treaty. The State aid was granted by Italy in violation of Article 108(3) of the Treaty.

2. The State aid referred to in paragraph 1 is incompatible with the internal market.

Article 5

1. Italy shall recover the incompatible State aid referred to in Article 4 from the beneficiaries.

2. The sums to be recovered shall bear interest from the date on which they were deemed to be put at the disposal of the beneficiaries until their actual recovery.

([131]) Regulation (EC) No 659/1999, cited, Article 14, paragraph 2.
([132]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

4. Italy shall cancel all outstanding payments of the aid referred to in Article 4 with effect from the date of adoption of this Decision.

Article 6

1. Recovery of the aid referred to in Article 5 shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within four months following the date of its notification.

Article 7

1. Within two months following notification of this Decision, Italy shall submit the following information:

(a) the total amount of aid received by the beneficiaries;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 4 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 8

This Decision is addressed to the Italian Republic.

Done at Brussels, 1 October 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION (EU) 2015/1585

of 25 November 2014

on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users)

(notified under document C(2014) 8786)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) Through a complaint received in December 2011, the Commission was informed that Germany had implemented State aid for the support of renewable electricity and for energy-intensive users ('EIU') by way of a cap on the surcharge financing the support of renewable electricity (*EEG-Umlage* or 'EEG-surcharge').

(2) By letter dated 18 December 2013, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of that aid ('Opening Decision').

(3) The Opening Decision was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the aid.

(4) The Commission forwarded comments received from interested parties to Germany, which was given the opportunity to react; its comments were received by letters dated 20 January and 14 November 2014.

(5) By letter dated 22 September 2014, Germany waived its right under Article 342 of the Treaty in conjunction with Article 3 of Regulation (EEC) No 1/1958 ([3]) to have this Decision adopted in German and agreed that this Decision be adopted in English.

2. DETAILED DESCRIPTION OF THE AID

2.1. The EEG-Act 2012

(6) The EEG-Act 2012 (*Erneuerbare-Energien-Gesetz*) was adopted on 28 July 2011 and entered into force on 1 January 2012 ([4]). It has been substantially altered by the EEG-Act 2014 ([5]). The Commission approved the new aid scheme resulting from that substantial alteration on 23 July 2014 ([6]).

([1]) OJ C 37, 7.2.2014, p. 73, and OJ C 250, 1.8.2014, p. 15.

([2]) Cf. footnote 1.

([3]) Regulation No 1 determining the languages to be used by the European Economic Community (OJ Series I, Volume 1952-1958, p. 59).

([4]) Gesetz für den Vorrang Erneuerbarer Energien (Erneuerbare-Energien-Gesetz — EEG), as amended by Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien, Bundesgesetzblatt, Part I, p. 1634, and by Gesetz zur Änderung des Rechtsrahmens für Strom aus solarer Strahlungsenergie und zu weiteren Änderungen im Recht der erneuerbaren Energien vom 17. August 2012, Bundesgesetzblatt, Part I, p. 1754.

([5]) Gesetz zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts vom 21. Juli 2014, Bundesgesetzblatt, Part I, p. 1066.

([6]) State aid case SA.38632 (2014/N) — Germany: EEG 2014 — Reform of the Renewable Energy Law (not yet published in the Official Journal).

(7) On the first level of the system established by the EEG-Act 2012, network operators (in most cases the Distribution System Operators, 'DSOs') are obliged to purchase electricity produced within their network area from renewable energy sources ('RES electricity') and from mine gas ('RES electricity' and electricity produced from mine gas are referred to together as 'EEG electricity'). The purchase prices are fixed by law ('feed-in tariffs'). Instead of requesting payment of the feed-in tariffs, producers of RES electricity and electricity from mining gas also have the possibility to sell their electricity directly on the market ('direct marketing'). When they do so, they are entitled to obtain a market premium from the network operator. The amount of that market premium is also fixed by law.

(8) On the second level, network operators have to immediately transfer the EEG electricity to their respective Transmission System Operators ('TSOs'), of which there are four in Germany, which in turn are under the obligation to compensate the network operators for the entire cost resulting from the feed-in tariffs and the market premiums.

(9) The EEG-Act 2012 also establishes an equalisation mechanism whereby the financial burden resulting from the purchase obligation is spread between four TSOs so that ultimately every TSO covers the costs of a quantity of electricity that corresponds to the average share of EEG electricity compared to the total electricity delivered to the final consumers in each area served by the individual TSO in the previous calendar year (§ 36 EEG-Act 2012). This is the third level.

(10) TSOs are obliged to sell the EEG electricity on the spot market. They can do so alone or together. If the price obtained on the spot market is not sufficient to cover the financial burden resulting from their payment obligations towards the network operators, TSOs are entitled by law to ask electricity suppliers to pay a share of this burden proportionate to the respective quantity of electricity delivered by the electricity suppliers to their final consumers. The share must be determined in such a way that each electricity supplier bears the same costs for each kilowatt-hour of electricity delivered by it to a final consumer. Monthly advance payments must be made for payment of this surcharge. The EEG-Act 2012 explicitly designates this charge that the TSO recovers from electricity suppliers as constituting the EEG-surcharge (see § 37(2) of the EEG-Act 2012). The four TSOs are obliged to indicate all payments they have received on a joint EEG account and to publish that account (§ 7 AusglMechV ([7])). This is the fourth level.

(11) The four TSOs together have to determine the EEG surcharge for the year n + 1 in October (§ 3 Absatz 2 AusglMechV). The methodology they have to use and the elements on which they have to base their calculation are set out in the *Ausgleichsmechanismusverordnung* (AusglMechV) and in the *Ausgleichsmechanismus-Ausführungsverordnung* (AusglMechAV) ([8]). Those legal texts do not leave the TSO any discretion. In particular, § 3 AusglMechV states the following:

'§ 3 EEG-Surcharge

(1) The transmission system operators calculate the EEG-Surcharge according to § 37 paragraph 2 of the Renewable Energy Act [i.e. the EEG-Act 2012] in a transparent manner as:

1. the difference between the projected revenues referred to in paragraph 3, points 1 and 3 for the following calendar year and the forecast expenditure referred to in paragraph 4 for the following calendar year, and

2. the difference between the actual income referred to in paragraph 3 and the actual expenditure referred to in paragraph 4 at the time of calculation.

(2) The EEG-surcharge for the following calendar year has to be published before 15 October of each calendar year on the website of the transmission system operator in aggregated form and must be indicated in cent per kilowatt-hour delivered to consumers; § 43 paragraph 3 of the Renewable Energy Act shall apply accordingly.

([7]) Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus vom 17. Juli 2009, Bundesgesetzblatt, Part I, p. 2101, as amended by Article 2 of Gesetz vom 17. August 2012, Bundesgesetzblatt, Part I, p. 1754.

([8]) Verordnung zur Ausführung der Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (Ausgleichsmechanismus-Ausführungsverordnung — AusglMechAV) vom 22. Februar 2010, Bundesgesetzblatt, Part I, p. 134, as amended by the Zweite Verordnung zur Änderung der Ausgleichsmechanismus-Ausführungsverordnung vom 19. Februar 2013, Bundesgesetzblatt, Part I, p. 310.

(3) Revenues are:

1. income from the day-ahead and intraday marketing pursuant to § 2,

2. income from the EEG-surcharge,

2a. income from payments according to § 35 paragraph 2 of the Renewable Energy Sources Act provided that the balancing exercise according to § 35 paragraph 3 of the Renewable Energy Act presents a positive balance for the transmission system operator,

3. income from interests referred to in paragraph 5,

4. income from the settlement of balancing energy for the EEG balance group, and

5. income under § 35 paragraph 4 or § 38 of the Renewable Energy Act and paragraph 6.

(4) Expenditures are:

1. feed-in tariffs and compensation payments according to § 16 or § 35, paragraph 1 of the Renewable Energy Act,

1a. payments of premiums pursuant to §§ 33g or 33i or § 35 paragraph 1a of the Renewable Energy Act,

1b. payments according to § 35 paragraph 1b of the Renewable Energy Act,

2. repayments under paragraph 6,

3. payments for interest referred to in paragraph 5,

4. costs necessary for the settlement of intraday transactions,

5. costs necessary for the settlement of balancing energy for the EEG balance group,

6. costs necessary for the preparation of day-ahead and intraday forecasts,

7. costs necessary for the establishment and operation of an installation register, provided that the transmission system operator are required to operate such a register on the basis of a decree adopted pursuant to § 64e Number 2 of the Renewable Energy Act.

(5) Differences between revenue and expenditure are subject to an interest. The interest rate for one calendar month amounts to 0,3 percentage points above the monthly average of the euro interbank offered rate set for the procurement of one-month money of the first addresses in the countries participating in the European Monetary Union (EURIBOR) for a period of one month.

(6) If there are entitlements as a result of discrepancies between the monthly payments according to § 37 paragraph 2 sentence 3 of the Renewable Energy Act and the final settlement pursuant to § 48 paragraph 2 of the Renewable Energy Act, they have to be compensated until 30 September of the year following the feeding-in.

(7) When forecasting the revenues and expenditures referred to in paragraph 1, point 1 to calculate the EEG-surcharge, transmission system operators are allowed to take into account a liquidity reserve. It may not exceed 10 % of the difference referred to in paragraph 1, point 1.'.

(12) Hence, the four TSOs determine jointly the EEG-surcharge on the basis of the forecasted financial needs for the payment of feed-in tariffs and premiums, the forecasted revenues from the sale of the EEG electricity on the spot market and the forecasted consumption of electricity. In addition, a series of revenues and costs linked to the management of the EEG-surcharge have to be taken into account for its calculation. For 2012, the EEG-surcharge amounted to 3,592 ct/kWh. In 2013, it was 5,277 ct/kWh. In 2014, the surcharge amounts to 6,240 ct/kWh.

(13) It furthermore follows from the provisions described in recital 11 that the EEG-surcharge ensures that all of the additional costs which the network operators and the TSOs incur as a result of their legal obligations under the EEG-Act 2012 vis-à-vis the producers of EEG electricity and the network operators respectively are compensated via the EEG-surcharge. If, in a given year, the revenues from the EEG-surcharge exceed the costs, the surplus is carried over into the next year, and the EEG-surcharge reduced accordingly; if there is a shortfall, the EEG-surcharge is increased accordingly. Those adjustments are automatic and do not require any further intervention of the legislator or the executive branch.

2.2. **The green electricity privilege**

(14) According to § 39 EEG-Act 2012, the EEG-surcharge is decreased for electricity suppliers in a given calendar year by 2 cents per kilowatt hour (ct/kWh), where the EEG electricity they deliver to all of their final consumers fulfils certain conditions (so-called *green electricity privilege*).

(15) The reduction is granted when the supplier has bought EEG electricity directly from national EEG electricity producers under direct marketing arrangements within the meaning of § 33b No 2 of the EEG-Act 2012 (that is to say, direct marketing arrangements where the EEG electricity producer does not apply for support under the EEG-Act 2012) and the amount of EEG electricity bought reaches the following thresholds:

(a) at least 50 % of the electricity the supplier delivers to all of their final consumers is EEG electricity; and

(b) at least 20 % of the electricity is wind or solar electricity within the meaning of §§ 29 to 33 of the EEG-Act 2012.

(16) The reduction of 2 ct/kWh will be applied on the entire electricity portfolio. This means that if a supplier sources 50 % of its electricity from conventional energy sources, whilst the other half of its electricity is EEG electricity purchased under the direct marketing arrangements described in recital 15, the supplier receives a payment of 4 ct/kWh. That payment can be passed on in part or entirely to the producers of EEG electricity.

(17) In that respect, Germany has explained that electricity suppliers which apply for the privilege only receive the 2 ct/kWh reduction on their whole portfolio if at least 50 % of it is EEG electricity. In order to avoid or minimise the risk of narrowly missing the 50 % target (in which case the full EEG surcharge would be due on the whole portfolio), electricity suppliers purchase EEG electricity with a safety margin, that is to say, in excess of the 50 % needed, sometimes ranging up to 60 %. In that case, in order to calculate the cost advantage that can potentially be passed on to EEG electricity producers, the EEG-surcharge reduction obtained for the whole portfolio, that is to say, 2 ct/kWh, needs to be divided by a higher EEG electricity share. For a share of 60 % for instance, the actual cost advantage that could be passed on would amount not to 4 ct/kWh, but to merely 3,3 ct/kWh. On average, the maximum advantage resulting from the *green electricity privilege* was 3,8 ct/kWh in 2012, 3,2 ct/kWh in 2013 and 3,9 ct/kWh in 2014.

(18) In order to determine the extent of historical potential discrimination under Articles 30 and 110 of the Treaty, with a view to finding a remedy to it, Germany has estimated that between 1 January 2012 and 31 July 2014, which is the period when the EEG-Act 2012 was in force, the imports of guarantees of origin corresponding to EEG electricity plants that would have been eligible for support under the EEG-Act 2012 amounted to 1,3 TWh.

Year	2012	2013	2014
Eligible EEG electricity imports backed by guarantees of origin (in GWh)	519	283	547

(19) Germany submits that if all those imports had benefited from the *green electricity privilege*, at approximately 4 ct/kWh, the revenues foregone under the EEG surcharge from electricity suppliers purchasing that electricity would have amounted to approximately EUR 50 million. Germany has committed to reinvest that amount into interconnectors and European energy projects.

2.3. **The capped EEG-surcharge for energy-intensive undertakings**

(20) The EEG-Act 2012 does not impose an obligation on electricity suppliers to pass on the EEG-surcharge to customers. However, the EEG-Act 2012 establishes how the electricity supplier has to indicate the EEG-surcharge on the electricity bill, where the EEG-surcharge is passed on. In practice, all electricity suppliers pass on the EEG-surcharge in its entirety.

(21) § 40 EEG-Act 2012 limits the amount of the surcharge that can be passed on by electricity suppliers to EIUs: upon request, the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* ('BAFA'), a public authority, will issue an administrative act that prohibits the electricity supplier from passing on the totality of the EEG-surcharge to an end-user when the end-user is a manufacturing undertaking with high electricity consumption ([9]). That provision is referred to as the 'special compensation rule' (*Besondere Ausgleichsregelung*, 'BesAR').

(22) § 40 EEG-Act 2012 states that that limitation is intended to reduce the electricity costs for those undertakings in order to maintain their international competitiveness, in so far as this is compatible with the goals of the EEG-Act 2012 and the limit imposed is still compatible with the interest of the electricity users as a whole.

(23) § 41(1) EEG-Act 2012 subjects the limitation of the EEG-surcharge to the following conditions:

(a) the electricity purchased from an electricity supplier and used by the undertakings themselves was at least 1 GWh in the previous financial year;

(b) the ratio of the electricity costs to be borne by the undertaking to its gross added value was at least 14 % in the previous financial year;

(c) the EEG-surcharge was passed on to the undertaking in the previous financial year;

(d) the undertaking has undergone a certified energy audit (that condition does not apply to undertakings whose electricity consumption is less than 10 GWh).

(24) The general rule in § 41(3) No 1 is that for an EIU, the EEG-surcharge is gradually capped as follows:

(a) consumption up to 1 GWh: no cap — full EEG-surcharge;

(b) consumption between 1 GWh and 10 GWh: 10 % of the EEG-surcharge;

(c) consumption between 10 GWh and 100 GWh: 1 % of the EEG-surcharge;

(d) consumption above 100 GWh: 0,05 cent/kWh.

(25) If an EIU has a consumption above 100 GWh and if costs of electricity represent more than 20 % of gross added value, the different thresholds described in recital 24 do not apply, and the EEG-surcharge will be limited to 0,05 cent/kWh for the EIU's entire electricity consumption (§ 41(3) No 2).

(26) The decision of the BAFA is binding not only upon the electricity supplier, but also upon the TSO. This means that where the BAFA has decided that an EIU only needs to pay a reduced EEG-surcharge to its electricity supplier, the EIU's electricity supplier's obligation to pay the EEG-surcharge to the TSO is in turn reduced accordingly. This will be taken into account when the TSO establishes the EEG-surcharge. Any disputes on the decision of the BAFA are to be brought to the administrative courts, because that decision is an administrative act. Therefore, those decisions are also immediately executable.

2.4. **The adjustment plan**

(27) In order to bring the reductions of the EEG-surcharge in line with the provisions in points 196 *et seq*. of the Guidelines on State aid for environmental protection and energy 2014-20 ([10]) ('2014 Guidelines'), Germany has submitted an adjustment plan.

([9]) The cap is also granted to railway undertakings. This cap is not examined in the framework of this decision. The Commission reserves the right to assess § 42 EEG-Act 2012 in a separate procedure.
([10]) OJ C 200, 28.6.2014, p. 1.

(28) For undertakings which have benefited from BesAR, but which paid less than they should have according to the rules laid down in Section 3.7.2 of the 2014 Guidelines (notably the eligibility criteria in points 185, 186 and 187 and the proportionality criteria in points 188 and 189), the adjusted EEG-surcharge for 2013 must not exceed 125 % of the surcharge that they actually paid in that year. The adjusted surcharge due for 2014 must not exceed 150 % of the same base value, that is to say, the surcharge that was actually paid in 2013. In order to speed up the recovery, and as the consumption data for the years concerned is not yet available for all undertakings concerned by recovery, Germany will, as a first step, use the electricity consumption that was submitted in the applications to calculate a preliminary recovery amount, to be recovered immediately to fulfil the *Deggendorf* requirement ([11]). Germany will, as a second step, apply the actual consumption data of the years concerned in order to determine the final recovery amounts and take the necessary steps to ensure recovery or repayment on the basis of those final amounts.

(29) From 2015, the adjustment mechanism is modified. According to §103(3) of the EEG-Act 2014 ([12]), the BAFA will limit the EEG-surcharge to be paid by EIUs in the years 2015 to 2018 in such a way that the EEG-surcharge for a given year x may not exceed the double of the EEG-surcharge that was paid in the business year preceding the year of application ($x - 2$). While the EEG-surcharge will thus be adjusted upwards each year, the surcharge to be paid in 2015 will be capped at the double of the surcharge of 2013, as will the surcharges in the following years until 2018.

2.5. **Transparency, EEG-account and monitoring by the State**

(30) A certain number of control, supervision and enforcement tasks have been entrusted to the Federal Networks Agency (*Bundesnetzagentur*, 'BNetzA').

(31) EEG electricity producers, network operators, TSOs and electricity suppliers are obliged to make the data required for the correct implementation of the EEG-system available to each other. The EEG-Act 2012 establishes in detail what type of information must be transmitted systematically to other operators and at what time of the year. Network operators, TSOs and electricity suppliers can require that the data be audited by an accountant.

(32) The EEG-Act 2012 established a dispute settlement body entrusted by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with the task of clarifying questions and resolving disputes between EEG electricity producers, network operators, TSOs and electricity suppliers (Clearingstelle).

(33) In addition, network operators and TSOs are obliged, according to the EEG-Act 2012 and implementing decrees (the AusglMechV and the AusglMechAV) to publish certain data on their websites (amount of EEG electricity purchased and at what price). TSOs have to keep all transactions linked to the EEG-Act 2012 separate from the rest of their activities. They are obliged to keep separate financial accounts for all financial flows related to the EEG-Act 2012, and there must be a separate bank account, administered jointly by the four TSOs, for all expenses and revenues linked to the EEG-Act 2012 (§ 5 AusglMechAV).

(34) TSOs are under the obligation to publish, on a common website designated as 'EEG-account', monthly aggregated revenues resulting from the sale of EEG electricity on the spot market and from the EEG-surcharge and aggregated costs (compensation to network operators and other costs related to the management of the system). They are also under an obligation to publish in advance the forecasted EEG-surcharge for the following year.

(35) The EEG-Act 2012 has established the obligation for installations to be registered with a public body. The registration will be a condition for entitlement to receive feed-in tariffs. The register has not yet been established but there is already a separate obligation in place for solar installations and liquid biomass installations to be registered in order to benefit from feed-in tariffs. The BNetzA manages the solar installation register and the *Bundesanstalt für Landwirtschaft und Ernährung* manages the liquid biomass installations register.

(36) Network operators and TSOs have to transmit to the BNetzA the details which they receive from the installation operators (installation location, production capacity, etc.), the network level (distribution or transmission) at which installations are connected, aggregated and individual tariffs paid to installations, the final invoices sent to electricity suppliers and the data required to verify the accuracy of the figures thus provided. Electricity suppliers

([11]) Cases T-244/93 and T-486/93, *TWD Textilwerke Deggendorf* v *Commission*, ECLI:EU:T:1995; 160.

([12]) Gesetz zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts vom 21. Juli 2014, Bundesgesetzblatt, Part I, p. 1066.

are required to communicate to the BNetzA the amount of electricity supplied to their customers and their final accounts. The BNetzA also has audit powers as regards owners of EEG electricity installations so as to monitor how network operators and TSOs have complied with their obligations.

(37) TSOs also have to transmit detailed data to the BNetzA relating to the establishment of the EEG-surcharge. In particular, they have to provide data related to the different revenues and expenditures entries that is used for the calculation of the EEG-surcharge, § 7(2) AusglMechV.

(38) Those benefiting from a capped EEG-surcharge must, upon request, provide the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with all information necessary in order to enable it to assess whether the objectives under § 40 will be met.

(39) The BNetzA has been entrusted with ensuring that:

— TSOs sell on the spot market the electricity for which feed-in tariffs are paid in accordance with applicable rules (that is to say, the AusglMechV),

— TSOs properly determine, set and publish the EEG-surcharge,

— TSOs properly charge electricity suppliers for the EEG-surcharge,

— feed-in tariffs and premiums are properly charged by network operators to TSOs,

— the EEG-surcharge is reduced only for electricity suppliers fulfilling the conditions of § 39.

(40) As to the determination of the EEG-surcharge, the BNetzA has numerous enforcement powers and tasks related to the different cost and revenue items that TSOs are allowed to include in the calculation of the EEG-surcharge. First, the BNetzA has the power to establish, in agreement with the competent ministries ([13]), the rules for the determination of items that are regarded as income or expenses for the establishment of the EEG-surcharge and the applicable interest rate. On that basis, the BNetzA has further detailed in the AusglMechAV what types of costs could be taken into account. Second, the BNetzA is to be provided with all the relevant elements and documents relating to the calculation of the EEG-surcharge. Third, the BNetzA can request additional information, including the accounts (§ 5(3) AusglMechAV). Finally, the TSOs are under an obligation to demonstrate the accuracy and necessity of certain cost items, before they can be taken into account for the calculation of the EEG-surcharge (see for instance § 6(2) AusglMechAV).

(41) The BNetzA has power to give instructions to TSOs and to establish standard forms for the data that TSOs have to transmit to it.

(42) The BNetzA also has the power to establish requirements, in agreement with the Federal Ministry for Environment, Nature Conservation and Nuclear Safety, related to the marketing of EEG electricity by the TSOs on the spot market and to establish incentives for the best possible marketing of the electricity. This was done by means of the AusglMechAV.

(43) The BNetzA has enforcement powers. It can, for instance, issue orders when TSOs do not establish the EEG-surcharge in accordance with the rules (see § 38 No 5; § 61(1) No 2). It can also set the level of the EEG-surcharge. § 6(3) AusglMechAV indicates that the difference between the EEG-surcharge in the collected amounts and the EEG-surcharge in the level authorised by the BNetzA in accordance with an enforceable decision of the BNetzA pursuant to § 61(1) Nos 3 and 4 of the EEG-Act 2012 also constitutes either revenue or expense within the meaning of § 3(3) and (4) of the AusglMechV. Unlike what Germany is claiming, this is evidence that the BNetzA can take enforceable decisions to correct the level of the surcharge. The legal basis for this is § 61, paragraphs 1 and 2, in conjunction with §§ 65 *et seq*. *Energiewirtschaftsgesetz* (EnWG) ([14]), which are provisions that enable the BNetzA to take binding decisions which apply to private operators. The BNetzA can also impose fines (see § 62(1) and (2) EEG-Act 2012).

(44) The BNetzA itself is subject to certain reporting obligations and has to communicate certain data to the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and to the Federal Ministry of Economics and Technology for statistical and evaluation purposes.

([13]) According to § 11 AusglMechV, the BNetzA can enact regulations in agreement with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (now Federal Ministry for the Environment, Nature Conservation, Construction and Nuclear Safety) and the Federal Ministry of Economics and Technology (now Federal Ministry for Economic Affairs and Energy).

([14]) Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz — EnWG) vom, 7. Juli 2005, Bundesgesetzblatt, Part I, p. 1970, 3621, as amended by Article 3(4) of Gesetz vom 4. Oktober 2013, Bundesgesetzblatt, Part I, p. 3746.

(45) The Federal Environmental Agency (*Umweltbundesamt*, 'UBA') keeps the register of guarantees of origin in accordance with Article 15 of Directive 2009/28/EC of the European Parliament and of the Council ([15]). In that respect, the UBA is responsible for issuing, transferring and cancelling the guarantees of origin.

3. **THE DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE**

(46) On 18 December 2013, the Commission decided to initiate the formal investigation procedure as it considered that the EEG-Act 2012 constituted State aid for EEG electricity producers, electricity suppliers benefitting from the *green electricity privilege*, and EIU and had doubts as to the compatibility of that aid with the internal market.

(47) As regards the existence of State aid, the Commission reached the preliminary conclusion that the EEG-Act 2012 involved the conferral of selective economic advantages (i) on producers of electricity from RES and mine gas, notably through the feed-in tariffs, and (ii) on energy-intensive users, through the reduction of their EEG-surcharges.

(48) The Commission also came to the preliminary conclusion that these advantages were financed from State resources, given in particular (i) that the German legislator appeared to have introduced a special levy intended to finance the support for EEG electricity production, the EEG-surcharge, (ii) that the German legislator and the executive branch had designated the TSOs to collectively administer that surcharge according to rules laid down by the State in the EEG-Act 2012 and in implementing regulations, and (iii) that the TSOs were closely monitored in the administration of that resource.

(49) While the support for EEG electricity was found to be compatible with the internal market on the basis of Article 107(3)(c) of the Treaty, the Commission voiced doubts as to whether the reductions of the EEG-surcharge could be found compatible on the basis of the Treaty, and in particular Article 107(3)(b) and (c) of the Treaty.

(50) Finally, the Commission expressed doubts as to whether the financing of the support for EEG electricity under the EEG-Act 2012 complied with Articles 30 and 110 of the Treaty, given that although the EEG-surcharge only benefited EEG electricity production in Germany, it was also imposed on the consumption of imported EEG electricity the producers of which may have been eligible for support under the EEG-Act 2012 had they been located in Germany.

4. **COMMENTS FROM INTERESTED PARTIES**

(51) Interested parties submitted their observations on the Opening Decision and on the application of the 2014 Guidelines to this Decision pursuant to point 248 of the 2014 Guidelines.

(52) Most interested parties argued that the EEG-Act 2012 should not be seen as involving State aid either at the level of EEG electricity producers, or in favour of the EIUs. They take the view that the German State has merely organised a system based on (successive) payments between private operators where those operators use their own financial resources. The mere fact that that system originates in State legislation (the EEG-Act 2012 and its implementing provisions), or the involvement of the BNetzA, the Bundesanstalt für Ernährung und Landwirtschaft, the UBA and the BAFA, the attributions of which are allegedly limited, cannot, in their view, alter the innately private nature of the system. This analysis is mostly based on the Court judgments in the cases *PreussenElektra* ([16]) and *Doux Élevage* ([17]). If there is any aid at all, the interested parties argue that it should be considered to be existing aid in the light of the Commission's decision on a previous German scheme in case NN 27/2000 ([18]).

(53) Moreover, interested parties have contended that the reductions in the EEG-surcharge are compatible with the internal market on the basis of either Article 107(3)(b) or (c) of the Treaty. The EEG-Act 2012 is described by those parties as pursuing a dual objective of supporting the development of EEG electricity production and of preserving Germany's and the Union's industrial basis. The interested parties submit that any aid involved in the EEG-Act 2012 is an appropriate and proportionate means of achieving that dual objective. In any case, they state that the Commission should not apply the 2014 Guidelines to this case, because such application would be retroactive. It should also refrain from recovery due to the need to protect the beneficiaries' legitimate expectations that the aid was lawfully granted.

([15]) Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).
([16]) Case C-379/98, *PreussenElektra* v *Schleswag*, ECLI:EU:C:2001:160.
([17]) Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348.
([18]) OJ C 164, 10.7.2002, p. 5.

(54) In contrast, the German Association of Energy Consumers (*Bund der Energieverbraucher*), which initially complained to the Commission about the EEG-Act 2012, argued that the reductions in the EEG-surcharge do indeed constitute State aid, within the meaning of Article 107(1) of the Treaty, to energy-intensive users and that they harm those German undertakings and consumers that have to pay a higher EEG-surcharge without benefiting from similar reductions. The Association further contended that the reductions cannot be found compatible on the basis of Article 107(3)(c) of the Treaty. These arguments were also made by several German citizens.

(55) The arguments submitted by interested parties are addressed in more detail in Section 7.

5. **COMMENTS FROM GERMANY ON THE OPENING DECISION AND ON THIRD PARTY COMMENTS**

(56) Germany points out that most of the actors in the system established by the EEG-Act 2012 are private, something which was already the case under *PreussenElektra*, and that those actors are not part of public administration. The only State involvement is in the adoption of the legislation and the strict control of its implementation. The public authorities involved, notably the BNetzA and the BAFA, are said to strictly comply with their limited attributions, without managing any funds. According to Germany, those authorities have no discretion. Further, Germany notes that the EEG-surcharge as such is not set by the State, but is based on a market mechanism, given that it depends on the revenues made from the EEG electricity sales on the spot market. Finally, Germany stresses that the EEG-Act 2012 does not require suppliers to pass on the surcharge to consumers, which means the pass-on is a matter of the electricity suppliers' pricing policy. Moreover, none of the operators involved in the system have special powers originating in public law; rather, they have to rely on the civil courts to enforce their payment claims against each other.

(57) Germany made the following legal arguments, which are similar to those submitted by interested parties, namely

— the absence of selective economic advantages, on the grounds that the support for EEG electricity meets the criteria of the *Altmark* judgment [19] and that the reductions for energy-intensive users merely amount to mitigating an existing disadvantage of the German industry;

— the absence of State resources and of State control, due to the incomparability of the legal and factual situation in the EEG-Act 2012 with the situations examined by the Court in cases *Essent* [20] and *Vent de colère* [21];

— the fact that, if they constitute State aid at all, the payments made under the EEG-Act 2012 would constitute existing aid in the light of the Commission's decision in State aid case NN 27/2000;

— the compatibility of any aid granted with the internal market on the basis of Article 107(3)(b) and (c);

— the absence of an infringement of Articles 30 and 110 of the Treaty due to the fact that imported EEG electricity cannot be compared with that which is domestically produced, notably in view of the recent *Ålands Vindkraft* ruling [22].

(58) Germany's arguments are examined and rebutted in more detail in Section 7.

6. **COMMITMENTS PROVIDED BY GERMANY**

(59) As mentioned above in recital 19, Germany provided the following commitment concerning the reinvestment of EUR 50 million into interconnectors and European energy projects:

'For the EEG 2012, a global solution could be conceived for both the Grünstromprivileg and the Article 30/110 issue. The solution would consist of the reinvestment into interconnectors or similar European energy projects of the estimated amount of the alleged discrimination. The reinvestment could be made in parallel to the progress of the relevant project. On the basis of the figures communicated by Germany, the reinvestment should amount to EUR 50 million for the period January 2012-July 2014. Again, Germany offers this commitment by safeguarding its legal position (no discrimination).'

[19] Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.
[20] Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413.
[21] Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851.
[22] Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037.

(60) In addition, Germany provided the following commitment concerning the adjustment plan mentioned in recitals 27 *et seq.*:

'Recovery [the recoverable amount] in respect of a given undertaking results from the difference of the relevant EEG costs as determined on the basis of the Guidelines on State aid for environmental protection and energy 2014-20 ("2014 Guidelines") and of the EEG costs as determined on the basis of the EEG-Act 2012. In that respect, the adjustment plan limits the payment to be made on the basis of the 2014 Guidelines to a maximum of 125 % (for the year 2013) and to a maximum of 150 % (for the year 2014) of the payment made in respect of the year 2013 according to the EEG-Act 2012. Negative recovery amounts are not taken into account.'

7. **ASSESSMENT OF THE AID**

7.1. **Existence of State aid within the meaning of Article 107(1) of the Treaty**

(61) According to Article 107(1) of the Treaty, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(62) In determining whether a measure constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission has to apply the following criteria: the measure must be imputable to the State and involve State resources, it must confer an advantage on certain undertakings or certain sectors which distorts or threatens to distort competition and is liable to affect trade between Member States.

7.1.1. *Existence of selective advantages affecting trade and competition*

(63) In its Opening Decision, the Commission found that the EEG-Act 2012 involved two types of selective advantages affecting trade and competition.

(64) The first advantage was conferred on producers of EEG electricity. Indeed the Commission found that the feed-in tariffs and premiums guaranteed the producers of EEG electricity a higher price for the electricity they produce than the market price. The same was true for direct marketing of EEG electricity that resulted in a right to a reduced EEG-surcharge under § 39 of the EEG-Act 2012, as that provision enabled the producers of EEG electricity to obtain a higher price for their electricity than the market price. The measure was selective because it only benefited producers of EEG electricity. Moreover, the electricity market had been liberalised and electricity producers were active in sectors where trade between Member States took place (recital 76 of the Opening Decision).

(65) The second advantage consisted in the reduction of the EEG-surcharge for certain EIUs under the BesAR. The Commission found that EIUs in the manufacturing sector enjoyed an advantage because their EEG-surcharge was capped. §§ 40 to 41 EEG-Act 2012 relieved them from a burden that they would normally have to bear. Indeed, the cap prevented TSOs and electricity suppliers from recovering the additional costs for the support of EEG electricity from EIUs. The measure was also considered to be selective because only EIUs from the manufacturing sector could benefit from it. Finally, the measure was liable to distort competition and affect trade between Member States because the beneficiaries were producers of energy-intensive goods (for example ferrous and non-ferrous metal producers, paper industries, chemical industry, cement producers) and were active in sectors in which trade between Member States took place (recitals 77 to 80 of the Opening Decision).

(66) Germany takes the view that there is no economic advantage either at the level of EEG electricity producers, or at the level of EIUs which benefit from the BesAR, for the following reasons.

(a) EEG electricity producers are said not to receive any economic advantage resulting from the EEG-surcharge in itself even if it were to be considered a State resource given that the feed-in tariffs at which they are remunerated are independent from the EEG-surcharge. Rather, the EEG-surcharge merely compensates the losses incurred by the TSOs. Moreover, the remuneration of the EEG electricity producers allegedly satisfies the criteria of the *Altmark* ruling ([23]).

([23]) Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraphs 87 to 93. The *Altmark* criteria have been set out by the Court of Justice to clarify under what circumstances a compensation provided by a public authority for the performance of a Service of General Economic Interest ('SGEI') qualifies as State aid under Article 107(1) of the Treaty.

(b) Concerning EIUs, Germany argues that the BesAR does not grant an economic advantage, but rather compensates for a competitive disadvantage suffered by those undertakings in comparison with their competitors in other Member States (which have lower RES financing costs) ([24]) and third countries (which mostly face no comparable burdens).

(67) Some interested parties have disputed the findings that the reduced EEG-surcharge constituted an economic advantage liable to distort competition. Rather, the measure was said to restore the competitive level-playing field in the Union, given that the industrial electricity costs were higher in Germany than elsewhere. In addition, some interested parties note that beneficiaries consuming more than 10 GWh per year incur financial costs associated with mandatory energy efficiency audits.

(68) Germany and interested parties have also challenged the finding that the economic advantages are selective and liable to affect competition and trade, notably because the BesAR is said to apply to all undertakings in the manufacturing industry and to undertakings of all sizes. Some interested parties argue that the reductions are not selective as beneficiaries are not in a comparable situation to other undertakings, given that the principal eligibility criteria are electro-intensity and electricity consumption and given that electro-intensive undertakings face a much bigger threat from the EEG-surcharge than undertakings that are not. Further, they argue that even if the reduced surcharges were *prima facie* selective, they would be inherent to the nature and logic of the EEG electricity support system: without the reductions, EEG electricity support could not be financed as EIU would relocate outside Germany.

(69) The arguments submitted by Germany and interested parties are unconvincing.

7.1.1.1. Level playing field between undertakings in different Member States

(70) First, the fact that an undertaking is compensated for costs or charges it has already incurred does not in principle exclude the existence of an economic advantage ([25]). Nor is the existence of an advantage ruled out by the mere fact that competing undertakings in other Member States are in a more favourable position ([26]), because the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure. Nevertheless, if one excludes taxes and levies, electricity prices for industrial consumers are lower in Germany than in other Member States on average.

(71) The General Court has recently reconfirmed the principle that the existence of an advantage has to be assessed irrespective of the competitive playing field in other Member States ([27]). The General Court found that the very nature of the preferential tariff, that is to say, the fact that *Alcoa Transformazioni* was reimbursed the difference between the electricity prices charged by ENEL and the rate provided by the 1995 decree, is enough to conclude that the undertaking concerned was not bearing all the charges which should have normally burdened its budget ([28]). The General Court went further to conclude that the existence of an advantage results from the simple description of the price differentiation mechanism, that is to say, a compensation mechanism, the purpose of which is to exonerate a company from the payment of a part of the price for electricity necessary for producing goods that are sold on the territory of the Union ([29]). Moreover, the General Court restated ([30]) the principle that State aid must be assessed on its own merits and not in the light of its objectives, such as the remediation of imperfect competition on a certain market.

(72) Similarly, the reductions of the EEG-surcharge granted under the BesAR improve the beneficiaries' financial situation by relieving them from a cost burden they would have to bear under normal conditions. Indeed, if it was not for the BesAR and the decision of the BAFA, they would have to pay the full EEG-surcharge like any other electricity consumer. Germany has stressed the necessity of the reductions in order to sustain the beneficiaries' competitiveness in comparison with EIUs in other Member States and third countries. In doing so, Germany implicitly acknowledges that the beneficiaries receive an economically advantageous treatment.

([24]) In support of this argument, Germany cites the Council of European Energy Regulators' (CEER) report of 25 June 2013, titled 'Status Review of Renewable and Energy Efficiency Support Schemes in Europe' (in particular, the tables at pages 18-20).

([25]) Case C-387/92, *Banco Exterior de España*, ECLI:EU:C:1994:100, paragraph 13; Case C-156/98, *Germany* v *Commission*, ECLI:EU:C:2000:467, paragraph 25; Case C-6/97, *Italy* v *Commission*, ECLI:EU:C:1999:251, paragraph 15; Case C-172/03, *Heiser*, ECLI:EU:C:2005:130, paragraph 36; Case C-126/01, *GEMO SA*, ECLI:EU:C:2003:622, paragraphs 28 to 31 on the free collection and disposal of waste.

([26]) Case 173/73, *Italy* v *Commission*, ECLI:EU:C:1974:71, paragraph 17. See also Case T-55/99, *CETM* v *Commission*, ECLI:EU:T:2000:223, paragraph 85.

([27]) Case T-177/10, *Alcoa Trasformazioni* v *Commission*, ECLI:EU:T:2014:897, paragraphs 82 to 85.

([28]) Case T-177/10, *Alcoa Trasformazioni* v *Commission*, ECLI:EU:T:2014:897, paragraph 82.

([29]) Case T-177/10, *Alcoa Trasformazioni* v *Commission*, ECLI:EU:T:2014:897, paragraph 84.

([30]) Case T-177/10, *Alcoa Trasformazioni* v *Commission*, ECLI:EU:T:2014:897, paragraph 85.

7.1.1.2. Selectivity

(73) As far as the allegations of the non-selectivity of the BesAR are concerned, it must be recalled that 'neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy' ([31]), as long as other sectors, such as for instance services, are excluded from the scope of beneficiaries. This is already the case here as only the manufacturing sector benefits from the aid (without any need for the Commission to examine further reasons for selectivity). Therefore, the reductions in the EEG surcharge do not apply to undertakings that are in a comparable situation with the beneficiaries. Moreover, the different reductions in the EEG surcharge depending on the consumption result in differentiations between entities in the same legal and factual situation, that is to say, energy-intensive users, and are in themselves selective.

(74) Concerning the argument that the scope of the BesAR and the differentiations are justified by the nature and general scheme of the system, it should be recalled that 'a measure which creates an exception to the application of the general tax system may be justified if it results directly from the basic or guiding principles of that tax system. In that context, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives' ([32]). However, neither environmental protection, nor the preservation of the industry's competitiveness qualify as basic or guiding principles inherent to the system of the surcharge. To the contrary, they are external objectives attributed to that system. Like in other cases before ([33]), the objective of environmental protection cannot in the case at hand alter the finding that the reductions in the EEG-surcharge constitute State aid. First, the preservation of competitiveness is not even listed among the law's objectives in § 1 of the EEG-Act 2012. To the contrary, it is actually specified in § 40, second sentence, that the preservation of competitiveness is subject to the condition that it does not jeopardise the objectives set out in § 1 of the EEG-Act 2012.

7.1.1.3. Advantage deriving from the EEG-surcharge; Altmark case-law

(75) As regards Germany's claim that the RES-surcharge in itself does not constitute an advantage to EEG electricity producers, the Commission maintains that the support measures improve the EEG electricity producers' financial situation beyond what they would be able to earn when selling their electricity at the market price. The EEG-surcharge serves to finance those support measures. Contrary to what Germany claims, the fact that the feed-in tariffs may or may not be influenced by the level of the EEG-surcharge is irrelevant for determining whether these tariffs constitute an economic advantage.

(76) Germany has submitted that the support for EEG electricity producers constitutes adequate compensation for the discharge of public service obligations within the meaning of the *Altmark* case.

(77) In Altmark, the Court of Justice decided that a State measure would not be caught by Article 107(1) of the Treaty where that measure had to be regarded 'as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings [did] not enjoy a real financial advantage and the measure thus [did] not have the effect of putting them in a more favourable competitive position than the undertakings competing with them' ([34]).

(78) However, that finding was subject to four conditions ([35]):

(a) 'First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.'

(b) 'Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.'

([31]) Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, paragraph 48.
([32]) Joined cases C-78/08 to C-80/08, *Paint Graphos*, ECLI:EU:C:2011:550, paragraph 69.
([33]) Case C-75/97, *Belgium* v *Commission*, ECLI:EU:C:1999:311, paragraph 38 *et seq.*; Case C-172/03, *Heiser*, ECLI:EU:C:2005:130; Case C-487/06 P, *British Aggregates Association* v *Commission*, ECLI:EU:C:2008:757, paragraphs 86 to 92; Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, paragraphs 43, 52 *et seq*.
([34]) Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraph 87.
([35]) Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraphs 89 to 93.

(c) 'Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.'

(d) 'Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

(79) Germany argues that the support of RES producers fulfils the first condition due to the existence of an objective of common interest, laid down in Article 3(1) of Directive 2009/28/EC of promoting the use of renewable energy. In addition, according to Germany, Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council ([36]) shows that the promotion of renewable energy can be the subject-matter of public service obligations imposed on undertakings operating in the electricity sector.

(80) Germany also considers the second *Altmark* criterion to be met. According to Germany, the parameters for the compensation of EEG electricity producers have been established in advance in an objective and transparent manner in the EEG-Act 2012.

(81) Germany considers the third criterion to be fulfilled since the Commission has concluded in its Opening Decision that EEG electricity producers will not be overcompensated.

(82) Finally, Germany contends that the level of support to EEG electricity producers has been determined on the basis of an analysis of the costs which a typical, well run and adequately endowed undertaking would have incurred in discharging its obligations. In that respect, Germany refers to the Commission's conclusion in the compatibility assessment of the Opening Decision that the support measures to EEG electricity producers have an incentive effect and are proportionate. Both facts allegedly demonstrate that the beneficiaries of the feed-in tariffs are well run.

(83) The Commission finds those arguments unconvincing.

(84) The first *Altmark* criterion requires that the provider of the public service must be entrusted with a public service obligation.

(85) Under the EEG-Act 2012 producers are not under an obligation to produce, but are reacting to an economic incentive provided by the German State.

(86) Therefore, the Commission concludes that the first *Altmark* criterion is not met.

(87) As the *Altmark* criteria are cumulative, without having to examine if the second, third and fourth criteria are met, the Commission concludes that, Germany's arguments that the feed-in tariffs for RES producers constitute an adequate compensation for the discharge of public service obligations within the meaning of the *Altmark* case cannot be accepted.

7.1.1.4. Van der Kooy, Danske Busvognmænd and Hotel Cipriani

(88) Concerning the reductions from the EEG-surcharge under the BesAR, Germany as well as some interested parties have quoted the Court judgment in *Van der Kooy* and the General Court judgments in *Danske Busvognmænd* and *Hotel Cipriani* to argue that the reductions do not constitute an economic advantage ([37]).

([36]) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

([37]) Joined cases 67/85, 68/85 and 70/85, *Kwekerij Gebroeders van der Kooy et al.*, ECLI:EU:C:1988:38; Case T-157/01, *Danske Busvognmænd* v *Commission*, ECLI:EU:T:2004:76; Joined cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.* v *Commission*, ECLI:EU:T:2008:537.

(89) In Van der Kooy, the Court of Justice ruled that a preferential tariff for natural gas granted to undertakings engaged in hothouse horticulture would not constitute aid if it was, 'in the context of the market in question, objectively justified by economic reasons such as the need to resist competition on the same market from other sources of energy the price of which was competitive' ([38]). However, contrary to the claims of Germany and of other interested parties, the issue at stake, that was referred to by the Court, was competition on the same market between different fuels and how a company selling such fuels can set its tariffs in accordance to it, that is to say, the application of the private investor test in a market economy. The question was whether the greenhouse companies would switch to coal because of the higher prices for gas and whether the preferential tariffs could therefore constitute rational economic behaviour on the part of the gas company. In the case at hand, there is no indication that Germany behaved like a private investor, and Germany has in fact never claimed that the reductions from the EEG-surcharge granted to EIUs should be considered as fulfilling the private investor test.

(90) In addition, the *obiter dicta* in the rulings of the General Court in *Danske Busvognmænd* ([39]) and *Hotel Cipriani* ([40]) have in the meantime been overruled by the Court of Justice and more recent rulings from the General Court. In *Comitato* 'Venezia vuole vivere' ([41]), the Court made it clear that that a measure is deemed not to constitute an advantage only when a State measure represents compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations, if those undertakings do not enjoy a real financial advantage and if the measure does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them ([42]). The Court added that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid ([43]). Moreover, measures designed to compensate for possible disadvantages to which undertakings established in a certain region of a Member State are exposed are capable of constituting selective advantages ([44]).

(91) Similarly, the General Court has found that the case-law in *Danske Busvognmænd* does not apply when charges that normally burden an undertaking's budget are relieved by the State. The General Court restated the principle that the scope of compensation, that is to say, of removing competitive disadvantages, does not remove its character of State aid within the meaning of Article 107(1) of the Treaty ([45]).

(92) In a later judgement, the General Court recognised that the objective of compensating for competitive disadvantages of undertakings, pursued by the reductions in certain contributions, could not remove from those advantages their character as aid within the meaning of Article 107(1) of the Treaty. Therefore a measure intended to offset a structural disadvantage cannot escape the classification as State aid, unless the criteria established in *Altmark* ([46]) are fulfilled.

(93) Therefore, the line of argumentation raised by Germany and by certain interested parties cannot be accepted.

(94) The Commission concludes that the measure entails selective advantages to producers of EEG electricity that are likely to affect competition and trade between Member States.

7.1.2. *Imputability*

(95) In its Opening Decision, the Commission held that the advantages were imputable to the German State, because the feed-in tariffs and premiums, the EEG-surcharge and the cap of that surcharge resulted from State legislation and implementing decrees and because the capping of the surcharge was established only after the BAFA, a public body, had checked that the legal conditions were met.

(96) Germany and third parties have disputed the imputability on the ground that the State has merely enacted legislation and the network operators are acting on their own accord.

([38]) Joined cases 67/85, 68/85 and 70/85, *Kwekerij Gebroeders van der Kooy et al.*, ECLI:EU:C:1988:38, paragraph 30.
([39]) Case T-157/01, *Danske Busvognmænd* v *Commission*, ECLI:EU:T:2004:76, paragraph 57.
([40]) Joined cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.* v *Commission*, ECLI:EU:T:2008:537, paragraph 185.
([41]) Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al.* v *Commission*, ECLI:EU:C:2011:368.
([42]) Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al.* v *Commission*, ECLI:EU:C:2011:368, paragraph 92.
([43]) Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al.* v *Commission*, ECLI:EU:C:2011:368, paragraph 95.
([44]) Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al.* v *Commission*, ECLI:EU:C:2011:368, paragraph 96.
([45]) Case T-295/12, *Germany* v *Commission*, ECLI:EU:T:2014:675, paragraph 144; Case T-309/12 — *Zweckverband Tierkörperbeseitigung* v *Commission*, ECLI:EU:T:2014:676, paragraph 261.
([46]) Case T-226/09, *British Telecommunications et al.* v *Commission*, ECLI:EU:T:2013:466, paragraph 71.

(97) The question of imputability may require a careful assessment where only the behaviour of publicly owned enterprises is concerned. However, there is no doubt about the fact that actions of the State's public administration and of the legislator are always imputable to the State ([47]).

7.1.3. *Existence of State resources*

(98) Concerning the support for producers of EEG electricity, the Commission came to the preliminary conclusion in the Opening Decision that under the EEG-Act 2012, the TSOs had been designated by the State to administer the EEG-surcharge and that the revenues from the EEG-surcharge constituted a State resource (recital 138).

(99) The State has not only defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also provided the financial resources to cover the costs of the support to EEG electricity. Contrary to what was the case in *Doux Élevage* ([48]), the EEG-surcharge is created and imposed by the legislature, that is to say, the State, and is not merely a private initiative of the TSOs which the State renders compulsory in order to prevent free-riding. The State has defined the purpose and destination of the surcharge: it serves to finance a support policy developed by the State and is not an action decided by the TSOs. The TSOs are not free to establish the surcharge as they want and are strictly monitored in the way the surcharge is calculated, levied and managed. The way they sell the EEG electricity is also monitored by the State. The provisions governing the establishment of the EEG-surcharge ensure that the surcharge provides sufficient financial cover to pay for the support for EEG electricity as well as for the costs stemming from the management of the system. Those provisions do not allow for the collection of additional revenue beyond the coverage of those costs. The TSOs are not allowed to use the EEG-surcharge to finance any other type of activity, and financial flows are to be kept on separate accounts (recital 137 of the Opening Decision).

(100) According to the case-law of the Court of Justice, both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State are included in the concept of State resources within the meaning of Article 107(1) of the Treaty ([49]). Therefore, the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude the possibility that State resources are involved ([50]). Moreover, the originally private nature of the resources does not prevent them from being regarded as State resources within the meaning of Article 107(1) of the Treaty ([51]). The fact that the resources are not, at any time, the property of the State does also not prevent them from constituting State resources, if they are under the control of the State ([52]) (see recitals 82, 83 and 84 of the Opening Decision).

(101) Thus, in several cases, the Court of Justice has held that contributions levied from private operators could constitute State aid due to the fact that a body had been specifically designated or established to administer those contributions in line with the State's legislation ([53]) (see recitals 85 to 89 of the Opening Decision). Indeed, as 'the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of [Article 107], even if they are administered by institutions distinct from the public authorities.' ([54]).

(102) The Commission therefore concluded in the Opening Decision, referring to the findings of the General Court ([55]), that the relevant criterion in order to assess whether the resources were public, whatever their initial origin, was that of the degree of intervention of the public authority in the definition of the measures in question and their methods of financing.

(103) While the Court excluded the existence of State resources in *PreussenElektra* and in *Doux Élevage*, this was due to the specific circumstances of those cases. In *PreussenElektra* ([56]), there was neither a surcharge or contribution, nor a body established or appointed to administer the funds, as the obligations imposed on the private operators had

([47]) Cf the conclusions of AG Wathelet, Case C-242/13, *Commerz Nederland*, ECLI:EU:C:2014:308, paragraphs 75 *et seq*.
([48]) Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348.
([49]) Case C-78/76, *Steinike & Weinlig* v *Germany*, ECLI:EU:C:1977:52, paragraph 21.
([50]) Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348, paragraph 35.
([51]) Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraphs 16 to 20.
([52]) Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 21.
([53]) Case C-78/76, *Steinike & Weinlig* v *Germany*, ECLI:EU:C:1977:52, paragraph 21; Case 173/73, *Italy* v *Commission*, EU:C:1974:71, paragraph 16; Case 259/85, *France* v *Commission*, ECLI:EU:C:1987:478, paragraph 23; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 66.
([54]) Case 173/73, *Italy* v *Commission*, ECLI:EU:C:1974:71, paragraph 16.
([55]) Case T-139/09, *France* v *Commission*, ECLI:EU:T:2012:496, paragraphs 63 and 64.
([56]) Case C-379/98, *PreussenElektra* v *Schleswag*, ECLI:EU:C:2001:160.

to be met by them with their own money. In *Doux Élevage*, there was indeed a contribution rendered compulsory by the State, but the private organisation was free to use the revenues from that contribution as it saw fit. There was therefore no element of State control over the funds collected.

(104) When applying these principles to the support system established by the EEG-Act 2012, the Commission came to the following preliminary conclusions:

(105) Through the EEG-Act 2012, the State has introduced a special levy, the EEG-surcharge, and has defined its purpose, which is the financing of the difference between the costs TSOs incur in purchasing EEG electricity and the revenue they generate from selling this electricity. The calculation method for determining the surcharge level is also set in the EEG-Act 2012, as is the principle that deficits and surpluses are corrected in the following year. This ensures that TSOs incur no losses, but also implies that they cannot use the revenue from the surcharge for anything else than the EEG financing. The Commission concluded that, unlike in *PreussenElektra*, the State had provided those undertakings with the required financial resources to finance the support for EEG electricity (see recitals 97 to 103 of the Opening Decision).

(106) Moreover, the Commission held that the TSOs had been designated to administer the surcharge. They have to:

— purchase EEG electricity produced in their area either directly from the producer when it is directly connected to the transmission line or from distribution system operators (DSOs) at feed-in tariffs, or pay the market premium. As a result the EEG electricity as well as the financial burden of the support provided for by the EEG-Act 2012 are centralised at the level of each of the four TSOs;

— apply the *green electricity privilege* to suppliers which ask for it and fulfil the relevant conditions, set out in § 39(1) of the EEG-Act 2012;

— equalise between themselves the amount of EEG electricity so that each of them purchases the same proportion of EEG electricity;

— sell the EEG electricity on the spot market according to rules defined in the EEG-Act 2012 and its implementing provisions, which can be done jointly;

— jointly calculate the EEG-surcharge, which has to be the same for each kWh consumed in Germany, as the difference between revenues from the sale of EEG electricity and expenditure linked to the purchase of EEG electricity;

— jointly publish the EEG-surcharge in a specific format on a joint website;

— publish also aggregate information on the EEG electricity;

— compare the forecasted EEG-surcharge with what it should really have been in a given year and adapt the surcharge for the following year;

— publish forecasts for several years in advance;

— collect the EEG-surcharge from electricity suppliers;

— (each) keep all financial flows (expenditure and revenues) linked to the EEG-Act 2012 in separate bank accounts.

(107) Finally, the Commission concluded that TSOs were being strictly monitored by the State in the administration of the surcharge (recitals 110 to 113 of the Opening Decision). The monitoring is performed by BNetzA, which also has the necessary enforcement powers. The BNetzA in particular monitors the way in which the TSOs sell the EEG electricity for which feed-in tariffs are paid on the spot market, that TSOs properly determine, set and publish the EEG-surcharge, that TSOs properly charge electricity suppliers for the EEG-surcharge, that feed-in tariffs and premiums are properly charged to the TSOs, and that the EEG-surcharge is only reduced for electricity suppliers fulfilling the conditions of § 39 of the EEG-Act 2012. The BNetzA also receives information from the TSOs on the support for EEG electricity and on the charging of the suppliers. Finally, the BNetzA can set fines and adopt decisions, including decisions influencing the level of the EEG-surcharge. The Commission also concluded that the BAFA, a State entity, grants the entitlements to a capped EEG-surcharge for EIUs following the application from the potential beneficiaries.

(108) Germany disputes the involvement of State resources. First, it states that the EEG support mechanism only involves private undertakings, be it the operators of the EEG electricity plants, the network operators, the TSOs or the electricity suppliers, each category of which is predominantly privately owned, even though the State or public bodies retain ownership of an important number of those undertakings. When imposing obligations on them, the EEG-Act 2012 does not differentiate on the basis of whether the undertakings are in private or public ownership. As far as public bodies are involved in the process (BNetzA, BAFA, UBA), they allegedly do not control either the collection or the use of the resources, but are limited to a role of supervising the legality and the functioning of the system.

(109) Secondly, Germany stresses that the level of the EEG-surcharge is not determined by the EEG-Act 2012, nor by a public body. The level of the EEG-surcharge is determined by the operation of the market, given that the TSOs first sell the EEG electricity on the spot market and then determine the remaining costs, which need to be covered by the EEG-surcharge.

(110) Several interested parties have shared Germany's analysis that the EEG-Act 2012 does not constitute State aid. In particular, they dispute the Commission's preliminary findings that the EEG-surcharge is administered by private bodies designated by the State. They also contend that BNetzA, rather than exercising control over the revenue stemming from the EEG-surcharge or the level of the surcharge itself, is merely monitoring legality without having any influence on the management of the funds. Finally, while the reduction of the EEG-surcharge is based on the EEG-Act 2012 and implemented by the BAFA, this allegedly cannot change the private nature of the funds, since payments occur between private undertakings and at no point leave the private sector, so that the State cannot exercise control over them. In addition, it is submitted that the pass-on of the EEG-surcharge from TSOs to electricity suppliers, and subsequently from electricity suppliers to electricity consumers is left to the discretion of the TSOs and electricity suppliers respectively, which makes the surcharge an element of the private undertakings' pricing policy and by no means a State-imposed charge.

(111) However, these arguments cannot alter the preliminary conclusion reached in the Opening Decision.

7.1.3.1. Existence of a surcharge introduced by the State

(112) Concerning Germany's argument that the EEG-surcharge never enters or transits through the State budget, it is sufficient to recall, as was already done in recital 100, that the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved, as long as the State has designated or established a body to administer the funds.

(113) Germany has stressed that the EEG-surcharge payments which the electricity suppliers have to make to the TSOs are of a private nature, given that the TSOs have no authority or powers stemming from public law to enforce their claim for compensation against the suppliers. Rather, like any other private undertaking, they have to rely on the civil courts. However, this analysis fails to take into account that the payments in question are not based on freely negotiated contracts between the parties concerned, but on legal obligations (*gesetzliche Schuldverhältnisse*) which the State has imposed on them. The TSOs are therefore bound by law to recover the EEG-surcharge from the electricity suppliers.

(114) In that respect, it is settled case-law ([57]) that the entities designated to administer the aid can be either public or private bodies. Therefore, the fact that the TSOs are private operators cannot as such exclude the existence of State resources. Moreover, the Court has found that '[t]he distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State' ([58]). In *Sloman Neptun* ([59]), the Court of Justice found that State resources are involved when the system at issues seeks, through its object and general structure, to create an advantage which would constitute an additional burden for the State or for the private bodies designated or established by the State ([60]). Therefore it is enough for the advantage to reduce the resources a private body is entitled to for State resources to be involved. The reduced EEG-surcharge to be paid by the EIUs has exactly this effect of reducing the amounts collected from the EIUs by the electricity suppliers.

([57]) Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 70; Case C-262/12, Association *Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 20.
([58]) Case C-72/91, *Sloman Neptun* v *Bodo Ziesemer*, ECLI:EU:C:1993:97, paragraph 19.
([59]) Case C-72/91, *Sloman Neptun* v *Bodo Ziesemer*, ECLI:EU:C:1993:97.
([60]) Case C-72/91, *Sloman Neptun* v *Bodo Ziesemer*, ECLI:EU:C:1993:97, paragraph 21.

(115) The fact that electricity suppliers are not obliged to pass on the EEG-surcharge to electricity consumers does not lead to the finding that the collected revenues are private, as long as the electricity suppliers themselves are under an obligation, stemming from the EEG-Act 2012, to pay the surcharge to the TSOs. Again, this obligation is not based on a contract into which the operators could enter freely, but is a legal obligation (*gesetzliches Schuldverhältnis*) stemming directly from the State's legislation. Moreover, as stated in recital 100, the originally private nature of the resources does not prevent them from being regarded as State resources. Unlike in *PreussenElektra*, where private operators had to use their own resources to pay the purchase price for a product, the TSOs have been collectively designated to administer a surcharge which the electricity suppliers are obliged to pay without receiving anything equivalent in return.

(116) According to Germany, some national courts have examined the EEG-surcharge and the monies collected through it and have actually concluded that the State has no control over them. In one case Germany is referring to ([61]), the national court noted that by creating a self-sustaining system for the pursuit of a public policy objective, the German State had to a certain extent outsourced the financing of RES support to private operators. For this reason, the national court considered that the EEG-surcharge did not constitute a special contribution (*Sonderabgabe*) within the meaning of German constitutional law because the proceeds from the EEG-surcharge were not allocated to the State budget and because the public authorities did not have the funds at their disposal, even indirectly. The Commission therefore notes that the national court's conclusion was limited to the application of national constitutional law, and in particular to the interpretation of the legal concept of the 'special contribution'. The national court did not address the question whether the EEG-Act 2012 involved State aid within the meaning of Article 107(1) of the Treaty. While there may be similarities between the test applied by the national court for the purposes of German constitutional law and the assessment which the Commission has to carry out under Article 107(1) of the Treaty, it follows from the case-law of the Court of Justice that resources do not need to flow into the State budget or be the property of the State to be considered State resources. Given that State resources can also be present when a public or private body has been established or appointed to administer them, the concept of State resources is wider than the test applied by the national court under German constitutional law ([62]).

7.1.3.2. Designation of the TSOs to administer the surcharge

(117) Germany disputes the Commission's finding that the TSOs have been collectively designated to administer a State resource. According to Germany, the TSOs are not subject to any entrustment by the State. Rather the different operators that are covered by the EEG-Act 2012, like all operators in the economy, merely settle private claims amongst themselves arising from the rights offered to them by law.

(118) However, the Commission considers that the EEG-Act 2012 clearly entrusts TSOs with a series of obligations and monitoring tasks in relation to the EEG system making them the central point in the functioning of the system (see recital 106). Each of the four German TSOs centralises, for its own area, all the EEG electricity and all the costs resulting from the acquisition of EEG electricity and the payment of market premiums, and the costs resulting from the administration of the EEG-surcharge. They also centralise each the proceeds of the EEG-surcharge for their area. Therefore, it is clear that the TSOs do not just settle private claims between themselves, but are implementing their legal obligations under the EEG-Act 2012.

7.1.3.3. Monitoring by the State, notably the BNetzA

(119) Germany and interested parties further contend that the attributions of the public authorities, notably the BNetzA and the BAFA, are too limited to give them any significant measure of control over the EEG-surcharge. The BNetzA and the BAFA only supervise the legality of actions of the private operators involved and if necessary impose administrative sanctions (BNetzA), or ascertain an EIU's right to benefit from a reduced surcharge (BAFA). They cannot influence the financial flows and they do not decide the level of the EEG-surcharge. According to Germany, the fact that the EEG-Act 2012 sets the method for calculating the surcharge as well as the transparency requirements, as well as the supervision carried out by the BNetzA, are aimed only at preventing the unjust enrichment by one of the private operators along the line of payment. However, this then has to be enforced by the private operators by bringing proceedings before the civil courts.

(120) Contrary to the assertions of Germany and the interested parties, the BAFA issues an administrative decision when establishing the entitlements to a capped EEG-surcharge for EIUs following the application from the

([61]) Oberlandesgericht Hamm, judgment of 14 May 2013, ref. 19 U 180/12.
([62]) Cf. Case C-78/76, *Steinike & Weinlig* v *Germany*, ECLI:EU:C:1977:52, paragraph 21.

potential beneficiaries. That decision can only be challenged before German administrative courts and not before civil courts, and is self-executing. Furthermore, the BNetzA has important enforcement powers under the EnWG, which it can use to fine all operators involved in the system and enforce compliance with the EEG-Act 2012.

(121) Moreover, the Court of Justice recently confirmed in *Elcogás* that State resources are involved even when the State body that was entrusted with the distribution of the collected amounts, does not enjoy discretion in this regard ([63]).

(122) More specifically, contrary to what the Commission held in recital 134 of the Opening Decision, Germany and interested parties argue that the BNetzA cannot set the level of the EEG-surcharge. However, as was already established in recital 43, § 6(3) AusglMechAV shows that the BNetzA can take enforceable decisions to correct the level of the surcharge. Moreover, the extent to which the BNetzA has exercised its powers is irrelevant as long as it had them. The BNetzA may simply not have considered it necessary to take any enforceable decisions.

7.1.3.4. The finding of State control in general

(123) Germany and several interested parties have criticised the Commission for allegedly unduly considering the different steps and relationships in the EEG-system as a whole in order to argue that the system was under State control. They claim that, had the Commission examined the steps separately and focused only on one set of relationships at a time (EEG electricity producer — DSO/TSO; TSO — BNetzA; TSO — supplier; supplier — consumer), the Commission would have had to conclude that there was no State control. Allegedly, the BAFA's role is limited to assessing eligibility, and the BAFA has no ability to exercise discretion in this.

(124) To the contrary, it is Germany and the interested parties which err by assuming a too fragmented view of the financing system set up by the EEG-Act 2012. In Bouygues, the Court held: 'As State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded […] that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention.' ([64]). The Court went on to state that this 'could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another' ([65]). This is exactly the situation of the EEG-system. The EEG-Act 2012, and the powers and actions of BNetzA, BAFA, UBA and Bundesanstalt für Landwirtschaft und Ernährung are so very closely interlinked and dependant on each other that they can only be viewed as inseparable.

(125) Germany also contends that the Commission has wrongly inferred State control from the way surpluses and deficits are managed in the EEG account. First, Germany notes that there is no connection between the EEG account and the State budget: the State does not compensate for a deficit in the EEG account, nor — as was the case in *Essent* — are any surpluses allocated to the State budget. In fact, both deficits and surpluses determine the level of the EEG-surcharge in the following year. They are therefore equalised between the private operators involved. The State has no say in this.

(126) However, the Commission considers that State control over the resources does not mean that there have to be flows from and to the State budget ([66]) involving the respective resources. In order for the State to exercise control over the resources, it is enough that it fully regulates what is supposed to happen in the event of a deficit or a surplus in the EEG account. The decisive element is that the State has created a system where the costs incurred by the network operators are fully compensated by the EEG-surcharge and where the electricity suppliers are empowered to pass on the surcharge to consumers.

(127) Germany also points out that regulation and supervision of flows of private money alone cannot constitute State aid. Germany compares the system established by the EEG-Act 2012 to other fields of economic regulation, such as consumer protection in banking, the obligation of drivers to subscribe to car insurance, or price regulation in telecoms and health. Germany argues that the regulation of a private economic activity as such does not as such

([63]) Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 29.
([64]) Case C-399/10 P, *Bouygues et al.* v *Commission*, ECLI:EU:C:2013:175, paragraph 103.
([65]) Case C-399/10 P, *Bouygues et al.* v *Commission*, ECLI:EU:C:2013:175, paragraph 104.
([66]) Case C-262/12, Association *Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 19; Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 24.

entail State control. The BNetzA does no more, according to Germany, than ensuring consumer protection. However, there is a significant difference between those fields where the State merely provides a protective framework for consumers and the situation at hand. Here, the State has enacted a separate piece of legislation, the EEG-Act 2012, the primary purpose of which is not consumer protection. Here, the State ensures a continuous flow of money across the sector in order to serve the policy goals of that legislation. Moreover, it is settled case-law ([67]) that funds financed through compulsory charges imposed by the legislation of a Member State, managed and apportioned in accordance with the provisions of that legislation, must be regarded as State resources within the meaning of Article 107(1) of the Treaty even if they are managed by entities separate from the public authorities. Therefore, the EEG-Act 2012 cannot be compared with State measures which the State does not influence or for which it does not ensure financing.

(128) According to Germany, the situation is comparable to that in *Doux Élevage*. In *Doux Élevage*, the Court found that the revenues collected from the contributions did not transit through the State budget, that the State did not forego revenue, that the funds remained private at all times and that non-payments had to be brought before the civil courts ([68]). Moreover, the contributions were not 'constantly under public control' and were not 'available to State authorities' ([69]), and in fact, the public authorities were not permitted to exercise control over the contributions 'except to check their validity and lawfulness' ([70]). Despite the claims of Germany, the case at hand is not comparable with *Doux Élevage*. The difference lies in the fact that in *Doux Élevage*, 'it is the inter-trade organisation that decides how to use the resources, which are entirely dedicated to pursuing objectives determined by that organisation' ([71]). In the case at hand, the purpose of the EEG-surcharge has been set by the State and the implementation is fully controlled by the State. Moreover, while in *Doux Élevage*, the French authorities limited themselves to rendering a pre-existing voluntary contribution compulsory for all operators in the relevant trades, in the case at hand, the State has established the whole mechanism of calculating and equalising the costs between the private operators.

(129) When assessing State control, Germany argues that the Commission's use of the word 'State' is ambiguous. As evidenced by *Doux Élevage*, 'State' should primarily encompass the executive, that is to say, the government and administrative agencies, but not generally applicable legislation passed by parliament. The mere fact that the State has legislated for the *AusglMechV* does not constitute State control.

(130) However, the 'State' criterion has to be understood widely. First, the Court has repeatedly held that the concept of the State naturally also encompasses the legislator ([72]). Moreover, as mentioned in recital 124, State control is exercised by a series of regulatory and control measures that should not be assessed on a stand-alone basis. In the case at hand, the relevant legislation goes into so much detail that the system ensures State control without needing further involvement of State authorities. In addition, the BNetzA has significant powers to influence the process.

(131) In contrast, Germany argues that the EEG-Act 2012 differs significantly from the situation in *Essent*. In the latter case, the level of the charge was defined by the law regardless of what costs it needed to cover. Moreover, surpluses in excess of NLG 400 million were transferred to the State budget. In contrast, the level of the EEG-surcharge is determined by the TSOs based on the sales on the spot market, and the State has no possibility to influence this. Moreover, the EEG account's surpluses are kept within the system, as they influence the surcharge in the following year.

(132) As shown in recital 126, State control over the resources does not mean that there have to be flows from and to the State budget ([73]) involving the respective resources. Moreover, in the case at hand the level of the EEG-surcharge is calculated in accordance with regulatory provisions taking into account the market price obtained by the TSOs. As explained in recital 13 of the Opening Decision, the way in which the TSOs calculate the EEG-surcharge after they know the price obtained on the spot market, is fully regulated and laid down in the EEG-Act 2012.

([67]) Case C-262/12, Association *Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 25; Case 173/73, *Italy* v *Commission*, ECLI:EU:C:1974:71, paragraph 16.
([68]) Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348, paragraph 32.
([69]) Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348, paragraph 36.
([70]) Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348, paragraph 38.
([71]) See footnote 69.
([72]) Case C-279/08 P, Commission v Netherlands, ECLI:EU:C:2011:551, paragraphs 102 to 113.
([73]) Case C-262/12, Association *Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 19; Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 24.

(133) Moreover, Germany contends that while in *Essent*, one specific body had been entrusted with the administration of the charge, the EEG-Act 2012 actually imposes obligations on an indefinite number of private operators, that is to say, network operators, TSOs and electricity suppliers, and those obligations are defined in a general manner. This is not an entrustment, and such a large number of private operators cannot be considered to be designated by the State to administer a charge. As stated in recital 118, the TSOs, and not other operators, are the entities designated to administer the EEG-surcharge. Moreover, there does not appear to be any legal ground which would prohibit a Member State from entrusting more than one entity with administering State resources.

(134) Germany and interested parties also stress the alleged differences between the EEG 2012-Act and the recent judgment in *Vent de colère* ([74]): In France, the relevant contribution was collected from consumers by a State-run fund, while in Germany, the private TSOs collect the EEG-surcharge from private suppliers, which can then pass it on to consumers. In France, the level of the contribution was determined by ministerial decree, while in Germany, it is calculated by the TSOs on the basis of their actual costs. In France, in the event of a deficit, the State would step in, while in Germany, a deficit will need to be borne by the TSOs before being compensated for by an increase of the surcharge in the following year.

(135) By arguing that State resources are only present if the State's executive has the funds at its disposal, Germany is misinterpreting the case-law. As explained in recital 130, the concept of the State is not limited to the executive, as it also encompasses the legislator, nor is it required that the State can dispose of the funds as if they were part of its own budget. As shown in recital 114, it is irrelevant whether the entity administering the State resources is private or public. Moreover, the TSOs calculate the EEG-surcharge on the basis of their costs in a manner that is laid down in the EEG-Act 2012 and the fact that the State has introduced a market-mechanism in the system does not affect the existence of State resources. The State also determines what is to be done in the event of a deficit. Indeed, the State does not pay for the deficit itself, but regulates and controls the manner in which the deficit is covered, ultimately also by the EEG-surcharge.

(136) In addition, Germany argues that *Vent de colère* requires a discretionary power of the State to dispose of the financial resources at any time, while in the EEG-Act 2012, the State, having merely enacted legislation, has no such discretionary power. According to Germany, the Commission has insufficiently distinguished between true means of executive control and mere legislative activity. State control implies the fact that the State has a discretionary power to dispose of the financial resources. In *Vent de colère*, paragraph 21, the Court reconfirms this finding.

(137) According to Germany, the absence of State control is also evidenced by the fact that the State cannot determine the level of the EEG-surcharge. In fact, given that the level of the surcharge depends on the revenue TSOs generate from selling the EEG electricity on the spot market, it is entirely determined by the market. The Commission acknowledges that the State does not always determine the exact level of the EEG-surcharge, but it determines the manner in which it is to be calculated taking into account the selling price of the electricity. Moreover, the State may introduce market mechanisms in the financing system without relinquishing control over the financing. In that respect, the Commission sees no difference between a public charge set by State authorities and a legal obligation imposed by the State through legislation. In both cases, the State organises a transfer of financial resources through legislation and established for what purposes these financial resources may be used.

(138) Therefore, the Commission maintains its assessment that the support for RES electricity producers and electricity production from mine gas through feed-in tariffs is financed by State resources.

7.1.4. *Distortive effect on competition and trade*

(139) Finally, the advantages to both EEG electricity producers and EIUs appear to be liable to distort competition and to affect trade, given that the beneficiaries operate in sectors where markets have been liberalised and where trade between Member States takes place.

7.1.5. *Conclusion on the existence of State aid*

(140) The Commission therefore concludes that the EEG-Act 2012 involves State aid within the meaning of Article 107 of the Treaty both for the benefit of EEG electricity producers and, under the BesAR, for the benefit of EIUs.

([74]) See footnote 21.

7.2. **Existing aid/new aid and lawfulness of the aid**

(141) In its Opening Decision, the Commission stated that the German renewable energy law that had entered into force on 1 April 2000 ('EEG-Act 2000'), the precursor of the EEG-Act 2012, had been considered not to involve State aid by the Commission (Commission Decision in case NN 27/2000) ([75]). However, the Commission considered that the changes introduced by the EEG-Act 2012 had been substantial and that aid granted on the basis of the EEG-Act 2012 constituted new aid, not covered by the previous Commission decision (recital 150 of the Opening Decision).

(142) This has been contested by Germany and by several interested parties.

(143) Germany and the interested parties argue that the successive changes that have occurred between the initial version of the EEG-Act 2000 and the EEG-Act 2012 have not substantially altered the aid scheme, so that the EEG-Act 2012 constitutes existing aid.

(144) Germany nevertheless concedes that there are two differences between the EEG-Act 2012 and the EEG-Act 2000:

(a) there has been a change in the equalisation mechanism: the original physical flow of EEG electricity to suppliers is replaced by the TSOs' obligation to sell the EEG electricity themselves on the spot market. In exchange for the payment of the EEG-surcharge for a given amount of electricity, the electricity suppliers may label that amount as EEG electricity. According to Germany, that means that the electricity suppliers acquire the 'renewable quality' of electricity, and thus the ability to indicate to consumers to what extent they have paid the surcharge (cf. §§ 53(1) and 54(1) EEG-Act 2012).

(b) the BesAR does not exist in the EEG-Act 2000.

(145) Apart from those two differences, the mechanism described in recitals 7, 8 and 9 is according to Germany identical to what was provided in the EEG-Act 2000. In particular, it argues that the essential feature, namely that electricity suppliers compensate the TSOs' additional costs from purchasing EEG electricity by using their own financial resources was already part of the EEG-Act 2000.

(146) The Commission maintains its finding that the State aid involved in the EEG-Act 2012 constitutes new aid, because the EEG-Act 2012 constitutes a substantial alteration compared to the EEG-Act 2000.

(147) Indeed, the changes acknowledged by Germany, namely the change in the equalisation mechanism and the introduction of the BesAR, constitute substantial alterations.

7.2.1. *Change in the equalisation mechanism*

(148) As a preliminary remark, the Commission points out that, while it considered in 2002 that the EEG-Act 2000 did not involve the transfer of State resources, this assessment was made shortly after the *PreussenElektra* judgment. However, further Court rulings have since clarified and even restricted *PreussenElektra*: Based on the rulings in *Essent*, *Vent de colère* and *Elcogás*, it would seem that under the initial equalisation mechanism, the TSOs had already been entrusted by the State with the administration of an aid scheme, which was financed by means of a surcharge levied from the electricity suppliers.

(149) The decisive point is that the equalisation mechanism has been substantially altered. It is no longer composed of a chain of obligations for physical electricity purchases (network operators from EEG electricity producers; TSOs from network operators; electricity suppliers from TSOs). Now, the physical transfer is interrupted at the level of the TSOs, which have to market the EEG electricity. That marketing has been decoupled from the equalisation mechanism. The latter is purely about the financial allocation of costs between the different operators. The TSOs have been given responsibility by the State for centralising and computing those costs, and collecting them from the electricity suppliers.

(150) Further, the EEG-Act 2000 was silent as to whether electricity consumers should also be made to participate in the costs for producing EEG electricity. That decision was left to the competent regulator, which at the time still had the power to regulate electricity prices for final customers. The EEG-Act 2012 explicitly allows suppliers to pass on costs to their customers, and de facto they all pass them on.

([75]) OJ C 164, 10.7.2002, p. 5.

(151) In addition, the BNetzA, which had no role under the EEG-Act 2000, is given powers to monitor those financial flows and to enforce compliance with the EEG-Act 2012, in particular for purposes of consumer protection. The BAFA, which also had no role under the EEG-Act 2000, takes the decision to grant a reduction from the EEG-surcharge to certain undertakings on the basis of the criteria laid down in the EEG-Act 2012.

7.2.2. *The Besondere Ausgleichsregelung (BesAR)*

(152) The logical corollary to the inclusion of electricity consumers in the burden-sharing is the reduction in the surcharge granted to energy-intensive undertakings. Under the EEG-Act 2012, the BAFA, which had no particular role to play under the EEG-Act 2000, is responsible for certifying, by way of administrative decisions, that the EIUs satisfy the conditions of the BesAR. Some interested parties have argued that the mere fact that some electricity consumers benefit from a capped surcharge cannot affect the private nature of the financial resources contributed by them. However, the Commission considers that the existence of the BesAR constitutes additional evidence for the fact that the EEG-Act 2012 is no longer based on purchase obligations involving private resources, but on a comprehensive system of cost allocation, based to a certain degree on considerations of distributive justice, organised by the State and monitored by State authorities.

(153) In conclusion, the numerous differences between the EEG-Act 2000 and the EEG-Act 2012 are summarised in the following table. They demonstrate that the EEG-Act 2012 constituted a new system altogether.

Feature	EEG-Act 2000	EEG-Act 2012
Passing on of the surcharge.	Successive obligations of the operators to purchase the EEG electricity.	The passing on of costs is decoupled from the transfer of the EEG electricity.
Equalisation mechanism on the third level.	Cost equalisation is coupled with the purchase of EEG electricity.	Equalisation of the costs resulting from the spot market sales of the EEG electricity.
Final consumers have to bear the costs, but some benefit from a cap.	Not provided for.	BesAR: EIUs can ask for reductions in their surcharge.
Role of the BNetzA.	No role.	Supervision and enforcement of the determination of the surcharge.
Role of the BAFA.	No role.	Authorises the reduction of the surcharge.
Level of the surcharge.	0,2 ct/kWh (2000).	6,24 ct/kWh (2014).
Feed-in of EEG electricity.	Less than EUR 1 bn (2000).	More than EUR 20 bn (2013).

(154) Given that the EEG-Act 2012 only applies to reductions in the EEG-surcharge granted for the years 2013 and 2014, only the reduction granted in those two years involve State aid ([76]).

7.3. **Compatibility with the internal market**

(155) In the Opening Decision, the Commission concluded that the State aid for the producers of EEG electricity could be declared compatible with the internal market. However, it raised doubts as to whether the granting of that aid could be assessed independently from its financing mechanism, that is to say, the EEG-surcharge. It also reached the preliminary conclusion that the EEG-surcharge violates Article 30 or 110 of the Treaty.

([76]) The EEG-Act 2012 came into force on 1 January 2012, so that the first reductions for which EIUs could apply under that law where those granted in 2013. The reductions granted in respect of the year 2012 were based on a different law preceding the EEG-Act 2012 and are therefore not examined in this procedure.

(156) In the Opening Decision, the Commission also raised doubts as to whether the BesAR could be declared compatible with the internal market on the basis of Article 107(3) of the Treaty.

7.3.1. *Legal basis and scope for the compatibility assessment of the BesAR*

(157) The compatibility assessment only covers new aid granted on the basis of the EEG-Act 2012. Reduced payments of the EEG-surcharge that took place in 2012 had their legal basis in the administrative act issued by BAFA at the end of 2011. Therefore, they are covered by Article 1(b)(ii) of Council Regulation (EC) No 659/1999 ([77]).

(158) This Decision does not cover reduced payments of the EEG-surcharge by railway undertakings. The Commission reserves the right to assess § 42 EEG-Act 2012 in a separate procedure.

(159) The Commission has assessed the compatibility of the BesAR with the internal market on the basis of Sections 3.7.2 and 3.7.3 of the 2014 Guidelines.

(160) The Commission has applied the 2014 Guidelines from 1 July 2014. Those Guidelines include the substantive rules for the assessment of reductions in the funding of support for energy from renewable energy sources, including reductions that were granted before 1 July 2014 (point 248). The State aid under examination must therefore be assessed on the basis of the 2014 Guidelines.

(161) According to the case-law, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States ([78]). Germany accepted the 2014 Guidelines on 31 July 2014. None of the parties has argued that the Guidelines depart from the rules in the Treaty.

(162) Interested parties have, however, contested the legality of point 248. They consider that the application of the 2014 Guidelines to aid that was granted before 1 July 2014 contravenes several general principles of Union law, namely the principle of legal certainty and the principle of non-retroactivity of detrimental measures ([79]), as well as the principle that State aid should be assessed on the basis of the rules applicable when the aid scheme is introduced.

(163) The interested parties err, however, when they consider that the second paragraph of point 248 constitutes retroactive application. According to the case-law, Union law differentiates between the immediate application of a new rule to future effects of an ongoing situation ([80]) and the retroactive application of the new rule to a situation that had become definitive prior to its entry into force (also referred to as an existing situation) ([81]). In addition, it is settled case-law of the Union Courts that operators cannot acquire legitimate expectations until the institutions have adopted an act closing the administrative procedure, which has become definitive ([82]).

(164) As the Court has ruled, unlawful State aid constitutes an ongoing situation. The rules governing the application of law in time dictate that the immediate application of new rules of compatibility to unlawful aid does not constitute a retroactive application of those new rules ([83]).

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

([78]) Judgement in *Germany and Others* v *Kronofrance*, C-75/05 and C-80/05, ECLI:EU:C:2008:482, paragraph 61, with further references.

([79]) The interested parties have referred to the following case-law: Case C-260/91, *Diversinte*, ECLI:EU:C:1993:136, paragraph 9; Case C-63/83, *Regina* v *Kirk*, ECLI:EU:C:1984:255, paragraphs 21 *et seq.*; Case C-1/73, *Westzucker*, ECLI:EU:C:1973:78, paragraph 5; Case C-295/02, *Gerken*, ECLI:EU:C:2004:400, paragraphs 47 *et seq.*; Case C-420/06, *Jager*, ECLI:EU:C:2008:152, paragraphs 59 *et seq.*; Case C-189/02 P, *Dansk Rørindustri et al.* v *Commission*, ECLI:EU:C:2005:408, paragraph 217.

([80]) Case C-334/07 P, *Commission* v *Freistaat Sachsen*, ECLI:EU:C:2008:709, paragraph 43; Case T-176/01, *Ferrière Nord* v *Commission*, ECLI:EU:T:2004:336, paragraph 139.

([81]) Case 68/69, *Bundesknappschaft* v *Brock*, ECLI:EU:C:1970:24, paragraph 6; Case 1/73 *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker*, ECLI:EU:C:1973:78, paragraph 5; Case 143/73, *SOPAD* v *FORMA et. al.*, ECLI:EU:C:1973:145, paragraph 8; Case 96/77, *Bauche*, ECLI:EU:C:1978:26, paragraph 48; Case 125/77, *KoninklijkeScholten-Honig NV et. al.* v *Floofdproduktschaap voor Akkerbouwprodukten*, ECLI:EU:C:1978:187, paragraph 37; Case 40/79, *P* v *Commission*, ECLI:EU:C:1981:32, paragraph 12; Case 270/84, *Licata* v *ESC*, ECLI:EU:C:1986:304, paragraph 31; Case C-60/98 *Butterfly Music* v *CEDEM*, ECLI:EU:C:1999:333, paragraph 24; C-334/07 P, *Commission* v *Freistaat Sachsen*, ECLI:EU:C:2008:709, paragraph 53; Case T-404/05 *Greece* v *Commission*, ECLI:EU:T:2008:510, paragraph 77.

([82]) Case C-169/95, *Spain* v *Commission*, ECLI:EU:C:1997:10, paragraph 51 to 54; Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA* v *Commission*, ECLI:EU:T:2003:217, paragraph 205.

([83]) Joined Cases C-465/09 P to C-470/09 P, *Diputación Foral de Vizcaya and Others* v *Commission*, ECLI:EU:C:2011:372, paragraphs 125 and 128.

(165) For those reasons, the Commission is required to assess the BesAR on the basis of the 2014 Guidelines. It has no discretion to deviate from those Guidelines in its assessment. As the Opening Decision was published in the Official Journal before 1 July 2014, the Commission has invited Germany and interested parties to submit their observations on the application of the 2014 Guidelines to the case at hand.

7.3.1.1. Observations from Germany and from third parties

(166) Several interested parties have argued that the 2014 Guidelines should not apply to the capped EEG-surcharges, but rather that the Commission should conduct a compatibility assessment on the basis of Article 107(3)(b) or (c) of the Treaty.

(167) First, those parties have submitted that the reductions in the EEG-surcharge could be found to be compatible with the internal market on the basis of Article 107(3)(b) of the Treaty, given that they promote the execution of an important project of common European interest (the promotion of renewable energy as required by Directive 2009/28/EC) or, failing this, that they are intended to remedy a serious disturbance in the economy of Germany (the threat of deindustrialisation as a result of the RES costs).

(168) The interested parties also argued that the reductions could be found to be compatible on the basis of Article 107(3)(c) of the Treaty, on the grounds that they have the objective of promoting the development of renewable energy while preventing carbon leakage and preserving an industrial basis in the Union. In that respect, the interested parties concerned argue that the BesAR is the appropriate instrument for reconciling the different aspects of that multiple objective. They also state that that instrument is proportionate since the beneficiaries of the BesAR still contribute to the financing. They also argue that the measure is proportionate on the grounds that electricity taxes and the EEG-surcharge are essentially similar (both being as charges on electricity consumption) and that the minimum rate of taxation on electricity consumed by businesses determined by the Union, as set out in Table C of Annex I to Council Directive 2003/96/EC ([84]), is 0,05 ct/kWh, that is to say the same as the minimum EEG-surcharge. Finally, interested parties argue that the EEG-Act 2012 does not distort competition or trade, since it does not fully counteract the distortion caused in the first place by the higher EEG-surcharge borne by German undertakings, compared to equivalent taxes or levies faced by undertakings in other Member States.

(169) On the application of Article 107(3)(b) and (c), comparable arguments were made by Germany in its reply to the Commission's Opening Decision.

(170) Secondly, the interested parties contend that the Commission cannot examine the reductions separately under a distinct legal basis for compatibility than the one that was used for examining the support for EEG electricity. Rather the Commission should have assessed (and approved) the reductions, being part of the financing, jointly with the renewable energy support in the Opening Decision. This is explained with reference to the case-law of the Court according to which the Commission must take into account the method of financing of the aid in a case where that method forms an integral part of the measure ([85]).

(171) Thirdly, even if the 2014 Guidelines were to apply, the interested parties argue that in view of points 248 and 250 of the 2014 Guidelines, those Guidelines could apply retroactively only to unlawful aid, but not to existing aid. However, even if the capped EEG-surcharges were to constitute State aid (which is disputed), they would need to be considered existing aid due to their implicit approval by the Commission in case NN 27/2000 ([86]).

(172) Fourthly, the interested parties claim that the 2014 Guidelines, in particular the rules concerning adjustment plans in Section 3.7.3, should be interpreted in a manner that would safeguard the beneficiaries' legitimate expectations: in other words, the progressive adjustment should be sufficiently small in the years 2013 and 2014 as to exclude recovery. Such legitimate expectations have arisen, according to those parties, from the Commission decision in case NN 27/2000.

([84]) Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).
([85]) Case C-261/01, *Van Calster*, ECLI:EU:C:2003:571, paragraph 49; Case C-333/07, *Société Régie Networks*, ECLI:EU:C:2008:764, paragraph 89.
([86]) See above footnote 75.

7.3.1.2. Assessment

(173) These arguments cannot alter the assessment in this Decision the applicability of the 2014 Guidelines presented in recitals 157 to 165.

(174) First, as far as the application of Article 107(3)(c) of the Treaty is concerned, point 10 of the 2014 Guidelines states that, in those specific Guidelines, 'the Commission sets out the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty'. According to the Court of Justice, 'the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty' ([87]). As the 2014 Guidelines set out ex ante, in a general and transparent manner, the compatibility conditions for the exception laid down in Article 107(3)(c) of the Treaty, the Commission is bound to apply those Guidelines.

(175) There is no scope for an application by analogy of the rules on electricity taxation, because the 2014 Guidelines contain a complete set of rules for the assessment of the reduction of RES surcharges.

(176) As far as the derogations in Article 107(3)(b) of the Treaty are concerned, the 2014 Guidelines do not contain any criteria as to how the Commission will exercise its discretion in the application of Article 107(3)(b). It is true that the Commission has adopted a communication on 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' ([88]), which is applied from 1 July 2014. However, according to point 52 of that communication, 'in the case of non-notified aid, the Commission will apply this communication if the aid was granted after its entry into force, and the rules in force at the time when the aid was granted in all other cases'. This means that the criteria laid down in the communication cannot be applied to the surcharge reductions examined in this Decision. Rather, the Commission has to apply the rules laid down in the 2008 Guidelines ([89]).

(177) In the Opening Decision, the Commission expressed doubts as to whether the BesAR could be found compatible with the internal market pursuant to Article 107(3)(b) of the Treaty in accordance with points 147 to 150 of the 2008 Guidelines. Those doubts were raised in particular because the reductions did not seem to relate to a project and a fortiori not a project which would be 'specific and clearly defined in respect of the terms of its implementation'. In addition, it remained anyhow questionable whether such a project could be considered as being 'of common European interest', that is to say, where the advantage provided would extend to the Union as a whole. Finally, it was doubtful whether the aid in question, namely the reductions in the EEG-surcharge, would 'present an incentive to the execution of the project' (recitals 211 and 212 of the Opening Decision).

(178) Those doubts have not been alleviated. Germany argues that both the achievement of the RES targets and the preservation of industrial competitiveness have to be considered to constitute one, if not several, projects of common European interest. Germany refers to the Commission's 'Europe 2020' strategy, which lists 'promoting a more resource efficient, greener and more competitive economy' as a priority ([90]). However, as important policy goals as they may be, the development of renewable energy sources and the promotion of competitiveness cannot be understood as specific projects in the literal sense. It would be even less possible to define such projects in terms of their implementation including their participants, their objectives and effects, as was required in point 147(a) of the 2008 Guidelines. If projects of common European interest were to be construed so as to encompass mere policy goals as such, the limits of Article 107(3)(b) would be stretched beyond their wording, and the requirement of targeting a specific, well-defined project would be rendered meaningless. This would go against 'the need for a narrow interpretation of the derogations from the general principle that State aid is incompatible with the common market' ([91]).

(179) More importantly, as the General Court made clear in *Hotel Cipriani*, 'an aid measure can benefit from the derogation provided for in [Article 107(3)(b) of the Treaty] only if it does not benefit mostly the economic operators of one Member State rather than the Community as a whole'. That criterion is not fulfilled where the

([87]) Case C-310/99, *Italy* v *Commission*, ECLI:EU:C:2002:143, paragraph 52.
([88]) OJ C 188, 20.6.2014, p. 4.
([89]) Community Guidelines on State aid for environmental protection of 2008 (OJ C 82, 1.4.2008, p. 1).
([90]) COM(2010) 2020 final, p. 10.
([91]) Case C-301/96, *Germany* v *Commission*, ECLI:EU:C:2003:509, paragraph 106.

national aid scheme merely seeks to improve the competitiveness of the undertakings concerned ([92]). Indeed, the BesAR is intended only to ease the cost burden of energy-intensive undertakings in Germany and thereby to improve their competitiveness.

(180) Finally, in view of the need for a narrow interpretation of the derogations from the general principle that State aid is incompatible with the internal market, mentioned in recital 178, the mere fact that electricity costs increase for a large number of industrial users cannot be regarded as a serious disturbance of the economy of the Member State concerned.

(181) Therefore, the Commission could not have approved the BesAR pursuant to Article 107(3)(b) of the Treaty.

(182) Secondly, concerning the argument summarised in recital 170, the aid granted to energy-intensive undertakings through reduced EEG-surcharges is clearly distinct and separable from the support for renewable energy. The beneficiaries of the latter are a different group compared to the group of beneficiaries of the former. Moreover, the reductions do not immediately serve the purpose of financing the support for renewable energy, but to the contrary, actually run counter to that purpose since their immediate effect is to decrease the revenue available for the RES financing This is evidenced by the fact that the EEG-surcharge had to be increased for all other non-privileged users in order to safeguard the financing.

(183) Thirdly, concerning the argument summarised in recital 171, the BesAR has to be considered to constitute unlawful aid falling in the remit of point 248 of the 2014 Guidelines: Indeed, as already explained in recitals 141 *et seq*., the EEG-Act 2012 has substantially altered the aid scheme approved by the Commission decision adopted in case NN 27/2000.

(184) The fourth argument concerning the beneficiaries' legitimate expectations is examined further in recital 257, as it only relates to recovery.

7.3.1.3. Alternative assessment under the 2008 Guidelines

(185) The General Court has on several occasions and contrary to the case-law of the Court of Justice taken the view that unlawful aid has to be assessed on the basis of the rules in force at the time when it was granted. Therefore, the Commission has carried out an alternative assessment pursuant to Article 107(3)(c) of the Treaty on the basis of the 2008 Guidelines.

(186) The result is that the Commission would have had to declare the operating aid granted on the basis of the BesAR incompatible in its entirety, for the reasons set out in recitals 187 *et seq*.

(187) The Opening Decision states that at the time of its adoption, there were no specific State aid rules that would recognise that exemptions or reductions from charges that serve to finance RES support could be considered as necessary to achieve an objective of common interest and therefore be authorised on the basis of Article 107(3)(c) of the Treaty.

(188) Furthermore, the Commission had prohibited similar operating aid notified by Austria in 2011 ([93]). That prohibition is in line with the case-law of the Court, according to which operating aid as such affects trading conditions to an extent contrary to the common interest, and can therefore not be declared compatible with the internal market ([94]). In that Decision, the Commission also explained why no analogy could be made to the rules on electricity taxation.

(189) For those reasons, the Commission could also not have authorised the aid in question pursuant to Article 107(3)(c) of the Treaty on the basis of the substantive rules in force at the time the aid was granted.

([92]) Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.*, ECLI:EU:T:2008:537, paragraph 337.

([93]) SA.26036 (C24/09) — Austria, State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ L 235, 10.9.2011, p. 42).

([94]) Judgment in *Germany* v *Commission* ('Jadekost'), C-288/96, ECLI:EU:C:2000:537, paragraph 77, with further references.

7.3.2. *Costs resulting from the support for energy from renewable energy sources*

(190) According to point 184 of the 2014 Guidelines, reductions can only be granted in respect of costs resulting from the support to energy from renewable sources.

(191) However, as the Commission established in its decision in case SA.38632 (2014/N) concerning the EEG-Act 2014 ('EEG 2014 Decision'), the EEG-surcharge also serves to finance support for the production of electricity from mine gas. Mine gas is not a renewable energy source within the meaning of point 19(5) of the 2014 Guidelines. Reductions from surcharges aimed at financing support for other sources of energy are not covered by Section 3.7.2 of the 2014 Guidelines ([95]).

(192) In that respect, Germany indicated in the context of the notification procedure in case SA.38632 (2014/N) that no reduction in the funding of the support to electricity from mine gas would be granted given that, under the EEG-Act 2014, energy-intensive undertakings need to pay the full surcharge for the first GWh of consumption at each consumption point concerned. Indeed, the revenue from the full surcharge on the first GWh is higher than the amount of subsidy paid in respect of electricity produced from mine gas ([96]).

(193) In 2012, the amount of support for mine gas (EUR 41,4 million) represented 0,25 % of the total amount of support under the EEG-Act 2012 for that year. Forecasts show that the volume of mine gas is likely to remain constant in the future or even decrease slightly ([97]).

(194) On that basis, the Commission found that for the beneficiaries of the BesAR under the EEG-Act 2014, the payment of the EEG-surcharge on the first GWh of consumption would already by far exceed the amount of support for mine gas ([98]). Moreover, the Commission concluded that when multiplying the percentage of EEG support paid in respect of mine gas (0,25 %) by the EEG-surcharge (6,24 ct/kWh in 2014), the result is 0,016 ct/kWh. That amount is below the minimum surcharge which the BesAR beneficiaries had to pay even beyond the first GWh of consumption (0,05 ct/kWh) ([99]).

(195) The EEG-Act 2012 features two alternative caps. Under the first alternative (§ 41(3) No 1), which is a degressive cap, beneficiaries must still pay the full surcharge for the first GWh of consumption, and the minimum surcharge to be paid for consumption beyond 100 GWh of consumption is 0,05 ct/kWh. Under the second alternative (§ 41(3) No 2), which concerns undertakings with the highest energy-intensity, the surcharge is capped at 0,05 ct/kWh for the beneficiary's whole consumption. In both cases, beneficiaries still pay more than the fraction of the surcharge which could be allocated to the support of mine gas (0,016 ct/kWh in 2014, and, on the basis of an EEG-surcharge of 5,277 ct/kWh in 2013, 0,013 ct/kWh).

(196) Therefore, the payment of the minimum surcharge of 0,05 ct/kWh in 2013 and 2014, in addition to the obligation to pay the surcharge for the first GWh for some of the beneficiaries, ensured that no reduction was granted to energy-intensive undertakings from the financing of electricity from mine gas ([100]).

7.3.3. *Eligibility*

(197) Point 185 of the 2014 Guidelines provides that the aid should be limited to sectors that are exposed to a risk to their competitive position due to the costs resulting from the funding of support to energy from renewable sources as a function of their electro-intensity and their exposure to international trade. Accordingly, the aid can only be granted if the undertaking belongs to the sectors listed in Annex 3 to the 2014 Guidelines.

(198) In addition, according to point 186 of the 2014 Guidelines, Member States can include an undertaking in their national scheme granting reductions from costs resulting from renewable support if the undertaking has an electro-intensity of at least 20 % and belongs to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines.

([95]) EEG decision 2014, recital 293.
([96]) EEG decision 2014, recitals 294 and 295.
([97]) EEG decision 2014, recital 295.
([98]) With 2707 eligible consumption points in 2014 and a EEG-surcharge at 6,24 ct/kWh, the surcharge revenue generated from payments for the first GWh of consumption equals EUR 168 916 800. See EEG decision 2014, recital 296.
([99]) EEG decision 2014, recital 296.
([100]) Cf. EEG decision 2014, recital 297.

(199) Finally, point 187 of the 2014 Guidelines provides that Member States can impose additional eligibility criteria provided that within the eligible sectors the choice of beneficiaries is made on the basis of objective, non-discriminatory and transparent criteria and that the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation.

(200) To the extent that aid in the form of a reduction in or exemption from the burden related to funding support for electricity from renewable sources was granted before the date of application of those Guidelines to undertakings that are not eligible according to the criteria in recitals 197 and 198 of this Decision, such aid can be declared compatible provided that it is in line with an adjustment plan (point 197 of the 2014 Guidelines).

(201) Germany has indicated that only a number of the beneficiaries of the BesAR in 2013 and 2014 were eligible for State aid in the form of reductions in the funding of support for electricity from renewable sources in accordance with Section 3.7.2 of the 2014 Guidelines. Germany has therefore submitted an adjustment plan (see Annex II) which is examined in Section 7.3.5 for those beneficiaries that were not eligible. Germany has also explained that all beneficiaries which could be included in the national scheme on the basis of point 186 of the 2014 Guidelines belong to sectors listed in Annex 5 to the 2014 Guidelines.

(202) For the calculation of the gross value added ('GVA'), which is necessary for the application of points 185 to 192 of the 2014 Guidelines and which is defined in Annex 4 thereto, § 41 EEG-Act 2012 uses the GVA at market prices over the last business year before the application for the surcharge reduction. Points 1 and 2 of Annex 4 to the 2014 Guidelines require the use of the GVA at factor costs as well as the arithmetic mean over the most recent three years for which data is available. Germany explained that such data was not available, because applications for the reductions for the years 2013 and 2014 only included GVA at market prices of the most recent business year for which data was available (that is to say 2011 and 2012). Similarly, Germany explained that, for the purpose of calculating electricity costs, average retail electricity prices were not available for all undertakings, at least not for higher consumption bands; instead, the calculation of electricity costs would be based on the actual electricity costs incurred in the years 2011 and 2012, as those figures were the ones submitted by the undertakings in their applications for the reductions in 2013 and 2014. According to point 4 of Annex 4 to the 2014 Guidelines, the definition of an undertaking's electricity costs is notably based on the undertaking's assumed electricity price. On the basis of Germany's explanations, the Commission concluded in its decision in case SA.38632 (2014/N) that the transitional rules in the EEG-Act 2014 allowing the use of GVA data at factor costs based on the last business year or the last two business years, as well as the use of real electricity costs of the last business year, were in line with the 2014 Guidelines, and in particular with point 195 (recitals 311 to 314 of that Decision). This was because that data, that is to say the GVA at factor costs based on the last year and the real electricity costs of the last year, would be applied only on a transitional basis until the data required by Annex 4 to the 2014 Guidelines had been gathered. This reasoning applies *a fortiori* to the assessment of the EEG-surcharge reductions that occurred in the years 2013 and 2014, and on the basis of this reasoning, it can also be accepted that GVA data at market prices is used for the purposes of assessing compatibility of State aid granted under the BesAR in 2013 and 2014 in the form of reductions in the funding of support for electricity from renewable sources according to Section 3.7.2 of the 2014 Guidelines.

(203) The Commission concludes that the EEG-Act 2012 only partially meets the eligibility rules laid down in points 185 and 186 of the 2014 Guidelines. Beneficiaries for which those criteria are not met should therefore be subject to recovery, the details of which are examined in Section 7.3.5 concerning Germany's adjustment plan.

7.3.4. *Proportionality*

(204) Point 188 of the 2014 Guidelines provides that aid is considered to be proportionate if the aid beneficiaries pay at least 15 % of the additional costs without reduction.

(205) Member States can however further limit the amount of the costs resulting from financing aid to renewable energy to be paid at undertaking level to 4 % of the gross value added of the undertaking concerned. For undertakings having an electro-intensity of at least 20 %, Member States can limit the overall amount to be paid to 0,5 % of the gross value added of the undertaking concerned. Finally, when Member States decide to adopt the limitations of respectively 4 % and 0,5 % of gross value added, those limitations must apply to all eligible undertakings (points 189 and 190 of the 2014 Guidelines).

(206) Germany has indicated that in some cases, the capped EEG-surcharge paid by the beneficiaries in the years 2013 and 2014 was not proportionate on the basis of the criteria in the 2014 Guidelines ([101]). Germany has therefore submitted an adjustment plan (see Annex II) which is examined in Section 7.3.5.

(207) The Commission concludes that the capped EEG-surcharges only partially fulfil the proportionality criteria in points 188 and 189 of the 2014 Guidelines. Beneficiaries for which those criteria are not met should therefore be subject to recovery, the details of which are examined in Section 7.3.5 concerning Germany's adjustment plan.

7.3.5. *The adjustment plan*

(208) According to points 193 *et seq*. of the 2014 Guidelines, Member States are to apply the eligibility and proportionality criteria set out in Section 3.7.2 of the 2014 Guidelines and described above in Sections 7.3.3 and 7.3.4 of this Decision at the latest by 1 January 2019. Aid granted in respect of a period before that date will be considered compatible if it satisfies the same criteria. In addition, the Commission considers that all aid granted to reduce the burden related to funding support for electricity from renewable sources in respect of the years preceding 2019 can be declared compatible with the internal market to the extent that it complies with an adjustment plan.

(209) That adjustment plan must entail progressive adjustment to the aid levels resulting from the application of the eligibility and proportionality criteria set out in Section 3.7.2 of the 2014 Guidelines and described in Sections 7.3.3 and 7.3.4.

(210) To the extent that aid was granted in respect of a period before the date of application of those Guidelines, the plan must also provide for a progressive application of the criteria for that period.

(211) Where, as specified in recital 200, aid was granted before the date of application of the 2014 Guidelines to undertakings that are not eligible according to the criteria described in Section 7.3.3 of this Decision, such aid can be declared compatible provided that the adjustment plan foresees a minimum own contribution of 20 % of the additional costs of the surcharge without reduction, to be established progressively and at the latest by 1 January 2019 (point 197 of the 2014 Guidelines).

(212) Germany has submitted an adjustment plan (Annex II), described in recitals 27 *et seq*., which provides for a progressive increase in the EEG-surcharge for all beneficiaries subject to recovery. The starting point is the EEG-surcharge that was actually paid in 2013; it is obtained by multiplying the beneficiary's reduced EEG-surcharge in 2013 by the beneficiary's actual electricity consumption in that same year (the 'basic surcharge'). According to the adjustment plan, the surcharges for 2013 and 2014 will be readjusted so as not to exceed 125 % and 150 % of the basic surcharge. As of 2015, the upward adjustment will be potentially bigger, as the cap is then brought to 200 % of the basic surcharge. In subsequent years up to 2018, the surcharge for year x will be similarly capped at 200 % of the surcharge of the year $x - 2$.

(213) Concerning the years under examination in this Decision, that is to say, the years 2013 and 2014, the adjustment plan provides for a progressive increase in the EEG-surcharge for all beneficiaries for which the eligibility and proportionality criteria of the 2014 Guidelines were not met. The increase is set to continue after 2014, so that it can be assumed that the levels required by the 2014 Guidelines will be met by 1 January 2019, both for undertakings which are in principle eligible, but did not pay a high enough surcharge, and for undertakings which are not eligible and therefore need to meet the minimum own contribution of 20 % of the additional costs of the surcharge set out in point 197 of the 2014 Guidelines. In addition, the Commission notes that the adjustment plan takes all relevant economic factors linked to the renewable policy into account and that Germany notified it within the deadline set out in point 200 of the 2014 Guidelines.

(214) As far as the years 2013 and 2014 are concerned, the adjustment plan is therefore in line with the requirements in Section 3.7.3 of the 2014 Guidelines. According to point 194 of the 2014 Guidelines, the reductions as modified by the adjustment plan can therefore be considered to be compatible with the internal market.

([101]) For the application of the GVA data and electro-intensity data, see recital 202 of this Decision.

7.3.6. *Conclusion on compatibility*

(215) The reduced EEG-surcharges for energy-intensive undertakings in 2013 and 2014 are compatible with the internal market only in so far as the following conditions are fulfilled:

(a) the reduction in the surcharge is granted only in respect of costs resulting from support for energy from renewable sources;

(b) the beneficiaries meet the eligibility criteria laid down in points 185, 186 and 187 of the 2014 Guidelines, as examined in Section 7.3.3 of this Decision; and

(c) the reduction in the EEG-surcharge is proportionate according to the criteria set out in points 188 and 189 of the 2014 Guidelines, as examined in Section 7.3.4 of this Decision.

(216) For beneficiaries for which one or more of the conditions described in recital 215 are not met, the Commission exceptionally considers that State aid granted on the basis of the BesAR in 2013 and 2014 can be declared compatible with the internal market, to the extent that it is ensured that beneficiaries pay at least 125 % of the basic surcharge defined in recital 212 for the year 2013 and 150 % of the basic surcharge for the year 2014. In order to ensure that result, recovery should take place as follows:

(a) for the reduction granted in respect of 2013, recovery should correspond to the difference between the surcharge that should have been paid if all conditions in recital 215 had been met and the EEG-surcharge that was actually paid in 2013; however, the total EEG-surcharge, including the amount recovered, of the undertaking subject to recovery must not exceed 125 % of the EEG-surcharge that was actually paid in 2013;

(b) for the reduction granted in respect of 2014, recovery should correspond to the difference between the surcharge that should have been paid if all criteria in recital 215 had been met and the EEG-surcharge that was actually paid in 2014; however, the total EEG-surcharge, including the amount recovered, of the undertaking subject to recovery must not exceed 150 % of the EEG-surcharge that was actually paid in 2013.

7.4. **Compliance with other Treaty provisions**

(217) In accordance with point 29 of the 2014 Guidelines, as the EEG-surcharge has the aim of financing support for EEG electricity, the Commission has examined its compliance with Articles 30 and 110 of the Treaty.

(218) According to the case-law, a charge which is imposed on domestic and imported products according to the same criteria may nevertheless be prohibited by the Treaty if the revenue from such a charge is intended to support activities which specifically benefit the taxed domestic products.

(219) If the advantages which those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect, contrary to Article 30 of the Treaty. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 of the Treaty, and the proportion used to offset the burden borne by the domestic products will be contrary to that provision ([102]).

(220) The Commission has considered, in its long-standing decision practice ([103]) and in line with the case-law of the Court ([104]), that the financing of national support schemes for RES by means of a parafiscal levy on electricity consumption may discriminate against imported RES. Indeed, if domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including consumption of imported

([102]) Joined Cases C-128/03 and C-129/03, *AEM*, ECLI:EU:C:2005:224, paragraphs 44 to 47; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 42.

([103]) State aid decision N 34/90; State aid decision N 416/99; State aid decision N 490/00; State aid decision N 550/00; State aid decisions N 317/A/2006 and NN 162/A/2003; State aid decisions N 707 and 708/02; State aid decision N 789/02; State aid decision N 6/A/2001; Commission decision 2007/580/EC; Commission decision 2009/476/EC; State aid N 437/09.

([104]) Joined Cases C-128/03 and C-129/03, *AEM*, ECLI:EU:C:2005:224, paragraphs 44 to 47; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraphs 58 and 59.

electricity), then the method of financing, which imposes a burden on imported electricity not benefiting from that financing, risks having a discriminatory effect on imported electricity from renewable energy sources and thereby infringes Articles 30 and/or 110 of the Treaty ([105]).

(221) In addition, in its Opening Decision, the Commission observed that the EEG-Act 2012 may *prima facie* have a discriminatory effect in that § 39 EEG-Act 2012 provides for the rate of the EEG surcharge to be reduced in the case of so-called direct marketing. The reduced rate applies only when the supplier has purchased 50 % of his electricity portfolio from national EEG electricity producers and seems therefore to constitute a discriminatory charge within the meaning of Article 110 of the Treaty.

(222) The Commission also considered that where the surcharge was raised on imports that would not have benefited from support under the EEG-Act 2012 if they had been produced in Germany (for instance electricity produced from facilities that have been in operation for more than 20 years), the surcharge would comply with Articles 30 and 110 on the grounds that, in this particular case, there is no difference in treatment between the national production and the imports.

(223) Germany disputes that the EEG-Act 2012 could result in discrimination within the meaning of Articles 30 and 110 of the Treaty, for the following reasons: first, it claims that there is no similarity between the imported products on which the EEG-surcharge is imposed and the domestic products financed by it. This is because the EEG-surcharge finances RES *installations*, whereas it is imposed on the consumption of RES *electricity*.

(224) Even if the surcharge was to be considered to finance RES electricity, there would still be a difference between the electricity on which the surcharge is imposed and the electricity that the surcharge promotes. The reason is that Germany's RES target, set by Article 3(3) and part A of Annex I to Directive 2009/28/EC, can only be fulfilled by RES electricity that has either been domestically produced or imported on the basis of a cooperation mechanism with the Member State where the electricity has been produced (Article 5(3) of that Directive). Therefore, in the absence of a cooperation mechanism, any imported RES electricity does not count towards the target. From the perspective of the consumers, such electricity cannot therefore be considered to be similar to domestic RES electricity.

(225) As far as the *green electricity privilege* is concerned (§ 39 of the EEG-Act 2012), Germany claims that it cannot be considered to be discriminatory because it actually implements Directive 2009/28/EC. Directive 2009/28/EC sets a national target for the share of energy from renewable sources, and it allows the Member States to set up support schemes and measures of cooperation (Article 3(3)). Under Article 5(3) of the Directive, RES electricity that is produced domestically counts towards the target. RES electricity produced in other Member States does in principle count towards the target when it is covered by a cooperation agreement between the Member States concerned. The conclusion of such agreements is not mandatory, but left to the Member States' discretion. According to Germany, it follows from those provisions of the Directive that Germany is entitled to support domestic RES electricity production only. It also follows from those provisions that Germany is not compelled either to grant access to its support scheme to RES electricity producers from other Member States, or to let such producers benefit from the *green electricity privilege*.

(226) In addition, Germany claims that if the *green electricity privilege* was made available to producers located in other Member States, there would be a risk that this would result in overcompensation of such producers, who could begin to cherry-pick between the different national support systems. It would also pose a threat to the financing mechanism of the EEG-Act 2012, since more and more non-domestic producers would want to make use of the *green electricity privilege*, and the amount of electricity on which the EEG-surcharge was actually imposed would continuously decrease, thereby eroding the base of the financing. This would in practice run counter to the objectives of Directive 2009/28/EC, which authorises the establishment of national support systems for the purposes of increasing renewable energy production.

(227) This interpretation is confirmed, according to Germany, by the recent *Ålands Vindkraft* ruling ([106]). In that case, concerning a national system which provided for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that Member State, the Court of Justice held that such a system constituted a measure having equivalent effects to quantitative restrictions on imports, in principle incompatible with the obligations resulting from Article 34 of the Treaty. However, the system could be justified by overriding requirements relating to protection of the environment ([107]).

([105]) Case 47/69 *France* v *Commission*, ECLI:EU:C:1970:60, paragraph 20; EEG 2014 Decision, recitals 329 *et seq*.
([106]) Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037.
([107]) Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037, paragraphs 75, 119.

(228) Finally, according to Germany, the EEG-surcharge does not constitute a charge within the meaning of either Article 30 or 110 of the Treaty. Rather, it is a mere refund claim which the TSOs have against electricity suppliers, given that the TSOs are considered to perform services for the suppliers. Germany refers to the case-law of the Court of Justice, according to which 'a charge which is imposed on goods by reason of the fact that they cross a frontier may escape classification as a charge having equivalent effect as prohibited by the Treaty, if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products, and imported or exported products alike, if it represents payment for a specific service actually and individually rendered to the trader of a sum in proportion to that service or, in certain circumstances, if it is levied on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law' ([108]).

(229) Germany considers the second and the third of the alternative criteria mentioned in the Court judgment to be fulfilled. First, Germany claims that the EEG-surcharge constitutes an adequate payment for a specific service rendered, namely the fact that the TSOs relinquish the renewable quality of the RES electricity transmitted, which is acquired by the electricity suppliers, as explained in recital 144 ([109]). From Germany's point of view, by paying the EEG-surcharge to the TSOs, the electricity suppliers receive something in return, that is the fact that a share of the electricity comes from renewable energy sources. Germany therefore argues that, contrary to the situation in the *Essent* case ([110]), where there was no service in return for the payments, the EEG-surcharge does correspond to a service rendered. Secondly, the EEG-surcharge is allegedly imposed in order to fulfil obligations imposed by Union law, namely by Directive 2009/28/EC.

(230) The Commission cannot agree with the reasoning provided by Germany.

(231) First, while it is true that the EEG-surcharge finances the setup of renewable energy installations, it supports the production of the electricity generated in those installations. This is evidenced by the fact that the EEG-surcharge is levied per kilowatt-hour of electricity consumed. Secondly, the similarity between domestically produced EEG electricity and imported EEG electricity cannot be altered by the mere fact that imported EEG electricity does not count towards the target set by Directive 2009/28/EC. According to the case-law of the Court, similarity has to be assessed 'on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use' ([111]). The question of similarity needs to be distinguished from the difference in treatment: A difference in treatment only exists in relation to imported electricity that would have been eligible under the EEG-Act 2012 if it had been produced in Germany. In that respect, the question whether imported RES electricity counts towards the target set by Directive 2009/28/EC is irrelevant.

(232) Moreover, the Commission disagrees with Germany's assertion that the EEG-surcharge does not constitute a charge within the meaning of Articles 30 and 110 of the Treaty. First, as the Court held in *Essent*, it is irrelevant for the application of Articles 30 and 110 of the Treaty that the charge is not levied by the State directly, but by the TSOs ([112]). Secondly, there appears to be no service or asset for which the EEG-surcharge paid by the electricity suppliers would constitute an adequate payment. The renewable quality as such is of no avail to the electricity suppliers, given that it is transmitted separately from the actual EEG electricity. The payments made by the suppliers are also not proportionate to the service rendered, since their payments differ according to how many non-privileged customers they have, whereas the supposed service rendered, namely that the electricity has renewable quality, is indivisible and the same for all. Thirdly, the EEG-surcharge is not imposed on account of *inspections*, and it is also directly not imposed on account of *obligations* stemming from Union law. Directive 2009/28/EC obliges Germany to introduce measures to ensure a steady increase in the share of energy from renewable sources (Article 3(2) of the Directive); the implementation is left to Germany's discretion, both as regards the specific measures (Article 3(3) of the Directive) and the way in which they are financed.

(233) As the Commission held in its Opening Decision, Articles 30 and 110 only prohibit the financing of a support scheme for national production by means of a discriminatory charge imposed on imported products. They do not oblige the Member State to extend the benefit of the support scheme to imported products. This Decision,

([108]) Case C-130/93, *Lamaire*, ECLI:EU:C:1994:281, paragraph 14.
([109]) Germany however recognises that the EEG-surcharge does not constitute a remuneration for the provision of RES electricity as such, which is sold on the spot market.
([110]) Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413.
([111]) Case 171/78, *Commission* v *Denmark*, ECLI:EU:C:1980:54, paragraph 5.
([112]) Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 46.

like previous decisions on national support schemes for renewable energy ([113]), does not put into question the fact that support under the EEG-Act 2012 is limited to national production. However, when drafting their support schemes, Member States may not introduce discriminatory charges within the meaning of Articles 30 and 110 of the Treaty.

(234) The *Ålands Vindkraft* ruling does not alter the assessment regarding Articles 30 and 110 of the Treaty. First, the sole question in that case was whether a national support system for renewable energy producers needed to be accessible for producers located in other Member States (the Court held that this was not the case). The judgment was not concerned with the question whether, in addition, such a national support system may be financed through a discriminatory charge imposed also on economic operators located in other Member States. Secondly, at the request of the Swedish court, the Court provided an interpretation of Article 34 on quantitative restrictions to the free movement of goods; the reference for a preliminary ruling was not concerned with Articles 30 and 110 on discriminatory duties and taxes, in respect of which, consequently, the Court said nothing. Thirdly, the Court found that Sweden's refusal to grant the claimant access to its certificate system, while constituting a measure having equivalent effect to a quantitative restriction, was justified by grounds of environmental policy and proportionate in achieving that environmental policy objective ([114]). However, discriminatory measures that infringe Articles 30 and 110 are not justifiable, even on environmental grounds: the Commission can see no instance where environmental protection (or, for that matter, any other overriding requirement of general interest) could be furthered by the imposition of a pecuniary obligation that would make economic operators in other Member States pay more than their domestic competitors.

(235) However, while maintaining its position that the EEG-surcharge does not infringe Articles 30 and 110 of the Treaty, Germany has provided a commitment to invest in interconnectors and similar European energy projects (see description in recital 19). Those investments would be equivalent to the estimated amount of alleged discrimination.

(236) The usual remedy for violations of Articles 30 and 110 of the Treaty is reimbursement of the charges imposed. However, the reinvestment of the share of the revenue from a parafiscal levy that was collected from imports into projects and infrastructure that specifically benefits imports has been recognised by the Commission as being a suitable remedy to historical potential discrimination under Articles 30 and 110 of the Treaty ([115]).

(237) To determine the share of past revenue from the EEG-surcharge that needs to be allocated to such investments, the first step is to estimate the imports of eligible EEG electricity into Germany. Germany has indicated that in the period of application of the EEG-Act 2012, between January 2012 and July 2014, the share of guarantees of origin corresponding to RES electricity that could be supported under the EEG-Act 2012 amounted to approximately 1 349 GWh: 519 GWh in 2012, 283 GWh in 2013 and 547 GWh in 2014. The much larger share of guarantees of origin not included in this amount corresponds to large, old hydropower plants, which would not be eligible under the EEG-Act 2012. However, since guarantees of origin can be traded separately, they are in themselves not sufficient to determine the extent to which EEG electricity is actually imported. Germany has indicated that the actual imports would have been lower, but has been unable to provide information on the extent to which the calculated imported green electricity described would have been covered by physical import contracts.

(238) The second step is to evaluate the extent to which imported green electricity was discriminated against. The discrimination lies in the fact that, although both domestic EEG electricity production and EEG imports contribute to the EEG-surcharge, it is only domestic EEG electricity production that benefits from it (within the limits of eligibility conditions).

(239) As such, the discrimination can be measured by the level of the EEG-surcharge faced by imported EEG electricity. However, it must be noted that any reimbursement would not cover the whole surcharge as such, but would be limited to the hypothetical form of support received (feed-in tariffs, market premiums or *green electricity privilege*). Indeed, given that the domestic EEG electricity producers also pay the surcharge, but receive the EEG-support, a difference in treatment would only arise to the extent that imports have to pay the surcharge without receiving any support. In essence, discrimination is equivalent to the level of support withheld from imported EEG electricity.

([113]) See for instance State aid SA.33384 (2011/N) — Austria, *Ökostromgesetz 2012*, C (2012) 565 final.
([114]) See footnote 107.
([115]) State aid SA.15876 (N490/2000) — Italy, Stranded costs of the electricity sector (OJ C 250, 8.10.2005, p. 10).

(240) Concerning the feed-in tariffs and the market premiums, the Commission notes that as these vary from one EEG technology to the other, it would be necessary to establish the different types of EEG electricity that were actually imported, and in what quantities, in order to apply those forms of support to imports. However, as Germany has explained that data on actual EEG imports was not available, it is not possible to measure discrimination by applying the specific feed-in tariff or market premium to the corresponding amount of imports.

(241) In contrast, the advantage resulting from the *green electricity privilege* can be more easily established: Germany has indicated that the advantage resulting from the *green electricity privilege* was in practice lower than 4 ct/kWh. This is because electricity suppliers which apply for the privilege only receive the 2 ct/kWh reduction on their whole portfolio if they succeed in having at least 50 % of the electricity coming from RES. In order to avoid or minimise the risk of narrowly missing the 50 % target (in which case the full EEG surcharge would be due on the whole portfolio), electricity suppliers purchase EEG electricity with a safety margin, that is to say, in excess of the 50 % needed, sometimes up to 60 %. In that case, in order to calculate the cost advantage that can potentially be passed on to RES electricity producers, the EEG-surcharge reduction obtained for the whole portfolio, that is to say, 2 ct/kWh, needs to be divided by a higher RES share. For a share of 60 % for instance, the actual cost advantage that could be passed on would amount not to 4 ct/kWh, but to merely 3,3 ct/kWh. On average, the maximum advantage resulting from the *green electricity privilege* was 3,8 ct/kWh in 2012, 3,2 ct/kWh in 2013 and 3,9 ct/kWh in 2014.

(242) It appears that the *green electricity privilege* was slightly higher than the EEG-surcharge in 2012, but lower than the surcharges in 2013 and 2014. It also appears that the *green electricity privilege* was lower than the advantage included in some of the feed-in tariffs (after deduction of the market price), for instance for solar power, but higher than the advantage included in other feed-in tariffs, for instance wind power. But even if the *privilege* may to some extent understate the actual magnitude of discrimination, it must be borne in mind that the amounts of guarantees of origin overstate the magnitude of imports. Therefore, the Commission's view is that the method used by Germany (described in recitals 238 *et seq.*) is appropriate. The advantage arising from the *green electricity privilege*, taken in conjunction with the figures on imported guarantees of origin, can be viewed as a reasonable proxy for the extent to which imported EEG electricity was discriminated against under the EEG-Act 2012.

(243) Using the values for eligible EEG electricity imports set out in recital 237 and the values for the *green electricity privilege* set out in recital 241, the amount to be reinvested equals EUR 50 million ([116]). Hence, the Commission views Germany's commitment to investing EUR 50 million (see recital 19) in interconnectors and European energy projects as remedying the historical potential discrimination under Articles 30 and 110 of the Treaty.

8. **AUTHENTIC LANGUAGE**

(244) As mentioned under Section 1 of this Decision, Germany has waived its right to have the decision adopted in German. The authentic language will therefore be English.

9. **CONCLUSION AND RECOVERY**

(245) Given that the historic violation of Articles 30 and 110 of the Treaty by the EEG surcharge has been remedied, the Commission concludes that the support for EEG electricity producers, which was found to be compatible in recitals 187 and 200 of the Opening Decision, is also compliant with the internal market in so far as its financing mechanism is concerned.

(246) The Commission concludes that Germany has unlawfully implemented the aid for the support of EEG electricity production and for energy-intensive undertakings in breach of Article 108(3) of the Treaty.

(247) The aid should be recovered to the extent that it is incompatible with the internal market.

(248) Recovery should only cover the reductions from the EEG-surcharge granted in respect of the years 2013 and 2014 (hereinafter 'the years concerned').

([116]) 19,7 (for 2012) + 9,1 (for 2013) + 21,3 (for 2014) = EUR 50,1 million.

(249) The recoverable amounts should be limited, for each of the years concerned, to the difference between the compatible amount for that year, as determined according to recitals 251, 252 and 253, and the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned.

(250) The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned is in principle obtained by applying the reduced surcharge for that year to the beneficiary's electricity consumption in that same year. However, in order to speed up the recovery, and as the consumption data for the years concerned is not yet available for all undertakings concerned by recovery, Germany will, as a first step, use the electricity consumption that was submitted in the applications to calculate a preliminary recovery amount, to be recovered immediately. Germany will, as a second step, apply the actual consumption data of the years concerned in order to determine the final recovery amounts and take the necessary steps to ensure recovery or repayment on the basis of those final amounts (this second step in the recovery process is referred to as the 'correction mechanism').

(251) The first step in determining the compatible amount lies in the application of Section 3.7.2 of the 2014 Guidelines. The undertaking which benefited from the reduction must belong to the sectors listed in Annex 3 to the 2014 Guidelines (point 185 of the 2014 Guidelines) or, failing this, the undertaking must have an electro-intensity of at least 20 % and belong to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines (point 186 of the 2014 Guidelines). For the application of point 186 of the 2014 Guidelines, as explained in recital 202, the data submitted in the applications made in respect of the years concerned may be used.

(252) Moreover, if the undertaking is eligible on the basis of recital 251, the undertaking must pay at least 15 % of the additional costs without reduction (point 188 of the 2014 Guidelines). However, the payable amount can be limited at undertaking level to 4 % of the gross value added of the undertaking concerned. Moreover, for undertakings having an electro-intensity of at least 20 %, the payable amount can be limited to 0,5 % of the gross value added of the undertaking concerned (point 189 of the 2014 Guidelines). For the application of point 189 of the 2014 Guidelines, as explained in recital 202, the data submitted in the applications made in respect of the years concerned may be used. If the undertaking is not eligible on the basis of recital 251, the payable amount is, according to Section 3.7.2 of the 2014 Guidelines, in principle equivalent to the EEG-surcharge without reduction, subject to the transit rule in point 197 of the 2014 Guidelines.

(253) If, for either of the years concerned, the payable amount determined on the basis of recital 252 is higher than the amount that was actually paid by the beneficiary in that year, the provisions of the adjustment plan will apply as set out in recital 212: For 2013, the compatible amount should not exceed 125 % of the surcharge that was actually paid in 2013 (that is to say, the same year). For 2014, the compatible amount should not exceed 150 % of the surcharge that was actually paid in 2013 (that is to say, the previous year). As explained in recital 250, the surcharge that was actually paid in 2013 and 2014 may, for the purpose of determining the preliminary recovery amount, be based on electricity consumption data included in the undertaking's application for the reduction in 2013 and 2014. For the purpose of the correction mechanism, the actual electricity consumption data for 2013 and 2014 will be used once it is available.

(254) If the payable amount determined on the basis of recitals 251, 252 and 253 is not higher than the amount that was actually paid by the beneficiary in either of the years concerned, there will be no recovery.

(255) Where the total amount of aid received by a beneficiary is less than EUR 200 000 and where the aid meets all the other criteria of either Commission Regulation (EU) No 1407/2013 ([117]) or Commission Regulation (EC) No 1998/2006 ([118]), such aid should be deemed not to constitute State aid in the sense of Article 107(1) of the Treaty, and should therefore not be subject to recovery.

(256) Where the total amount of aid received by a beneficiary is more than EUR 200 000, of which an amount of less than EUR 200 000 has to be recovered, Regulations (EC) No 1998/2006 and (EU) No 1407/2013 do not apply, because the aid concerns the same eligible costs and cumulation is therefore excluded (Article 5(2) of Regulation (EU) No 1407/2013 and Article 2(5) of Regulation (EC) No 1998/2006). Such amounts should therefore have to be recovered.

([117]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).
([118]) 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 (OJ L 379, 28.12.2006, p. 5).

(257) The Commission has further examined whether there are any obstacles to recovery pursuant to Article 14 of Regulation (EC) No 659/1999. As described in recital 172, some interested parties have argued that the adjustment in 2013 and 2014 should be as small as possible in order to safeguard the beneficiaries' legitimate expectations, and that no recovery should take place. However, for the reasons stated in recitals 146 *et seq*., the Commission's decision in case NN 27/00 cannot give rise to legitimate expectations on the part of the beneficiaries, given that the EEG-Act 2012 is different from the EEG-Act 2000 and was adopted more than 10 years later and that in particular the BesAR did not exist in the EEG-Act 2000,

HAS ADOPTED THIS DECISION:

Article 1

The State aid for the support of electricity production from renewable energy sources and from mine gas, including its financing mechanism, granted on the basis of the *Erneuerbare-Energien-Gesetz* 2012 (EEG-Act 2012), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market subject to the implementation of the commitment set out in Annex I by Germany.

Article 2

The Commission accepts the adjustment plan submitted by Germany in respect of the years 2013 and 2014, as set out in Annex II.

Article 3

1. The State aid consisting of reductions in the surcharge for the funding of support for electricity from renewable sources (EEG-surcharge) in the years 2013 and 2014 for energy-intensive users (*Besondere Ausgleichsregelung*, BesAR), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market if it falls into one of the four categories set out in this paragraph.

Where the State aid was granted to an undertaking which belongs to a sector listed in Annex 3 to the Guidelines on State aid for environmental protection and energy 2014-20 (2014 Guidelines), it is compatible with the internal market if the undertaking paid at least 15 % of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which are subsequently passed on to their customers. If the undertaking paid less than 15 % of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4 % of its gross value added or, for undertakings having an electro-intensity of at least 20 %, at least 0,5 % of gross value added.

Where the State aid was granted to an undertaking which does not belong to a sector listed in Annex 3 to the 2014 Guidelines but had an electro-intensity of at least 20 % in 2012 and belonged, in that year, to a sector with a trade intensity of at least 4 % at Union level, it is compatible with the internal market if the undertaking paid at least 15 % of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which were subsequently passed on to electricity consumers. If the undertaking paid less than 15 % of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4 % of its gross value added or, for undertakings having an electro-intensity of at least 20 %, at least 0,5 % of gross value added.

Where the State aid was granted to an undertaking eligible for compatible State aid on the basis of the second or third subparagraph, but the amount of the EEG-surcharge paid by that undertaking did not reach the level required by those subparagraphs, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125 % of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150 % of the surcharge that the undertaking actually paid in 2013.

Where the State aid was granted to an undertaking not eligible for compatible State aid on the basis of the second or third subparagraph, and where the undertaking paid less than 20 % of the additional costs of the surcharge without reduction, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125 % of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150 % of the surcharge that the undertaking actually paid in 2013.

2. Any aid that is not covered by paragraph 1 is incompatible with the internal market.

Article 4

Individual aid granted on the basis of the aid schemes referred to in Articles 1 and 3 does not constitute aid if, at the time it was granted, it fulfilled the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ([119]) which was applicable at the time the aid was granted.

Article 5

Individual aid granted on the basis of the aid schemes referred to in Articles 1 and 3 which, at the time it was granted, fulfilled the conditions laid down by the regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98, or by any approved aid scheme, is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

Article 6

1. Germany shall recover the incompatible aid referred to in Article 3(2) from the beneficiaries according to the method described in Annex III.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([120]).

4. Germany shall cancel all outstanding payments of aid under the scheme referred to in Article 3(2) with effect from the date of adoption of this Decision.

Article 7

1. Recovery of the incompatible aid referred to in Article 3(2) shall be immediate and effective.

2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision by recovering the incompatible aid granted.

3. Where Germany recovers only the preliminary recovery amounts set out in paragraph 4 of Annex III, Germany shall ensure that the correction mechanism described in paragraph 4 of Annex III is implemented within one year following the date of notification of this Decision.

Article 8

1. Within two months following notification of this Decision, Germany shall submit the following information:

(a) the list of beneficiaries that have received aid referred to in Article 3(1) and (2) and the total amount of aid received by each of them under the scheme;

([119]) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

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

(b) the total preliminary recovery amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision, including the commitment set out in Annex I;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid and that the commitment set out in Annex I is complied with.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 3(2) has been completed and the commitment set out in Annex I is fully implemented. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 9

Germany has committed to reinvest EUR 50 million in interconnectors and in European energy projects. Germany shall keep the Commission informed of the implementation of this commitment.

Article 10

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 November 2014.

For the Commission

Margrethe VESTAGER

Member of the Commission

ANNEX I

COMMITMENT SUBMITTED BY GERMANY ON 7 JULY 2014

'Article 110/30 issue for existing installations and Grünstromprivileg (EEG 2012)

For the EEG 2012, a global solution could be conceived for both the Grünstromprivileg and the Article 30/110 issue. The solution would consist of the reinvestment into interconnectors or similar European energy projects of the estimated amount of the alleged discrimination. The reinvestment could be made in parallel to the progress of the relevant project. On the basis of the figures communicated by Germany, the reinvestment should amount to EUR 50 million for the period January 2012-July 2014. Again, Germany offers this commitment by safeguarding its legal position (no discrimination).'

ANNEX II

COMMITMENT SUBMITTED BY GERMANY ON 4 JULY 2014

'Die Rückforderung bezogen auf ein Unternehmen ergibt sich aus der Differenz der entsprechenden EEG-Kosten nach Umwelt- und Energiebeihilfeleitlinien (EEAG) und der nach EEG 2012 bemessenen EEGKosten. Dabei begrenzt der Anpassungsplan die nach EEAG zu leistende Zahlung auf max. 125 % (für 2013) bzw. max. 150 % (für 2014) der nach EEG 2012 für 2013 geleisteten EEG-Zahlung (vgl. folgende schematische Darstellung). Negative Rückforderungsbeträge werden nicht berücksichtigt.

Schematische Darstellung der Berechnung

$$\text{Rückforderung}_{2013} = \text{Z(Anpassplan)}_{2013} - \text{Z(EEG2012)}_{2013}$$

$$\text{Mit: Z(Anpassplan)}_{2013} = \text{Minimum von Z(EEAG) und } 125\ \% \times \text{Z(EEG2012)}_{2013}$$

$\text{Rückforderung}_{2013}$: Rückforderung für das Jahr 2013

$\text{Z(Anpassplan)}_{2013}$: Zahlung gemäß Anpassungsplan für 2013

Z(EEAG)_{2013}: Zahlung gemäß EEAG für 2013

Z(EEG2012)_{2013}: Für 2013 nach EEG2012 tatsächlich geleistete EEG-Zahlung

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Aufgrund der Dringlichkeit einerseits und zur Begrenzung des ohnehin als sehr hoch einzuschätzenden administrativen Aufwandes andererseits ist es nötig, für die Berechnung der unternehmensbezogenen Rückforderungsbeträge ausschließlich auf dem BAFA schon vorliegende Zahlen zurückzugreifen (*). Daher werden die spezifischen Unternehmensdaten (Bruttowertschöpfung zu Marktpreisen, Strombezugsmenge, Stromkosten) der Anträge für 2013 bzw. 2014 verwendet ("Bescheiddaten"), die sich auf das entsprechende Nachweisjahr beziehen (maßgebendes Geschäftsjahr des Unternehmens in 2011 (Voraussetzungsjahr) für Begrenzung in 2013 (Begrenzungsjahr); maßgebendes Geschäftsjahr des Unternehmens in 2012 für Begrenzung in 2014). Demzufolge wird für die Berechnung u. a. jeweils die spezifische Bruttowertschöpfung zu Marktpreisen verwendet, da die Daten für die Bruttowertschöpfung zu Faktorkosten nicht vorliegen. Weiterhin erfordert diese Vorgehensweise, dass der gesamte Berechnungsvergleich auf der angemeldeten Strombezugsmenge im Voraussetzungsjahr beruht, die von der in dem betreffenden Begrenzungsjahr tatsächlich verbrauchten Strommenge abweicht.

Jahresbezug der verwendeten Werte:

	Bescheid für 2013	Bescheid für 2014
Bruttowertschöpfung (zu Marktpreisen)	2011	2012
Strommenge	2011	2012
Stromkosten	2011	2012'

(*) Original footnote: "Die unternehmensbezogenen Daten des Jahres 2013 liegen dem BAFA nicht vor. Unternehmensbezogene Daten des Jahres 2014 existieren naturgemäß noch nicht.".

Translation

'Recovery [the recoverable amount] in respect of a given undertaking results from the difference of the relevant EEG costs as determined on the basis of the Guidelines on State aid for environmental protection and energy 2014-20 ("2014 Guidelines") and of the EEG costs as determined on the basis of the EEG-Act 2012. In that respect, the adjustment plan limits the payment to be made on the basis of the 2014 Guidelines to a maximum of 125 % (for the year 2013) and to a maximum of 150 % (for the year 2014) of the payment made in respect of the year 2013 according to the EEG-Act 2012 (see diagram). Negative recovery amounts are not taken into account.

Diagram: method of calculating recovery

$$\text{Recovery}_{2013} = \text{P(Adjustment plan)}_{2013} - \text{P(EEG2012)}_{2013}$$

$$\text{P(Adjustment plan)}_{2013} = \text{Minimum of P(EEAG) and } 125\ \% \times \text{P(EEG2012)}_{2013}$$

Recovery_{2013}: Recovery in respect of the year 2013

$\text{P(Adjustment plan)}_{2013}$: Payment due according to the adjustment plan for 2013

P(EEAG)_{2013}: Payment due according to the 2014 Guidelines for 2013

P(EEG2012)_{2013}: Actual payment made on the basis of the EEG-Act 2012 for 2013

In view of the urgency, and in order to limit the administrative effort, which is estimated to be very high, it is necessary to calculate the undertakings' recovery amounts solely on the basis of the data which is already available to the BAFA (*). Hence, use will be made of the company-specific data (on gross value added at market prices, electricity consumption and electricity costs) which was submitted in the undertakings' applications for 2013 and 2014, but which corresponds to the year for which evidence had to be submitted (that is to say, the business year of 2011 for a reduction granted in 2013, and the business year of 2012 for a reduction granted in 2014). Accordingly, the calculation is based on the gross value added at market prices, as the data concerning the gross value added at factor costs is not available. Moreover, the compared calculation must be based on the electricity consumption data which was submitted in the applications and which corresponds to the year for which evidence had to be submitted. That electricity consumption data is different from the data on the electricity that was actually consumed in the year for which the reduction is granted.

Reference years of the values used:

	BAFA decision for 2013	BAFA decision for 2014
Gross value added at market prices	2011	2012
Electricity consumed	2011	2012
Electricity costs	2011	2012'

(*) Original footnote: "Company-specific data for 2013 is not available to the BAFA. Company-specific data for 2014 does not exist yet.".

ANNEX III

RECOVERY METHOD

1. Recovery shall only cover the reductions from the EEG-surcharge granted in respect of the years 2013 and 2014 ('the years concerned').

2. The recoverable amount shall be equivalent, for each of the years concerned, to the difference between the compatible amount for that year, as determined in accordance with paragraphs 5 to 8, and the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned, as determined in accordance with paragraphs 3 and 4.

The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned

3. The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned shall be obtained by applying the reduced surcharge for that year to the beneficiary's electricity consumption in that same year.

4. By way of derogation of paragraph 3, Germany may, as a first step, use the electricity consumption that was submitted in the beneficiary's application for the year concerned to calculate a preliminary recovery amount. In that case, the preliminary recovery amount shall be recovered without delay, and Germany shall, as a second step, determine the final recovery amount on the basis of the actual consumption data and take the necessary steps to ensure recovery or repayment on the basis of that final amount ('correction mechanism').

The compatible amount

5. If the beneficiary belongs to a sector listed in Annex 3 to the 2014 Guidelines (point 185 of the 2014 Guidelines), or if the beneficiary has an electro-intensity of at least 20 % and belongs to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines (point 186 of the 2014 Guidelines), the beneficiary is eligible for aid in the form of reductions in the funding of support for electricity from renewable sources. For the application of point 186 of the 2014 Guidelines, the data submitted in the application made in respect of the year concerned may be used.

6. If the beneficiary is eligible on the basis of paragraph 5, the compatible amount is equivalent to 15 % of the EEG-surcharge without reduction (point 188 of the 2014 Guidelines). However, the compatible amount may be limited at undertaking level to 4 % of the gross value added of the undertaking concerned. Moreover, for undertakings having an electro-intensity of at least 20 %, the compatible amount may be limited to 0,5 % of the gross value added of the undertaking concerned (point 189 of the 2014 Guidelines). For the application of point 189 of the 2014 Guidelines, the data submitted in the application made in respect of the year concerned may be used.

7. If the beneficiary is not eligible on the basis of paragraph 5, the compatible amount is equivalent to 20 % the EEG-surcharge without reduction (point 197 of the 2014 Guidelines).

8. If, for either of the years concerned, the compatible amount determined on the basis of paragraphs 6 and 7 is higher than the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned, the compatible amount shall be limited as follows:

(a) for 2013, the compatible amount shall not exceed 125 % of the amount of EEG-surcharge that was actually paid by the beneficiary in the year 2013 (that is to say, the same year);

(b) for 2014, the compatible amount shall not exceed 150 % of the amount of EEG-surcharge that was actually paid by the beneficiary in the year 2013 (that is to say, the previous year).

COMMISSION DECISION (EU) 2015/1586

of 26 February 2015

on measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo airport

(notified under document C(2015) 1281)

(Only the Polish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

1.1. Proceedings before the Commission

(1) By letter dated 7 September 2012, Poland notified the Commission, for reasons of legal certainty, of plans to finance the conversion of a military airfield near Gdynia in the north of Poland into a civil airport. The measure was registered under number SA.35388.

(2) By letters dated 7 November 2012 and 6 February 2013, the Commission requested further information on the notified measure. On 7 December 2012 and 15 March 2013, Poland submitted additional information. A meeting between the Commission and Poland took place on 17 April 2013. At this meeting Poland confirmed that the notified financing had already been irrevocably granted.

(3) By letter dated 15 May 2013, the Commission informed Poland that it was transferring the case to the register of non-notified aid because the bulk of the financing notified to the Commission had already been irrevocably granted. By letter dated 16 May 2013, Poland submitted further information.

(4) By letter dated 2 July 2013, the Commission informed Poland of its decision to initiate the procedure provided for in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) [2] (hereinafter 'the opening decision') in respect of the financing granted to Port Lotniczy Gdynia-Kosakowo sp. z o. o. (hereinafter 'Gdynia-Kosakowo Airport Ltd' or 'the airport operator') by the city of Gdynia (hereinafter 'Gdynia') and the municipality of Kosakowo (hereinafter 'Kosakowo'). Poland provided its comments on the opening decision on 6 August 2013.

(5) The Commission's decision to initiate the procedure was published in the Official Journal of the European Union [3]. The Commission invited interested parties to submit their comments on the measure in question within one month of the publication date.

[1] OJ C 243, 23.8.2013, p. 25.

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

[3] The Decision notified to Poland under case number C(2013) 4045 final was published with a summary in OJ C 243, 23.8.2013, p. 25.

(6) The Commission did not receive any comments from interested parties. Poland was informed of this by letter dated 9 October 2013.

(7) By letter dated 30 October 2013, the Commission requested further information. Poland provided further information by letters dated 4 and 15 November 2013. A meeting between the Commission and Poland took place on 26 November 2013. Poland provided further information by letters dated 3 December 2013 and 2 January 2014.

(8) On 11 February 2014 the Commission adopted Decision 2014/883/EU ([4]) finding the State aid which Poland had unlawfully granted to Gdynia-Kosakowo Airport Ltd and the State aid which Poland was planning to grant to that airport operator to be incompatible with the internal market. The Decision ordered Poland to recover the aid that had already been granted from Gdynia-Kosakowo Airport Ltd.

1.2. **Proceedings before the General Court and the recovery process**

(9) On 9 April 2014 Kosakowo, followed on 16 April 2014 by Gdynia and the airport operator, challenged Decision 2014/883/EU before the General Court, requesting its annulment ([5]). The applicants claimed, *inter alia*, that the Commission had wrongly included in the amount to be recovered expenditure on activities falling within the remit of public policy.

(10) On 8 and 9 April 2014, respectively, Gdynia together with the airport operator and Kosakowo applied for interim measures in these cases.

(11) On 7 May 2014 Gdańsk-Polnoc District Court issued a decision declaring Gdynia-Kosakowo Airport Ltd bankrupt and ordering its liquidation. All creditors were invited to submit their claims within three months. On 5 June 2014 Kosakowo submitted a claim for PLN 6,28 million (around EUR 1,57 million) plus interest. On 22 August 2014 Gdynia submitted a claim for PLN 85,44 million (around EUR 21,36 million) plus interest.

(12) The applications for interim relief were rejected by orders of the President of the General Court on 20 August 2014 ([6]). In particular, the President of the General Court found that Decision 2014/883/EU could not be considered the decisive cause of harm resulting from bankruptcy of Gdynia-Kosakowo Airport Ltd, given that the company had itself filed for bankruptcy long before the Polish authorities adopted binding measures to execute the Commission decision.

(13) On 15 October 2014 Poland intervened in both main cases, pleading that Decision 2014/883/EU should be annulled as regards the recovery of financial resources allocated to the airport operator and used to finance activities falling within the remit of public policy, as described in point 3.1.1 of the opening decision.

(14) According to information provided by Poland, under the ongoing bankruptcy procedure involving the liquidation of the company's assets, Gdynia-Kosakowo airport is being managed by a trustee ([7]).

1.3. **Withdrawal**

(15) During the proceedings before the General Court it became apparent that the aid which Decision 2014/883/EU declares incompatible with the internal market includes certain investments that do not constitute State aid according to the opening decision.

([4]) Commission Decision 2014/883/EU of 11 February 2014 on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia Kosakowo Airport (OJ L 357, 12.12.2014, p. 51).
([5]) These applications were respectively registered as Case T-215/14 and Case T-217/14.
([6]) Order of the President of the General Court in case T-215/14 R *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* v *Commission* EU:T:2014:733; Order of the President of the General Court in case T-217/14 R *Gmina Kosakowo* v *Commission*, unpublished.
([7]) Letters from the President of the Office for Competition and Consumer Protection of 30 June 2014 and 8 January 2015.

(16) In fact, in recital 25 of the opening decision, the Commission concluded that investment in buildings and equipment for firefighters, customs, airport security guards, police and border guards fell within the remit of public policy and hence did not constitute State aid within the meaning of Article 107(1) TFEU. Consequently, the formal investigation procedure did not relate to this investment.

(17) In Decision 2014/883/EU, however, the Commission found that Polish law obliged airport operators to finance such investment from their own resources. A private market operator would therefore take these costs into account when deciding whether to invest in the airport (as was done in the studies submitted by Poland), and public funding of this investment would be liable to constitute State aid.

(18) Given that the opening decision concluded that investment in buildings and equipment for firefighters, customs, airport security guards, police and border guards did not constitute State aid, the Commission considers that it should not call into question that conclusion in the final decision on the measure. Decision 2014/883/EU should therefore be withdrawn and replaced by this Decision. As all the elements necessary for the assessment of the measure are present on the file, there is no need to reopen the formal investigation procedure.

2. DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE

2.1. Background to the investigation

(19) The case concerns the financing of a new civil airport in Pomerania (Pomorskie province), on the boundary between the city of Gdynia and the municipality of Kosakowo, 25 kilometres away from Gdańsk airport [8]. The new airport is managed by Gdynia-Kosakowo Airport Ltd. The airport operator is wholly owned by the municipalities of Gdynia and Kosakowo.

(20) The objective of the investment project is to create a second airport for Pomerania based on the infrastructure of a military airfield located in Kosakowo [9]. The new airport would mainly handle general aviation traffic (e.g. private jets, gliders/light-sport aircraft), low-cost carriers (hereinafter 'LCC') and charter flights. At the time of notification the airport was expected to start operating at the beginning of 2014. A 2012 report by PricewaterhouseCoopers (hereinafter 'PWC') provided the following forecasts for passenger traffic during the first years of operation: around […] in 2014, […] in 2017, […] in 2020 and at around […] in 2028.

(21) The origins of the project date back to April 2005, when various regional authorities, the Ministry of National Defence and representatives of Gdańsk airport [10] signed a letter of intent to create a new airport for Pomerania based on the infrastructure of the military airfield in Kosakowo.

(22) Under that letter, the management of the future Gdynia-Kosakowo Airport was to be entrusted to Gdańsk airport. The decision was approved by the Minister for Transport and the Minister for National Defence in August 2006.

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[8] Depending on the route chosen, the distance by car between Gdynia and Gdańsk airports is 26 to 29 kilometres; source: Google maps, Bing maps. Gdańsk airport is owned and operated by Gdańsk Lech Wałęsa Airport Ltd, a company set up by public entities. The company's share capital breaks down as follows: city of Gdańsk (32 %), Pomorskie province (32 %), 'Polish Airports' State Enterprise (31 %), city of Sopot (3 %) and city of Gdynia (2 %). Gdańsk Lech Wałęsa airport (hereinafter 'Gdańsk airport') is the third largest airport in Poland. In 2012 it handled 2,9 million passengers (2,7 million on scheduled air services and 0,2 million on charter flights).
The following eight airlines offer scheduled air services from Gdańsk airport (January 2014): Wizzair (22 destinations), Ryanair (7 destinations), Eurolot (4 destinations), LOT (2 destinations), Lufthansa (2 destinations), SAS (2 destinations), Air Berlin (1 destination), Norwegian (1 destination). Since the opening of a new terminal in May 2012 Gdańsk airport has the capacity to handle 5 million passengers a year. According to information provided by Poland, the extension of the terminal (scheduled for 2013-2015) will increase the airport's capacity to 7 million passengers. The investment at Gdańsk airport was also financed using State aid (see the 2008 Commission decision in State aid case N 153/08 — EUR 1,7 million (OJ C 46, 25.2.2009, p. 7); the 2009 Commission decision in State aid case N 472/08, as a result of which Poland granted about EUR 33 million for Gdańsk Airport (OJ C 79, 2.4.2009, p. 2)).

[9] The existing Gdynia-Oksywie military airfield is located on the boundary between the city of Gdynia and the municipality of Kosakowo.

[10] The letter was signed by the authorities of Pomorskie province, the cities of Gdańsk, Gdynia and Sopot, the municipality of Kosakowo and representatives of the Polish government (the governor of Pomorskie province, the Ministry of National Defence and the Ministry of Transport) and Gdańsk airport.

(23) In July 2007 the local authorities in Gdynia and Kosakowo founded a company called Gdynia-Kosakowo Airport Ltd. In December 2009 Gdynia and Kosakowo got the Ministry of Transport to agree that Gdynia-Kosakowo Airport Ltd would henceforth be responsible for the new airport.

(24) On 10 July 2008 the Polish Parliament adopted an amendment ([11]) to the Act of 30 May 1996 on the management of certain State Treasury assets and the Military Property Agency (hereinafter 'the Act of 30 May 1996, as amended') that allowed the conversion of military airfields into civil airports.

(25) On 24 December 2008 the Polish Government adopted an implementing act to the Act of 30 May 1996, as amended (hereinafter 'the implementing act'), containing the list of military airfields or parts thereof which may be used for setting up or expanding civil airports. The implementing act lists Gdynia-Kosakowo military airfield (more specifically, parts thereof) among the military airfields that may, under the Act of 30 May 1996, as amended, be rented to a local authority for a period of at least 30 years for the sole purpose of setting up or expanding a civil airport. The Act of 30 May 1996, as amended, specifies that a local authority may, if it decides not to set up an airport on its own, further lease or rent the rented property for a period of at least 30 years to an entity setting up or managing a civil airport.

(26) Under the Act of 30 May 1996, as amended, and the implementing act, on 9 September 2010 the governor of Pomorskie province, representing the State Treasury, concluded a 30-year rental agreement (running from 9 September 2010 to 9 September 2040) with Kosakowo for the 253 hectare site on which the military airfield is located. Under the rental agreement, Kosakowo is obliged to transfer 30 % of the rent to the Armed Forces' Modernisation Fund ([12]).

(27) On 11 March 2011 Kosakowo leased the land for 30 years (until 9 September 2040) to the airport operator Gdynia-Kosakowo Airport Ltd. The lease agreement lays down the rights and obligations of the parties and the amount of rent to be paid by the airport operator to Kosakowo.

(28) In another agreement signed on 11 March 2011 the shareholders (Gdynia and Kosakowo) laid down the financing conditions for the investment in setting up a civil airport. In this agreement Gdynia pledged to inject a total of PLN 59 million over the period 2011-2013. For its part, Kosakowo pledged to provide a non-cash contribution in the form of a debt-for-equity swap over the period 2011-2040.

(29) Moreover, on 7 March 2011 an operational agreement was signed with the airport's military user for the purpose of laying down rules on the shared use of the airport and its infrastructure by Gdynia-Kosakowo Airport Ltd and the military user ([13]).

The investment project ([14])

(30) Because the existing Gdynia-Kosakowo (Gdynia-Oksywie) airfield was originally used exclusively for military purposes, the operator of the new airport is able to use the existing infrastructure (such as a runway of 2 500 meters, taxiways, an apron, navigation equipment etc.). The total cost of the investment in the conversion project is estimated at PLN 164,9 million (EUR 41,2 million ([15])) in nominal terms and PLN 148,4 million (EUR 37,1 million) in real terms. Table 1 provides an overview of the gradual development of the airport, which is divided into four phases. In Poland's opinion, the total cost of the investment also includes investment relating to the performance of tasks falling within the remit of public policy ([16]), which amount to around PLN […] million (EUR […] million) in total (for all four phases).

([11]) Journal of Laws of 2008, No 144, item 901 (Dz. U. Nr 144, poz. 901).
([12]) This clause implements Article 4h(2) of the Act of 30 May 1996, as amended.
([13]) The operational agreement states that the sharing of operating costs will be governed by a separate agreement (paragraph 5(5)), while the sharing of investment and renovation costs will be the subject of separate agreements to be signed by both parties before any new investment or renovation works (paragraph 9(7)).
([14]) The investment costs presented in this part reflect the investment project as presented in Poland's notification of 7 September 2012 and the 2012 MEIP study provided with the notification.
([15]) The exchange rate used for the purposes of this Decision is EUR 1 = PLN 4, which corresponds to the average weekly exchange rate for 2010. Source: Eurostat.
([16]) In Poland's view, the investment falling within the remit of public policy includes buildings and equipment for firefighters, customs officials, airport security guards, police officers and border guards, an airport perimeter fence with video surveillance etc.

Table 1

Total nominal cost of investment at Gdynia-Kosakowo airport in 2007-2030

The investment project		
	Costs in PLN million	Costs in EUR million
Phase I: 2007-2011	[…]	[…]
Preparatory works (e.g. cleaning of the side, removal of old buildings and trees) and feasibility studies, planning		
Phase II: 2012-2013	[…]	[…]
— Terminal (to be ready in June 2013 and initially used for GA) — Building for the airport administration and the fire brigade — Renovation of the apron, — Energy infrastructure, navigation lights and airport fence — Airport maintenance and security equipment — Adjustment of the navigation equipment — Access roads, petrol station and car park		
Phase III: 2014-2019	[…]	[…]
— Investments necessary to serve bigger airplanes (e.g. Boeing 737 or Airbus A320), such as taxiway extension, apron and airport equipment — Other passenger service oriented investments (e.g. car park extension)		
Phase IV: 2020-2030	[…]	[…]
— Expansion of the Terminal — Extension of the aiport administration and fire brigade building — Extension of aprons, taxiways and car parks		
Total investment costs	164,90	41,02

Source: information provided by Poland.

Financing of the investment project

(31) The investment project is being financed through capital injections by the public shareholders (i.e. Gdynia and Kosakowo). The capital injections are intended to cover both the investment costs and the operating costs of the airport during the initial phase of its operation (i.e. the period to the end of 2019). The public shareholders expect the airport operator to start generating a profit and so be able to finance all its activities from its own revenue in 2020.

(32) Before the project was notified to the Commission (i.e. before 7 September 2012), the public shareholders in Gdynia-Kosakowo Airport Ltd agreed to contribute a total of about PLN 207,48 million ([17]) (about EUR 51,87 million) for the purposes of carrying out the investment project and covering the airport's losses in the early years of its operation. Gdynia was to contribute PLN 142,48 million (around EUR 35,62 million) in cash over the years 2007-2019. Kosakowo provided a cash contribution of PLN 0,1 million (EUR 25 000) when the

([17]) In nominal terms.

company was founded. In the years 2011-2040 Kosakowo was also to make a non-cash contribution of PLN 64,9 million (around EUR 16,2 million) by swapping part of the annual rent payable by Gdynia airport under the lease for shares in the airport (see Table 2).

Table 2

Financing of the investment project through capital increases

	PLN million	EUR million
Before 18 June 2012		
Cash capital injections of Gdynia	60,73	15,18
Cash capital injection of Kosakowo	0,10	0,03
Dept to equity swap of Kosakowo	3,98	1,00
Total contributions before 18 June 2012	64,81	16,20
Foreseen after 18 June 2012		
Cash capital injections of Gdynia:	81,75	20,44
of which:		
in 2013	29,90	7,48
in 2014	[…]	[…]
in 2015	[…]	[…]
in 2016	[…]	[…]
in 2017	[…]	[…]
in 2018	[…]	[…]
in 2019	[…]	[…]
Dept to equity swap of Kosakowo:	60,92	15,23
of which:		
in 2013-2039 (27*PLN […])	[…]	[…]
in 2040	[…]	[…]
Total contributions foreseen after 18 June 2012	142,67	35,67
Total foreseen capital of Gdynia-Kosakowo Airport Lt	207,48	51,87

Source: based on information provided by Poland.

2.2. **Grounds for initiating the formal investigation procedure and the initial assessment**

2.2.1. *Conclusion*

(33) The opening decision raised the following questions:

— The first is whether the public funding of the investment project is in line with the Market Economy Investor Principle (hereinafter 'MEIP'), in particular with regard to (i) the application of the MEIP in time, the methodology to apply the MEIP and (ii) whether the MEIP analysis carried out by the Polish authorities leading to a positive Net Present Value (hereinafter 'NPV') ([18]) is based on realistic and reliable assumptions.

([18]) Net Present Value indicates whether the return on a given project exceeds the (opportunity) costs of capital. A project is considered an economically viable investment if it generates a positive NPV. Investments producing a return lower than the (opportunity) costs of capital are not economically viable. The (opportunity) costs of capital are reflected in the discount rate.

— Second, whether the operating and investment aid to Gdynia airport can be considered compatible with the internal market.

2.2.2. *Application of the MEIP*

(34) As regards the first question, the Commission expressed doubts as to whether the MEIP study conducted in 2012, i.e. after the irrevocable decision to finance the conversion of the airport was taken by the public shareholders, can be used in order to assess the existence of State aid. The Commission therefore had doubts as to whether the counterfactual scenario, in which the investment is assumed to have ended in 2012, was appropriate.

(35) Given that Gdynia airport is to pursue a similar business model (focussing on LCC, charter flights and general aviation) to the existing Gdańsk airport, which still has spare capacity and further expansion plans and which is located only 25 km away, the Commission expressed doubts as to whether the revenue forecast for Gdynia airport was based on realistic assumptions, in particular with regard to the level of airport charges and the level of expected passenger traffic. In particular, the Commission noted that the business plan for Gdynia airport envisaged a higher passenger charge than that applied, after the deduction of discounts/rebates, at Gdańsk airport and other comparable regional airports in Poland.

(36) The Commission also expressed doubts as to whether the business plan took into account all the planned incentives (such as marketing support, rebates, or any other route development incentives etc.) that are to be granted directly by Gdynia airport, its shareholders or other regional authorities to induce airlines to establish new routes from the airport.

(37) Since the growth rate of an undertaking is not generally higher than that of the economy in which it operates (i.e. in terms of GDP growth), the Commission expressed doubts as to whether the turnover growth rate of […] used to calculate Terminal Value is appropriate ([19]). This doubt directly affects the assessment of the investment project's profitability, as the equity value of the new airport becomes positive only in the light of the project's terminal value from 2040 (the cumulative discounted cash flows over the projection period of 2010-2040 are negative).

(38) The Commission therefore considered that the public funding for the investment project gives rise to selective economic benefits for the operator of Gdynia airport. The public funding was also granted from state resources and is imputable to the State. Moreover, it distorts or threatens to distort competition and trade between Member States. As all the cumulative criteria for the notion of aid were met, the Commission considered that the public funding constituted State aid within the meaning of Article 107(1) TFEU.

2.2.3. *Compatibility of the aid*

(39) As regards the second question, the Commission expressed doubts as to whether the investment and operating aid for the airport operator could be considered compatible with the internal market.

(40) As regards the investment aid, the Commission doubted whether all the compatibility criteria set out in the 2005 Aviation Guidelines for investment aid to airports ([20]) were met. In particular, the Commission doubted whether the investment at issue meets a clearly defined objective of common interest, whether the infrastructure is necessary and proportional and whether it offers satisfactory medium-term prospects for use. Moreover, the Commission doubted whether the impact on the development of trade was compatible with the common interest.

([19]) The Terminal Value is the present value of all cash flows generated after the projection period ends. This assumes that the project will last forever and grow at a pre-determined growth rate (in this case, based on the equity value of the airport operator in the last year of the submitted business plan).

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

(41) As regards the operating aid in the form of financing Gdynia-Kosakowo Airport Ltd's operating losses during its first years of operation, the Commission expressed doubts as to whether such aid qualified for the derogation set out in Article 107(3)(a) TFEU. In particular, the Commission expressed doubts as to whether the operating aid could be considered compatible under the Guidelines on national regional aid for 2007-2013 ([21]) (hereinafter 'the RAG').

3. **POLAND'S COMMENTS**

3.1. **Application of the MEIP and the existence of aid**

(42) Poland maintains its position that the public funding of the investment in Gdynia airport is in line with the market economy investor principle (MEIP) and does not therefore constitute State aid. In this connection, Poland refers to the MEIP studies conducted for the investment in the years 2010-2012. Poland states that all MEIP studies resulted in a positive net present value and an internal rate of return ([22]) (hereinafter 'IRR') higher than the costs of capital.

3.1.1. *The decision-making process and the methodological soundness of the MEIP study*

(43) Poland explains that discussions and work on converting the Gdynia/Kosakowo military airfield into a civil airport began back in 2005. At the time other partners were involved (such as Gdańsk airport). Poland also explains that in 2007 Gdynia and Kosakowo established the company Gdynia-Kosakowo Airport Ltd, which has been responsible for the investment ever since.

(44) During the proceedings, Poland submitted three MEIP studies carried out by PWC. The first MEIP study (dated 16 July 2010, hereinafter 'the 2010 MEIP study') was carried out in July 2010. PWC subsequently produced two updates to the MEIP: the first in May 2011 (dated 13 May 2011, hereinafter 'the 2011 MEIP study') and the second in July 2012 (dated 13 July 2012, hereinafter 'the 2012 MEIP study'). These updates incorporate new projections for passenger traffic, changes in the scope of the project, changes in the investment figures and changes in the methodology and the basic inputs into the NPV calculations (such as the beta and the discount rate). In November 2013 Poland provided further information suggesting that new sources of revenue (i.e. the sale of fuel and the provision of navigation services) would enhance the project's NPV. At the date on which the opening decision was adopted Poland had submitted only the 2012 MEIP study.

(45) Poland also explains the time frame for Gdynia and Kosakowo's project to invest in Gdynia airport. In this respect, Poland stresses that the investment process can be divided into two project implementation stages:

i. *The first stage (2007-2009) covered the preparatory works and feasibility studies for the purpose of setting up the new airport (this relates to Phase 1, as described in Table 1):*

(46) Poland explains that the first phase saw the company established by Gdynia and Kosakowo carry out preparatory tasks (e.g. preparation of a masterplan for the investment, the documents necessary to obtain the status of airport operator, a report on the environmental impact of the investment, design documentation, etc.).

(47) Poland maintains that there was no significant capital investment during the first phase and that the public funding granted to the airport operator complied with the *de minimis* aid rules ([23]). Poland states that capital injections into the company prior to 26 June 2009 totalled PLN 1,691 million (about EUR 423 000).

([21]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

([22]) The internal rate of return of an investment is the discount rate at which the net present value equals zero. The IRR is usually compared with the cost of capital.

([23]) The rules applicable at the time were laid down in 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 (OJ L 379, 28.12.2006, p. 5).

ii. *The second phase (from 2010 onwards) concerned the actual conversion of the airport (this relates to Phases II to IV, as described in Table 1):*

(48) Poland goes on to explain that the first, preparatory phase ended in 2010, when both the masterplan ([24]) and the first 2010 MEIP study for Gdynia airport were finalised. Poland points out that the 2010 MEIP study showed that the investment by the two local authorities would be carried out on market terms (i.e. it would not represent State aid), increasing the company's share capital to PLN 6,05 million (around EUR 1,5 million).

(49) The 2010 MEIP study calculated the NPV for the investment project using the free cash flow to the firm (FCFF) method ([25]). This NPV calculation is predicated on the assumption that all the capital injections provided for in the investment plan would be made in order to implement the investment project. This valuation method is used to calculate cash flows to all holders of capital in the firm (both equity holders and bond holders) in the projection period. The cash-flow projections are then discounted by the weighted average cost of capital (WACC) ([26]) to obtain the firm's discounted cash flow (DCF) in the projection period. Terminal value is then calculated using the perpetuity growth method (which assumes a stable growth path based on the FCFF from the most recent projection period). The NPV is based on the sum of the DCF for the projection period and the terminal value. In this case, the 2010 MEIP study provided cash-flow estimates for the period 2010-2040 using a WACC of […] % ([27]). Using these inputs, the study produced a DCF of minus PLN […] million (EUR […] million) for the period 2010-2040 and a (discounted) terminal value of about PLN […] million (EUR […] million). Hence, the NPV of the overall project is estimated at PLN […] million (or EUR […] million), assuming that the airport will generate a stable profit forever, as of 2040, with a growth rate of […] % per annum.

(50) Poland adds at the same time that the shareholders, despite the MEIP study showing that the investment did not constitute State aid, started preparing a notification to the Commission that was to be submitted for reasons of legal certainty only.

(51) Poland goes on to explain that a new MEIP study was carried out in May 2011. Poland states that this MEIP study was an update of the 2010 MEIP study that was carried out in the light of the progress of preparations and the availability of more precise data on the investment plan, its timetable and financing. Poland explains that in the period between the preparation of the 2010 MEIP study and the 2011 MEIP study:

— the shareholders signed an agreement on 11 March 2011 laying down the financing conditions for the investment in the start-up of a civil airport. In this agreement Gdynia pledged to inject a total of PLN 59 million in the period 2011-2013. For its part, Kosakowo pledged to provide a non-cash contribution in the form of a debt-for-equity swap (as described in Table 2) in the period 2011-2040;

— on the same day, 11 March 2011, the company responsible for setting up Gdynia-Kosakowo airport concluded a lease agreement with Kosakowo for the land (specifying the scope of the land leased, the conditions for lease payments, tax issues, etc.);

— the investment costs included in the investment plan were specified and updated.

(52) Poland explains that the 2011 MEIP study also produced a positive NPV. Poland goes on to state that the airport operator's public shareholders made subsequent capital injections on this basis. Poland points out that the company's equity (own capital) was increased to PLN 33,801 million (EUR 8,45 million) in July 2011 and to PLN 64,810 million (EUR 16,20 million) in April 2013.

([24]) The masterplan for the investment project identified the different measures necessary for the conversion of the airport.
([25]) The FCFF is used to calculate the firm's earnings before interest and taxes each year (EBIT), adding depreciation and amortisation (as these are non-cash expenses) and subtracting investment needs, changes in working capital and taxes (See Table 5 of the 2010 MEIP study).
([26]) The weighted average cost of capital is the rate that a company is expected to pay to all its security holders to finance its assets.
([27]) It is based on a risk-free rate of […] %, a credit risk premium of […] %, a corporate tax rate of 19 %, a beta of […], a market rate premium of […] % and a capital structure of […] % debt and […] % equity (See Section 4.4 on page 21 of the 2010 MEIP study). The Commission notes that the calculations submitted by Poland seem to indicate that a WACC with a downward term structure was used for the MEIP study.

(53) In the 2011 MEIP study, the DCF was calculated on the basis of the DCF for the 2011-2040 projection period. The updated DCF stood at PLN (– […]) million (EUR – […] million), suggesting larger losses, while the terminal value was decreased to PLN […] million (around EUR […] million). The NPV was therefore reduced to PLN […] million (or less than EUR […] million). The WACC was reduced to […] % ([28]) and the stable growth rate for the terminal value was decreased from […] % to […] %. These calculations excluded expenditure falling within the remit of public policy, meaning that the projections about the profitability of the investment take no account of the capital necessary to finance the part of the infrastructure claimed to fall within the remit of public policy.

(54) Poland states that a change in the macroeconomic situation (the financial crisis and the economic slowdown) caused the project to be re-assessed in 2012, which resulted in a new MEIP study (namely the 2012 MEIP study). Poland states that the following changes were made to the assumptions in the previous MEIP studies for the purposes of the 2012 MEIP study:

— The passenger traffic forecast for Gdynia airport was reduced.

— The scope of the investment was reduced, cutting the investment costs by PLN […] million (EUR […] million).

— The idea of building a main terminal (together with the related development of road infrastructure and car parks) was abandoned. It was decided instead to expand the capacity of the general aviation terminal by […] % in the second investment phase.

— After verifying the situation on the market, the investment costs related to security had to be increased by PLN […] million (EUR […] million).

— The reduction in the investment resulted in a shorter payback period for the investment (in nominal terms, by […] years, from […] years and […] months to […] years and […] months).

(55) Poland also states that the methodology used for the previous MEIP studies was modified for the purposes of the 2012 MEIP study:

— To better reflect the structure of financing and the cost of debt servicing, the free cash flow to the firm method was replaced by the free cash flow to equity (hereinafter 'FCFE') method ([29]).

— Following changes on the financial (securities) market, the risk-free interest rate and the beta factor were updated. Moreover, companies from outside Europe were eliminated from the comparative analyses. This resulted in a new discount rate.

— The discount rate for calculating the NPV was set on the basis of an analysis of comparable companies, covering both airport companies and companies providing services at airports (whose financial results are closely correlated to the performance of airport companies) ([30]).

— It was assumed that the project would be financed primarily from shareholders' resources and only then from external sources (working capital loans) and operating revenue.

(56) In the 2012 MEIP study, the DCF was calculated on the basis of the DCF for the 2012-2030 projection period (i.e. the projection period used for the previous study was reduced by 10 years). The updated DCF amounted to

([28]) The risk-free rate was increased to […] % and the beta was increased to […]. The capital structure was modified by increasing the share of debt ([…] %) and decreasing that of equity ([…] %).

([29]) FCFE = FCFF + credits and loans taken — credits and loans repaid — interest on credits and loans. In comparison to the FCFF, FCFE is discounted by a rate of return on equity that is always higher than the WACC. As the result, the NPV shows what part of the return on investment is available to shareholders (equity investors). The NPV calculated on the basis of the FCFE does not therefore reflect the overall return on investment, i.e. the return for shareholders and the return for the creditors.

([30]) To reflect the differences in the typical financing structure of airport companies and companies providing airport services, the latter companies' return on equity was increased before calculating averages.

PLN (– […] million) (around EUR (– […]) million), while the terminal value underwent a significant increase, rising to PLN […] million (EUR […] million). The capitalised value of investments already made (PLN […] million) was then deducted. As updated in 2012, the NPV amounted to PLN […] million (or EUR […] million). In order to calculate the NPV a cost of equity of […] % ([31]) was used and the stable growth rate for the terminal value calculation was further decreased from […] % to […] %.

(57) Poland points out that the results of the 2012 MEIP study were still positive and led to further capital injections by the shareholders. Poland stated that the capital of the company had been increased to PLN 91,310 million (EUR 22,8 million) by April 2013 and did not change further in 2013, as summarised in Table 3.

Table 3

Increases in Gdynia airport operator's capital by Gdynia and Kosakowo

Date of decision on entry in the National Court Register	Date of resolution on capital increase	Name of share holder	Subject-matter of the resolution	Value of shares	Share capital	Cumulative share in the total capital increases done up to the end of 2013
				(PLN million)	(PLN million)	
28.8.2007	23.7.2007	Gdynia	creation of new shares	0,030	0,030	0,03 %
28.8.2007	23.7.2007	Kosakowo	creation of new shares	0,020	0,050	0,05 %
4.3.2008	6.12.2007	Gdynia	creation of new shares	0,120	0,170	0,19 %
4.3.2008	6.12.2007	Kosakowo	creation of new shares	0,080	0,250	0,27 %
11.9.2008	21.7.2008	Gdynia	creation of new shares	0,500	0,750	0,82 %
28.7.2009	26.6.2009	Gdynia	404 shares owned by Gdynia Municipality were cancelled without consideration to the shareholder	– 0,404	0,346	0,38 %
28.7.2009	26.6.2009	Gdynia	creation of new shares	1,345	1,691	1,85 %
8.12.2010	29.7.2010	Gdynia	creation of new shares	4,361	6,052	6,63 %
8.7.2011	7.6.2011	Gdynia	creation of new shares	25,970	32,022	35,07 %
1.9.2011	26.7.2011	Kosakowo	creation of new shares	1,779	33,801	37,02 %
25.4.2012	5.4.2012	Gdynia	creation of new shares	28,809	62,610	68,57 %
25.4.2012	5.4.2012	Kosakowo	creation of new shares	2,200	64,810	70,98 %
27.5.2013	8.4.2013	Gdynia	creation of new shares	4,269	69,079	75,65 %
27.5.2013	8.4.2013	Kosakowo	creation of new shares	2,200	71,279	78,06 %
17.6.2013	25.4.2013	Gdynia	creation of new shares	20,031	91,310	100,00 %

Source: information provided by Poland.

([31]) The risk-free rate was reduced to […] % and the beta was reduced to […].

(58) Summing up, Poland states that while the local authorities took preliminary steps to set up Gdynia airport as long ago as 2005, the project did not acquire its final shape until the preparation of the masterplan and the first MEIP study, i.e. in 2010. Poland explains that the project's initial assumptions were substantially revised as a result of changes in external circumstances. Poland argues that the public shareholders' final decision on the project's implementation and final shape was taken in 2012. Poland also stresses that all three versions of the MEIP study confirmed the project's viability and demonstrated that a market economy investor would have carried out the project.

(59) On the counterfactual scenario, Poland argues that national law entitled Kosakowo to use the land on which Gdynia airport is located only to set up a new civil airport. In this respect, Poland explains that the airport site was leased to Kosakowo for a period of 30 years. Poland states that the rental agreement obliges Kosakowo to lease the land only to an entity responsible for setting up and/or operating a civil airport. According to Poland, the land could have been taken back by the State if Kosakowo had not leased out the land to set up a civil airport within 6 months, if the land had been used for other purposes or if the airport had not started its activities within 3 years. As the scenario in which the land of Gdynia airport is used/leased for other than aviation purposes was not possible, it could not be used to establish a counterfactual scenario.

3.1.2. *Reliability of the key assumptions for the 2012 MEIP study*

Traffic projections and revenue forecast

(60) Poland explains that the planned airport charges were based on the publicly available tariffs applied by other airports so as not to disrupt the existing market while ensuring an appropriate level of profitability for the project on the basis of the projected volume of passenger traffic. According to Poland, the charges do not differ significantly from the standard charges collected by small airports. In particular, two newly opened regional airports, Warsaw-Modlin and Lublin, apply standard airport charges similar to those projected in the MEIP study for Gdynia airport.

(61) In reply to the Commission's comment that the charges foreseen for Gdynia airport (PLN 25 (EUR 6,25) in the first 2 years and then PLN 40 (EUR 10) per departing passenger) are higher than the discounted charges applied at Gdańsk airport (PLN 24, that is EUR 6) per departing passenger by an aircraft of LCC type if an international route is served at least 2 times per week; for a domestic route the charge would be PLN 12,5 (EUR 3,1), Poland notes that the level of charges in the business plan is averaged for the whole projection period (2014-2030) and takes into account the fact that in the long-period term charges at Gdańsk airport will have to increase following improved standard of service at that airport.

(62) Moreover, Poland points out that the project's profit margin, the revised (slightly higher) air traffic forecast and the sharing of some operational costs by the military mean that Gdynia airport should be able to maintain reduced passenger charges over a longer period (the reduced charges could be applied until the end of 2021) while maintaining a positive NPV for the public shareholders.

(63) Poland also argues that the updated (in March 2013) traffic forecast for Pomerania assumes higher traffic than the 2012 MEIP study. According to the latest figures, Gdynia airport would handle 1 149 978 passengers in 2030, not 1 083 746. For Pomerania as a whole, passenger numbers are forecast to increase from 7,8 to 9 million passengers in 2030.

(64) In Poland's view, these figures confirm that it is viable for Gdańsk airport and Gdynia airport to coexist and operate jointly on the Pomeranian market. They consider that even if Gdańsk airport is expanded to reach the planned capacity of 7 million passengers, there is room on Pomerania's developing aviation market for another small regional airport (with a capacity of 1 million) that would complement the services provided by Gdańsk airport.

Table 4

Comparison of 2012 MEIP study's traffic projections and the updated traffic projections (March 2013) for Gdynia airport

Year	Commercial traffic		Commercial traffic		General aviation	
	Passengers (000)		Aircraft operations		Aircraft operations	
	Based on the 2012 MEIP study	Updated forecast	Based on the 2012 MEIP study	Updated forecast	Based on the 2012 MEIP study	Updated forecast
	Total	Total	Total	Total	Total	Total
2009	[…]	[…]	[…]	[…]	[…]	[…]
2010	[…]	[…]	[…]	[…]	[…]	[…]
2011	[…]	[…]	[…]	[…]	[…]	[…]
2012	[…]	[…]	[…]	[…]	[…]	[…]
2013	[…]	[…]	[…]	[…]	[…]	[…]
2014	[…]	[…]	[…]	[…]	[…]	[…]
2015	[…]	[…]	[…]	[…]	[…]	[…]
2016	[…]	[…]	[…]	[…]	[…]	[…]
2017	[…]	[…]	[…]	[…]	[…]	[…]
2018	[…]	[…]	[…]	[…]	[…]	[…]
2019	[…]	[…]	[…]	[…]	[…]	[…]
2020	[…]	[…]	[…]	[…]	[…]	[…]
2021	[…]	[…]	[…]	[…]	[…]	[…]
2022	[…]	[…]	[…]	[…]	[…]	[…]
2023	[…]	[…]	[…]	[…]	[…]	[…]
2024	[…]	[…]	[…]	[…]	[…]	[…]
2025	[…]	[…]	[…]	[…]	[…]	[…]
2026	[…]	[…]	[…]	[…]	[…]	[…]
2027	[…]	[…]	[…]	[…]	[…]	[…]
2028	[…]	[…]	[…]	[…]	[…]	[…]
2029	[…]	[…]	[…]	[…]	[…]	[…]
2030	1 083 746	1 149 978	[…]	[…]	[…]	[…]

Source: based on information provided by Poland.

Operating costs (incentives to the airlines, costs related to the military operation of the airport)

(65) Poland explains that the MEIP study takes into account the airport's marketing and promotional measures in estimating:

i. operating costs, such costs being estimated on the basis of the financial statements available for all Poland's major airports,

ii. other costs by type, which are projected for Gdynia Airport at a conservatively high level, also taking into account the corresponding costs in other airports.

(66) Poland also states that the MEIP study assumed that all operating costs would be borne by the investor, thereby taking no account of any sharing of operating costs by the airport's military user. Poland argues that the division of operating costs for shared infrastructure was assumed to be […] for the number of civil and military flights. Poland also explains that the costs of renovation and repairs will be […]. Poland stresses that the adoption of rules on the shared use of the airport (not yet formally agreed with the military user of the airport) will lead to a reduction of at least […] in the costs related to third-party services and payroll. According to Poland, the inclusion of this factor in the MEIP studies would result in a higher projected profitability of the project.

Long-term growth rate

(67) Poland explains that the growth rate of […] % adopted in the MEIP study refers to the terminal value in nominal terms.

(68) Poland also states that the growth rate of […] % is equal to the inflation target set for Poland by the Monetary Policy Council (a decision-making body of the National Bank of Poland). Poland notes that according to the latest forecast by the International Monetary Fund of July 2013, Poland's GDP will grow at the rate of 2,2 % in 2014, 3 % in 2015, 3,3 % in 2017 and 3,8 % in 2018.

The November 2013 update

(69) In November 2013 Poland reported that the airport operator had received the administrative decisions from the Customs Office and the Energy Regulatory Office authorising it to sell fuel to aircraft directly. The sale of fuels by the airport operator would be an additional source of revenue and improve the financial results of the business plan.

(70) According to Poland, all the MEIP studies conducted to date provided for the sale of fuel via an external operator. The sale of fuel by the airport operator would increase the company's profit margin on this activity from PLN […] (EUR […]) per litre (where fuel is sold by an external operator) to PLN […] (EUR […]) (where fuel is sold directly by the airport operator).

(71) In Poland's view, this additional revenue would improve the 2012 MEI update result. Poland points out that the NPV for the project is thereby expected to increase from PLN […] million (EUR […] million) to PLN […] million (EUR […] million). Poland goes on to explain that the IRR would increase from […] % to […] %.

(72) Poland argues that the additional revenue would, alternatively, allow airport charges to be kept down for airlines in the long term.

(73) Poland confirmed that a prudential approach had prevented the direct sale of fuel to aircraft operators from being covered by the MEIP studies. At the time when these studies were carried out, the airport operator did not have the required authorisations or any guarantee that it would be able to obtain them.

(74) In addition, Poland stated that the company intends to provide navigation services to airlines (instead of the Polish Air Navigation Services Agency). Poland points out that this would enable the terminal fee paid by airlines (currently paid to the Agency) to be reduced and thereby make Gdynia airport more attractive to airlines. The airport operator would therefore be able to offer airlines more competitive airport charges than the neighbouring airports.

3.2. **Compatibility assessment**

3.2.1. *Investment aid*

(75) According to Poland, all the compatibility criteria laid down in the 2005 Aviation Guidelines for investment aid to airports are met.

Meeting a clearly defined objective of common interest

(76) Poland argues that setting up Gdynia airport, as an element of Pomerania's transport system, optimises the use of available infrastructure and will have a positive impact on regional development, notably through an increase in airport jobs, income from the aviation market supply chain and the development of tourism.

(77) Poland refers to the 'Regional transport development strategy in Pomerania for 2007-2020', which is based on air traffic forecasts for the region and recognises the need to build a hub of airports working in close cooperation to meet the needs of the Tricity area's population ([32]).

(78) According to Poland, the main arguments for the construction of a hub of airports in the Tricity area are: increasing air traffic in Poland, the lack of scope for increasing Gdańsk airport's capacity and the agglomeration's extension over a distance of nearly 60 km (or over 100 km if the cities of Tczew and Wejherowo are included). Poland argues that although Gdańsk airport currently has a capacity of about 5 million passengers, some air traffic forecasts project that potential passenger traffic at that airport may exceed 6 million passengers in 2035. On the one hand, Poland claimed in its comments that environmental restrictions and residential developments in the vicinity of Gdańsk airport limit the prospects for its further expansion. On the other hand, in its comments of 6 December 2012 Poland invoked the Gdańsk airport masterplan to argue that there are no restrictions regarding the expansion of Gdańsk airport.

(79) Poland states that air safety also warrants the construction of a hub of airports in the Tricity area, with Gdynia airport serving as a back-up, emergency airport (landing at Gdynia airport is possible in about 80 % of cases when the cloud base and visibility do not allow landing at Gdańsk airport).

(80) Lastly, Poland argues that the development of Gdynia airport corresponds to the objectives of the national and regional strategy documents concerning the development of aviation infrastructure in Poland. Poland explains that the development of Gdynia airport is expected to have a positive impact on the development of Pomerania and the use of existing military infrastructure and that it is complementary to Gdańsk airport.

Necessity and proportionality of infrastructure

(81) Poland argues that the infrastructure is necessary and proportional to the objective set because of the small scale of the airport's operations (1,55 % share in the Polish aviation market in 2030), forecasts for passenger traffic volumes that exceed Gdańsk airport's expansion capacity, the attractiveness of the region for tourism and the projected high rate of development for Pomerania.

([32]) The Tricity is an urban area consisting of three major cities in Pomerania (Gdańsk, Gdynia and Sopot). There are currently three airports in the Tricity area: Lech Wałęsa Airport in Gdańsk, the military airfield in Pruszcz Gdański and the military airfield on the boundary between Gdynia and Kosakowo (Gdynia-Oksywie).

(82) Poland emphasises the Gdynia military airfield's strategic role in the region and notes that the use of existing infrastructure minimises investment costs and maximises the positive impact on regional development.

(83) Poland also points out that the costs have been kept to a minimum and the effectiveness of the investment has been increased through the implementation of technical solutions such as, for example, building a general aviation terminal for both general aviation and passenger traffic, housing the majority of airport services (border guards, customs offices, the police, firefighters, management) in a single building and adapting other existing buildings to optimise their use. Moreover, the infrastructure's operating costs will be shared with the army.

Satisfactory medium-term prospects for use

(84) Poland points out that the medium-term prospects for use for Gdynia-Kosakowo airport are satisfactory, owing to GDP growth in Pomerania, which is expected to outstrip the average for Poland and the EU, the region's attractiveness to tourists, its status as a foreign investment hub and the forecast growth in air traffic.

(85) Poland stresses that the planned collaboration with Gdańsk airport and the complementarity of services offered by the two airports (Gdynia airport will be dedicated mainly to general aviation traffic) further strengthen the medium- and long-term prospects for Gdynia-Kosakowo airport.

(86) Poland goes on to explain that the airport also plans to develop specialised aviation-related activities within the airport zone, such as the production of simple service parts, the repair of aircraft parts or the production of other components/products supplied on a 'just-in-time' basis.

(87) Poland points to a letter of intent signed by a commercial bank and expressing the bank's willingness to open talks on financing the investment in Gdynia-Kosakowo airport as further proof of the project's attractiveness.

Impact on the development of trade contrary to the common interest

(88) Since Gdynia-Kosakowo airport is to be an airport with a small market share (serving fewer than 1 million passengers a year), Poland does not consider the project's impact on trade contrary to the common interest. In the light of the projected growth in air traffic, Poland expects Gdańsk and Gdynia airports to form a cooperative aviation hub serving Pomerania's Tricity area and offering complementary services.

(89) Poland stresses that Gdynia airport will not be a competitor for Gdańsk airport, as it will focus on providing services for the general aviation sector (maintenance, repair and overhaul services, a flight academy) and cooperating with Gdynia seaport.

(90) Poland further argues that charter and low-cost traffic at Gdynia-Kosakowo airport will not be at the cost of Gdańsk airport but will result from an overall increase in wealth and mobility. Poland points out that the rate at which Gdańsk airport is growing and the nature of the aircraft operations it handles mean that the number of flights it handles will sooner or later have to be limited. Poland states that these conclusions are presented in the environmental impact assessment report on the project 'Expansion of the Lech Wałęsa Gdańsk Airport'.

(91) Poland explains that the investment in Gdynia-Kosakowo airport can limit the financial and social costs of any restriction on activity at Gdańsk airport. Poland points out that shifting some air traffic from Gdańsk airport to Gdynia airport will result in better use of capacity at both airports.

Necessity of aid and incentive effect

(92) Poland argues that the company would not have carried out the project without public financing. Poland notes that the aid was kept to a minimum and that the project's costs were reduced and optimised by using existing military infrastructure.

(93) In Poland's view, the capital injections into Gdynia airport are necessary and limited to a minimum, as borne out by:

i. the project's internal rate of return of […] %, only slightly higher than the discount rate (cost of equity), which stands at […] % (based on the 2012 MEIP study);

ii. the need, forecast in the financial projections, to borrow working capital loan to finance the airport's operations, as Gdynia-Kosakowo Airport Ltd might otherwise lose liquidity;

iii. the fact that the total financing from the equity capital is lower than total capital expenditure (financing from the equity capital accounts for less than […] of total cash costs in the projection period, including total capital expenditure).

(94) Poland goes on to explain the proportionality of the aid measure, comparing its public financing (about PLN 148 in real terms) with that of a greenfield investment (Lublin-Świdnik Airport, for which the net construction costs were about PLN 420 million) and an investment based on a military airfield (Warsaw-Modlin Airport, the construction of which has so far cost almost PLN 454 million).

3.2.2. *Operating aid*

(95) Poland argues that the project meets the compatibility criteria laid down in the RAG for operating aid in a region covered by Article 107(3)(a) TFEU. In Poland's view, the operating aid for the project:

i. is intended to finance a predefined set of expenditures;

ii. is limited to a necessary minimum and granted on a temporary basis (the aid for operating costs is granted to the extent and for the period necessary to bring the airport into operation, i.e. until the end of 2018);

iii. is degressive and decreases from […] % of capital expenditure in 2013 to […] % in 2018;

iv. is designed to meet the project's goals of regional development and alleviation of existing limitations. Taking into account the amount of the aid in relation to its beneficial effects on the development of Pomerania, Poland argues that it has to be considered proportional.

(96) Poland also stresses that the aid is intended for a small airport with a maximum capacity of 1 million passengers a year, meaning that the risk of its distorting competition and having an effect contrary to the common interest is minimal, especially in view of the planned cooperation between Gdynia and Gdańsk airports and the complementarity of their cooperation.

(97) Poland also points out that the cooperation currently being negotiated with the airport's military user and the latter's participation in the airport's operating costs will reduce the company's losses and operating costs.

4. **OBSERVATIONS BY THIRD PARTIES**

(98) The Commission has received no observations from interested parties following the publication of its decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect to the financing granted to Gdynia-Kosakowo Airport Ltd by Gdynia and Kosakowo.

5. ASSESSMENT

5.1. Existence of State aid

(99) By virtue of Article 107(1) of the TFEU 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

(100) The criteria set out in Article 107(1) of the TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) of the TFEU all of the following conditions need to be fulfilled. Namely, the financial support must:

— be granted by the State or through State resources;

— favour certain undertakings or the production of certain goods;

— distort or threaten to distort competition; and

— affect trade between Member States.

5.1.1. *Economic activity and notion of undertaking*

(101) According to settled case-law, the Commission must first establish whether the Gdynia-Kosakowo Airport Ltd is an undertaking within the meaning of Article 107(1) of the TFEU. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([33]). Any activity consisting in offering goods or services on a given market is an economic activity ([34]).

(102) In its 'Leipzig-Halle airport' judgment the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity ([35]). Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the TFEU, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator ([36]).

(103) In this regard the Commission notes that the infrastructure which is the subject of the present decision is to be operated on a commercial basis by the airport operator Gdynia-Kosakowo Airport Ltd. Since the airport operator will be charging users for the use of this infrastructure, the latter has to be deemed commercially exploitable. It follows that the entity exploiting this infrastructure constitutes an undertaking for the purposes of Article 107(1) TFEU.

(104) However, not all the activities of an airport operator are necessarily of an economic nature ([37]). The Court of Justice has held that tasks for which the State is normally responsible on the basis of its sovereign power are not of an economic nature and do not fall within the scope of the rules on State aid. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform

([33]) Case C-35/96 *Commission* v *Italy* [1998], EU:C:1998:303/[1998] ECR I-3851; C-41/90 *Höfner and Elser* [1991], EU:C:1991:161/[1991] ECR I-1979; Case C-244/94 *Fédération Française des Sociétés d'Assurances* v *Ministère de l'Agriculture et de la Pêche* [1995], EU:C:1995:392/[1995] ECR I-4013; Case C-55/96 *Job Centre*, EU:C:1997:603/[1997] ECR I-7119.

([34]) Case C-118/85 *Commission* v *Italy* [1987], EU:C:1987:283/[1987] ECR 2599; Case C-35/96 *Commission* v *Italy* [1998], EU:C:1998:303/[1998] ECR I-3851;

([35]) Joint Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* v *Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, EU:T:2011:117/[2011] ECR II-01311, confirmed by the ECJ, Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, EU:C:2012:821; see also Case T-128/98 *Aéroports de Paris* v *Commission*, EU:T:2000:290/[2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P, EU:C:2002:617/[2002] ECR I-9297, and Case T-196/04 *Ryanair* v *Commission*, EU:T:2008:585/[2008] ECR II-3643.

([36]) Cases C-159/91 and C-160/91, *Poucet* v *AGV and Pistre* v *Cancave*, EU:C:1993:63/[1993] ECR I-637.

([37]) Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol*, EU:C:1994:7/[1994] ECR I-43.

these activities are considered in general to be of a non-economic nature ([38]). Although public funding of such non-economic activities does not constitute State aid, it has to be strictly confined to compensating for the costs engendered by these activities and may not be used to cover costs associated with another type of economic activity ([39]).

(105) Indeed, it is settled case-law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ([40]). Therefore if a legal system normally requires airport operators to bear the costs of certain services, then airport operators which do not have to bear those costs may enjoy an advantage, even if those services are in themselves deemed non-economic. It is therefore necessary to analyse the legal framework applicable to an airport operator in order to assess whether under that legal framework airport operators are required to bear the cost of providing some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.

(106) The Commission notes that in the opening decision of 2 July 2013, it did not assess whether Polish law requires airport operators to bear the costs of the services that were claimed to be of a non-economic nature. This decision expressly states that investment in buildings and equipment for firefighters, customs, airport security guards, police and border guards fell within the remit of public policy and accordingly did not constitute State aid within the meaning of Article 107(1) TFEU ([41]). As explained in recital 18, the Commission considers that, under these particular circumstances, it should not call this conclusion into question in its final decision.

(107) The amount of PLN […] million (EUR […] million) referred to in the opening decision for the investment costs in buildings and equipment falling within the remit of public policy concerns the 2012 MEIP study. Under the 2010 MEIP study, costs falling within the remit of public policy would amount to PLN […] million (EUR […] million) ([42]), and the 2011 MEIP study refers to an amount of PLN […] million (EUR […] million) ([43]).

(108) Thus, in the light of the above, when assessing the 2010 and 2011 MEIP studies, the Commission will exclude the part of the investment that relates to activities which are claimed to fall within the public policy. And since the funding of this part of the investments is not considered State aid, the Commission will not order its recovery.

5.1.2. *State resources and imputability to the State*

(109) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it ([44]). For the purposes of Article 107 TFEU, local authorities' resources are State resources ([45]). In the present case, the capital injected into Gdynia-Kosakowo Airport Ltd comes from the budgets of two local authorities, Gdynia and Kosakowo. The Commission therefore considers that the resources of the two municipalities involved are State resources.

(110) The Commission considers that it is irrelevant whether the measure takes the form of a direct grant (cash contribution of Gdynia and Kosakowo) or the swapping of part of the airport operator's debt to one of its public shareholders (the rent due to Kosakowo) for equity. Rental income is part of Kosakowo's financial resources and therefore constitutes State resources.

([38]) See, in particular, Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol*/[1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati* v *Commission*, EU:C:2009:191/[2009] ECR I-2207, paragraph 71.
([39]) Case C-343/95 *Cali & Figli* v *Servizi ecologici porto di Genova*, EU:C:1997:160/[1997] ECR I-1547; Commission Decision N309/2002 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.
([40]) See i.a. Case C-172/03 *Wolfgang Heiser* v Finanzamt Innsbruck, EU:C:2005:130/[2005] ECR I-01627, paragraph 36, and case-law cited.
([41]) Recital 25 of the opening decision.
([42]) The 2010 MEIP does not indicate what part of the investments would fall within the remit of public policy. The Commission has therefore used the approach taken in the 2011 MEIP study to determine the amount of the investments that would fall within the remit of public policy. See recital 132.
([43]) During the proceedings before the General Court, Kosakowo indicated that PLN […] million (EUR […] million) had been spent on investments allegedly falling within the remit of public policy.
([44]) Case C-482/99 *France* v *Commission*, EU:C:2002:294/[2002] ECR I-4397.
([45]) Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08, Nord-Pas-de-Calais, EU:T:2011:209/[2011] ECR II-01999, paragraph 108.

(111) Thus, the Commission considers that the capital injected into Gdynia-Kosakowo Airport Ltd is financed through State resources and imputable to the State.

5.1.3. *Economic advantage*

5.1.3.1. Conclusion

(112) The Commission observes that Poland argues, on the one hand, that the capital injections are in line with the MEIP while, on the other hand, considering the aid to be compatible, as the airport operator would not have made investment without the public funding.

(113) To determine whether the measure at issue in this case grants Gdynia-Kosakowo Airport Ltd an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the airport operator's public shareholders to that of a market economy investor guided by prospects of profitability in the longer term ([46]).

(114) Any positive repercussions on the economy of the region in which the airport is located should be disregarded in the assessment, since the Court has explained that the relevant question when applying the MEIP study is 'whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ([47]).

(115) Poland argues that the measures at issue do not grant an economic advantage to Gdynia airport because they are in line with the MEIP. As described in section 3.1, in order to support this, Poland submitted the results of MEIP studies carried out by PWC ([48]). In November 2013 Poland provided further information suggesting that new sources of revenue (i.e. the sale of fuel and navigation services) would enhance the project's NPV. At the time of the opening decision, Poland had submitted only the 2012 MEIP study.

(116) Despite the fact that the 2011 shareholder agreement bound Gdynia and Kosakowo to provide cash and non-cash contributions to finance the investment project until 2040, Poland argues that only the 2012 MEIP study and the later information on the additional revenue streams are relevant when assessing whether the capital injections are compatible with the internal market.

(117) Below, the Commission will first consider the Polish authorities' argument that the question of whether the airport operator received an advantage should be assessed on the basis of the 2012 MEIP study and later information, and not, therefore, on the basis of the 2010 and 2011 MEIP studies (Section 5.1.3.2). The Commission will then assess whether the MEIP is met on the basis of, respectively, the 2010 MEIP study (Section 5.1.3.3), the 2011 MEIP study and the 2012 MEIP study (Section 5.1.3.4).

5.1.3.2. The relevance of the 2010 MEIP study for the assessment of economic advantage

(118) In Stardust Marine the Court stated that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation' ([49]).

([46]) Case C-305/89 *Italy* v *Commission* ('Alfa Romeo'), EU:C:1991:142/[1991] ECR I-1603; Case T-296/97 *Alitalia* v *Commission*, EU:T:2000:289/[2000] ECR II-3871.

([47]) Case C-40/85 *Belgium* v *Commission*, EU:C:1986:305/[1986] ECR I-2321.

([48]) Though the Commission asked the Polish authorities to submit the underlying Excel spreadsheets used for the calculations with the formulas, the Polish authorities submitted the Excel spreadsheets without the formulas.

([49]) Case C-482/99 *France* v *Commission*, EU:C:2002:294/[2002] ECR I-4397.

(119) Furthermore, the Court ruled in EDF that, '[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen' ([50]).

(120) In order to be able to apply the MEIP the Commission has to place itself in the context of the period during which the individual decisions concerning the conversion of the former military airfield into a civil airport were taken. The Commission also has to base its assessment on the information and assumptions available to the public shareholders at the time when the decision regarding the financial arrangements of the investment project was taken.

(121) The Commission considers the 2010 MEIP study the most relevant for the purposes of determining whether the municipalities of Gdynia and Kosakowo acted as a private investor. Indeed, the assessment of whether State intervention is in line with market conditions should be carried out on the basis of an ex-ante analysis, considering information and data available at the time the investment was decided upon.

(122) The Commission observes that only studies and preparatory works for the investment project in question were carried out prior to 2010. These included the masterplan for the investment project, the environmental report, the design documentation for the general aviation terminal, the design documentation for the administration building and the firefighters' building, specialist aviation documents and other studies. By the end of 2010 the cost of these studies stood at PLN […] million (EUR […]) ([51]).

(123) Moreover, as Poland states, in 2010 the public shareholders of the airport operator finalised the preparations for the investment project at issue. In the same year, the public shareholders increased the company's share capital to PLN 6,05 million (around EUR 1,5 million) with a view to implementing the investment project. The main investments in fixed assets (such as the construction of the general aviation terminal) were planned to start in 2011 but actually started in 2012. The Commission believes that any private investor would have assessed the expected profitability of the project at that moment. If the investment plan did not show an acceptable rate of return or if it was based on doubtful assumptions, a private investor would not have started implementing the plan and would not have spent any further money on it, on top of that already spent on the preparatory works mentioned in recital 122. With regard to the capital injections, the Commission notes that the first important capital injection of PLN 4,4 million was decided on 29 July 2010 (almost quadrupling the existing capital of PLN 1,7 million), right after the 2010 MEIP study was finalised on 16 July 2010. In addition, the shareholders' agreement on the further increases of share capital of the company until 2040 (mentioned in recital 28) was signed on 11 March 2011 ([52]) (i.e. before the finalisation of the second MEIP study on 13 May 2011). Moreover, the operational agreement with the airport's military user of the and the lease agreement for the land (mentioned in recital 27) were concluded at the same time, on 7 and 11 March 2011 respectively. Kosakowo also concluded a rental agreement with the State Treasury for the land on which the military airfield is located on 9 September 2010, a few months after the 2010 MEIP study (see recital 26). That land could only be used to set up a new civil airport (see recitals 25 and 59).

(124) The Commission also underlines that Poland confirmed ([53]) that the capital injection decided on 29 July 2010 was based on the economic assessment of the project contained in the 2010 MEIP study. It is therefore clear that at this stage the public shareholders had unequivocally committed themselves to the investment project in question, which was to take 30 years to implement and was subject to a contractual penalty for non-fulfilment of the parties' obligations until its completion in September 2040, as stipulated in the shareholders' agreement (mentioned in recital 28).

([50]) Case C-124/10P *European Commission* v *Électricité de France* (EDF), EU:C:2012:318, paragraph 85.

([51]) See Section 4.7.5 of the 2012 MEIP study. According to comments received from Poland, at 26 June 2009 capital injections into Gdynia airport totalled PLN 1,691 million (about EUR 423 000). Only PLN […] million (about EUR […]) had been used to finance the different studies undertaken in the preparation of the project.

([52]) The agreement provides for Gdynia to make cash contributions totalling PLN 59,048 million (EUR 14,8 million) over the period 2011-2013 and for Kosakowo to make a non-cash contribution (swapping annual rental fees for shares) in the period 2011-2040.

([53]) Letter of 6 August 2013.

(125) By the time the first update of the MEIP was carried out in 2011, the public shareholders had already injected PLN 6,05 million into the company (see Table 3). And by the time the second update of the MEIP study was finalised in July 2012, the public shareholders had injected a total of PLN 64,810 million (i.e. about 70 % of all capital injected).

(126) In addition to the capital injections into the airport operator described above, the various MEIP studies submitted by the Polish authorities also describe the projected capital expenditures ('capex') (i.e. capital outflows) up to 2030. In particular, and as described in Table 1, the 2012 MEIP study shows the investments in fixed assets to be divided into 4 phases. Significantly, according to the information submitted by Poland, capital expenditure in 2012 amounted to PLN […] million (of which more than half was spent before the 2012 study update even started). Figure 1 shows the annual (nominal) capex as presented in the 2012 MEIP study (however, expenditure falling within the remit of public policy has been removed).

Figure 1

Annual capex (2012 MEIP study, excluding expenditure falling within the remit of public policy)

[…]

(127) The 2011 MEIP study and the 2012 MEIP study assessed only the amendments to the initial decision to embark on the investment project that was taken in 2010 on the basis of the 2010 MEIP study. The two subsequent studies show that the shareholders were guided by market developments and were adapting the scope of the project accordingly (either upwards or downwards, depending on the type of investment). These changes were, however, marginal when compared with the overall decision to convert the military base into a civil airport. Figure 2 shows the (nominal) capital expenditure as presented in the 2010, 2011 and 2012 MEIP studies (excluding expenditure falling within the remit of public policy). As can be seen, while the timing and extent of the investments were updated both in 2011 and 2012, these changes were not substantial when compared with the overall size of the project. In 2010, the nominal capex was estimated at about PLN […] million and this figure was increased to about PLN […] million in 2011 (mostly due to new investment in road infrastructure).

Figure 2

Capex (PLN '000) as projected in the 2010, 2011 and 2012 MEIP studies (excluding expenditure falling within the remit of public policy)

[…]

(128) In recitals 122 and 127 the Commission considers that, in order to assess whether Gdynia and Kosakowo behaved like a prudent private investor operating in a market economy, it must primarily base its assessment on the 2010 MEIP study, disregarding any further developments and information that was not at the disposal of those public shareholders at the time when they took their decision to implement the investment project in question.

(129) It is to be expected that a private investor would adjust an investment plan in the course of its implementation in the light of changing circumstances. However, in this case, the Commission needs to assess whether a private investor would have taken on the project of converting a military airfield into a civil airport. In order to do so, it is necessary to determine exactly when the main decision to carry out the project was actually taken. Based on the evidence available in the file (capital injections, the rental agreement and the lease agreement), the key steps had already been taken before the 2011 MEIP study. Given that any private investor would perform an *ex ante* assessment of a project's financial profitability before committing significant resources or entering into binding contractual arrangements, the 2010 MEIP study is the most relevant analysis for evaluating the market conformity of the investment.

(130) The 2011 and 2012 MEIP studies make adjustments to the initial investment plan, on the basis of which the initial decision to embark on the project to convert the military airfield was taken. Hence, the capital injections implemented further to these subsequent MEIP studies cannot be examined in isolation.

5.1.3.3. Application of the MEIP on the basis of the 2010 MEIP study

(131) The 2010 MEIP study is based on a business plan projecting future cash flows for the period 2010-2040. At the time when the MEIP study was carried out, Poland expected the airport to start handling general aviation traffic in 2011, charter flights in 2013 and LCCs in 2015. This would result in a steady increase in the number of passenger served from […] passengers in 2013 up to almost […] million in 2024 and 1,753 million in 2040 (as shown in Table 5 below).

Table 5

Traffic projections for Gdynia airport used in the 2010 MEIP study ('000)

Expected passenger development (2010 MEIP study)										
Year	2013	2014	2015	2016	2020	2024	2028	2032	2036	2040
No of passengers	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 752 835

(132) The 2010 MEIP study, as submitted by Poland, includes capital necessary to finance costs which are claimed to fall with the remit of public policy but does not quantify those costs. On the other hand, the 2011 MEIP study excludes those capital costs but does quantify them. The scope of the investment project in the 2010 and 2011 MEIP studies is substantially the same. Apart from excluding costs related to the public policy remit, the 2011 MEIP study differs from the 2010 MEIP study only inasmuch as it contains updated data on costs and the discount rate, the verified costs of road infrastructure, the financial result of the lease agreement signed by Kosakowo and the airport operator and the schedule of capital injections agreed by Kosakowo and Gdynia. Hence, in order to remove the alleged costs falling within the remit of public policy from the NPV calculations in the 2010 MEIP study, the Commission applied the same methodology as was applied in the 2011 MEIP study to determine the share of the capital investment accounted for by costs falling within the remit of public policy. In particular, the 2011 MEIP study indicates ([54]) that […] % of terminal costs (for the passenger and GA terminals) are deemed to fall within the remit of public policy; […] % costs of the multipurpose building housing the firefighters fall within the remit of public policy as do all costs relating to the fence, monitoring equipment, equipment for baggage screening, equipment for airport security service (in total PLN […] million; EUR […] million). By excluding the same capital cost items and using the same share of costs falling within the remit of public policy for the various buildings (as these figures are based on the floor space in those buildings attributed to security functions, which did not change in the interval between the two studies), the Commission calculated the share of investment costs in the 2010 MEIP study that, for the purpose of this Decision, should be excluded from the MEIP as falling within the remit of public policy. These costs amount to PLN […] million (or EUR […] million).

(133) Furthermore, according to the 2010 MEIP study, the company would be profitable at EBITDA level as from 2018. However, on a cumulative basis (i.e. adding each year the cash flows from previous years), the total discounted cash flow (DCF) over the entire period 2010-2040 is expected to be negative (as illustrated in Figure 3). In other words, the positive cash flows expected to be generated from 2018 are not high enough to offset the highly negative cash flows of the early investment periods. As can be seen, the project's cumulative discounted cash flow would remain negative until 2040.

([54]) See page 35 of the 2011 MEIP study.

Figure 3

Cumulative DCF in PLN '000 (2010 MEIP study)

[…]

Source: Based on the 2010 MEIP study and excluding expenditure falling within the remit of public policy.

(134) After 2040 the value of the airport operator is expected to grow forever, with free cash flow growing at a stable rate of […] %. Under this assumption, Poland calculated the terminal value of the airport operator in 2040. The discounted terminal value amounts to PLN […] million. The original 2010 MEIP study resulted in a positive equity value ([55]) of PLN […] million (that is, around EUR […] million). This positive equity value is due to the difference with the Terminal Value of PLN […] million, which is greater in absolute terms than the NPV of the Free Cash Flow to the Firm (FCFF) estimated at PLN ([…]) million over the period 2010-2040. The IRR for the investment project was estimated at […] %, which is higher than the assumed cost of capital of the airport operator ([…] %). When expenditure falling within the remit of public policy is excluded, the NPV of the free cash flow to the firm (FCFF) remains negative at PLN ([…]) million and the project becomes profitable only due to the calculated terminal value of PLN […] million. The positive equity value of the project (excluding expenditure falling within the remit of public policy) is therefore PLN […] million (that is, around EUR […] million).

(135) Hence, the project only becomes profitable if it is assumed that, beyond the 30-year lease period, the airport operator continues to operate the airport forever and grows at a stable rate of […] % per annum (i.e. the terminal value ([56])). However, as mentioned in recitals 25 - 27, the Polish State owns the land on which the airport is built and rented it to Kosakowo for a period of 30 years until September 2040. Kosakowo subsequently leased the land for 30 years to Gdynia-Kosakowo Airport Ltd. Therefore, according to applicable Polish law (Articles 48 and 191 of the Civil Code), all buildings and facilities constructed on the rented property which are permanently attached to the land are owned by the owner of the property (the State Treasury) and not Gdynia-Kosakowo Airport Ltd or Kosakowo. The rental agreement stipulates that the rented property has to be returned to landlord within […] after the expiry of the rental agreement (§ 4(16)). The rental agreement does not provide for a unilateral right to extend the rent after that period or a right to obtain any compensation for investments in the airport infrastructure. It is also far from clear whether such rights may be claimed under general provisions of Polish civil law. Moreover, the rental agreement (§ 4(11)) and the lease agreement (§ 5(4)) state that in the event that the airport operator ceases its economic activity, the infrastructure is to be handed over to the State without compensation. It therefore seems unreasonable to rely on the exact amount specified in the study, as, under the terms of the rental agreement of 9 September 2010, neither the airport operator nor the shareholders own the airport infrastructure. Hence, the terminal value of the investment relied upon in the MEIP studies is unreliable and very probably significantly overstated.

(136) The Commission notes, moreover, that the key value driver of the Gdynia airport operator's future cash flows is the expected revenue, which will depend on passenger numbers and the level of airport charges paid by the airlines. In the 2010 MEIP study, revenue from LCC and charter flights (passenger, landing, parking fees) accounts for [80 - 90] % of all revenue in 2040 and for an average of [80 - 90] % of all revenue over the whole period assessed, namely 2010 to 2040. This contradicts Poland's statements to the effect that Gdynia airport's activities would complement those of Gdańsk airport because Gdynia would focus on general aviation activities. In fact, as shown by the data presented above, LCC and charter flights are the main source of revenue in most of the years covered by the forecast. However, as will be explained in greater detail below, the bulk of Gdańsk airport's revenue also comes from LCC and charter flights (see recital 140).

(137) In the context of demand among passengers and air carriers, the Commission observes that Gdynia airport would have the same catchment area as Gdańsk airport, which is only about 25 km away from Gdynia-Kosakowo airport. Gdańsk airport was extended in 2012 to serve up to 5 million passengers and a further

([55]) This equity value includes the net present value of the cash flows in 2012-2040 plus the discounted terminal value of Gdynia airport as calculated as of 2040.

([56]) Terminal value is calculated on the basis of the projected cash flow for the last year of the detailed forecast, adjusted to take account of the replacement investment needed to ensure the continued operation of the infrastructure.

extension to serve up to 7 million passengers is planned for 2015. This expansion timetable was already publicly known in 2010, i.e. at the time of preparation the 2010 MEIP study ([57]). Moreover, public funding for the extension of Gdańsk to the capacity of 5 million passengers was also notified to the Commission on 24 September 2008 under State aid case No N 472/08 and was approved by the Commission on 5 February 2009 ([58]).

(138) Poland informed the Commission that the masterplan prepared for Gdańsk airport in 2010 ([59]) provides for the extension of the runway, aprons and other airport infrastructure, as a result of which Gdańsk airport would in future be able to handle over 10 million passengers a year.

(139) The Commission further observes that in 2010 Gdańsk airport handled 2,2 million passengers (i.e. it used 45 % of its capacity, including the capacity under construction). According to the forecasts provided for Gdańsk airport, only 50 to 60 % of the available capacity will be used by 2020 ([60]). These forecasts do not take into account the start of operations at Gdynia airport (i.e. it is assumed that all demand in the catchment area will be met by Gdańsk airport). The Commission notes that Gdańsk airport will be able to meet demand in the region for a long period of time, i.e. until at least 2030, even if dynamic growth in passenger traffic is assumed.

(140) As indicated above, the 2010 MEIP study for Gdynia airport expects the bulk of its revenue ([80 - 90] % on average for the whole period 2012 - 2040) to be generated by LCCs and charter airlines. In this context, the Commission notes that also Gdańsk airport mainly handles LCC and charter traffic. In 2010 LCC and charter flights accounted for 72 % of all passengers handled by Gdańsk airport ([61]).

(141) In view of the close proximity to another established and uncongested airport pursuing the same business model with significant spare capacity in the long run, the Commission considers that the ability of the operator of Gdynia airport to attract traffic and passengers will largely depend on the level of airport charges offered to airlines, notably in comparison with those of its closest competitors.

(142) In this context, the Commission observes that the 2010 MEIP study foresees a passenger charge for charter and LCC flights of PLN 25/PAX (EUR 6,25) until 2014 and PLN 40/PAX (EUR 10) from 2015 (to 2040). The landing charge for such flights was set at PLN 25/tonne (EUR 6,25) for the whole period (the average MTOW (maximum take-off weight) was presumed to be 70 tonnes) while the parking charge was estimated at PLN 4 (EUR 1,0) per 24h/tonne (with an average MTOW of 70 tonnes). According to the 2010 MEIP study, prices were set at levels comparable to those at other regional airports at the time the 2010 MEIP study was conducted. Prices at Gdynia airport were also set on the assumption that there would be no competition from Gdańsk airport.

(143) The Commission also notes that the schedule of tariffs applied by Gdańsk airport since 31 December 2008 fixes the standard passenger charge at PLN 48/PAX (EUR 12,0), the standard landing charge for aircraft above 2 tonnes (i.e. including all charter and LCC aircraft) at PLN 25/tonne (EUR 6,25) and the parking charge at PLN 4,5/24h/ tonne (EUR 1,25).

(144) The Commission, however, notes that the schedule of tariffs applied at Gdańsk airport also offers various discounts and rebates concerning, inter alia, LCC flights. Gdańsk airport applies a reduced passenger charge of

([57]) See, for example, Commission decision No C(2009) 4445 of 3 June 2009, granting Community financial aid in the field of trans-European transport networks.
([58]) See footnote 9.
([59]) The masterplan was commissioned in February 2010 and delivered in November 2010.
([60]) Passenger traffic (in '000 passengers a year) at Gdańsk airport.

Actual passengers:

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of passengers	466	672	1 256	1 715	1 954	1 911	2 232	2 463	2 906

Expected passenger growth

Year	2013	2014	2015	2016	2017	2018	2019	2020	
Number of passengers	3 153	3 311	3 477	3 616	3 760	3 911	4 067	4 230	

([61]) LCCs 64.5 %, charters 7,5 %. In both 2009 and 2011 this figure was 70 %.

PLN 24/PAX (EUR 6) for all new connections (as of 1 January 2004) and for all increases in frequency involving an aircraft with an MTOW of between 50 and 100 tonnes (e.g. Airbus A320 and Boeing 737 and other aircraft used by LCCs). The landing charge applied for such connections is also reduced by 50 % (i.e. to PLN 12,5/tonne). The parking charge is waived completely if the frequency of a connection is at least 6 times a week. In addition, the standard passenger charge is first reduced by PLN 23 for all departing passengers on scheduled domestic connections. An appropriate discount is then applied. The Commission considers, taking into account the discounts and rebates applied at Gdańsk airport, airport charges at Gdynia airport were on average significantly higher than at the established neighbouring airport. By applying the airport charges in question, Gdynia airport, as a new entrant, will not be able to attract significant traffic when there is an established airport with spare capacity in the same catchment area applying lower net charges for new connections and increases in frequency on existing connections. The Commission also notes that the schedule of airport charges for Gdańsk airport provides for the discounted charges to apply until 31 December 2028. Since the 2010 MEIP study (based on the airport operator's business plan at that point in time) views airport charges as the airport operator's main source of revenue, the Commission considers this solution as proof that the 2010 MEIP study is not solid and credible enough to demonstrate that the investment project in question would have been pursued by a private investor.

(145) Given that both Gdynia airport and Gdańsk airport would focus mainly on low-cost and charter carriers, that Gdańsk airport does not use its full capacity, that its actual charges are lower than those assumed in the Gdynia business plan and the close proximity of the two airports, the Commission also considers the assumption that there will be no price competition between the two airports to be mistaken.

(146) The Commission also notes that at the time of the preparation of the 2010 MEIP study the net charges (standard charges after applicable discounts) applied at Bydgoszcz airport (located 196 kilometres and 2 hours 19 minutes by car from Gdynia airport) and Szczecin airport (located 296 kilometres and 4 hours 24 minutes by car from Gdynia airport), the second and third closest Polish regional airports, were significantly lower ([62]).

(147) In view of the above, the Commission considers, given the close proximity of another uncongested airport pursuing the same business model, the airport charges in the 2010 MEIP study, which are higher than those applied in Gdańsk and at other regional airports nearby, to be unrealistic. Taking into account the competitive situation of Gdynia airport, the traffic forecasts included in the 2010 MEIP study were based on unrealistic assumptions.

(148) It should also be noted that the 2010 MEIP study involved neither a sensitivity analysis nor any assessment of the probability of an outcome (such as a worst-case, best-case and base-case scenario). The Commission therefore concludes that the scenario presented in the 2010 MEIP study appears to rely on overly optimistic assumptions regarding the development of passenger traffic and the level of charges.

(149) The Commission performed a number of sensitivity calculations and notes that reducing the annual revenue from passenger charges linked to the LCC and charter traffic by […] % (over the projection period of 2010-2040) suffices to render the project unprofitable despite the significant terminal value, which is itself uncertain, as explained in recital 135. Such a fall in revenue could occur if charges and/or traffic were lower than assumed. In this respect, it is worth noting that the airport charges in the business plan used for the 2010 MEIP study are already […] % higher than at Gdańsk airport ([63]). In this context, it is highly unlikely that Gdynia airport would

([62]) Bydgoszcz Airport: The standard departing passenger charge is PLN 30 (EUR 7,5); the standard landing charge is PLN 45/tonne (EUR 11,25) for the first 2 tonnes of MTOW, PLN 40/tonne (EUR 10) between 2 and 15 tonnes of MTOW, PLN 35/tonne (EUR 8,75) between 15 and 40 tonnes of MTOW, PLN 30/tonne (EUR 7,5) between 40 and 60 tonnes of MTOW, PLN 25/tonne (EUR 6,25) between 60 and 80 tonnes of MTOW and PLN 20/tonne (EUR 5) for every tonne above 80 tonnes of MTOW; a standard parking charge of PLN 8/tonne/24 h (EUR 2; no charge for the first 4 hours). Discounts: Passenger charges may be reduced by from 5 % (if an air carrier has 100-300 passengers departing from Bydgoszcz Airport per month) to 50 % (if an air carrier has more than 8 000 passengers departing from Bydgoszcz Airport per month); landing charge — 50 % discount in the first 12 months of a connection, 50 % for landing between 14.00 and 20.00; landing and parking charges: 10 % for a carrier with 4-10 flights a month, 15 % for 11-30 flights a month, 20 % for more than 31 flights a month. Szczecin airport: The standard departing passenger charge is PLN 35 (EUR 8,75); the standard landing charge is PLN 70/tonne (EUR 17,5); the standard parking charge is PLN is 8/tonne/24 h (no charge for the first 2 hours). Discounts: from 20 % (if a carrier offers departing passengers more than 800 seats a week) to 90 % (if more than 1 300 seats are offered).

([63]) Calculation of passenger charges for LCCs.

be able to attract traffic without providing any significant rebate on the PLN 40 (EUR 10) charge in the business plan. The high sensitivity of the NPV to a seemingly marginal reduction in airport charges (resulting from realistic assumptions) therefore casts significant doubt on the credibility of the initial business plan.

(150) While the 2010 MEIP study was based on traffic projections available at that time and *ex-post* information should not be used to assess directly the MEIP study, the Commission nevertheless notes the extent to which such projections were over-optimistic. Indeed, a comparison of the 2010 and 2012 traffic projections shows significant differences. Not only was the start of the project delayed, but in addition and over the 'positive EBITDA' period, traffic projections were reduced by […] to […] % in each year. Such a significant correction after just two years and without any significant alteration of circumstances constitutes a useful sense check of the initial assumptions. It further bears out the fact that the sensitivity checks performed by the Commission (the scope of which is much narrower in comparison) highlight the unrealistic nature of the assumptions underpinning the conclusion that the project was worthwhile.

Table 6

Comparison of passenger traffic forecasts used in the 2010 MEIP study and the 2012 MEIP study

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total pax in 2010 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total pax in 2012 MEIP Study	—	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Difference		– 53 %	– 69 %	– 55 %	– 38 %	– 36 %	– 29 %	– 27 %	– 25 %
	2022	2023	2024	2025	2026	2027	2028	2029	2030
Total pax in 2010 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 343 234
Total pax in 2012 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 083 746
Difference	– 23 %	– 21 %	– 19 %	– 17 %	– 17 %	– 18 %	– 18 %	– 19 %	– 19 %

(151) Further sensitivity tests show that the project would become unprofitable if overall revenue were just […] % a year lower over the whole projection period or revenue […] % lower and operating expenditure […] % higher. The profitability of the investment is therefore highly sensitive to small changes in the basic assumptions. The Commission considers such changes to be marginal in comparison with the changes made in the successive MEIP studies.

(152) The Commission observes, moreover, that the positive results of the 2010 MEIP study also depend to a great extent on the terminal value of the investment at the end of the period covered by the business plan (i.e. in 2040). Indeed, the discounted cash flow of the company for the period 2010-2040 is negative and amounts to PLN (– […] million). The discounted terminal value on 30 June 2010 amounts to PLN […] million.

(153) With respect to the assumptions underlying the calculations, the terminal value was calculated on the basis of assumptions that the annual growth rate for the investment's cash flow after 2040 would forever amount to […] %. According to standard practice, an undertaking's growth rate should not be higher than that of the economy in which it operates (i.e. in terms of GDP growth). Indeed, the terminal value is calculated at the time when the firm is expected to reach maturity and when the high growth period of the firm is thus over. Given that the economy is expected to comprise undertakings with high growth and others with stable growth, the growth rate of mature firms should therefore be lower than the average growth rate of the overall economy. Poland did not indicate in its comments the basis on which it selected a long-term growth rate of […] %, but it did explain that the long-term growth rate is a nominal growth rate. Based on information available from the IMF, the Commission found that the forecasts for real GDP growth in Poland available in early 2010 indicated that the nominal growth rate of the Polish economy would range from 5,6 % in 2011 to 6,6 % in 2015. With inflation of the order of 2,5 %, real GDP could be expected to grow by 4 %. Hence, the choice of a […] % nominal growth rate for Gdynia airport could at first sight be deemed to be in line with the information available at the time and the standard practice of choosing a growth rate lower than the growth of the economy. However, by choosing a long-term growth rate above inflation (which was estimated at 2,5 % in April 2010), the business plan assumes that the airport would continue to grow every year beyond 2040.

Table 7

Data and forecasts concerning GDP and inflation available from the IMF in April 2010

	2009	2010	2011	2012	2013	2014	2015
% growth GDP (constant prices)	1,70	2,70	3,20	3,90	4,00	4,00	4,00
% growth GDP (current prices)	5,50	4,40	5,60	6,20	6,60	6,50	6,60
% inflation	4,20	3,50	2,30	2,40	2,50	2,50	2,50

Source: International Monetary Fund, World Economic Outlook Database, April 2010 (downloaded from http://www.imf.org/external/data.htm)

(154) Moreover, the Commission notes that in this case, in view of the particularly long projection period and the remoteness of the date for which the terminal value was calculated, the task of determining the most appropriate growth rate is all the more complex and the uncertainty all the greater. Indeed, GDP growth forecasts rarely go beyond a five-year horizon, whereas in this case the model had to predict a reasonable growth rate for the airport after it has been operating for 30 years. This fact indicates that a prudent investor would have undertaken a series of sensitivity tests.

(155) The stable growth rate model used to calculate the terminal value in this case also requires assumptions to be made about the date at which the firm will start growing at a stable rate that it can sustain forever. In the 2010 MEIP study, this date was set at 2040, meaning a projection period of 30 years (2010-2040). In the 2012 MEIP study, the projection period was reduced to 18 years (2012-2030) and the terminal value was therefore calculated in 2030. If the same time horizon is applied to the 2010 MEIP study, the NPV of the project is significantly reduced (PLN […] million or EUR […] million).

(156) The Commission also notes that the 2012 MEIP study specifically mentions that a prudent investor would have taken into consideration the fact that the project entails a particularly long time horizon before reaching profitability (See Section 4.10.1.2 of the 2012 MEIP study, in which it is concluded that 'The positive result of the net present value proves that the investment in the Gdynia-Kosakowo Airport can be an interesting business for potential investors. However, before any decisions are made, investors will have to consider also the long-term investment horizon typical of infrastructure investment projects').

Conclusion

(157) The project to convert Gdynia-Kosakowo airport entails significant investments and a long-period of negative cash flows. Indeed, the business plan shows that the cumulative discounted cash flow over the 2010-2040 projection period is negative (– […] million or — EUR […] million). According to the business plan, the project only achieves positive figures by virtue of the discounted terminal value of PLN […] million calculated for 2040 and forever after, assuming that the airport grows annually and forever thereafter at a nominal rate of […] %). However, as explained in recital 135, it appears that neither the airport operator nor its shareholders own the land, as it remains property of the State Treasury, so the terminal value presented for the airport is not reliable. What is more, despite the significant uncertainties inherent in such a long-term project, the business plan contains no sensitivity analysis and thereby differs from the analysis that a prudent investor would have undertaken for such a project.

(158) Furthermore, the Commission's analysis concluded that the business plan relies on a series of assumptions that are overly optimistic and unrealistic in view of the proximity of Gdańsk airport, which has the same business model, spare capacity and expansion plans. Several sensitivity tests indicate that the NPV of the project becomes negative in the event of minor and realistic modifications to the underlying assumptions.

(159) In view of the above, the Commission considers that a private investor would not have decided to embark on the investment project in question on the basis of the 2010 MEIP study. Therefore the decision of Gdynia and Kosakowo municipalities to finance the conversion of the airfield into a civil airport confers on the airport operator an economic advantage that it would not have obtained under normal market conditions.

5.1.3.4. Application of the MEIP on the basis of the 2011 MEIP study and the 2012 MEIP study

Application of the MEIP on the basis of the 2011 MEIP study

(160) The first update of the MEIP study was conducted in May 2011. Even though the capital injections made after this MEIP study was carried out were pledged before May 2011 (see recital 51 above), the Commission has also assessed whether, on the basis of the information contained in this economic study, the capital injections can be considered to reflect the behaviour of a private investor operating in a market economy. In the 2011 MEIP study, revenue from the project was kept constant, but the capital expenditure was increased (see Figure 2 showing the cumulative investment expenditures). This study also takes into account the previous capital injections and capital expenditure already made. The WACC was reduced slightly (from […] % to […] %) and the long-term growth rate was reduced from […] % to […] %. These updates resulted in a significantly lower NPV of PLN […] million (about EUR […]). This was due to higher losses (the discounted cash flow over the period 2011-2030 would amount to PLN – […] million), and the terminal value would decrease slightly, to PLN […] million.

(161) With regard to passenger demand and related revenue, the Commission considers that the arguments presented in recitals 136 — 141 concerning Gdynia airport's competition for airlines and passengers with Gdańsk airport are also valid for the assessment of the 2011 MEIP study.

(162) The Commission observes in particular that the level of airport charges quoted in the 2011 MEIP study was the same as in the 2010 MEIP study.

(163) Since Gdańsk, Bydgoszcz and Szczecin airports applied the same tariffs in 2011 as in 2010 (including the same discounts), the Commission's assessment of the level of charges in the 2011 MEIP study for Gdynia airport is the same as for the 2010 MEIP studies (see recitals 141 to 147).

(164) The Commission considers that a market economy investor guided by the prospect of profitability would not base any investment decision in the project in question on charges significantly higher than the net charges applied at other Polish regional airports ([64]), especially Gdańsk airport.

(165) In this context, the Commission notes that a reduced airport charge comparable to the airport charges paid at other Polish regional airports (e.g. Gdańsk, Bydgoszcz, Szczecin, Lublin) would result in a negative equity value.

(166) The Commission undertook a number of sensitivity calculations and notes that reducing the annual revenues from passenger charges linked to the LCC and charter traffic by just […] % (over the projection period of 2010-2040) is enough to render the project unprofitable despite the significant terminal value.

(167) Further sensitivity tests suggest that the project would become unprofitable if overall revenue were just […] % a year lower over the whole projection period or if revenue were […] % lower and operating expenses […] % higher. The profitability of the investment is therefore highly sensitive to small changes in the basic assumptions.

(168) The Commission observes, moreover, that the positive results of the 2011 MEIP study also depend to a great extent on the terminal value of the investment at the end of the period covered by the business plan (i.e. in 2040). As explained in recital 135, it doubtful whether the terminal value of the infrastructure accrues in full or even in part to the airport operator and its shareholders.

(169) Consequently, the Commission concludes that, just like the 2010 MEIP study, the 2011 MEIP study is based on unrealistic assumptions, in particular concerning traffic projections and airport charges. Hence, on the basis of the 2011 MEIP study too, the decision of Gdynia and Kosakowo municipalities to finance the conversion of Gdynia-Kosakowo (Gdynia-Oksywie) airfield into a civil aviation airport is inconsistent with the MEIP and therefore confers on the airport operator an economic advantage that would not have obtained under normal market conditions.

Application of the MEIP on the basis of the 2012 MEIP study

(170) Poland considers that the Commission should assess compliance with the MEIP on the basis of the 2012 MEIP study. The Commission notes that the 2012 MEIP study takes into account the previous capital injections and the capital expenditure already made. The 2012 MEIP study shows that the financing provided to Gdynia-Kosakowo Airport Ltd results in a positive equity value of PLN […] million (around EUR […] million) for its shareholders. In addition, the investment project's IRR of […] % is higher than the airport operator's forecast cost of capital ([…] %) ([65]).

(171) The 2012 MEIP study compares the equity value of the company with further investments in a situation in which the new airport becomes operational (the 'basic scenario') with the equity value of the company without further investments in a situation in which the investment project was discontinued as of June 2012 (the 'counterfactual scenario') ([66]).

([64]) In addition to Gdańsk, Bydgoszcz and Szczecin airports, the Commission also analysed airport charges at Lublin airport, a regional airport opened in December 2012. The standard departing passenger fee at Lublin airport is PLN 34 (EUR 8,5); the standard landing fee is PLN 36/tonne; the standard parking fee is PLN is 15/tonne/24 h (no fee for first 4 hours). Discounts: if an air carrier opens an operating base at Lublin Airport, the departing passenger fee is between PLN 4,21 (EUR 1,05) and PLN 5,76 (EUR 1,44) in the first five seasons (2,5 years); a 99 % discount is applied to parking and landing charges. After 5 seasons discounts are applied for new connections. Discounts on passenger, landing and parking fees range from 95 % in the first year of a connection to 25-65 % in the fifth year (depending on the number of passengers). After the fifth year a discount of 60 % is applied if an air carrier handles more than 250 000 departing passengers from Lublin airport.

([65]) Those calculations include expenditure falling within the remit of public policy.

([66]) As the MEIP study was carried out in June 2012, the analysis is based on this date.

(172) This approach is fundamentally flawed for the purpose of assessing whether the conversion of the military airfield into a civil airport involves State aid, since it ignores the substantial amounts of capital already invested in the airport. The correct counterfactual scenario would have been not to start implementing the project at all. The Commission notes that a private investor would not have had invested in the project in the first place if the plans to develop a new civil airport in the area showed no realistic prospect of making a profit on such an investment. Therefore, the counterfactual scenario defined in the 2012 MEIP study is distorted by previous decisions which did not reflect the behaviour of a private investor. Like the previous capital injections, which constitute State aid because a private market operator would not have carried them out, later capital injections in the same project also constitute State aid.

(173) The Commission observes that the basic scenario in the 2012 MEIP study provided by Poland is based on a business plan providing for future cash flows to the equity investors over the period 2012-2030 (i. e. a period of a high growth) ([67]). The projected future cash flows are based on the assumption that the airport will start its activities in 2013. At the time when the 2012 MEIP study was carried out, Poland expected the airport to serve around […] passengers in 2014 and gradually expand its activities up to […] passengers in 2020 and around […] in 2028 (see passenger development forecast in Table 8).

Table 8

Passenger traffic projections for Gdynia airport (in ’000)

Expected growth in passenger numbers										
Year	2013	2014	2015	2017	2018	2019	2020	2023	2026	2030
Total	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 083,7

(174) According to the 2012 MEIP study, it is expected that after 2030 the airport operator will grow forever at a stable growth rate of […]. Under this assumption, Poland calculated the terminal value of the airport operator in 2030.

(175) The Commission notes that, as in the 2010 and 2011 MEIP studies, the key value driver of the future cash flows of the operator of Gdynia airport is the expected aviation revenue, which will depend on the number of passengers and the level of airport charges paid by airlines.

(176) With regard to the expected passenger development, Poland argues that the demand for air passenger services will increase over time and with the expected increase in Poland’s GDP and the region’s development. Poland is therefore of the opinion that the traffic projections are conservative and that actual traffic might be higher than forecast. In Poland’s view, the March 2013 update of the traffic forecast for the region foresees higher traffic than the 2012 MEIP study.

(177) Poland argues that the business plan forecast that Gdynia airport would handle less than […] % of the region’s passenger traffic. Moreover, in Poland’s view, the development of Pomerania’s air services market leaves room for an additional small airport complementing the services offered by Gdańsk airport.

(178) With regard to passenger demand and related revenue, the Commission considers that the arguments presented above for the 2010 and 2011 MEIP studies in recitals 136 - 147 and 161 - 165 are also valid for the assessment of the 2012 MEIP study.

([67]) A widely used method for evaluating equity investment decisions is to consider the equity value of the company. Equity value is the value of a company available to its owners or shareholders. It is calculated by adding up all future cash flows available for equity investors discounted at the appropriate rate of return. The discount rate generally used is the cost of equity, which reflects the risk of the cash flows.

(179) The Commission considers that a market economy investor would not set its charges at a higher level on the assumption that charges at Gdańsk airport would increase in the long-term. In this respect, the Commission observes that the schedule of charges applied at Gdańsk airport foresees the application of discounts until 2028 (i.e. for a period only two years shorter than that in the business plan for the 2012 MEIP study). On this basis, even if the airport charges at Gdańsk airport were to increase after 2028, the Commission considers that the forecast average airport charges over the period of the business plan (i. e. until 2030) remain higher than the average level at the competing airport.

(180) Poland confirmed that the 2012 MEIP study takes into account operating costs related to military activity at the airport. These costs are expected to be offset by the State. Poland also confirmed that no formal agreement has yet been reached on the sharing of costs (both operating and investment costs) between Gdynia airport and the military user.

(181) The Commission considers that a market economy investor would base its assessment only on results foreseeable at the time of the investment decision. The Commission therefore considers that no account should be taken of the possible reduction in costs through the sharing of costs with the airport's military user (and the impact on the airport's overall costs and revenue) when assessing the investment's consistency with the MEIP. Indeed, the 2012 MEIP study does not quantify the cost reductions that the airport operator could obtain in this connection.

(182) As is the case for the 2010 MEIP study, the overall DCF for the project over the period 2012-2030 is negative, as shown in Figure 4. The airport will first start generating positive cash flows in 2020, but the long investment period means that the cumulative cash flow would, in discounted terms, remain negative for the projection period.

Figure 4

Cumulative DCF (in PLN) 2012 MEIP study (excluding expenditure falling within the remit of public policy)

[…]

(183) Consequently, the Commission concludes that the 2012 MEIP study cannot be considered the right test for assessing whether the decision of Gdynia and Kosakowo municipalities to finance the conversion of Gdynia airfield into a civil aviation airport is in line with the MEIP. When the 2012 MEIP study was carried out, the investment decisions of the shareholders had already been taken. The Commission also considers that the capital injections executed after the 2012 MEIP study had been carried out cannot be regarded as autonomous investment decisions taken in isolation, since they concern the same investment project, which the public shareholders started carrying out at the latest in 2010, and the 2012 MEIP study only reflects adjustments or amendments to the initial project.

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(184) The Commission also considers that modifications to the investment plan aimed at generating additional revenue from the sale of fuel by the airport (without an external operator) and offering navigation services should not be taken into account when assessing the investment's consistency with the MEIP. Poland confirmed that these possible additional sources of revenue were included neither in the 2010 MEIP study, the 2011 MEIP study nor the 2012 MEIP study prepared for Gdynia airport, as at the time when these studies were prepared the public shareholders and the company were so unsure about obtaining all necessary permissions and concessions to provide such services that they did not include this revenue in their own projections (not even as an optimistic scenario). As obtaining the requisite authorisations and concessions was unlikely at the time when the MEIP studies were carried out, the Commission cannot take retrospective account of them.

Conclusion

(185) The public funding provided by Gdynia and Kosakowo to the airport operator is not in line with the MEIP. The Commission therefore considers that the measure at issue confers on Gdynia-Kosakowo Airport Ltd an economic advantage that it would not have obtained under normal market conditions.

5.1.4. *Selectivity*

(186) Under Article 107(1) TFEU, for a measure to be defined as State aid, it has to favour 'certain undertakings or the production of certain goods'. In the case at issue, the Commission notes that the capital injections concern the Gdynia-Kosakowo Airport Ltd only. They are therefore, by definition, selective within the meaning of Article 107(1) of the TFEU.

5.1.5. *Distortion of competition and effect on trade*

(187) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid ([68]). The economic advantage conferred by the measure at issue strengthens the airport operator's economic position, as the airport operator will be able to start up its business without bearing the inherent investment and operating costs.

(188) As assessed in Section 5.1.1, the operation of an airport is an economic activity. There is competition, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight) and, on the other hand, between airport operators, which may compete between themselves to be entrusted with the management of a given airport. Moreover, the Commission underlines, especially with regard to LCCs, that airports located in different catchment areas and in different Member States may also be in competition with each other to attract those airlines. The Commission notes that Gdynia airport will handle around […] 000 passengers until 2020 and up to 1 million passengers in 2030.

(189) As mentioned in paragraph 40 of the 2005 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the TFEU, given that they compete with other small airports to attract in particular LCC and charter traffic. The Commission considers that competition and trade between Member States are capable of being affected.

(190) On the basis of the arguments presented in recitals 187 to 189, the economic advantage conferred on the operator of Gdynia airport strengthens its position vis-à-vis its competitors on the Union market of providers of airport services. The public funding under examination therefore distorts or threatens to distort competition and affects trade between the Member States.

5.1.6. *Conclusion*

(191) In view of the arguments presented in recitals 101 to 190, the Commission considers that the capital injections granted to Gdynia-Kosakowo Airport Ltd constitute State aid within the meaning of Article 107(1) TFEU. As the financing had already been made available to Gdynia-Kosakowo Airport Ltd, the Commission also considers that Poland has failed to comply with the prohibition in Article 108(3) TFEU ([69]).

([68]) Case T-214/95 *Het Vlaamse Gewest* v *Commission*, EU:T:1998:77/[1998] ECR II-717.
([69]) Case T-109/01 *Fleuren Compost* v *Commission*, EU:T:2004:4/ [2004] ECR II-127.

5.2. **Compatibility of the aid**

(192) The Commission has examined whether the aid at issue can be deemed compatible with the internal market. As described above, the aid consists of the financing of the investment costs connected with starting up Gdynia airport and operating losses during the first years of the airport's operation (i.e. until 2019, including, according to both the 2010 MEIP study and the 2012 MEIP study).

5.2.1. *Applicability of the 2014 and 2005 Aviation Guidelines*

(193) Article 107(3) TFEU provides for a number of exceptions to the general rule laid down in Article 107(1) TFEU that State aid is not compatible with the internal market. The aid in question can be assessed on the basis of Article 107(3)(c) TFEU, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.

(194) In this regard, the 2005 Aviation Guidelines and Guidelines on State aid to airports and airlines of 31 March 2014 ('the 2014 Aviation Guidelines') ([70]) provide frameworks for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the TFEU.

(195) According to the 2014 Aviation Guidelines, the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([71]) applies to unlawful investment aid to airports. In this respect, if unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission will apply the principles set out in the 2005 Aviation Guidelines to unlawful investment aid to airports granted before 4 April 2014 ([72]).

(196) According to the 2014 Aviation Guidelines, the provisions of the notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports, even if the aid was granted before 4 April 2014 ([73]).

(197) The capital injections constitute unlawful State aid to Gdynia-Kosakowo Airport Ltd granted before 4 April 2014 (see recital 191).

5.2.2. *Distinction between investment and operating aid*

(198) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals 196 - 197, the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.

(199) According to point 25(18) of the 2014 Aviation Guidelines, investment aid is defined as 'aid to finance fixed capital assets, specifically, to cover the capital costs funding gap'.

(200) Operating aid, on the other hand, means aid covering the shortfall between airport revenues and its operating costs, the latter being defined as 'the underlying costs (…) of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent and

([70]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([71]) OJ C 119, 22.5.2002, p. 22.
([72]) Point 173 of the 2014 Aviation Guidelines.
([73]) Point 172 of the 2014 Aviation Guidelines.

administration, but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit' ([74]).

(201) In the light of those definitions, the State aid in favour of Gdynia-Kosakowo Airport Ltd must be considered as investment aid in so far as it was destined to finance fixed capital assets. The part of the annual capital injections that covers losses of the airport operator that are not already included in the EBITDA (that is to say, the annual depreciation of assets, costs of financing, etc.), minus costs falling within a public policy remit as established in recitals 102 to 107, also constitutes investment aid.

(202) In contrast, the part of the annual capital injections that was used to cover annual operating losses ([75]) of Gdynia-Kosakowo Airport Ltd, net of costs included in the EBITDA that are considered to fall within a public policy remit as established in recitals 102 - 107, constitutes operating aid in favour of the airport operator.

5.2.3. *Investment aid*

(203) State aid for financing airport infrastructure is compatible with Article 107(3)(c) TFEU if it complies with the conditions laid down in paragraph 61 of the 2005 Aviation Guidelines:

(i) construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)

(ii) the infrastructure is necessary and proportional to the objective which has been set;

(iii) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(iv) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

(v) the development of trade is not affected to an extent contrary to the Union interest.

(204) In addition, to be compatible with the internal market, State aid to airports, like any other State aid measure, should have an incentive effect and be necessary and proportional to the legitimate objective pursued.

(205) Poland is of the opinion that the public financing of the conversion project at Gdynia airfield complies with all the criteria for investment aid in the 2005 Aviation Guidelines.

(i) *Construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)*

(206) The Commission notes that Pomerania is already efficiently served by Gdańsk airport, which is only about 25 km away from the planned new airport.

(207) Gdańsk airport is located next to the Tricity ring road, which is part of the S6 express road that bypasses Gdynia, Sopot and Gdańsk and provides the large majority of Pomerania's inhabitants with easy access to the airport. Even for Gdynia's inhabitants, the construction of a new airport would not in itself lead to a substantial improvement in connectivity, since both Gdynia and Gdańsk airports are about 20-25 minutes by car from the centre of Gdynia.

([74]) Point 25(21), (22) and (23) of the 2014 Aviation Guidelines.
([75]) Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation ('EBITDA').

(208) The Commission also observes that the Tricity Metropolitan Rail link currently being built with co-financing from the Union's structural funds will enable residents of both Gdańsk and Gdynia to travel directly from the centre of their town to Gdańsk airport in about 25 minutes. The Tricity Metropolitan Rail will also provide people in other areas of Pomerania with direct or indirect rail links to Gdańsk airport.

(209) The Commission also observes that Gdańsk airport currently has a capacity of 5 million passengers a year, whereas actual passenger traffic in 2010 to 2013 was as follows: 2010 — 2,2 million, 2011 — 2,5 million, 2012 — 2,9 million, 2013 — 2,8 million. The Commission also notes that Gdańsk airport is currently being expanded to handle 7 million passengers a year. This investment is to be completed in 2015.

(210) In addition, according to the traffic forecast provided by Poland for Pomerania and used to prepare the 2012 MEIP study, total demand in the region will be […] million passengers a year […].

Table 9

Traffic projections for Pomerania (in millions)

2013	2015	2017	2019	2020	2023	2026	2027	2028	2030
2,8	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	7,7

(211) The Commission also observes that, according to the information provided by Poland, the masterplan for Gdańsk airport provides for further expansion of the airport to handle more than 10 million passengers a year. Depending on the development of traffic, a decision to expand the capacity of the Gdańsk airport above 7 million may therefore be taken in the future.

(212) According to Poland, the updated forecast (prepared in March 2013) shows that demand in the catchment area is expected to be higher than the traffic projections in 2012. According to the modified projections, demand in the catchment area will be about 9 million passengers in 2030. However, even this forecast shows that Gdańsk airport alone would be sufficient, without further investment, to meet demand in the region until at least 2025 (on the basis of the adjusted traffic forecasts described in recital 63).

(213) Furthermore, according to the information provided by Poland, current runway capacity at Gdańsk airport is 40-44 operations an hour, while use is currently averaging 4,7 operations an hour.

(214) On the basis of information provided by Poland (see recitals 209 to 213 above) the Commission observes that Gdańsk airport will be used at only about 50–60 % of its capacity in the coming years. As a result, even with fast growth in passenger numbers in Pomerania, Gdańsk airport will be able to meet demand from airlines and passengers for a long time.

(215) The Commission further observes that Gdańsk airport offers more than 40 national and international destinations (both point-to-point connections and connections to hub such as Frankfurt, Munich, Warsaw and Copenhagen).

(216) As mentioned in recital 78, Poland argues, on the one hand, that the scope for expanding capacity at Gdańsk airport is limited for planning and environmental reasons. On the other hand, it also argues that there are no limits on the scope for expanding capacity at Gdańsk airport. As the arguments regarding the capacity expansion restrictions are contradictory and are not substantiated anyway, the Commission considers that it cannot base its assessment on them.

(217) In view of the spare capacity at Gdańsk airport, which will not be fully used in the long-term, and the plan to further expand capacity at that airport if necessary in the longer term, the Commission does not believe that creating another airport in Pomerania would contribute to the region's development. The Commission observes, moreover, that Pomerania is already well connected thanks to Gdańsk airport and that a new airport will not improve links with this region.

(218) The Commission also notes that the business model for Gdynia airport suggests that it would compete for passengers with Gdańsk airport in the LCC, charter and general aviation markets. Moreover, the creation of a new airport to serve as a back-up, emergency airport cannot justify the scale of investment at Gdynia airport.

(219) As mentioned in recital 77, Poland refers to the 'Regional transport development strategy in Pomorskie province for 2007 - 2020' that according to Poland recognised a need to build a hub of closely collaborating airports serving Pomerania.

(220) The Commission notes however that the 'Regional transport development strategy in Pomorskie province for 2007-2020' presents only the possible strategic directions in which the transport in the region can or should be developed. The conclusions on Gdynia airport are of a very general nature. Moreover, the document does not set out any implementing steps ensuring the use of Gdynia airport for civil aviation. Nor does it impose any obligations concerning this objective. On the contrary, the document underlines that 'Plans for the development of commercial activities at airports Gdynia Kosakowo or Slupsk Redzikowo should primarily be directed at capacity that is economically viable and satisfies existing demand and the possibility of handling freight where it is profitable.'

(221) Similarly, the letter of intent signed on 29 April 2005 by the Ministry of National Defence, the Ministry of Transport, Gdańsk airport and various regional authorities (mentioned in recital 21 of this Decision) is of a very general character, expressing only the intention to introduce civil aviation to the military airfield in Kosakowo.

(222) The Commission also notes that following the adoption of Decision 2014/883/EU, the governor of Pomorskie province together with the mayors of Gdańsk and Sopot (two out of three biggest cities in the region and shareholders in Gdańsk airport) made a written statement. In this statement, they declared that they had not signed the letter of 29 April 2005 with the intention of starting the construction of a new airport in Gdynia. According to the statement, the letter of intent was signed only to safeguard the infrastructure of the existing military airfield for the future cooperation of this military airfield with Gdańsk airport. In this context, Gdynia airport could serve GA traffic only.

(223) The local authorities also underlined that the decision to set up Gdynia airport was an independent decision of Gdynia and Kosakowo, which were repeatedly informed that this investment had no economic justification.

(224) In a letter dated 6 August 2013 Poland announced that the shareholders in Gdańsk airport (including Gdynia) had decided on 30 July 2013 (i.e. after the opening of formal investigation procedure) to set up a working group to analyse the possible scenarios for cooperation of Gdynia and Gdańsk airports. In a letter of 30 October 2013 (provided to the Commission on 4 November 2013), the Mayor of Gdynia reported that the working group had recommended to Gdańsk airport's shareholders that the two Pomeranian airports be merged (by Gdańsk airport taking over Gdynia airport). The Mayor also reported that the details of such a merger were still being analysed.

(225) In the Commission's view, the setting-up of the working group was dictated solely by the opening of the formal investigation procedure and cannot be seen as proof of the implementation of a regional transport strategy. It should also be underlined that the Commission was not informed about any earlier or later actions concerning cooperation between the two Pomeranian airports. The Commission also notes that cooperation between Gdynia airport with Gdańsk airport in the framework of a hub would not eliminate a duplication of infrastructure with no basis in actual transport needs.

(226) In the light of the above, the Commission considers that the investment in Gdynia airport will lead simply to the duplication of infrastructure in the region, which does not meet a clearly defined objective of common interest.

(ii) *The infrastructure is necessary and proportional to the objective which has been set*

(227) As stated in recitals 206 to 226, the Commission considers that the catchment area of Gdynia airport is and will continue to be efficiently served by Gdańsk airport. In addition, both airports would pursue a similar business model and focus mainly on LCCs and charter flights.

(228) In the absence of a clearly defined objective of common interest the Commission considers that the infrastructure cannot be considered to be necessary and proportional to an objective of common interest (see also recital 226).

(iii) *The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure*

(229) As stated in point (i), Gdynia airport is only about 25 km away from the existing Gdańsk airport, and the two airports have the same catchment area and a similar business model.

(230) Gdańsk airport is currently used at less than 60 % of its capacity. Taking into account the investments currently being carried out, Gdańsk airport is sufficient to handle demand in the region until at least 2025-2028, depending on the forecasts used, and its further expansion is feasible.

(231) The Commission also notes that the business plan for Gdynia airport indicates that the airport would generate about [80-90] % of its revenue from serving low-cost and charter carriers. This means that it would be focussing on the markets that represent Gdańsk airport's core business.

(232) In this context, the Commission also observes that Poland has provided no proof of possible cooperation between both airports (see also recitals 224 and 225).

(233) The plans to generate revenues from other aviation and non–aviation activities (production and services) would not be sufficient in themselves to cover the high operating costs related to running Gdynia airport either.

(234) The Commission therefore considers that Gdynia airport does not offer satisfactory medium-term prospects for use.

(iv) *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*

(235) Poland confirmed that all potential users would have access to the airport infrastructure on an equal and non-discriminatory basis without any commercially unjustified discrimination.

(v) *The development of trade is not affected to an extent contrary to the common interest*

(236) The Commission notes that Poland has not provided any proof that Gdynia and Gdańsk airports would form a collaborative aviation hub. Logic suggests that the two airports would actually have to compete for essentially attracting the same passengers.

(237) The Commission further notes that the business plan of Gdynia airport (in which about [80-90] % of revenue is generated by low-cost and charter flights) and the scale of the investment (e.g. a terminal with a capacity of 0,5 million passengers a year that is to be expanded in the future) do not substantiate the claim that Gdynia airport would focus on general aviation traffic and would provide only or mainly services to the general aviation sector.

(238) Taking into account the above and the fact that both airports would focus on LCC and charter flights, the Commission considers that the aid is directed to an airport which would be in direct competition with another airport in the same catchment area, without there being any demand for airport services that could not be met by the existing airport.

(239) The Commission therefore considers that the aid in question would affect trade to an extent contrary to the common interest. This conclusion is reinforced by the absence of a common interest objective that the aid is intended to achieve.

(vi) *Necessity of aid and incentive effect*

(240) Based on the data provided by Poland, the Commission considers that the investment costs may be lower than for the construction of other comparable regional airports in Poland. This is due mainly to the use of existing infrastructure at the military airfield. Moreover, Poland argues that without the aid the investment would not be undertaken by the airport operator.

(241) The Commission further observes that the long period necessary to reach the break-even point for this type of investment means that public financing could be necessary to modify the beneficiary behaviour's in such a way that it proceeds with the investment. Moreover, since the expected profitability of the investment project cannot be established (see recital 185) and a market economy investor would not pursue such project, it is indeed likely that the aid is changing the behaviour of the airport operator.

(242) However, in the absence of a clearly defined objective in the common interest, the Commission concludes that the aid cannot be considered necessary and proportional to that objective.

(243) The Commission therefore considers that the investment aid by Gdynia and Kosakowo in favour of Gdynia-Kosakowo Airport Ltd does not comply with the requirements of the 2005 Aviation Guidelines and cannot be considered compatible with the internal market.

5.2.4. *Operating aid*

(244) The Commission based its assessment of the operating aid in recital 227 of Decision 2014/883/EU on the finding that 'granting operating aid in order to ensure the operation of an investment project that benefits of incompatible investment aid is inherently incompatible with the internal market.' Without the incompatible investment aid Gdynia airport would not exist, as it is entirely financed by that aid, and operating aid cannot be granted for non-existent airport infrastructure.

(245) That conclusion under the 2005 Aviation Guidelines is equally valid under the 2014 Aviation Guidelines and sufficient to find that the operating aid granted to the airport operator is incompatible with the internal market.

(246) Moreover, the first compatibility condition established by the 2014 Aviation Guidelines, according to which operating aid can be considered compatible if it contributes to a well-defined objective of common interest in the form of increasing the mobility of citizens of the Union and connectivity of the regions or facilitates regional development, is clearly not met if the operating aid at issue is aimed at ensuring the functioning of an airport that has been built exclusively with investment aid that is incompatible with the internal market.

(247) Accordingly, the Commission considers that recitals 203 et seq. (which demonstrate that the investment aid granted to Gdynia-Kosakowo Airport Ltd, because of the duplication of airport infrastructures, does not meet a clearly defined objective of common interest and is therefore incompatible with the internal market pursuant to the 2005 Aviation Guidelines) also demonstrate that the operating aid granted to Gdynia-Kosakowo Airport Ltd is equally incompatible with the internal market, as already concluded in Decision 2014/883/EU. The operating aid granted to Gdynia-Kosakowo Airport Ltd (just like the investment aid) will lead simply to the duplication of airport infrastructure in a region which appears already well served by a non-congested airport and therefore does not contribute to a well-defined objective of common interest.

(248) For the sake of completeness, the Commission notes that the same conclusion would be reached if the operating aid were to be assessed in the light of the regional aid rules invoked by Poland. In such a case, the Commission would have to take into account the fact that Gdynia airport is located in an underprivileged region covered by the derogation set out in Article 107(3)(a) of the TFEU, whereby the Commission would have to assess whether the operating aid at stake can be considered compatible under the RAG.

(249) According to paragraph 76 of the RAG, operating aid in regions covered by the derogation in Article 107(3)(a) TFEU may be granted provided that the following cumulative criteria are met: (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate.

(250) Poland is of the opinion that the operating aid is compatible with paragraph 76 of the RAG (see recitals 95 to 97).

(251) Since Pomerania is already served by Gdańsk airport and the new airport will not improve connections with this region, the Commission would not be able to conclude that the aid would contribute to regional development.

(252) The Commission considers, therefore, that the operating aid cannot be considered proportional to the handicaps it seeks to alleviate, as Pomerania does not appear to suffer from any connectivity handicap.

(253) Moreover, the Commission would take the view that the operating aid assessed has been allocated to finance a predefined set of expenditure. However, in view of the Commission's assessment of the business plan for Gdynia airport and its assessment of the level of forecast revenue and costs presented in Section 5.1.3, it cannot be concluded that the aid would be limited to a necessary minimum, granted on a transitional basis and degressive. In particular, with regard to the uncertainties regarding the expected profitability of the airport operator (see section on the existence of aid) the transitional nature and degressivity of the aid cannot be ensured.

(254) Therefore, the Commission considers that the operating aid in favour of Gdynia-Kosakowo airport Ltd granted by Gdynia and Kosakowo is incompatible with the internal market, as it aims to ensure the operation of an airport which exists only because of incompatible investment aid and (just like that investment aid) leads simply to the duplication of airport infrastructure.

5.2.5. *Conclusion on compatibility*

(255) Consequently, the Commission concludes that the State aid granted to Gdynia-Kosakowo Airport Ltd is incompatible with the internal market.

(256) The Commission has identified no other provision concerning compatibility with the internal market that could provide a basis for considering the aid in question compatible with the Treaty. Nor has Poland invoked any provision concerning compatibility with the internal market or provided any substantial arguments that would permit the Commission to consider this aid compatible.

(257) The investment and operating aid which Poland has granted or intends to grant in favour of Gdynia-Kosakowo Airport Ltd is incompatible with the internal market. Poland has unlawfully implemented the aid in breach of Article 108(3) TFEU.

6. **RECOVERY**

(258) In accordance with the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([76]). The Court has also consistently held that the obligation for a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to restore the previously existing situation ([77]). In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([78]).

(259) Following that case-law, Article 14 of Council Regulation (EC) No 659/99 ([79]) laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(260) Therefore, the State aid mentioned above must be reimbursed to the Polish authorities, insofar as it has been paid out.

(261) The Commission recalls that it is settled case-law that the fact that undertakings are in difficulties or bankrupt does not affect the Member State's obligation to recover aid ([80]). In these cases, the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of the liability relating to the repayment of such aid in the schedule of liabilities ([81]). Where the State authorities are unable to recover the full amount of aid, the registration of the liability meets the recovery obligation only if the insolvency proceedings result in the winding up of the undertaking concerned, i.e. the definitive cessation of its activities ([82]),

HAS ADOPTED THIS DECISION:

Article 1

Decision 2014/883/EU is withdrawn.

Article 2

1. The capital injections in favour of Gdynia-Kosakowo Airport Ltd between 28 August 2007 and 17 June 2013 constitute State aid which has been unlawfully put into effect by Poland in breach of Article 108(3) of the Treaty on the Functioning of the European Union and which is incompatible with the internal market, except in so far as these capital injections were spent on investments necessary to carry out the activities that according to Decision C(2013) 4045 final must be considered as falling within the public policy remit.

([76]) Case C-70/72 *Commission* v *Germany*, EU:C:1973:87/[1973] ECR 813, paragraph 13.
([77]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, EU:C:1994:325/[1994] ECR I-04103, paragraph 75.
([78]) Case C-75/97 *Belgium* v *Commission*, EU:C:1999:311/[1999] ECR I-03671, paragraphs 64-65.
([79]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).
([80]) Case C-42/93 *Spain* v *Commission* ('Merco'), EU:C:1994:326/[1994] ECR I-4175, paragraph 33; Case C-496/09 *Commission* v *Italy*, EU:C:2011:740/[2011] I-11483, paragraph 72.
([81]) Case C-277/00 *Germany* v *Commission* ('SMI'), EU:C:2004:238/ [2004] ECR I-4355, paragraph 85; Case 52/84 *Commission* v *Belgium*, EU:C:1986:3/[1986] 89, paragraph 14; Case C-142/87 *Belgium* v *Commission* ('Tubemeuse'), EU:C:1990:125/[1990] I-959, paragraphs 60–62.
([82]) Judgment in C-610/10 *Commission* v *Spain* ('Magefesa'), EU:C:2012:781, paragraph 104 and the case-law cited.

2. The capital injections which Poland is planning to implement in favour of Gdynia-Kosakowo Airport Ltd after 17 June 2013 for the conversion of the Gdynia-Kosakowo military airfield into a civil aviation airport constitute State aid which is incompatible with the internal market. The State aid may accordingly not be implemented.

Article 3

1. Poland shall recover the aid referred to in Article 2(1) from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([83]).

3. Poland shall cancel all outstanding payments of the aid referred to in Article 2(2) with effect from the date of notification of this Decision.

Article 4

1. Recovery of the aid referred to in Article 2(1) and the interest referred to in Article 3(2) shall be immediate and effective.

2. Poland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Poland shall submit the following information to the Commission:

a) the total amount (principal and recovery interest) to be recovered from the beneficiary;

b) a detailed description of the measures already taken and planned to comply with this Decision;

c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Poland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2(1) and the interest referred to in Article 3(2) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Republic of Poland.

Done at Brussels, 26 February 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission

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

ANNEX

INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary	Total amount of aid received (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency.

COMMISSION DECISION (EU) 2015/1587

of 7 May 2015

on the State aid SA.35546 (2013/C) (ex 2012/NN) implemented by Portugal for Estaleiros Navais de Viana do Castelo S.A.

(notified under document C(2015) 3036)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.35546 (2013/C) (ex 2012/NN) ([1]),

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

1. PROCEDURE

(1) By e-mail of 3 October 2012, the Portuguese authorities informally submitted to the Commission a brief memorandum on the State measures seeking to maximise revenues from the privatisation of Estaleiros Navais de Viana do Castelo S.A. ('ENVC'). On the basis of the information provided, the Commission decided to open an *ex officio* case on 5 October 2012, registered with number SA.35546 (2012/CP). Portugal was informed of the opening of the case by letter of 11 October 2012.

(2) The Commission requested additional information by letter of 12 October 2012, to which Portugal replied by e-mail of 9 November 2012 and letter of 20 November 2012. It appeared from that information that ENVC had benefited in the past from a number of measures that might constitute State aid. A conference-call with the Portuguese authorities took place on 16 October 2012. At the request of the Portuguese authorities, a meeting between the Commission and the Portuguese authorities took place on 11 December 2012. Additional information was submitted by Portugal by letter of 28 December 2012 and by e-mail of 18 January 2013.

(3) By letter dated 23 January 2013, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid ('the opening decision').

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]), inviting interested parties to submit their comments on the measures. Portugal submitted its comments on the opening decision by letter dated 12 March 2013. The Commission received no observations from interested parties.

(5) Throughout the formal investigation procedure, Portugal submitted information in numerous occasions in reply to requests for information from the Commission. Moreover, the Commission and the Portuguese authorities held telephone conference-calls on 27 May 2013, 29 July 2013, 13 November 2013 and 20 January 2015. Also, a meeting between the Commission and the Portuguese authorities took place on 17 March 2014.

([1]) State aid — Portugal — State aid SA.35546 (2013/C) (ex 2012/NN) — Past measures in favour of Estaleiros Navais de Viana do Castelo S.A. — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 95, 3.4.2013, p. 118).

([2]) See footnote 1.

(6) By letter dated 27 February 2015, Portugal asked the Commission to confirm that any potential recovery obligation would not be extended to WestSea. In the same letter, Portugal agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation No 1/1958 ([3]) and to have the present decision adopted and notified in English.

2. BACKGROUND

2.1. The beneficiary

(7) ENVC was a Portuguese shipyard founded in 1944 and nationalised in 1975. It was fully owned by the State through *EMPORDEF — Empresa Portuguesa de Defesa (SGPS), S.A.* ('EMPORDEF'), a 100 % State-owned holding company controlling a number of State-owned enterprises in the defence sector.

(8) By the time of the opening decision of the Commission (see recital 3 above), ENVC employed some 638 employees and was the only shipyard in Portugal capable of constructing military vessels ([4]). ENVC's shipbuilding portfolio at that point in time was limited to the construction of two asphalt carriers commissioned by Petróleos de Venezuela S.A ('**PDVSA**'), a company 100 % owned by the Venezuelan State.

(9) ENVC used to operate on land under concession. This concession was first granted to ENVC in 1946 and subsequently modified in 1948, 1949 and 1974. In 1989 the concession area was extended in size and the duration — originally until 2006 — was extended until 2031 ([5]).

2.2. The privatisation procedure

(10) At the time of the opening decision, ENVC was still active on the market. By Decree-Law 186/2012, of 13 August 2012, the Government decided to re-privatise the company ([6]).

(11) The privatisation process was to be carried out within the framework of the Portuguese Privatisation Law ([7]). The specific rules governing the process, i.e. Decree-Law 186/2012 and Resolution of the Council of Ministers 73/2012, were published in the Portuguese Official Gazette on 13 and 29 August 2012 respectively ([8]). The Resolution of the Council of Ministers 73/2012 clarified that the privatisation was to be carried out by a direct sale — no tender — of up to 95 % of ENVC's share capital.

(12) Portugal indicated that over 70 potential investors were identified by EMPORDEF and its financial advisor. Three investors submitted binding offers by the deadline of 5 November 2012, but only two were considered eligible: Brazil's Rio Nave Serviços Navais and Russia's JSC River Sea Industrial Trading ([9]).

(13) By resolution of the Council of Ministers 27/2013, of 17 April 2013, the Portuguese Government decided to reject the only valid offer of JSC River Sea Industrial Trading (the offer of Rio Nave Serviços Navais had in the meantime expired) arguing that its conditions were excessive and could not be assumed.

([3]) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).
([4]) On the basis of the information provided by Portugal, it appears that the capacity in terms of workforce devoted to the construction of vessels for military purposes peaked in 2005 at 33 % of the total activity of ENVC (including construction, repairing, etc.). From 2006 to 2011, the average capacity devoted to military construction had been approximately 11 %, but in 2012 it fell to zero due to the cancellation of an order of the Portuguese Army to build military vessels.
([5]) The concession agreement was also modified in 2005 and 2007 to allow ENVC to sub-concession part of the land for the manufacturing of wind generators.
([6]) This process was not covered by the Memorandum of Understanding on specific economic policy conditionality signed between Portugal and the Commission, the International Monetary Fund and the European Central Bank.
([7]) *Lei Quadro das Privatizações*, approved by Law No 11/90 of 5 April 1990 and re-published by Law No 50/2011 of 13 September 2011.
([8]) *Diário da República* n° 156, 13.8.2012, p. 4364 and *Diário da República* n° 167, 29.8.2012, p. 4838, respectively.
([9]) Although Volstad Maritime submitted a binding offer on 5 November 2012, it was disqualified for submitting it after the deadline of 10 o'clock am.

(14) By Decree-Law 98/2013, of 24 July 2013, the Portuguese Government authorised ENVC to proceed to a sub-concession of the land on which it operated. The sub-concession procedure was initiated on 31 July 2013. Two bidders submitted offers, but only the one of Martifer-Energy Systems SGPS, S.A. jointly with Navalria-Docas, Construções e Reparações Navais, S.A. (through their join subsidiary WestSea) was considered eligible. Portugal confirmed that the offer of WestSea had been selected on 11 October 2013.

(15) In view of the financial situation of ENVC, which by mid-2013 had accumulated losses in excess of EUR 264 million, the Portuguese Government decided to liquidate ENVC by resolution of the Council of Ministers 86/2013, of 5 December 2013. At the same time, the Government instructed ENVC's Board of Directors to start selling the company's assets and to maximize their value through transparent sales.

(16) On 4 March 2014, ENVC held a general assembly in which EMPORDEF, as the sole shareholder of ENVC, confirmed the decision to proceed with the sale of the assets of ENVC as well as with the dismissal of the approximately 607 employees at that point in time, in order to liquidate and dissolve the company as soon as possible.

(17) After doing the necessary arrangements to comply with the decision of the general assembly of ENVC, selling the assets and dismissing the employees, the Portuguese Government requested the *Comissão de Recrutamento e Selecção para a Administração Pública* — CRESAP (the Portuguese Agency for the Selection and Recruitment of Senior Administration Officers) to nominate the liquidation team in charge of the liquidation of ENVC. The Portuguese authorities confirmed that ENVC will be liquidated in the coming months.

3. DESCRIPTION OF THE MEASURES

(18) On the basis of the information provided by Portugal in the course of the formal investigation procedure, it appears that ENVC benefited from several aid measures in the past ('**the past measures**').

(19) Some of the past measures were provided by EMPORDEF or by the Portuguese Treasury in order to cover operating costs and/or losses of ENVC between 2006 and 2013. The measures are summarised in table 1 below.

Table 1

Past measures granted to cover operating costs and/or losses of ENVC

Date	Measure	Provider	Amount (in EUR)
11 May 2006	Capital increase of ENVC	EMPORDEF	24 875 000
2012/2013	Interest-bearing loans to cover operating costs — *see Annex I for details*	EMPORDEF	101 118 066,03
(i) 31 January 2006 (ii) 11 December 2008 (iii) 28 April 2010 (iv) 27 April 2011	Loans to cope with operating costs	Direção-Geral do Tesouro e Finanças (DGTF)	(i) 30 000 000 (ii) 8 000 000 (iii) 5 000 000 (iv) 13 000 000

(20) On 11 May 2006, the General Assembly of ENVC (whose sole member was EMPORDEF) decided to proceed to an increase of ENVC's capital of EUR 24,875 million ('**the 2006 capital increase**') ([10]). According to Portugal, the 2006 capital increase was necessary to allow ENVC to honour its financial and commercial commitments (in particular with the Portuguese Navy) and was carried out bearing in mind a restructuring plan for ENVC dated 17 August 2005 (see recital 47 below). Portugal also notes that the 2006 capital increase was needed in order to comply with Article 35 of the Portuguese Companies Code ('*Código das Sociedades Comerciais*'), the alternatives being a reduction of ENVC's capital or the liquidation of the company.

(21) In 2012 and early 2013, several banks ceased providing loans to ENVC and were only willing to do so in relation to EMPORDEF. As a result, in order to ensure the continuation of activities by ENVC, EMPORDEF — as its sole shareholder — provided financial support to ENVC in the form of multiple interest-bearing loans amounting to a total of EUR 101 118 066,03 ('**the 2012 and 2013 loans**') ([11]). Portugal explains that these loans were granted to cover operating costs and to ensure the rollover of existing bank loans. The interest rates applicable to the 2012 and 2013 loans depend on each specific contract. Portugal claims that the interest rates applied by EMPORDEF to ENVC replicated the bank interest rates applicable to the underlying loans to EMPORDEF. As of February 2014, ENVC had neither reimbursed the 2012 and 2013 loans nor paid any interest.

(22) Finally, in 2006, 2008, 2010 and 2011, ENVC obtained financing for a total of EUR 56 million from the Portuguese Treasury ('*Direção-Geral do Tesouro e Finanças*' — DGTF) in the form of several loan agreements ('**the DGTF loans**'). Portugal states that the interest rates applicable were EURIBOR plus a variable spread depending on the contract. The DGTF loans were granted to cover previous outstanding financial responsibilities and cash requirements to cope with operating costs of ENVC. Portugal confirmed that the DGTF loans have not been repaid ([12]).

(23) Portugal also provided information about a number of other measures granted to ENVC in the past. The measures are summarised in table 2 below.

Table 2

Other past measures granted to ENVC ([1])

Date	Measure	Provider	Amount (in EUR)
29 November 2011	Comfort letter for a loan granted by Banco Comercial Português (BCP)	EMPORDEF	990 000
3 November 2011	Comfort letter for a loan granted by BCP	EMPORDEF	400 000
30 September 2010	Comfort letter for a loan granted by BCP	EMPORDEF	12 500 000
31 August 2010	Comfort letters for two standby letters of credit issued by Caixa Geral de Depósitos (CGD)	EMPORDEF	12 890 000 ([2])
24 June 2010	Comfort letter for a loan granted by BCP	EMPORDEF	5 000 000

([10]) In its submission of 28 December 2012, Portugal referred to a capital increase apparently carried out in 2009. However, in the course of the formal investigation procedure Portugal confirmed that no capital increase had taken place in 2009.

([11]) This measure includes the assumption by EMPORDEF of debt of ENVC towards Parvalorem in an amount of EUR 5 111 910,08, as well as interest accrued and not paid of EUR 5 281 882,02.

([12]) Portugal noted that ENVC paid interest in relation to the 2006 and 2008 DGTF loans on five occasions between 2006 and 2010, for a global amount of EUR 3 291 293,50.

Date	Measure	Provider	Amount (in EUR)
25 November 2009	Comfort letter for revolving loan by CGD	EMPORDEF	15 000 000
7 September 2009	Comfort letter for revolving loan by Banco Espírito Santo (BES)	EMPORDEF	4 500 000
26 June 2008	Comfort letter for BCP as performance bonds in relation to two shipbuilding contracts	EMPORDEF	14 512 500
8 January 2007	Comfort letter for revolving loan by CGD	EMPORDEF	5 000 000
—	Aid for shipbuilding 2000-2005 (3) — *see Annex II for details*	DGTF	27 129 933,20
—	Aid for professional training 2005-2006 (4)	DGTF	257 791
23 December 2009	Loan for the construction of the Atlântida vessel	EMPORDEF	37 000 000

(1) The opening decision included among the other measures a comfort letter from EMPORDEF in relation to letters of credit issued by CGD, of EUR 12 890 000. During the formal investigation procedure, Portugal clarified that this measure is the one described in recital 24.

(2) During the formal investigation procedure, Portugal clarified that the amount subject to the standby letters of credit was EUR 12 890 000, i.e. 10 % of the construction costs of the two asphalt carriers (EUR 128 900 000). In addition, Portugal clarified that the contract for the emission of the standby letters of credit was entered into in 2010 and not 2012 as stated in the opening decision.

(3) According to the information provided by Portugal, the aid for shipbuilding purposes was provided in the form of subsidies linked to 14 contracts in the period 2000-2005, and not 2000-2007 as indicated in the opening decision.

(4) Portugal has clarified that the aid for professional training was provided in 2005 and 2006 and not in the period 2000-2007 as indicated in the opening decision.

(24) In 2010, ENVC entered into a contract with PDVSA for the construction of two asphalt carriers. The contract value for each vessel was EUR 64,45 million, totalling EUR 128,9 million. According to the construction contract, PDVSA was to make an advanced down payment to ENVC of 10 % of the total price of the contract, i.e. EUR 12,89 million, with the precedent condition of obtaining two standby letters of credit, which served the purpose of guaranteeing PDVSA's down payment in case ENVC would fail to comply with its contractual obligations. The two standby letters of credit were issued by CGD on the basis of comfort letters from EMPORDEF and were withdrawn on 28 February 2014 and 31 March 2014.

(25) Portugal also explains that between 2007 and 2011 EMPORDEF issued numerous other comfort letters and guarantees in support of financing agreements between ENVC and commercial banks (the comfort letters detailed in recital 24 above and in the present recital will be jointly referred to as '**the comfort letters**' — they total EUR 70 792 500). Portugal notes that EMPORDEF never charged ENVC for the comfort letters.

(26) Between 2000 and 2005, ENVC received numerous subsidies for shipbuilding activities amounting to EUR 27 129 933,20 ('**the shipbuilding subsidies**'). This amount corresponds to multiple non-refundable subsidies for the construction of a number of vessels and tankers, which Portugal claims were provided according to Decree-Law 296/89 implementing Council Directive 87/167/EEC (13).

(13) Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ L 69, 12.3.1987, p. 55).

(27) ENVC also received financial aid for professional training amounting to EUR 257 791 ('**the professional training subsidies**') in 2005 and 2006 under the Operational Programme for Employment, Training and Social Development (POEFDS) sponsored by the European Social Fund.

(28) In relation to the Atlântida vessel, Portugal explains that its construction was subject to an international public tender in 2006, in which only ENVC and one more company participated. However, both offers were rejected because they did not comply with the necessary requirements of the tender. The construction of the vessels was awarded to ENVC at a later stage through direct negotiation with Atlanticoline, the public company responsible for the ocean transportation in Azores. The initial value of the contract for the Atlântida vessel was EUR 39,95 million, subsequently increased to EUR 45,35 million. At a later point in time, Atlanticoline terminated its contract with ENVC claiming that the Atlântida vessel was incapable of reaching the stipulated speed.

(29) In order to put an end to the conflict between Atlanticoline and ENVC, EMPORDEF received a loan from CGD for an amount of EUR 37 million on 23 December 2009. The loan agreement specified that the loan was to be used by EMPORDEF to provide ENVC with the necessary funds to allow ENVC to put an end to the proceedings with Atlanticoline. The interest rate charged was 6-month EURIBOR plus a 2 % spread ('**the loan for the Atlântida vessel**').

(30) The finished vessel was tendered out in the course of 2014. This sale procedure was publicised in national and international newspapers and the price was the sole criterion for choosing the winner of the tender. The purchase agreement with the buyer (Mystic Cruises SA) for EUR 8,75 million was signed on 30 September 2014.

4. THE OPENING DECISION

(31) On 23 January 2013, the Commission decided to open the formal investigation procedure. In its opening decision, the Commission's preliminary view was that ENVC could be considered a firm in difficulty in the sense of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([14]) ('**the 2004 R&R Guidelines**'), in particular in view of ENVC's significant losses since at least 2000.

(32) Although the Commission highlighted in its opening decision that it had been provided with limited information on the past measures, it came to the preliminary view that all of them entailed State resources and were imputable to the State ([15]). The Commission was also of the preliminary opinion that the past measures provided ENVC with an undue advantage, given that it seemed unlikely that any rational private operator would have provided ENVC with the past measures given the difficulties of ENVC at the time. The advantage would be selective in nature given that its sole beneficiary was ENVC.

(33) The Commission also noted that the past measures were likely to affect trade between Member States as ENVC was in competition with shipyards from other Members States of the European Union as well as from the rest of the world. The past measures therefore enabled ENVC to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results.

(34) On the basis of the above, the Commission's preliminary view was that the past measures seemed to constitute State aid within the meaning of Article 107(1) TFEU. Also, since the past measures would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU, the Commission noted that they appeared to constitute unlawful State aid.

([14]) OJ C 244, 1.10.2004, p. 2. On 1 August 2014 entered into force the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1) ('the 2014 R&R Guidelines'). According to point 135 of the 2014 R&R Guidelines, the Commission will apply these guidelines with effect from 1 August 2014 until 31 December 2020. However, in accordance with point 138 of the 2014 R&R Guidelines, the past measures subject to the present decision are to be assessed on the basis of the guidelines which applied at the time the aid was granted, i.e. the 2004 R&R Guidelines (or where applicable the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2 — 'the 1999 R&R Guidelines').

([15]) As regards EMPORDEF, the Commission observed in recitals 46 to 48 of the opening decision that its decisions seemed imputable to the Portuguese State within the meaning of the *Stardust Marine* case-law (judgment in *France v Commission*, C-482/99, EU:C:2002:294).

(35) The Commission also expressed doubts on the compatibility with the internal market of the past measures, in particular since the Portuguese authorities did not provide any possible grounds for compatibility.

(36) The Commission nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would *prima facie* be applicable to the past measures. After discarding the applicability of the exceptions laid down in Article 107(2) TFEU, the Commission preliminarily observed that only the exception laid down in point (c) of Article 107(3) TFEU could apply.

(37) The Commission noted that the past measures did not appear to have been granted pursuant to the specific State aid rules applicable the shipbuilding industry at the time the past measures were granted, i.e. the Framework on State aid to shipbuilding ([16]) or its predecessors ([17]). In view of the fact that ENVC seemed to be a firm in difficulty within the meaning of the 2004 R&R Guidelines at the time when the past measures were provided, the Commission noted that only relevant compatibility basis appeared to be the one concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU, i.e. the 2004 R&R Guidelines.

(38) The Commission noted that the conditions for rescue aid laid down in section 3.1 of the 2004 R&R Guidelines did not seem to be met. Also, in relation to restructuring aid as defined in section 3.2 of the 2004 R&R Guidelines, the Commission observed that Portugal failed to demonstrate that any of the necessary elements for the past measures to be considered compatible restructuring aid (restructuring plan, own contribution, compensatory measures, etc.) were present. The Commission therefore lacked evidence whether any of the past measures could be found compatible on the basis of the R&R Guidelines as rescue or restructuring aid.

(39) In view of the above, the Commission expressed doubts on the compatibility of the past measures in favour of ENVC with the internal market.

(40) In addition, the Commission made a number of observations on the measures planned by Portugal in the context of the privatization of ENVC. Although the planned measures accompanying the privatisation of ENVC were not subject to the opening decision, the Commission, in view of the economic situation of ENVC and the nature of the planned measures, considered it likely that those measures would contain State aid. However, the Commission observes that Portugal rejected the only valid offer for the privatization of ENVC and that it decided to liquidate the company instead (see recitals 14 to 15 above). On this basis, the Commission understands that the planned measures accompanying the privatisation of ENVC were not provided and will therefore not be considered in the present decision.

5. **COMMENTS OF PORTUGAL ON THE OPENING DECISION**

(41) In its comments on the Commission's opening decision, Portugal noted that despite the losses that ENVC had accumulated since 2000, and in particular since 2009, the decision to keep the company afloat by providing it with sufficient means was a rational option for EMPORDEF in line with the logic of the market economy operator ('MEO') principle.

(42) As regards the difficulties of ENVC, Portugal noted that the gravity of its financial situation became evident only in 2009/2010 and that its irreversibility was only recognised in the annual accounts of the company of 2012.

(43) Portugal also explained that the **2006 capital increase** was due to a legal obligation on the basis of Article 35 of the Portuguese Companies Code. According to this provision, when half of the share capital of a given company is lost, (i) the company must be dissolved, (ii) the share capital must be reduced for an amount not lower than the equity ('*capital próprio*') of the company, or (iii) the shareholders of the company must contribute to the share capital. It is on this basis that the shareholders of ENVC decided in 2006 to inject EUR 24,875 million of capital into the company.

([16]) OJ C 364, 14.12.2011, p. 9.

([17]) Namely the 2004 Framework on State aid to shipbuilding (OJ C 317, 30.12.2003, p. 11) and Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1).

(44) According to Portugal, this decision was taken in the belief that the alternative options under Article 35 of the Portuguese Companies Code would not allow ENVC to honour its financial and commercial commitments (in particular with the Portuguese Navy). As of 2006, ENVC had in its order book 15 construction projects for a global amount of EUR 386 million.

(45) Portugal claims that a market economy investor would have opted as well for increasing the capital of ENVC and allowing it to continue operating, thereby reinforcing its competitiveness in the shipbuilding market.

(46) In its submission of 14 February 2014, Portugal indicated that the decision to proceed to the 2006 capital increase was taken having in mind not only the portfolio of the company but also a restructuring plan for ENVC dated August 2005.

(47) The restructuring plan, a draft of which was provided, was prepared by Banco Português de Investimento S.A. ('BPI') and covered the period 2005-2009. According to the restructuring plan, ENVC would need to focus on military activities in order to return to viability although it acknowledged that the financial and economic sustainability of ENVC was conditional on management capacity, the fulfilment of the existing contracts and the evolution of the shipbuilding market.

(48) The restructuring plan did not quantify the costs associated to the non-fulfilment of the contracts available to ENVC at the time. However, the costs associated to closing down the company (including the dismissal of the employees and the regularization of liabilities) were estimated at EUR 175 million. According to Portugal, in view of the fact that liquidation was more onerous than the capital increase, the former line of action was not retained.

(49) Portugal further explains that the restructuring plan acknowledged the need for support to ENVC, since the company was not able on its own to continue operations in 2005-2007. However, Portugal observes that a 2009 report of the *Inspecção-Geral de Finanças* — IGF (the entity charged of supervising the Portuguese public companies) noted that the restructuring plan of ENVC had not been sufficiently implemented and that the financial and economic forecasts for the period 2008-2011 were too optimistic.

(50) In relation to **the 2012 and 2013 loans**, Portugal claims that the interest rates applied to ENVC were the same as those that EMPORDEF managed to obtain from the market. Therefore, the interest rates should be considered at market terms and free of aid. According to Portugal, since EMPORDEF was the sole shareholder of ENVC, it could be considered liable at last instance for the debts and liabilities of ENVC. Therefore, Portugal claims that EMPORDEF did not increase its risk by exposing it further to ENVC by means of the 2012 and 2013 loans.

(51) In its submission of 14 February 2014, Portugal clarified that as of February 2014, ENVC had neither reimbursed the 2012 and 2013 loans nor paid any interest. Moreover, Portugal also noted that the loans to ENVC were, when necessary, accompanied by comfort letters issued by EMPORDEF.

(52) Concerning **the DGTF loans** granted in 2006, 2008, 2010 and 2011, Portugal is of the view that they were provided on market terms since the interest rate applied was EURIBOR plus a variable spread depending on each loan contract. Portugal also notes that the DGTF loans were provided bearing in mind the order book of ENVC, which would create reasonable expectations that ENVC would be able to pay back the loans.

(53) Portugal also highlights that the use of **comfort letters** is normal between private operators as a mechanism to guarantee access to the financial markets for companies with a lower borrowing capacity. Portugal notes that EMPORDEF would in any case be considered liable in last instance for the debts of ENVC given that it was its sole shareholder. In any event, Portugal acknowledges that EMPORDEF never charged ENVC for the comfort letters.

(54) As regards **the shipbuilding subsidies**, Portugal claims that they were provided according to Decree-Law 296/89 — implementing Directive 87/167/EEC — and that they would therefore constitute compatible aid to the shipbuilding industry. Concerning **the professional training subsidies**, Portugal claims that they were provided to all companies fulfilling the regulatory conditions and that therefore they would not have provided ENVC with an undue selective advantage.

(55) In relation to **the Atlântida vessel**, Portugal observes that as of June 2012 its market value was estimated at EUR 29,24 million, taking into consideration *inter alia* the economic obsolescence and the physical and functional depreciation. In this context, Portugal claims that there are no reasons to consider that the construction of the vessel entailed an undue advantage to ENVC, bearing in mind that the cost of construction exceeded the contractual price.

6. ASSESSMENT OF THE MEASURES

(56) This decision addresses as a preliminary point the issue of whether ENVC is a firm in difficulty in the sense of the 2004 R&R Guidelines ([18]). It then analyses whether the measures under scrutiny entail State aid to ENVC in the meaning of Article 107(1) TFEU and then whether such aid, were it to be present, is lawful and compatible with the internal market.

6.1. Difficulties of ENVC

(57) As noted above in recital 42, Portugal claims that the gravity of ENVC's financial situation became evident only in 2009/2010 and that its irreversibility was only recognised in the annual accounts of the company of 2012.

(58) The Commission reiterates the views it expressed in its opening decision. According to recital 9 of the 2004 R&R Guidelines, the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

(59) Recital 10 of the 2004 R&R Guidelines clarifies that a limited liability company is regarded as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(60) Recital 11 of the 2004 R&R Guidelines adds that, even if the conditions in recital 10 are not satisfied, a firm may be considered to be in difficulty in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(61) The Commission observes that ENVC is a limited liability company which has continuously registered significant losses since at least 2000 (see table 3 below):

Table 3

Net results of ENVC between 2000 and 2013

	Net result (in EUR million)
2000	– 2,72
2001	– 4,98
2002	– 11,12

([18]) See footnote 14 above.

	Net result (in EUR million)
2003	– 26,87
2004	– 27,02
2005	– 14,38
2006	– 5,26
2007	– 8,04
2008	– 12,07
2009	– 22,26
2010	– 41,90
2011	– 22,70
2012	– 8,78
2013	– 52,42

Source: annual accounts of EMPORDEF for 2006, 2007, 2008, 2012 and 2013 (available at http://www.empordef.pt/main.html), annual accounts of ENVC for 2001, 2002, 2003, 2009, 2010 and 2011.

(62) In addition to the significant losses of ENVC, which constitute a first indication of the difficulties of the company, some of the other usual signs of a firm in difficulty in the sense of the 2004 R&R Guidelines are also present. For instance, ENVC's turnover was in constant decrease since at least 2008, passing from EUR 129,62 million in that year to EUR 55,58 million in 2009, EUR 20,22 million in 2010 and EUR 15,11 million in 2011. Although in 2012 there was an increase in turnover (EUR 30,38 million) due to some additional works for a logistic support vessel ([19]), this was a one-off event and in 2013 the turnover plummeted again to EUR 3,79 million.

(63) In addition, ENVC had negative equity since at least 2009: EUR -25,62 million in 2009, EUR -74,49 million in 2010, EUR -129,63 million in 2011, EUR -142,45 million in 2012 and EUR -193,46 million in 2013 ([20]).

(64) According to Portugal (see recital 43 above), the 2006 capital increase was needed in order to comply with Article 35 of the Portuguese Companies Code, the alternatives being a reduction of ENVC's capital or the liquidation of the company. Moreover, the restructuring plan prepared by BPI dated August 2005 (see recital 47 above), highlights that since the end of 2003, ENVC was in a situation of technical bankruptcy ('*falência técnica*'). Finally, the Commission observes that the 2009 report of the IGF indicates that as of 31 December 2005 and at the end of 2008, ENVC was again in a situation of technical bankruptcy. Therefore, it appears that at those points in time when ENVC was in technical bankruptcy it showed all the signs of bankruptcy except that it had not been formally declared bankrupt by the competent court. This suggests that the company fulfilled the criteria under domestic law for being the subject of collective insolvency proceedings, in line with recital 10 of the 2004 R&R Guidelines at least at the end of 2003, 2005 and 2008.

(65) In view of the above, the Commission concludes that ENVC was a firm in difficulty within the meaning of the 2004 R&R Guidelines at the time when all the past measures were granted.

([19]) Source: annual accounts of EMPORDEF for 2012.
([20]) Source: annual accounts of EMPORDEF for 2012 and 2013. From the annual accounts of ENVC for 2001, 2002 and 2003, it results that ENVC also had negative total equity in 2000 (EUR -5,99 million), 2001 (EUR -10,97 million), 2002 (EUR -22,09 million) and 2003 (EUR -48,97 million).

6.2. **Existence of aid**

(66) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(67) In order to conclude on whether State aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of State resources, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the measures identified.

(68) The Commission already notes in this respect that Portugal does not contest the State aid character of the **shipbuilding subsidies** since they were — according to the Portuguese authorities — provided according to Decree-Law 296/89 implementing Directive 87/167/EEC. The Commission will assess their compatibility with the internal market in section 6.4 below.

(69) In relation to the **professional training subsidies** provided in 2005 and 2006 amounting to EUR 257 791, Portugal states that they were granted under the Operational Programme for Employment, Training and Social Development (POEFDS) sponsored by the European Social Fund. The Commission observes that these funds constitute *per se* State aid since they were provided by the Member State in the context of the Structural Funds 2000-2006. Therefore, the Commission will directly assess their compatibility with the internal market in section 6.4 below.

6.2.1. *State resources and imputability*

(70) Portugal does not dispute the preliminary findings of the Commission as per the opening decision in relation to the presence of State resources and imputability.

(71) In the first place, the Commission highlights that the DGTF loans, the shipbuilding subsidies and the professional training subsidies were provided directly from the State budget (mainly through the DGTF) and therefore there is no doubt that these past measures entail State resources and are imputable to the State.

(72) As regards EMPORDEF, the Commission also considers that its actions entailed State resources (given that the budget of EMPORDEF is provided directly by the State) and that those actions are imputable to the State in the sense of the *Stardust Marine* case-law ([21]). In the first place, the Commission notes that this is a public holding 100 % owned by the State: the sole shareholder of EMPORDEF on behalf of the State is the DGTF. Moreover, EMPORDEF is under the direct supervision of the Ministry of Finance and Public Administrations, as regards financial supervision, and the Ministry of National Defence, as regards sectorial supervision ([22]).

(73) In addition, according to the web page of EMPORDEF, its operations are consistent with the objectives, policies and goals established by its sole shareholder, i.e. the State ([23]). Moreover, the President of EMPORDEF and its Executive Directors are nominated directly by the Minister of National Defence ([24]).

([21]) Judgment in *France v Commission*, C-482/99, EU:C:2002:29.
([22]) Source: http://www.empordef.pt/main.html.
([23]) Source: http://www.empordef.pt/uk/main.html.
([24]) See list of nominations in the web page of the Ministry of National Defence (http://www.portugal.gov.pt/pt/o-governo/nomeacoes/ministerio-da-defesa-nacional.aspx). See in addition EMPORDEF's web page (http://www.empordef.pt/main.html) as well as several press releases, for example http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1768612 or http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1950754.

(74) In addition to the above, the rules governing the planned privatisation of ENVC (see section 2.2 above) clearly indicated that the final decision was to be taken by the Portuguese Government and not by EMPORDEF. In terms of indirect evidence, the Commission observes that on 4 January 2012, the Portuguese Ministry of National Defence issued a press release stating the following: 'on 2 July 2011, the Ministry of National Defence decided to suspend the decommissioning of [ENVC]. In August, the Ministry of National Defence mandated the new administration of EMPORDEF to find a solution that would avoid the decommissioning and closure of ENVC' ([25]). Furthermore, on multiple occasions the Minister of National Defence publicly announced the steps to be undertaken as regards the planned privatisation of ENVC ([26]). Once the privatisation plans were discarded, the Portuguese Government empowered EMPORDEF to take the necessary measures as regards ENVC ([27]).

(75) In light of the above, the Commission concludes that EMPORDEF's actions are imputable to the State and that the past measures it granted to ENVC entailed State resources.

6.2.2. *Selective advantage*

(76) As regards whether the past measures provided ENVC with an undue selective advantage, the Commission observes that Portugal considers that this is not the case for most of the past measures since they would be in line with the MEO principle.

(77) In its opening decision, the Commission indicated that despite the limited information available at the time, it seemed unlikely that any rational private operator would have provided ENVC with the past measures. Indeed, given the difficulties of ENVC at the time, the Commission was of the preliminary view that a rational market operator, operating under market conditions, would not have provided such financing to a company like ENVC. The Commission also preliminarily concluded the advantage would be selective in nature given that its sole beneficiary was ENVC.

(78) As regards the **2006 capital increase**, the Commission does not share the opinion of Portugal that a MEO would have opted for increasing the capital of ENVC — instead of liquidating it — in order to allow the company to continue operating in the shipbuilding market, in particular in view of the order book at the time of 15 construction projects for an amount of EUR 386 million (see recital 44 above).

(79) In the first place, the Commission observes that a rational market operator would have taken into consideration whether it would be more economically rational to liquidate the company or to provide additional capital, bearing in mind the poor financial performance of ENVC between 2000 and 2006 and considering as well the measures already granted by the State to ENVC before the 2006 capital increase (i.e. one of the DGTF loans for an amount of EUR 30 million granted in January/February 2006, the shipbuilding subsidies in excess of EUR 27 million and the professional training subsidies).

(80) Although the amount of the book order seemed to exceed the amount resulting from those past measures, the Commission is of the view that a rational market operator would have also taken into consideration the probability that ENVC would have been able to carry out the constructions at a profit and/or within the

([25]) The original text in Portuguese is as follows: '*[…] no passado dia 2 de julho de 2011 o Ministério da Defesa Nacional decidiu suspender o desmantelamento dos Estaleiros Navais de Viana do Castelo. Em agosto, o Ministério da Defesa Nacional mandatou a nova administração da Empordef para que fosse encontrada uma solução que evitasse esse desmantelamento e encerramento dos ENVC*'. See http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120104-mdn-envc.aspx.

([26]) See for instance http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120319-mdn-modelo-reprivatizacao.aspx, http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120502-mdn-envc.aspx and http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120713-seamdn-envc.aspx.

([27]) See for instance http://www.portugal.gov.pt/pt/os-ministerios/ministro-da-presidencia-e-dos-assuntos-parlamentares/documentos-oficiais/20131205-comunicado-cm.aspx. The involvement of the State in the actions of EMPORDEF is further evidenced by the following press release of the Portuguese Government: http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20140205-mdn-comunicado-estaleiros.aspx.

contractual deadlines so as to avoid the payment of penalties ([28]). According to the information provided by Portugal, nothing suggests that EMPORDEF made these considerations at the time of carrying out the 2006 capital increase.

(81) In addition, Portugal notes that according to the restructuring plan prepared by BPI in August 2005, the costs associated to closing down ENVC were estimated at EUR 175 million. According to Portugal, in view of the fact that liquidation was more onerous than the capital increase, the former line of action was not retained.

(82) In this regard, the Commission observes that the estimation made by BPI in the restructuring plan is not backed by evidence. On this basis, the Commission is not able to assess the accuracy of this estimation and conclude whether indeed it was more economically rational for EMPORDEF to carry out the capital increase than to proceed to the liquidation of the company.

(83) Moreover, the Commission observes that the restructuring plan prepared by BPI noted that ENVC on its own did not have the capacity to return to viability and that it needed external funds in an amount of EUR 45-50 million in a base case and EUR 70-80 million is a pessimistic case. The amount of the 2006 capital increase (EUR 24,875 million) remains significantly short from these estimations and would not have allowed ENVC to return to viability.

(84) Finally, the Commission takes notes that ENVC was in need of in-depth restructuring as acknowledged by the restructuring plan prepared by BPI. Although the restructuring plan is merely a draft, it already indicates the difficulties of ENVC and the need for additional external funds. However, the restructuring plan makes clear that the return of ENVC to viability would significantly depend on the capacity of the management of the company to honour its contracts and the evolution of the shipbuilding markets. In this respect, the Commission observes that Portugal has provided no evidence that EMPORDEF took these elements into consideration when carrying out the 2006 capital increase, which — in any event — would fall short from the amounts estimated by the restructuring plan to allow the company to return to viability.

(85) In view of the above, the Commission comes to the conclusion that a prudent market economy operator would not have provided the 2006 capital increase and therefore that it entailed an undue advantage to ENVC.

(86) As regards the **2012 and 2013 loans** provided by EMPORDEF for a global amount of EUR 101 118 066,03, it results on the basis of the information provided by Portugal that in the course of 2012 EMPORDEF signed 70 contracts with ENVC, normally short-term with 90-day maturity. The loans were granted for several different amounts and had different interest rates, mainly 3-month EURIBOR plus a margin. However, some contracts had a fixed interest rate, in particular the contracts signed from October 2012 onwards (see for example the contracts signed on 30 March 2012 for EUR 16,7 million with an interest rate of 2 %, on 2 November 2012 for EUR 10,570 million with an interest rate of 5,871 % or on 1 December 2012 for EUR 1 million with the same interest rate of 5,871 %). It also appears that the loan contracts were not collateralised.

(87) Portugal argues the absence of aid in the DGTF loans given that EMPORDEF applied to ENVC the same interest rates it received from the market. Since in any event EMPORDEF would be considered liable for the debts and liabilities of ENVC, given that it was its sole shareholder, Portugal claims that EMPORDEF did not increase its risk by exposing it further to ENVC.

(88) In the first place, it does not appear that EMPORDEF would be liable for all the debts and liabilities of ENVC, given that EMPORDEF and ENVC are limited liability companies ('*sociedade anónima*'). As a general rule, in limited liability companies the liability of the members (participation holders) is limited to the face value of their shares according to Article 271 of Portuguese Companies Code ([29]). On this basis, by providing the 2012 and 2013 loans to ENVC, EMPORDEF would have incurred additional risks going beyond its shares in the company.

([28]) In this respect, the Commission observes as *ex post* evidence that the 2009 report of the IGF (see recital 49) highlighted that in 2005-2007 ENVC delivered 11 vessels whose construction costs exceeded by 15,4 % the agreed contractual costs (to be noted that already the costs budgeted by ENVC exceeded by 4,1 % the contractually agreed costs, which meant that in any event the company would build the vessels at a loss).

([29]) Source: http://ec.europa.eu/enterprise/policies/sme/business-environment/files/annexes_accounting_report_2011/portugal_en.pdf.

(89) In any event, irrespective of the above, the Commission considers that EMPORDEF did not act as a rational market investor when providing the 2012 and 2013 loans to ENVC. At that point in time, the financial situation of ENVC was extremely difficult: its losses in the previous year had reached EUR 22,70 million (see table 3 above) and its negative equity was of EUR -129,63 million (see recital 63 above). In view of the difficulties of ENVC, the Commission considers that a market economy investor would have assessed the financial situation of ENVC and analysed the ability of the company to pay back the loans and the interests. In this respect, the Commission observes that several financial institutions — in relation to which the Commission has no reason to suspect that they did not operate as market investors — had refused to provide loans directly to ENVC. This in itself indicates that the markets no longer believed that ENVC would be able to repay the loans.

(90) By merely replicating the interests it obtained for the loans in the market, EMPORDEF provided an undue advantage to ENVC, since the latter would not have been able to obtain those conditions — as a matter of fact, ENVC did not get any of the loans from the market. Although some of the interest rates applied by EMPORDEF to ENVC could appear relatively high (e.g. 3-month EURIBOR plus 8,431 % for the contract signed on 30 May 2012), the Commission considers that no private financial institution would have provided such a loan with no collateralisation to a firm clearly in difficulty.

(91) The Commission also notes that once the first contracts had reached their 90-day maturity, EMPORDEF would have been able to observe that ENVC had neither repaid the principal nor paid any interest (see recital 51 above). On this basis, the Commission considers that a rational market operator would not have provided additional loans to ENVC.

(92) The Commission therefore concludes that the 2012 and 2013 loans entailed an undue advantage to ENVC.

(93) The Commission will now assess whether **the DGTF loans** for an amount of EUR 56 million provided ENVC with an undue advantage. Portugal indicates that these loans had an interest rate of 6-month EURIBOR plus a variable spread depending on each contract. According to Portugal, this remuneration would be satisfactory for an investor, thereby excluding the presence of an undue advantage and this of State aid. Portugal also notes that the DGTF loans were provided bearing in mind the order book of ENVC.

(94) The Commission cannot share the views of Portugal that setting an interest rate corresponding to 6-month EURIBOR plus a variable spread would make the DGTF loans market-conform. Table 4 below summarises the total interest rate applicable to the DGTF loans at the time of their signature:

Table 4

Total interest rate applicable to the DGTF loans

Date of signature of the contract	Amount in EUR	6-month EURIBOR (a) (%)	Spread ([1]) (b)	Total interest rate (a)+(b) (%)
31 January 2006	30 000 000	2,698	150bp	4,198 ([2])
11 December 2008	8 000 000	3,417	100bp	4,417
28 April 2010	5 000 000	0,964	100bp	1,964
27 April 2011 (paid out in two instalments in April 2011 and in June 2011)	13 000 000	1,661	3,907 % (April 2011) 3,580 % (June 2011)	5,568 (April 2011) 5,241 (June 2011)

([1]) For the contract signed on 27 April 2011, the applicable spread was the Mid Asset Swap spread of Portuguese public debt with equivalent maturity (data provided by Portugal).
([2]) As of 2010, the interest rate was aligned with that of the loan of 11 December 2008.

(95) In order to ascertain the market-conformity of the interest rates applied to the DGTF loans, the Commission will use as the best available proxy the reference rates resulting from the applicable rules at the time.

(96) First, as indicated in section 6.1 above, the Commission considers that in 2006 and 2008 ENVC would qualify as a firm in difficulty. As regards in particular the 2006 DGTF loan, the Commission observes that according to the 2009 report of the IGF, as of 31 December 2005, ENVC was in a situation of technical bankruptcy. As regards the 2008 DGTF loan, the same report indicates that as of the end of 2008 ENVC was again in a situation of technical bankruptcy (see recital 64 above).

(97) In particular, concerning the 2006 DGTF loan, the Commission notice on the method for setting the reference and discount rates of 1997 ([30]), applicable at the time, established that the base rate (3,70 % in Portugal in January 2006) ([31]) was to be increased by a premium amounting to 400bp or more in situations involving a particular risk. In this respect, the Commission highlights the difficulties of ENVC at the time and the fact that it was in a situation of technical bankruptcy. Also, according to the 2006 DGTF loan contract, ENVC agreed to have as collateral the revenues resulting from the construction of certain vessels for the Portuguese Navy. However, it is unclear whether a market-oriented lender would have accepted such collateral in view of ENVC's problems to carry out the constructions at a profit and/or within the contractual deadlines (see in this respect recital 80 and footnote 28 above). In any event, the Commission has not been provided with evidence allowing it to examine those construction contracts. The Commission therefore considers that applying a margin of at least 400bp would be reasonable. As a result, the applicable reference rate would be at least 7,70 %, which is well above the interest rate of 4,198 % actually applied by the DGTF.

(98) As regards the 2008 DGTF loan, the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008 ([32]), applicable at the time, established that to the base rate (2,05 % in Portugal in December 2008) ([33]) a margin was to be applied depending on the rating of the undertaking concerned and the level of collateralisation offered. In view of the difficulties of ENVC at the time and the low level of collateralisation (see recital 97 above, which applies *mutatis mutandis*), the applicable margin would be at least 1 000bp. As a result, the applicable reference rate would be at the very least 12,05 %, also above the interest rate of 4,417 % actually applied by the DGTF.

(99) In relation to the 2010 and 2011 DGTF loans, the Commission reiterates its views that ENVC qualifies as a firm in difficulty at the moment the loans were granted (see section 6.1 above). According to the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008, applicable at the time, the base rate applicable for Portugal was 1,24 % in April 2008 and 1,49 % in April 2011.

(100) As regards the 2010 DGTF loan, the Commission observes that there is no strict collateralisation but merely a promise by ENVC to use the revenues resulting from a given framework-contract with the Ministry of National Defence to repay the loan. On this basis, and bearing in mind the difficulties of ENVC at the time, the Commission is of the view that the applicable margin should be at least 1 000bp. Therefore, the applicable reference rate would be at least 11,24 %, compared to the much lower 1,964 % charged by the DGTF.

(101) Finally, as regards the 2011 DGTF loan, the Commission observes that, as in the case of the 2010 DGTF loan, there is strictly speaking no collateralisation but merely a promise by ENVC to use the revenues resulting from a given framework-contract with the Ministry of National Defence to repay the loan, which moreover had to be confirmed by the Administration Board of ENVC and approved by the Ministry of National Defence. It is thus highly doubtful that this level of collateralisation could be considered adequate by a market-oriented lender. Therefore, given that ENVC was at the time a firm in difficulty, the Commission considers that the applicable margin should be at least 1 000bp, which would result in a reference rate of at least 11,49 %, much higher than the interest rates actually applied to ENVC (5,568 % in April 2011 and 5,241 % in June 2011).

(102) Bearing in mind the above, the Commission comes to the conclusion that the DGTF loans provided ENVC with an undue advantage.

([30]) OJ C 273, 9.9.1997, p. 3.
([31]) Source: http://ec.europa.eu/competition/state_aid/legislation/reference_rates_eu25_en.pdf.
([32]) OJ C 14, 19.1.2008, p. 6.
([33]) Source: http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf.

(103) In what relates to **the comfort letters** issued by EMPORDEF between 2007 and 2011, the Commission first observes that they appear to have a very similar nature to a guarantee, since in most of these letters EMPORDEF specifically stated that it would do everything necessary to make sure that ENVC would have the necessary means available to honour the underlying loan agreement. However, the comfort letters dated 8 January 2007 and 26 June 2008 have a different wording. In these letters, EMPORDEF notes that it owns ENVC at 100 % and that this shareholding will not be diminished; otherwise the granting bank is allowed to ask ENVC to pay back the loan before maturity. This statement alone does not allow the Commission to consider that EMPORDEF would be liable for ENVC's default on the respective loans and therefore it does not appear adequate to assimilate them to guarantees. It is therefore not established that these letters have provided an advantage to ENVC.

(104) As regards the rest of the comfort letters (i.e. the ones provided in 2009, 2010 and 2011), given that EMPORDEF declares to be ready to step in if ENVC does not honour the underlying loan contract, it appears clear that they are equivalent to a guarantee, since EMPORDEF reassures the granting financial institution by undertaking to do everything necessary for ENVC to have the means available to pay back the loans. A normal market operator would have asked a premium in exchange for providing this type of 'guarantee', which however EMPORDEF never did despite the significant risk that ENVC would not be able to repay the loans in view of its difficulties at the time.

(105) According to section 2.2 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([34]) ('the Guarantee Notice'), 'risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms'. It is thus necessary to examine whether the guarantee could in principle have been obtained on market conditions from the financial markets and whether the market premium for the guarantee was paid ([35]).

(106) The Commission observes that the comfort letters were not remunerated and that ENVC did not pay to EMPORDEF any premium. Therefore, the risk incurred by EMPORDEF was not remunerated. This in itself is sufficient to conclude that the comfort letters, which have very similar features to a guarantee, provided ENVC with an undue advantage.

(107) As regards the argument of Portugal that EMPORDEF would in any case be considered liable in the last instance for the debts of ENVC given that it was its sole shareholder, the Commission refers to its reasoning in recital 88 above, which applies *mutatis mutandis*.

(108) Therefore, the Commission is of the view that the comfort letters of 2009, 2010 and 2011 provided ENVC with an undue advantage.

(109) As regards the **loan for the Atlântida vessel**, the Commission observes that in December 2009, EMPORDEF provided ENVC with EUR 37 million obtained from CGD for terminating the legal proceedings with Atlanticoline. At that point in time, when ENVC was already a firm in difficulty, a rational market operator would have assessed the situation of the company and its capacity to repay the loan, instead of simply transferring the funds to ENVC. Also, a rational market operator would have assessed the risks associated to the operation and the possibility of selling the vessel to a different buyer — something which eventually happened in September 2014 (see recital 30 above). The Commission moreover observes that the loan was provided to EMPORDEF at an annual interest rate of 6-month EURIBOR plus 2 %, which at the time of the contract meant 2,993 %. However, in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008, applicable at the time, the base rate applicable for Portugal in December 2009 was 1,45 % to which a margin of at least 1 000bp should be added in view of the difficulties of ENVC and the absence of strict collateralisation. Therefore, the applicable reference rate would be at least 11,45 %.

([34]) OJ C 155, 20.6.2008, p. 10. See as well the 2000 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

([35]) See for example recitals 249 and 250 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1).

(110) The Commission understands that ENVC did not repay the EUR 37 million of the loan for the Atlântida vessel to EMPORDEF and that it did not pay any interest for this amount, with the exception of EUR 840 480,54 in interests paid in 2010. On this basis, and bearing in mind the above, the Commission comes to the conclusion that the loan for the Atlântida vessel provided ENVC with an undue advantage.

6.2.3. *Distortion of competition and affectation of intra-EU trade*

(111) The past measures are likely to affect trade between Member States as ENVC is in competition with shipyards from other Members States of the European Union as well as from the rest of the world. The past measures in question thus enabled ENVC to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results. Therefore, the past measures also distorted competition.

6.2.4. *Conclusion on existence of State aid and quantification*

(112) On the basis of the assessment above, the Commission concludes that the past measures constitute State aid, since they meet the necessary requirements of the definition of State aid laid down in Article 107(1) TFEU, with the exception of the comfort letters of dated 8 January 2007 and 26 June 2008 (see recital 103 above).

(113) As indicated in recitals 68 and 69 above, the totality of the **shipbuilding subsidies** and of the **professional training subsidies** constitute State aid for an amount of EUR 27 129 933,20 and EUR 257 791, respectively.

(114) As regards the rest of the past measures, the Commission reiterates that in view of the difficulties of ENVC at the time, no market-oriented operator would have provided them to the company. For this reason, the Commission is of the view that ENVC received State aid in an amount equal to the totality of the **2006 capital increase** (EUR 24,875 million).

(115) As regards the **comfort letters** of 2009, 2010 and 2011, the Commission reiterates that they have a very similar nature to guarantees (see recitals 103 and 104 above). In this respect, the Guarantee Notice states the following in section 4.1: 'The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee'.

(116) The Commission observes that the banks provided the loans to ENVC only because of the existence of the 'guarantees' (in the form of comfort letters) of EMPORDEF reassuring the banks that it would do the necessary to ensure that ENVC would pay back the loans. Moreover, the Commission notes that the comfort letters were provided for free at a time when ENVC was in difficulty and despite the significant risk that it would not be able to honour its commitments. The Commission moreover observes that ENVC had been in at least three occasions in a situation of technical bankruptcy (see recital 64 above) and despite this, EMPORDEF decided to issue the comfort letters without a premium. In this context, the Commission concludes that there is no possible market rate that could be used as a reasonable comparator and therefore takes the view that ENVC received State aid in an amount equal to the totality of the amounts guaranteed by the comfort letters of 2009, 2010 and 2011 (i.e. EUR 51 280 000).

(117) A similar logic applies to the case of the loans provided to ENVC, i.e. the **2012 and 2013 loans**, the **DGTF loans** and the **loan for the Atlântida vessel**. EMPORDEF and the DGTF provided these loans to ENVC at a time when the company was in difficulty and no rational market operator would have provided them. This is particularly obvious for the case of the 2012 and 2013 loans, since as indicated in recital 21 above, the banks had ceased providing loans to ENVC and were only willing to do so in relation to EMPORDEF. Also, the

Commission observes that the DGTF loans and the loan for the Atlântida vessel were provided between 2006 and 2011: during these years, private banks were willing to lend to ENVC only on the basis of a guarantee (in the form of a comfort letter) from EMPORDEF. This indicates that no market operator was willing to provide a loan to ENVC alone. Therefore, in view of the above, Commission concludes that ENVC received State aid in an amount equal to the totality of the 2012 and 2013 loans (EUR 101 118 066,03), the DGTF loans (EUR 30 million, EUR 8 million, EUR 5 million and EUR 13 million, respectively) and the loan for the Atlântida vessel (EUR 37 million).

6.3. **Unlawful aid**

(118) Article 108(3) TFEU states that a Member State shall not put an aid measure into effect before the Commission has adopted a decision authorising this measure.

(119) The Commission observes that Portugal granted the past measures to ENVC without notifying them to the Commission for approval (with the exceptions indicated in recital 125 below). The Commission regrets that Portugal did not comply with the stand-still obligation and therefore violated its obligation according to Article 108(3) TFEU.

6.4. **Compatibility of the past measures with the internal market**

(120) Insofar as the measures identified above constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that provision.

(121) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ([36]). The Portuguese authorities consider that most of the past measures do not constitute State aid and have therefore not provided any possible grounds for compatibility.

(122) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would be applicable to the past measures.

(123) As regards the **shipbuilding subsidies**, Portugal argues that they were provided under Decree-Law 296/89 implementing Directive 87/167/EEC (see recital 68 above). However, as the Commission already noted in the opening Decision, this Directive has ceased to apply since 31 December 1990 (see Article 13 thereof).

(124) In addition, Portugal has not provided any evidence that the shipbuilding subsidies would be compatible with any of the subsequent legal bases for declaring compatible aid for shipbuilding purposes.

(125) The sole exception concerns two shipbuilding subsidies granted to ENVC in 2003 and 2005 for the construction of two vessels (contracts C224 and C225 — see Annex II). These subsidies were authorised by Commission Decision in case C 33/2004 ([37]) on the basis of Regulation (EC) No 1540/98. The Commission therefore concludes according to the information provided that the subsidies for contracts C224 and C225 amounting to EUR 2 675 275 each (or a total of EUR 5 350 550) constitute aid to shipbuilding compatible with the internal market.

(126) The Commission nonetheless comes to the view that the rest of shipbuilding subsidies (amounting to EUR 21 779 383,21) — for which Portugal does not discuss their State aid character — are incompatible with the internal market.

([36]) Judgment in *Italy v Commission*, C-364/90, EU:C:1993:157.

([37]) Commission Decision 2006/946/EC of 6 September 2005 on State aid Portugal — Extension of the three-year delivery limit for two chemical tankers built by Estaleiros Navais de Viana do Castelo, S.A. (OJ L 383, 28.12.2006, p. 16).

(127) In relation to the **rest of the past measures** (with the exclusion of the comfort letters dated 8 January 2007 and 26 June 2008), as already indicated in the opening decision, in view of the nature of the measures and of the difficulties of ENVC, the only relevant compatibility criteria appear to be those concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU on the basis of the 2004 R&R Guidelines ([38]).

(128) In the first place, the Commission reiterates its findings of the opening decision that that the conditions for rescue aid laid down in section 3.1 of the 2004 R&R Guidelines are not met. According to point 25(a) of the 2004 R&R Guidelines, the rescue aid must consist of liquidity support in the form of loans or loan guarantees; in both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms. For instance the 2006 capital increase would already not meet this requirement.

(129) In addition, point 25(a) adds that any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after the disbursement of the first instalment to the firm. As explained above, this does not seem to have occurred for any of the past measures under assessment.

(130) Point 25(b) estates that the recue aid must be warranted on the grounds of serious social difficulties and have no unduly adverse spill-over effects on other Member States. Portugal has provided no evidence that this was the case for any of the past measures.

(131) Also, in the case of non-notified recue aid, point 25(c) requires the Member State to communicate to the Commission, no later than six months after the first implementation of the rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and /or that the guarantee has been terminated. Once again, Portugal did not fulfil this necessary compatibility requirement.

(132) According to point 25(d), the recue aid must be restricted to the amount needed to keep the firm in business. In view of the significant amounts of aid stemming from all the past measures, the Commission concludes that this requirement was not met either.

(133) Finally, point 25(e) of the 2004 R&R Guidelines requires that the 'one time, last time' principle is respected. According to this principle, where less than 10 years have elapsed since rescue aid was granted or a restructuring period came to an end, the Commission will not allow further rescue or restructuring aid. In view of the numerous interventions of the State during the time spam covered by the past measures, it is clear that the 'one time, last time' principle has not been respected and that ENVC benefited from unlawful State aid in numerous occasions.

(134) In relation to restructuring aid as defined in section 3.2 of the 2004 R&R Guidelines, the Commission observes that Portugal did not notify to the Commission any of the measures identified above as restructuring aid and thus failed to demonstrate that any of the necessary elements for it to be considered as such are present (restructuring plan, own contribution, compensatory measures, etc.).

(135) In particular, recital 34 of the 2004 R&R Guidelines states that the grant of restructuring aid is conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. In addition, any restructuring aid must include measures seeking to avoid undue distortions of competition ('compensatory measures' — see points 38 to 42) and must also provide for 'own contribution' from the beneficiary which in the case of ENVC should have reached 50 % of the restructuring costs given that it was a large undertaking (see points 38 to 45). In addition, as for recue aid, the 'one time, last time' principle must be respected.

([38]) As regards the professional training subsidies, the Commission observes that the Guidelines on national regional aid 2000-2006 (OJ C 74, 10.3.1998, p. 9), applicable at the time, excluded the provision of regional aid to firms in difficulty.

(136) The Commission first reiterates that the 'one time, last time' principle has not been respected (see recital 133 above). Indeed, the Commission observes that numerous past measures were provided outside the planned restructuring period 2005-2009. This would be in breach of the 'one time, last time' principle, and therefore sufficient to consider that the past measures cannot be deemed compatible restructuring aid as per the 2004 R&R Guidelines.

(137) In any event, the Commission highlights that Portugal submitted the restructuring plan prepared by BPI only in 2014, i.e. 5 years after the planned restructuring period (2005-2009) had expired. In addition, the Commission highlights that the plan prepared by BPI seems to be a draft for discussion. In any event, while the restructuring plan seems to include some of the elements required by the 2004 R&R Guidelines, it does not include any compensatory measures and does not foresee any own contribution by ENVC. Therefore, the restructuring plan of BPI cannot be deemed to respect the necessary requirements of the 2004 R&R Guidelines.

(138) In the absence of any proposed compensatory measures and own contribution from ENVC, and bearing in mind that the 'one time, last time' principle has not been respected, the Commission concludes that the rest of the past measures cannot be deemed compatible restructuring aid under the R&R Guidelines.

6.5. **Conclusion on compatibility**

(139) In view of the above, the Commission considers that the shipbuilding subsidies for contracts C224 and C225, amounting to EUR 2 675 275 each (see recital 125 above), constitute aid to shipbuilding compatible with the internal market.

(140) The Commission also considers that the rest of the past measures (i.e. the 2006 capital increase, the 2012 and 2013 loans, the DGTF loans, the comfort letters of 2009, 2010 and 2011, the professional training subsidies, the loan for the Atlântida vessel and the rest of the shipbuilding subsidies) do not meet the conditions of the 2004 R&R Guidelines. The Commission has not identified any other compatibility basis. Therefore, the Commission considers the rest of the past measures to entail State aid that is incompatible with the internal market.

6.6. **Recovery**

(141) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([39]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([40]).

(142) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([41]).

(143) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ([42]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'. Article 15 of the same Regulation clarifies that '[t]he powers of the Commission to recover aid shall be subject to a limitation period of ten years', which 'shall begin on the day on which the unlawful aid is awarded to the beneficiary […]. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period'. Since the first action taken by the Commission in case SA.35546 occurred on 11 October 2012 (see recital 1 above), any recovery of incompatible aid cannot include aid awarded before 11 October 2002.

([39]) Judgment in *Commission v Germany*, C-70/72, EU:C:1973:87, paragraph 13.
([40]) Judgment in *Spain v Commission*, C-278/92, C-279/92 and C-280/92, EU:C:1994:325, paragraph 75.
([41]) Judgment in *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraphs 64 and 65.
([42]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(144) The Commission observes in this respect that some of the shipbuilding subsidies were awarded before 11 October 2002, in particular in relation to contracts C206, C211, C217, C218, C219, C220, C221 and C222 (see Annex II). Therefore, the incompatible aid for these contracts, amounting to EUR 11 297 009,19 is subject to the limitation period of ten years and cannot be recovered.

(145) The rest of the past measures entailing unlawful and incompatible State aid (see table 5 below) must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear recovery interest until effective recovery.

Table 5

Amounts to be recovered (in EUR)

Date	Measure	Amount to be recovered [1]
11 May 2006	2006 capital increase	24 875 000
2012/2013	2012 and 2013 loans	101 118 066,03
(i) 31 January 2006 (ii) 11 December 2008 (iii) 28 April 2010 (iv) 27 April 2011	DGTF loans	(i) 30 000 000 (ii) 8 000 000 (iii) 5 000 000 (iv) 13 000 000
29 November 2011	Comfort letters for a loan granted by BCP	990 000
3 November 2011	Comfort letter for a loan granted by BCP	400 000
30 September 2010	Comfort letter for a loan granted by BCP	12 500 000
31 August 2010	Comfort letters for two standby letters of credit issued by CGD	12 890 000
24 June 2010	Comfort letter for a loan granted by BCP	5 000 000
25 November 2009	Comfort letter for revolving loan by CGD	15 000 000
7 September 2009	Comfort letter for revolving loan by BES	4 500 000
—	Shipbuilding subsidies (contracts C212, C213, C214 and C223)	10 482 374,01 [2]
—	Aid for professional training 2005-2006	257 791
23 December 2009	Loan for the Atlântida vessel	37 000 000

(1) Where applicable, the interests due and not paid by ENVC must also be subject to the recovery obligation.

(2) This figure results from the totality of the shipbuilding subsidies (*i*) minus those subsidies subject to the 10-year limitation period (*ii*) minus the subsidies declared compatible aid (*iii*), i.e. (*i*) EUR 27 129 933,20 — (*ii*) EUR 11 279 009,19 — (*iii*) EUR 5 350 550 = EUR 10 482 374,01.

7. ASSESSMENT OF ECONOMIC CONTINUITY BETWEEN ENVC AND WESTSEA

(146) On 4 March 2014, ENVC held a general assembly in which EMPORDEF, as the sole shareholder, confirmed the decision to proceed with the sale of ENVC's assets, as well as with the dismissal of the employees, in order to liquidate and dissolve the company as soon as possible.

(147) On 27 February 2015, in view of the future liquidation of ENVC, Portugal addressed a two-fold request to the Commission:

'(a) *Taking in consideration that, in the event of a negative Commission decision imposing the recovery of incompatible aid to ENVC in the context of Articles 107 and 108 TFEU, most part of ENVC assets will be sold and the process of ENVC winding up will be practically concluded, the Portuguese State kindly requests the Commission to confirm that under the conditions described above the sale of the said assets does not constitute aid to the purchasers.*

(b) *Taking also in consideration that, in the event of a negative Commission decision imposing the recovery of incompatible aid to ENVC in the context of Articles 107 and 108 TFEU, the Portuguese State would be required to recover the incompatible aid, the Portuguese authorities ask the Commission to confirm that such recovery obligation would not be extended to WestSea in spite of it taking-over some of the assets of ENVC.*'

(148) Indeed, in the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is normally required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies. Furthermore, even in the absence of economic continuity, (new) State aid for the buyer could also result from the sale of the assets below their market value.

(149) By the present decision, the Commission does not assess the assignment of the contracts for the construction of two asphalt carriers ([43]), which has not yet taken place.

(150) In order to decide on whether there is State aid benefiting the buyer(s) of the assets, the Commission needs to (a) determine whether the sale of any assets takes place at their market price; and (b) take into account also other criteria mentioned in the recital below.

(151) According to the Court decision on *Italy and SIM 2 v Commission* ([44]), on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM* ([45]), the assessment of economic continuity between the previous (aided) entity and the buyer is established based on a set of indicators. The following factors may be taken into consideration: (i) the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), (ii) the sale price, (iii) the identity of the buyer(s), (iv) the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and (v) the economic logic of the operation. This set of indicators was confirmed by the General Court in its decision of 28 March 2012 *Ryanair v Commission* ([46]), which confirmed the *Alitalia* decision.

([43]) See recital 24. The contract initially concluded between PDVSA and ENVC for the construction of two asphalt carriers has been transferred to EMPORDEF. Portugal has committed that the subcontracted parts of the contract will be tendered out following transparent, non-discriminatory and unconditional tenders opened to Portuguese and non-Portuguese bidders, the best price being the sole criterion to select the suppliers and service providers and to exclude ENVC from the process in case its liquidation and dissolution is not concluded when they occur.

([44]) Judgment in *Italy and SIM 2 Multimedia SpA v Commission*, C-328/99 and C-399/00, EU:C:2003:252.

([45]) Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/ Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia*; Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

([46]) Judgment of 28 March 2012 in *Ryanair Ltd v Commission*, T-123/09, ECR, EU:T:2012:164, confirmed on appeal by Judgment of 13 June 2013 in *Ryanair Ltd v Commission*, C-287/12 P, ECR, EU:C:2013:395.

7.1. **Scope of assets sold**

(152) In order to avoid economic continuity, the Commission has to establish that the assets and other elements of the business transferred represent only a part of the previous company or its activities. The larger the part of the original business that is transferred to a new entity, the higher the likelihood that the economic activity related to these assets continues benefitting from the advantage stemming from the incompatible aid granted to the previous entity.

(153) ENVC's main assets included (i) the concession granted by the Viana do Castelo Port Administration for the land where the shipyard is located and (ii) various equipment and raw materials. All these assets were sold following transparent, non-discriminatory, and unconditional tenders opened to Portuguese and non-Portuguese bidders, the best price being the sole criterion to select the bidders.

(154) As regards the *sub-concession for the land where the shipyard is located*, following a tender process, it was awarded until March 2031 to WestSea, a joint subsidiary of the Portuguese holding Martifer and the Portuguese shipyard Navalria. WestSea will pay an annual rent fee of EUR 419 233,95 and a guarantee of EUR 435 500.

(155) As regards the *various equipment and raw materials*, including vehicles and a major lifter/crane, they were sold in the course of 120 small tenders in 884 batches of goods. As a consequence, out of the total EUR 3 358 905,13 of goods sold, the buyers acquired on average EUR 55 981,75 of merchandise, ranging from EUR 10 up to EUR 1,035 million. The *Ministério dos Transportes e Comunicações de Timor* was the most important buyer with a share of 31 %. WestSea acquired less than 20 % of the assets sold.

(156) Finally, with respect to *employees*, no employment contract has been transferred to any of the buyers: 596 labour contracts have already been terminated and the remaining 13 employees are in the process of being dismissed. The tenders did not include any specific condition to transfer employment contracts or employees from ENVC to any buyer.

(157) As a consequence of the above elements, the Commission concludes that the scope of the assets acquired or to be acquired by WestSea will be significantly reduced in comparison to that of ENVC and its previous activity.

7.2. **Sale price**

(158) In order to avoid economic continuity between ENVC and WestSea, the Commission has to establish that the assets and other elements of the business transferred were or will be sold at market price. The market price is the price, which would be set by a private investor acting under market conditions ([47]).

(159) The sub-concession for the land where the shipyards are located and the various equipment and raw materials have been divested through open, transparent, non-discriminatory and unconditional tenders, the best price being the sole criterion to select the bidders.

(160) As a consequence of the above elements, the Commission concludes that the grant of the sub-concession for the land where the shipyards are located and the sale of ENVC's various equipment and raw materials to WestSea were carried out via open, transparent, non-discriminatory and unconditional tender processes to the highest bidder and thus led to a market price.

7.3. **Identity of the buyers**

(161) In order to avoid economic continuity, the Commission has to establish that the buyers of the assets and other elements of the business transferred do not have economic or corporate link with ENVC.

([47]) Judgment in *Seydaland*, C-239/09, EU:C:2010:778, paragraph 34.

(162) As concerns the concession for the land where the shipyard is located, the Portuguese authorities confirm that WestSea does not have any economic or corporate links with ENVC or the Portuguese State.

(163) As concerns the various equipment and raw materials already divested, the Portuguese authorities confirm that none of the main buyers have economic or corporate links with ENVC or its shareholder.

(164) As a consequence of the above elements, the Commission concludes that WestSea is an entity independent from ENVC and from its shareholder.

7.4. **Moment of the sale**

(165) In order to avoid economic continuity, the Commission has to establish that the moment of the sale of the assets and other elements of the business transferred does not lead to a circumvention of a decision by the Commission to recover incompatible State aid.

(166) The Commission notes that the tender processes for the sub-concession of the land where the shipyards are located as well as for the acquisition of the assets and equipment have been launched and concluded before the adoption by the Commission of the present final decision.

(167) Moreover, as mentioned in recital 1 above, it was Portugal that first approached the Commission in order to properly organise ENVC's privatisation in accordance with EU State aid rules. Thus, the series of events indicate that the privatisation was not construed as a mechanism to circumvent existing negative decisions or pending investigations by the Commission.

(168) As a consequence of the above elements, the Commission concludes that the fact that the granting of the sub-concession of the land where the shipyards are located as well as the acquisition of ENVC's various equipment and raw materials occurred before the adoption by the Commission of the present final decision does not indicate that there is circumvention of a potential recovery decision by the Commission.

7.5. **Economic logic of the operation**

(169) In order to avoid economic continuity, the Commission has to establish that the buyers of the assets and others elements of the business transferred will not employ these assets in the same way as the previous owner but will use them to set up a different activity or strategy.

(170) Some of ENVC's assets acquired by WestSea may be used for the same general activity (shipbuilding), in particular the land where the shipyard is located. However, the mere fact that the buyer would be active in the same economic sector as the previous entity does not necessarily imply that there is economic continuity. WestSea has no obligation to take over any of ENVC employees or employment contracts. In addition, WestSea will integrate the shipyard in its business strategy in order to guarantee synergies with other shipyard sites. WestSea will have the possibility to manage its activities under different operating conditions than ENVC and will have the freedom to apply its own business model.

(171) As a consequence of the above elements, the Commission concludes that WestSea will integrate these elements into its company strategy and will use them in order to pursue its own economic logic.

7.6. **Conclusion on the economic continuity between ENVC and WestSea**

(172) First, the scope of the assets acquired by WestSea is significantly reduced in comparison to that of ENVC and its previous activity. Second, the granting of the sub-concession for the land where the shipyard is located and the acquisition of the various equipment and raw materials were carried out via open, transparent, non-discriminatory and unconditional tenders. Third, WestSea is an entity independent from ENVC and its shareholder. Fourth, the moment of the grant of the sub-concession of the land where the shipyards are located as well as the acquisition of various equipment and raw materials does not indicate that there is circumvention of a potential recovery decision by the Commission. Fifth, WestSea will integrate ENVC's assets into its company strategy and will use them in order to pursue its own economic logic.

(173) Consequently, the Commission concludes that there is no economic continuity between ENVC and WestSea.

8. **CONCLUSION**

(174) The Commission finds that the past measures, with the exception of the comfort letters dated 8 January 2007 and 26 June 2008, constitute State aid in favour of ENVC within the meaning of Article 107(1) TFEU.

(175) The past measures constituting State aid are incompatible with the internal market (with the exception of the two shipbuilding subsidies authorised by Commission Decision in case C 33/2004), because the relevant conditions of the 2004 R&R Guidelines were not met and no other compatibility grounds were identified.

(176) The Commission also finds that Portugal has unlawfully implemented the measures referred to above in breach of Article 108(3) TFEU.

(177) The incompatible State aid must be recovered from the beneficiary, as outlined in section 6.6 above.

(178) Such recovery will not concern WestSea, due to the absence of economic continuity between ENVC and WestSea.

(179) Finally, the Commission notes that Portugal agreed to have the present decision adopted and notified in English.

HAS ADOPTED THIS DECISION:

Article 1

1. The comfort letters dated 8 January 2007 and 26 June 2008 do not constitute State aid within the meaning of Article 107(1) TFEU.

2. The State aid contained in the shipbuilding subsidies corresponding to contracts C224 and C225 (amounting to EUR 5 350 550) is compatible with the internal market.

3. The State aid referred to in the table below, unlawfully put into effect by Portugal in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Date	Measure	Amount
11 May 2006	2006 capital increase	24 875 000
2012/2013	2012 and 2013 loans	101 118 066,03
(i) 31 January 2006 (ii) 11 December 2008 (iii) 28 April 2010 (iv) 27 April 2011	DGTF loans	(i) 30 000 000 (ii) 8 000 000 (iii) 5 000 000 (iv) 13 000 000
29 November 2011	Comfort letters for a loan granted by BCP	990 000
3 November 2011	Comfort letter for a loan granted by BCP	400 000
30 September 2010	Comfort letter for a loan granted by BCP	12 500 000
31 August 2010	Comfort letters for two standby letters of credit issued by CGD	12 890 000

Date	Measure	Amount
24 June 2010	Comfort letter for a loan granted by BCP	5 000 000
25 November 2009	Comfort letter for revolving loan by CGD	15 000 000
7 September 2009	Comfort letter for revolving loan by BES	4 500 000
—	Shipbuilding subsidies (contracts C212, C213, C214 and C223)	10 482 374,01
—	Shipbuilding subsidies (contracts C206, C211, C217, C218, C219, C220, C221 and C222)	11 279 009,01
—	Aid for professional training 2005-2006	257 791
23 December 2009	Loan for the Atlântida vessel	37 000 000

Article 2

1. Portugal shall recover the incompatible aid referred to in paragraph 2 of Article 1 from the beneficiary (including, where applicable, the interests accrued and not paid by ENVC), with the exception of the shipbuilding subsidies linked to contracts C206, C211, C217, C218, C219, C220, C221 and C222 (for an overall amount of EUR 11 279 009,01) for them being subject to the 10-year limitation period laid down in Article 15 of Regulation (EC) No 659/1999.

2. Such recovery of incompatible State aid shall not concern WestSea.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([48]), and to Commission Regulation (EC) No 271/2008 ([49]) amending Regulation (EC) No 794/2004.

5. Portugal shall cancel all outstanding payments of aid, if any, with effect from the date of adoption of this decision.

Article 3

1. Recovery of the aid referred to in paragraph 2 of Article 1 shall be immediate and effective.

2. Portugal shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Portugal shall submit the following information:

(a) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

([48]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).
([49]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

2. Portugal shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in paragraph 2 of Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to Portugal.

Done at Brussels, 7 May 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission

ANNEX I

THE 2012 AND 2013 LOANS

Date of signature	Amount	Interest rate applied
6 January 2012	970 000,00	7,108 %
9 January 2012	175 000,00	3-month EURIBOR + 7,108 %
31 January 2012	3 445 258,51	3-month EURIBOR + 6,62 %
8 February 2012	64 741,49	3-month EURIBOR + 6,62 %
30 March 2012	1 026 647,44	3-month EURIBOR + 7,887 %
30 March 2012	16 700 000,00	2 %
30 April 2012	1 268 536,13	3-month EURIBOR + 5 %
2 May 2012	48 997,82	3-month EURIBOR + 7,887 %
30 May 2012	1 100 000,00	3-month EURIBOR + 8,431 %
31 May 2012	5 375 000,00	3-month EURIBOR + 8,5 %
31 May 2012	834 830,96	3-month EURIBOR + 8,451 %
1 June 2012	12 844 000,00	3-month EURIBOR + 4,976 %
5 June 2012	281 000,00	3-month EURIBOR + 4,976 %
6 June 2012	345 000,00	3-month EURIBOR + 7,682 %
8 June 2012	1 449 714,00	3-month EURIBOR + 7,682 %
11 June 2012	696 481,42	3-month EURIBOR + 7,682 %
21 June 2012	177 979,74	3-month EURIBOR + 7,682 %
21 June 2012	4 785 000,00	3-month EURIBOR + 8,1509 %
22 June 2012	118 070,71	3-month EURIBOR + 7,682 %
25 June 2012	83 694,43	3-month EURIBOR + 4,976 %
26 June 2012	1 163 308,28	3-month EURIBOR + 4,976 %
29 June 2012	664 537,83	3-month EURIBOR + 4,976 %
3 July 2012	272 811,37	3-month EURIBOR + 8,5 %
11 July 2012	71 104,02	3-month EURIBOR + 4,976 %

Date of signature	Amount	Interest rate applied
11 July 2012	1 742 275,55	3-month EURIBOR + 8,1509 %
13 July 2012	40 000,00	3-month EURIBOR + 8,431 %
19 July 2012	45 000,00	3-month EURIBOR + 4,956 %
27 July 2012	1 000 000,00	3-month EURIBOR + 5,78 %
31 July 2012	400 000,00	3-month EURIBOR + 8,182 %
31 July 2012	1 450 000,00	3-month EURIBOR + 4,756 %
2 August 2012	100 000,00	3-month EURIBOR + 8,182 %
14 August 2012	275 000,00	3-month EURIBOR + 8,151 %
17 August 2012	180 000,00	3-month EURIBOR + 8,1509 %
20 August 2012	1 186 322,44	3-month EURIBOR + 8,1509 %
20 August 2012	400 000,00	3-month EURIBOR + 5,624 %
24 August 2012	600 000,00	3-month EURIBOR + 5,624 %
13 September 2012	365 000,00	3-month EURIBOR + 5,624 %
19 September 2012	5 111 910,08	Debt of ENVC towards Parvalorem assumed by EMPORDEF
21 September 2012	19 000,00	3-month EURIBOR + 5,624 %
25 September 2012	1 180 491,65	3-month EURIBOR + 4,668 %
27 September 2012	1 050 000,00	3-month EURIBOR + 5,624 %
28 September 2012	48 000,00	3-month EURIBOR + 5,624 %
12 October 2012	120 000,00	5,871 %
16 October 2012	15 000,00	8,1509 %
19 October 2012	566 000,00	3-month EURIBOR + 4,64 %
26 October 2012	1 000 000,00	3-month EURIBOR + 4,64 %
29 October 2012	84 685,34	8,151 %
30 October 2012	120 000,00	8,1509 %
2 November 2012	10 570 971,04	5,871 %
9 November 2012	5 227,50	4,459 %

Date of signature	Amount	Interest rate applied
27 November 2012	250 000,00	5,871 %
28 November 2012	250 000,00	8,1509 %
29 November 2012	200 000,00	7,915 %
29 November 2012	120 000,00	5,871 %
30 November 2012	84 685,12	5,871 %
3 December 2012	300 000,00	4,459 %
3 December 2012	35 000,00	7,915 %
7 December 2012	1 500,00	8,151 %
11 December 2012	100 000,00	4,459 %
14 December 2012	180 000,00	4,459 %
19 December 2012	200 000,00	4,459 %
20 December 2012	29 159,75	4,459 %
21 December 2012	1 000 000,00	5,871 %
28 December 2012	5 000 000,00	7,915 %
31 December 2012	16 500,00	4,459 %
4 January 2013	120 000,00	4,459 %
9 January 2013	84 756,80	4,459 %
11 January 2013	260 000,00	7,911 %
17 January 2013	200 000,00	8,15 %
8 February 2013	5 767 984,59	4,165 %
31 May 2013	5 281 882,02	Interest to be paid by ENVC to EMPORDEF for the 2012 loans
	***Total:* 101 118 066,03**	

ANNEX II

THE SHIPBUILDING SUBSIDIES

Contract number	2000	2001	2002	2003	2004	2005	TOTAL	Granting act (Despacho)	Date of publication in the Diário da República
C206	*679 362,74*						***679 362,74***		
C211			*2 081 867,70*				***2 081 867,70***	*245/2002 of 31.12.2001*	*6.4.2002*
C212			1 629 892,00	407 473,00			2 037 365,00	882/2002 of 25.12.2002	12.12.2002
C213			2 265 871,06	541 732,94	701 901,00		3 509 505,00	880/2002 of 25.12.2002	12.12.2002
C214			2 807 604,01		701 901,00		3 509 505,01	880/2002 of 25.12.2002	12.12.2002
C217		*1 415 887,71*					***1 415 887,71***	*158/2001 of 29.12.2000*	*16.02.2001*
C218		*1 415 887,71*					***1 415 887,71***	*158/2001 of 29.12.2000*	*16.02.2001*
C219		*1 425 998,34*					***1 425 998,34***	*158/2001 of 29.12.2000*	*16.2.2001*
C220		*1 425 998,34*					***1 425 998,34***	*158/2001 of 29.12.2000*	*16.2.2001*
C221	*1 140 802,66*	*276 446,76*	*8 753,90*				***1 426 003,32***	*810/2000 of 25.7.2000*	*5.8.2000*
C222			*1 426 003,33*				***1 426 003,33***	*244/2002 of 31.12.2001*	*6.4.2002*
C223			1 425 999,00				1 425 999,00	881/2002 of 25.11.2002	12.12.2002

Contract number	2000	2001	2002	2003	2004	2005	TOTAL	Granting act (Despacho)	Date of publication in the Diário da República
C224				2 140 220,00		535 055,00	2 675 275,00	879/2002 of 25.11.2002	12.12.2002
C225				2 140 220,00		535 055,00	2 675 275,00	879/2002 of 25.11.2002	12.12.2002
	1 820 165,40	5 960 218,86	11 645 991,00	5 229 645,94	1 403 802,00	1 070 110,00	**27 129 933,20**		

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