



EUROPEAN COMMISSION

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**Subject: State aid SA.34191 (2012/C) (ex 2012/NN) – Latvia**  
***Alleged aid to airBaltic***

Sir,

The Commission wishes to inform Latvia that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

## **1. PROCEDURE**

### **1.1. The pre-notification – SA.33799 (2011/PN)**

- (1) By SANI notification n° 6332 of 18 October 2011, registered on 20 October 2011, the Latvian authorities pre-notified to the Commission a LVL 16 million

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(EUR 22.65 million)<sup>1</sup> loan in favour of A/S Air Baltic Corporation (hereinafter "airBaltic" or "the company"). The Latvian authorities were of the view that the loan did not constitute state aid but nonetheless pre-notified it for reasons of legal certainty and transparency. This pre-notification was registered with reference number SA.33799 (2011/PN).

- (2) A meeting with the Latvian authorities and their advisers took place on 27 October 2011, after which the Latvian authorities submitted supplementary information by letter of 7 November 2011. The Commission requested additional information by e-mails of 16 November 2011, 17 November 2011, 1 December 2011, and 9 December 2011,
- (3) to which the Latvian authorities respectively replied by e-mails of 16 November 2011, 22 November 2011, 7 December 2011, and 13 December 2011.
- (4) On 4 January 2012, the Latvian authorities submitted additional information and explained that the LVL 16 million loan – referred to in recital (1) above – had been provided to the company already on 21 October 2011 without prior Commission authorisation. In addition, on 13 December 2011, the Latvian State decided to increase the capital of the company and on 14 December 2011 it granted a second loan to airBaltic.
- (5) In view of the fact that the measure had been granted to the company and of the complaint received on 9 January 2012 (see section 1.2 below), the Latvian authorities withdrew their pre-notification by e-mail of 21 February 2012. State aid case SA.33799 (2011/PN) was administratively closed on 27 February 2012.

## **1.2. The complaints – SA.34191 (2012/C) (ex 2012/NN)**

- (6) On 9 January 2012, the Commission received a complaint lodged by the private company SIA Baltijas aviācijas sistēmas (hereinafter "BAS" or "the complainant"), former shareholder of airBaltic, in relation to a number of measures allegedly provided to airBaltic by the Latvian State.
- (7) By letter of 23 January 2012, the Commission sent the complaint for comments to the Latvian authorities, who replied on 13 March 2012.
- (8) By letter of 14 May 2012, the Commission requested additional information from the Latvian authorities, who replied on 16 July 2012.
- (9) By letter of 18 July 2012, registered on 20 July 2012, the Commission received a new complaint from Mrs Inga Piterniece, former member of the board of BAS, regarding an additional measure allegedly granted by the Latvian State to airBaltic. By e-mail of 24 July 2012, the Commission sent the new complaint for comments to the Latvian authorities, who replied on 22 August 2012 and 4 September 2012.
- (10) Meetings with the Latvian authorities, their advisers and representatives of airBaltic took place on 5 July 2012 and 17 August 2012.

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<sup>1</sup> Exchange rate of EUR 1 = LVL 0.7063. Average exchange rate for 2011 published by the European Central Bank, available at <http://sdw.ecb.europa.eu/reports.do?node=100000233>.

## 2. THE LATVIAN AIR TRANSPORT MARKET

- (11) The air transport market in Latvia has rapidly expanded since Latvia joined the EU. Between 2003 and 2007, the annual average growth of passengers at Riga International Airport – including point-to-point and transfer passengers – reached 47%, passing from approximately 700,000 passengers in 2003 to 4.1 million in 2007. The entry of low-cost carriers, especially Ryanair, further contributed to the market growth as substantial new demand was created with the opening of new routes.
- (12) The global economic crisis of 2008-2009 severely hit the economic growth of the Baltic state and as a consequence its air transport market. As a result of the crisis, the number of point-to-point passengers in Latvia decreased from 3.2 million in 2008 to 2.7 million in 2009, although the total number of passengers continued to grow thanks to transfer passengers.
- (13) As of 2010, overall market growth resumed, reaching an average 12% annual growth. While the point-to-point passenger market has increased on average 9% annually, the increase in the transfer passenger market reached 18% per year. Going forward, it is expected that the Latvian air transport market will continue to grow at an annual growth rate of 7% between 2012 and 2015.
- (14) Riga International Airport is the leader in the Baltic region. In 2011, approximately 5.1 million passengers travelled to/from Riga, compared to 1.9 million passengers travelling to/from Tallinn and 1.7 million passengers travelling to/from Vilnius. In 2011, airBaltic carried 66% of the passengers flying via Riga, while Ryanair, second largest operator and main competitor of airBaltic, carried 20%. 15 other companies operate to/from Riga (full-service providers and low-cost carriers) accounting for 14% of all passengers.<sup>2</sup>

## 3. THE BENEFICIARY

- (15) airBaltic was established in 1995 through a joint venture between Scandinavian Airlines SAS and the Latvian State. In January 2009, SAS sold its entire stake in the company (47.2%) to BAS.
- (16) From information published in the press, it appears that BAS was set up as a private company wholly owned by Mr Bertolt Flick until December 2010, when 50% of its shares were transferred to the Bahamas-registered Taurus Asset Management Fund Ltd ("Taurus").<sup>3</sup>
- (17) As of October 2011, airBaltic's shareholders were the Latvian State – through the Ministry of Transport – with 52.6% of the shares and BAS with 47.2%, the rest (0.2%) being held by the Russian airline Transaero. At the time, the

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<sup>2</sup> Source: Riga International Airport Yearbook 2011, available at <http://www.riga-airport.com/en/main/about-company/gada-gramata>.

<sup>3</sup> See <http://bnn-news.com/airbaltic-shareholders-structure-11608>. The press reports some links between Taurus and Mr Vladimir Antonov, a Russian entrepreneur and former main shareholder and chairman of the Lithuanian bank Snoras. Snoras was nationalised by the Lithuanian Government on 16 November 2011. The Central Bank of Lithuania explained that it needed to nationalise Snoras because of the failure to meet regulatory requirements, failure to provide requested information, and the poor condition of assets. See <http://en.rian.ru/business/20120523/173624459.html> and <http://www.bloomberg.com/news/2011-12-19/antonov-says-he-invested-50-million-euros-in-latvia-s-airbaltic.html>.

president and CEO of airBaltic was Mr Bertolt Flick. Since 1 November 2011, the CEO of airBaltic is Mr Martin Gauss, former CEO of Malév.

- (18) On the basis of the information provided by the Latvian authorities, it appears that BAS had pledged its 47.2% shareholding in airBaltic as collateral to Latvijas Krājbanka.<sup>4</sup> On 21 November 2011, the operations of Latvijas Krājbanka were suspended by order of the Finance and Capital Market Commission of Latvia ("FCMC") and the bank was nationalised.<sup>5</sup>
- (19) On 30 November 2011 Latvijas Krājbanka sold all except one of airBaltic shares owned by BAS to the Ministry of Transport at their nominal value, totalling LVL 224,453 (EUR 317,787).<sup>6</sup> As a result, Latvia's shareholding in airBaltic increased to 99.8%, while BAS retained just one share.
- (20) It also appears from the press that the shareholders of BAS had also pledged their shares in BAS as security with Latvijas Krājbanka.<sup>7</sup> On 6 February 2012, in the context of insolvency proceedings relating to BAS,<sup>8</sup> a subsidiary of Latvijas Krājbanka took over BAS' shares from its prior shareholders and appointed a new management.
- (21) Finally, it appears that on 8 June 2012 the Latvian State purchased from BAS its sole share in airBaltic for LVL 1. Therefore, as of this date, BAS is no longer shareholder of airBaltic.<sup>9</sup>
- (22) In relation to the financial situation of airBaltic, the Latvian authorities have explained that the difficulties of the company started in 2008, due to the global economic recession and the drastic oil price increase. As a result, in 2008 airBaltic had losses of LVL 28 million (EUR 39.64 million). In 2009 the company however turned back to profits of LVL 14 million (EUR 19.82 million).<sup>10</sup> In 2010, airBaltic again made losses of LVL 34.2 million (EUR 48.42 million). In June 2011, the Latvian Minister of Economy said that airBaltic operated with a loss of LVL 18 million (EUR 25.48 million) in the

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<sup>4</sup> Latvijas Krājbanka was an affiliate of Snoras (see footnote 3 above).

<sup>5</sup> On the same day, the FCMC decided to appoint several persons to manage the operations of Latvijas Krājbanka. See [http://www.fktk.lv/en/publications/other\\_publications/2012-02-07\\_jsc\\_latvijas\\_krajbanka\\_c/](http://www.fktk.lv/en/publications/other_publications/2012-02-07_jsc_latvijas_krajbanka_c/).

<sup>6</sup> It is unclear on what basis the Latvian State acted when acquiring BAS' shares in airBaltic. The Minister of Transport explained that the goal of the acquisition was to protect the depositors of Latvijas Krājbanka. Apparently, BAS' financial problems threatened to prevent the State from investing in airBaltic's capital and thus the Government decided to act proactively in the defence of its interests and take control of airBaltic. See <http://www.bloomberg.com/news/2011-12-01/latvia-buys-out-minority-shareholder-in-airbaltic-ministry-says.html> and [http://www.sam.gov.lv/?cat=8&art\\_id=2598](http://www.sam.gov.lv/?cat=8&art_id=2598).

<sup>7</sup> See <http://www.baltic-course.com/eng/transport/?doc=54423>. The press also reports that BAS allegedly owed LVL 14 million to Latvijas Krājbanka (see for instance <http://www.baltic-course.com/eng/transport/?doc=53861>).

<sup>8</sup> On the basis of the information available, it appears that BAS has faced several insolvency proceedings, facilitated by the fact that Latvian law apparently allows claimants to initiate insolvency proceedings against debtors easily. The current situation of BAS is unclear.

<sup>9</sup> In addition, it seems that since at least 2010 the relationship between the main shareholders of airBaltic – the Latvian State and BAS – has been one of conflict: the press reports on numerous legal actions between the Latvian State and BAS (see for instance <http://atwonline.com/airline-finance-data/news/airbaltic-files-bankruptcy-0921>).

<sup>10</sup> See <http://centreforaviation.com/analysis/airbaltics-restructuring-plan-is-in-full-swing-but-competition-from-estonian-air-is-rising-74754>.

first five months of 2011 and was close to bankruptcy.<sup>11</sup> The press reports that airBaltic filed for legal protection from its creditors on 21 September 2011.<sup>12</sup> The audited results for 2011 show a loss of LVL 83.5 million (EUR 118.22 million).

- (23) The Latvian State is currently looking for a strategic private partner for airBaltic.<sup>13</sup> It appears that Latvia intends to increase airBaltic's capital and that the investor will be offered to participate in the company's share capital up to 50% minus one vote (significant minority stake). However, transactions of a different nature are not excluded.

#### 4. DESCRIPTION OF THE MEASURES

##### 4.1. The 3 October 2011 agreement: the first State loan and the BAS loan

- (24) On the basis of an agreement dated 3 October 2011, Latvia agreed to provide to airBaltic a loan of LVL 16 million (EUR 22.65 million) ("the first State loan", **measure 1**) alongside another loan of LVL 14 million (EUR 19.82 million) from BAS ("the BAS loan"). The conditions of both loans were linked and identical,<sup>14</sup> and the initial interest rate was set at [11-13]%.  
(25) The 3 October 2011 agreement also stipulated that no later than 15 December 2011, an additional loan for an undetermined amount would be granted to airBaltic in proportion to its voting rights, on identical conditions to the first State loan. Both State loans were to be capitalised if a number of conditions were met, among which the approval by the board of airBaltic of a business / restructuring plan.  
(26) A number of other investors were also party to the 3 October 2011 agreement. They agreed to grant two syndicated loans to airBaltic for EUR 35 million each at an initial interest rate of [5-7]%. Syndicated loan 1 was provided by Latvijas Krājbanka and Snoras. Syndicated loan 2 was provided by several companies, among which Taurus.  
(27) Article 7.3 of the 3 October 2011 agreement states that "*the State loan and BAS loan [...] may be added to the sum to be capitalised*". Under Article 7.4, BAS undertook to vote for the capitalisation of the loan and for the capital increase as well as to participate in the equity increase. In case BAS did not fulfil its commitments, Article 7.4 gives the State the right to purchase from BAS its shares in airBaltic for LVL 1.<sup>15</sup> If this situation occurs, the investors who granted syndicated loan 2 to airBaltic – including BAS' shareholder Taurus – agreed to "*assign and to hand over to the State or its nominated*

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<sup>11</sup> See <http://www.eurofound.europa.eu/emcc/erm/factsheets/18371/Air%20Baltic%20Corporation?Template=searchfactsheets&kSel=1> and <http://www.baltic-course.com/eng/transport/?doc=42089>.

<sup>12</sup> See <http://atwonline.com/airline-finance-data/news/airbaltic-files-bankruptcy-0921>.

<sup>13</sup> The Latvian Ministry of Transport placed an advertisement in the European and British editions of the Financial Times on 27 August 2012 inviting non-binding expressions of interest to participate in the sale of shares issued by airBaltic. See [http://prudentia.lv/upload\\_file/27082012-ABC%20ad%20EN.pdf](http://prudentia.lv/upload_file/27082012-ABC%20ad%20EN.pdf).

<sup>14</sup> However, at the time of granting the loan to airBaltic on 1 November 2011, BAS waived its right to have the BAS loan collateralised.

<sup>15</sup> The Latvian State apparently exercised this right on 8 June 2012 (see recital (20) above).

*company for the sum of LVL 1 all claims which stem from [...] the outstanding [syndicated] loan nr 2".*

- (28) Latvia granted the loan to airBaltic on 21 October 2011 (see recital (3) above). BAS granted the BAS loan on 1 November 2011.
- (29) On 13 December 2011, once Latvia's shareholding in airBaltic had increased to 99.8% (see recital (18) above), the Latvian Government decided to authorise an interest rate cut for the first State loan from [11-13]% to [2-4]%. Since the first State loan and the BAS loan were linked (see recital (23) above), the same interest rate cut was applied to the latter.

#### **4.2. The second State loan of 13 December 2011**

- (30) On 13 December 2011, at the same time as the interest rate cut of the first State loan (see recital (28) above), the Latvian Government decided to provide a convertible loan to airBaltic of LVL 67 million (EUR 94.86 million) at an interest rate of [9-11]% divided into two tranches ("the second State loan", **measure 2**).
- (31) The first tranche of the second State loan of LVL 41.6 million (EUR 58.89 million) was immediately made available to airBaltic by agreement of 14 December 2011. The second tranche of LVL 25.4 million (EUR 35.96 million) has apparently not been paid out to the company yet. The decision of the Latvian Government specifically states that this second tranche was provided in case BAS would not fulfil its commitments towards airBaltic derived from the 3 October 2011 agreement. .

#### **4.3. airBaltic's capital increase agreed on 22 December 2011**

- (32) During airBaltic's shareholders' meeting of 22 December 2011, the Latvian State and BAS – despite it having only one share in the company – agreed to a capital increase of LVL 110 million (EUR 155.74 million) ("the capital increase", **measure 3**), as provided for in the 3 October 2011 agreement. This was to be achieved through conversion into capital of the first State loan, the first tranche of the second State loan and the BAS loan, together with a cash contribution from BAS of LVL 37.7 million (EUR 53.38 million).
- (33) The Latvian State executed its decision to participate in airBaltic's capital increase on 29 December 2011 and proceeded to convert into capital the first State loan and the first tranche of the second State loan.
- (34) By letter of 4 January 2012, the Ministry of Transport of Latvia requested that BAS participate in the capital increase by converting the BAS loan and injecting the cash. However, on 19 January 2012 the FCMC issued a formal prohibition to BAS and airBaltic on including the BAS loan as part of the capital increase.
- (35) Despite the requests of the Latvian authorities, BAS did not seem inclined to fulfil the agreement reached at the shareholders' meeting. Indeed, by letters dated 6 to 26 January 2012, BAS contested the State's acquisition from Latvijas Krājbanka of the airBaltic shares that BAS previously owned (see recital (18) above) and requested that the State refrain from adopting decisions concerning changes in airBaltic's capital.

- (36) By 30 January 2012, i.e. the end of the first stage of the subscription implementation period for the capital increase, BAS had neither converted its loan nor injected the cash.

#### **4.4. The complaint from BAS and subsequent events**

- (37) The complaint filed with the Commission on 9 January 2012 concerned the first and second State loans as well as the capital increase. In addition, BAS complained about two other measures potentially entailing aid to airBaltic, namely the acquisition by the State of 0%-coupon bonds from airBaltic in April 2010 (**measure 4**) and the payment of EUR 2.8 million by Latvijas Krājbanka to airBaltic on 21 and 22 November 2011 (**measure 5**).

##### *4.4.1. The "reShape" business plan of March 2012*

- (38) In March 2012, airBaltic adopted a business plan entitled "reShape". It foresees a number of measures, including the purchase of more efficient planes<sup>16</sup> and the [...], which would allow the company to break-even in [...] in the realistic and optimistic scenarios. However, in the pessimistic scenario, airBaltic would have negative EBIT until [...].
- (39) The business plan foresees that on top of the LVL 83 million (EUR 117.51 million) already committed to the company,<sup>17</sup> additional financing of LVL [...] (EUR [...]) will be needed [...] in the realistic scenario. This amount would go down to LVL [...] (EUR [...]) in the optimistic scenario but would increase to LVL [...] (EUR [...]) in the pessimistic one.

##### *4.4.2. Subsequent events*

- (40) At the shareholders' meeting of airBaltic of 17 May 2012, the board and the council of the company decided to postpone the final decision on a partial capital increase until 28 June 2012, decision later postponed to the shareholders' meeting of 30 July 2012.<sup>18</sup>
- (41) On 8 June 2012, the State acquired BAS' remaining share in airBaltic for LVL 1 on the basis of Article 7.4 of the 3 October 2011 agreement (see recitals (20) and (26) above). It also appears that the State filed a court claim against BAS in May-June 2012

#### **4.5. The complaint of 18 July 2012**

- (42) On 18 July 2012, the Commission received an additional complaint (see recital (8) above) regarding the obligation of the investors under Article 7.4 of the 3

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<sup>16</sup> On 10 July 2012 airBaltic signed a letter of intent with Bombardier to acquire 10 CS300 aircraft and take purchase rights on a further 10 CS300 jetliners. Based on the list price of the CS300 airliner, a firm-order contract will be valued at approximately USD 764 million (EUR 621.74 million), and could increase to USD 1.57 billion (EUR 1.28 billion) should the purchase rights be converted to firm orders. See <http://www.airbaltic.com/public/49780.html>. Exchange rate of EUR 1 = USD 1.2288 – average exchange rate for July 2012 published by the European Central Bank, available at <http://sdw.ecb.europa.eu/reports.do?node=100000233>.

<sup>17</sup> The first State loan of LVL 16 million and the second State loan of LVL 67 million (including the second tranche of LVL 25.4 million, which following the "reShape" business plan is to be provided to the company in the second half of 2012).

<sup>18</sup> The Latvian authorities have not provided information to the Commission on the result of the shareholders' meeting of airBaltic of 30 July 2012.

October 2011 agreement to assign and to hand over to the State or its nominated company all claims stemming from syndicated loan 2 for just LVL 1 (see recital (26) above). The complainant alleges that by letters of 9 February 2012 and 12 June 2012 the Latvian State had decided that a claim of EUR 5 million towards airBaltic for syndicated loan 2 – the part granted by Taurus, of a total of EUR 35 million – is to be assigned to airBaltic for a price of LVL 1 (**measure 6**).

## 5. COMMENTS FROM LATVIA

- (43) The Latvian authorities acknowledge the problematic financial situation of the company at the time measures 1, 2 and 3 were granted (October-December 2011). However, the Latvian authorities consider that airBaltic cannot be considered a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>19</sup> (hereinafter "the R&R Guidelines") in view of the fact that it was able to obtain funding from its private and public shareholders. However, they also argue that if the Commission were to consider that state aid was present, then airBaltic would qualify as a firm in difficulty.
- (44) The Latvian authorities consider that measures 1, 2 and 3 were done on *pari passu* terms with the private investor BAS. They also argue that the Commission must only consider investment decisions at the time these decisions were taken. In relation to measures 1, 2 and 3, the Latvian authorities are of the view that these measures were agreed on 3 October 2011, i.e. the date when the first contract between airBaltic and BAS was signed. As a result, the Latvian authorities consider that the State behaved like a market investor and exclude any state aid to airBaltic.
- (45) In particular, the Latvian authorities claim that the first State loan (**measure 1**) was granted on *pari passu* terms with another loan from BAS in proportion to their shareholding and with identical conditions, as foreseen in the 3 October 2011 agreement. They explain that this agreement also foresaw the possibility of an interest rate cut for the first State loan and the BAS loan. This possibility materialised on 13 December 2011 when the Latvian State decided to lower the interest rate from [11-13]% to [2-4]% (see recital (29) above).
- (46) The Latvian authorities are of the opinion that the cut in the interest rate by [7-11] percentage points – [...] – was appropriate in view of the valuation of the collateral of the first State loan. This, and the fact that the 3 October 2011 agreement already foresaw the possibility of an interest rate cut, would exclude in their view the presence of state aid to airBaltic. Finally, the Latvian authorities observe that the interest rate of the first State loan and the BAS loan was relevant for only a very short period of time as both the State and BAS had planned to convert their loans into capital and thus the interest rate on those loans cannot be compared to funding provided by private banks.
- (47) Regarding the second State loan (**measure 2**), the Latvian authorities claim that this measure was granted in order to be converted into capital and that it was due to be accompanied by another loan from BAS on *pari passu* terms on

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<sup>19</sup> OJ C 244, 1.10.2004, p. 2.

the basis of the 3 October 2011 agreement, which in their view would exclude the presence of state aid. They also argue that the interest rate applied to the second State loan ([9-11]%) was at market level, which would also eliminate any advantage to airBaltic.

- (48) Regarding the capital increase (**measure 3**), the Latvian authorities note that at airBaltic's shareholders' meeting of 22 December 2011, both BAS and the State voted for the capitalisation of their respective loans as well as for a cash injection from BAS (see recital (31) above). In view of the concomitant decision of BAS and the State to capitalise the company – and bearing in mind that the obligation to vote for the capitalisation was foreseen in the 3 October 2011 agreement –, the Latvian authorities conclude that measure 3 was in line with the market economy investor principle (hereinafter "MEIP") and thus exclude state aid to airBaltic. In the opinion of the Latvian authorities, this conclusion would not be altered by the fact that BAS did not fulfil its promise. They also insist that the Commission must not take into consideration any event that occurred after 22 December 2011.
- (49) The Latvian authorities argue that the State was legally obliged to proceed with the capitalisation of airBaltic as agreed on 22 December 2011, irrespective of BAS' behaviour. In this sense, the Latvian authorities claim that it became clear to them that BAS would neither convert the BAS loan nor inject the cash only on 30 January 2012, i.e. the end of the first stage of the subscription implementation period for the capital increase.
- (50) Finally, the Latvian authorities explain that the decision of the shareholders' meeting to accept the capital increase subscribed by the State has been postponed several times. They maintain that to date the capital increase has not been approved by the shareholders' meeting and the Articles of Association have not been amended.
- (51) In relation to **measure 4** (i.e. the acquisition by the Latvian State of 0%-coupon bonds from airBaltic in April 2010), the Latvian authorities explain that, in June 2009, BAS requested the Latvian State – as the other main shareholder of airBaltic at the time – to jointly increase the capital of the company by at least LVL 30 million (EUR 42.47 million). On 30 April 2010, BAS and the Latvian State agreed to acquire LVL 30 million of convertible bonds issued by airBaltic, with nominal value LVL 1 each and no interest, in proportion to their shareholding.<sup>20</sup> The bonds are to be converted into capital on 1 July 2015, at a rate of one share per bond. The aim of the bond issuance was, as stated in the 30 April 2010 agreement, to ensure that the level of equity of the company reached an acceptable level for international standards.
- (52) The subscription and purchase of the bonds allocated to the Latvian State was carried out by the Latvian State Radio and Television Centre ("LVRTC") – a 100% State-owned company – instead of the actual shareholder, i.e. the Ministry of Transport.

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<sup>20</sup> Which would result in the Latvian State acquiring 0%-interest bonds from airBaltic in an amount of approximately LVL 15.78 million (EUR 22.34 million) and BAS acquiring approximately LVL 14.16 million (EUR 20.05 million).

- (53) The Latvian authorities argue that the 0%-interest bond purchase was agreed by both shareholders on identical terms, which in their view makes the investment a sound one, thereby excluding state aid to airBaltic. They also note that the bonds were purchased by the LVRTC not for hiding alleged state aid but solely due to budgetary reasons.
- (54) As regards the EUR 2.8 million funding from Latvijas Krājbanka (**measure 5**), the Latvian authorities explain that no payments were made to airBaltic on 21 and 22 November 2011 as alleged by the complainant. The Latvian authorities explain that airBaltic submitted three payment orders to Latvijas Krājbanka prior to the decisions of the FCMC of 17 November 2011 to limit banking operations above EUR 100,000<sup>21</sup> and to halt all operations of Latvijas Krājbanka on 21 November 2011 (see recital (17) above). These orders were executed by Latvijas Krājbanka days after. In particular, the operations at stake are two payments of USD [...] to IATA Clearing House and of EUR [...] to Riga International Airport executed on 25 November 2011, and a transfer of EUR [...] to an alternative bank account of airBaltic in Swedbank on 30 November 2011.
- (55) The Latvian authorities contest the claim of the complainant that these payments entail state aid to airBaltic, since in their view they constitute normal banking operations. Moreover, they argue that the decisions of Latvijas Krājbanka cannot be regarded as imputable to the State.
- (56) In relation to the measure identified in the additional complaint, i.e. the claim of EUR 5 million assigned to airBaltic (**measure 6**), the Latvian authorities argue that the attribution to airBaltic of this claim intended to protect airBaltic in case of default of BAS and the private investors, and that it was foreseen in the letter and the spirit of the 3 October 2011 agreement. Since airBaltic was contractually entitled to benefit from these funds, the Latvian authorities conclude that the measure is MEIP-conform and exclude state aid.<sup>22</sup>
- (57) In relation to the remaining EUR 30 million of syndicated loan 2 – out of the total of EUR 35 million (see recital (25) above) –, the Latvian authorities maintain the following:
- a. The Latvian State has initiated court proceedings to obtain the transfer of two claims for an amount of EUR [...] – provided by Transatlantic Holdings Company – and EUR [...] – provided by AKB Investbank – as part of syndicated loan 2. The Latvian authorities confirm that the State intends to grant these claims to airBaltic at a later stage.
  - b. Regarding the remaining claim for an amount of EUR [...] – provided by SIA KD Jet –, the Latvian authorities explain that the direct transfer of this claim for LVL 1 cannot be implemented for legal reasons.
- (58) Finally, in relation to the "reShape" business plan and the future of airBaltic, the Latvian authorities admit that the company will need LVL [...] (EUR [...]) in additional funding between [...]. However, the Latvian authorities claim

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<sup>21</sup> See [http://www.lkb.lv/en/about\\_bank/news/archyve?item=2022&page=6](http://www.lkb.lv/en/about_bank/news/archyve?item=2022&page=6).

<sup>22</sup> From the submission of the Latvian authorities of 4 September 2012, it appears that a Court has issued a freeze order on the transfer of this claim.

that this financing will be made on market terms or on a *pari passu* basis with a future private investor.

## 6. ASSESSMENT

### 6.1. Difficulties of airBaltic

- (59) In view of the fact that they claim that the measures under examination are in line with the market economy investor principle, the Latvian authorities submit that airBaltic did not qualify as a firm in difficulty at the time the measures were taken, since in their view at that point in time airBaltic was able to obtain the necessary funding from its shareholders and thus was not condemned to go out of business in the short or medium term. However, they also argue that if the Commission were to consider that state aid was present, then airBaltic would qualify as a firm in difficulty.
- (60) The Commission recalls that point 10(c) of the R&R Guidelines establishes that a firm is regarded as being in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. This seems to be the case of airBaltic at least as of 21 September 2011 – if not earlier – when it filed for legal protection from its creditors (see recital (21) above).
- (61) Moreover, the losses of airBaltic were of such magnitude that in 2010 its negative equity amounted to approximately LVL 23.4 million, which increased to approximately LVL 107 million due the additional losses incurred in 2011.<sup>23</sup> This suggests that airBaltic also fulfilled the provisions of point 10(a) of the R&R Guidelines.
- (62) In any event, the Commission notes that in accordance with point 11 of the R&R Guidelines, a firm may be considered to be in difficulty "*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*".
- (63) In this respect, as explained in recital (21) above, the Commission notes that airBaltic has been loss-making since 2008 until the present, with the only exception of 2009. Indeed, the "reShape" business plan admits that airBaltic was able to achieve profit in 2009 only due to the extraordinary drop in fuel prices. Therefore, the return to profitability in 2009 appears to be a one-off occurrence due to extraordinary circumstances and not a structural trend. The company's debt also increased significantly between 2010 and 2011.<sup>24</sup> Finally, the "reShape" business plan also highlights that the cost-related variables of airBaltic increased at a rate of 7% per year, much faster than the revenue-related variables which increased at 5% annually.
- (64) The elements above thus seem to indicate that the criteria of point 11 of the R&R Guidelines would also be met. In view of this, the Commission has reached the preliminary conclusion that airBaltic was a firm in difficulty

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<sup>23</sup> Source: airBaltic's annual report for 2011.

<sup>24</sup> Source: airBaltic's annual report for 2011.

within the meaning of the R&R Guidelines at the time the measures identified above were granted.

## 6.2. Presence of state aid

- (65) 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.
- (66) 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 each of the measures identified.

### 6.2.1. The first State loan (measure 1)

- (67) The Commission notes that the first State loan was provided directly by the Latvian State through the State Treasury upon request of the Ministry of Transport. This is expressly stated in the 3 October 2011 agreement on the basis of which the first State loan was provided to airBaltic. It is therefore clear that measure 1 entails State resources and that it is imputable to the State.
- (68) The Commission must also assess whether measure 1 entailed a selective advantage to airBaltic. The Commission notes that the first State loan and the BAS loan were agreed on 3 October 2011 and effectively provided on 21 October 2011 and 1 November 2011 respectively. At the time, the Latvian State and BAS were the majority shareholders of the company and the loans were provided in proportion to their shareholding (52.6% and 47.2% respectively). As noted in recital (23) above, the conditions of the loans were identical and linked, which at first sight would seem to suggest that the loans had been provided on *pari passu* terms.
- (69) However, the Commission cannot assess the first State loan and the BAS loan in isolation but must assess them in the context of the provisions of the 3 October 2011 agreement, on the basis of which both loans were granted.
- (70) The 3 October 2011 agreement, in addition to the loans, also includes a commitment from the Latvian State to provide no later than 15 December 2011 an additional loan to airBaltic, to be capitalised, for an undetermined amount (see recital (24) above). However, from the agreement it does not result – contrary to what the Latvian authorities maintain – that, in addition to the BAS loan, BAS also had to issue a convertible loan to airBaltic alongside the additional loan of the State. In this respect, the sole commitment of BAS contained in Article 7.4 of the 3 October 2011 agreement was "*to vote for the capitalisation of the loan and for the increase in the equity [...] the same way as the State votes and to participate in the equity increase*" (see recital (26) above). In other words, the State made commitments that were different and economically more significant than those taken by the private investor BAS. Therefore, measure 1 was not agreed *pari passu* with a private investor,

because the private investor knew that its investment was to be followed by a further loan from the State.

- (71) The Commission also notes that the decision of BAS to invest in airBaltic was taken in a context in which the public authorities had already demonstrated their willingness to financially support the company, which might have influenced the conduct of the private investor. As the General Court has clarified, "*la concomitance ne saurait à elle seule, même en présence d'investissements privés significatifs, être suffisante pour conclure à une absence d'aide au sens de l'article 87, paragraphe 1, CE sans prendre en considération les autres éléments pertinents de fait ou de droit*".<sup>25</sup>
- (72) In any event, considering the context in which the first State loan was provided to airBaltic, it is also doubtful at this stage whether the agreed interest rate of [11-13]% would be at market level. In the first place, airBaltic was experiencing significant difficulties at the time and allegedly was close to bankruptcy (see recital (21) above). It is therefore unclear whether at the time a private investor would have provided the company with a loan at such interest rate in view of the terms of the loan (repayment within 5 years), the collateral provided,<sup>26</sup> and the absence of a proper business plan at the time.<sup>27</sup>
- (73) That said, the Latvian authorities observe that the interest of the first State loan and the BAS loan was relevant for only a very short period of time as both the State and BAS had planned to convert their loans into capital such that it cannot be compared to the rate attached to funding provided by private banks.
- (74) In addition to its doubts regarding the first State loan, the Commission observes that on 13 December 2011, once Latvia's shareholding in airBaltic had increased to 99.8%, the Latvian Government decided to authorise a cut in the interest rate on the first State loan – and thus also of the BAS loan – of [7-11] percentage points [...], from [11-13]% to [2-4]% (see recital (29) above). The Latvian authorities argue that this decision was taken after the appointment of a new management in airBaltic and on the basis of an estimation of the collateral value of the first State loan of approximately LVL [...].
- (75) The Commission notes that the Latvian authorities have provided no evidence on the abovementioned valuation. In any event, the Commission does not consider at this stage that this valuation would be sufficient to justify a total removal of the risk premium. In view of the significant difficulties of airBaltic at the time, it seems reasonable to consider that a private investor would not have provided a loan to the company at an interest rate of merely [2-4]%. Indeed, the Commission does not have reasons to believe that the situation of airBaltic had improved between October and December 2011. The Commission thus considers that the conclusions reached at recital (71) above apply *mutatis mutandis*.

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<sup>25</sup> Case T-565/08 *Corsica Ferries v Commission*, judgment of 11 September 2012, not yet reported, at para 122.

<sup>26</sup> In relation to the collateral Latvia argues that at the time of the first State loan it was estimated to be in the region of LVL [...] on the basis of a valuation performed by Ernst & Young in 2009. However, given the absence of a more recent valuation and in view of the nature of the operation, the Latvian authorities decided to apply a [7-11]% risk margin.

<sup>27</sup> The "reShape" business plan was adopted in March 2012 (see recital (37) above).

- (76) Since airBaltic was a firm in difficulty at the time (see recital (63) above), it seems highly unlikely that a private market operator would have accepted such a low interest rate for its loan ([2-4]%). Indeed, the Commission notes that the 1-year IBOR applicable in Latvia at the time of the interest rate cut, i.e. 13 December 2011, was 2.8%.<sup>28</sup>
- (77) Moreover, the Commission notes that on the same day another loan was provided to airBaltic – the second State loan – with an interest rate of [9-11]%. The Latvian authorities have not provided an explanation as to why the loans have different conditions.
- (78) Against this background, the Commission has doubts whether the first State loan can be regarded as conducted on *pari passu* terms as claimed by the Latvian authorities and comes to the preliminary conclusion that it provided airBaltic with an undue advantage. As the first State loan was granted for the sole benefit of airBaltic, the advantage would be selective in nature. Moreover, the Commission considers that the interest rate cut of the first State loan provided airBaltic with an additional undue advantage. As the first State loan was granted for the sole benefit of airBaltic, the advantage would be selective in nature.

#### 6.2.2. *The second State loan (measure 2)*

- (79) The second State loan was granted by means of a decision of the Latvian Government adopted on 13 December 2011 authorising the Ministry of Finance to provide in the State budget for a convertible loan to airBaltic of LVL 67 million, divided into two tranches of which only the first one of LVL 41.6 million was immediately made available to airBaltic. Measure 2 therefore entails State resources and is imputable to the State.
- (80) The Commission must also assess whether measure 2 entailed a selective advantage to airBaltic. In this respect, it must be noted first that although the second State loan was effectively granted to airBaltic on 14 December 2011, it was already foreseen in Article 7.2 of the 3 October 2011 agreement (see recital (24) above). The amount of the second State loan was however not defined in this agreement since it depended on a number of factors foreseen therein.
- (81) The Commission does not share the opinion of the Latvian authorities that the second State loan did not entail an advantage to airBaltic in view of the fact that it was due to be accompanied by another loan from BAS on *pari passu* terms on the basis of the 3 October 2011 agreement. First, as a matter of fact, the second State loan was not accompanied by another loan from BAS and must therefore be regarded as a measure unilaterally granted by the Latvian State. Moreover, as explained in recital (69) above – and contrary to what the Latvian authorities maintain – it does not follow from that agreement that, in addition to the BAS loan, BAS also had to issue a convertible loan to airBaltic alongside the second State loan.

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<sup>28</sup> The RIGIBOR (Riga Interbank Offered Rate) applicable on 13 December 2011 was 2.8% on the basis of the information provided by the Bank of Latvia (see <http://www.bank.lv/en/monetary-policy/monetary-policy-instruments/market-operations/money-market-indexes-rigibid-and-rigibor>).

- (82) Moreover, when the Latvian Government decided to provide the loan to airBaltic – be it 3 October 2011 or 13 December 2011 –, there was no possible concomitance on the side of BAS since it was under no obligation to provide any other loan to airBaltic (and in fact did not do so) – see recital (26) above. Although BAS had agreed in the 3 October 2011 agreement to vote for the capitalisation of the loan and for the capital increase, as well as to participate in the equity increase, this is not sufficient to consider – as the Latvian authorities do – that all measures taking place after the said agreement are *per se* concomitant.
- (83) In addition, the Commission also notes that the Latvian State was aware of the likelihood that BAS would not fulfil its commitment to participate in the equity increase deriving from the 3 October 2011 agreement and provided for a second tranche of the second State loan precisely to cover this eventuality. This is an additional argument to exclude concomitance from the side of BAS. The fact that the second tranche has apparently not been disbursed to date (see recital (30) above) would not change this assessment.
- (84) In relation to the interest rate of the second State loan ([9-11]%), the Commission has doubts that a private investor would have provided the company with a loan at such an interest rate in view of the difficulties that airBaltic was facing and the fact that the collateral used was the same as that granted in relation to the first State loan.
- (85) In view of the arguments set out above, the Commission is of the view that the second State loan was not concomitant to any investment decision by BAS and that it cannot be regarded as conducted on *pari passu* terms. The Commission also has doubts as to whether the interest rate applied to the second State loan would constitute a market rate. Therefore, at this stage the Commission is of the view that the second State loan provided an advantage to airBaltic. As the second State loan was granted for the sole benefit of airBaltic, the advantage would be selective in nature.

### 6.2.3. *The capital increase (measure 3)*

- (86) The capital increase agreed on 22 December 2011 was to be achieved – in relation to the part subscribed by the State – by converting into capital LVL 57.6 million, i.e. the first State loan of LVL 16 million and the first tranche of the second State loan of LVL 41.6 million. In view of the conclusions reached in recitals (66) and (78) above that the first and second State loans entail State resources, the Commission must conclude that measure 3 also entails State resources. Moreover, since the State – in the person of the Ministry of Finance – voted for the capitalisation of the said loans at the shareholders' meeting of 22 December 2011, it can be concluded that measure 3 is imputable to the State.
- (87) Although it is true that the Latvian State and BAS had agreed to capitalise airBaltic on 22 December 2011, the Commission does not share the view of the Latvian authorities that this suffices to exclude *per se* an advantage to airBaltic. The Commission must assess not only the measures at the time they occurred but must also consider the context and the prospects of the sector in

which they took place.<sup>29</sup> In this respect, the Commission notes that at the time the recapitalisation decision was taken (22 December 2011), BAS had lost all except one of its shares in airBaltic, which the State had acquired from Latvijas Krājbanka in exchange of LVL 224,453. As a result, the State increased its shareholding in the company to 99.8% (see recital (18) above). Therefore, the conversion made little economic sense for BAS, who – in order to regain its former shareholding – was requested not only to convert into capital the BAS loan but also to inject LVL 37.7 million in cash, all this with limited possibilities that the equity would provide any return in the short- to medium-term in view of the difficulties of the company.

- (88) Moreover, the Commission has doubts that the date at which measure 3 was granted is 22 December 2011 as claimed by the Latvian authorities. From the information provided it appears that on 29 December 2011 the Latvian State and airBaltic amended the agreements by means of which the State provided to the company the first and second State loans.<sup>30</sup> On 30 December 2011, the State approved its subscription of LVL 57.6 million of capital in airBaltic. According to the Latvian authorities, these acts created a binding obligation on the part of the State to pay for the subscribed shares.
- (89) An aid measure is considered as having been granted as of the legally binding act by which the competent national authority undertakes to grant it.<sup>31</sup> On the basis of the information provided by the Latvian authorities, the Commission considers at this stage that the date at which measure 3 is to be considered granted is 29 or 30 December 2011, and not the date of the shareholders' meeting.
- (90) Irrespective of when the aid is to be considered granted, it appears from the information provided that BAS and the State had a certain period of time – presumably until 30 January 2012, i.e. the end of the first stage of the subscription implementation period for the capital increase – to inject the capital in airBaltic. The State did so on 29 or 30 December 2011, when the shares subscribed by the State were deemed paid, subject to the approval by the management of airBaltic and the corresponding amendment of the Articles of Association. The Latvian authorities claim that it only became clear to them on 30 January 2012 that BAS would neither convert the BAS loan nor inject the cash.
- (91) The Commission considers at this stage that a market economy investor would in this case not have carried out the conversion of its loans into capital before being reasonably assured that the other party to the agreement would also do so.
- (92) As mentioned above, BAS had until 30 January 2012 to convert the BAS loan and to inject the cash. It appears from the information provided that before that date, the Latvian State should have had strong doubts about BAS' willingness

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<sup>29</sup> See for instance Commission Decision 82/653/EEC of 22 July 1982 in case *Leeuwarder papierfabriek*, OJ L 277, 29.9.1982, p. 15: "*The situation on the market in question provides no reasonable grounds for hope that a firm urgently needing large-scale restructuring could generate sufficient cash flow to finance the replacement investment necessary, even if it received the proposed assistance*".

<sup>30</sup> Agreements of 21 October 2011 and 14 December 2011, respectively.

<sup>31</sup> Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, para 74.

to fulfil its commitments. For instance, already on 6 January 2012, BAS requested that the State refrain from adopting decisions concerning changes in airBaltic's capital (see recital (34) above). What is more, BAS had already given indications that it would not convert the BAS loan even before 22 December 2011. As the Latvian authorities explained themselves, the reason why on 14 December 2011 the State added a second tranche of LVL 25.4 million to the second State loan was to be sure that airBaltic would get the financing it asked for in case BAS would not fulfil its commitments (see recital (30) above).

- (93) Notwithstanding the fact that BAS did not seem inclined to fulfil the agreement reached on 22 December 2011, the State proceeded to convert its loans on 29 or 30 December 2011. The Commission considers at this stage that a market economy investor would not have done so in view of the circumstances and BAS' declared reluctance to fulfil its obligations.
- (94) The Latvian authorities admit that BAS will not now be able to fulfil its commitments towards airBaltic. The new management of BAS, appointed on 6 February 2012 (see recital (19) above), is not legally permitted to commit funds to invest in airBaltic.
- (95) For the reasons set out above, it appears that the capital increase agreed on 22 December 2011 provided airBaltic with an undue advantage. Thus, measure 3 does not appear to be MEIP-conform. As in the case of the first and second State loans, the capital injection was provided for the sole benefit of airBaltic, which would make the advantage selective in nature.
- (96) The Latvian authorities claim that airBaltic shareholders' meeting has not yet formally approved the capital increase subscribed by the Latvian State and that the Articles of Association of the company have not been formally amended. The Commission has not been provided with information about the decisions taken at the latest shareholders' meetings and thus cannot confirm whether this claim is properly substantiated. In any event, the preliminary conclusion that the capital increase would entail a selective advantage to airBaltic would not be altered in case the shareholders' meeting has not formally approved the capital increase. The capital increase was widely reported in the press<sup>32</sup> and the "reShape" business plan includes in its projections LVL 57.6 million as capital of airBaltic. In addition, being the State shareholder of airBaltic at 99.98% and having full control over the company, it seems unlikely that the shareholders' meeting would actually refuse the increase on capital provided by the State itself. It thus appears that the company would have derived an advantage from the conversion of the State loans, even if the conversion into capital has not been formally approved by the shareholders' meeting.

#### *6.2.4. The 0%-coupon bonds (measure 4)*

- (97) The acquisition of LVL 30 million of 0%-coupon bonds from airBaltic in April 2010 was carried out by the majority shareholders of airBaltic at the time, i.e. the Latvian State and BAS. The part corresponding to the Latvian

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<sup>32</sup> See for instance <http://www.breakingtravelnews.com/news/article/airbaltic-secures-future-with-government-programme/>. airBaltic also referred to the capital increase in its web page: <http://www.airbaltic.com/public/49435.html>.

State was not directly subscribed by the Ministry of Transport – the actual owner of airBaltic's shares – but by the LVRTC (see recital (51) above). It follows from the 30 April 2010 agreement formalising the purchase of the bonds that the LVRTC acted on behalf of the Latvian State. In addition, the Latvian authorities acknowledge that the bonds were purchased by the LVRTC for budgetary reasons (see recital (52) above). It is therefore clear that measure 4 entails State resources and that it is imputable to the State.

- (98) The Latvian authorities consider that the acquisition of the bonds was a sound investment given that it was agreed by both shareholders on identical terms. In their view, this would exclude any undue advantage to airBaltic.
- (99) The Commission notes that it follows from the 30 April 2010 agreement that the bonds – which offer no remuneration for more than 5 years, since they are to be converted into capital on 1 July 2015 – are counted as share capital in airBaltic's accounts. This would make these bonds comparable to a capital injection in the company. Following well-established case practice, capital injections must be assessed as against their expected profitability.<sup>33</sup>
- (100) The Commission considers at this stage that a prudent investor in comparable circumstances, before making such investment, would have assessed the probability of realising an appropriate return. In the present case, profitability is excluded from the outset in view of the fact that no interest is attached to the bonds. Moreover, as regards future profitability upon conversion, the Commission does not see at this stage how a reasonable profit could be expected in view of the difficulties of the company, the situation of the airline industry, and the absence at the time of a plan for bringing the airline back to profitability. In those circumstances, the Commission doubts that the conduct of the State could be described as that of a normal private investor.
- (101) The Commission notes that a concomitant investment made by a private investor in comparable circumstances provides an indication that the market investor test is met. However, this is only a rebuttable presumption. In its assessment the Commission must also assess whether the behaviour of the private investor is influenced by the State's conduct.<sup>34</sup>
- (102) In the present case, in view of the absence of profitability of the investment, it cannot be excluded at this stage that BAS acquired the bonds because of the strong interest shown by the Latvian State in airBaltic before the bond issuance.<sup>35</sup> The Commission has come to the preliminary conclusion that if the Latvian State had not been prepared to acquire the 0%-interest bonds, BAS

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<sup>33</sup> See Commission Decision 89/43/EEC of 26 July 1988 in case *ENI-Lanerossi*, OJ L 16, 20.1.1989, p. 52: "*the financial and economic position of the factories, particularly in view of the duration and volumes of their losses, was such that a normal return in dividends or capital gains could not be expected for the capital invested*".

<sup>34</sup> See in this regard Opinion of Advocate General Geelhoed in Joined Cases C-328/99 and C-399/00 *Italy v Commission* and *SIM 2 Multimedia SpA v Commission (Seleco)* [2003] ECR I-4035, at paras 53-54.

<sup>35</sup> The press reports that the Latvian Government had decided already on 17 March 2010 to support airBaltic by injecting LVL 15.6 million through the LVRTC. See for instance [http://www.bbn.ee/article/2010/03/17/airBaltic\\_gets\\_22\\_million\\_euros\\_from\\_Latvian\\_governmen\\_t](http://www.bbn.ee/article/2010/03/17/airBaltic_gets_22_million_euros_from_Latvian_governmen_t)

would most likely not have acquired them either in view of the lack of profitability attached thereto.

- (103) What is more, in assessing whether the State has behaved like a normal private investor, the Commission will take into account a concomitant investment made by a private investor only if it can be shown that that investment in fact followed a market logic or, in other words, if it was a behaviour that could be described as that of a normal private investor.
- (104) For these reasons, the Commission considers at this stage that the acquisition by the Latvian State of 0%-interest bonds of airBaltic might have provided the company with an undue selective advantage.

*6.2.5. The EUR 2.8 million payments by Latvijas Krājbanka (measure 5)*

- (105) The Commission notes that Latvijas Krājbanka was nationalised and its operations were suspended by order of the FCMC on 21 November 2011. Previously, the FCMC had ordered to limit banking operations of Latvijas Krājbanka above EUR 100,000 on 17 November 2011 (see recital (53) above). However, the operations under assessment, i.e. the payments to IATA Clearing House and to Riga International Airport and a transfer to an alternative bank account of airBaltic in Swedbank, were executed on 25 November 2011 and 30 November 2011, respectively.
- (106) On the basis of the information provided by the Latvian authorities, the Commission cannot conclude with certainty whether at the time measure 5 was provided the actions of Latvijas Krājbanka, being a 100% State-owned bank as of 21 November 2011, were independent of those of the State.
- (107) In particular, the Latvian authorities have provided no evidence that airBaltic submitted the payment and transfer orders – all above EUR 100,000 – before the FCMC decision of 17 November 2011 to limit banking operations per client above this amount. Moreover, even assuming this was the case, the Latvian authorities have provided no explanations as to why these orders were to be executed despite the FCMC decision and whether other clients of Latvijas Krājbanka in the same situation as airBaltic were treated equally.
- (108) On the basis of the above, the Commission is uncertain as to whether airBaltic derived an advantage from the execution by Latvijas Krājbanka of the payment and transfer orders. In particular, the transfer of EUR [...] to an alternative bank account of airBaltic in Swedbank could have entailed an advantage to the company, in view of the fact that these types of transactions appeared to be forbidden at the time for all clients of Latvijas Krājbanka.
- (109) For the reasons set out above, the Commission considers at this stage that the execution by Latvijas Krājbanka of the payment and transfer orders of airBaltic for an amount of approximately EUR 2.8 million could have provided the company with an undue selective advantage.

*6.2.6. The EUR 5 million claim attributed to airBaltic (measure 6)*

- (110) Article 7.4 of the 3 October 2011 agreement foresees an obligation, under certain circumstances, for the private creditors that granted syndicated loan 2 to airBaltic to attribute their claims against airBaltic to the Latvian State or to

the company nominated by it (see recital (26) above). By letters of 9 February 2012 and 12 June 2012 the Latvian State decided that a claim of EUR 5 million towards airBaltic for syndicated loan 2 – the part granted by Taurus, of a total of EUR 35 million – is to be assigned to airBaltic for a price of LVL 1. The Commission notes that since the decision on the final beneficiary of the claim was in the hands of the Latvian State, it is clear that measure 6 entails State resources and that it is imputable to the State.

- (111) The Commission is of view that the attribution of the EUR 5 million claim to airBaltic entails an advantage to the company. By its decision, the Latvian State gave airBaltic a claim of EUR 5 million against itself in exchange of LVL 1. In economic terms, this operation is very similar to a debt waiver. By assigning the claim to airBaltic, the Latvian State is actually freeing airBaltic from its obligation to repay part of syndicated loan 2 to the bearer of the claims, be it Taurus or the Latvian State. Moreover, as a consequence of the attribution of the claim, airBaltic will not pay the interest rate initially set at [5-7] %.
- (112) The Commission does not share the claim of the Latvian authorities that measure 6 is MEIP-conform in view of the fact that airBaltic was contractually entitled to benefit from these funds and that the attribution of the claims aimed at protecting it in case of default of BAS and the investors. While indeed airBaltic was contractually entitled to syndicated loan 2 by virtue of the 3 October 2011 agreement, it was not entitled to benefit of such loan in exchange of LVL 1 and was moreover obliged to pay interest and reimburse the principal.
- (113) On the basis of the above, the Commission is thus of the view that measure 6 entailed a selective advantage to airBaltic.
- (114) In relation to the rest of the claims under syndicated loan 2 totalling EUR 30 million (see recital (56) above), the Commission notes the willingness of the Latvian authorities to grant to airBaltic two claims of EUR [...] and of EUR [...] (the parts corresponding to Transatlantic Holdings Company and to AKB Investbank respectively). In relation to the EUR [...] claim corresponding to SIA KD Jet, the Latvian authorities explain that this claim will not be attributed to airBaltic for legal reasons.
- (115) The Commission notes that the reasoning above would apply *mutatis mutandis* to these claims if they are granted to airBaltic in exchange of LVL 1.

#### 6.2.7. Distortion of competition and effect on intra-EU trade

- (116) The measures identified affect trade between Member States and have the potential to distort competition as airBaltic competes in the liberalised EU market for air transport with other EU airlines.
- (117) The measures in question thus enable airBaltic to continue operating because, unlike its competitors, it does not have to face the consequences normally deriving from its difficult financial results.

#### 6.2.8. *Conclusions on the presence of state aid*

(118) On the basis of the reasoning set out above, the Commission considers at this stage that measures 1 to 6 provided a selective advantage to airBaltic stemming from State resources, which distort or threaten to distort competition and affect trade between Member States. Under these conditions the Commission considers at this stage that the measures identified above constitute state aid within the meaning of Article 107(1) TFEU.

### **6.3. Unlawful aid**

(119) If the measures identified were to constitute state aid, they would have been granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Thus, the Commission considers at this stage that the measures granted to airBaltic qualify as unlawful state aid.

(120) Notwithstanding the above, the Commission notes that the second tranche of the second State loan of LVL 25.4 million (EUR 35.96 million) has apparently not been paid out to the company yet (see recital (30) above). The Commission also takes note of the intention of the Latvian authorities to grant to airBaltic some of the claims under syndicated loan 2 (see recitals (56) and (113) above). In relation to these measures, the Commission recalls the obligation of the Latvian authorities under Article 108(3) TFEU to inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant aid.

### **6.4. Compatibility with the internal market**

(121) 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 Article.

(122) 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.<sup>36</sup> The Latvian authorities consider that the measures do not constitute state aid and have not provided any possible grounds for compatibility.

(123) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would *prima facie* be applicable to the measures under assessment. The Commission considers at this stage that the exceptions laid down in Article 107(2) TFEU are clearly not applicable and have not been invoked by the Latvian authorities. The same conclusion would apply to the exceptions foreseen in Article 107(3), points (d) and (e), TFEU.

(124) In view of the fact that airBaltic seemed to be in difficulty within the meaning of the R&R Guidelines already in April 2010 – i.e. at the time measure 4 was adopted – and continued to be in difficulty throughout 2011 and 2012 (see recital (63) above), it does not appear at this stage that the exception relating to the development of certain areas or of certain sectors laid down in Article 107(3)(a) TFEU could be applicable, despite the fact that the beneficiary is

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<sup>36</sup> C-364/90 *Italy v Commission* [1993] ECR I-2097, at para 20.

located in an assisted area under Article 107(3)(a) TFEU and could be eligible for regional aid.

- (125) The Commission has also assessed whether any of the measures could be compatible on the basis of Article 107(3)(b) TFEU under the crisis rules enshrined in the Temporary Framework.<sup>37</sup> However, the measures under assessment do not appear to fulfil the conditions of applicability of the Temporary Framework.
- (126) In view of the nature of the measures and of the difficulties of airBaltic, the only relevant 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 R&R Guidelines.
- (127) However, the Commission notes that the conditions for rescue aid laid down in section 3.1 of the R&R Guidelines do not seem to be met. In relation to restructuring aid as defined in section 3.2, the Commission observes that the "reShape" business plan does not include any of the necessary elements for it to be considered a restructuring plan (own contribution, compensatory measures, etc.). Moreover, as indicated above, the Latvian authorities have provided no arguments as to possible compatibility of the measures as restructuring aid.

#### **6.5. Conclusion on compatibility**

- (128) At this stage the Commission has doubts on the compatibility with the internal market of the different measures identified.

### **7. DECISION**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Latvia to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Latvia that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Latvia that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by

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<sup>37</sup> Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 16 of 22.1.2009, p. 1, as modified by the Communication from the Commission amending the Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 303, 15.12.2009, p. 6. The Temporary Framework expired in December 2011.

sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
B-1049 Brussels

Fax No: +32-2-296-1242

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-president of the Commission