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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>	<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.35388 (2013/C, ex 2013/NN, ex 2012/N) – Poland

Setting up the Gdynia-Kosakowo airport

Dear Sir,

The Commission wishes to inform Poland that, having examined the information supplied by your authorities on the measure 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 (hereafter: "TFEU").

1. PROCEDURE

- (1) By letter dated 7 September 2012 Poland notified to the Commission, for reasons of legal certainty, the planned financing of the conversion of a military airport into a civil aviation airport near Gdynia in the north of Poland. The measure was registered under the state aid case 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

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and 15 March 2013 Poland submitted additional information. A meeting between the Commission and Poland took place on 17 April 2013. During this meeting, Poland confirmed that the notified financing was already irrevocably granted.

- (3) By letter dated 15 May 2013 the Commission informed Poland that it will transfer the case in a not notified case register (NN case), because the major part of the financing notified to the Commission was already irrevocable granted. By letter dated 16 May Poland submitted further information.

2. DESCRIPTION OF THE MEASURES

2.1. Background of the notification

- (4) Gdynia-Kosakowo airport (hereinafter: "Gdynia airport") is located in the Pomeranian Region (Pomorskie Voivodship), on the boarder of City of Gdynia (hereinafter: "Gdynia") and commune of Kosakowo (hereinafter: "Kosakowo"), 25 kilometres away from Gdansk airport¹. The airport is a military airport used by the Polish Navy Air Force.
- (5) In April 2005, the authorities of the Pomeranian Region, the cities of Gdansk, Gdynia and Sopot, the commune of Kosakowo together with representatives of the Polish government (the voivod of Pomeranian Region, Ministry of National Defence, Ministry of Transport) and the Gdansk Airport signed a letter of intent to create a new airport for the Pomeranian Region based on the infrastructure of the military airport located in Kosakowo.
- (6) As a result of this letter of intent, the Ministry of Transport together with the Ministry of National Defence signed, in August 2006, an agreement which designated the Gdansk Airport to be responsible for setting up and operating the new airport.
- (7) In July 2007, the local authorities of Gdynia and Kosakowo founded a company called Port Lotniczy Gdynia-Kosakowo sp. z o. o. ("Gdynia-Kosakowo Airport Ltd"). The objective of the newly established company was the conversion of the military airport into a new civil aviation airport. The new civil aviation airport is supposed to become a second airport of the Pomeranian Region, serving mainly general aviation, low cost

¹ The Gdansk airport is owned and operated by the Gdansk Lech Walesa Airport Ltd., a company set up by public entities. The funding capital of the company is broken down as follows: Municipality of Gdansk (32%), Pomeranian Region (32%), 'Polish airports' State Enterprise (31%), Municipality of Sopot (3%), and Municipality of Gdynia (2%). Gdansk Lech Walesa airport (hereinafter: "Gdansk airport") is the third largest airport in Poland. In 2012, it served 2.9 million passengers (2.7 million in regular traffic and 0.2 million in charters).

The following eight airlines operate regular routes from Gdansk airport (March 2013): Wizzair (23 destinations), Ryanair (10 destinations), Eurolot (6 destinations), Lot (2 destinations), Lufthansa (2 destinations), SAS (2 destinations), Air Berlin (1 destination), Norwegian (1 destination). After the opening, a new terminal in May 2012 Gdansk airport has an annual capacity of 5 million passengers. According to the information provided by Poland, the enlargement of the terminal (scheduled in 2013-2015) will result in an increase of the capacity to 7 million passengers. The investments at Gdansk airport were also financed though State aid (see 2008 Commission decision in State aid case N 153/2008; EUR 1.7 million; OJ C 46 of 25.2.2009, p.7 and 2009 Commission decision in State aid case N 472/2008, as the result around EUR 33 million granted to the Gdansk Airport by the Polish authorities; OJ C 79 of 2.4.2009, p.2).

carriers (hereinafter: "LCC"), charters and flight schools. Part of the airport will still be used for military purposes.

- (8) In December 2009, Gdynia and Kosakowo obtained an agreement from the Ministry of Transport that their company would be further responsible for a new airport. Based on this, the Polish government handed over for a period of 30 years the land of 254 hectare, on which the military airport is located, to Kosakowo which then rent it for the same period to Gdynia-Kosakowo Airport Ltd.

2.2. The investment project

- (9) As Gdynia airport was initially a military airport, the new civil aviation airport will use the existing infrastructure, such as a runway of 2500 meters, taxiways, an apron and the navigation equipment. Only additional airport infrastructure necessary for civil aviation will need to be built.
- (10) The planned investment costs amount to PLN 148.8 million in current prices (around EUR 37.2 million²) or PLN 164.9 million in real terms (i.e. with inflation; around EUR 41 million) in years 2007 – 2030.
- (11) The investment plan is divided into the following four phases taking into account the basic assumption of gradual development of the airport's commercial activities:
- (a) First phase - 2007 – 2011 (PLN [...] or EUR [...]) contains analyses, feasibility studies and planning of investments as well as the first initial works, such as cleaning the site, removal of old buildings and trees.
- (b) Second phase – 2012 – 2013 (PLN [...] or EUR [...]) involves the construction of a general aviation terminal (to be completed mid 2013), a building for the airport administration and the fire brigade, renovation of the general aviation apron, energy infrastructure, airport fence, access roads. Furthermore, this phase comprises also the installation of navigation lights and building of a petrol station and a car park. In addition, the company intends to purchase airport maintenance and security equipment and adjust the existing military navigation equipment to the purposes of civil aviation. At the end of this phase, the airport will start to serve general aviation traffic. It will also be at least partially ready to serve commercial passenger traffic (charters and LCC).
- (c) Third phase 2014 – 2019 (PLN [...] or EUR [...]) foresees investments indispensable to serve airplanes code C (e.g. Boeing 737, Airbus A320) and involves the construction of a dedicated apron, an extension of taxiways, the purchase of additional airport equipment as well as other investments related to passenger service, such as the extension of the car park.
- (d) Forth phase 2020 – 2030 (PLN [...] or EUR [...]) concerns a further expansion of the general aviation terminal, the airport administration building and the fire brigade building, as well as of aprons, taxiways and car parks.

² Exchange rate used: PLN 4 = EUR 1

- (12) According to the Polish authorities the total investment cost includes also investments with regard to tasks falling within public policy remit³, which amount in total to around PLN [...] (EUR [...]) for all four investment phases.

2.3. The financing of the investment project

- (13) The investment project will be financed through capital injections by the public shareholders (Gdynia and Kosakowo). The capital injections will cover the investment costs necessary for the conversion of the airport into a civil aviation airport and also operating costs of the airport at the beginning of its operation (i.e. until 2019, including).
- (14) The public shareholders of the operator of Gdynia airport agreed to contribute to the investment project and the losses of the airport in the first years of its operation PLN 207.48 million (around 51.87 million) in total. Gdynia would provide cash contributions amounting to PLN 142.48 million (around EUR 35.62 million) in years 2007-2019. Kosakowo provided a cash contribution of PLN 0.1 million (EUR 25 000) when the company was founded. In years 2011 – 2040 Kosakowo would contribute also with non-cash contributions amounting to PLN 64.9 million (around EUR 16.2 million) by converting a part of the annual land rent (being a liability of the operator of Gdynia airport towards Kosakowo) into shares of the airport.
- (15) On 18 June 2012⁴, the company's own capital amounted to PLN 64.8 million (EUR 16.2 million), of which Gdynia had provided PLN 60.7 million (EUR 15.2 million) and Kosakowo had provided PLN 4.08 million (EUR 1.02 million), of which all (apart from PLN 0.1 million) in the form of non-cash contribution (converting a part of the annual land rent into shares).
- (16) The following table summarises the different financing measures described above:

³ The investments falling within public policy remit include the construction and equipment for fire brigade, customs, airport security guards, police and border guards.

⁴ The date used as a starting point for the Market Economy Investor Test submitted by the Polish authorities.

Table 1: Capital injections into the Gdynia-Kosakowo Airport Ltd

	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	[...]	[...]
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

3. ASSESSMENT

3.1. Existence of State aid

- (17) 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."*
- (18) The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 107(1) of the TFEU all of the following conditions need to be fulfilled. Namely, the financial support:
- is granted by the State or through State resources,
 - favours certain undertakings or the production of certain goods,
 - distorts or threatens to distort competition, and
 - affects trade between Member States.

3.1.1. Economic activity and notion of undertaking

- (19) 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.⁵ Any activity consisting in offering goods and services on a given market is an economic activity.⁶

- (20) In its "Leipzig-Halle airport" judgement the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity⁷. Once an airport operator engages in economic activities, 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 therefore apply⁸.
- (21) In this regard the Commission notes that the infrastructure which is the subject of the present decision will be operated on a commercial basis by the airport manager - Gdynia-Kosakowo Airport Ltd. Since the airport operator will charge users for the use of this infrastructure the latter is commercially exploitable. It follows that the entity exploiting this infrastructure constitutes an undertaking for the purposes of Article 107(1) of the TFEU.
- (22) However, not all the activities of an airport operator are necessarily of an economic nature⁹. It is necessary to establish to what extent airport activities are of an economic nature.
- (23) The Court of Justice¹⁰ has held that activities that normally fall under State 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. Such activities include security, air traffic control, police, customs, etc. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities.¹¹
- (24) Therefore, the practice of the Commission¹² is that in relation to activities falling within the public policy remit, the financing of these activities or of infrastructure directly related to these activities does not constitute State aid. This means that the financing of infrastructure necessary for security reasons or essential for the control

⁵ Case C-35/96 *Commission v Italy* [1998] ECR I-3851; C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013; Case C-55/96 *Job Centre* [1997] ECR I-7119.

⁶ Case 118/85 *Commission v Italy* [1987] ECR 2599; Case 35/96 *Commission v Italy* [1998] ECR I-3851.

⁷ Joint Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt c/ Commission*, (hereafter: "Leipzig-Halle airport case"), [2011] ECR II-01311, confirmed by the ECJ, Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, [2012], not yet published in the ECR,; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P, ECR 2002 Page I-9297, and Case T-196/04 *Ryanair v Commission* [2008], ECR II-3643.

⁸ Cases C-159/91 and C-160/91, *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

⁹ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

¹⁰ Commission Decision N309/2002 of 19 March 2003 on Aviation security - compensation for costs incurred following the attacks of 11 September 2001.

¹¹ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* [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.

¹² Commission Decision N309/2002 of 19 March 2003 on Aviation security - compensation for costs incurred following the attacks of 11 September 2001.

and supervision of the air navigation and airspace falls within the public policy remit.¹³

- (25) In view of the above, the Commission notes that the investments into buildings and equipment for fire brigade, customs, airport security guards, police and border guards amounting in total to PLN [...] (EUR [...]) falls within the public policy remit, and hence the financing of this measure does not constitute State aid in the meaning of Article 107(1) of the TFEU.

3.1.2. State resources and imputability to the State

- (26) 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.¹⁴
- (27) In the present case, the capital injections into Gdynia-Kosakowo Airport Ltd. are provided from the budgets of two local authorities, Gdynia and Kosakowo. Thus, the Commission considers that they are financed by State resources and are imputable to the State.

3.1.3. Economic advantage

- (28) In order to determine whether the measure at stake 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 public shareholders of the airport operator to a market economy investor who is guided by prospects of profitability in the long-term.¹⁵
- (29) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Commission assesses whether the given measure constitutes aid by considering whether *"in similar circumstances a private shareholder, having regard to the foresee ability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question"*¹⁶.
- (30) Poland argues that the measures at stake do not grant an economic advantage to the airport operator of Gdynia airport, because they are in line with the Market Economy Investor Principle (hereinafter "MEIP"). In order to support this, Poland provided a Market Economy Investor Test (hereinafter "MEIT") showing that the financing provided to Gdynia-Kosakowo Airport Ltd. results in a positive equity value¹⁷ of PLN [...] (around EUR [...]) for its shareholders. In addition, the Internal Rate of Return¹⁸

¹³ See Commission Decision N620/2006 of 7 March 2007 on Einrichtung des Regionalflughafens Memmingen.

¹⁴ Case C-482/99 *France v Commission* (hereafter: "*Stardust Marine*") [2002] ECR I-4397.

¹⁵ Case C-305/89 *Italy v Commission* ("*Alfa Romeo*") [1991] ECR I-1603; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871.

¹⁶ Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

¹⁷ This equity value includes the net present value of the cash flows in 2012-2030 and the discounted Terminal Value of the airport operator in 2030.

¹⁸ IRR measures the return/profit that the investor achieves on its invested capital.

(hereinafter "IRR") of the investment project amounting to [...] is higher than the assumed cost of capital of the airport operator ([...]).

- (31) The submitted MEIT compares the equity value of the company with further investments, where the new airport becomes operational (the "*basic scenario*"), and the equity value of the company without further investments (the "*counterfactual scenario*"), where the investment project would be discontinued as of June 2012.¹⁹
- (32) The Court declared in the Stardust Marine Judgment 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.*"²⁰
- (33) In order to be able to apply the MEIT the Commission has to place itself at the time when the decisions to convert the former military airport into a civil aviation airport were taken. The Commission must also base its assessment on the information and assumptions, which were at the disposal of the public shareholders, when the decisions for the financial arrangements of the investment project were taken.
- (34) On the basis of the information at its disposal, the Commission takes the preliminary view, that the financing of the investments at Gdynia airport was committed by a unique binding investment decision of the public shareholders in 2007, which was further confirmed and complemented by the successive financing decisions of the public shareholders (such as the March 2011 agreement). This is in particular supported by the fact that all measures at stake are related to one investment project which will be realised in four phases. The Commission invites Poland to clarify, at what point in time the financing at stake was committed, and in particular whether it was committed on the basis of a unique investment project coupled by a binding investment decision of the public shareholder in 2007 (even, if the amount was not specified and was payable in the future) or on the basis of several separate binding decisions taken on the basis of different or amended investment plans.
- (35) On the other hand, the Polish authorities have submitted a MEIT based on the situation on the 18 June 2012; 6 years after the initial financing decision and one year after the March 2011 financing decision, clarifying the amount of the financing, were taken. In addition, the counterfactual scenario was defined as a scenario, in which the public shareholders of Gdynia airport would have to discontinue the investment project.
- (36) In this context, the Commission notes that the MEIT should assess whether the initial decision of the public shareholders taken in 2007 to finance the conversion of the military airport into a civil aviation airport is in line with MEIP. Therefore, the Commission considers that the counterfactual scenario for the measures at stake would be not to pursue the conversion project (i. e. "zero"). Consequently, the Commission's assessment will focus on the assumptions in the basic scenario of the submitted MEIT

¹⁹ As the MEIP test was carried out in June 2012, the analysis is based on this date.

²⁰ Case C-482/99 France v Commission [2002] ECR I-04397 ("*Stardust Marine Judgement*").

(i. e. the financing of the creation of a new civil aviation airport in Gdynia) and compare those with the alternative not to finance the investment project.

- (37) The basic scenario of the MEIT provided by Poland is based on a business plan projecting the future cash flows for the equity investors for the period 2012 – 2030 (i. e. a period of a high growth)²¹. The projected future cash flows are based on the assumption that the airport will start its activities in 2013. At the time when the MEIT was conducted, Poland expected that the airport would serve around [...] passengers in 2014 and progressively extend its activities up to [...] passengers in 2020 and around [...] in 2028 (see passenger development forecast in Table 2 below).

Table 2: Traffic projections for Gdynia airport (in thousands)

Expected passenger development											
Year	2013	2014	2015	2016	2017	2018	2019	2020	2023	2026	2030
Total	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	1083.7

- (38) After 2030 it is expected that the airport operator will grow endlessly at a stable growth rate of the turnover of [...]. Under this assumption, the Polish authorities calculated the Terminal Value of the airport operator in 2030.²²
- (39) The Commission notes that the key value drivers of the future cash flows of the operator of Gdynia airport are the expected revenues, which will be determined by the number of passengers and level of airport charges paid by airlines.
- (40) With regards to the expected passenger development, Poland argues that the demand for air passenger services will increase over time together with the expected increase of Poland's GDP (Gross Domestic Product) and the region's development. Poland is therefore of the opinion that the traffic projections are conservative and the actual traffic might be higher than the foreseen. Poland also argues that the business plan foresees that less than [...] of the passenger traffic in the region will be served by Gdynia.
- (41) In this context, the Commission notes that only 50 to 60% of the available capacity of the existing Gdansk airport will be used until 2020.²³ The terminal of Gdansk airport was extended in 2012 to serve up to 5 million passengers and a further extension to serve up to 7 million is foreseen in 2015. These extension decisions were already taken at the beginning of 2007. According to Poland also further extensions of Gdansk airport are possible in order to meet the foreseen demand in the region over a long period of time. In addition, the business plan of Gdynia airport foresees that the main part of the revenue (80-90%) will be generated by LCC's and charter airlines. Also Gdansk airport serves mainly LCC traffic (35 out of 47 destinations in March 2013²⁴).

²¹ A commonly used way to evaluate equity investment decisions is considering the equity value of the company. Equity value is the value of a company available to its owners or shareholders. The equity value is calculated by summing all future cash flows available for equity investors discounted at the appropriate return. The discount rate generally used is the cost of equity that reflects the risk of the cash flows.

²² The terminal value is the present value of all subsequent cash flows generated under the stable growth rate forever (i. e. the equity value of the airport operator in the last year of the submitted business plan).

²³ The passenger traffic (in 1 000 passengers per annum) of Gdansk airport:

- (42) In view of the close proximity of another uncongested airport pursuing the same business model, the Commission considers that the level of airport charges will have a substantial impact on passenger traffic developments at Gdynia airport. The business plan for the airport foresees a standard passenger charge of PLN 40 (EUR 10) per passenger, and a reduced passenger charge of PLN 25 (EUR 6.25) per passenger, which will be applicable in 2013 and 2014 only (i. e. during the first two years of its operation).
- (43) The Commission notes that while the foreseen standard and reduced charges at Gdynia airport are lower than the standard passenger charge at Gdansk airport, Gdansk airport offers discounts on passenger charges for air carriers flying regularly to/from Gdansk.²⁵ Taking into account these discounts the passenger charges at Gdansk airport are lower than the charges foreseen in Gdynia. Also the analyses of charges at other Polish airports, such as Szczecin, Bydgoszcz, Lublin, shows that the level of charges foreseen in Gdynia is significantly higher.²⁶
- (44) In view of the above, the Commission has doubts whether the revenue forecast of Gdynia airport is based on realistic assumptions, in particular with regard to the level of airport charges and the level of expected passenger traffic.
- (45) In addition, the stress test conducted by Poland shows that the equity value turns negative, if the passenger charge is reduced to PLN [...] (EUR [...]). The Commission notes that a reduced airport charge, which would be comparable with the level of airport charges paid at other Polish airports, would result in a negative equity value.
- (46) Furthermore, according to the *Charleroi Judgement*²⁷ when assessing the measures in question, the Commission has to take into account all the relevant features of the measures and their context. At the current stage the Commission has doubts whether

Actual passengers:									
Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Passengers	466	672	1256	1715	1954	1911	2232	2463	2906
Expected passenger development:									
Year	2013	2014	2015	2016	2017	2018	2019	2020	
Passengers	3153	3311	3477	3616	3760	3911	4067	4230	

²⁴ Wizzair (23 destinations), Ryanair (10 destinations), Eurolot (6 destinations), Lot (2 destinations), Lufthansa (2 destinations), SAS (2 destinations), Air Berlin (1 destination), Norwegian (1 destination).

²⁵ For instance, according to the Gdansk airport price list, an air carrier operating regular international flights to/from Gdansk airport with air planes of a maximum take-off weight between 50 and 100 tons (i.e. Airbus A320 and Boeing 737) pays until 31.12.2028 a reduced passenger charge equal to PLN 24 (EUR 6) per departing passenger. Also the applied reduced landing charge is in Gdansk lower (PLN 10 or EUR 2.5 per ton) than foreseen in the business plan of Gdynia (PLN 25 or EUR 6.25 per ton).

²⁶ For instance, Lublin Airport: standard departing passenger charge: PLN 34 (EUR 8.5), discounts: 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 equal to 60% if an air carrier serves more than 250 000 departing passengers from Lublin Airport. If an air carrier opens an operational base in Lublin Airport, departing passenger charge is between PLN 4.21 (EUR 1.05) and PLN 5.76 (EUR 1.44) in the first five seasons (2.5 year); Bydgoszcz Airport: standard departing passenger charge: PLN 30 (EUR 7.5), discounts: 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 8000 passengers departing from Bydgoszcz per month Airport); Szczecin Airport: standard departing passenger charge: PLN 35 (EUR 8.75), discounts: from 20% (if more than 800 passenger seats offered to departing passengers weekly by a given air carrier) to 90% (if more than 1300 seats offered).

²⁷ Case T-196/04 Ryanair v Commission [2008] ECR II-3643 ("*Charleroi Judgement*").

the business plan takes into account all the planned incentives (such as marketing support, rebates, or any other route development incentives etc.) envisaged to be granted directly by Gdynia airport or by its shareholders or other regional authorities to attract airlines to establish new routes from this airport. The Commission considers that these possible incentive schemes have a direct impact on the profitability of the airport, and therefore also the costs of such incentive schemes need to be taken into account when applying the MEIP.

- (47) According to Poland the MEIT takes into account operating costs, which are related to the military operation at the airport. These costs are expected to be compensated by the State. However, no further details have been provided by Poland at this stage, since no actual agreement exists. The Commission considers that a market economy investor would base its assessment on estimated results foreseeable at the time it takes the investment decision (see also paragraph 32 above).
- (48) In addition, due to negative operating results at the beginning (until approximately [...]), the equity value of the new airport turns only positive because of the Terminal Value of the airport operator. The growth rate of the turnover used for the calculation of the Terminal Value was set at [...]. According to standard practice a growth rate between 0 and 2 is usually acceptable, depending on the business and situation of the undertaking concerned. Moreover, the growth rate of the undertaking should not be higher than that of the economy in which it operates (i.e. in terms of GDP growth).
- (49) Poland argues that the growth rate of [...] can be justified due to the expected high inflation rate in Poland. At the current stage, the Commission doubts whether the growth rate of [...] reflects appropriately growth potential of the airport, and thus does not inflate the equity value of the airport operator.
- (50) In view of the above, it cannot be concluded that the financing at stake fulfils the MEIT. Therefore, the Commission takes the preliminary view that the financing measures at stake provide an advantage to Gdynia Airport Ltd. that it would not have obtained under normal market conditions.
- (51) Moreover, the Commission considers that the fact that Gdynia is also a shareholder (2%) of Gdansk airport's operator is irrelevant for the assessment of the MEIT, as this participation is too small and does not appear to have any relation with the investment project under assessment. Also the fact that the Gdansk airport's operator signed a letter of intent in 2005 to create a new airport for the Pomeranian Region based on the infrastructure of the military airport located in Kosakowo is also irrelevant for the assessment of investment in the conversion of the Gdynia airport realised as of 2007. Indeed, that letter of intent does not appear to be a binding document and in any case the Gdansk airport's operator did not participate in the subsequent investment in the conversion of the Gdynia airport.
- (52) The Commission invites Poland and third parties to submit comments and further information necessary to assess whether the financing at stake is in line with the MEIP.

3.1.4. *Selectivity*

(53) Article 107 (1) TFEU requires that a measure, in order to be defined as State aid, favours "*certain undertakings or the production of certain goods*". In the case at stake, the Commission notes that the capital injections concern the Gdynia-Kosakowo Airport Ltd only. Thus they are selective within the meaning of Article 107 (1) TFEU.

3.1.5. *Distortion of competition and effect on trade*

(54) 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 aid²⁸. The economic advantage granted by the present measure to the airport operator strengthens its economic position, as the airport operator will be able to initiate commercial airport operations without incurring the initial investment costs necessary for this operation.

(55) As previously explained, the operation of an airport is an economic activity²⁹. Competition takes place on the one hand between airports to attract airlines and the correlative air traffic (passengers and freight) and on the other between airport operators, which may compete between themselves to be entrusted with the management of a given airport. Gdynia airport will serve around [...] passengers until 2020 and up to 1 million passengers in 2030.

(56) As mentioned in paragraph 40 of the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports³⁰ (hereinafter: "2005 Aviation Guidelines"), it is not possible to exclude even small airports from the scope of application of Article 107(1) of the TFEU. In view of the forecasted traffic at Gdynia airport and its proximity to Gdansk airport (only 25 kilometres away) the Commission considers that competition and trade between Member States are likely to be affected.

(57) On the basis of what precedes, the economic advantage which the operator of Gdynia airport receives strengthens its position vis-à-vis its competitors on the European market of providers of airport services. Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States.

Conclusion

(58) In view of the above the Commission takes the preliminary view that the financing granted to Gdynia-Kosakowo Airport Ltd. constitutes State aid within the meaning of Article 107(1) of the TFEU. As the financing was already put at the disposal of Gdynia Airport Ltd. and the decisions to finance the conversion of the former military airport into a civil aviation airport involve an irrevocable commitment by which the national authorities undertook to grant the aid prior to the Commission decision, the

²⁸ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

²⁹ See above, paragraph 20 further above.

³⁰ OJ C 312, 9.12.2005, p. 1

Commission also takes the preliminary view that Poland has not respected the prohibition of Article 108(3) of the TFEU.³¹

3.2. Compatibility of the aid

- (59) The Commission has examined, if the aid identified above financing investments and operating losses during the first years of the operation of Gdynia airport (until 2019, including) can be found compatible with the internal market.
- (60) Article 107 (3) of the TFEU provides for certain exemptions to the general rule set out in Article 107 (1) of the TFEU that State aid is not compatible with the internal market. The aid in question can only be assessed on the basis of Article 107 (3) (c) of the 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. In this regard, the 2005 Aviation Guidelines provide a framework for assessing whether aid to airport operators may be declared compatible pursuant to Article 107(3)(c) of the TFEU. They mention a number of criteria, which the Commission has to take into account.

Operating aid

- (61) With regard to the financing of the operating losses of Gdynia Airport Ltd., the Commission notes that, since Poland does not consider it to be State aid, no arguments have been brought forward as to its compatibility with the internal market.
- (62) According to the case-law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.³²
- (63) At this stage the Commission takes a preliminary view that the financing of operating losses of Gdynia Airport Ltd. represents operating aid, reducing the airport operator's current expenditure. According to the case law of the Court,³³ such operating aid is in principle incompatible with the internal market. According to the 2005 Aviation Guidelines, operating aid granted to airports can only be declared compatible under exceptional circumstances and strict conditions in underprivileged regions.³⁴
- (64) The Commission notes that Gdynia airport is located in an underprivileged region covered by the derogation set out in Article 107(3)(a) of the TFEU, and thus, the Commission has to assess whether the operating aid at stake can be considered compatible under the Guidelines on national regional aid for 2007-2013³⁵ (hereinafter "RAG").
- (65) According to paragraph 76 of the RAG the operating aid in regions eligible under the derogation in Article 107(3)(a) of the TFEU may be granted provided that (i) it is

³¹ Case T 109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

³² Case C-364/90, *Italy/Commission*.

³³ Case T-459/93 *Siemens SA v Commission*, ECR [1995] II-01675.

³⁴ See paragraph 23 and 63 of the 2005 Aviation Guidelines.

³⁵ OJ C 54, 4.3.2006, p.13

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.

- (66) At the current stage, the Commission is not in a position to conclude that the criteria set out in the paragraph 76 of the RAG are met, notably, because the Pomeranian Region is already served by Gdansk airport and the new airport will not increase the connectivity of this region.
- (67) The Commission invites Poland and third parties to comment on the compatibility of the operating aid.

Investment aid

- (68) State aid for financing airport infrastructure is compatible with Art. 107(3)(c) TFEU if it complies with the conditions laid down in paragraph 61 of the 2005 Aviation Guidelines:
 - (i) the 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; and
 - (v) the development of trade is not affected to an extent contrary to the EU interest.
- (69) In addition State aid to airports, as any other State aid measure, should have an incentive effect and should be necessary and proportional in relation to the aimed legitimate objective in order to be compatible.
 - (i) Construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)
- (70) According to Poland the investment in Gdynia airport will address the growing demand of passengers and airlines in the Pomeranian Region and will increase the connectivity of the region. In addition, Poland submits that the implementation of the project will have a positive impact on the entire region and will positively influence its economic and social development.
- (71) The Commission notes that the Pomeranian Region is already served by Gdansk airport, which is located only around 25 kilometres away from the planned new airport. For instance passengers travelling from/to Gdynia could reach Gdansk and Gdynia airports within a similar travelling time of 20 – 25 minutes by car from the city centre of Gdynia. In addition, Gdansk airport will be used only at around 50 - 60 % of

its capacity in the coming years. The airport offers more than 40 national and international destinations.

(72) The Commission observes further that with Gdansk airport the Pomeranian Region is already well connected and the new airport will not increase the connectivity of this region. The Commission considers that the investment project seems to lead to a mere duplication of infrastructure in the region.

(73) Hence, the Commission has serious doubts whether the public funding of the infrastructure of Gdynia airport meets a clearly defined objective of common interest. The Commission invites Poland and third parties to comment on the notion of a clearly defined objective of common interest.

(ii) *The infrastructure is necessary and proportional to the objective which has been set*

(74) Poland submits that the investment project at Gdynia airport is necessary due to the limited number of airports in Poland and the increasing demand for passenger air services in the region as well as the dynamic development of this region. Moreover, according to Poland due to the existence of a military airport a new civil aviation airport can be created with limited investment costs.

(75) Moreover, Poland has exposed that all of the infrastructure investments that it will undertake and finance are necessary to attain the goals that they have set and the project is not disproportionately large or elaborate. In addition, Poland argues that the investment is also proportional due to the foreseen increase of demand for passenger air services in the region.

(76) As previously mentioned, the catchment area of Gdynia airport is currently efficiently served by Gdansk airport that is located in close proximity (around 25 kilometres). Both airports pursue a similar business model and focus mainly on LCC's and charters.

(77) In view of the above, the Commission has serious doubts whether the infrastructure in question is necessary. In the absence of a clearly defined objective of common interest the Commission is not in a position to assess whether the infrastructure at Gdynia airport is proportional to the objective that has been set. Hence, the Commission has also serious doubts whether the infrastructure is necessary and proportional.

(78) The Commission invites Poland and third parties to comment on the necessity and proportionality of the infrastructure in question.

(iii) *The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure*

(79) Poland argues that the infrastructure has satisfactory medium-term prospects for use.

(80) In 2012, Poland provided the following forecasts (in million passengers per annum) of the increase in passenger demand in the catchment area of Gdynia and Gdansk airports:

Table 3: Traffic projections for the Pomeranian Region (in millions)

2013	2015	2017	2019	2020	2023	2026	2027	2028	2030
2.8	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	7.7

- (81) According to Poland, the updated forecasts (prepared in March 2013) show that demand in the catchment area is expected to be higher than the traffic projections in 2012. According to the modified projections the demand in the catchment area amounts to around 9 million passengers in 2030.
- (82) The current capacity of Gdansk airport is 5 million passengers per annum and it will be expanded up to 7 million by 2015. According to Poland, Gdansk airport is able to expand its capacity further to serve even more than 10 million passengers per annum.
- (83) Comparing the forecasted demand in the catchment area and the capacity of Gdansk airport, this airport alone would be sufficient to serve, depending on the forecasts used, the demand in the region at least until 2025 - 2028.
- (84) In view of the unused existing capacity at Gdansk airport, the Commission takes the preliminary view that it is doubtful that Gdynia airport has satisfactory medium-term prospects for use. Therefore, the Commission has doubts as to whether this criterion of the 2005 Aviation Guidelines is complied with.
- (85) The Commission invites Poland to provide a plan demonstrating the future medium-term prospects for use of Gdynia airport are satisfactory in particular in view of the existing capacity of Gdansk airport.
- (iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner
- (86) Poland confirmed that all potential users will 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
- (87) As previously mentioned, Poland expects that Gdynia airport will experience a gradual, stable increase in passenger traffic and will handle 1 million passengers per annum in 2028. Poland argues that the aid to Gdynia airport, because of its size, and the fact that it will serve only less than [...] of the demand in the region, does not affect the development of trade to an extent contrary to the common interest.
- (88) The Commission notes that the funding will be directed to an airport, which is in direct competition with another airport in the same catchment area. In such a situation, the development of trade would appear to be affected to an extent contrary to the common interest. Moreover, because of the close proximity of two airports with a similar business model serving the same catchment area, a spill-over effect on the air transport market (i. e. airlines using these airports) cannot be excluded, in particular in view of possible incentive schemes.
- (89) Therefore, the Commission at this stage has serious doubts as to whether this criterion is complied with.

(vi) Necessity of aid and incentive effect

- (90) The Commission must establish, whether the State aid granted to Gdynia-Kosakowo Airport Ltd. has changed the behaviour of the beneficiary undertaking in such a way that it engages in an 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 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.
- (91) The Commission has doubts whether the behaviour of the beneficiary of the aid was changed in a way that an objective of common interest is attained.
- (92) With regard to the proportionality of the aid, at the current stage the Commission has doubts whether the aid is limited to the funding gap (i. e. the difference between the investment costs and the Net Present Value of the expected operating profits generated by the investment). Therefore, the Commission has doubts whether the aid is proportional and necessary to attain an objective of common interest.
- (93) The Commission invites Poland to provide further information whether and to what extend the public financing of the measures in question was aimed at changing the behaviour of the aid beneficiary. The Commission also invites Poland to provide any document or information that could be relevant in order to prove the proportionality of the aid measure at stake. Finally, the Commission invites Poland and third parties to provide comments on necessity and incentive effect of the aid.

Conclusion

- (94) In the view of the above, the Commission considers that not all conditions for compatibility as set out in the 2005 Guidelines seem to be satisfied in the present case.
- (95) On the basis of the considerations above, the Commission has serious doubts whether the financing of the infrastructure investments can be declared compatible with the internal market pursuant to Article 107(3)(c) of the TFEU.
- (96) The measures do not appear to qualify for any other exemption provided in the Treaty. Therefore, at the current stage, the Commission cannot exclude that they involve illegal and incompatible State aid.

4. INVITATION TO SUBMIT COMMENTS IN VIEW OF A POSSIBLE SUSPENSION INJUNCTION

- (97) Article 11 (1) of Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (hereafter: the Procedural Regulation)³⁶ provides that the Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market.
- (98) The Commission herewith invites Poland to submit its comments pursuant to Article 11 (1) of the Procedural Regulation in view of a possible Commission decision requiring Poland to suspend the financing of the infrastructure project at Gdynia airport. According to the information at its disposal, the financing of the infrastructure project at Gdynia airport constitutes aid (see paragraphs 17-58).

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 Poland to submit its comments and to provide all such information as may help to assess the measures notified by Poland, within one month of the date of receipt of this letter. In particular, the Commission invites Poland to submit any document and information at its disposal concerning the assessment of the notified measures in the light of the MEIT as well as their compatibility with the internal market. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Poland 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 Poland 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 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 Competition
State Aid Greffe
B-1049 Bruxelles
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

³⁶ OJ. L 83, 27.3.1999, p.1.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President