



## EUROPEAN COMMISSION

Brussels, 31.07.2015  
C (2015) 5347 Final

<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><b>PUBLIC VERSION</b></p> <p>This document is made available for information purposes only.</p>
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**Subject: State aid SA. 33769 (2015/NN) (ex-2011/CP) – Romania – Alleged aid to Târgu Mureş Transilvania Airport, Wizz Air, Ryanair and other airlines**

Sir,

The Commission wishes to inform Romania 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.

### **1. PROCEDURE**

- (1) On 13 October 2011, a complaint was made to the Commission, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) <sup>1</sup>, about alleged illegal State aid concerning Târgu Mureş Transilvania Airport (hereinafter "TMA", or the "airport manager"). The complaint was registered under case number SA.33769. Since it appeared that the State support had been put in place before the Commission could take a position on its compatibility with the internal market, the measure has been subsequently registered as un-notified aid.

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<sup>1</sup> OJ L 138 of 30.04.2004.

Mr Bogdan Lucian AURESCU  
The Ministry of Foreign Affairs of Romania  
Aleea Alexandru nr. 31,  
Sector 1,  
011822 Bucharest

- (2) The complaint was forwarded to the Romanian authorities for comment on 19 December 2011 and after an extension of the deadline, a reply was received from the Romanian authorities on 13 February 2012.
- (3) The complainant ("first complainant") supplied further information to the Commission on 14 October 2011, 18 October 2011, 3 November 2011, 24 November 2011, and 10 January 2012.
- (4) The Commission asked the Romanian authorities to provide additional information by letter dated 24 February 2012. After an extension of the deadline, the information requested was submitted by the Romanian authorities on 13 April 2012 and 24 April 2012.
- (5) On 1 March 2012, information was received by the Commission from a second complainant in the form of an additional complaint about alleged illegal State aid granted to the airline Wizz Air at TMA. The second complainant supplied additional information to the Commission on 2 April 2012, 20 April 2012, and 15 October 2012.
- (6) Also on 15 October 2012, information was received by the Commission from a third complainant in the form of an additional complaint about alleged illegal State aid granted to TMA for the financing of infrastructure and alleged illegal State aid resulting from an incorrect entrustment of Service of General Economic Interest (hereinafter "SGEI") duties to TMA.
- (7) The first complainant supplied further information to the Commission on 8 November 2012.
- (8) On 7 December 2012, 26 February 2013, 27 February 2013, and 5 December 2013, further information was received by the Commission from the third complainant.
- (9) On 18 September 2013, an additional submission was received from the third complainant, alleging that TMA or Târgu Mureş local authorities had granted aid to Ryanair, in particular through a marketing agreement.
- (10) That submission was forwarded to the Romanian authorities on 28 November 2013, and a reply was received on 20 December 2013, stating that no marketing agreement had been concluded by TMA or Târgu Mureş local authorities with Ryanair or any other airline.
- (11) On 20 January 2014, a meeting took place in Brussels between the Commission and representatives of the third complainant.
- (12) On 14 October 2014, the Commission forwarded to the third complainant the letter of the Romanian authorities of 20 December 2013. A response from the third complainant was received by the Commission on 27 October 2014 (hereinafter "the third complainant's complaint summary").
- (13) On 11 December 2014, the Commission asked the Romanian authorities to provide additional information. After an extension of the deadline, the information requested was submitted by the Romanian authorities on 18 February 2015.

- (14) On 12 and 18 February 2015, further information with regard to SGEI at TMA was received by the Commission from the third complainant. On 1 April 2015, this information was forwarded to the Romanian authorities for comment, and a reply from the Romanian authorities was received by the Commission on 8 May 2015.

## **2. DETAILED DESCRIPTION OF THE MEASURES**

### **2.1. Târgu Mureş Transilvania Airport (TMA)**

- (15) TMA is located 14 km southwest of Târgu Mureş, a city of 135,000 inhabitants in Mureş County, central Romania. Both the city and airport are in the historic region of Transilvania.
- (16) In 2001 TMA had just 5,147 passengers, but this number has increased dramatically partly because of investment made in infrastructure at the airport. The changes in passenger numbers from 2006-2014 are set out in the following table, whose figures the Romanian authorities are invited to confirm:

**Table 1 - Passenger numbers at TMA<sup>2</sup>**

	2006	2007	2008	2009	2010	2011	2012	2013	2014
No. of passengers	46,822	156,929	69,945	84,062	74,353	257,303	300,427	363,389	343,521

- (17) Airlines that have operated from TMA include Malev, TAROM, Ryanair and Wizz Air. Of these airlines, only Wizz Air is currently present at the airport, where its operations form the vast majority of flights.
- (18) Wizz Air first began operations at TMA in June 2006 with a route to Budapest, and it quickly expanded its activities at the airport, and in 2007 operated routes to Budapest, London, Barcelona, Rome, Milan, and Dortmund.
- (19) In November 2007 Wizz Air ceased activity at TMA, moving certain services to Cluj-Napoca International Airport (hereinafter "CNIA"). In 2008 Wizz Air re-started services from TMA to Budapest. In 2011, Wizz Air increased its services substantially re-opening routes to London, Barcelona, Rome, Milan, and Dortmund, and adding new routes to Madrid and Paris.
- (20) Wizz Air is currently operating flights from TMA to Budapest, Dortmund, Memmingen, Frankfurt Hahn, Paris Beauvais, London Luton, Milan, Madrid and Rome Ciampino airports. From CNIA, Wizz Air is currently operating flights to 20 different destinations. These destinations included six which the company was also serving from TMA, namely: Dortmund, Paris Beauvais, London Luton, Milan, Madrid and Rome Ciampino airports.
- (21) Ryanair began operating flights from TMA to Brussels and Pisa in 2013, but in 2014 discontinued all operations from TMA.

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<sup>2</sup>Source:

[https://ro.wikipedia.org/wiki/Aeroportul\\_Interna%C8%9Bional\\_Transilvania,\\_T%C3%A2rgu\\_Mure%C8%99](https://ro.wikipedia.org/wiki/Aeroportul_Interna%C8%9Bional_Transilvania,_T%C3%A2rgu_Mure%C8%99).

- (22) The distance from TMA to CNIA by is 103km, or 1 hour 31 minutes by car, whereas the distance from TMA to Sibiu International Airport is 114km, 1 hour 53 minutes by car.<sup>3</sup> All other major airports, including the currently under construction Braşov-Ghimbav International Airport, are more than 2 hours away from TMA by car.

#### *2.1.1. Governance of Târgu Mureş Transilvania Airport (TMA)*

- (23) TMA's airport infrastructure was first opened to users in 1936, and like CNIA and the vast majority of airports in Romania, had until 1997 been part of the Self-governing Company of Regional Airports in Romania (RAATR). The airport fees and tariffs were identical at all RAATR airports.
- (24) Subsequent to Government Decision No 398/1997, 13 airports within the structure of RAATR were subordinated to county councils, including TMA, which was subordinated to Mureş County Council, and CNIA, which was subordinated to Cluj County Council. Since that time, the operator of each airport has been responsible for the development of the infrastructure of the airport, supply of its equipment and its overall organisation.
- (25) TMA operates the airport under a concession agreement with the State, the owner of the airport infrastructure. Since its creation, TMA has always been wholly owned by Mureş Local County. The Romanian authorities are invited to provide all relevant information pertaining to the concession arrangements.
- (26) Regia Autonomă "Aeroportul Transilvania" TG-Mureş is the name of the company controlling TMA, (referred to interchangeably in this decision as "TMA" or the "airport manager"). The current board of directors was established for a four year term by Regional Decision of Mureş Country Council No. 65 of 31 May 2012.

#### **2.2. Cluj-Napoca International Airport (CNIA)**

- (27) CNIA is the second largest airport in Romania, located near Cluj-Napoca, the largest urban centre of Transylvania, a historical region in north-western Romania.
- (28) CNIA currently serves 23 domestic and international destinations, the vast majority of which are operated by Wizz Air, (see paragraph (20)). In addition, various holiday destinations are operated by charter flights.
- (29) CNIA currently serves more than 1 million passengers per year. The number of passengers has substantially increased since the deregulation of the Romanian air traffic in 2007.

#### **2.3. Description of the measures subject to the formal investigation procedure**

- (30) The complaints can be summarised into the following allegations:

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<sup>3</sup> According to [www.googlemaps.com](http://www.googlemaps.com), the route that is both the shortest and the quickest between the two airports by car is 103km, or 1 hour 31 minutes.

- *The level of airport charges is so low that it confers State aid to airlines operating at TMA*
- *TMA receives unlawful State aid in the form of an incorrect entrustment of the SGEI duties to TMA, and the financing of ground handling equipment, and car parking facilities*

(31) These measures are described more fully in the following sections (2.4 and 2.5):

**2.4. Potential aid to airlines in relation to the level of airport charges for airlines operating at TMA**

- (32) It is alleged that with effect from 6 July 2012 airlines opening new routes from TMA have only been paying a passenger service fee of 1 euro per passenger.
- (33) An alleged result of the setting of TMA's charges at these levels was a transfer to TMA from CNIA of routes operated by Wizz Air to certain destinations.
- (34) It was also alleged that Târgu Mureş County Council subsidised Ryanair by means of a marketing services agreement, (see paragraph (10)), but the Romanian authorities confirmed that no such agreement exists. This allegation was not repeated in the third complainant's complaint summary.
- (35) The level of the airport charges that the allegations refer to has been set by the Decision of Mureş County Council No 83/2012 of 6 July 2012, (hereinafter "Regional Decision of July 2012") approving a decision of the Board of Directors of TMA No 7/26.06.2012.
- (36) Under the Regional Decision of July 2012, the airport charges became the following:

**Table 2 - Airport charges at TMA applicable following the Regional Decision of July 2012**

Charge	Cost (euros)
Landing	1,25/tonne
Runway lighting	0,40/tonne
Parking	0,15/tonne
Passenger service fee	1,00/passenger

- (37) The Romanian authorities are invited to confirm whether the charges set by the Regional Decision of July 2012 were effective immediately on the day the decision was taken (6 July 2012) or were only put into effect at a later date. The Romanian authorities are also requested to confirm whether the aircraft parking charge in Table 2 varies according to the time parked. In addition, the Romanian authorities are also asked to confirm whether TMA receives the whole passenger service fee of 1 euro, or whether, as alleged by one of the complainants, a tax of 0,325 euros per passenger is made under national legislation for the purposes of

safety and security.

- (38) The landing charge mentioned in Table 2 can be discounted if the airline makes more than three landings per month at TMA, according to the following scale:

**Table 3 - Landing charge discounts at TMA applicable following the Regional Decision of July 2012**

No. of landings/month	Discount
3-5	5%
6-10	10%
11-15	15%
16-20	20%
21-25	25%
26-30	30%
31-35	35%
36-40	40%
41-45	45%
More than 46	50%

- (39) The airport charges set out in Table 2 and Table 3 were published in AIP<sup>4</sup> Romania GEN 4.1-16 of 20 September 2012.

- (40) In order to allow the Commission to assess whether the airport charges available to the airlines at TMA were expected to lead to a positive incremental profit contribution for the airport<sup>5</sup>, i.e. to lead to a higher profit or lower losses than would be achieved in the counterfactual situation (if those airlines were not present at the airport paying those charges), Romania was asked to provide any business plan on which the decision to set the airport charges was based and were no genuine *ex ante* profitability analysis have been carried out ahead of the Regional Decision of July 2012, a reconstructed *ex ante* profitability analysis that a reasonable market economy operator would have performed before adopting the 2012 airport charges.<sup>6</sup>

- (41) In response, the Romanian authorities stated that the analysis of the opportunity

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<sup>4</sup> Aeronautical Information Publication (AIP) is the basic aviation document intended primarily to satisfy international requirements for the exchange of permanent aeronautical information and long duration temporary changes essential for air navigation. It is published by ROMATSA, the Romanian Air Traffic Services Administration. See: <http://www.aisro.ro/>.

<sup>5</sup> Guidelines on State aid to airports and airlines, (OJ C 99, 4.4.2014, p. 3), point 61 specifies "At present the Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines."

<sup>6</sup> Letter of the Commission of 11 December 2014.

offered by the airport charges which were set by the Regional Decision of July 2012 were based on the document: "Economic forecast the evolution of compensation in 2011-2015 based on airport charges proposed for approval", (hereinafter "Economic Forecast Document"). The document was drafted ex-ante to the setting of the charges by the Regional Decision of July 2012. This document is reproduced in Table 4:

**Table 4 - Economic Forecast Document (actual 2011/forecast 2012-2015)**

Year	Total rotations Wizz Air	Total rotations Other airlines	Total revenues Wizz Air (euros)	Total revenues Other airlines (euros)	Exchange rate RON/euro BNR/Eurostat	Total revenues Wizz Air (RON)	Total revenues Other airlines (RON)	SGEI compensation (RON)	Budget (RON)
2011	[...]	130	[...]	61.880	4,3197	[...]	358.555,46	4.953.161	8.035.000
2012	[...]	250	[...]	130.000	4,4140	[...]	573.820,00	4.299.831	7.790.247
2013	[...]	350	[...]	182.000	4,4412	[...]	808.298,40	3.525.543	7.649.967
2014	[...]	555	[...]	316.350	4,5200	[...]	1.429.902,00	3.251.270	9.051.300
2015	[...]	700	[...]	490.000	4,5600	[...]	2.234.400,00	1.993.424	11.286.000

- (42) The Economic Forecast Document contains real ex-post data for 2011 and ex-ante forecasts for the period 2012-2015. The data covers the number of rotations by Wizz Air and by other airlines, and the revenues for TMA derived from Wizz Air and from other airlines, SGEI compensation to TMA, and a figure for budget. The Romanian authorities are invited to explain how the columns "Total Revenues", "SGEI compensation" and "Budget" relate to each other, and in particular what the Budget figure represents.
- (43) According to the Romanian authorities, the Economic Forecast Document outlines the beneficial effect of the new airport charges and shows the drastic decrease forecast each year in the amount of SGEI compensation sought by TMA from the local authorities. Furthermore, it demonstrates the ultimate aim of TMA being able to achieve breakeven in a reasonable time frame of 5-10 years, through the generation of additional traffic at the airport.

## **2.5. Measures in favour of TMA**

- (44) It is alleged by the complainants that since 2011 the SGEI entrusted to TMA involves overcompensation, and that the airport uses this SGEI overcompensation to subsidise low airport charges to airlines.
- (45) It is further alleged that TMA financed by means of SGEI compensation, investments which should normally fall outside the scope of the SGEI mission of the airport. These investments included ground handling equipment, and an upgrade of TMA's car parking facilities.

### *2.5.1. SGEI duties entrusted to TMA*

- (46) TMA has been receiving public subsidies from the budget of the Mureş County Council since 1997, following Government Decision No 398/1997 (see paragraph (24)).
- (47) According to the Romanian authorities, this funding constituted compensation for public service obligations, which complied with all substantive conditions for SGEI.
- (48) The public financing granted to TMA by the local county to compensate SGEI costs in the period 2007 to 2009 is being assessed by the Commission under case SA.30931 (2011/C) (ex N 185/2010).<sup>7</sup> Romania submitted that this financing, and that in favour of other Romanian airports, would amount to aid exempted from the notification requirement on the basis of Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (hereinafter 'the 2005 SGEI Decision').<sup>8</sup>
- (49) In particular, Romania claimed that the public financing in question represented compensation for the provision of SGEIs entrusted to TMA (and other Romanian airports) by means of Government Decision 398/1997. That Government Decision refers to the transfer of ownership of Romanian regional airports from the Ministry of Transport to the regions and local counties and lays down in its Annex the Statutes of the airport managers, which include a detailed list of their activities. Romania claimed that those activities, i.e. the overall management of the airports in question, should be regarded as SGEIs.
- (50) The Commission opened the formal investigation procedure in above-mentioned case SA.30931 on 24 May 2011. The public financing granted to TMA by the local county in the period 2007 to 2009 is thus being assessed by the Commission separately under SA.30931 and is not subject to the present Decision. For the period 1 January 2010 onwards, the Commission partially closed the formal investigation procedure under Article 108(2) TFEU in respect of the notified scheme providing for public financing to support infrastructure improvements in small regional airports, as Romania has withdrawn its notification concerning the project in question. This decision only concerns public financing granted to the TMA for the period 2011 onwards.

#### 2.5.1.1. 2011 SGEI entrustment

- (51) In 2011, TMA was entrusted with the provision of a SGEI (hereinafter the "2011 SGEI") by Regional Decision No. 107/2011 of 18 August 2011 of Mureş County Council, (hereinafter "Regional Decision of August 2011"). Under Article 1(2), the following activities carried out by airport constitute a SGEI:

A) the construction of airport infrastructure and equipment: runways, terminals, ramps, traffic control tower or installations that directly support them: fire extinguishing facilities, security and safety equipment;

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<sup>7</sup> The Decision to open the formal investigation procedure was adopted on 24 May 2011 and was published in OJ C 207, 13.07.2011. The Commission adopted a Corrigendum to that Decision on 23 June 2011.

<sup>8</sup> OJ L 312, 29.11.2005, p. 67.



B) operating the infrastructure, equipment and installations that directly support them, including maintaining, repairing, upgrading or administering the airport infrastructure;

C) the provision of ancillary services for air transport, with the exception of ground handling services;

D) the provision of air traffic control services, fire extinguishing service, emergency services, safety;

E) ensuring, in accordance with the law, the presence of the spaces and utilities necessary for public authorities performing specific control activities at the airport;

F) processing of flights by aircraft legally exempted from the payment of airport charges<sup>9</sup>, including processing the passengers of these flights;

G) the acquisition and maintaining of the necessary ground service equipment for aircraft legally exempted from the payment of airport charges;

H) the protection of the airport infrastructure.

(52) According to the Romanian authorities the activities under points D) to H) above are not of an economic nature and are in the scope of the powers of public authority. With regard to points F) and G) the Romanian authorities state that certain categories of aircraft are legally exempted from all airport taxes and charges, including ground handling charges, at all Romanian airports.<sup>10</sup>

(53) In accordance with Article 1(3) of the Regional Decision of August 2011, commercial activities which are not linked directly to the activities of the airport may not be supported, and these activities include the building, financing, using and leasing of land and buildings, not only for offices and storage, but also for hotels and economic operators located on airport premises, as well as shops, restaurants or car parks.

(54) The compensation paid to TMA for the operation of the SGEIs between 2011 and 2014 is set out in the following table:

**Table 5 - SGEI funding paid to TMA, (2011-2014)**

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<sup>9</sup> According to Article 31(2) of the Romanian Aviation Code, at airports open to commercial traffic, the following types of aircraft are exempted from the payment of the passenger charge, landing charge, parking and lighting charge and air navigation services charge: a) Romanian military aircraft; b) Foreign military aircraft, by virtue of bilateral agreements concluded at the request of the Ministry of Defence; c) Aircraft carrying State representatives in their official capacity; d) Aircraft flying in the interest of the UN, Red Cross or Red Crescent; e) Aircraft carrying out search and rescue missions; f) Aircraft carrying out humanitarian and aid missions; g) Aircraft that must land due to technical difficulties, meteorological conditions or other emergency situations; h) Aircraft landing upon instruction from the Ministry of Transport and/or the Ministry of Defence; i) Other types of aircraft as laid down by the law. Under Article 31(4) the exemptions laid down at letters a) - c) only apply at airports where the Romanian State is the majority shareholder.

<sup>10</sup> See footnote 9.

	2011	2012	2013	2014
Compensation (RON)	4,951,625	5,367,648	5,606,274	6,142,923
Compensation (euros) <sup>11</sup>	1,111,750	1,205,157	1,258,734	1,379,223

- (55) The Romanian authorities are invited to confirm how much of the compensation paid out for 2014 was granted under the 2011 SGEI, and how much under the 2014 SGEI, (see section 2.5.1.2).
- (56) On 17 July 2014, a civil judgment (No. 4873/2014) was issued by the Cluj Tribunal in case 8989/117/2013, which annulled the Regional Decision of August 2011.
- (57) Mureş County Council appealed this ruling on the grounds of unlawfulness *inter alia*, and requested a relocation of determination, a request which was accepted by the High Court of Cassation and Justice (HCCJ). As a result, the appeal against civil judgment No 4873 of 17 July 2014 will be held at the Court of Appeal of Alba. The case is still pending.
- (58) Such an appeal in administrative litigation matters has a suspensive effect, which means that the appeal lodged by Mureş County Council against judgement No 4873 of 17 July 2014 suspended the latter's effect on the Regional Decision of August 2011, and that therefore the Regional Decision of August 2011 remained in force.

Compensation mechanism under the 2011 SGEI:

- (59) The Regional Decision of August 2011 in Article 4 includes a mechanism for calculating and reviewing the compensation received by TMA to fulfil the public service obligations and to avoid overcompensation.
- (60) In respect of this mechanism TMA has an obligation to keep separate accounts for SGEI activities. As regards the costs, the calculation of the compensation takes into account all costs incurred in carrying out the activities related to the SGEI, and a corresponding share of the airport's common costs is allocated to SGEI costs.
- (61) Mureş County Council carries out checks, on the basis of the annual financial statements submitted by the TMA, that the airport has not received compensation exceeding the amount referred to in Article 4 of the Regional Decision of August 2011, and verifies that the airport has met its public service obligations. Regional Decision of August 2011 provides that Mureş County Council may order to recover any overcompensation.

<sup>11</sup> Based on exchange rate of 25 May 2015, of 4.4539 RON/euro. Source: European Central Bank.

#### 2.5.1.2. 2014 SGEI entrustment

- (62) The airport was entrusted a second SGEI (hereinafter the "2014 SGEI") by Mureş County Council Decision No. 161/2014 of 30 October 2014, (hereinafter "Regional Decision of October 2014").
- (63) According to the Romanian authorities, the 2014 SGEI was drawn up and adopted in accordance with the TFEU and the Communication from the Commission on the application of the European Union state aid rules on compensation granted for the provision of services of general economic interest<sup>12</sup>, and the European Union framework for State aid in the form of public service compensation (hereinafter "SGEI Framework")<sup>13</sup> with account also taken of the 2014 Guidelines on State aid to airports and airlines (hereinafter "2014 Aviation Guidelines").<sup>14</sup>
- (64) The Romanian authorities are invited to confirm whether the 2014 SGEI had the effect of repealing the 2011 SGEI, (see paragraph (58)), and the date when the 2014 SGEI entered into force.
- (65) The Romanian authorities are further invited to confirm the amounts of compensation paid out for 2014 and so far for 2015 under the 2014 SGEI, (see paragraph (55)).
- (66) The Regional Decision of October 2014 allows for grants for both investment and operating costs, as compensation for the operating of an SGEI:
- Under Article 4(2), investment costs are compensated based on the funding gap in accordance with the airport's business plan up to an intensity of 75% of eligible costs (airport infrastructure costs, including costs of ground handling equipment). Article 4(3) lays down that the public financing may exceptionally exceed 75% of eligible costs subject to prior notification to and approval by the Commission;
  - Under Article 4(4), public financing of operating costs is set annually on the basis of the operating deficit of the SGEI activities based on the airport's business plan. According to Article 4(5) the compensation for operating costs in the first five years may not exceed 80% of the operating deficit over the five previous years, and, according to Article 4(6), 50% of that operating deficit for the following 5 years.
- (67) The 2014 SGEI covers a transitional period of 10 years until 4 April 2024 and may be reviewed in any of the following situations:
- 4 years from the initial entrustment;
  - if the airport's traffic exceeds 700,000 passengers per year;
  - whenever required by relevant legislation.

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<sup>12</sup> OJ C8, of 11.01.2012, p. 4.

<sup>13</sup> Commission Communication on a European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

<sup>14</sup> OJ C 99, 4.4.2014, p. 3.

### 2.5.2. *Financing of ground handling equipment*

- (68) The following amounts were paid to TMA in respect of ground handling equipment:

**Table 6 - Funding of Ground Handling equipment**

<b>Investment</b>	<b>Amount committed (RON)</b>	<b>Amount paid (RON)</b>	<b>Amount paid (euros)<sup>15</sup></b>
Apron buses	206,000	205,823	46,212
Passenger luggage cart	59,200	59,164	13,284
Ground Power Unit (500 kVA)	188,500	179,676	40,341
Self – propelled stairs	920,000	919,823	206,521
De-icing unit	1,674,000	1,673,876	375,823
<b>TOTAL</b>		<b>3,038,362</b>	<b>682,180</b>

- (69) According to the Romanian authorities all the payments were approved prior to adoption of the Regional Decision of August 2011. However the costs concerned qualify as compensation for SGEI since all relevant EU criteria concerning SGEIs are met. The Romanian authorities are invited to state when both the granting and transfer of the funds mentioned in Table 6 took place, and also to state under what legal framework these funds were granted if it was not the 2011 SGEI.
- (70) The Romanian authorities emphasise that in order to fulfil its SGEI obligations, any airport has a duty to ensure a minimum ground handling equipment necessary in order to cater for movements of aircraft exempted by law of airport charges, (see paragraph (52)).

### 2.5.3. *Financing of airport parking facilities*

- (71) It is alleged that Mureş County Council provided funding for car parking facilities via Regional Decision No. 47/2013 of Mureş County Council which approved financing of 89 million RON for a number of road and infrastructure projects in the County, but which specifically included 8 million RON for "*Landscaping – access Airport Transilvania DN 15 Km 61 + 422*" under the Annexe to Article 2 of the decision. The Romanian authorities are invited to confirm whether the exact form of this funding was a loan or a loan guarantee, or some other support instrument.
- (72) The Romanian authorities are further invited to clarify what is included in this funding for "access" to TMA, and in particular whether car parking or any other infrastructure at TMA is included. The Romanian authorities are further invited to clarify whether the 8 million RON funding constitutes a loan, a loan guarantee or

<sup>15</sup> Based on exchange rate of 25 May 2015, of 4.4539 RON/euro. Source: European Central Bank.

other instrument. Moreover, the Romanian authorities are invited to confirm whether this financing has been activated, and whether works on this infrastructure have begun.

### 3. ASSESSMENT

#### 3.1. Measures in favour of airlines operating at TMA: Level of airport charges

- (73) The following assessment of measures in favour of airlines operating at TMA applies to the airport charge schedule established by the Regional Decision of July 2012 (see section 2.4).
- (74) At this stage the Commission notes that the level of the passenger service fee of 1 euro per passenger (see Table 2) following the Regional Decision of July 2012, does *prima facie* seem very low, and it seems difficult to imagine that TMA could be profitable with such charges to airlines, notwithstanding the incremental extra income stemming from other airport charges, including (discounted) landing, parking and lighting charges, as well as non-aeronautical income that the airport will also receive as a result of the presence of the airlines in question.

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

- (75) According to Article 107(1) of the Treaty ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’.
- (76) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures under investigation constitute State aid within the meaning of Article 107(1), all of the following conditions need to be fulfilled. Namely, the financial support should:
- be granted by a Member State or through State resources,
  - favour certain undertakings or the production of certain goods,
  - distort or threaten to distort competition,
  - affect trade between Member States.

##### 3.1.1.1. State resources and imputability to the State

- (77) Any economic advantage involved in the airport charges set by the Regional Decision of July 2012 would be financed through the resources of the airport manager, which is a publicly controlled company. Therefore, any such economic advantage would have to be considered financed through State resources.
- (78) Moreover, the Commission notes that Regional Decision of July 2012 which sets the airport charges is a decision taken directly by a local county in Romania. As the Court established in its *Stardust Marine* ruling, the concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it.<sup>16</sup> The measures

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<sup>16</sup> Case C-482/99 *France v Commission* (*‘Stardust Marine’*) [2002] ECR I-4397.

adopted by intra-state entities (decentralised, federated, regional, local, or other) of the Member States, whatever their legal status and description, fall, in the same way as measures taken by the central authority, within the ambit of Article 107 of the Treaty.<sup>17</sup> Regional Decision of July 2012 thus appears to be imputable to the State. At this stage the Romanian authorities have not indicated that the setting of TMA's airport charges by the Regional Decision of July 2012 was not imputable to the State, nor have indicated that the compensation linked to the decision did not constitute State resources.

- (79) Therefore, based on the information available to it at this stage the Commission takes the preliminary view that the setting of the airport charges that apply to the airlines operating at TMA is imputable to the State, and involves State resources.

#### 3.1.1.2. Economic advantage

- (80) In the course of the preliminary investigation Romania claimed that, the airport charges applied to Wizz Air and other airlines, entail the airport manager acting as a prudent Market Economy Operator guided by profitability perspectives would have done in a similar situation, such that the charging regime in question does not confer any economic advantage that the airlines would not have obtained under normal market conditions. Consequently, the airport charges would comply with the market economy operator principle (hereinafter “MEOP”) and would thus confer no economic advantage on the airlines concerned.
- (81) According to the 2014 Aviation Guidelines, by virtue of the MEOP, aid to an airline using an airport can, in principle, be excluded where:
- the price charged for the airport services corresponds to the market price as estimated through a benchmarking method, or
  - it can be demonstrated through an *ex-ante* analysis, namely an analysis based on the data which would have been available at the moment the measures in question were decided, that the airport/airline arrangement could be expected to lead to a positive incremental profit contribution for the airport.<sup>18</sup>
- (82) In addition, according to the 2014 Aviation Guidelines, ‘when assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.’<sup>19</sup>
- (83) As concerns the first approach (comparison of the price charged for airport services with the market price), the Commission has strong doubts that an appropriate benchmark can be defined so as to establish the market value of the services provided by airports. In addition, Romania has not put forward any relevant comparators which could constitute an appropriate benchmark to establish the market price for services provided by the airport manager to the

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<sup>17</sup> Judgment of the Court of 6 March 2002, joint cases T-127/99, T-129/99, T-140/99 *Diputación Foral de Álava and others v Commission*, Rec 2002, p. II-1330, paragraph 142.

<sup>18</sup> 2014 Aviation Guidelines, point 53.

<sup>19</sup> *Ibid*, point 66.

airlines. Therefore at present the Commission considers *ex-ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines.<sup>20</sup>

- (84) In this analysis, all the relevant incremental revenues and costs associated with the transaction must be taken into account.
- (85) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement, and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred absent the agreement such as incremental personnel, equipment and investment costs<sup>21</sup> if any, induced by the presence of the airlines concerned at the airport as well as the costs of the marketing grants and other financial incentives. On the contrary, costs which the airport would have to incur anyway independently from the arrangement with the airlines should not be taken into account in the MEOP assessment.
- (86) As set out in paragraph (40) Romania was asked to provide to the Commission with any business plan on which the decision to set the airport charges was based and where no genuine *ex ante* profitability analysis have been carried out ahead of the Regional Decision of July 2012, a reconstructed *ex ante* profitability analysis that a reasonable market economy operator would have performed before adopting the 2012 airport charges.
- (87) The only information provided by the Romanian authorities in reply to that request is the Economic Forecast Document<sup>21</sup> which, according to the Romanian authorities, was an analysis of the opportunity offered by the setting of the airport charges by the Regional Decision of July 2012.

#### Assessment of Incremental Costs and Revenues

- (88) The Commission must assess whether the airport charges available to the airlines at TMA were expected to lead to a positive incremental profit contribution for the airport, i.e. to lead to a higher profit or lower losses than would be achieved in the counterfactual situation (if those airlines were not present at the airport).
- (89) The Economic Forecast Document is *ex-ante* to the years 2012-2015 and contains predictions for passenger numbers, and for revenues.
- (90) However, there are several features of the Economic Forecast Document which appear to distinguish it from an *ex-ante* business plan or profitability analysis that a hypothetical MEO airport operator in the place of TMA, might have used for the purposes of ascertaining the profitability of the presence of airlines at TMA.
- (91) Firstly, the Economic Forecast Document does not seem to be specifically linked to the presumed start date of the new airport charges, i.e. the date of the Regional Decision of July 2012, (6 July 2012), but rather an end of year analysis with real data for 2011 and predicted data for 2012-2015.

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<sup>20</sup> 2014 Aviation Guidelines, points 59 and 61.

<sup>21</sup> See paragraphs (41) to (43).

- (92) Secondly, the Economic Forecast Document does not contain any information on incremental costs that might result from the envisaged airport charge levels.
- (93) Incremental costs are important in this context since the analysis required should examine whether for a given airline (whatever it may be) operating at the airport, the expected incremental revenues generated by that airline (taking into account discounts to airport charges, non-aeronautical revenues *inter alia*) would be sufficient to cover incremental costs and a reasonable profit. Without information on incremental costs, it is not possible to make that decision as an MEO would.
- (94) Thirdly, while the Economic Forecast Document has total revenues predicted for 2012-2015, there is nothing to indicate that these revenues are incremental with regard to the setting of airport charges at issue.
- (95) Fourthly, the Economic Forecast Document includes a column for SGEI compensation, which may be an indication that incremental revenues linked to airport charges are not sufficient to cover incremental costs. The Romanian authorities are invited to comment on this matter.
- (96) The Romanian authorities are invited to confirm whether non-aeronautical revenues are also factored in to the Economic Forecast Document.
- (97) In view of the above, the Commission takes the preliminary view that the Economic Forecast Document is not a suitable profitability analysis for the purposes of the MEOP and notes that the Romanian authorities have not provided any reconstructed ex ante analysis to date, even though they had been invited by the Commission to do so, were there be no genuine ex ante profitability analysis.
- (98) Therefore, at this stage, the Commission does not have the required data to reconstruct the *ex-ante* profitability analysis of the airport charges levels applied to airlines operating at TMA based on the incremental costs and revenues that could be reasonably expected by a market economy operator acting in lieu of TMA at the time of the adoption of these charges.
- (99) Therefore at this stage the response of the Romanian authorities of 18 February 2015 did not dispel all doubts the Commission has that the airport charges levels applied to airlines operating at TMA could be reasonably expected to be incrementally profitable at the time they were set. By opening the formal investigation procedure the Commission invites Romania to provide it with all data required to assess the profitability of those agreements, including a proper reconstructed ex ante profitability analysis. This data should include *inter alia* any deductions to TMA's income with respect to taxes due, including any taxes related to security, (see paragraph (37)).
- (100) The Commission further notes that through the discounts to landing charges set out in Table 3, it appears that some of the users might pay higher landing charges for the same level of services as other users, due to the number of routes they currently operate at TMA. The Commission observes further that it is no clear whether and to what extent the landing charge rebates have been fixed by a direct reference to operating costs of the airport infrastructure and services provided and on the basis of the information available cannot assess if a market economy investor would have offered them. The Romanian authorities are invited to comment on this point.



### 3.1.1.3. Selectivity

- (101) In order to fall within the scope of Article 107(1) of the TFEU, a State measure must favour ‘certain undertakings or the production of certain goods’. Hence, only those measures favouring undertakings which grant an advantage in a selective way may qualify as State aid.
- (102) In the case at hand, the Commission notes that according to the Romanian authorities, the schedule of airport charges in question been provided to all other airlines operating from TMA.
- (103) In this regard the Commission notes that while the measure in question may be granted to all airlines present at TMA, it is not granted to airlines who are not present at TMA. Therefore, the economic advantage inherent to the 2012 airport charge schedule, if confirmed, would be granted by the Mureş County Council, through TMA, only to companies belonging to a sub-segment of the air transport sector. For that reason alone, the Commission reaches the preliminary view that that an economic advantage, if confirmed, would be selective.
- (104) In this regard, it is important to note that the concept of selectivity is not based solely on the assumption that a measure is selective if it is discriminatory, i.e. it treats companies or comparable production sectors differently. The criterion of selectivity rather serves to distinguish state aid measures from general fiscal or economic policy applicable to all economic operators.
- (105) According to established case law and in accordance with the terms of Article 107 paragraph 1 TFEU, there is still selectivity when an aid measure benefits all companies in a given sector in the same way.<sup>22</sup> This applies *a fortiori* also apply when, as in the present case, only certain firms in the airline sector benefit from the aid, even though they were selected based on an objective criterion, i.e. the fact that they were operating from TMA.
- (106) Hence to establish selectivity, it is irrelevant whether all competing companies in a Member State or region within a given sector receive the same aid. On the contrary, the simple fact that the aid is limited to certain firms competing in the Internal Market is enough to establish that aid exists.
- (107) Therefore, even if there was no competition between airlines operating TMA and CNIA, which the Commission doubts (see paragraphs (172) and (196)), the charging schedule at TMA would still be no less selective as it is limited to airlines serving TMA.
- (108) In addition, the Commission considers at this stage that the measure under investigation appears to favour certain potential users of TMA over others without that being justified by the nature and overall scheme of the airport charge schedule. First, the Commission notes that the passenger service fee (EUR 1 per passenger) seems particularly low. Furthermore, a very low passenger service fee is likely to favour airlines which carry large numbers of passengers from a given airport and have a particularly high level of aircraft utilization, as is often the case

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<sup>22</sup> See most recently the judgement C-672/13 *OTP Bank Nyrt*, EU:C:2015:185, points 48-50, with other references to the case law; see also point 53, third indent.

for low cost carriers such as Wizz Air, the main carrier operating at TMA, without this necessarily reflecting the underlying costs incurred by TMA with respect to each airline. Furthermore, the Commission notes that the 2012 airport charge schedule involves substantial discounts to the landing charge depending on the number of landings per month. Such a discount system tends to favour airlines with several routes from the airport, such as Wizz Air at TMA, or with high frequencies, without this necessarily reflecting the underlying costs incurred by TMA with respect to each airline. Therefore, the 2012 airport charge schedule seems to favour certain airlines over others without any clear and objective reason linked to the logic of the airport charge schedule identified at this stage. As a result, even assuming that the selectivity of the measure under assessment would depend on whether the economic advantage inherent to that measure would equally benefit all potential users of TMA, the Commission would still doubt at this stage that the measure is not selective.

- (109) For all those reasons, the Commission reaches the preliminary conclusion that the economic advantage inherent to the 2012 airport charge schedule, if confirmed, would be selective.

#### 3.1.1.4. Affection of trade and distortion of competition

- (110) In order to be qualified as State aid, a financial measure must affect trade between Member States and distort or threaten to distort competition. In its assessment of those two conditions, the Commission is not required to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable given the circumstances to affect such trade and distort competition.<sup>23</sup> When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.
- (111) Since the entry into force of the third package on the liberalisation of air transport on 1 January 1993<sup>24</sup>, air carriers can freely operate flights on intra-European connections. As the Court of Justice observed,
- a) ‘where an undertaking operates in a sector in which [...] producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share and reduces their chances of increasing exports.’<sup>25</sup>
- (112) The Commission has taken the preliminary view that TMA granted a selective advantage to airlines operating at TMA. Those carriers are active on a liberalised, competitive market and the advantage they received, if confirmed, is liable to

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<sup>23</sup> See for instance Case C-372/97 *Romania v Commission* [2004] ECR I-3679, paragraph 44.

<sup>24</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, all of these published in OJ L 240, 24.08.1992, p. 1-17.

<sup>25</sup> Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

improve their competitive position on the market for air transport services to the detriment of other Union air carriers. In this light, the Commission finds that the advantage granted to those carriers, if confirmed, is liable to distort competition and affect trade between Member States.

#### 3.1.1.5. Conclusion on the existence of aid

- (113) The Commission takes the preliminary view that the measure adopted by Mureş County Council pursuant to the setting of the airport charges by the Regional Decision of July 2012 involves State aid to the benefit of airlines operating at TMA within the meaning of Article 107(1) TFEU.

#### 3.1.2. *Lawfulness of the aid to airlines operating at TMA*

- (114) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put any notified measures into effect until the notification procedure has resulted in a final decision.
- (115) The measure at issue has been put into effect without being authorised by the Commission. At this stage, the Commission sees no legal act that providing for an exemption from the notification and standstill obligations laid down in Article 108 TFEU that could potentially apply to the measure under investigation. Therefore, the Commission takes the preliminary view that if the measure in question constitutes State aid, that aid is unlawful.

#### 3.1.3. *Compatibility of the aid to airlines operating at TMA*

- (116) So far, the Romanian authorities have not invoked a compatibility base of the measure under the assumption that it would qualify as State aid.
- (117) In this regard, the Commission reminds Romania that it is for the Member State to invoke compatibility grounds, the absence of such arguments being a first reason to doubt the compatibility of the measure.
- (118) The Commission considers that the 2005 Aviation Guidelines could potentially constitute a compatibility basis for the assessment the level of airport charges set by the Regional Decision of July 2012, and that the 2014 Aviation Guidelines could potentially be a compatibility basis for those charges as of 4 April 2014. It invites Romania and interested parties to comment this point.
- (119) In this regard the Commission notes that the 2005 Aviation Guidelines allow Start-Up aid to be paid to airlines for the creation of new routes, if twelve cumulative conditions are met. Those conditions are set out in point 79 (a) to (l) of the 2005 Aviation Guidelines.
- (120) According to condition (a), the beneficiaries must be air carriers with a valid operating licence issued by a Member State pursuant to Council Regulation (EEC) No 2407/92<sup>26</sup>. In this case the Commission has no reason to believe that the beneficiaries are not air carriers as defined by Regulation (EC) No

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<sup>26</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L240, 24.8.1992, p. 1.

1008/2008.<sup>27</sup> The first condition set forth by the 2005 Aviation Guidelines is therefore fulfilled.

- (121) According to condition (b), the aid must be paid for routes linking a regional airport in category C or D to another EU airport. TMA qualifies as a category D regional airport pursuant to the 2005 Aviation Guidelines. However, the charges are seemingly available to flights to all destinations, not just to destinations located in the Union. The second condition thus does not seem to be observed.
- (122) The remaining nine conditions cover requirements related to eligible costs, duration of the aid, business plans, appeal procedures, and penalty mechanisms, *inter alia*. At this stage, it would appear that few if any of these requirements were inherent in the airport charges set at TMA.
- (123) Therefore, the Commission takes the preliminary view that level of airport charges at TMA set by the Regional Decision of July 2012 cannot be found to constitute compatible start-up aid under the 2005 Aviation Guidelines.
- (124) For the period after 4 April 2014, the Commission notes that the 2014 Aviation Guidelines also allow Start-Up aid to be paid to airlines for the creation of new routes, if a different set of cumulative conditions are met.
- (125) The 2014 Aviation Guidelines set out in points 138-155 several cumulative conditions to be complied with, in order for start-up aid granted to airlines launching new routes to be found compatible with the internal market under Article 107(3)(c) TFEU.
- (126) However, the start-up aid that may be permitted under the 2014 Aviation Guidelines is limited to a subsidy up to a maximum of 50 % of the airport charges in respect of a new route for a maximum period of three years, where the eligible costs are the airport charges in respect of the route.<sup>28</sup>
- (127) In this case, the possible aid to airlines takes the form of the level of the airport charges, therefore it would not seem possible to qualify these airport charges as being a discount on airport charges. This condition is thus not complied with.
- (128) Therefore, since the conditions at issue must be complied with cumulatively, the Commission takes the preliminary view that level of airport charges at TMA set by the Regional Decision of July 2012 cannot be found to constitute compatible start-up aid under the 2014 Aviation Guidelines.

#### 3.1.3.1. Conclusion

- (129) In view of the foregoing, the Commission takes the preliminary view that the measure under investigation cannot be found to constitute compatible Start-up aid under the 2005 Aviation Guidelines, or under the 2014 Aviation Guidelines.

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<sup>27</sup> Following the entry into force of Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, Regulation 2407/92 has been repealed and, according to Article 27 of Regulation 1008/2008, references to the repealed Regulation shall be construed as references to Regulation 1008/2008.

<sup>28</sup> See 2014 Aviation Guidelines, point 150.

- (130) Therefore the Commission has doubts whether the measure under investigation in favour of airlines operating at TMA is compatible with the Treaty.

### **3.2. Measures in favour of TMA**

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

##### **3.2.1.1. Economic activity and concept of undertaking**

- (131) This section applies to all the measures in favour of TMA under investigation as described in section 2.5.
- (132) As mentioned in paragraph (76), in order to determine whether a measure constitutes State aid within the meaning of Article 107(1), a number of cumulative criteria have to be met, including that the financial support in question should "favour certain undertakings or the production of certain goods".
- (133) With regard to all the measures in favour of TMA under investigation described in section 2.5, and according to settled case law, the Commission must first establish whether the airport manager is an undertaking within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>29</sup> Any activity consisting in offering goods or services on a given market is an economic activity.
- (134) In its Leipzig / Halle Airport judgment, the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity.<sup>30</sup> Once an airport manager engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport manager.<sup>31</sup>
- (135) In *Leipzig / Halle Airport*, the General Court held that from the date of the judgment in *Aéroports de Paris* (12 December 2000), the application of State aid rules to the financing of airport infrastructure could no longer be excluded.
- (136) Consequently, from 12 December 2000 onwards, the operation and construction of airport infrastructure must be considered as an activity falling within the scope of State aid control. Conversely, the Commission cannot put into question, on the basis of State aid rules, financing measures granted to airport managers before 12

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<sup>29</sup> Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637, paragraph 17; Case C-35/96 *Commission v Romania* [1998] ECR I-3851, paragraph 36.

<sup>30</sup> Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECR I-0000; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 and case T-196/04 *Ryanair v Commission* [2008] ECR II-3643.

<sup>31</sup> Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancava* [1993] ECR I-637.

December 2000.<sup>32</sup>

- (137) In view of the above, the Commission is of the preliminary view that from 12 December 2000 onwards, the airport manager was engaged in an economic activity and that it constitutes an undertaking in the sense of Article 107(1) of the Treaty.

3.2.1.2. Public policy remit

- (138) The Court of Justice has held that activities that normally fall under the State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid.<sup>33</sup> At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are generally considered to be of a non-economic nature.<sup>34</sup>
- (139) Romania has claimed that TMA carried out certain activities falling within the public policy remit. In particular, Romania submitted that the costs incurred by the airport manager on behalf of State entities operating on airport premises, as well as costs incurred in the servicing of flights exempted from the payment of airport charges are to be considered as falling within the public policy remit.
- (140) With regard to the 2011 SGEI, as set out in paragraph (52), the Romanian authorities claim that the activities under points D) to H) of Article 1(2) of the decision establishing the 2011 SGEI are not of an economic nature and are in the scope of the powers of public authority.
- (141) In this regard, the Romanian authorities are invited to comment on how much of the compensation provided under the 2011 SGEI has been used to fund each of the activities under points D) to H) of Article 1(2) of the decision establishing the 2011 SGEI. The Romanian authorities are further invited to confirm whether this expenditure is accounted for separately in the airport's accounts. Moreover, it would appear that the processing of flights legally exempted from airport charges is limited and requires no dedicated infrastructure.
- (142) With regard to the 2014 SGEI, the Romanian authorities are invited to comment on whether compensation that has been granted, or is to be granted under this act also covers non-economic activities.
- (143) With regard to the funding of ground handling equipment, as mentioned at paragraph (70), the Romanian authorities claim that in order to fulfil its SGEI obligations, any airport has a duty to ensure a minimum ground handling equipment necessary in order to cater for movements of aircraft exempted by law

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<sup>32</sup> 2014 Aviation Guidelines, point 29.

<sup>33</sup> Commission Decision of 19 March 2003 in case N 309/2002, cited.

<sup>34</sup> See, in particular, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71; 2014 Aviation Guidelines, point 35.

of airport charges.

- (144) In this regard, the Commission notes that the ground handling facilities are not exclusively for the use of such aircraft. The Commission further notes the funding was provided in full and the Romanian authorities have not suggested that any attribution of the cost was split according to the proportions of movements of aircraft exempted by law of airport charges. Moreover, the Commission notes that according to the 2014 Aviation Guidelines ground handling as such is considered an economic activity.<sup>35</sup>
- (145) With regard to the funding of car parks, according to the Romanian authorities the funding for car parks is not State aid because the facilities are partially used by persons performing public remit (i.e. non-economic) activities.
- (146) In this regard, the Commission notes that the car parking facilities do not seem to be exclusively for the use of such persons. The Commission further notes that the funding was provided in full and the Romanian authorities have not suggested that any attribution of the cost was split according to the proportions of personnel performing economic and non-economic activities using this facility.
- (147) In view of the above, the Commission doubts that the parameters for calculating compensation in respect of any public remit duties inherent in the 2011 SGEI or the 2014 SGEI are well defined. The Commission further doubts that the funding of ground handling equipment and of car parks at TMA are genuine public remit activities by nature.
- (148) Moreover, the Commission considers that the public financing of non-economic activities must not lead to undue discrimination between airlines and airport managers. If in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic.<sup>36</sup> So far, Romania has not provided any clear justification as to why this non-discrimination condition would be met in the present case.
- (149) Therefore, by opening the formal investigation procedure the Commission invites Romania to detail the type of costs referred to and to clarify whether all airport managers are bound by existing legislation to bear such costs in the relevant legal order. In addition, Romania should clarify whether the national legislation lays down any entitlement of airport managers to compensation for the costs borne for such activities. If, under the applicable legal system, Romanian airports normally have to bear the relevant costs themselves, such costs should be considered to constitute normal expenses of airport managers<sup>37</sup> any compensation granted by public authorities to cover such expenses may qualify as State aid.

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<sup>35</sup> 2014 Aviation Guidelines, point 31.

<sup>36</sup> 2014 Aviation Guidelines, point 37.

<sup>37</sup> Ibid.

### 3.2.1.3. State resources and imputability to the State

- (150) This section applies to all the measures in favour of TMA under investigation as described in section 2.5.
- (151) As the Court established in its *Stardust Marine* ruling, the concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it.<sup>38</sup> Resources of intra-state entities (decentralised, federated, regional, local, or other) of the Member States are, for the purpose of application of Article 107 of the Treaty, State resources.<sup>39</sup> In addition, the measures adopted by such entities, whatever their legal status and description, fall, in the same way as measures taken by the central authority, within the ambit of Article 107 of the Treaty.<sup>40</sup>
- (152) With regard to the compensation granted under the 2011 SGEI, and any compensation granted under the 2014 SGEI, the Commission notes that the Regional Decisions of August 2011 October 2014 respectively apparently authorised this funding. These are decisions taken directly by a local county in Romanian which is clearly part of the Romanian State. At this stage the Romanian authorities have not indicated that the compensation granted under the 2011 SGEI and possible compensation granted under the 2014 SGEI by the Regional Decisions of August 2011 October 2014 were not imputable to the State or did not involve State resources.
- (153) With regard to the funding of ground handling equipment, at this stage it is not clear under what legal framework this funding took place, (see paragraph (69)). However, according to the information available at this stage, it appears that that funding originates from Mureş County Council and was decided by the latter. Furthermore, at this stage the Romanian authorities have not indicated that the funding of ground handling equipment was not imputable to the State or did not involve State resources. They are invited to comment on the matter.
- (154) With regard to the possible funding of parking facilities, the Commission notes that Regional Decision No. 47/2013 of Mureş County Council apparently authorised this funding, including specifying its amount, and details about the modalities of the funding. This is a decision taken directly by a local county in Romanian which is clearly part of the Romanian State and the resources involved appear to originate from that same local county. At this stage the Romanian authorities have not indicated that the possible funding of parking facilities by Regional Decision No. 47/2013 of Mureş County Council was not imputable to the State.
- (155) In view of the above, the Commission is of the preliminary view that the measures in favour of TMA under investigation as described in section 2.5 involve State resources and are imputable to the State.

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<sup>38</sup> *Stardust Marine* judgement, cited.

<sup>39</sup> Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], ECR II-1999 paragraph 108.

<sup>40</sup> Judgment of the Court of 6 March 2002, joint cases T-127/99, T-129/99, T-140/99 *Diputación Foral de Álava and others v Commission*, Rec 2002, p. II-1330, paragraph 142.



#### 3.2.1.4. Economic advantage

- (156) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, namely in the absence of State intervention.<sup>41</sup> In this sense ‘capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid’ (the ‘MEOP’).<sup>42</sup>
- (157) Furthermore, financing of costs incurred in the provisions of SGEI does not confer an economic advantage on the recipient to the extent that the conditions laid down by the Court in the Altmark case<sup>43</sup> are observed.
- (158) Therefore for measures such as those examined in this section not to constitute State aid, they should either comply with the MEOP or with the conditions laid down by the Court in the Altmark judgment.
- (159) In what follows, the Commission first assesses whether each of the measures in favour of TMA under investigation as described in section 2.5 comply with the Altmark conditions.

#### Altmark conditions – 2011 SGEI

- (160) As set out in section 2.5.1.1, TMA has been a recipient of compensation under the 2011 SGEI.
- (161) In case of undertakings entrusted with the provision of an SGEI, in order to conclude whether or not the measures under assessment constitute an advantage within the meaning of Article 107(1) of the Treaty, the Commission must examine observance of the conditions set out by the Court in its judgement in the Altmark case. Those conditions may be summarised as follows:
- the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined (‘Altmark 1’);
  - the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (‘Altmark 2’);
  - the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (‘Altmark 3’);
  - where an SGEI mission is not entrusted to an undertaking pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical

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<sup>41</sup> Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

<sup>42</sup> *Stardust Marine* judgement, cited, paragraph 69.

<sup>43</sup> Case C 280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

undertaking, well run and adequately provided with means to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations ('Altmark 4').

- (162) The Commission first assesses observance of the Altmark 4 criterion.
- (163) In this case the beneficiary has not been chosen following a public tender procedure.
- (164) The Commission may also assess the existence of proof that the level of compensation granted to the airport operator has been *"determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging these obligations."*
- (165) In this regard, the Romanian authorities have provided some potentially relevant information concerning the mechanism for compensation under the 2011 SGEI. The mechanism is described in paragraphs (59) to (61).
- (166) The Commission notes that nothing at this stage suggests that the costs of a typical well-run airport operator are taken into account in the compensation calculation.
- (167) The Commission therefore considers that the public financing for the 2011 SGEI cannot be found to have been determined on the basis of the costs of a typical efficient airport operator.
- (168) The Commission next assesses observance of the Altmark 1 condition.
- (169) The Altmark 1 condition sets out that the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined.
- (170) The Commission notes that the scope of the 2011 SGEI appears to essentially cover the entire operations of TMA. The Commission further notes that the public service tasks defined in the 2011 SGEI include those of a non-economic nature, and it is not clear what the level of compensation is with regard to the duties of a non-economic nature, and what the level of compensation is for the remainder of the purported public service tasks.
- (171) With regard to the overall management of an airport as an SGEI, the 2014 Aviation Guidelines state: *"As far as airports are concerned, the Commission considers that it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI. [...] the Commission considers that this can only be the case if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development. [...]". The Commission notes that certain airports have an important role to play in terms of regional connectivity*

*of isolated, remote or peripheral regions of the Union.*"<sup>44</sup>

- (172) The Commission doubts that the area served by TMA would be isolated without the airport, since another airport (CNIA) is located 103km away.
- (173) In this regard the Commission has doubts as to whether the obligations of the 2011 SGEI are genuine public service ones, in the sense of Altmark 1, and therefore doubts that the 2011 SGEI constitutes a genuine SGEI.
- (174) The Commission next assesses observance of the Altmark 2 and Altmark 3 conditions.
- (175) Although Romania claimed that the public financing granted to TMA in 2011-2014 partly represented compensation for the provision of SGEIs, the acts entrusting the airport with the provision of an SGEI do not appear to lay down in a clear and transparent manner the public service obligations, the parameters for calculating the compensation and the arrangements for avoiding any overcompensation. Therefore, the Commission doubts that the compensation was clearly defined in advance in a transparent and objective manner and was proportional to the SGEI costs.
- (176) Given that the Altmark conditions have to be complied with cumulatively, non-observance of any of those conditions would lead to the conclusion that the presence of an advantage cannot be excluded on the basis of this test.
- (177) Given that the four Altmark conditions do not seem to be cumulatively observed in this case, the Commission reaches the preliminary conclusion that the presence of an advantage cannot be excluded on the basis of this test.

#### Altmark conditions – 2014 SGEI

- (178) All the doubts expressed by the Commission with regard to the Altmark conditions expressed in the previous section for the 2011 SGEI, apply *mutatis mutandis* to the 2014 SGEI.

#### Ground handling

- (179) According to the Romanian authorities the funding for ground handling is related to the SGEI duties of TMA. In this regard, the ground handling equipment in question would seem to be used by all flights to and from TMA, and be associated with the general operations of the airport.
- (180) As set out in paragraph (170), the SGEI funding under the 2011 SGEI seems to be related to the funding of the entire operations of the airport. For the same reasons as outlined in paragraphs (171) to (173), the Commission has doubts as to whether the obligations inherent in the provision of funding for ground handling equipment, if any, are genuine public service ones.
- (181) Accordingly, the Commission comes to the preliminary conclusion that the possible funding for ground handling does not comply with the four cumulative conditions of the Altmark judgement.

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<sup>44</sup> See 2014 Aviation Guidelines, point 72.

### Car parking

- (182) As indicated in paragraph (146), the car parking facilities seem to be used by the airport's general personnel, and not just those personnel employed in relation to public remit activities. If this is so, it seems that those facilities are intrinsically linked to the general operations of the airport and for the same reasons as those set out at paragraph (180) for ground handling equipment, the Commission has doubts as to whether the obligations inherent in the provision of funding for car parking facilities, if any, are genuine public service ones.

### Compliance with the MEOP

- (183) This section applies to all the measures in favour of TMA under investigation as described in section 2.5.
- (184) The Commission recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid'.<sup>45</sup>
- (185) In order to determine whether the public financing of TMA conferred on the airport manager an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the funding in question to that of a market economy investor guided by prospects of profitability.<sup>46</sup>
- (186) In order to be able to apply the MEOP, the Commission has to place itself at the time when the decision to provide public funds to the airport manager was taken.
- (187) The Commission first notes that Romania did not argue that the grants complied with the MEOP.
- (188) Based on the information available at this stage, in exchange for the right to manage the airport infrastructure, TMA pays a concession fee to the State<sup>47</sup>. There is however no indication that concession fees owed by airport managers in Romania aim to remunerate the State for public investments in airport infrastructure, or for the public service compensation linked to the 2011 and 2014 SGEIs. There is no indication that, when financing certain investments at TMA, or when financing the 2011 and 2014 SGEIs, the State could expect an increase in the traffic and a related increase in the concession fees that would be of a sufficient magnitude to ensure a fair return in relation to its expenses. In addition, the Commission notes that in this case, the public financing in question was mostly provided by the local county, rather than the State. At this stage it is not clear that the local county could expect any return on its investment since unlike the State, it does not seem to receive any concession fee or equivalent remuneration from TMA.
- (189) Since there is no indication that the financing in question was expected to yield a

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<sup>45</sup> *Stardust Marine* judgement, cited, paragraph 69.

<sup>46</sup> Case C-305/89 *Romania v Commission* ('*Alfa Romeo*') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.

<sup>47</sup> In paragraph (25), the Commission has requested that the Romanian authorities provide further detail on this point.

normal return, the Commission doubts that the public financing under assessment complied with the MEOP and takes the preliminary view that it conferred an economic advantage on the airport manager.

### Conclusion

- (190) The Commission is of the preliminary view that all the measures in favour of TMA under investigation as described in section 2.5 confer an advantage on TMA.

#### 3.2.1.5. Selectivity

- (191) This section applies to all the measures in favour of TMA under investigation as described in section 2.5.
- (192) In order to fall within the scope of Article 107(1) of the TFEU, a State measure must favour ‘certain undertakings or the production of certain goods’. Hence, only those measures favouring undertakings which grant an advantage in a selective way may qualify as State aid.
- (193) In the case at hand, the Commission notes that the funding in question has only been provided to the airport manager. The Commission is therefore of the preliminary view that that advantage is therefore selective within the meaning of Article 107(1) TFEU.

#### 3.2.1.6. Affection of trade and distortion of competition

- (194) In order to be qualified as State aid, a financial measure must affect trade between Member States and distort or threaten to distort competition. In its assessment of those two conditions, the Commission is not required to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable given the circumstances to affect such trade and distort competition.<sup>48</sup> When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.
- (195) As assessed above, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. In this respect, the Commission underlines that notably with respect to low-cost carriers and charter operators, airports that are not located in the same catchment areas and in different Member States may also be in competition with each other to attract those airlines.
- (196) In this regard, given the relatively close proximity of CNIA at 103km, the Commission has doubts that TMA and CNIA are not located in the same catchment area.
- (197) With regard to competition between EU airports to attract airlines, the 2014

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<sup>48</sup> See for instance Case C-372/97 *Romania v Commission* [2004] ECR I-3679, paragraph 44.

Aviation Guidelines make clear that "...public funding to both airports and airlines can distort competition and have an effect on trade in air transport markets across the Union."<sup>49</sup>

- (198) Moreover, the 2014 Aviation Guidelines set out how competition between airports can be assessed based on the criteria airlines use in their choices of where to fly from, and in this regard: "...The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition."<sup>50</sup>
- (199) As mentioned in point 40 of the 2005 Aviation Guidelines and reaffirmed in point 45 of the 2014 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the Treaty on the grounds that their financing by public authorities could not distort competition or affect trade between Member States. Furthermore, point 45 of the 2014 Aviation Guidelines explicitly states that 'the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected.'
- (200) TMA currently serves ca. 350,000 passengers per year<sup>51</sup>, and the vast majority of these passengers are flying to or from international destinations. In light of this and the reasons given above, it must be considered that the economic advantage conferred on the airport manager through the various measures at issue distorted or threatened to distort competition and were at least liable to affect trade between Member States.

#### 3.2.1.7. Conclusion on the existence of aid

- (201) Therefore, the Commission is of the preliminary view that the measures in favour of TMA under investigation as described in section 2.5 constitute State aid within the meaning of Article 107(1) TFEU.

#### 3.2.2. *Lawfulness of the aid to TMA*

- (202) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put any notified measures into effect until the notification procedure has resulted in a final decision.
- (203) In the present case it has to be examined whether the measures in favour of TMA under investigation as described in section 2.5 have been put into effect without being authorised by the Commission or benefit from an exemption from the notification and standstill obligations referred to in the previous point ("block exemption").
- (204) The measures in favour of TMA have not been notified to the Commission for prior approval and according to the information available so far, they have already been put into effect. Moreover, it appears at this stage that the only acts

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<sup>49</sup> 2014 Aviation Guidelines, point 44.

<sup>50</sup> 2014 Aviation Guidelines, point 43.

<sup>51</sup> See **Table 1**.

that could potentially provide for a block exemption applying to the measures at issue are the 2005 SGEI Decision, applicable to aid granted before 31 January 2012, or Decision 2012/21/EU<sup>52</sup> (hereinafter "2012 SGEI Decision"), applicable to aid granted after 31 January 2012.

- (205) The 2005 SGEI Decision exempted from the notification requirement State aid in the form of public service compensation granted to undertakings in connection with SGEIs which comply with the conditions stipulated therein. In particular, the 2005 SGEI Decision declared compatible State aid in the form of public service compensation to airports i) for which the average annual traffic does not exceed 1,000,000 passengers, ii) with an average annual turnover before tax of less than 100 million during the two financial years preceding that in which the SGEI was assigned, which receive annual compensation of less than EUR 30 million.
- (206) The 2005 SGEI Decision only applied to aid in the form of public service compensation for a genuine SGEI. In order to benefit from an exemption, public service compensation for the operation of an SGEI had to also comply with the conditions set out in Articles 4, 5 and 6 thereof.
- (207) According to the Romanian authorities compensation received by TMA under the Regional Decision of August 2011 for SGEI activities since 2011 meets the conditions laid down in the 2005 SGEI Decision. They state that TMA meets both the thresholds, mentioned in Article 2(a) and (d) of the 2005 SGEI Decision (also mentioned above in paragraph (205)), since the public service compensation in question is less than EUR 30 million per annum, and therefore significantly less than the EUR 100 million threshold. Moreover, the annual traffic of approximately 300,000 passengers is significantly less than the 1,000,000 allowed for in that decision.
- (208) The Romanian authorities further state that the Regional Decision of August 2011 includes all the elements referred to in Article 4(a) to (e) of the 2005 SGEI Decision. In regard to Article 4(a) concerning the nature and the duration of the public service obligations, they cite Articles 1(2) and (3) and Article 2(1) and (2) of Regional Decision of August 2011.
- (209) However, the Commission has doubts that this condition is met for the reasons already outlined in paragraphs (174) to (175).
- (210) The Romanian authorities further state that in regard to Article 4(d) concerning the parameters for calculating, controlling and reviewing the compensation, Articles 4 and 5 of Regional Decision of August 2011, meet this condition.
- (211) However, the Commission has doubts that this condition is met for the reasons already outlined in paragraphs (160) to (178).
- (212) Since the conditions of the 2005 SGEI Decision are cumulative, the Commission doubts that the 2005 SGEI Decision is fulfilled by the compensation related to the 2011 SGEI.

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<sup>52</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

- (213) As regards the compensation related to the 2014 SGEI, it should be examined whether it fulfils the requirements of the 2012 SGEI Decision, which entered into force on 31 January 2012 and covers *inter alia* public service compensation granted to:
- a) airports where the average annual traffic does not exceed 200 000 passengers during the 2 financial years preceding the SGEI entrustment; and
  - b) airlines, as regards air links to islands where the average annual traffic does not exceed 300 000 passengers.
- (214) The Commission notes that TMA currently has more than 200,000 passengers per annum, and has had more than that every year between 2011 and 2014. Therefore, at this stage the Commission notes that the measures in favour of TMA under investigation appear to be outside the scope of the 2012 SGEI Decision. Moreover, the same reasons as those set out in paragraphs (209) to (211) apply *mutatis mutandis* to the compensation related to the 2014 SGEI, insofar as very similar conditions are also contained in the 2012 SGEI Decision.

### 3.2.3. *Compatibility of the aid*

- (215) In this section the Commission will examine the compatibility with the Treaty of each of the measures in favour of TMA under investigation as described in section 2.5.

#### 3.2.3.1. Compensation received under the 2011 SGEI

- (216) The Commission will assess the compatibility of the measures at issue under Article 106(2) and Article 107(3)(c), which seem to be the only possible legal bases under which those measures might potentially be found compatible with the internal market. In the context of this case, compatibility under Article 106(2) and Article 107(3)(c) ought to be assessed on the basis of the criteria laid down respectively in the SGEI Framework and in the Aviation Guidelines.

#### Assessment under the SGEI Framework

- (217) Point 16 of the SGEI Framework sets out the requirements for an SGEI to be considered as validly entrusted. Notably point 16(a) thereafter lays down that the entrustment act must spell out the content and duration of PSOs.
- (218) However the analysis of the 2011 SGEI, with respect to the Altmark 1 and Altmark 2 conditions, as set out in paragraphs (168) to (175), in essence is very similar to that of the requirements under point 16 of the SGEI Framework. In the analysis of compliance with the Altmark conditions, the Commission noted that the act entrusting the airport with the provision of an SGEI (i.e. the Regional Decision of August 2011) does not seem to result in the recipient undertaking having clearly defined public service obligations to discharge, and does not appear to lay down in a clear and transparent manner the public service obligations, the parameters for calculating the compensation and the arrangements for avoiding any overcompensation. Therefore, in this case the Commission takes the preliminary view that the aid to TMA cannot be considered compatible under the SGEI Framework.. Moreover, no element was submitted to the Commission



demonstrating that points 17 and 18 of the SGEI Framework have been met.

- (219) At this stage the Commission therefore considers that the aid to TMA to cover SGEI costs in 2011-2014 under the 2011 SGEI cannot be declared compatible with the internal market pursuant to Article 106(2) of the Treaty.

Assessment under the Aviation Guidelines

- (220) Operating aid granted before the entry into force of the 2014 Aviation Guidelines, that is before 4 April 2014 may be declared compatible provided that the following conditions are met<sup>53</sup>:

- a) *Contribution to a well-defined objective of common interest*: this condition is fulfilled *inter alia* if the aid increases the mobility of Union citizens and connectivity of the regions or facilitates regional development<sup>54</sup>;
- b) *Appropriateness of State aid as a policy instrument*: the Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid<sup>55</sup>;
- c) *Need for State intervention*: the aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver<sup>56</sup>;
- d) *Existence of incentive effect*: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced<sup>57</sup>;
- e) *Proportionality of the aid amount (aid limited to the minimum necessary)*: in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place<sup>58</sup>;
- f) *Avoidance of undue negative effects on competition and trade*.<sup>59</sup>

- (221) As explained in paragraphs (195) and (196), at this stage the Commission has doubts as to the extent to which the catchment areas of CNIA and TMA overlap, and therefore cannot conclude that the operating aid to TMA contributed to the achievement of an objective of common interest.

- (222) In addition, by opening the formal investigation procedure, the Commission invites Romania to justify that the operating aid was an appropriate instrument to achieve the objective of common interest and to justify that the operating aid brings about a material improvement that the market itself cannot deliver.

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<sup>53</sup> Point 137 of the 2014 Aviation Guidelines.

<sup>54</sup> Points 137 and 113 of the 2014 Aviation Guidelines.

<sup>55</sup> Points 137 and 120 of the 2014 Aviation Guidelines.

<sup>56</sup> Points 137 and 116 of the 2014 Aviation Guidelines.

<sup>57</sup> Points 137 and 124 of the 2014 Aviation Guidelines.

<sup>58</sup> Points 137 and 125 of the 2014 Aviation Guidelines.

<sup>59</sup> Points 137 and 131 of the 2014 Aviation Guidelines.

- (223) Furthermore, at this stage it is not clear whether absent the aid in question, TMA's activity would have been significantly reduced or whether the operating aid in question was limited to the minimum necessary for the aided activity to take place.
- (224) In addition, as stated above, Romania is invited to confirm that the airport infrastructure has been made available to all airlines on non-discriminatory terms.
- (225) On that basis, the Commission takes the preliminary view that the compatibility conditions laid down by the 2014 Aviation Guidelines are not met in full and therefore the operating aid under assessment cannot be deemed compatible with the internal market under Article 107(3)(c) of the Treaty. By opening the formal investigation procedure the Commission invites Romania to justify the observance of the abovementioned conditions.
- (226) At this stage the Commission takes the preliminary view that any funding granted under the 2011 SGEI is not compatible with the Treaty.

#### 3.2.3.2. Compensation received under the 2014 SGEI

##### Assessment under the SGEI Framework

- (227) Point 16 of the SGEI Framework sets out the requirements for an SGEI to be considered as validly entrusted. Notably point 16(a) thereafter lays down that the entrustment act must spell out the content and duration of PSOs.
- (228) In particular, no entrustment act has been provided to the Commission which clearly defines *ex ante* the SGEI entrusted to the beneficiary, nor its entitlement to compensation. Moreover, no element was submitted to the Commission demonstrating that points 17 and 18 of the SGEI Framework have been met.
- (229) However the analysis of the 2014 SGEI with respect to the Altmark conditions, (see paragraph (178)), refers *mutatis mutandis* to the analysis of the 2011 SGEI against those same conditions. In this regard, as previously mentioned (see paragraph (218)), this analysis with respect to the Altmark 1 and Altmark 2 conditions, as set out in paragraphs (168) to (175), is in essence very similar to that of the requirements under point 16 of the SGEI Framework.
- (230) An application of this analysis *mutatis mutandis* to the 2014 SGEI, implies that the entrustment act in this case (i.e. Regional Decision of October 2014) also does not seem to result in the recipient undertaking having clearly defined public service obligations to discharge, and does not appear to lay down in a clear and transparent manner the public service obligations, the parameters for calculating the compensation and the arrangements for avoiding any overcompensation. Therefore, in this case the Commission takes the preliminary view that the aid to TMA cannot be considered compatible under the SGEI Framework. Moreover, no element was submitted to the Commission demonstrating that points 17 and 18 of the SGEI Framework have been met.
- (231) At this stage the Commission therefore considers that any aid to TMA to cover SGEI costs in 2014 and 2015 under the 2014 SGEI cannot be declared compatible with the internal market pursuant to Article 106(2) of the Treaty.

### Assessment under the Aviation Guidelines

- (232) Insofar as any aid, (if any has been granted), under the 2014 SGEI has been granted after 4 April 2014, the requirements of the Aviation Guidelines pertaining to aid granted as of 4 April 2014 apply. This holds true both for operating aid and investment aid granted under the 2014 SGEI.
- (233) It follows from the description set out at paragraph (66) that the provisions of the Regional Decision of October 2014 seem to have some similarities with the provisions of the 2014 Aviation Guidelines with respect to operating aid and investment aid. However, at this stage, those similarities do not seem sufficient to ensure full compliance of the compensation with all the relevant requirements of the 2014 Aviation Guidelines.
- (234) First, with respect to compensation for investment costs, the Regional Decision of October 2014 does not seem to contain any provision ensuring that that compensation is limited to the extra costs resulting from undertaking the investment project rather than the alternative project or activity undertaken in the counterfactual scenario.<sup>60</sup> By the same token, no provision ensures that the funding in question is necessary for the implementation of the investment projects for which it is granted.<sup>61</sup> Furthermore, there is no evidence at this stage that the investment projects that could be funded under the Regional Decision of October 2014 contribute to a genuine objective of common interest, notably in view of the relative proximity of another airport (CNIA) which does not seem to be operating at near of full capacity.<sup>62</sup> Moreover, the Regional Decision of October 2014 does not seem to contain any provision ensuring that that the investment projects that could be funded under that mechanism have satisfactory medium-term prospects for use<sup>63</sup> and that the compensation would not lead to undue negative effects on competition and trade, notably in view of the relative proximity of CNIA.<sup>64</sup>
- (235) As regards the compensation for operating costs, the considerations set out above with respect to the contribution of the compensation to the furtherance of genuine objectives of common interest and to the avoidance of undue negative effects on competition and trade equally apply.<sup>65</sup> Moreover, the Commission notes that the Regional Decision of October 2014 seems to contain a commitment to provide operating aid to the airport manager over the period 2014-2024<sup>66</sup> whereas under the 2014 Aviation Guidelines, operating aid to airports with less than 700,000 passengers may only be granted for a period of five years following 4 April 2014, but there is no explicit provision allowing for operating aid to those airports beyond that period.<sup>67</sup>

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<sup>60</sup> Point 99 of the 2014 Aviation Guidelines.

<sup>61</sup> Points 94-96 of the 2014 Aviation Guidelines.

<sup>62</sup> Points 84-84 of the 2014 Aviation Guidelines.

<sup>63</sup> Point 85 of the 2014 Aviation Guidelines.

<sup>64</sup> Points 106-108 of the 2014 Aviation Guidelines.

<sup>65</sup> Points 113-115 and 131-134 of the 2014 Aviation Guidelines.

<sup>66</sup> See paragraph (66).

<sup>67</sup> Points 130 and 134 of the 2014 Aviation Guidelines.

- (236) Furthermore, the Regional Decision of October 2014 foresees that the compensation for operating costs is “set annually on the basis of the operating deficit of the SGEI activities based on the airport's business plan”. This suggests that the full amount of operating aid granted over the period 2014-2024 is not capped by a ceiling defined *ex ante*, contrary to the requirements of the Aviation Guidelines, and there is no evidence at this stage that the business plan on the basis of which the compensation is supposed to be calculated results from sound assumptions and methods.<sup>68</sup>
- (237) The Commission invites the Romanian authorities to comment on these aspects. Should they consider that the compensation laid down in the Regional Decision of October 2014 complies with the compatibility conditions of the 2014 Aviation Guidelines, they are invited to provide comprehensive justifications showing why in their view each and every relevant compatibility condition is satisfied.
- (238) In view of the above, the Commission takes a preliminary view that any funding granted under the 2014 SGEI is not compatible with the Treaty.

#### 3.2.3.3. Ground handling

- (239) According to the Romanian authorities the funding for ground handling equipment was made in respect of the SGEI activities of TMA. However, as outlined in paragraphs (179) to (180) the Commission has doubts as to whether the obligations inherent in the provision of funding for ground handling equipment are public service ones.
- (240) The 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.
- (241) If the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission applied the principles set out in the 2005 Aviation Guidelines in the case of unlawful investment aid to airports granted before 4 April 2014. The Commission applied the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid to airports even if the aid was granted before 4 April 2014.
- (242) Therefore, in the alternate, the aid for ground handling, where the aid was granted before 4 April 2014, may be assessed with regard to the criteria for compatibility for investment aid under the 2005 Aviation Guidelines.
- (243) The Commission first notes that according to the 2005 Aviation Guidelines, eligible costs of investments in an airport must be limited to construction of airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security or safety equipment)<sup>69</sup>.
- (244) The Commission further notes that according to the 2005 Aviation Guidelines, the funding of ground handling infrastructure is not considered to constitute an

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<sup>68</sup> Point 121 of the 2014 Aviation Guidelines.

<sup>69</sup> 2005 Aviation Guidelines points 53(i) and 55.

eligible cost when assessing the compatibility of investment aid<sup>70</sup>. For this reason the Commission takes the preliminary view that the funding of ground handling infrastructure cannot be considered as compatible investment aid under point 61 of the 2005 Aviation Guidelines. This position coincides with the view of the Romanian authorities, who are of the opinion that the investment aid criteria under the 2005 Aviation Guidelines are not applicable in this case.

#### 3.2.3.4. Car parking facilities

- (245) For the reasons set out above in paragraphs (241) to (242), the Commission could also consider the possible funding for car parking facilities with regard to the criteria for compatibility for investment aid under the 2005 Aviation Guidelines.
- (246) The Commission notes that eligible costs must exclude costs not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, or for shops, restaurants and car parks<sup>71</sup>.
- (247) Therefore since the funding of car parking is not considered to constitute an eligible cost when assessing the compatibility of investment aid<sup>72</sup>, the Commission takes the preliminary view that it cannot be considered as compatible investment aid under point 61 of the 2005 Aviation Guidelines. The Romanian authorities are invited to comment on this matter.

#### Conclusion

- (248) The Commission takes the preliminary view that the compatibility conditions laid down by the 2005 Aviation Guidelines are not met in full and therefore the investment aid under assessment is incompatible with the internal market pursuant to Article 107(3)(c) of the Treaty. By opening the formal investigation procedure the Commission invites Romania to justify that the financing of car parks at TMA observed the conditions set out above.
- (249) Therefore the Commission takes a preliminary view that the funding for car parks is not compatible with the Treaty.

#### 3.2.3.5. Conclusion

- (250) In view of the foregoing, the Commission has doubts whether the measures in favour of TMA under investigation as described in section 2.5 are compatible within the Treaty.

### **4. 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 Romania to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It

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<sup>70</sup> 2005 Aviation Guidelines points 53(iii) and 55.

<sup>71</sup> 2005 Aviation Guidelines point 53(iv).

<sup>72</sup> 2005 Aviation Guidelines points 53(iii) and 55.

requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Romania 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 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 disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to:

European Commission  
Directorate-General for Competition  
State aid Greffe  
1049 Brussels  
Stateaidgreffe@ec.europa.eu

Yours faithfully,  
For the Commission

Margrethe VESTAGER  
Member of the Commission