

Press release

## “Flemish airports Antwerp (Deurne) & Ostend a critical view”

### ***Deurne and Ostend airports.***

### ***Research into the legal, financial and accounting aspects of the Flemish airport policy and the legality of its implementation. Declaration of suspected offenses.***

This research was carried out by the non-profit association Bond Beter Leefmilieu ([BBL](#)), the non-profit organization [WILOO](#) (Working Group on the Impact of Ostend Airport on the Environment) and Civic Platform [Vliegerplein](#) (Deurne) to point out to the new Flemish Government:

- the unorthodox financial constructions within the newly created companies for the development and operation of the Deurne and Ostend airports (LOM / LEM construction);
- the suspected partly illegal implementation of the airport policy by the executive.

And hereby also request the new Government:

- not to renew the current grant agreements;
- to develop an extinction scenario for the within a densely populated area located airport of Deurne;
- to plan a reconversion for Ostend airport into a smaller airport closed at night with shortened runways;
- with regard to our future generations, to be aware of the concerns of achieving the climate goals.

Given the seriousness and scope of the findings resulting from the investigation, the three aforementioned action groups also decided to appoint Mr. Johan Verstraeten (\*) as their lawyer to report **suspected criminal offenses to the Public Prosecutor at the Brussels Court of Appeal.**

### In summary

The airport policy of the Flemish Government provided that privatization could make the regional airports of Ostend and Deurne profitable. To this end, she created a construction through the so-called LEM / LOM decree with, on the one hand, an Airport Development Company (LOM) and, on the other hand, an Airport Exploitation Company (LEM). The LOM - a public limited company - would become the owner of all infrastructure and related real estate. The LEM - a private limited company - takes care of the exploitation through a concession agreement. The LOM takes responsibility for all investments in the infrastructure and all major maintenance during the entire duration of these concessions. In addition, it also subsidizes specific security tasks executed by the LEM. The LEM, in turn, pays a concession fee for the operation of the airport and the maintenance of the infrastructure.

An international tender was launched in 2013 for the operation of both airports, to which only one candidate operator (out of two) stayed interested : the French EGIS SA.

To finally keep EGIS SA on board, a (very low) concession agreement and a (very high) subsidy agreement were agreed upon. Both agreements were approved and signed in 2014. The first runs for 25 years. The latter formally ends by the end of 2019.

Despite partial confidentiality of the agreements, we were able to deduce what the private partner EGIS pays for the use of both airports by reading the annual accounts of the companies LOM Oostende-Brugge NV and LOM Antwerpen NV (the recipients).

The least that can be said about these concession fees is that they are unlikely low. For example, the private partner in Antwerp pays an average of around 250,000 euro per year for a fully equipped airport of 188 hectares with associated infrastructure and thousands of square meters of buildings. In other words, just as much as the annual rent of a 100 m<sup>2</sup> store in the main shopping street of Antwerp.

The Flemish Government tries to present this concession fees as "in line with the market" and believes it can use all resources, even if these resources are not permitted by decree. Moreover, our investigation shows that the Government is trying to keep this illegal situation from the public and this by methods that are very likely to be of a criminal nature.

Some of the facts noted during our investigation are probably so serious that we, as citizens of a democratic constitutional state, feel obliged, when applying the special law of June 25, 1998, to bring it to the attention of the Public Prosecutor at the Court of Appeal in Brussels.

In our opinion, the grant agreement is also a major problem for the European competition authority. And this both with regard to the size of the amount and the acceptability of the amount - as fair and just state aid.

For example, it is important to point out that the grants awarded each year amount to almost double the annual aeronautical turnover achieved by the French private partner (airport taxes, landing fees, etc.). In contrast to an estimated cumulative (2015-2017) aeronautical turnover of both LEMs of around 17,000,000 euro, the annual accounts filed show a cumulative operating fee of 32,676,957 euro.

On the other hand, attention must also be drawn to the fact that up to now no declaration has been made to Europe of the state aid provided by the Flemish Government, although according to the European directives it should be made "in advance for each benefit".

Several "pre-notifications" have already been done, a kind of checking with the EU how far the Flemish Government could go. But no real notification has been done so far, this in spite of all the promises done in the mobility committee of the Flemish Parliament.

#### Research into the "market conformity" of the concession fee

It goes without saying that the concession fees for the use of the buildings and the fully equipped airports of Ostend and Deurne are on the very low side.

According to the "valuation decision", which was added to the act of capital increase of LOM Oostende-Brugge NV, the airport of Ostend has a "Fair value in continued use" value of 192,029,600 euro. However, the fee in 2017 is only 226,943 euro. No manager will be satisfied with a return of 0.12% for such an investment, while he also has to bear all major costs, such as future runway (overlay) maintenance and so on, rendering return even negative in the future.

In Deurne, the "valuation decision" filed at the registry indicates an amount of 115,367,000 euro. With a concession fee in 2017 of 236,563 euro, this is a compensation of 0.21% on the investment used. Here too, the lessor LOM Antwerpen NV must also bear very large costs itself.

What an ordinary citizen can notice won't not escape Europe of course, namely that the return on investment is 'rather' low. In his report the Finance Inspector to the Flemish Government also confirmed that a high validation of the airports compared to the very low concession contribution could be a problem in assessing whether the state aid at both airports was/is justified. With the explicit idea of constructing an alternative solution to this "problem", the Flemish Government then

kept "the value of the land" out of the books. This happened - as our research clearly suggests - with the intention of misleading Europe and in this way explicitly circumventing the rules of "European Union loyalty".

In October 2014 the executive, the Flemish Government, simply ignored the Parliamentary LOM-LEM decree! The Flemish Government did indeed set up a new construction introducing only the building leases and long leases and no longer the value of the land. However, this construction was not permitted by the LOM-LEM decree on the day it was set up because the decree provided that all property, including the grounds, had to be introduced into value of the LOMs.

How did this work? On 24 October 2014, a representative of the Flemish Government presented himself to the notary office. He showed two authorizations to only introduce the "ground leases" to the planned capital increases and not the entire value of the airports of Ostend and Deurne as was imposed by the LEM - LOM decree. In addition, the representative of the Flemish Government had two additional deeds to be executed regarding the ground leases, while this was not mandated by any document. These documents are to be found in the registry files of the Brussels Commercial Court filed on 31 October 2014. Although they were signed, they were not dated, they were in any case only enforceable after publication in the Belgian Official Gazette, which had not happened. The notary failed to verify the enforceability of these authorizations and therefore did not establish that the authorized representative had no mandate for the actions taken that day.

The Flemish Government subsequently attempted to disguise these illegalities by implementing a text modification in the LEM - LOM decree. This was included in the text through a Government amendment. This Government amendment was submitted after all competent committees in parliament had already given their say. As a result, the decree was quickly adopted before the Christmas recess of 2014 without any factual and/or material knowledge by the members of parliament. The amendment that allows not to introduce "the value of the ground" obtained force of law on 3 February 2015 by publication in the Belgian Official Gazette. It became practicable with retroactive effect to January 1, 2014.

It was therefore only after 3 February 2015 that the ministerial authorizations could be published - so that they would only become enforceable at that time. But there is a problem: the undated authorizations, which appear in the registry files, **do not have a date** and were previously implemented without authorization by decree. Moreover, they were never published as such (without a date).

In our opinion, being well aware of the above, the Flemish Government chose to prepare new government decisions, this time with a date and in the hope of being able to mask the illegality of the October 2014 deeds. According to the correspondence contained in the Chancellery filings, the signing of these new and this time dated decisions took place between March 23 and April 8, 2015. However, the date mentioned above the signatures is October 24, 2014, **which was deliberately done to mask the illegality of the cover up of "the October 24, 2014 actions" by antedating.**

The latter finding is the reason why we felt compelled to report this to the Prosecutor General at the Court of Appeal in Brussels with a request to possibly investigate these facts .

Moreover, the illegal actions identified for this purpose were carried out - as is apparent from the statements of the managing director and legal adviser of the Flemish Government of both LOMs - with the intention:

- to provide a private company with faster income;
- and to keep the value of the land "out of the books".

### The valuation of the airports in the two LOMs

The property rights of the buildings were transferred to the two LOMs by means of a capital increase. As is apparent from the foregoing, for reasons directly related to the state aid issue, the real value of the land was kept out of the books by introducing a "building leases and long leases only" construction.

The valuation of a building lease normally takes into account the rental income associated with the imported goods. According to the LEM - LOM decree, all rights belong(ed) to the two LOMs, including the rental income of the leased properties. These rents were mentioned separately in the annual accounts of the Flemish airports' DABs (public entities prior to the privatization into LOM -LEM companies) as non-aeronautical turnover. They currently amount to around 1,000,000 euro annually for each airport individually.

For the occasion of the contribution in kind to the two LOMs, reports were drawn up by the auditor and the external accountant of the two LOMs. The reading of these reports shows that apparently neither of them seemed to be aware of the fact that the goods brought in were actually rented out at the time of the transfer. We have serious questions about this. The fact is that a few months before the contribution in kind the income from the leases was transferred to the private operator by means of what they call "third party contracts". The tenant agrees to no longer pay the rent from a certain date to the two DABs (now LOMs) but directly to the private operators (the current LEMs) of the airports.

The owners of a right (here the two LOMs) can hand this over to a third party. They must, however, show this in their accounts. Public-law companies are also required to keep accounts in accordance with the law of 17 July 1975. However, the waiver of these rents for free is concealed in the accounts of the two LOMs. **This concealing also hides these "donations" to the two LEMs - worth around 1,000,000 euro per year - from Europe.**

In addition, these transferred rents associated with the buildings must be taken into account for the valuation of the contribution in kind. Both the auditor and the external accountant do not appear to have (had) this information and will wrongly base the valuation on the rent that the two LOMs could receive under the concession agreements and not on the rents that the LOMs were entitled to by law and as owners.

It will now be clear to everyone that a far too low and non-real value determination of the value of both airports serves to justify an excessively low concession fee. This creates a circular reasoning, which proves nothing and attempts to show that the concession fee would be "in line with the market" compared to the much too low value of the values calculated in this way, this in violation of the rules of logic.

In addition to the fact that the concession fee is clearly not "in line with the market", a hidden subsidy of around 1,000,000 per year and per airport is created. Because these subsidies are not included in the accounts of the two LOMs they are therefore invisible to potential researchers from the European Commission.

### The violation of European Union law by the Flanders Executive

Flanders is committed - as part of the Belgian membership of the European Union - to comply with Union law and certainly not to take measures to circumvent this right.

In our opinion, the reports that we were able to view clearly show that:

- the decree relating to the rights attached to the property was violated by means of hidden "third-party contracts";

- the land value of both airports was kept out of the books by setting up a "building leases and long leases only" construction;
- the Flemish Government is turning a blind eye to the fact that the concession fees for both airports are not in line with the market;
- the Flemish Government, by means of hidden subsidies, did (and still does) hide the too low concession fees from the eye of Europe;
- the hidden subsidies are created by not including rental incomes transferred to the operator of the airports (LEMs, in this case EGIS) in the LOMs' accounts. Rental incomes should be property of the landlords (the LOMs) by decree.

The established facts clearly show that the executive powers, in particular the Flemish Government and certain departments of the Flemish Region, played an active role and still play a part in the deception of the European competition authority with regard to the acceptability of the Flemish state aid.

#### We ask

- In view of the foregoing, the investigators thought they should report the above mentioned facts to Prosecutor General at the Brussels Court of Appeal. This is in accordance with the special law of 25 June 1998 which stipulates that there is only one point of contact for all the facts ascertained, in particular the Prosecutor General at the Court of Appeal in Brussels;
- Regarding the grant schemes - including the identified hidden grants - we ask the new Government not to renew the current grant agreements. We also ask for a new cost-benefit analysis, concerning the profitability of the operating grants granted to the two LEMs, to be carried out by the Court of Auditors. We request the new Government to immediately start an investigation by the Court of Auditors into the investment subsidies granted to the two LOMs. All this, inter alia in the light of the European rules whereby the two regional airports should be self-sufficient by 2024, which is very doubtful since their aeronautical receipts today represent just over half of the operating grants received;
- We also request the new Flemish Government to explicitly ask the Court of Auditors to pay attention and to investigate the discrepancy between the totals of operating grants claimed by the Flemish Government and the amounts indicated in the accounts of the two LEMs. For the airport of Ostend, LEM Oostende-Brugge NV mentions, for the financial years 2015 to 2017, 1,966,864 euro more operating subsidies than the competent minister (over the same period) specifies. For Deurne airport, the LEM Antwerp NV mentions (over the same period) 2,243,227 euro more than the minister states;
- We further request that the Court of Auditors be instructed to investigate the debts of the Flemish Government to the LOM Antwerpen NV and the LOM Oostende-Brugge NV and to find out whether these match and if they were recorded separately as unequivocal debts in the annual accounts of the Flemish government. According to the deposited annual accounts as at 31/12/2017 of LOM Oostende-Brugge NV (code 9500), this provisional debt, not found in the Flemish accounts, amounts to 4,111,227 euro. According to the annual accounts of LOM Antwerpen NV for the same period, this undiscovered debt amounts to 4,774,986 euro;
- We ask the new Government to cease the not booked and hidden subsidies which are valued at around 1,000,000 euro per company and per year. The latter can be achieved by enforcing the Law of 17 July 1975 on the accounting of companies, and this for the two LOMs as companies under public law. More specifically, it concerns the free waiver of rights that should have been brought into possession of the LOMs by decree, but were stolen in advance by third-party agreements.