

V

(Oznámení)

ŘÍZENÍ TÝKAJÍCÍ SE PROVÁDĚNÍ POLITIKY HOSPODÁŘSKÉ SOUTĚŽE

EVROPSKÁ KOMISE

STÁTNÍ PODPORA – POLSKO

Státní podpora SA.53903 (2020/C) (ex 2019/NN) – Regionální investiční podpora pro LG Chem 2 – LIP**Výzva k podání připomínek podle čl. 108 odst. 2 Smlouvy o fungování Evropské unie**

(Text s významem pro EHP)

(2021/C 7/02)

Dopisem ze dne 11. srpna 2020, který je v závazném jazykovém znění přiložen k tomuto shrnutí, oznámila Komise Polsku své rozhodnutí zahájit ve věci výše uvedené podpory / uvedeného opatření řízení podle čl. 108 odst. 2 Smlouvy o fungování Evropské unie.

Zúčastněné strany mohou podat své připomínky k podpoře ve prospěch podniku LG Chem, kvůli které Komise řízení zahajuje, do jednoho měsíce ode dne zveřejnění tohoto shrnutí a přiloženého dopisu na adresu Evropské komise, Generálního ředitelství pro hospodářskou soutěž:

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Tyto připomínky budou sděleny Polsku. Zúčastněné strany podávající připomínky mohou písemně a s uvedením důvodů požádat o zachování důvěrnosti ohledně své totožnosti.

ShrnutíPopis opatření a investičního projektu

Dne 4. července 2019 oznámilo Polsko regionální investiční podporu v hodnotě 95 milionů EUR, kterou hodlá udělit, resp. již udělilo, podniku LG Chem Wrocław Energy Sp. z o.o. („LG Chem“) na investici, jejímž cílem je rozšířit kapacitu stávajícího zařízení na výrobu bateriových článků pro elektrická vozidla. Oznámená investice se nachází v Dolnoslezském vojvodství, což je oblast způsobilá pro regionální podporu podle čl. 107 odst. 3 písm. a) SFEU se standardní maximální intenzitou regionální podpory ve výši 25 % na základě mapy regionální podpory pro Polsko na období od července 2017 do roku 2020 ⁽¹⁾. Příjemcem podpory je dceřiná společnost plně vlastněná společností LG Chem Ltd., která má sídlo v Jižní Koreji a je považována za velký podnik.

⁽¹⁾ Úř. věst. C 249, 31.7.2014, s. 1.

Podpora se poskytuje prostřednictvím balíčku podpory, který se opírá o čtyři různé nástroje: nevratný grant v hotovosti, podpora *ad hoc* ve formě prodeje pozemků a související infrastruktury za zvýhodněnou cenu, osvobození od daně z příjmu právnických osob, pokud jde o příjmy z oznámené investice, a osvobození od daně z nemovitostí.

Posouzení slučitelnosti opatření podpory

Společné zásady pro posouzení slučitelnosti stanovené v oddíle 3.1 pokynů k regionální podpoře uvádějí, že regionální podporu lze schválit, pouze pokud 1) jsou splněny určité minimální požadavky definované jako příspěvek projektu k regionálnímu rozvoji, vhodnost podpory a zvolené formy podpory, formální a hmotné motivační účinky podpory a její proporcionalita, 2) podpora nevede ke zjevným negativním účinkům na hospodářskou soutěž a obchod a 3) pozitivní účinky podpory jasně převažují nad jejími negativními účinky.

Odstavec 61 pokynů k regionální podpoře stanoví, že (podstatný) motivační účinek lze dokázat na základě jednoho ze dvou možných scénářů: tj. v případě neposkytnutí podpory by investice uskutečnila v jiné oblasti (scénář 2). Polsko se odvolává na situaci podle scénáře 2 a tvrdí, že bez podpory by investice byla provedena v [...] (*) v Číně, kde skupina LG Chem Group ovládá prostřednictvím společného podniku jiné zařízení na výrobu baterií pro elektrická vozidla. Podle Polska by investice v Číně byla rentabilnější o 77,3 milionu EUR.

V této fázi má Komise pochybnosti o tom, že navrhovaná podpora bude mít požadovaný motivační účinek. Komise zejména konstatuje, že údajný rozdíl v rentabilitě ve výši 77,3 milionu EUR (tj. rozdíl mezi čistými současnými hodnotami projektu ve dvou údajně konkurenčních lokalitách) vyplývá ze subvence ve výši přibližně 106 milionů EUR, kterou podnik LG Chem podle svého tvrzení očekával od Číny a kterou do svých srovnávacích výpočtů čisté současné hodnoty pro [...] zahrnul jako příjem.

V této fázi se Komise domnívá, že důkazy poskytnuté Polskem ohledně toho, jakou podporu by podnik LG Chem získal v Číně v době vydání rozhodnutí o lokalitě, nepostačují k tomu, aby bylo možné se domnívat, že předpokládaná čínská subvence má realistický základ, a aby proto mohla být zohledněna ve výpočtech rozdílu v rentabilitě. Na základě informací poskytnutých polskými orgány Komise konstatuje, že v okamžiku vydání rozhodnutí o lokalitě ve prospěch Polska (tj. dne 16. srpna 2017) neměl podnik LG Chem pro svou alternativní investici v Číně od čínských orgánů žádnou písemnou nabídku podpory. Důkazy, které byly k tomuto datu k dispozici, ve skutečnosti spočívají pouze v očekávání podniku LG Chem, že od čínských orgánů obdrží podporu ve výši podobné částce, kterou obdržel v minulosti pro dřívější investiční projekt, a v údajném verbálním vyjádření vyššího čínského úředníka, který na schůzce konané dne 9. srpna 2017 zastupoval potenciálního poskytovatele podpory. Komise podotýká, že pokud se tato čínská nabídka z výpočtu rozdílu v rentabilitě vyloučí, údajný rozdíl v rentabilitě zmizí a projekt bude v Polsku značně rentabilnější než v Číně, a oznámená podpora by tak postrádala motivační účinek.

Kromě toho se Komise domnívá, že pochybnosti o důvěryhodnosti Číny jako alternativy pro lokalitu daného investičního projektu vyvolávají i další skutečnosti: zaprvé nelze vyloučit, že by podnik z důvodu strategických úvah (např. zeměpisná blízkost k zákazníkům a snadnost logistiky) investoval v Polsku, i kdyby skutečně existoval údajný rozdíl v rentabilitě, zadruhé se zdá, že v době přijetí rozhodnutí o investici v srpnu 2017 se jihokorejský výrobci baterií pro elektrická vozidla potýkali v Číně s obzvláště nepřátelským politickým prostředím: čínské orgány vyloučily elektrická vozidla vybavená bateriemi, které tito jihokorejský výrobci vyrobili, z režimu poskytování premií kupujícím elektrických vozidel; jihokorejský výrobci baterií pro elektrická vozidla proto prakticky nemohli na čínském trhu prodávat.

Posouzení proporcionality výše podpory požadované podle oddílu 3.6 pokynů k regionální podpoře lze provést jedině, až se potvrdí značný motivační účinek podpory. Jelikož se v této fázi zdá, že pro lokalizaci investice do Polska nebyla nutná žádná podpora, oznámená podpora není omezena na částku nezbytnou k dosažení tohoto výsledku, a tudíž není přiměřená.

Jelikož se zdá, že investice by se v Polsku uskutečnila v každém případě, a to i bez podpory, Komise rovněž vyjadřuje pochybnosti o tom, zda oznámená investiční podpora přispívá k regionálnímu rozvoji dotyčného regionu, a nemůže potvrdit vhodnost podpory pro řešení specifických regionálních znevýhodnění dotyčného regionu.

(*) Důvěrné informace

Oddíl 3.7.2 pokynů k regionální podpoře výslovně uvádí řadu situací, ve kterých negativní účinky na obchod a/nebo hospodářskou soutěž zjevně převažují nad veškerými pozitivními účinky a u kterých je regionální podpora zakázána. Analýza zjevných negativních účinků a celkového vyvážení pozitivních a negativních účinků je však relevantní pouze v případě, že Komise zjistí, že výše uvedené minimální požadavky jsou splněny. Nejsou-li tyto minimální požadavky splněny, negativní účinky na hospodářskou soutěž a obchod přesahují pozitivní účinky podpory (které zřejmě neexistují, jelikož se v této fázi nezdá, že by podpora byla nezbytná).

V každém případě má Komise v této fázi potíže vyloučit, že celková podpora ze všech zdrojů nepřesáhne maximální přípustnou intenzitu podpory na projekt, která podle odstavce 119 pokynů k regionální podpoře představuje negativní účinek, který pravděpodobně nebude kompenzován žádnými pozitivními prvky.

Z výše uvedených důvodů má Komise o slučitelnosti podpory pochybnosti.

Zúčastněné strany se vyzývají, aby se k dotyčné podpoře vyjádřily, zejména pak k otázkám, které jsou podrobně rozpracovány v připojeném dopise Polsku.

V souladu s článkem 16 nařízení Rady (EU) 2015/1589⁽²⁾ lze požadovat, aby příjemce veškerou protiprávní podporu vrátil.

⁽²⁾ Úř. věst. L 248, 24.9.2015, s. 9.

ZNĚNÍ DOPISU

The Commission wishes to inform Poland that, having examined the information supplied by your authorities on the aid/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 4 July 2019, the Polish authorities notified a regional aid package (hereinafter, 'the aid measure' or 'the measure') it had granted (according to Poland, subject to Commission approval) on 20 September 2017, 2 October 2017, 19 February 2018, and 5 September 2018 in favour of LG Chem Wrocław Energy Sp. z o.o. (hereinafter, 'LG Chem').
- (2) Following information requests of 3 September 2019, 24 October 2019, 28 November 2019, and 18 February 2020, Poland submitted additional information registered on 14 October 2019, 17 October 2019, 29 October 2019, 5 November 2019, 20 November 2019, 2 December 2019, and 27 February 2020. The case was further discussed in a meeting on 14 November 2019. By letter of 19 December 2019, the Commission informed the Polish authorities that the case will be examined under the procedure regarding unlawful aid laid down in Article 12 of the Procedural Regulation ⁽¹⁾.
- (3) By letter of 4 July 2019, the Polish authorities agreed to have the present decision adopted and notified in the English language.

2. DESCRIPTION OF THE AID MEASURE**2.1. Objective of the aid measure**

- (4) Poland intends to promote the regional development of the Dolnośląskie region (NUTS-2, PL51) by providing regional investment aid for an initial investment of LG Chem. That region is eligible for regional aid under Art. 107 (3)(a) TFEU, with a standard regional aid ceiling of 25 % under the Polish regional aid map for the period from July 2014 to 2020 ⁽²⁾ (hereinafter 'Regional Aid Map'). The project is expected to create 1666 new direct jobs.
- (5) The investment project is located in Biskupice Podgórne, Wrocławski, Dolnośląskie region.

2.2. The beneficiary

- (6) The recipient of aid is LG Chem Wrocław Energy Sp z.o.o. (hereinafter 'LG Chem'), a fully owned subsidiary of LG Chem Ltd, which is headquartered in Seoul, Korea. LG Chem Ltd is a large undertaking with a turnover of about 20 billion EUR in 2017. LG Chem Wrocław Energy (LG Chem) is already active in Poland in the field of electric vehicles ('EV') battery manufacturing.
- (7) The Polish authorities have confirmed that the beneficiary is not a company in difficulty in the meaning of the guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ⁽³⁾.

2.3. The investment project**2.3.1. The notified project**

- (8) The investment project is to extend the capacity of LG Chem's establishment in Biskupice Podgórne (Special Economic Zone (hereinafter 'SEZ') Tarnobrzeg Euro-Parl Wisłosan) that is producing lithium-ion (Li-ion) batteries for EV. The extension (hereinafter 'Investment 2') creates additional capacity of [20-25] (*) GWh annually, which is equivalent to producing batteries for about [200 000 — 400 000] EV yearly, which is planned to serve exclusively the European Economic Area (EEA) market.
- (9) The project involves the construction of buildings and the acquisition/installation of [...] electrode lines, [...] battery cell assembly lines, and [...] module and pack lines.

(1) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

(2) OJ C 210, 04.07.2014, p. 6.

(3) OJ C 249, 31.7.2014, p. 1.

(*) Confidential information.

- (10) Works on the investment project started on 1 October 2017, after the relevant aid applications were introduced on 11 August, 14 September, and 21 September 2017. Production started in [...] 2018 and full production was to be reached by [...] 2020. The planned end date of the investment project is [...] 2021.

2.3.2. Eligible investment costs

- (11) The notified total eligible investment costs amount to PLN 4 468 941 000 (EUR 1 054 244 161) ⁽⁴⁾ in nominal value, which corresponds to PLN 4 261 117 075 (EUR 994 960 440), in present value ⁽⁵⁾. The eligible costs (accepted only for new assets) result from the cost of buildings (37 %) and plant, machinery, and equipment (63 %).

2.4. Forms of aid, aid granting authorities, and national legal basis for granting the aid

- (12) The notified public support is given through an aid package relying on four different instruments, which constitute the aid measure:

(a) A non-refundable cash grant (payment subject to Commission approval) based on a grant agreement between the Minister of Entrepreneurship and Technology and LG Chem signed on 5 September 2018. Its national legal bases are the Programme for the support of investments of considerable importance to the Polish economy for the years 2011-2023 ⁽⁶⁾ and the Act on principles of developing policy of 6 December 2006 ⁽⁷⁾, but Poland considers that the cash grant constitutes ad-hoc aid (the 'Programme' was never notified). LG Chem applied on the 21 September 2017 for a cash grant of PLN 242 000 000. On 4 December 2017, the Polish Trade and Investment Agency offered a cash grant of PLN 242 597 555 (i.e. PLN 597 555 more than requested) which LG Chem accepted on 18 December 2017. Nonetheless, the cash grant agreement of 5 September 2018 limits the maximum cash grant to the amount applied for, i.e. PLN 242 000 000.

(b) An ad-hoc aid in the form of a sale of land and related infrastructure at preferential price (EUR 1) agreed in a temporary land sale agreement (final agreement and ownership transfer subject to Commission approval) signed on 19 February 2018 by Agencja Rozwoju Przemysłu ('ARP'), a public entity which owns the land plot and manages the relevant Special Economic Zone (SEZ). The national legal basis for the land sale is the Act on Special Economic Zones of 20 October 1994 ⁽⁸⁾, the Regulation of the Council of Ministers of 15 December 2008 on the Tarnobrzeg Special Economic Zone ⁽⁹⁾, and the Regulation of the Minister of Economy of 2 July 2009 on the entrustment of the Agencja Rozwoju Przemysłu S.A. with the granting of permits for conducting business activity within the area of Tarnobrzeg Special Economic Zone EURO-PARK Wisłosan and for carrying out inspections of fulfilment of the conditions of such permits ⁽¹⁰⁾. The aid was granted following a tender (No. 4/KB/2017) published by ARP on 9 June 2017 for both the sale of the land and for the awarding of the permit to operate in the SEZ. On 19 February 2018, LG Chem and ARP concluded a preliminary land sale agreement which stipulates the terms of the sale and includes a stand-still clause making the conclusion of the final land sale conditional upon the approval of the State aid package by the European Commission.

(c) A Corporate Income Tax (CIT) exemption granted by ARP on 20 September 2017 through the permit No. 349/2017 which allows LG Chem to conduct business activities in the Tarnobrzeg Special Economic Zone EURO-PARK Wisłosan (the 'SEZ permit') and to invoke exemptions from corporate income tax for income from the investment.

⁽⁴⁾ Figures expressed in EUR are given based on an exchange rate of 4,239 EUR/PLN used internally by the LG Chem Group, which is very close to the official exchange rate of the European Central Bank on the date of the notification (4,2439 EUR/PLN).

⁽⁵⁾ The present values are calculated based on a discounting rate of 2,83 %, applicable at the time of the filling of the first application for aid (base rate 1,83 % plus 100 basis points). Present values are discounted to 2017, the year of the award of the aid.

⁽⁶⁾ Resolution of the Council of Ministers No. 122 of 5 July 2011, as amended by the Resolution of the Council of Ministers no. 39 of 20 March 2012, 143 of 13 August 2013, 143 of 22 July 2014, 212 of 27 October 2014, 60 of 8 June 2016, 141 of 15 September 2017, and 181 of 27 November 2017 regarding the Programme for supporting investments of major importance to the Polish economy for the years 2011-2023.

⁽⁷⁾ Published in the Journal of Laws 2016, item 383.

⁽⁸⁾ Published in the Journal of Laws 2017, item 1010.

⁽⁹⁾ Published in the Journal of laws 2018, item 411.

⁽¹⁰⁾ Published in the Journal of laws 2009, item 113.

Its national legal basis is the Act on Special Economic Zones of 20 October 1994⁽¹¹⁾, the Regulation of the Council of Ministers of 15 December 2008 on the Tarnobrzeg Special Economic Zone⁽¹²⁾, the Regulation of the Minister of Economy of 2 July 2009 on the entrustment of Agencja Rozwoju Przemysłu S.A. with the granting of permits for conducting business activity within the area of Tarnobrzeg Special Economic Zone EURO-PARK Wisłosan and for carrying out inspections of fulfilment of the conditions of such permits⁽¹³⁾ and the Regulation of the Council of Ministers of 10 December 2008 on the State aid granted to entrepreneurs operating on the basis of a permit for conducting business activity in special economic zones⁽¹⁴⁾.

The CIT exemption constitutes an individually notifiable case of application of the aid scheme SA.40523 (2015/X)⁽¹⁵⁾ which was put into effect under Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty⁽¹⁶⁾ (General Block exemption Regulation, hereinafter 'GBER'). Under this scheme, Poland provides regional aid in the form of corporate income tax exemptions to enterprises that conduct business activity in the Polish special economic zones on the basis of permits issued up until 31 December 2020. Therefore, based on permit No. 349/2017, LG Chem is allowed to conduct business in the SEZ Tarnobrzeg Euro-Parl Wisłosan that it is exempted from CIT and it can benefit from the CIT exemption for as long as the SEZ exists. The amount of CIT exemption is capped at a maximum ceiling, calculated by applying the maximum allowable aid intensity for the project to the maximum eligible investment costs of the project, as described in recital (16).

The SEZ permit was issued following the tender No. 4/KB/2017 announced by ARP on 9 June 2017 for the sale of the land and for the awarding of the permit to operate in the SEZ. On 11 August 2017, LG Chem submitted an offer to the above mentioned tender (which constitutes the application for aid) requesting aid in the form of CIT of EUR 24 175 882 (PLN 102 481 562), in nominal value and aid in the form of the sale of land below market price in the amount of EUR 6 784 404 (PLN 27 759 000), in nominal value. The aid application also specifies that LG Chem is seeking for its investment project a full incentive package amounting to approx. EUR 93,51 million (in nominal value). On 18 September 2017, LG Chem and ARP concluded a Memorandum of Understanding setting out the scope of the business activity to be conducted by LG Chem in the SEZ, the number of jobs to be created, the minimum and maximum eligible costs of the investment, the date of the completion of the investment, etc. The Polish authorities have indicated in the notification that the permit No. 349/2017 granted by ARP on 20 September 2017 (the SEZ permit) constitutes the aid-granting act for the CIT exemption. As the Memorandum, the SEZ permit describes the scope of the business activity to be conducted by LG Chem in the SEZ, the number of jobs to be created, the minimum and maximum eligible costs of the investment, the date of the completion of the investment, etc. However, the SEZ permit does not specify the maximum amount of aid granted to LG Chem in the form of CIT, nor does it contain a standstill clause making the granting of aid conditional upon a positive Commission decision.

- (d) A Real Estate Tax (RET) exemption based on a confirmation, conditional upon State aid approval by the Commission, issued on 2 October 2017 by the Mayor of the Commune of Kobierzycze following an application by LG Chem introduced on 14 September 2017. Its national legal basis is the Local Taxes Act of 12 January 1991⁽¹⁷⁾, the Regulation of the Council of Ministers of 9 January 2015 on the conditions for granting exemptions from property tax and tax on means of transport, accounting for regional investment aid, aid for culture and heritage conservation, aid for sports infrastructure and a multi-purpose recreational infrastructure and aid to local infrastructure⁽¹⁸⁾ and the Resolution no. VI/74/15 of the Council of the Kobierzycze of 27 March 2015 concerning real estate tax exemptions for supporting new investments in the framework of regional investment aid for small, medium and large enterprises conducting business activity in the Municipality of Kobierzycze⁽¹⁹⁾. The RET exemption constitutes an individually notifiable case of application of the aid scheme SA.41495 (2015/X)⁽²⁰⁾ which was put into effect under the GBER. Under this scheme, the Polish local authorities provide regional investment aid in the form of property tax exemptions to undertakings, which carry out investment projects in accordance to the applicable provisions of the GBER. The granting of the RET exemption is conditional upon the Commission's approval of the aid.

⁽¹¹⁾ Published in the Journal of Laws 2015, item 282.

⁽¹²⁾ Published in the Journal of laws 2015, item 1306.

⁽¹³⁾ Published in the Journal of laws 113, item 941.

⁽¹⁴⁾ Published in the Journal of laws 2015, item 465.

⁽¹⁵⁾ SA.40523 Regional aid scheme for enterprises conducting business activity in the Special Economic Zones, on the basis of a permit issued in the period from 25 December 2014 to 31 December 2020.

⁽¹⁶⁾ OJ L 187, 26.6.2014, p. 1.

⁽¹⁷⁾ Published in the Journal of laws 2016, item 716.

⁽¹⁸⁾ Published in the Journal of laws item 174.

⁽¹⁹⁾ Published in the Official Journal of the Lower Silesia Region, item 1666.

⁽²⁰⁾ SA.41495 — Regulation of the Council of Ministers of January 9, 2015 on the conditions of granting real estate tax exemptions and exemptions from the tax on the means of transport, which constitute regional investment aid, aid for culture and preservation of cultural heritage, aid for sports infrastructure and multifunctional recreational infrastructure, and aid for local infrastructure.

- (13) The Commission notes that the aid in the form of CIT exemption that was granted by the Polish authorities to LG Chem for the investment project under assessment and notified to the Commission (EUR 28 201 440 million (PLN 119 545 904), in nominal value) is higher than the amount applied for (EUR 24 175 882 (PLN 102 481 562), in nominal value). With regards to that inconsistency, the Polish authorities explained that in the application for the CIT exemption, LG Chem requested to receive aid in the form of CIT exemption equal to the difference between the maximum aid allowable for the investment project and the total value of the other aids granted for the same investment (i.e. in the form of a cash grant, land sale, and RET exemption). That amount was initially estimated in the application for CIT exemption aid at EUR 24 175 882 (PLN 102 481 562), in nominal value. That estimation was allegedly modified (i.e. increased) when the aid in the form of a cash grant was agreed. Specifically, the Polish authorities explained that prior to aid application for the cash grant of 21 September 2017, on 31 August 2017, after negotiations of the cash grant amount, the Ministry of Economic Development provided LG Chem with a preliminary offer of a cash grant of PLN 242 000 000, which was lower than the cash grant amount sought by LG Chem. The Polish authorities consider that the difference between the amount of the cash grant sought by LG Chem and the amount offered would be compensated by an increase in aid in the form of CIT. However, the Commission notes that the Polish authorities did not provide any evidence as to whether the aid application for the CIT exemption (lodged on 11 August 2017, i.e. before the preliminary cash grant offer was received) was indeed amended to reflect the above changes in the aid amount requested before the aid in the form of CIT was granted (on 20 September 2017).

2.5. Aid amount

- (14) The total notified aid amounts to PLN 402 525 976 (EUR 94 957 767) in nominal value and PLN 362 194 962 (EUR 85 443 492) in present value. The aid is planned to be paid out in instalments.
- (15) The cash grant amounts to PLN 242 000 000 (EUR 57 088 936) in nominal value and PLN 217 785 842 (EUR 51 376 702) in present value.
- (16) The Polish authorities consider that the aid in the form of the corporate income tax exemption gives the beneficiary the entitlement to reduce the amount of corporate income tax owed for the duration of the existence of the Tarnobrzeg Special Economic Zone up to the total cumulative amount of PLN 119 545 904 (EUR 28 201 440 million) in nominal value and PLN 107 083 287 million (EUR 25 261 450 million) in present value. However, that maximum aid amount is not specified in the respective aid granting act (the permit). The Polish authorities determined the maximum aid amount in the form of CIT exemption by calculating the maximum aid amount for the project in relation to the maximum eligible investment costs of the project specified in the permit ⁽²¹⁾, from which they deduct aid granted for the same project through other instruments (see recitals (15), (17), and (18)).
- (17) The aid in the form of a real estate tax exemption amounts to PLN 12 220 983 (EUR 2 882 987) in nominal value and PLN 10 876 446 million (EUR 2 565 805) in present value.
- (18) The aid resulting from the sale of land and related infrastructure at preferential price was quantified based on an independent expertise of the 29 March 2017. The independent expert determined the market price of the land in question by comparing it to past transactions (over 2014-2017) of plots of land with comparable purpose, similar location and existing infrastructure. The aid element of the land sale for the entire plot of land with an area of 186 400 m² equals the market price of minus PLN 4,24 (1 EUR). The market price per m² is ca. PLN 154 (ca. EUR 36/m²), which leads to an aid amount of PLN 28 758 996 (EUR 6 784 382). This value is slightly lower than the notified amount of PLN 28 759 089 (EUR 6 784 404). The Polish authorities explained that this small discrepancy (of 93 PLN, which is equivalent to 22 EUR) results from approximations of exchange rates used in the conversion of the respective value from PLN to EUR and back to PLN.

2.6. Aid intensity, single investment project, and cumulation with other investment aid

- (19) On 7 July 2016, i.e. less than three years before the start of works on the notified project on 1 October 2017, the beneficiary started works on another investment in the same location and NUTS 3 region, with eligible expenditure of EUR 315 783 968, in nominal value. Aid of EUR 39 592 000, in nominal value, was granted. This earlier investment and the notified investment project constitute a single investment project (hereinafter 'SIP') pursuant to paragraph 20(t) to the Regional Aid Guidelines 2014-2020 ⁽²²⁾ ('RAG').

⁽²¹⁾ By applying the formula specified in the national legal basis: maximum aid amount = R x (50 mil. EUR + 0,50 x B + 0,34 x C), where R is the unadjusted regional aid ceiling, B is the eligible expenditure between EUR 50 million and EUR 100 million, and C is the eligible expenditure above 100 million

⁽²²⁾ Guidelines on regional State aid for 2014-2020, OJ C 209, 23.7.2013, p. 1

- (20) The total planned aid for the SIP amounts to EUR 119 154 997 in discounted value⁽²³⁾, for a planned eligible expenditure of EUR 1 281 235 227 in discounted value, corresponding to an aid intensity of 9,30 %.
- (21) The Polish authorities declared that the financial support for the notified project will not be combined with any other financial support that would be disbursed for the same eligible costs from any other local, regional, national or European Union source.
- (22) The Polish authorities confirmed that neither the approved maximum aid amount in present value, nor the approved aid intensity would be exceeded if the amount of eligible expenditure deviates from the estimated amount.

2.7. Own contribution of the aid beneficiary

- (23) The Polish authorities confirmed that the aid beneficiary will contribute at least 25 % of the total eligible costs free of any public support.

2.8. Maintenance of the investment in the assisted region

- (24) LG Chem committed to maintain the investment in the assisted region for at least five years following the day of the completion of the investment.

2.9. General provisions

- (25) The Polish authorities undertook to publish on a central website or on a single website retrieving information from several websites at least the following information on the notified aid measure: aid granting decision (or a link to it), granting authority, individual beneficiary, form and amount of aid, date of granting, and the region in which the beneficiary is located. The information will be kept for at least 10 years and will be available to the general public without restrictions.

3. INFORMATION SUBMITTED BY POLAND FOR THE ASSESSMENT OF THE COMPATIBILITY OF AID ON THE BASIS OF THE COMMON ASSESSMENT PRINCIPLES

3.1. Contribution to regional development (cohesion) objective

- (26) The Polish authorities suggest that the aided project contributes to the regional development of the Dolnoślaskie region for the following reasons:
- It creates around 1666 new direct jobs — of which at least 210 high-quality jobs open to university graduates — and additional indirect jobs with suppliers.
 - It contributes to the creation of the first EV battery cluster in the EU, as several suppliers⁽²⁴⁾ of LG Chem decided to invest in the same region. This will improve the competitiveness of the EU EV manufacturers which gain access to new technologies, while proximity will facilitate inventory and supply chain management and improve quality control.
 - It contributes to technology transfer into a disadvantaged region, in particular as the aided project will apply advanced technologies, identified in detail by Poland, that are further developed compared to LG Chem's first investment.
 - It contributes to knowledge transfer through systematic training of employees and cooperation with local universities⁽²⁵⁾ (internship program).
 - Finally, the project will generate significant tax revenues and additional regional household income; the salaries of LG Chem workers [...] local salary levels.

3.2. Appropriateness

- (27) The Polish authorities argue that the notified aid package, which constitutes the aid measure, is necessary to counterbalance an incentive package offered by China, consisting mainly of a direct grant to carry out the project in China.

⁽²³⁾ For calculating the discounted eligible expenditure and aid amount of the SIP, the annual amounts have been discounted to 2016 (i.e. the date when the first granting authority calculated in advance the maximum permissible aid intensity for LG Chem's first investment project), taking into account the reference rate applicable at that time (i.e. base rate 1,83 % plus 100 basis points).

⁽²⁴⁾ Enchem Co Ltd (a Korean manufacturer of electrolytes); Jiangsu Ruitai New Energy Materials Co. Ltd. and Zhangjiagang Guotai-Huarong Chemical New Material Co. Ltd. who formed a joint venture to setup a subsidiary in the region (also manufacturers of electrolytes); Umicore (A Belgian manufacturer of cathode materials); SK Innovation (a Korean company which is expected to invest in a plant producing separators for Li-Ion batteries in Poland).

⁽²⁵⁾ Wrocław University of Science.

- (28) Poland considers that aid in potentially less distortive forms (e.g. loan instruments) would not allow bridging the viability gap: given its standing, LG Chem is able to obtain external financing under favourable conditions from commercial banks. Interest subsidies on these favourable terms would be insufficient to create the needed aid amount. In addition, due to the absence of immediately available off-the-shelf preferential debt or equity instruments, negotiating preferential loan packages would have led to long delays.
- (29) Furthermore, ad-hoc aids (e.g. the cash grant ⁽²⁶⁾ and land at preferential price) are considered appropriate because they are customized precisely to provide the necessary location incentive: these ad-hoc aids are offered only to investors, which are implementing projects in priority sectors ⁽²⁷⁾, or for projects of strategic importance to the Polish economy ⁽²⁸⁾.
- (30) Under the cash grant agreement, LG Chem is required to carry out the project regardless of its ultimate profitability, and has limited flexibility with respect to the amount of investment expenditures and the number of jobs created. A material reduction of the scope of the investment project would require LG Chem to reimburse the entire cash grant. Therefore, LG Chem has a strong interest to carry out the investment as planned, regardless of the risks.
- (31) Finally, LG Chem will receive the full amount of CIT exemption only if the investment generates sufficient profits during the existence of the Tarnobrzeg Special Economic Zone. Therefore, LG Chem has a strong interest to maintain the investment in the region, and to ensure its profitability.

3.3. Incentive effect

3.3.1. Formal incentive effect

- (32) Poland explained that LG Chem submitted the formal application for the acquisition of land at preferential price and the corporate tax exemption on 11 August 2017, for the real estate tax exemption on 14 September 2017, and for the cash grant on 21 September 2017. Works on the investment project started shortly after, on 1 October 2017.

3.3.2. Counterfactual scenario

- (33) In the notification, the Polish authorities invoke a scenario 2 situation in the meaning of paragraph 61 of the RAG, arguing that without the aid the investment project would have been implemented in [...] (China), where LG Chem operated via joint venture two EV battery-manufacturing facilities, built respectively in 2015, and between 2016 and 2018.
- (34) LG Chem's EV battery plant in [Asia outside of China] was excluded as an alternative investment location early in the decision making process due to its high production costs.
- (35) Poland considers that China was a feasible location for the investment because the Chinese Government had lifted a few months before the investment decision the so-called joint-venture requirement. LG Chem could thus set up a new wholly owned subsidiary in China and undertaken the investment on its own. Poland conceded however that when the investment was decided, LG Chem's access to the Chinese market was severely restricted: the EV demand in China was strongly driven by government subsidies, but EV cars equipped with batteries from Korean manufacturers were excluded from receiving subsidies ⁽²⁹⁾. Therefore, the claimed alternative location in China is presented exclusively as an export base intended to serve the European market.
- (36) Poland argues therefore that the targeted EEA market could be served both from Poland and China, and the production levels and the customer base (largely already identified and secured through take-off agreements) would be identical.
- (37) According to the Polish authorities, the beneficiary compared the economic feasibility of both locations, taking into account the total costs of the investment, the planned production costs and revenues over a reference period of [6-10] years, and the terminal value of the investment (calculated as the book value of the assets) at the end of that period, discounted to their current value in 2017 using the average weighted cost of capital (WACC) of [8-10,5] as discount rate for both investment scenarios.

⁽²⁶⁾ The project contributes to the aims of the Program for supporting investments of major importance for the Polish economy, under the programme identified in recital (12)(a) and footnote 6.

⁽²⁷⁾ E.g. automotive, aviation.

⁽²⁸⁾ Manufacturing projects in all sectors with minimum eligible costs of PLN 750 million and creating at least 200 new jobs, or with minimum eligible costs of PLN 500 million and creating at least 500 new jobs.

⁽²⁹⁾ The Polish authorities confirmed that the same subsidies access restrictions applied to the previous distinct investment project (please see recital (41)) pursued in China and that the products produced were projected to be sold overseas, although selling them within China was also physically possible.

- (38) Based on these calculations, the project's net present value is by EUR 28,6 million higher in Poland and thus more viable than in China, mainly due to a substantially lower corporate income tax rate, and the lack of custom duties on imports of batteries.
- (39) Investment costs are slightly higher in Poland compared to China. The investment's expected revenues are independent from its location.
- (40) However, the Polish authorities recall paragraph 80 of the RAG: '*... In scenario 2 situations (location incentives), the aid amount should not exceed the difference between the net present value of the investment in the target area with the net present value in the alternative location. [...] where the alternative location is in the EEA, subsidies granted in that other location are not to be taken into account.*'

Based on that RAG provision, they consider that the viability comparison between the locations can take into account aid of EUR 106 million that LG Chem could expect to receive in China. This would result in a net advantage for China of EUR 77,3 million.

NPV (in million EUR)	Poland	China	Difference (Poland –China)
Without extra-EEA subsidy	[...]	[...]	+ 28,6
With extra-EEA subsidy	[...]	[...]	- 77,3

- (41) The Polish authorities explained that, since LG Chem was not in the possession of a Chinese incentive offer when the planning of the notified project started in July 2017, the aid expected in China was estimated on the basis of an incentive offer received for a previous investment project, a battery manufacturing facility built in [...] between [...] and [...] ('the distinct investment project'). Poland claims that this previous investment — although somewhat similar in scope and timing — is distinct from the counterfactual investment scenario of the notified project. The distinct investment project comprised production space (buildings) and production lines for electrodes and EV battery cells with investment costs initially estimated at USD [450-900] million (nominal value). On [2014-2016], LG Chem received from the Chinese authorities a preliminary incentive offer of USD [40-85] million, in the form of a cash grant and of approximately USD [12-26] million, in the form of tax incentives (e.g. exemption from land acquisition price, gradually reduced exemptions from corporate income tax, value added tax, and property tax for 10 years). In January 2017, the distinct investment project was reduced in scope (from USD [450-900] million to USD [280-630] million), and the Chinese incentive offer was subsequently reduced. The Polish authorities claim that the final incentive offer for the distinct investment project included support in the form of a cash of USD [35-85] million, but lower additional tax incentives. The Chinese aid intensity of the distinct investment project was then calculated by LG Chem conservatively taking into account only the cash grant⁽³⁰⁾ at [10-20] % (i.e. the cash aid offer of USD [35-85] million divided by the total costs of the investment project of USD [280-360] million).
- (42) Given that LG Chem was not in the possession of a Chinese incentive offer for the counterfactual scenario of the notified investment when the planning of the project started in July 2017, LG Chem therefore estimated conservatively that it would receive Chinese aid of EUR 106 million (i.e. in a slightly lower aid intensity than it had received in the past for the distinct investment project). Consequently, LG Chem used this estimation in the calculations of the net present value ('NPV') of the counterfactual scenario.
- (43) Poland thus considers the notified aid of EUR 70 million justified to bridge the viability gap.

Evidence as to the aid negotiation process in China

- (44) The Polish authorities explained that negotiations between LG Chem and the [...] Economic and Technological Development Zone Committee concerning an aid package for the notified investment had started in early 2017 and continued until November 2017. Poland claims that the exact content of the negotiated incentive package or of the negotiating discussions up to 9 August 2017 was not documented in writing. For the aid negotiations after (and including) that date, Poland submitted the following documentary evidence:

⁽³⁰⁾ LG Chem explained that the tax incentives received less emphasis in LG Chem's internal decision making process because their cash amount was considered hard to predict.

- (a) Slides and notes from a meeting that took place on 9 August 2017 (i.e. before the location decision) between a delegation representing the [...] Development Zone and LG Chem. The slides prepared by the Chinese authorities present potential Chinese locations for the investment, but contain no reference to potential subsidies. The Polish authorities claim that in the meeting, LG Chem sought confirmation of alleged earlier promises that an appropriate plot of land would be available for the investment and that public support would be granted by the Chinese authorities. The minutes prepared by LG Chem suggest that the Chinese authorities provided the verbal confirmation during the meeting that the *'ratio of preferential policies to total investment will refer to previous LGC investments in the development zone'*.
- (b) A thank you letter dated 17 August 2017, sent by the [...] Development Zone Committee to LG Chem, containing no reference to any reached agreement as regards the location of the investment or the existence and content of the incentive offer.
- (c) An unstamped written offer of incentives dated 18 September 2017. According to Poland, such an offer letter before the signature of the contract constituted a rather special and unusual event, as offer letters are neither a customary nor a necessary procedure in China. The unstamped offer refers to a number of aid measures totalling USD [180-360] million for investment costs of USD 1,2 billion (aid intensity of approximately [15-30] %, of which [13-17][...] % in cash, and the remaining [3-7] [...] % in tax incentives).
- (d) Given that an official stamp bears legal significance in China, LG Chem requested the Chinese aid granting authority to provide a stamped incentive offer. The stamped offer was received on 13 November 2017. It refers to an investment of USD 1,1 billion, and cuts the incentive package to USD [165-275] million (aid intensity of approximately [16-21] %, of which [11-16] % in cash, [3-7] % in tax incentives).
- (45) Even though LG Chem did not have a written aid offer from the Chinese authorities when they decided to locate the investment in Poland, the Polish authorities consider it very likely that the expected Chinese aid would have materialized on the basis of the beneficiary's previous experience conducting investments in China and verbal indications received by LG Chem from the Chinese authorities.

3.3.3. *Decision-making process*

- (46) Poland explained that LG Chem Ltd decided on the investment in several steps, involving four different corporate bodies, each with different competencies.
- (47) As required by LG Chem Ltd's Corporate Investment Guidelines, the investment plan was prepared by the Automotive Battery Division and submitted in a first step, on 31 July 2017, for review to the President of the Energy Solutions Company. The original investment plan envisaged a project with a scope slightly larger (i.e. total investment costs of app. EUR [...] billion) than the one that notified to the Commission. The President of the Energy Solutions Company, approved the project after examining the data for both locations and the feasibility figures.
- (48) In a second step, LG Chem Ltd's Chief Financial Officer (CFO) conducted an examination of the project's financials and profitability and rejected it on 1 August 2017 on the grounds that the project in Poland was insufficiently profitable.
- (49) Following this rejection, in a third step, the scope of the investment was reduced and the project resubmitted for review on 2 August 2017 to the President of the Energy Solutions Company who consequently approved it.
- (50) In a fourth step, LG Chem Ltd's CFO examined the project in its reduced scope and approved it on 3 August 2017, provided that the maximum allowable aid would be granted in Poland.
- (51) In a fifth step, the investment report was submitted to LG Chem Ltd's Corporate Investment Committee (CIC) where the project was discussed and approved on 16 August 2017. The CIC approved the project with respect to its feasibility and its location in Poland.
- (52) The decision of the CIC to locate the investment project in Poland was final, and constituted the basis for the investment proposal which was submitted in the sixth and final step to LG Chem Ltd's Board of Directors which gave on 29 August 2017 the final greenlight to carry out the investment project on condition that the project would receive the maximum available State aid from Poland. The Polish authorities explained that while LG Chem's CIC is normally responsible with the irreversible decision concerning the location of the investment, the Board of Directors takes a YES/NO decision to pursue the investment as approved by the CIC, but does not re-evaluate the alternative investment locations.

3.4. Proportionality of the aid

- (53) The Polish authorities consider the aid does not exceed the minimum necessary to incentivise LG Chem to locate the investment in Poland, as the viability gap between the two locations, quantified by LG Chem at EUR 77,3 million (in present value), is higher than the aid package of EUR 70 million (in present value, calculated using the company's WACC of [8-10,5] % as a discount rate). LG Chem is prepared to bear the remaining cost disadvantage in view of certain qualitative and strategic factors in favour of Poland, such as the proximity to customers.

3.5. Avoidance of undue effects on competition and trade

- (54) The Polish authorities confirmed that the aided facility will produce batteries to be used mainly in EVs and that these will not replace any other products produced by the beneficiary. In fact, the European car producers signed take-off agreements for almost the entire production capacity of the notified investment. Furthermore, at its production sites abroad, LG Chem uses distinct and separate cell assembly lines for EV and energy storage systems (ESS) applications as the respective types of cells are different in size and other characteristics.
- (55) The project covers the full vertical chain of production, from electrodes, to battery cells, modules, and battery packs.
- (56) The Polish authorities suggest that the market for Li-ion batteries is the global market. At present, the bulk of global production EV battery capacities is located in Asia (mostly in China and South Korea). For that reason, most of the supply flows to Europe from Asia.
- (57) As the investment would take place in any event, even without the aid, the aid, and the location of the investment, has no effect on competition. Furthermore, the global and EEA markets for EV batteries are set for exponential growth in the next decade. Therefore, whatever the definition of the geographic market, the aid is unlikely to impede dynamic incentives or hamper exit or entry on the market.
- (58) The Polish authorities emphasize that the aid has no counter-cohesion effect in the meaning of paragraph 121 of the RAG, as the alternative location is not in the EEA.
- (59) Finally, the Polish authorities informed that the beneficiary confirmed that, at group level, it has not closed down the same or similar activity in the EEA in the two years preceding the aid application and does not intend to close down the same or similar activity elsewhere in the EEA in the two years after the completion of the investment. The aid therefore does not lead to the relocation of activities affecting other EEA Member States.

4. ASSESSMENT OF THE MEASURE/AID

4.1. Existence of aid

- (60) The public support is/was awarded by Poland in the form of a cash grant, land sale at preferential price, a real estate tax exemption, and a corporate income tax exemption. It is administered by the public bodies and it is based on the regulations indicated in recital (12). The support was/will be given by the Member State and financed through State resources within the meaning of Article 107(1) TFEU.
- (61) As the public support is granted to a single company, LG Chem, the measure is selective.
- (62) The public support will relieve LG Chem from costs that it normally would have to bear itself, and therefore the company benefits from an economic advantage over its competitors.
- (63) The measure is likely to affect trade between Member States as trade between Member States exists in the EV battery sector.
- (64) As the measure favours LG Chem, competition is distorted or is threatened to be distorted.
- (65) Consequently, the Commission considers that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

4.2. Legality of the aid measure

- (66) If the regional investment aid amount to be granted from all sources exceeds the notification threshold laid down in Article 4(1)(a) of the GBER, the aid is not covered by the exemption provided for by the same GBER, and has thus to be notified individually to the Commission. In the Dolnoślaskie region, the applicable threshold is EUR 18,75 million, in accordance with paragraph 20(n) of the RAG and the Polish regional aid map that stipulates a maximum aid intensity of 25 % for the respective region. The aid package, which constitutes the aid measure, described in recital (12) of this decision exceeds this amount, and therefore the planned aid measure cannot be exempted from notification.

- (67) The Commission notes that the Polish authorities have put part of the aid measure into effect before a final Commission decision on its compatibility was forthcoming. More specifically, the aid granting agreement for the CIT exemption — indicated by the Polish authorities as the SEZ Permit No. 319/2017 — does not contain a standstill clause making the granting of aid conditional upon a positive Commission decision (please see also recital (12)(c) of this decision). Therefore, the Commission considers that the respective aid was put into effect on 20 September 2017, i.e. the date on which the permit was issued, and constitutes therefore illegal aid from the date of its granting as it was implemented in breach of Poland's standstill obligation under Article 108(3) TFEU.

4.3. Assessment of the aid measure

- (68) Having established that the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, it is necessary to examine whether the investment project is eligible for aid and whether the measure can be found compatible with the internal market.
- (69) As the objective of the measure is to promote regional development in an area designated in accordance with Article 107(3)(a) TFEU, and the aid is to be granted in the period between 1 July 2014 and 31 December 2020, the legal basis for its assessment is Art. 107(3)(a) TFEU, as interpreted by the RAG 2014-20.
- (70) In line with the provisions of the RAG, the Commission will first establish whether the notified investment project can be found eligible for regional aid. The Commission will then verify the compatibility of the notified aid measure in application of the assessment principles laid down in the RAG.

4.3.1. Eligibility of the notified project

- (71) The notified investment project is carried out in Biskupice Podgórne in the Dolnoślaskie region, an area eligible for regional aid pursuant to Article 107(3)(a) TFEU ('a-area') in accordance with the Polish Regional Aid Map. Pursuant to paragraph 34 of the RAG, in a-areas initial investments by large undertakings may benefit from regional investment aid.
- (72) Pursuant to paragraph 20(h) of the RAG an initial investment means an investment in tangible and intangible assets related to, in particular, the extension of the capacity of an existing establishment. As the project involves the extension of the capacity of an existing establishment consisting in a vertically integrated Li-ion batteries manufacturing plant, it represents an initial investment within the meaning of paragraph 20(h) of the RAG.
- (73) According to paragraph 20(e) of the RAG, and within the limits defined in that paragraph, the costs for new assets for LG Chem's investment are in principle eligible for regional aid ⁽³¹⁾.
- (74) Therefore, the Commission considers that the notified project is eligible for regional aid if all compatibility criteria of the RAG are met.

4.3.2. Compatibility of the aid measure

- (75) The Commission communication on state aid modernisation ⁽³²⁾ of 8 May 2012 called for the identification and definition of common principles applicable to the assessment of the compatibility of all aid measures. In their section 3, the RAG define and operationalise these common assessment principles for the purposes of regional aid.
- (76) In accordance with these principles, the compatibility of the measure is assessed in three steps:
- in a first step, it is checked whether **minimum requirements** regarding credibility of counterfactual scenario, appropriateness, incentive effect, and proportionality of the aid and its contribution to regional development are met (see RAG, sections 3.2-3.6);
 - in a second step, it is verified, that the aid does not lead to **manifest negative effects on competition or trade** (blacklist) that would prohibit the granting of aid, e.g. aid creating overcapacity in a sector in absolute decline, exceeding the allowable maximum aid intensity ceiling, attracting an investment that would have gone without the aid to another region with a similar or worse off socio-economic situation, or causal for the closure of activities elsewhere in the EEA (see RAG, section 3.7.2);

⁽³¹⁾ Pursuant to paragraph 20(e) of the RAG eligible costs means, for the purpose of investment aid, tangible and intangible assets related to an initial investment, or wage costs.

⁽³²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on EU State Aid Modernisation (SAM), COM/2012/0209 final.

— in a third step, for not blacklisted aid projects meeting the minimum requirements, a **balancing test** is carried out to ensure that the contribution to regional development outweighs the negative effects on trade and competition (see RAG, sections 3.7.1 and 3.7.4).

4.3.3. *Minimum requirements*

4.3.3.1. *Contribution to a regional objective*

- (77) The RAG require the Member State to prove in concrete terms the real and sustained contribution of the aided investment to the regional development of the target region. To help Member States in this task, Section 3.2.2. of the RAG lists a number of indicators that Member States may use in order to demonstrate the regional contribution of individual investment aid notified to the Commission.
- (78) The Dolnoślaskie region is eligible for regional aid pursuant to Article 107(3)(a) of the TFEU.
- (79) The Commission takes note that Poland invokes positive regional effects of the investment (see section 3.1 of this decision). The number of jobs created (both direct and indirect), clustering effects and knowledge spill overs invoked by Poland are among the indicators listed in section 3.2.2 of the RAG.
- (80) To prove the real and sustained contribution, the Member State also has to show that the viability of the project is demonstrated by a financial contribution of the aid beneficiary of at least 25 % of the eligible costs⁽³³⁾, provided through its own resources or by external financing, in a form that is free of any public financial support. In addition, the investment (the aided assets) has to be maintained in the area concerned for a minimum period of five years (three years for SMEs) after completion of the investment⁽³⁴⁾. The Commission notes that the beneficiary will contribute at least 25 % of the eligible costs, and commits to keep the investment for five years after completion of the project in the area concerned (see recitals (23) and (24) of this decision).
- (81) Thus, at this stage, the Commission does not exclude that the investment contributes to regional development. However, as indicated in recitals (111) and (112) of this decision, the Commission has doubts, at this stage of the assessment, on the incentive effect of the aid and is not convinced that the investments would not take place in absence of the aid.
- (82) Consequently, the Commission has doubts as to the contribution of the aid to regional development of the target region and thus to the achievement of a common objective.

4.3.3.2. *Need for state intervention*

- (83) According to Section 3.3 of the RAG, in order to assess whether State aid is necessary to achieve the objective of common interest, it is necessary to first diagnose the problem to be addressed. State aid should be targeted towards situations where aid can bring about a material improvement that the market cannot deliver itself.
- (84) As established in paragraph 49 of the RAG, state intervention is considered justified for the development of the areas included in the regional aid map. The Commission notes that Biskupice Podgórne (situated in the Dolnoślaskie region) is eligible for regional aid pursuant to Article 107(3)(a) of the TFEU, which is in line with Section 3.2. of the RAG.

4.3.3.3. *Appropriateness of regional aid / the aid instrument*

- (85) According to paragraph 50 of the RAG, the notified aid measure must be an appropriate policy instrument to address the policy objective concerned; the paragraph underlines that an aid measure will not be considered compatible if other less distortive policy instruments or other less distortive types of aid instruments are available. Section 3.4 therefore introduces a double appropriateness test. Under the first appropriateness test, Member States have in particular to identify the bottlenecks to regional development and the specific handicaps of firms operating in the target region, and to clarify to what extent bottlenecks to regional development could also successfully be targeted by non-aid measures. Under the second appropriateness test, the Member State has to indicate why — in view of the individual merits of the case — the chosen form of regional investment aid is the best instrument to influence the investment or location decision.

⁽³³⁾ See paragraph 38 of the RAG.

⁽³⁴⁾ See paragraph 36 of the RAG.

- (86) The Commission notes that the neediness of the Dolnoślaskie region in general is confirmed by its status as a region eligible for regional aid in accordance with Article 107(3) (a) TFEU. The Dolnoślaskie region, which had a GDP per capita of 65,33 % of the EU average⁽³⁵⁾ remains amongst the disadvantaged regions of the EU. The Commission accepts that infrastructural developments and other general measures alone are insufficient to reduce the given regional disparities. In such an economic situation, State aid has already been acknowledged by the Commission's case practice as an appropriate means to address the economic shortcomings (e.g. in the LG Chem 1⁽³⁶⁾ and Mondi SCP⁽³⁷⁾ decisions under the RAG, as well as in the AUDI decision⁽³⁸⁾ under comparable provisions of the Communication from the Commission on the criteria for an in-depth assessment of regional aid to large investment projects⁽³⁹⁾).
- (87) Therefore, the Commission accepts that State aid, and regional investment aid in particular, is an appropriate form of support to achieve the cohesion objective for the Dolnoślaskie region.
- (88) The aid is granted in the form of a direct grant combined with land sale at preferential price and corporate income tax credit and real estate tax exemption. The Commission considers that this aid package, which constitutes the aid measure, would in principle be an appropriate instrument to bridge viability gaps since other less distortive aid instruments such as reimbursable loans would not address the needs of the beneficiary. However, the Commission has doubts as to the existence of a real viability gap between the two alternative investment locations (please see recital (111) and (112) of this decision). Therefore, the Commission raises doubts whether this aid can be declared compatible as it considers that a similar contribution to regional development could possibly be achieved by other more efficient means.

4.3.3.4. Incentive effect

- (89) According to section 3.5 of the RAG, regional aid can only be found compatible with the internal market if it has an incentive effect. An incentive effect is present when the aid changes the behaviour of an undertaking in a way that it engages in additional activity contributing to the development of an area which it would not have engaged in without the aid or would only have engaged in such activity in a restricted or different manner or in another location. The aid must not subsidise the costs of an activity that an undertaking would have incurred in any event and must not compensate for the normal business risk of an economic activity.
- (90) Paragraphs 64-65 of the RAG, as referred to by paragraph 69 of the RAG, set out the formal incentive effect requirements, i.e. works on an individual investment can start only after submitting the application form for aid. As the beneficiary applied for aid on 11 August 2017, 14 and 21 September 2017, i.e. before start of works on the investment on 1 October 2017, this condition has been respected.
- (91) As there are many valid reasons for a company to locate its investment in a certain region, even without any aid being granted, the RAG requires the Commission to verify in detail that the aid is necessary to provide a substantive incentive effect for the investment. In this context — as set out in section 3.5.2 of the RAG — the Member State is required to provide a comprehensive description of the counterfactual scenario in which no aid would be granted to the beneficiary. The Commission has to verify that these scenarios are realistic and credible.
- (92) Paragraph 69 of the RAG requires the Member State to demonstrate to the Commission the existence of the incentive effect of the aid and to provide clear evidence that the aid effectively had an impact on the investment choice or the location choice. It thus places the burden of proof regarding the existence of an incentive effect on the Member State.
- (93) Paragraph 61 of the RAG stipulates that the (substantive) incentive effect can be proven in two possible scenarios: in the absence of aid the investment would not be sufficiently profitable in any location (scenario 1); in the absence of aid the investment would take place in another location (scenario 2).
- (94) The Commission notes that Poland presents the incentive effect in the context of a scenario 2 situation. The Polish authorities justify the aid by invoking a net present value viability gap of EUR 77,3 million compared to an alternative investment location in [...], China where LG Chem controls via a joint venture other EV battery production facilities.
- (95) Therefore, it is claimed that the aid of EUR 70 million partly compensates for the net disadvantages of EUR 77,3 million linked to the decision to locate the investment in Poland as compared to China.

⁽³⁵⁾ As shown in Annex 1 of the RAG 2014-2020.

⁽³⁶⁾ SA.47662 LIP — Aid to LG Chem Wrocław Energy Sp. z o.o., 28.1.2019.

⁽³⁷⁾ SA.41768 LIP — Investment aid to Mondi SCP; OJ C 400, 24.11.2017.

⁽³⁸⁾ SA.36754 LIP — HU — Aid for AUDI HUNGARIA MOTOR Ltd; OJ L 310, 17.11.2016.

⁽³⁹⁾ OJ C 223, 16.09.2009, p. 3.

- (96) Paragraph 62 of the RAG clarifies that aid that does not stimulate '(additional) investment in the area concerned, ... lacks incentive effect to achieve the regional objective and cannot be approved as compatible with the internal market'.
- (97) Paragraph 71 of the RAG indicates that for scenario 2 — which is invoked by the Polish authorities in the present case — the Member State could prove the incentive effect of the aid by providing company documents showing that a comparison has been made between the costs and benefits of locating in the area concerned and those in the alternative area. For that purpose, the Member State is, in particular, invited by paragraph 72 of the RAG to rely on official board documents, risk assessments, financial reports, internal business plans, expert opinions, other studies and documents that elaborate on various investment scenarios.
- (98) To verify the viability in a scenario 2 context, all relevant costs and revenues have to be taken into account, with the exception of possible subsidies available in the alternative location, where this alternative location is in the EEA.
- (99) The Commission notes that the Polish authorities submitted the required information documenting the decision-making process of the beneficiary (at the level of the LG Chem Group) concerning the investment and location decision (see section 3.3.3 of this decision). The submitted documents explain the counterfactual scenario, which involves two comparable investments and two locations, Biskupice Podgórne in Poland and [...] in China (located outside of the EEA)⁽⁴⁰⁾.
- (100) The Commission notes that the claimed NPV gap of EUR 77,3 million is explained essentially by an incentive of approximately EUR 106 million, which LG Chem claims that it was expecting to receive in China (see recitals (40) to (42) of the present decision). Since the Chinese incentive is substantial and decisive for the claimed NPV gap in favour of the Chinese investment scenario, the Commission considers that its credibility is essential for providing the incentive effect of the aid, i.e. by showing that the aid is necessary to compensate for the net disadvantages and costs of locating the investment in Poland instead of China.
- (101) However, as described in recital (44) of the present decision, at the moment of the location decision in favour of Poland (i.e. on the 16 August 2017), LG Chem did not possess a written aid offer from the Chinese authorities for its alternative investment in China. As described in recital (44)(a) of the present decision, the only evidence available at that date consisted in LG Chem's anticipation that it would receive from the Chinese authorities aid in an amount similar to what it had received in the past for a previous investment project and a verbal reference allegedly made to it by a senior Chinese official representing the potential aid grantor in a meeting which took place on the 9 August 2017.
- (102) In this context, the Commission reminds that it is required — by paragraph 71 of the RAG — to verify that the comparisons of the costs and benefits of the alternative investment scenarios have a realistic basis. Paragraph 68 of the RAG further clarifies that, for non-notifiable investment projects pursued by large companies under investment aid schemes, 'a counterfactual is credible if it is genuine and relates to the decision-making factors prevalent at the time of the decision by the beneficiary regarding the investment'. By analogy with paragraph (68) of the RAG, the Commission considers that at least the same standard concerning the credibility of the counterfactual is required for individual investment aid that exceeds the notification thresholds
- (103) At this stage, the Commission considers that the evidence provided by LG Chem to justify its expectations of aid in China and available at the time of the location decision (i.e. of 16 August 2017, see recital (44)), is insufficient to conclude that the anticipated Chinese subsidy has 'a realistic basis', and can therefore be taken into account in the NPV calculations. In particular, the Commission considers that LG Chem's previous experience in pursuing investments in China and the alleged verbal indications received from the Chinese authorities on 9 August 2017 (see recital (44)(a)) constitute insufficient proof that the Chinese aid would have materialized if the investment project in China would have been pursued. The Commission considers that the fact that LG Chem took the irreversible decision to locate the investment in Poland before obtaining at least a written aid offer from the Chinese authorities represents an indication that China was not a credible alternative investment location to Poland and that the beneficiary was prepared to pursue the investment in Poland in any event (i.e. with or without the Polish aid).
- (104) In view of the above, the Commission considers that at this stage it cannot conclude without any doubt that LG Chem was justified to take the Chinese aid offer into account in the calculation of the viability gap between the alternative investment locations.

⁽⁴⁰⁾ The only other possible location considered by the company, LG Chem's battery cell plant in [Asia outside of China] — was excluded early in the decision making process due to its high labour costs when compared to Poland or China.

- (105) The Commission notes that if the Chinese incentive is excluded from the viability gap calculations, the claimed viability gap disappears and the project is more viable in Poland than in China by EUR 28,6 million.
- (106) On the basis of the analysis above, the Commission raises doubts on the credibility of the investment incentive in China, and the claimed NPV gap of EUR 77,3 million, and thus on the incentive effect of the aid of EUR 70 million that the Polish authorities in part intend to, and in part have already granted to LG Chem.
- (107) The Commission considers that a further element might raise doubts as to the credibility of the Chinese investment scenario, namely the existing hostile political environment in China towards South Korean investors, at the time of the investment decision.
- (108) The Commission considers that the state of the political relations between China and South Korea at the time of LG Chem's investment decision are relevant for the assessment of the credibility of the alternative investment scenario. According to press reports ⁽⁴¹⁾, ⁽⁴²⁾, it appears that since 2016, South Korean EV battery producers in China have been facing a particularly hostile economic environment due to political considerations, with the result that they were in practice largely prevented from supplying the Chinese market with their products because the Chinese authorities withdrew subsidies for EV equipped with batteries provided by the South Korean producers. This political risk is acknowledged in the internal documents presented to LG Chem's decision makers.
- (109) In view of the above, at this stage the Commission cannot exclude that the strategic considerations for investing in Poland, e.g. geographic closeness to clients and easier outbound logistics, combined with the hostile investment climate in China towards South Korean EV battery producers would not have led the company to invest in Poland in any event, even in the presence of the claimed viability gap.
- (110) Considering all the factors presented above, the Commission is therefore of the preliminary view that the regional aid was not crucial for a positive location decision in favour of Poland.
- (111) Therefore, at this stage, the Commission has doubts on the credibility of the Chinese incentive at the moment of the location decision and on the claimed NPV gap of EUR 77,3 million between China and Poland, and thus on the incentive effect of the aid of EUR 70 million that the Polish authorities intend to grant (and in part have already granted) to LG Chem.
- (112) In addition, the Commission raises doubts on the credibility of the Chinese counterfactual investment scenario, as it cannot exclude that a combination of factors such as the quickly expanding European market, the proximity to European customers, and the hostile political and economic climate in China, would not have constituted overriding strategic considerations that would have led the company to locate its investment in Poland in any event, even in the absence of aid.
- (113) The Commission calls upon interested parties to comment on the doubts raised on the credibility of the Chinese incentive at the moment of the location decision, of the NPV viability gap, on the credibility of the counterfactual investment scenario, and on the substantive incentive effect of the aid.

4.3.3.5. *Proportionality of the aid amount*

- (114) According to section 3.6 of the RAG, the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned. Therefore, the assessment of the proportionality of the aid amount can only be carried out once the incentive effect of the aid is confirmed. As a rule, notified individual aid will be considered to be limited to the minimum, if the aid amount corresponds to the net extra costs of implementing the investment in the area concerned, compared to the counterfactual in the absence of aid.
- (115) For scenario 2 situations, according to paragraph 106 of the RAG, the Member State must demonstrate the proportionality based on documentation such as that referred to in paragraph 72 of the RAG.
- (116) Pursuant to paragraph 80 of the RAG, in scenario 2 situations (location incentives), the notified aid should not exceed the difference between the net present value of the investment in the target area and the net present value in the alternative location, while taking into account all relevant costs and benefits in the NPV calculations. Where the alternative investment location is in the EEA, subsidies granted in that other location are not to be taken into account. The corollary of this is that where the alternative investment location is not in the EEA (as in the present case), subsidies granted in that other location can be taken into account in the NPV calculations.

⁽⁴¹⁾ https://www.upi.com/Top_News/World-News/2018/05/23/Chinese-cars-with-South-Korean-batteries-turned-down-for-subsidies/3141527092277/

⁽⁴²⁾ http://www.koreatimes.co.kr/www/tech/2020/04/129_287517.html

- (117) The Commission reminds that it had expressed doubts on the credibility of the information submitted for scenario 2 and considers that the NPV gap between the two alternative investment locations is unrealistic, as it is based on the — *prima facie* — insufficient proof that an aid was granted or about to be granted in China.
- (118) Therefore, at this stage, the Commission takes the view that the aid would not be proportional, as it doubts that the aid is limited to the minimum necessary to trigger the investment location in favour of Poland. In fact, based on the NPV calculations and the insufficient proof as to the aid in China, it appears that no aid would be required to attract the investment project to Poland.

4.3.3.6. Conclusion as to the respect of the minimum requirements

- (119) Based on its assessment, reflected in recitals (77) to (118) of this decision, the Commission is at this stage unable to confirm that all minimum requirements laid down in sections 3.2 to 3.6 of the RAG, in particular those relating to the contribution to a common objective, appropriateness, incentive effect, and proportionality of the aid, are met. The Commission therefore raises doubts as to the compatibility of the aid, in particular with regard to its contribution to a common objective, its appropriateness, its incentive effect, and its proportionality.

4.3.4. Manifest negative effects on competition and trade

- (120) The Commission reminds that the analysis of manifest negative effects is relevant only if the Commission finds that the minimum requirements described in recital (76) of the present decision are fulfilled. Even if an aid met all minimum requirements, its compatibility could be affected by manifest negative effects on competition and trade, or an insufficient compensation of its negative effects by its positive effects.
- (121) Section 3.7.2 of the RAG explicitly identifies a series of situations where the negative effects on trade and/or competition manifestly outweigh any positive effects, and where regional aid is prohibited.

4.3.4.1. Manifest negative effect on trade: The (adjusted) aid intensity ceiling is exceeded

- (122) A manifest negative effect would exist according to paragraph 119 of the RAG where the maximum aid intensity of the project is exceeded. This would be the case where the proposed aid amount exceeds, compared to the eligible (standardised) investment expenditure⁽⁴³⁾, the maximum (adjusted) aid intensity ceiling that applies for a project of the given size, taking into account the required 'progressive scaling down'⁽⁴⁴⁾.
- (123) The applicable regional aid ceiling for large undertakings in the Dolnoślaskie region area is 25 % (see recital (4) of the present decision). In view of the expected higher distortion of competition and trade, the maximum aid intensity for large investment projects must be scaled down using the mechanism as per paragraph 20(c) of the RAG.
- (124) On the basis of the total eligible costs of the notified project of PLN 4 468 941 000 (EUR 1 054 244 161) in nominal value, and the expenditure breakdown per year, the Commission has established that the discounted value (in 2017) of the total eligible expenditure is PLN 4 261 117 075 (EUR 994 960 440). By applying the regional ceiling of 25 % Gross Grant Equivalent (GGE) and the scaling-down rules⁽⁴⁵⁾ of paragraph 86 and 20(c) of the RAG, the Commission has calculated that the corresponding maximum total aid for the notified investment project is PLN 401 948 921 (EUR 94 821 637) in discounted value, equivalent to a maximum adjusted aid intensity of 9,53 %. The Polish authorities consider that the actual aid intensity of the notified project is 8,58 %. On this basis, the maximum adjusted aid intensity ceiling for the notified project would not be exceeded.
- (125) As described in recital (19) of the present decision, the notified investment project and the earlier investment pursued by LG Chem in the same location constitute a SIP within the meaning of paragraph 20(t) of the RAG. Therefore, the maximum aid amount for the SIP, calculated on the basis of the scaling-down rules of paragraph 86 and 20(c) of the RAG must also be respected.

⁽⁴³⁾ The standardised eligible expenditure for investment projects by large firms is described in detail in section 3.6.1.1 and 3.6.1.2 of the RAG.

⁽⁴⁴⁾ See paragraph 86 and 20(c) of the RAG.

⁽⁴⁵⁾ The adjusted aid amount means the maximum permissible aid amount for a large investment project, calculated according to the following formula: maximum aid amount = $R \times (50 + 0,50 \times B + 0,34 \times C)$, where R is the maximum aid intensity applicable in the area concerned, excluding the increased aid intensity for SMEs, B is the part of eligible costs between EUR 50 million and EUR 100 million and C is the part of eligible costs above EUR 100 million.

- (126) The Polish authorities consider that aid for the SIP amounts to EUR 119 154 997 in discounted value⁽⁴⁶⁾, for a proposed eligible expenditure of EUR 1 281 235 227 in discounted value, corresponding to an aid intensity of 9,30 %. By applying the regional ceiling of 25 % Gross Grant Equivalent (GGE) and the scaling-down rules of paragraph 86 and 20(c) of the RAG, the Commission has calculated that the corresponding maximum total aid for the SIP is EUR 119 154 997 in discounted value, equivalent to a maximum aid intensity of 9,30 % (i.e., the same values as those indicated by the Polish authorities). On this basis, the maximum adjusted aid intensity ceiling for the SIP would in principle also not be exceeded.
- (127) However, the Commission notes that the SEZ permit, which gives LG Chem the right to invoke the corporate tax exemption for revenues from the project does not specify the corresponding aid amount, but only the maximum eligible costs of EUR 1 054 244 195⁽⁴⁷⁾, in nominal value. The Commission also notes that the aid granting act corresponding to the corporate income tax exemption (i.e. the SEZ permit) does not mention the other aids to be granted for the same investment project. Absent these details from the aid granting act, the Commission considers that it is not obvious that the aid measure in the form of CIT exemption is limited to the amount notified of EUR 28 201 440 (in nominal value), as claimed by the Polish authorities. In fact, by applying the maximum allowable aid intensity to the maximum eligible costs specified in the permit — which appears to be the standard practice applied by the Polish authorities to determine the maximum aid amount corresponding to such permits — the maximum aid amount in the form of CIT exemption would be of EUR 94 821 637 million. The Commission notes also that the individual aid granting act (permit) does not specify the method by which compliance with cumulation rules will be ensured. Therefore, at this stage, the Commission considers that this aid was already granted *in toto* on 20 September 2017, when LG Chem received — via the permit to conduct business in the Tarnobrzeg Special Economic Zone — the entitlement to the corporate tax exemption for its income generated as a result of the notified investment project. In this situation, both the maximum adjusted aid intensity ceiling for the notified project⁽⁴⁸⁾ and the maximum adjusted aid intensity ceiling for the SIP⁽⁴⁹⁾ are exceeded. In any event, in the absence of the mentioned details and information in the SEZ permit (i.e., the other aids to be granted for the same investment project and the rules on cumulation), there is a risk that the maximum adjusted aid intensity ceilings for the notified project and SIP are exceeded.
- (128) The Polish authorities claim that certain safeguards are implemented at the level of the payment of the aid, which ensure that the maximum aid intensity is not exceeded. They consider that the respect of the aid intensity ceilings is required by national law and suggest that the fiscal authorities are prepared to control the respect of maximum aid ceilings at the level of payment of the aid (i.e. when the tax exemptions are invoked in the relevant fiscal years). In particular, according to Poland, enterprises operating in special economic zones are obliged to provide, together with the annual tax declarations, a separate form (i.e. CIT/8S) comprising information on the revenues obtained in the SEZ, as well as information on the amount of aid(s) received from other sources for the same investment project. Similar cumulation controls at the level of the payment of the aid do not appear to be required for other authorities responsible for the payment of aid, besides the relevant fiscal authorities.
- (129) With regards to the above, the Commission first notes that cumulation rules need to be ensured by the relevant granting authorities both at the moment(s) when the individual aids are granted, as well as at the moment when the respective aids is/are paid out. In this regard, paragraph 92 of the RAG requires the first granting authority to calculate in advance the maximum permissible aid intensity per project. In view of recital (128), the Commission considers that effective cumulation control at the level of the awarding of the aid is not ensured in the present case. The Commission also notes that cumulation controls at the level of the payment of the aid appear to be insufficient for two reasons: first, the controls rely on self-declarations of the aid beneficiaries, and second, the respective controls appear to take place only at the level of the fiscal authorities responsible for the payment of some parts of the aid, but not at the level of the other authorities involved in the payment of aid.
- (130) In view of the above, at this stage, the Commission raises doubts as to whether there are sufficient safeguards that the total aid from all sources will not exceed the maximum permissible aid intensity for both the notified project and the SIP, and thus as to the compatibility of the aid package (which constitutes the aid measure) with the provisions laid down in paragraph 92 of the RAG.
- (131) The Commission calls upon interested parties to comment on the doubts raised in recital (130).

⁽⁴⁶⁾ For calculating the discounted eligible expenditure and aid amount of the SIP, the annual amounts have been discounted to 2016 (i.e. the date when the first granting authority calculated in advance the maximum permissible aid intensity for LG Chem's first investment project), taking into account the reference rate applicable at that time (i.e. base rate 1,83 % plus 100 basis points).

⁽⁴⁷⁾ This amount is slightly different from the amount notified of EUR 1 054 244 161. The Polish authorities have not provided an explanation for this discrepancy.

⁽⁴⁸⁾ The aid intensity of the notified project is in that situation 14,64 %

⁽⁴⁹⁾ The aid intensity of the SIP is in that situation 14,29 %

4.3.4.2. *Manifest negative effects on competition: The aid creates overcapacity in a market in absolute decline*

- (132) According to paragraph 120 of the RAG, a manifest negative effect arises also where the investment aid creates capacity in a market in absolute decline, as such aid is likely to crowd out competitors, or to prevent low cost firms from entering, and risks weakening incentives for competitors to innovate. This results in inefficient market structures which are also harmful to consumers in the long run.
- (133) *Prima facie*, the Commission has doubts as to whether the aid has incentive effect at all. If the aid has no incentive effect, it cannot lead to overcapacity, as the investment would have happened in any event.
- (134) If the aid had incentive effect and was limited to the minimum necessary, this verification stipulated in paragraph 120 of the RAG would be necessary only where additional capacity is created on the relevant geographic market by the aid. Where the investment would have happened in any event ('scenario 2') in the same geographical market, the aid — provided it is limited to the minimum necessary to change the location decision — influences only the location decision, and additional capacity would have come on the relevant geographic market independent of it. Therefore, this verification will normally be required only in Scenario 1 situations⁽⁵⁰⁾ or in those Scenario 2 situations where the alternative locations (i.e. the target region and the alternative, more viable region for the implementation of the project) are located in different geographic markets.
- (135) In order to determine whether this verification is necessary in the case at hand, the Commission has to assess and establish whether the two alternative locations are situated in different geographical markets. If the locations under consideration are in fact situated in different geographical markets, or if the Commission leaves open the question whether the two locations are situated on the same or different geographical markets, the 'overcapacity in a declining market' test needs to be carried out.
- (136) To verify whether the investment addresses a market in absolute decline — if the test is necessary — the relevant product and geographic market needs to be defined. A market is in absolute decline⁽⁵¹⁾ if it shows over an appropriate reference period a negative growth rate. The average growth rate of the market concerned (apparent consumption data or sales data) is normally measured over the last three years before the start of the project or on the basis of projected growth rate in the coming three to five years.

Product concerned

- (137) The product concerned is normally the product covered by the investment project. However, when the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned may be the downstream product.
- (138) In the case at hand, the Commission considers that the products concerned by the investment project are the battery cells. These can be sold directly to car makers, or they can be first assembled into battery modules and possibly further into battery packs, and then sold to the car makers.
- (139) Given that it is the customers who decide whether LG Chem should supply them with battery cells or modules or packs, and given that battery cell production constitutes the most substantial part of the value added of the final product, it appears reasonable to focus on the market of battery cells only. In any event, the market for battery cells is an appropriate proxy for the downstream products of battery modules and battery packs that follow the same market trends.
- (140) Therefore, the Commission considers that the battery cells represent the product concerned by the investment, and will assess the competition effects of the aid at the level of the market for battery cells. The Commission adopted the same approach also in its decision on SA.47662 in the LG CHEM 1 case and on SA.48556 in the Samsung case.

Relevant product market

- (141) The Polish authorities submit that besides the application in the automotive industry (for electric vehicles), Li-ion battery cells can find other uses, most notably in battery energy storage systems (ESS). Battery cells for energy storage systems (ESS) can be generally manufactured in the same facility as the cells for the automotive segment, thus the capacity LG Chem intends to install in Poland could in principle be used to supply cells for the ESS market as well. However, the Polish authorities explained that LG Chem has no specific plans to this effect. Furthermore, the planned installed capacity of LG Chem in Poland was already almost fully contracted to supply the automotive sector for the entire reference period of the project. Therefore, the Commission considers for the purpose of the state aid assessment for this decision that the relevant product market is the market for battery cells for electric vehicles (measured in GWh).

⁽⁵⁰⁾ See paragraph 120 of the RAG.

⁽⁵¹⁾ It might also be necessary to verify whether an absolute decline is not hidden behind the effects of business cycle effects on the product market concerned, or caused by other exceptional effects that would bias the results of the standard approach. Constantly sinking product prices might be an indicator for a situation of absolute decline, or simply the result of substantial and continuous technical progress allowing to reduce per unit production costs.

- (142) On this basis, the Commission verified whether the aid creates overcapacity in a market in absolute decline in this particular market.

Relevant geographic market

- (143) The Polish authorities submit that the relevant geographic market is global, as LG Chem Ltd has been able to negotiate contracts globally with a substantial number of car manufacturers, including many European ones. Some of these European clients are to be supplied out of Poland, while others from the other LG Chem Ltd battery manufacturing facilities in China and South Korea. Furthermore, the product itself can be shipped easily, which constitutes an additional argument militating in favour of a global geographical market.
- (144) For the purpose of the present decision, the Commission decided to leave the question of the exact definition of the geographic market open, and to proceed with the assessment of two plausible markets, the EEA market and the global market⁽⁵²⁾. Thus, the Commission has to verify whether the aid creates overcapacity in a market in absolute decline at the level of the market for EV battery cells of the EEA, and at global level.

Testing whether the aid creates overcapacity in a market in absolute decline

- (145) The Polish authorities submit that there is a widespread agreement that the demand for EV batteries will grow exponentially, both globally and in the EEA, in the following 5-10 years, driven to a large extent by environmental regulations aimed at curbing greenhouse gases and/or local pollutants, as well as related government subsidies and incentive programs.
- (146) On the basis of internal LG Chem calculations, the Polish authorities argue that the global demand for EV batteries (measured in terms of total battery capacity) is expected to grow from about [50-60] GWh in 2017 to [500-800] GWh in 2022/2023, while the EEA demand is expected to grow from about [5-10] GWh in 2017 to [200-400] GWh in 2022/2023.
- (147) The Commission agrees to the existence of a high growth potential on the global and EEA market, and therefore concludes that — regardless of the exact scope of the geographic market — the aid does not contribute to, or reinforces the creation of overcapacity in a market in absolute decline, thus it does not have a manifest negative effect on competition⁽⁵³⁾.

4.3.4.3. *Manifest negative effect on trade: Counter-cohesion effect*

- (148) Paragraph 121 of the RAG prohibits an EEA region with a lower project-specific viability to participate in 'subsidy races' to the detriment of equally weak or worse-off regions⁽⁵⁴⁾.
- (149) Poland confirms that the aid beneficiary considered in the final decision making process only one other alternative location for the investment project, namely [...], China, which is not in the EEA.
- (150) Therefore, the Commission accepts that the aid does not risk to have a counter-cohesion effect.

4.3.4.4. *Manifest negative effect on trade: Closure of activities elsewhere/relocation*

- (151) Pursuant to paragraph 122 of the RAG, where the beneficiary has concrete plans to close down, or actually closes down the same or a similar activity in another area in the EEA and relocates that activity to the target area, if there is a causal link between the aid and the relocation, this will constitute a negative effect that is unlikely to be compensated by any positive elements.
- (152) The Polish authorities and the aid beneficiary declared that the beneficiary has not closed down the same or similar activity in the EEA in the two years preceding the application for aid, and does not have any concrete plans to do so within two years after completion of the investment.
- (153) The Commission therefore accepts that the aid is not causal for any closure and relocation.

⁽⁵²⁾ In fact, a definite definition of the geographic market is not necessary in the given case in view of the general evolution of the global and the EEA market for battery cells for EV use.

⁽⁵³⁾ The market for battery cells for ESS shows also substantive growth, both at EEA and global level. Therefore, a wider definition of the product market, to include cells for EV and ESS, would lead to the same result that the market is not in absolute or relative decline, and thus that the aid — independent of the definition of the geographic market as EEA or global market, has no undue negative effect on competition.

⁽⁵⁴⁾ According to paragraph 121 of the RAG, the counter-cohesion effect resulting from aid to the detriment of a weaker or similarly weak EEA region would constitute a negative element in the overall balancing test that is unlikely to be compensated by any positive elements, because it runs counter the very rationale of regional aid.

4.3.4.5. *Conclusions as to the existence of manifest negative effects on competition and trade*

- (154) In light of the assessment in recitals (122) to (153) of this decision, the Commission concludes at this stage that it cannot exclude that the aid has manifest negative effect on competition or trade in the meaning of section 3.7.2 of the RAG, as the Commission has doubts that total aid from all sources does not exceed to maximum permissible aid intensity for both the notified project and the SIP.

4.3.5. *Balancing of positive and negative effects of the aid*

- (155) Paragraph 112 of the RAG lays down the following: 'For the aid to be compatible, the negative effects of the measure in terms of distortion of competition and impact on trade between Member states must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest. Certain situations can be identified where the negative effects manifestly outweigh any positive effects, meaning that aid cannot be found compatible with the internal market.'
- (156) As explained in recital (119), the Commission cannot conclude at this point that the notified regional aid measure satisfies the minimum requirements of the RAG in view of the doubts expressed in connection with the contribution of the aid to regional development, the appropriateness of the aid, the incentive effect and the proportionality of the aid.
- (157) Furthermore, even if the measure was to meet these minimum requirements of the RAG, if the measure has negative effects on competition and trade as pointed out in recital (154) above, the aid cannot be found compatible with the internal market.
- (158) In light of these considerations, the Commission raises doubts as to whether the positive effects of the aid outweigh their negative effects.

4.3.6. *Transparency*

- (159) In view of para.II.2 of the Transparency Communication from the Commission⁽⁵⁵⁾ Member States must ensure the publication on a comprehensive State aid website, at national or regional level, of a full text of the approved aid scheme or the individual aid granting decision and its implementing provisions, or a link to it; the identity of the granting authority or authorities; the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME/large company), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level). Such information must be published after the decision to grant the aid has been taken, must be kept for at least ten years and must be available to the general public without restrictions.
- (160) The Commission notes that the Polish authorities confirmed that all requirements concerning transparency set out in para.II.2 of the Transparency Communication will be respected.

4.4. *Doubts and grounds for opening*

- (161) For the reasons set out above (see recitals (77) to (158) of this decision), the Commission, after a preliminary assessment of the measure, has doubts as to the conformity of the measure with the provisions of the RAG concerning the appropriateness, the incentive effect, and the proportionality of the aid, as well as its contribution to a common objective. In addition, the Commission notes that it cannot be excluded that the aid exceeds that maximum (adjusted) aid intensity ceiling, and could therefore be particularly distortive. For all these reasons, the Commission raises doubts as to the compatibility of the notified aid measure with the internal market.
- (162) Consequently, the Commission is under duty to carry out all the required consultations and, therefore, to initiate the procedure under Article 108(2) of the TFEU. This will give the opportunity to third parties whose interests may be affected by the granting of aid to comment on the measure. In light of both the information submitted by the Member State concerned and that provided by third parties, the Commission will assess the measure and will take its final decision.
- (163) The Member State and interested parties are invited to provide their comments to the opening decision all information necessary to carry out this formal investigation.

⁽⁵⁵⁾ Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines (OJ C 198, 27.6.2014, p. 30.)

- (164) On the basis of the information submitted concerning the above mentioned factors, the Commission will perform a balancing exercise of the positive and the negative effects of the aid. The overall assessment of the impact of the aid will allow the Commission to take a final decision and close the formal investigation procedure.
- (165) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Poland to submit its comments and to provide all such information as may help to assess the aid, within one month from the date of receipt of this letter. Please refer in particular to the requested information listed in detail in Annex 1 to the present decision.
- (166) The Commission wishes to remind Poland that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of the Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (167) The Commission warns Poland that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
- (168) Finally, the Commission notes that Poland exceptionally agreed to have the present decision adopted in the English language.

ANNEX 1

Information requested from Poland

- (a) All existing documents (e.g. all documents that have been prepared by or for or received by the members of LG Chem's Board, Corporate Investment Committee, Chief Financial Officer, President of the Energy Solutions Company, etc.), in original language and translated into English, concerning the negotiation process for subsidies between the LG Chem Group and the Chinese authorities with respect to the counterfactual investment to the notified project.
 - (b) Information on all LG Chem investments that were ongoing or planned at the moment of the location decision (i.e. 16 August 2017) targeting the EEA and the Chinese market for the provision of EV batteries.
 - (c) With respect to the investment project started in China in [...] (the 'Distinct Investment Project'):
 - i. a detailed account of the decision-making process, including all relevant supporting documents;
 - ii. a detailed account, and all relevant supporting documents, of the negotiation process for subsidies with the Chinese authorities from its start and until the entire aid was paid (as applicable); please explain in particular whether subsidy negotiations between the two parties were still ongoing between [...] — [...], as suggested in the notes of the meeting of 9 August 2017 between the LG Chem Group and the Chinese authorities;
 - iii. a copy of the final aid/investment agreement;
 - iv. the date when the works on project started and when were they completed.
 - (d) For the avoidance of doubt, documents to be sent in reply to paragraphs (a) to (c) above shall be provided in their entirety, including those parts that deal with matters that are not included in the topics listed in paragraphs (a) to (c) above. Emails shall include the entire email chain and all attachments.
 - (e) For the avoidance of doubt, the notion 'documents' means all computer files in the possession, custody or control of the LG Chem Group and include, without limitations, the following items:
 - i. Any electronically stored information, including emails and instant messages, word processing and pdf documents, spreadsheets and slide presentations; and
 - ii. Drafts of documents, metadata and copies of documents, the originals of which are not in the possession, custody or control of the LG Chem Group, as the case may be.
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