

DECISIONS

COMMISSION DECISION (EU) 2018/1040

of 16 June 2017

on the State aid SA.32544 (2011/C) implemented by Greece in favour of the Greek Railway Group TRAINOSE SA

(notified under document C(2017) 4047)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments.

Whereas:

1. PROCEDURE

- (1) By letter dated 9 February 2011, Greece notified the Commission certain measures in favour of the Greek Railway Group — TRAINOSE SA ('TRAINOSE').
- (2) By letters dated 23 March 2011 and 5 July 2011, the Commission requested further information on the notified measures, which Greece provided by letters dated 6 May 2011 and 5 October 2011.
- (3) By letter dated 13 July 2011, the Commission informed Greece that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('Treaty') in respect of the notified measures ('Opening Decision') ⁽¹⁾. By letter dated 13 September 2011, Greece provided comments on the Opening Decision. The Commission called on interested parties to submit their comments on the Opening Decision.
- (4) By letters dated 21 December 2011, 14 February 2012, 16 March 2012, 23 March 2012, 11 June 2012, 25 October 2012, 7 February 2013, 12 March 2013, 24 July 2015, 28 January 2016, 21 April 2016, 10 October 2016 and 13 February 2017, the Commission requested further information from Greece.
- (5) Greece provided the Commission with further information by letters dated 5 October 2011, 20 January 2012, 14 May 2012, 4 July 2012, 26 March 2013, 26 August 2015, 15 February 2016, 10 March 2016, 23 May 2016, 2 December 2016, 5 December 2016, 9 December 2016, 31 January 2017 and 27 March 2017.
- (6) By letter dated 1 July 2013, Greece notified the Commission that it had decided to withdraw the measure relating to the transfer of the ownership of five terminals from Hellenic Railways Organisation (Οργανισμός Σιδηροδρόμων Ελλάδος, O.S.E. or 'OSE') to TRAINOSE (Measure 6, as described in Section 3.6). By letter dated 9 December 2016, Greece notified the Commission of the fact that it had decided to withdraw the measure relating to the second tranche of the equity increase amounting to EUR 65 million in favour of TRAINOSE (Measure 2, as described in Section 3.2).
- (7) By letter dated 2 December 2016, Greece agreed exceptionally to have this decision adopted in English only.

⁽¹⁾ OJ C 272, 15.9.2011, p. 7.

2. CONTEXT OF THE MEASURES

- (8) The beneficiary of the measures is TRAINOSE, the 100 % State-owned Greek passenger and freight rail incumbent.
- (9) TRAINOSE was established in 2005, as a subsidiary of OSE. In December 2008 TRAINOSE became a separate legal entity, entirely independent from OSE.
- (10) TRAINOSE is the sole provider of rail transport services in Greece. It also provides international coach services.
- (11) Since 2008, the financial situation of TRAINOSE has steadily deteriorated. TRAINOSE has been affected by the economic situation of Greece, experiencing significant disturbances, such as a decrease in the demand for rail transport services for both passengers and freight due to the cessation of activities of certain undertakings and the inability of certain businesses to pay their bills. Between 2008 and 2012 the served passenger-kilometres decreased by 49 % and the freight tonne-kilometres dropped by as much as 64 %. This situation has resulted in a reduction of the operating revenues of TRAINOSE.
- (12) In the period between 2008 and 2012 TRAINOSE had negative earnings before interest taxes, depreciation, and amortisation (EBITDA). Further, it was having negative own equity and mounting debt until the end of 2013 as summarised in Table 1 below. Although the company has been eligible for dissolution according to the Greek legislation since at least 2008, the State, in its quality of sole owner, chose not to proceed with the dissolution of TRAINOSE.

Table 1

Overview of key financial indicators of TRAINOSE 2008-2015

(million EUR)

	2008	2009	2010	2011	2012	2013	2014	2015
Turnover	108,0	98,7	102,7	84,6	82,9	75,7	77,9	68,7
EBITDA ⁽¹⁾	- 233,0	- 231,5	- 187,5	- 33,5	- 0,25	1,1	0,1	1,6
Interest charges	0,05	0,05	0,1	0,09	0,1	0,2	0,1	0,1
EBT	- 232,2	- 231,1	- 187,3	- 33,6	- 0,3	1,95	1,5	2,8
Accumulated losses	424,5	655,6	842,9	876,5	876,2	874,2	873,1	870,6
Registered capital	153,0	213,0	213,0	213,0	213,0	213,0	213,0	213,0
Own equity	- 271,5	- 442,6	- 629,9	- 663,4	- 663,2	- 661,2	- 660,0	- 657,6
Debt	375,6	566,6	779,9	828,7	861,4	882,6	792,0	789,5
Debt/Equity ratio	- 1,38	- 1,28	- 1,23	- 1,25	- 1,29	- 1,33	- 1,2	- 1,2

⁽¹⁾ EBITDA means earnings before interest, tax, depreciation and amortisation; EBT means earnings before tax.

- (13) On 3 May 2010, in order to receive EU and IMF financial assistance loans, Greece signed a Memorandum of Understanding ('MoU') ⁽¹⁾ with the European Commission, the European Central Bank and the International Monetary Fund ('Troika'). The MoU required the privatisation of TRAINOSE since 2010 ⁽²⁾.

⁽¹⁾ Memorandum of Understanding on Specific Economic Policy Conditionality, 3 May 2010.

⁽²⁾ Under the initial timetable, the tender process for Trainose was planned to be launched in the fourth quarter of 2012, with its assets being transferred to the Greek privatisation fund.

- (14) The macroeconomic recovery programme for Greece consists of measures listed in detail in the MoU on which financial assistance from EU and IMF is conditional, i.e. reforms that Greece committed to undertake in order to address its economic challenges. The macroeconomic recovery programme has identified TRAINOSE as being in the need of restructuring due to its systemic importance for the Greek economy. Since 2010 TRAINOSE has become also part of the Privatisation Programme ⁽¹⁾ of Greece, the implementation of which has been undertaken by the Hellenic Republic Asset Development Fund SA ⁽²⁾ ('HRADF'), which is 100 % owned by the Greek State.
- (15) On 18 January 2013, Greece decided to proceed with the privatisation of TRAINOSE through the sale of shares representing 100 % of the share capital of the company ⁽³⁾. On 5 April 2013, Greece transferred all TRAINOSE shares to HRADF. On 28 June 2013, the Board of Directors of HRADF approved the process, timeline and conditions for the sale of 100 % of the share capital of TRAINOSE to an investor which would be selected through a public tendering procedure. Thereafter, HRADF published the privatisation tender for TRAINOSE ⁽⁴⁾. Even though three investors submitted their expression of interest, none of them submitted a binding offer for TRAINOSE.
- (16) The privatisation process was re-launched in January 2016. On 26 July 2016, Ferrovie Dello Stato Italiane SpA ('TRENITALIA'), a State-owned holding company that manages infrastructure and transport services on the Italian rail network, submitted a binding offer for TRAINOSE. The agreed privatisation price for TRAINOSE is EUR 45 million. The Sale Purchase Agreement ('SPA') was signed by HRADF and TRENITALIA on 18 January 2017 and the transaction is expected to be closed following the adoption of the present decision.

3. DESCRIPTION OF THE MEASURES AND THE REASONS FOR THE OPENING DECISION

- (17) In the Opening Decision, the Commission identified the following measures as potentially constituting State aid to TRAINOSE:
- (a) Measure 1: Debt cancellation.
 - (b) Measure 2: Equity increase.
 - (c) Measure 3: Annual grants to TRAINOSE for 2011-2013.
 - (d) Measure 4: The transfer of TRAINOSE's employees to other public sector employers.
 - (e) Measure 5: Service Level Agreements (SLAs) between TRAINOSE and OSE.
 - (f) Measure 6: Transfer of freight terminals from OSE to TRAINOSE.

3.1. Measure 1: Debt cancellation

- (18) Greece envisages cancelling a debt of up to EUR 748,6 million towards OSE for infrastructure charges, provision and maintenance of rolling stock and other services, which was accrued by TRAINOSE over the period 2007-2010, as shown in Table 2. The debt cancellation has not yet been implemented and is subject to the Commission's approval.

Table 2

Evolution of TRAINOSE debts towards OSE 2007-2010 ⁽¹⁾

(million EUR)

Year	Debt incurred	Accumulated debt
2007	120,9	120,9
2008	212,6	333,5

⁽¹⁾ The Privatisation Programme is laid down in Table II of Chapter B' of Law 3985/2011 on Mid-Term Fiscal Strategy Framework 2012-2015. Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding of 8 December 2010, see: <https://www.imf.org/external/np/loi/2010/grc/120810.pdf>

⁽²⁾ HRADF was established in accordance with Law 3986/2011 on Urgent Measures for the implementation of the Mid-Term Fiscal Strategy Framework 2012-2015, Greek Government Gazette A'152/1.7.2011.

⁽³⁾ Decision No 226 of 18 January 2013 of the Inter-Ministerial Committee for Asset Restructuring and Privatisations ('ICARP').

⁽⁴⁾ Decision No 232 of 5 April 2013 of the ICARP (Greek Government Gazette B'803/5.4.2013).

(million EUR)

Year	Debt incurred	Accumulated debt
2009	206,0	539,5
2010	209,1	748,0

(¹) Submission of Greece dated 27 March 2017, p. 1.

- (19) In the Opening Decision, the Commission considered that the debt cancellation would constitute State aid within the meaning of Article 107(1) of the Treaty and expressed doubts as to whether that aid would be compatible with the internal market. In particular, the Commission expressed doubts as to whether the cancellation of TRAINOSE's debts towards OSE can be considered to be compensation to TRAINOSE for discharging a public service obligation ('PSO') in absence of an entrustment act and a compensation amount established *ex ante*.

3.2. Measure 2: Equity increase

- (20) In 2009, Greece increased TRAINOSE's share capital by EUR 60 million.
- (21) Greece has informed the Commission that a second tranche of the capital increase amounting to EUR 65 million initially planned has not been implemented and will not be any more pursued and should be considered to be withdrawn.
- (22) In the Opening Decision, the Commission expressed doubts whether in 2009 a Market Economy Operator ('MEO') would have injected capital in TRAINOSE given the difficult financial situation of the company. Therefore, the Commission considered that the equity increase would constitute State aid within the meaning of Article 107(1) of the Treaty and expressed doubts as to whether that aid would be compatible with the internal market.

3.3. Measure 3: Annual grants to TRAINOSE for the period 2011-2013

- (23) Pursuant to the provisions of Regulation (EC) No 1370/2007 of the European Parliament and of the Council (¹), the annual grants to TRAINOSE for carrying out passenger transport services were limited to EUR 50 million during the period 2011 to 2013.
- (24) In the Opening Decision, due to the absence of sufficient information, the Commission expressed the doubt that the alleged PSO compensation in the form of annual grants might constitute an undue economic advantage to TRAINOSE. Therefore, the Commission took the preliminary view that the annual grants to TRAINOSE for the period from 2011 to 2013 constitute State aid within the meaning of Article 107(1) of the Treaty and expressed doubts as to whether that aid would be compatible with the internal market.

3.4. Measure 4: The transfer of TRAINOSE's employees to other public sector employers

- (25) During the period from 2011 to 2013, 593 employees of TRAINOSE were transferred to other public sector employers, such as public hospitals, Ministries, regional authorities and municipalities, universities, social insurance and pension funds and museums. For employees remaining in TRAINOSE, the salaries and privileges have been reduced.
- (26) In the Opening Decision, the Commission considered that Greece had not demonstrated the existence of a structural disadvantage in employing the employees concerned. Consequently, the Commission considered that the transfer of those employees constitutes State aid and expressed doubts as to whether this aid could be considered compatible with the internal market.

3.5. Measure 5: SLAs between TRAINOSE and OSE

- (27) Following the recommendation of the Troika to formalise the commercial relations between TRAINOSE and OSE, TRAINOSE concluded with OSE a number of SLAs concerning: (a) the provision of rolling stock maintenance; (b) the leasing of rolling stock; (c) personnel training; (d) office rental; and (e) coach rental.

(¹) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

- (28) In the Opening Decision, the Commission expressed doubts as to whether the SLAs between OSE and TRAINOSE were concluded on market terms and whether the aid would be compatible with the internal market.

3.5.1. SLA concerning the provision of rolling stock maintenance

- (29) Pursuant to the SLA concerning the provision of rolling stock maintenance concluded between OSE and TRAINOSE on [...] (*), the indicative costs for maintenance services were set at EUR [0-50] million per year. The price charged was set as a function of the costs of material and spare parts, costs of maintenance personnel and relevant administrative costs. The duration of this SLA was two years, which could be further extended by one year. The invoicing was monthly (if not possible, biannually). A clearing at the end of each year was foreseen. The SLA included clauses against both parties for the late delivery of rolling stock, for the maintenance as well as a clause against TRAINOSE in case of late payments.
- (30) Greece stated that the annual salary of OSE's maintenance personnel (EUR [25 000-50 000]) is similar to that of AMEL's (Attiko Metro Operation Company) personnel.
- (31) In the Opening decision the Commission expressed doubts whether the comparison of the maintenance cost of OSE with the full costs of AMEL, and not with the costs of AMEL's maintenance staff only, was pertinent.

3.5.2. SLA concerning the leasing of rolling stock

- (32) Pursuant to the SLA concerning the leasing of rolling stock concluded between OSE and TRAINOSE on [...] the indicative costs of TRAINOSE were set at EUR [0-50 million per year]. The SLA took into account the annual depreciation of the leased rolling stock and the financing costs of that rolling stock (i.e. the interest of the loan for obtaining the rolling stock). Invoicing was monthly (if not possible, biannual) and there was a clearing at the end of each year. The duration of the SLA with OSE was two years, with a possibility of an extension for one additional year.
- (33) In the Opening Decision the Commission expressed doubts on the market conformity of the lease, because its calculation formula included an unexplained depreciation factor of 2/3.

3.5.3. SLA concerning personnel training

- (34) Pursuant to the SLA for personnel training of [...], OSE provided TRAINOSE with technical and professional training of staff dealing with circulation and safety (e.g. training and licensing to work on electrified railway networks). The indicative costs of TRAINOSE for these services were set at EUR [0-5] million per year. The fee was a function of the total number of training hours carried out and the number of participating staff, with EUR [0-30] per hour for groups over 15 persons, EUR [20-40] per hour for groups between 10 and 15 persons and EUR [20-40] per hour for groups between 5 and 9 persons. The training was provided at OSE's premises and *in situ* on the rail network. The training charges included training personnel fees, costs of the training material, equipment, premises and all related taxes and duties. The duration of the SLA was two years, with a possibility of an extension for one additional year.
- (35) In the Opening Decision the Commission expressed doubts as to whether the submitted training fees reflected market fees, because Greece had not provided detailed information concerning similar trainings by other providers.

3.5.4. SLA concerning office rental

- (36) Pursuant to the SLA between GAIAOSE (until 2013 the real estate subsidiary of OSE) and TRAINOSE of [...], TRAINOSE was leasing offices of [0-5 000] m² for EUR [0-50 000] per month (EUR [0-15]/m²), for a period of [0-5] years. The lease was adjustable to changes of the Consumer Price Index ('CPI') on an annual basis. TRAINOSE had to deposit a guarantee of two months of lease (EUR [0-50]) for the first year, which had to be adjusted on an annual basis). All taxes, duties and expenses related to the lease (electricity, maintenance costs, etc.) were paid by TRAINOSE.
- (37) In the Opening Decision the Commission expressed doubts as to whether the monthly lease charged to TRAINOSE was market conform, as it seemed to have been calculated by TRAINOSE itself and not by an independent evaluator.

(*) Confidential information

3.5.5. SLA concerning coach rental

- (38) According to the SLA concerning coach rental concluded between OSE and TRAINOSE on [...], TRAINOSE was leasing [20-50] coaches, [0-10] tank trucks, [10-25] trucks and [0-10] passenger cars for a period of [0-5] years, with a possibility of an extension for one additional year. The costs of TRAINOSE for the coach rental was set at EUR [0-5] million per year. The lease amount was a function of the value of the vehicles on [...] [...], discounted by [5-10] % on an annual basis for depreciation. TRAINOSE paid the circulation tax as well as the maintenance and the insurance expenses.
- (39) In the Opening Decision, the Commission expressed doubts as to whether the annual leasing costs were at a market level, since they were based on the vehicles' current value whereas they should rather depend on the supply and demand for those assets.

3.6. Measure 6: Transfer of freight terminals from OSE to TRAINOSE

- (40) Initially Greece envisaged transferring five terminals owned by OSE to TRAINOSE. By letter dated 1 July 2013, Greece informed the Commission that it had withdrawn this measure.

3.7. Compatibility of the aid

- (41) In the Opening Decision the Commission expressed doubts as to whether, in the absence of complete information on the entrustment acts and compensation methodology, Measures 1 and 3 could be considered compatible with the internal market pursuant to Regulation (EC) No 1370/2007.
- (42) In the Opening Decision, the Commission also assessed the compatibility of the measures with the internal market under the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty⁽¹⁾ ('R&R Guidelines'). In particular, the Commission expressed doubts as to whether the proposed restructuring plan of TRAINOSE was based on realistic assumptions with regard to future operating conditions and whether it would restore TRAINOSE's long-term viability within a reasonable timescale. The Commission also questioned whether the proposed compensatory measures would be sufficient to compensate for the distortion of competition induced by the restructuring aid. In addition, the Commission expressed doubts as to whether TRAINOSE would be able to provide a significant own contribution to its restructuring. Moreover, in the absence of sufficient information, the Commission was unable to assess whether the 'one time, last time' criterion was complied with.
- (43) In the Opening Decision, the Commission announced that it would explore whether the notified measures may be considered compatible aid under Article 107(3)(b) of the Treaty. The Commission observed that rail transport may constitute an essential service for the functioning of the economy of a Member State, and that an interruption in rail transport may trigger systemic knock-on effects on the entire economy, in particular due to interruptions in the supply chain. The Commission underlined that these effects could be particularly severe in countries undergoing macroeconomic restructuring. However, in the absence of sufficient information, the Commission was not in a position to establish whether the aid could be deemed to contribute to remedy a serious disturbance in the economy of Greece. It therefore invited Greece and interested parties to submit any relevant information in this regard.

4. COMMENTS FROM INTERESTED PARTIES

- (44) Following the publication of the Opening Decision in the *Official Journal of the European Union*, no interested party submitted comments.

5. COMMENTS FROM GREECE

- (45) Greece argued that the measures in favour of TRAINOSE led to a reorganisation of the company and, more generally, of the Greek railway sector, which both were commitments of Greece made towards the Troika pursuant, among others, to the MoU of 3 May 2010. Furthermore, the railway sector is a crucial sector in the Greek economy due to both the employment it sustains and its role in the supply chain in Greece.

⁽¹⁾ OJ C 249, 31.7.2014, p. 1.

- (46) Greece asserted that the measures described in the Opening Decision do not constitute State aid within the meaning of Article 107(1) of the Treaty. Should the Commission conclude that these measures constitute State aid within the meaning of Article 107(1) of the Treaty, be it in part or in totality, then the aid should be deemed compatible with the Treaty.
- (47) In its reply to the Opening Decision, Greece provided further clarifications on the measures described in the Section 3 and their compatibility.

5.1. Measure 1: Debt cancellation

- (48) By letter dated 23 March 2017, Greece clarified that the outstanding debts envisaged to be cancelled amount to EUR 748,6 million (see Table 2).
- (49) The cancellation of accumulated debts should compensate TRAINOSE for the unprofitable operation of 26 passenger routes as a result of the service and pricing obligations ('SPOs'), which represent SPOs imposed by Greek law ⁽¹⁾. According to Greece, the State never respected its commitments to compensate TRAINOSE for the losses resulting from discharging these SPOs.
- (50) The cancellation of these debts will allegedly not provide any undue economic advantage to TRAINOSE, because the company would be entitled under Greek law ⁽²⁾ to claim this compensation as compensatory damages. A judicial approach was however not pursued, because this could delay TRAINOSE's restructuring. Therefore, Greece considers that as established by the Court, inter alia, in the *Asteris* ⁽³⁾ judgment, and held by the Commission in a case relating to the expropriation of German farmers ⁽⁴⁾, compensation for damages incurred for acts/lack of action imputable to the State does not constitute State aid.
- (51) Greece asserted that, although the compensation was determined *ex post*, it was still calculated in a way that ensured that it would be as close as possible to its level had it been calculated *ex ante*, and produced a result close to the estimation included in TRAINOSE's business plan for 2007 on the basis of the 2005 data.
- (52) The basis of the calculation were the losses TRAINOSE would have incurred if it operated the entire network after the implementation of the restructuring plan, i.e. excluding any past inefficiencies. In other words, the *ex post* PSO compensation was not calculated on the basis of TRAINOSE's losses per line in 2010, but on the basis of losses of a restructured TRAINOSE, i.e. a well-run company possessing adequate means of transport, which would be able to meet the necessary PSOs. Therefore, Greece submitted that there is no risk of any internalisation of past inefficiencies and that the compensation does not exceed what is necessary to cover all the incurred costs minus all the relevant revenues and without including any reasonable profit, to which TRAINOSE would be entitled to.

5.2. Measure 2: Equity increase

- (53) Greece reiterated that the equity increase of EUR 60 million performed in 2009 did not involve State aid within the meaning of Article 107(1) of the Treaty, insofar as this measure was in conformity with the market economy operator ('MEO') principle. The second tranche of the equity increase of EUR 65 million was not carried out and should be considered withdrawn.
- (54) On the basis of the information that was available at the time of the equity increase, and taking into account that already in 2009 a company restructuring was envisaged in view of a privatisation of TRAINOSE, Greece underlined that it expected an acceptable return on the injected capital within a reasonable period.
- (55) The decision to increase equity was motivated by the following considerations:
 - (a) the desire to avoid the collapse of the sole operator (100 % State owned) providing rail transport services in Greece and to ensure its long-term profitability;

⁽¹⁾ Greek Law 674/1970, Greek Royal Decree 404/1972, Greek Legislative Decree 1300/1972 and Greek Law 2671/1998 (Greek Government Gazette A'289/28.12.1998).

⁽²⁾ Submission of Greece dated 27 March 2017, p. 1.

⁽³⁾ Joined Cases C-106/87 to 120/87 *Asteris and Others v Greece and EEC* [1988] ECLI:EU:C:1988:457, paragraphs 24-25.

⁽⁴⁾ Commission Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act (OJ L 107, 24.4.1999, p. 21).

- (b) the prospects of privatising the company and thus achieving the highest possible return from such transaction;
 - (c) the desire to avoid the shutdown of various commercial activities of OSE, the infrastructure manager, also 100 % owned by the State.
- (56) Greece argued that those considerations were in conformity with the case law of the European Courts, according to which it would be acceptable to take into account also an indirect material benefit, such as the desire to protect the group's image or to redirect its activities ⁽¹⁾.
- (57) The only alternative option available was the liquidation of TRAINOSE, which would have disastrous consequences both for the State, being its sole shareholder, and the Greek economy. Because TRAINOSE had no significant assets allowing an equity investor to recover any of its invested capital, the Greek state would have lost its investment into the company. Moreover, Greece would have lost its only railway operator and would endanger also its rail infrastructure manager OSE.
- (58) Greece alleged that, in its capacity as *current shareholder*, it could accept temporary lower returns when increasing its existing investment. A public authority that controls an undertaking or a group of undertakings would be less motivated by purely short-term profit considerations.

5.3. Measure 3: Annual grants to TRAINOSE for the period 2011-2013

- (59) Greece clarified that the annual grants to TRAINOSE for the period 2011 to 2013 were awarded in agreement with the Troika in order to allow the company to break-even while maintaining the operation of a number of loss-making routes. The compensation is granted on a basis of a PSO Agreement, which was awarded directly without a public tender. The PSO Agreement was signed on 15 June 2011. Greece submitted that the PSO Agreement complies with Regulation (EC) No 1370/2007, except for the obligation for prior publication of certain information in the Official Journal.
- (60) Greece asserted that the calculation parameters of the PSO Agreement comply with the requirements of Regulation (EC) No 1370/2007. Due to the absence of account separation of TRAINOSE since its incorporation, the calculation of the compensation was based on the most up-to-date estimates and assumptions of TRAINOSE (management accounts). As from October 2011, TRAINOSE maintained separate accounts for the PSO and non-PSO activities and hence avoided any cross-subsidisation between the different activities. The account separation was also applied *ex post* for the period from 1 January 2011 to 30 September 2011 on the basis of management accounts. The PSO compensation was capped in agreement with the Troika at EUR 50 million per annum.
- (61) The PSO Agreement contained provisions providing for the possibility to modify the PSO compensation (such as reduction of the scope of services) in case of increase of costs or decrease of revenues, in order to maintain the cap of EUR 50 million per annum.
- (62) The renewal of the current public service contract for rail passenger transport had to be completed by direct award to TRAINOSE by end of April 2014 and should have a maximum duration of five years.

5.4. Measure 4: The transfer of TRAINOSE's employees to other public sector employers

- (63) Greece argued that, in line with the *Combus* ⁽²⁾ judgment, the transfer of employees did not confer any advantage on TRAINOSE because it did not alleviate the company of burdens normally assumed in an undertaking's budget, but rather of burdens which were imposed by the State due to the quasi-civil servant status of TRAINOSE's employees (reflected in redundancy restrictions and above-market salaries). Greece considers that, on substance, the measure relates to the removal of a structural disadvantage stemming from a period when the company was a State monopoly.
- (64) Greece stated that the quasi-civil servant status of TRAINOSE's employees and that the respective burdens borne by TRAINOSE were imposed by law and therefore are imputable to the Greek State.

⁽¹⁾ Case C-303/88, *Italy v Commission*, [1991] ECLI:EU:C:1991:136.

⁽²⁾ Case T-157/01 *Danske Busvognmaend v Commission* [2004] ECLI:EU:T:2004:76.

- (65) TRAINOSE was legally separated from OSE in 2008, and its relationship with its personnel is subject to the same Greek labour laws, collective employment agreements ('CEAs') and general employment statutes ('GEKAP') as OSE (collectively 'Specific Labour Regulations'). TRAINOSE, as the successor of OSE with regard to the railway transport services, inherited accordingly the entire labour law framework applicable to OSE. Similarly, in 1970 OSE had inherited its labour framework from Railways of the Hellenic State (*Σιδηρόδρομοι Ελληνικού Κράτους* or 'SEK' ⁽¹⁾), a company governed by public law, which had the monopoly over the operation of the Greek railway network and whose employees had the status of civil servants and benefited accordingly from all the advantages derived from that status.
- (66) In 2005, the right to quasi-civil servant status for new hires was abolished, but employees hired under the previous regime fully maintained their former status. Therefore, in view of Greece, the Greek State is responsible for the abnormally high level of salaries received by TRAINOSE employees.
- (67) Greece also explains that, even after the signing of new CEA of 24 March 2011 that abolished numerous benefits of TRAINOSE employees, TRAINOSE's remaining employees would still benefit from an inflated salary, i.e. on average [10-30] % higher than the salaries of private sector employees with similar work experience, as shown in Table 3.
- (68) Since its creation in 2007, TRAINOSE has not hired any new employees, but for one person.
- (69) Greece has explained that in accordance with Articles 15, 16 and 18(2) of Law 3891/2010 ⁽²⁾ in total 593 TRAINOSE employees (575 in 2011, 10 in 2012 and 8 in 2013) were transferred to other public sector employers, i. e. 4 % fewer than originally foreseen ⁽³⁾.
- (70) TRAINOSE does not have the financial means to offer to its personnel a voluntary retirement scheme (VRS). Greece underlined that any advantage to be derived by TRAINOSE from the employee transfer would at any rate be offset by the losses that the company shall continue to incur as a result of the privileged status of its employees as imposed by the State, because even after the proposed collective salary reduction agreement, the remaining employees would still retain salaries higher than the market average.

Table 3

Comparison between TRAINOSE regular salary scheme and average monthly regular salary of the private sector

Personnel Category	Current monthly regular salary of TRAINOSE personnel (in EUR)	Average monthly regular salary of private sector personnel (in EUR)	Salary differential
Engine drivers	[2 000-3 000]	1 694	– [25-50] %
Railcar personnel	[2 000-3 000]	1 682	– [0-25] %
Coach drivers	[2 000-3 000]	1 587	– [0-25] %
Administration	[1 000-2 000]	1 566	– [0-25] %
Loaders	[1 000-2 000]	1 514	– [0-25] %
Total	[1 000-2 000]	1 641	– [0-25] %

- (71) To quantify the advantage stemming from the transfer of employees, Greece provided a study prepared by auditing company PricewaterhouseCoopers. The calculations are based on the initially foreseen transfer of

⁽¹⁾ SEK was a public sector entity which was established in 1920 and operated most Greek railway lines until 31 December 1970 when all railways in Greece with the exception of private industrial lines and E.I.S. were transferred to newly founded state-owned *Hellenic Railways Organisation* SA, i.e. OSE.

⁽²⁾ Greek Government Gazette A'188/4.1.2010.

⁽³⁾ Submission of Greece dated 27 March 2017, p. 2.

620 employees. According to the study, the advantage amounts to the difference between the 'normal costs' of a VRS borne by a private company and the costs of a hypothetical VRS for TRAINOSE employees (EUR [100-200] million). The difference between the two VRS schemes amounts to EUR [0-100] million. According to Greece, however, the costs for TRAINOSE's VRS included over EUR [0-100] million of abnormal costs borne by TRAINOSE due to the permanent status and higher salaries of its employees, which should not be taken into account.

Table 4

Quantification of the advantage granted to TRAINOSE through the transfer of 593 employees (based on PWC Study for 620 employees)

(EUR million)	
Category	Updated estimate
(a) Discounted value of the VRS for 593 TRAINOSE employees	[100-200]
(b) Economic value of equivalent VRS of a private firm	[0-100]
(a)-(b) 'Abnormal costs' for TRAINOSE VRS	[0-100]
(c) Discounted value of remaining personnel payroll (TRAINOSE salaries)	[200-300]
(d) Discounted value of remaining personnel payroll salaries (salaries equivalent to private sector)	[100-200]
(c)-(d) 'Abnormal costs' of remaining TRAINOSE personnel	[0-100]

5.5. Measure 5: SLAs between TRAINOSE and OSE

- (72) In relation to the SLAs between TRAINOSE and OSE, Greece asserted that according to the recommendations of the Troika the SLAs were concluded on market terms and therefore the SLAs did not constitute State aid within the meaning of Article 107(1) of the Treaty.

5.5.1. SLA concerning the provision of rolling stock maintenance

- (73) Greece explained that the submitted comparison of the maintenance costs of OSE was conducted on the basis of AMEL's maintenance personnel and not on the basis of the totality of AMEL's personnel. Accordingly, the annual salary of AMEL's maintenance technicians ranged at the time the SLA was concluded between EUR [25 000-50 000] and EUR [25 000-50 000] depending on the experience and the years of employment at the company, leading to an average annual salary of AMEL's maintenance technicians of EUR [25 000-50 000].
- (74) In addition, Greece explained that the annual average salary of OSE's rolling stock maintenance personnel at the time when the SLA was concluded was estimated at EUR [25 000-50 000] or EUR [20-40] per hour. The estimate was based on the average regular salary in December 2010 and on allowances consisting of overtime payments and insurance contributions. Following the implementation of Law 3899/2010 ⁽¹⁾ the adjusted salary of OSE's rolling stock maintenance personnel amounted to EUR [20-40] due to further reductions in the salaries. Consequently, the gain for OSE amounts to EUR [0-5] per maintenance hour, leading to a return margin of [0-10] %.

5.5.2. SLA concerning the leasing of rolling stock

- (75) Greece explained the calculation of the rolling stock leasing charges set out in the relevant SLA. The charges were based on the rolling stock annual depreciation and the financing costs for obtaining the relevant rolling stock, which Greece considered as at par with market rates.
- (76) Greece also explained the justification for the depreciation factor used (2/3) and claimed that it fully complies with all Greek SA companies' accrual accounting standards. The depreciation factor corresponded to [...] of the

⁽¹⁾ Greek Government Gazette A'212/17.12.2010.

value which was financed through company's own resources and [...] of the value which was financed through loans. According to Greece, all financial statements of OSE were audited by a certified external auditor annually, and OSE applied International Financial Reporting Standards (IFRS) to its financial statements. Therefore, the book value and the annual depreciation of the rolling stock, as recorded in OSE's asset registry, fully complied with IFRS with regard to asset value as well.

- (77) Greece added that OSE would apply a non-discriminating policy and charge the same price for the same services to any other rail operator. On this basis Greece provided an updated calculation of the PWC Study as shown in Table 4.

5.5.3. SLA concerning personnel training

- (78) OSE provided TRAINOSE with compulsory technical and professional training including training on current train fleet, training and licensing to work on electrified railway networks, economic driving, etc. The training programme was in line with the Framework on Technical Specifications of Interoperability (TSI) of the European Railway Agency ⁽¹⁾ and the notices of the national safety authority for railway transport ⁽²⁾.
- (79) In order to determine the typical average hourly costs which OSE should charge for its training activities, Greece conducted a comparison with other training providers in Greece. This comparison of the personnel training costs with the market prices was not direct since OSE is the only organisation that provides technical seminars for rail-drivers and on other railway related topics. Therefore, LAEK (the Employment and Professional Training Fund) and IEKEM TEE (the Educational & Training Institute for the members of the Technical Chamber of Greece) have been chosen for the comparison due to the training related services that they provide.
- (80) At the time of the conclusion of the SLA, LAEK provided subsidies to beneficiaries amounting to up to EUR [20-40] per hour per person for their personnel training when using external instructors/training services. For personnel training services provided by companies internally (using own instructors and/or infrastructure), the subsidy provided by LAEK, depending on the number of participants, ranged between EUR 33 and EUR 14 per hour and person, as summarised in Table 5.

Table 5

Average subsidy of LAEK for internal training per hour and participant

(EUR)	
Number of Participants	Average subsidy per hour and participant
Up to 3	33
Up to 6	25
Up to 15	16
Up to 35	14

- (81) In the opinion of Greece, at the time of the conclusion of the SLA, IEKEM TEE paid on average EUR 26 per hour for equivalent technical seminars, as shown in Table 6 provided by Greece.

Table 6

Training fees per hour for trainings offered by IEKEM TEE

(EUR per hour)		
Organisation providing the training	Training	Fee
IEKEM TEE	Post-training of Safety Technicians	9,90
IEKEM TEE	Audit and Assurance of Industrial Infrastructure and Materials	13,39

⁽¹⁾ Commission Directive 2014/106/EU of 5 December 2014, amending Annexes V and VI to Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community (OJ L 355, 12.12.2014, p. 42).

⁽²⁾ Regulatory Authority for Railways (Ρυθμιστική Αρχή Σιδηροδρόμων or RAS).

(EUR per hour)		
Organisation providing the training	Training	Fee
IEKEM TEE	Real Estate	13,41
IEKEM TEE	Diploma in Management & Leadership	14,35
IEKEM TEE	Autocard 2009 — 3D	15,75
IEKEM TEE	Project Management for Engineers	15,75
PWC Training Services	Management — Mini MBA	16,88
Hellenic Association of management	Diploma in Environmental Management	17,31
PWC Training Services	VAT: Accounting and Practices	18,00
PWC Training Services	Accounting and Tax Workshop end use	20,51
PWC Training Services	Analysis of Financial Statements	25,33
Economotechniki Seminars SA	Cost-cutting practices in Food Industry	35,00
Economotechniki Seminars SA	Operational Structuring of Warehouses and Business Logistics	35,00
Advanced Business Process Management SA	Computer-based pricing	57,40
Advanced Business Process Management SA	Reform of financial results & accounting disputes	57,40
Advanced Business Process Management SA	Industrial Cost Estimation	60,68
Average fee per hour		26,63

- (82) Greece asserted that the average hourly costs per participant that were negotiated between TRAINOSE and OSE were within the range of the market comparison. The costs for TRAINOSE's personnel training provided by OSE were equivalent to the costs of the provision of similar services by another company. In addition, the negotiation took into account the standard market practice of offering a discount for training programmes for companies with a large amount of training participants.

5.5.4. SLA concerning office rental

- (83) Greece emphasised that the monthly rent of EUR [0-10] per m² for offices of a total surface of [0-5 000] m², i.e. in total EUR [0-50 000] per month, was set at a market price based on a valuation of OSE's 2005 real estate property (adjusted for 2011) by GAIAOSE, a company completely separate and independent from TRAINOSE. As a basis for the evaluation, a report by Eurobank Properties Services for buildings in Athens with similar characteristics was used.
- (84) Greece has explained that the adjustments to the rent took into account the state of the rented building, its location and the continuously deteriorating state of the surrounding area, decreasing demand in the real estate market and the uncertain economic environment. Greece submitted that at the time the SLA was concluded most rental agreements had been renegotiated resulting in a reduction of the rent of up to 30 %.

5.5.5. SLA concerning coach rental

- (85) Greece explained that annual rental costs of each vehicle rented by TRAINOSE were a function of its current value and its depreciation cost for the given year. In order to ensure that market rates were charged, the current value of each vehicle on the road on 1 January 2011 and the respective depreciation have been estimated by the suppliers of each type of vehicles.

5.6. Compatibility of the aid with the internal market

- (86) Greece submitted that the measures should be deemed compatible aid within the meaning of Article 107(3)(b) of the Treaty, which states that aid may be deemed compatible with the internal market if its objective is 'to remedy a serious disturbance in the economy of a Member State'.
- (87) Greece claimed that it was unable to reach a balanced budgetary position since its first Stability Programme in December 2010 because of the missed fiscal targets due to overspending, tax evasion, overoptimistic tax projections and the failure to reform the health and pension systems. In 2009, the government sector accounted for over 50 % of the GDP, crowding-out private investments and weakening economic performance. In 2009, the gross government debt accounted for 115 % of GDP, whereas the net external debt amounted to almost 100 % of GDP, where as much as 75 % of the net external debt pertained to the public sector and has relatively long maturities.
- (88) According to Greece, the rigidity of the product and labour markets and the underperformance in many structural policy areas had a negative impact on its economic performance leading to low employment and labour productivity levels. Greece was therefore especially vulnerable to the 2008/09 global financial and economic crises. The average capital adequacy ratio of Greek banks improved to 11,7 % at the end of 2009, partly thanks to public capital injections. However, nonperforming loans increased from 5 % in 2008 to 7,7 % in December 2009, raising concerns about the creditworthiness of the sovereign debt.
- (89) In April 2010, Greece asked for official financial assistance which resulted in the conclusion of the MoU 2010. Due the systemic importance of the Greek railway sector and its direct dependence on the Greek State budget, the MoU imposed the restructuring of the entire Greek railway sector as a condition for the payment of the financial aid requested by Greece.
- (90) The restructuring of the railway sector has been of utmost importance for Greece. The railways have been instrumental in Greece's regional development, and their potential disappearance would have disastrous consequences on Greece's economy as a whole.
- (91) TRAINOSE is the only railway operator in Greece. As such it serves a number of routes in both passenger and freight transportation through the 2 554 km long urban and suburban railway network which runs from the South to the North of Greece passing through and servicing its largest cities and ports. If TRAINOSE would cease operations or suffer substantial disruptions in its services, that would have severe adverse effects on a number of stakeholders. In particular, this would affect passengers, customers/suppliers, employees, other rail related private and public business entities and ultimately the Greek economy as a whole, since a lot of current business and, more importantly, potential opportunities, particularly in the freight transportation sector, would be lost or significantly slowed down.
- (92) Any cease/disruption of TRAINOSE's operations would deprive passengers of a number of public routes both urban and suburban for a certain period of time. TRAINOSE conducts approximately 300 passenger services per day, including high quality suburban and intercity services, and approximately 16 million passengers use TRAINOSE's services per annum. The PSO routes operated by TRAINOSE account for more than 98 % of all domestic passenger rail transport routes in Greece. Any disruption of the rail transport services would create a heavy burden on the overall public transportation network, primarily in the urban network of Athens (used by 8 million passengers per year), Thessaloniki and Patras. Specific high traffic urban routes are exclusively serviced by TRAINOSE and thus such an event would not only deteriorate traffic conditions in urban areas but also force passengers to use other more expensive means of transportation, mostly in suburban routes. An example is the disruption of TRAINOSE's service in 2011 in the Edessa-Florina route in northern Greece where passengers' cost of commuting went up by 50 %. In 2011, in agreement with the Troika, Greece decided to stop running certain non-profitable routes and to increase significantly train tickets' prices on routes that continued to be operated. At the same time Greece decided to discontinue discount fares that were previously offered for students, military personnel, big families, etc.
- (93) Moreover, Greece stated that TRAINOSE offers specialised, niche services of a tourist nature on provincial routes that are characterised as attractions themselves. Such routes boost much needed local economic activity and expand as well as complement the critically important product offering of the Greek tourism industry.
- (94) The freight tonnage transported by TRAINOSE on an annual basis is estimated to be more than [0-500] million tons. Out of this, approximately [50-100] % is export freight. Consequently, TRAINOSE contributes significantly

to the export efforts of the Greek manufacturing companies. Certain products due to their size and tonnage can only be transported by rail and the interruption of rail transport services would have serious consequences in the supply chain in Greece, affecting companies such as EBZ SA and VIOHALKO SA, and the ports of Piraeus and Thessaloniki. While the privatisation of Piraeus port was completed in 2016, Thessaloniki port was due to be privatised in March 2017.

- (95) The railway is used as a key means of transport by the Greek Armed Forces. Such transportation includes both scheduled, regular freight transport (fuel transport, heavy military equipment) and Greek Armed Forces personnel transport during times of peace. The railway and TRAINOSE are also critical elements in the transportation and mass mobilisation plans of the Greek Armed Forces in the event of a crisis. Fast mobilisation drills to test among other things response times are regularly being conducted with TRAINOSE playing a crucial role. For all such needs, TRAINOSE must keep available and ready for use at any time at least [...] wagons and [...] tanker trucks.
- (96) TRAINOSE is a very important direct and indirect employer in Greece, where over 99 % of companies are SMEs. It has 655 full time employees, possessing significant accumulated rail experience and expertise in the railway sector. Greece already has one of the highest unemployment rates in the EU (23 %), and if TRAINOSE were to cease its operations, this situation would obviously become even worse.
- (97) According to Greece, a liquidation of TRAINOSE would also have negative consequences for its suppliers. EESSTY, the rolling stock maintenance provider, and OSE, the railway infrastructure manager, would face extreme difficulties and most probably go out of business. EESSTY currently employs 416 employees, and approximately 100 % of its annual revenues are generated by its business relation with TRAINOSE. OSE employs 1 595 (1 396 employees at OSE and another 199 at ERGOSE, a subsidiary of OSE responsible for the development and upgrade of railway infrastructure) and track access charges collected from TRAINOSE in 2015 accounted for 86 % of OSE's annual track access revenues for that year. Additionally, GAIAOSE, the manager of rolling stock and real estate assets, would also be negatively affected. A number of private businesses, such as service providers and contractors for cleaning, catering and ticketing services, freight forwarders etc., would also be affected very adversely.
- (98) In addition, Greece recalls that the construction of a safe, modern and integrated railway network is one of the Union's priorities. According to Greece, rail is the most environmentally friendly and safe means of transport. Therefore, leaving Greece essentially with no railways would run counter to all the Union's efforts in the past years to shift traffic to rail and to improve the Union's rail network. The completion of the rail infrastructure upgrading works in the next two to three years, including the construction and electrification of a new high speed double track railway line for most of the railway network, will ensure that the required conditions for the provision of more efficient railway services are in place.
- (99) Greece asserted that the approval of the aid under Article 107(3)(b) of the Treaty would also be consistent with the Commission's past decision practice. In 1987, the Commission approved aid in the form of financial reorganisation of companies in the public sector in Greece noting that 'if such a large section of Greek industry were to be allowed to go into liquidation it would have major negative effects on the possible achievement of success of the austerity programme' ⁽¹⁾. In the case at hand, allowing TRAINOSE to go into liquidation would undoubtedly negatively affect Greece's chances of recovery. Also, in 1991, the Commission approved aid for a reform programme in Greece ⁽²⁾, noting that the programme in question was an integral part of Council Decision 91/136/EEC ⁽³⁾ which concerned the recovery of the Greek economy. Likewise, in the present case, the restructuring of the railway sector is part of the financing agreement between Greece and the Troika for the recovery of Greece's economy.
- (100) In addition, Greece has committed to undertake the following measures in order to ensure the further opening of the Greek railway market:
- (a) The establishment of an independent contracting authority for public service contracts for rail passenger transport according to Regulation (EC) No 1370/2007, not integrated in the Transport Ministry, the Safety Authority nor the Railway Regulatory Authority, was to be fully implemented by December 2013.

⁽¹⁾ Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry (OJ L 76, 22.3.1988, p. 18).

⁽²⁾ Commission Decision on State aid NN 11/91, not published.

⁽³⁾ Council Decision 91/136/EEC of 4 March 1991 concerning a Community loan in favour of the Hellenic Republic (OJ L 66, 13.3.1991, p. 22).

- (b) The duration of the public service contract with TRAINOSE for rail passenger transport was to be renewed by the end of April 2014 for a maximum period of five years.
 - (c) In addition, future PSO contracts will be awarded by the independent contracting authority via public tenders for service bundles. To this end, the PSO contract shall be split into service bundles, to be contracted via different PSO contracts not exceeding (5) five years each. Greece guarantees that each of these PSO contracts, upon expiry, shall be re-tendered out by the independent contracting authority. The necessary legal framework for PSOs was due to be enacted in 2013.
 - (d) Participants in those first tenders for PSO contracts shall be provided with relevant information covering the period of the upcoming PSO direct award to TRAINOSE and with sufficient time to prepare bids on that basis.
 - (e) The rent contracts concerning all rolling stock, employed in every public service contract will be synchronised both in terms of their duration and to allow for any reallocation of rolling stock as it may become necessary when amending these public service contracts. The rent contract between TRAINOSE and the State was to be initially synchronised with the 5 year PSO contract including an additional option to extend for a maximum period of five years. Contracts were to be awarded at market prices.
- (101) Therefore, in the opinion of Greece, the aid to TRAINOSE is an important element in the efforts Greece has been undertaking to overcome one of the worst economic and financial crises of its history, and therefore qualifies as aiming to remedy a serious disturbance in the economy of a Member State.

6. WITHDRAWAL OF THE NOTIFICATION

- (102) As stated Section 3, Greece withdrew its notification concerning the equity increase amounting to EUR 65 million (part of Measure 2) and the transfer of five terminals from OSE to TRAINOSE (Measure 6).
- (103) According to Article 10 of Council Regulation (EU) 2015/1589 ⁽¹⁾ the Member State concerned may withdraw the notification in due time before the Commission has taken a decision on the aid. According to Article 10(2) of Regulation (EU) 2015/1589, in cases where the Commission has initiated the formal investigation procedure, the Commission is to close the procedure.
- (104) Due to the fact that Greece has withdrawn its notification and will not proceed with the capital increase of EUR 65 million (part of the Measure 2) nor with the transfer of terminals (Measure 6), it is appropriate to decide to close the formal investigation procedure under Article 108(2) of the Treaty in respect of those notified measures.

7. ASSESSMENT

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

- (105) By virtue of Article 107(1) of the Treaty ‘... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’.
- (106) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) of the Treaty, all of the following conditions need to be fulfilled:
- (a) the beneficiary is an undertaking within the meaning of Article 107(1) of the Treaty, which implies that it engages in an economic activity;
 - (b) the measure is financed by State resources and is imputable to the State;
 - (c) the measure confers an economic advantage;
 - (d) this advantage is selective;
 - (e) the measure distorts or threatens to distort competition and may affect trade between Member States.

⁽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 (OJ L 248, 24.9.2015, p. 9).

7.1.1. Economic activity and notion of undertaking within the meaning of Article 107(1) of the Treaty

- (107) According to settled case law, the Commission must first establish who will be the beneficiary of the measures under assessment. Article 107(1) of the Treaty refers to the concept of undertaking in defining the beneficiary of the aid.
- (108) The Commission considers that by providing passenger and freight transport services for remuneration TRAINOSE is performing an economic activity. Therefore, TRAINOSE should be considered an undertaking within the meaning of Article 107(1) of the Treaty for the whole period in which the aid measures in question were or will be granted.

7.1.2. Measure 1: Debt cancellation

7.1.2.1. State resources and imputability to the State

- (109) In order to constitute State aid, the measure in question has to be financed from State resources and the decision to grant the measure must be imputable to the State ⁽¹⁾.
- (110) The cancellation of debts will be done by OSE on the basis of a joint ministerial decision under Article 13(1) of the Greek Law 3891/2010.
- (111) The Court of Justice held in the *Stardust Marine* ⁽²⁾ judgment that the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned, constitute State resources.
- (112) OSE is 100 % owned by the Greek State. Therefore, it is clearly a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC ⁽³⁾. Since OSE is a public undertaking, its resources constitute State resources.
- (113) Concerning imputability, in its *Stardust Marine* judgment the Court of Justice furthermore held that the fact that the State or a State entity is the sole or majority shareholder of an undertaking is not sufficient to find that a transfer of resources by that undertaking is imputable to its public shareholders ⁽⁴⁾. According to the Court of Justice, even if the State was in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case could not be automatically presumed, since a public undertaking may also act with more or less independence, according to the degree of autonomy left to it by the State.
- (114) The Commission observes that the debt cancellation will be done by OSE on the basis of a joint ministerial decision instructing the company to cancel TRAINOSE's debts.
- (115) In view of the above, the Commission considers that the debt cancellation involves the use of State resources, which is also decided by and imputable to the Greek State.

7.1.2.2. Economic advantage

- (116) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit, which an undertaking would not have obtained under normal market conditions, that is to say, in the absence of State intervention ⁽⁵⁾. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention ⁽⁶⁾.
- (117) In this case, Greece will cancel EUR 748,6 million of debts directly related to railway activities of TRAINOSE. No reasonable market economy operator would cancel liabilities of such a magnitude without any remuneration.

⁽¹⁾ Judgment of the Court of Justice of 16 May 2002, *France v Commission* ('*Stardust Marine*'), C-482/99, ECLI:EU:C:2002:294.

⁽²⁾ *Stardust Marine*, paragraphs 51 et seq.

⁽³⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

⁽⁴⁾ *Stardust Marine*, paragraphs 51 et seq.

⁽⁵⁾ Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; judgment of the Court of Justice of 29 April 1999, *Kingdom of Spain v Commission of the European Communities*, C-342/96, ECLI:EU:C:1999:210, paragraph 41; judgment of the Court of Justice of 16 May 2002, *France v Commission* ('*Stardust Marine*'), C-482/99, ECLI:EU:C:2002:294, paragraph 69.

⁽⁶⁾ Judgment of the Court of 2 July 1974, *Italian Republic v Commission of the European Communities*, C-173/73, ECLI:EU:C:1974:71, paragraph 13.

By freeing TRAINOSE from the legal obligation to service and eventually repay this debt, the measure will effectively provide TRAINOSE with additional funds can use for its commercial operations and/or investment and improve its financial indicators, which in turn could potentially reduce future borrowing costs and/or improve access to market funding. The debt cancellation is thus liable to provide TRAINOSE with an economic advantage not otherwise available at market conditions.

- (118) Greece asserted that the cancellation of TRAINOSE's debts towards OSE involves a compensation for discharging a PSO.
- (119) As regards the granting of an economic advantage through a compensation for costs incurred to discharge a PSO, the Court has made clear in the *Altmark* judgment that the granting of an advantage can be excluded if the following four cumulative conditions are met ⁽¹⁾:
- (a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
 - (b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
 - (c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
 - (d) Fourth, where the undertaking that is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (120) The Commission first notes that Greece had not provided it with any entrustment act related to the period under review (i.e. 2007-2010). Article 7 of Greek Law 674/1970 merely refers to the possibility for an operator, where the operation of new routes or the maintenance of the operation of existing routes is imposed in a mandatory way and results in or prolongs a loss-making activity, to request a Financial Agreement. Also according to Article 20 of Greek Law 674/1970, any losses stemming from the obligation to provide services at a specific price are to be regulated by a Financial Agreement. According to Article 18 of Greek Law 674/1970, such a Financial Agreement is also to regulate the financial relations between the rail operator (at that time OSE) and the Greek State, and contain the terms and conditions of the compensation to be paid to cover eventual exploitation losses for a period not exceeding 13 years from the ratification of that agreement. As confirmed by Greece, no such Agreement has been concluded between the operator and the Greek State for the period under review. It follows that TRAINOSE did not have clearly defined public service obligations to discharge and compensate during the period under consideration between 2007 and 2010. Therefore, Measure 1 does not comply with the first *Altmark* condition.
- (121) Second, even if according to Greek Law 2671/1998 the rail operator (at that time still OSE) would have been entrusted to discharge PSOs and operate certain routes at a certain price, the obligations of the Greek State to compensate the rail operator had been limited until 31 December 2007 as expressly provided in Art. 9.5 of the law.
- (122) Third, the Commission observes that the parameters for the compensation have not been established beforehand. The envisaged compensation is solely based on an *ex post* calculation based on TRAINOSE's financial estimates after its restructuring. The Commission therefore concludes that the parameters on the basis of which the alleged under-compensation was calculated by Greece were not established in advance and that, therefore, Measure 1 does not comply with the second *Altmark* condition either.
- (123) Considering the cumulative nature of the *Altmark* conditions, there is no need for the Commission to examine whether the other two conditions have been met in the present case.
- (124) Therefore, it is concluded that the decision of Greece to cancel TRAINOSE's liabilities will confer on that undertaking an economic advantage within the meaning of Article 107(1) of the Treaty.

⁽¹⁾ Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 87 to 95.

7.1.2.3. Selectivity

- (125) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid. As the debt cancellation will benefit TRAINOSE alone and is not available to other Greek undertakings as part of a general measure of economic policy, it is selective within the meaning of Article 107(1) of the Treaty.

7.1.2.4. Distortion of competition and effect on trade

- (126) The Commission has to analyse whether the measure distorts or threatens to distort competition and is liable to have an effect on trade between the Member States. There is an assumption that there is a distortion of competition within the meaning of Article 107(1) of the Treaty whenever the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ⁽¹⁾.
- (127) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ⁽²⁾. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ⁽³⁾.
- (128) The EU rail freight market was first opened to competition on the trans-European rail freight network on 15 March 2003 by the first railway package ⁽⁴⁾. The second railway package liberalised all international freight transport on 1 January 2006, and national rail freight from 1 January 2007 ⁽⁵⁾. However, several Member States had unilaterally liberalised their national markets prior to that date.
- (129) With regard to passenger transport, from 1 January 2010, the third railway package opened the market for international passenger transport ⁽⁶⁾. While this only concerns international services, it does include the activities of the beneficiaries on those lines. At any rate, as established by the Court in the *Altmark* judgment, the fact that a transport company is active only in one Member State does not exclude the possibility of aid distorting intra-Union trade ⁽⁷⁾. In this respect, it must be noted that since 1995 several Member States have unilaterally opened their rail passenger transport and that any advantage granted to a rail transport company in one Member State may reduce the possibility for a competitor from another Member State to trade on that geographic market.

⁽¹⁾ Judgment of the General Court of 15 June 2000, *Alzetta and others v Commission*, T-298/97, ECLI:EU:T:2000:151, paragraphs 141 to 147.

⁽²⁾ See, in particular, Judgment of the Court of 17 September 1980, *Philip Morris v Commission*, C-730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 21; Judgment of the Court of Justice of 29 April 2004, *Italy v Commission*, C-372/97, ECLI:EU:C:2004:234, paragraph 44.

⁽³⁾ Judgment of the General Court of 30 April 1998, *Het Vlaamse Gewest v Commission*, T-214/95, ECLI:EU:T:1998:77.

⁽⁴⁾ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 75, 15.3.2001, p. 1), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ L 75, 15.3.2001, p. 26), Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29).

⁽⁵⁾ Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (Agency Regulation) (OJ L 164, 30.4.2004, p. 1), Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ L 164, 30.4.2004, p. 44), Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system (OJ L 164, 30.4.2004, p. 114) and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 164, 30.4.2004, p. 164).

⁽⁶⁾ A third package was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1), Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14), Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Communities railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315, 3.12.2007, p. 44) and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community (OJ L 315, 3.12.2007, p. 51).

⁽⁷⁾ Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, ECLI:EU:C:2003:415, paragraphs 77-81.

- (130) In this case, TRAINOSE provides services in competition with other undertakings providing transport services in the internal market and some of those services are cross-border. Therefore, the selective economic advantage granted through the planned debt cancellation in favour of TRAINOSE strengthens its economic position, as it will relieve the railway operator from debts incurred in the period 2007-2010. Consequently, TRAINOSE will be providing railway transport services in the internal market without bearing all of the relevant investment and/or operating costs in the past.
- (131) The Commission concludes that the measure will distort or will threaten to distort competition in the internal market and is liable to affect trade between Member States.

7.1.2.5. Conclusion

- (132) In the light of the foregoing, the Commission considers that the debt cancellation that Greece plans to implement constitutes State aid within the meaning of Article 107(1) of the Treaty.

7.1.3. Measure 2: Equity increase

7.1.3.1. State resources and imputability to the State

- (133) As stated in recital 109, the measure in question has to be financed from State resources and the decision to grant the measure must be imputable to the State.
- (134) The equity increase was financed directly from the Greek State budget and was decided by the Interministerial Committee for Public Enterprises and Organisations, a committee representing the Greek central authorities.
- (135) Therefore, the equity increase involved the use of State resources, which was also decided by and imputable to the Greek State.

7.1.3.2. Economic advantage

- (136) Greece asserted that the equity increase does not confer any undue economic advantage on TRAINOSE, because any private investor in a situation similar to the one of Greece would have chosen to further invest into the company in order to maintain its existing investment rather than to seek the liquidation of the company. Greece expected that the equity increase leading to the restructuring of TRAINOSE and followed by its privatisation would allow it to recover a larger part of its investment and to avoid negative effects on OSE.
- (137) To determine whether Greece's investment confers an advantage on TRAINOSE, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy (market economy operator, 'MEO' principle) could have been prompted to make the investment in question ⁽¹⁾.
- (138) Greece asserted that its decision to inject capital into TRAINOSE aimed at avoiding collapse of the sole rail operator in Greece and any negative spill-over effects on the Greek economy as such.
- (139) However, the MEO test should be applied leaving aside all considerations which relate exclusively to a Member State's role as a public authority (for example social, regional or sectorial policy considerations) ⁽²⁾. In other

⁽¹⁾ See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission* ('ALFA Romeo'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

⁽²⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79, 80 and 81; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany v Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57; Judgment of the General Court of 24 September 2008, *Kahla Thüringen Porzellan v Commission*, T-20/03, ECLI:EU:T:2008:395; Judgment of the General Court of 17 October 2002, *Linde v Commission*, T-98/00, ECLI:EU:T:2002:248.

words, if a State intervention is driven by public policy reasons, for instance, for reasons of such as social or regional development which increase the losses or reduce the profits of the holding, the State's behaviour, while being rational from a public policy perspective, may at the same time include considerations which a MEO would normally not consider or would even reject, if they reduce the return expected on the holding. Therefore, the Commission considers that for the purposes of the MEO test of the equity increase it is necessary to leave aside the negative spill-over effects on the Greek economy or the fact that TRAINOSE is the sole rail operator in Greece.

- (140) Greece further stated that already in 2009 it was envisaged to restructure TRAINOSE with a view to privatising it, and therefore it could have expected an acceptable return on the injected capital within a reasonable period of time. Greece further emphasised that ephemeral lower returns would be acceptable to an existing investor.
- (141) Whether a State intervention is in line with market conditions must be examined on an *ex ante* basis, having regard to the information available at the time the intervention was decided upon ⁽¹⁾. In fact, any prudent market economy operator would normally carry out its own *ex ante* assessment of the strategy and financial prospects of a project ⁽²⁾. It is not enough to rely on *ex post* economic evaluations entailing a retrospective finding that the investment made by the Member State concerned was actually profitable ⁽³⁾.
- (142) An economic evaluation on the basis of a generally accepted standard assessment methodology ⁽⁴⁾ must be based on the available objective, verifiable and reliable data ⁽⁵⁾, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations. A widely accepted standard methodology to determine the (annual) return on investments is to calculate the internal rate of return (IRR) ⁽⁶⁾. One can also evaluate the investment decision in terms of its net present value (NPV) ⁽⁷⁾, which produces results equivalent to the IRR in most cases.
- (143) Before the decision to inject equity of EUR 60 million was taken by the Interministerial Committee for Public Enterprises and Organisations in 2009, no profitability assessment of the expected return was conducted by Greece, using either any of the generally accepted standard assessment methodologies or any other methodology. No factual evidence showing any future profitability for the shareholder was brought by Greece to support the decision to inject capital into TRAINOSE. No document shows any illustration or calculation of the capital remuneration for the shareholder of TRAINOSE or an increase in the value of Greece's equity participation after the capital injection. The Commission observes that TRAINOSE's profit and loss forecasts merely show that the company was expected to return to profitability as from 2011. And even the expected profitability cumulated until 2013 (EUR 14 million) is insufficient to offset the expected loss of TRAINOSE in 2011 (EUR -165 million).
- (144) Furthermore, Greece neither assessed the prospects of the privatisation of TRAINOSE nor quantified the expected privatisation proceeds. The Commission notes that at the point in time when the equity increase was irrevocably decided (i.e. 2009), there may have been merely vague plans for privatisation of the company, but no privatisation mandate was yet published, no binding bids had been submitted and it was still unclear whether the privatisation would be successful at all. TRAINOSE became part of the Privatisation Programme of Greece only in 2010 ⁽⁸⁾, and only in 2013 did Greece actually decide to proceed with the privatisation of the company ⁽⁹⁾. Nevertheless no investor submitted a binding bid and the privatisation process had to be re-launched in 2016 leading to an expected privatisation in 2017.
- (145) The fact that the public body concerned has prior economic exposure to an undertaking should be taken into consideration when examining whether a transaction is in line with market conditions ⁽¹⁰⁾. Prior exposure must

⁽¹⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.

⁽²⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85 and 105.

⁽³⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 85.

⁽⁴⁾ See Judgment of the General Court of 29 March 2007, *Scott v Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 134, and Judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 39.

⁽⁵⁾ See Judgment of the General Court of 16 September 2004, *Valmont Nederland BV v Commission*, T-274/01, ECLI:EU:T:2004:266, paragraph 71.

⁽⁶⁾ The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

⁽⁷⁾ The NPV is the difference between the positive and negative cash flows over the lifetime of the investment, discounted at the appropriate return (the cost of capital).

⁽⁸⁾ See recital 14.

⁽⁹⁾ See recital 15.

⁽¹⁰⁾ See Judgment of the Court of Justice of 3 April 2014, *ING Groep NV*, C-224/12 P, ECLI:EU:C:2014:213, paragraphs 29 to 37.

be considered in the framework of counterfactual scenarios for the purpose of the MEO test. For instance, in the case of an equity or debt intervention in a public undertaking in difficulty, the expected return on such an investment should be compared with the expected return in the counterfactual scenario of the liquidation of the company. In the event that liquidation provides higher gains or lower losses, a prudent market economy operator would choose that option ⁽¹⁾.

- (146) Greece had not assessed prior to the equity increase any prospects for proceeds from a hypothetical liquidation of TRAINOSE. The Commission observes that on 31 December 2008 TRAINOSE's asset book value amounted to EUR 104 million whereas the value of its debts amounted to EUR 376 million. Therefore, Greece as TRAINOSE's shareholder in a hypothetical liquidation scenario would be unlikely to benefit from any return. As a corollary therefore Greece would legally have no liability other than the loss of its shareholdings, without any further investment into the company.
- (147) Notwithstanding the social and political pressure that would result from a decision to allow TRAINOSE to enter the liquidation procedure, the Commission maintains the view that the costs for a MEO in a similar situation would be nil, as the Greek State is the sole shareholder of TRAINOSE. Under those circumstances, the capital increase could only involve a loss for the Greek State, which a MEO would not have consented to.
- (148) Therefore, the Commission considers that the decision to increase equity of TRAINOSE by EUR 60 million conferred an economic advantage on TRAINOSE which it would not have obtained under normal market conditions.

7.1.3.3. Selectivity

- (149) The equity increase benefitted TRAINOSE only and was not part of a broader measure of general economic policy available to Greek undertakings. It is, therefore, selective within the meaning of Article 107(1) of the Treaty.

7.1.3.4. Distortion of competition and effect on trade

- (150) For the reasons outlined in Section 7.1.2.4, the equity increase had distorted or had threatened to distort competition in the internal market and was also liable to affect trade between Member States.

7.1.3.5. Conclusion

- (151) In the light of the foregoing, the Commission considers that the equity increase of EUR 60 million implemented in 2009 constitutes State aid within the meaning of Article 107(1) of the Treaty.

7.1.4. Measure 3: Annual grants to TRAINOSE for the period 2011-2013

7.1.4.1. State resources and imputability to the State

- (152) The annual grants to TRAINOSE for the period 2011-2013 were granted directly from the Greek State budget, hence the measure involves the use of State resources, which was also decided by the State and is therefore imputable to it.

7.1.4.2. Economic advantage

- (153) Greece asserted that the annual grants to TRAINOSE for the period 2011-2013 involve a compensation for discharging a PSO.
- (154) Following the guidance provided by the Court of Justice in its *Altmark* judgement ⁽²⁾, the Commission observes that the PSO Agreement for the period from 2011 to 2013 was not awarded following a public tender.

⁽¹⁾ See, to that effect, Judgment of the General Court of 12 December 2000, *Alitalia v Commission*, T-296/97, ECLI:EU:T:2000:289, or Judgment of the Court of Justice of 24 January 2013, *Frucona v Commission*, C-73/11 P, ECLI:EU:C:2013:32, paragraphs 79 and 80.

⁽²⁾ See recital 119.

- (155) When the PSO is not established on the basis of a tendering procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (156) The Commission notes that when the PSO Agreement was concluded in 2011, TRAINOSE was facing financial difficulties and its costs could not have been considered costs of a typical undertaking, well-run and adequately provided with means to meet the public service requirements. The PSO compensation for years 2011 to 2013 were based on estimates of TRAINOSE's restructuring plan without any counterfactual assessment of costs of a typical and well-run undertaking adequately provided with means to actually meet the public service requirements. Therefore, the Commission considers that this criterion has not been complied with.
- (157) Considering the cumulative nature of the *Altmark* conditions, there is no need to examine whether the other three *Altmark* conditions have been met in the present case.
- (158) Therefore, it is concluded that the grants to TRAINOSE in the period from 2011 to 2013 confers an economic advantage on TRAINOSE within the meaning of Article 107(1) of the Treaty.

7.1.4.3. Selectivity

- (159) The annual grants in the period 2011-2013 were made available to and benefited only TRAINOSE and were, therefore, selective within the meaning of Article 107(1) of the Treaty.

7.1.4.4. Distortion of competition and effect on trade

- (160) For the reasons set out in Section 7.1.2.4, the grants distorted or threatened to distort competition in the internal market and were also liable to affect trade between Member States.

7.1.4.5. Conclusion

- (161) In the light of the foregoing, the Commission considers that the annual grants implemented by Greece in the period 2011-2013 constitute State aid within the meaning of Article 107(1) of the Treaty.

7.1.5. *Measure 4: The transfer of TRAINOSE's employees to other public sector employers*

7.1.5.1. State resources and imputability to the State

- (162) The scheme for the transfer of TRAINOSE's employees originates from the Greek Law 3891/2010. It provides for the transfer of TRAINOSE's employees to other public sector employers such as Ministries or municipalities, which remunerate them with their public resources.
- (163) Therefore, the measure involves the use of State resources and is also decided by and imputable to the Greek State.

7.1.5.2. Economic advantage

- (164) According to Greece, the reduction of workforce through the transfer of employees does not provide any advantage to TRAINOSE, since it is to be considered as a one-off compensation for the structural disadvantage that TRAINOSE continues to bear in relation to the remaining employees.
- (165) Alternatively, to quantify the possible advantage stemming from the transfer of employees, Greece provided a study prepared by a consultant. According to the study, the advantage amounts to the difference between 'normal costs' of a hypothetical VRS borne by a private company and the costs a hypothetical VRS for TRAINOSE's employees. The latter would amount to EUR 120 million. However, Greece argues that one should deduct from the costs of the hypothetical VRS the 'abnormal costs' which the company incurs by reason of the quasi-civil servant status of the TRAINOSE employees, both the transferred ones and the remaining 904 employees. According to Greece, the 'true' advantage from the transfer of employees amounts to EUR 37 million.

- (166) The Commission notes that whenever the financial situation of an undertaking is improved as a result of State intervention on terms differing from normal market conditions, an advantage is present ⁽¹⁾. In this respect, not only is the granting of positive economic advantages relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. This covers any mitigation of charges normally included in the budget of an undertaking ⁽²⁾. It has to be examined whether the financial situation of the undertaking, following the State measure, has improved, as compared with the financial situation that the entity would have been into, if the measure had not been taken ⁽³⁾.
- (167) It therefore needs to be assessed whether the transfer of TRAINOSE employees corresponds to a relief from a structural disadvantage that TRAINOSE would continue to face, in the absence of the particular measure.
- (168) The Commission notes that TRAINOSE was facing a situation of overstaffing. Under normal market conditions, an undertaking would have to establish a VRS in order to encourage its personnel to retire. As argued by Greece, TRAINOSE however had no funds for such a scheme, and therefore the scheme for the transfer of employees to other public sector employers was established by the Greek State.
- (169) Likewise, the argument that the measure does not confer an advantage on TRAINOSE because it is in compensation for a certain disadvantage that this undertaking inherited from obligations under past collective employment agreements cannot be accepted. The transfer of TRAINOSE employees had the effect of reducing the personnel costs that TRAINOSE would have had to pay and which constitute normal costs of an undertaking, even if those costs arose as a result of the specific status of TRAINOSE's employees and were higher than those of employees which did not enjoy a similar status ⁽⁴⁾.
- (170) Moreover, the financial advantages of TRAINOSE resulting from the lower personnel costs due to the transfer of some of its employees to other public sector employers cannot be compared with the alleged disadvantages arising from the quasi civil servant status for the employees of TRAINOSE under the collective agreements.
- (171) To respond to the arguments invoked by Greece concerning the alleged disadvantages caused by the quasi civil servant status of TRAINOSE's employees, three considerations can be made. First, TRAINOSE, in the wake of the full opening of the Greek railway market to competition, had and continues to maintain trained and competent personnel, without which its market position could not have been maintained. Second, as pointed out by Greece, under the new Collective Employment Agreement, numerous benefits of TRAINOSE's employees were abolished and measures were taken to reduce the costs of existing personnel for TRAINOSE. Third, there are currently no other rail operators active in Greece and the general comparison conducted by Greece with other private sector employees with similar work experience cannot be considered as a valid benchmark taking into account the specificity of TRAINOSE's personnel.
- (172) In view of the above considerations, the costs related to the benefits stemming from earlier law appear to be normal costs to be borne by any company. Therefore, the relief of such costs through the transfer of employees favours TRAINOSE within the meaning of Article 107(1) of the Treaty.

7.1.5.3. Selectivity

- (173) The transfer of employees benefited only TRAINOSE and is therefore selective within the meaning of Article 107(1) of the Treaty.

7.1.5.4. Distortion of competition and effect on trade

- (174) For the reasons outlined in Section 7.1.2.4, the transfer of employees distorted or threatened to distort competition in the internal market and was also liable to affect trade between Member States.

⁽¹⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽²⁾ Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 13; Judgment of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy v Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 36.

⁽³⁾ Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.

⁽⁴⁾ Commission Decision 2012/540/EU of 20 December 2011 on State aid C 25/08 (ex NN 23/08) reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom implemented by the French Republic in favour of France Télécom (OJ L 279, 12.10.2012, p. 1); confirmed by Judgment of the Court of 26 October 2016 in Case C-211/15 P, *Orange (France Télécom) v Commission*, ECLI:EU:C:2016:798 and Judgment of the Court of 22 October 2014 in Case C-620/13 P *BT plc v Commission*, ECLI:EU:C:2014:2309.

7.1.5.5. Conclusion

- (175) In the light of the foregoing, the Commission considers that the transfer of TRAINOSE's employees to other public sector employers between 2011 and 2013 constitutes State aid within the meaning of Article 107(1) of the Treaty.

7.1.6. Measure 5: SLAs between TRAINOSE and OSE

7.1.6.1. Economic advantage

- (176) As stated in Section 3.5.5, in the Opening Decision the Commission expressed doubts as to whether the SLAs between TRAINOSE and OSE were concluded on market terms.
- (177) In response to the Opening Decision, Greece provided further clarifications on the method by which the fees for the services specified in the various SLAs between TRAINOSE and OSE were established. As stated in recital 72, Greece asserted that in line with the recommendations of the Troika, the SLAs were concluded on market terms and therefore did not confer any economic advantage on TRAINOSE.
- (178) It therefore has to be examined whether the terms and conditions of the SLAs concluded between TRAINOSE and OSE provided an economic advantage to TRAINOSE, which would not have been available to TRAINOSE under normal market conditions ⁽¹⁾. To that end, the Commission must assess whether a hypothetical market economy operator ('MEO') in a situation similar to OSE, taking into account the available information and the prevailing market conditions at that point in time and any foreseeable developments, would have entered into the SLAs in question on the same terms and conditions ⁽²⁾.
- (179) The SLAs were not concluded by means of a competitive, transparent, non-discriminatory and unconditional tender, which would have provided direct and specific evidence of compliance with market conditions. The Troika recommended that SLAs be concluded to formalise the already existing commercial relations with OSE which was, at that point in time, not only the infrastructure manager, but also the provider of the rolling stock and maintenance services, personnel training, offices and coaches to TRAINOSE. At the point in time when the SLAs were concluded, TRAINOSE was the sole rail operator in Greece. TRAINOSE was also dependent on many of the services that OSE was supplying.
- (180) The fact that the SLAs were not concluded via a tender does not mean that they do not comply with market conditions ⁽³⁾. In the absence of a tender, the compliance of the SLAs with market conditions can be assessed in the light of the terms under which comparable transactions were carried out by comparable private operators in comparable situations (benchmarking) or using other assessment methods ⁽⁴⁾.
- (181) To identify an appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned, the type of transaction at stake and the market or markets concerned. The timing of the transactions is also particularly relevant when significant economic developments have taken place. Where appropriate, the available market benchmarks may need to be adjusted according to the specific features of the State transaction ⁽⁵⁾. The benchmarking often does not establish one precise reference value but rather establishes a range of possible values by assessing a set of comparable transactions.

⁽¹⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽²⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), point 74; Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria v Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90; Case T-274/01 *Valmont v Commission*, ECLI:EU:T:2004:266, paragraph 45; Case C-290/07 *P Commission v Scott*, ECLI:EU:C:2010:480, paragraph 68; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission*, ECLI:EU:T:2003:57, paragraph 246 and the case-law cited therein. Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.

⁽³⁾ See Judgment of the General Court of 12 June 2014, *Sarc v Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98.

⁽⁴⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), point 97.

⁽⁵⁾ See Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 251.

(a) *SLA on the provision of rolling stock maintenance*

- (182) The Commission observes that the price for the provision of rolling stock maintenance services had been set as a function of the costs of material and spare parts, the costs of maintenance personnel and relevant administrative costs. Hence, the price set in the SLA covered all the costs related to the provision of the maintenance services provided by OSE, including even a contribution to the relevant administrative costs.
- (183) The main cost driver for the provision of maintenance services is the cost of maintenance personnel. AMEL, the company in charge of the Athens metro operations until 2010, was the only company in Greece which was comparable to OSE, taking into account the nature of the services provided and the prevailing market environment. Prior to concluding the SLA, OSE paid its maintenance personnel an average salary of EUR [25 000-50 000] per annum or EUR [20-40] per hour. The Commission notes that the annual salary of AMEL's maintenance technicians ranged at the time the SLA was concluded from EUR [25-50 000] to EUR [25 000-50 000] depending on the experience and the years of employment at the company, leading to an average annual salary of AMEL's maintenance technicians of EUR [25 000-50 000]. Accordingly, the average salary of OSE's maintenance personnel was comparable to the salary of AMEL's maintenance technicians.
- (184) The Commission takes note that after the entry into force of Law 3899/2010, OSE's maintenance personnel costs further decreased by EUR [0-5] per hour, whereas the agreement with TRAINOSE was not adjusted. Consequently, the profit for OSE increased by EUR [0-5] per maintenance hour, further contributing to OSE making a market driven return margin of [0-10] %.
- (185) The Commission further observes that the SLA was concluded for a period of two years which could be extended by one additional year. The SLA also included penalties for delays in the delivery of the rolling stock and for late payments. This indicates that the SLA was agreed taking into consideration the commercial interests of the parties and does not appear to constitute a disguised means to use OSE as a vehicle to confer any undue advantage over market conditions on TRAINOSE.
- (186) In view of the above considerations, it can be considered that the SLA on the provision of rolling stock maintenance would have been concluded by a hypothetical MEO and therefore conferred no undue economic advantage on TRAINOSE.

(b) *SLA concerning the leasing of rolling stock*

- (187) The Commission observes that the rolling stock leasing charges set out in the SLA are based on the annual depreciation and the costs of financing of that rolling stock. Accordingly, the depreciation factor reflects the financing mix and corresponded to [...] of the value, which was financed through the company's own resources, and [...] of the value, which was financed through loans.
- (188) The Commission notes that the depreciation factor fully complies with the Greek SA companies' accrual accounting standards and that the financial statements of OSE were audited by a certified external auditor annually. Moreover, since OSE's financial statements were based on IFRSs, the value of rolling stock recorded in OSE's asset registry corresponds to its market value.
- (189) On the basis of the above, the Commission considers that the SLA concerning the leasing of rolling stock was concluded on market terms and thus it does not confer any undue economic advantage on TRAINOSE.

(c) *SLA concerning personnel training*

- (190) The Commission notes that, before setting up the SLA concerning personnel training, TRAINOSE attempted to compare the training costs per hour charged by other training providers in Greece. Since OSE is the only provider of technical training for train-drivers and other railway related topics, this comparison of the personnel training costs was not direct.
- (191) As stated in recital 79, LAEK and IEKEM TEE were chosen for the comparison due to the training-related services that they provide. The training costs per hour range between EUR [0-20] and EUR [20-40] for training provided by LAEK, and between EUR [0-15] and EUR [50-70] for training given by IEKEM TEE.

- (192) The Commission considers that the training costs negotiated between OSE and TRAINOSE were set within the range of the market prices and, therefore, that the personnel SLA concerning personnel training was concluded on market terms and does not confer any undue advantage on TRAINOSE. The cost of training is a function of the total number of training hours carried out during the training programme, the number of trainees participating in the training programme (minimum of five (5) persons), and the average hourly cost of training programme which is per participant, dependant on the number of participants per training program, as follows:

Number of Participants	Average Hourly Cost in Euro
$5 \leq X \leq 10$	[20-40]
$10 \leq X \leq 15$	[20-40]
$15 < X$	[0-20]

(d) *SLA concerning office rental*

- (193) The monthly rent set in the SLA concluded in 2011 concerning office rental was established on the basis of a report by an independent real estate valuator at the end of 2005 and adjusted by GAIAOSE to take into account the current state of the building and of the surrounding areas, and the prevailing market conditions.
- (194) At the end of 2005, the estimated rental value of the offices amounted to EUR [10-20] per m². The building where the rented offices are located was constructed in 1972 and does not meet the standards of modern office infrastructure, considering that it lacks open spaces and has a very high percentage (30 %) of common areas. The building itself is in a mediocre state of repair while over recent years its surrounding area has deteriorated, including the increase of criminal activity.
- (195) The Commission notes that when the SLA concerning office rental was concluded, demand for office space rentals dropped by up to 30 % between end 2005 and February 2011 due to the emerging economic crisis, resulting in a decrease in rents. This is confirmed by the market report of a private independent valuator, Eurobank Properties Services, which set the market rents for buildings with similar characteristics in the area where the offices were located at a range between EUR 11 and EUR 14 per m² for July 2010, which represents a 20 % reduction in comparison to 2009.
- (196) Taking into account the factors mentioned in recitals 193 and 194, the monthly rent was adjusted from EUR [10-20] per m² in 2005 to EUR [0-10] per m² in 2011. This adjustment led to a reduction by [20-40] %, which corresponds approximately to the reduction in the prices in that area and the state of the rented building ⁽¹⁾. In addition to paying the basic rent, TRAINOSE was obliged to cover all the costs related to the offices, such as maintenance, energy, taxes and duties, etc.
- (197) In view of the above considerations, the Commission considers that the SLA concerning office rental was established on market terms and that it does not confer any undue advantage on TRAINOSE.

(e) *SLA concerning coach rental*

- (198) The Commission observes that the coach and other vehicle leasing charges set out in the relevant SLA were based on the market value of each of the vehicles on 1 January 2001 adjusted by annual depreciation. The market value of the vehicles as well as the annual depreciation was estimated by the suppliers of those vehicles.
- (199) On the basis of the above, the Commission considers that the SLA concerning coach rental was concluded on market terms and thus it does not confer any undue economic advantage on TRAINOSE.

(f) *Conclusion*

- (200) In view of the foregoing, the Commission concludes that the SLAs have not conferred any undue economic advantage on TRAINOSE.

⁽¹⁾ See Bank of Greece, The real estate market: developments and prospect, Annual Report 2010 (April 2011) https://www.bankofgreece.gr/BogDocumentEn/Governor%27s_AnnualReport2010,April2011ChapterV,S,ection2.pdf

- (201) In view of the fact that the necessary conditions determining the existence of State aid within the meaning of Article 107(1) of the Treaty are cumulative, the absence of any one of them is decisive. There is therefore no need to assess whether Measure 5 meets the other conditions of Article 107(1) of the Treaty.
- (202) Therefore, the Commission concludes that Measure 5 does not constitute State aid within the meaning of Article 107(1) of the Treaty.

7.2. Lawfulness of the aid

- (203) Pursuant to Article 108(3) of the Treaty, Member States must inform the Commission of any plans to grant or alter aid, and must not put the proposed measures into effect until the procedure provided for in Article 108(2) of the Treaty has resulted in a final decision.
- (204) The Commission observes that Measure 1 has not yet been implemented and its implementation is subject to this decision. Since Measure 1 has not yet been implemented, the Commission considers that Greece has respected the notification obligation of Article 108(3) of the Treaty ⁽¹⁾.
- (205) The Commission notes that Measures 2, 3 and 4 were implemented in the period 2011-2013. The aid granted through those measures had not received the Commission's prior approval; therefore, Greece has not respected the stand-still obligation contained in Article 108(3) of the Treaty. Therefore, Measures 2, 3 and 4 constitute unlawful State aid.

7.3. Compatibility of the aid

- (206) Since Measures 1, 2, 3 and 4 constitute State aid within the meaning of Article 107(1) of the Treaty, the Commission must assess whether that aid can be found compatible with the internal market.
- (207) In light of the very specific circumstances of the present case and of the Greek economy, Greece has asserted that the aid in question can be considered compatible with the internal market under Article 107(3)(b) of the Treaty on the grounds that it seeks to remedy a serious disturbance in the economy of a Member State.
- (208) Pursuant to Article 107(3)(b) of the Treaty 'The following may be considered to be compatible with the internal market: [...] aid [...] to remedy a serious disturbance in the economy of a Member State; [...]'.
- (209) As for any derogation from the prohibition on State aids enshrined in Article 107(1) of the Treaty, that provision must be interpreted and applied restrictively. Such a strict application requires taking into account, in particular, the nature and the objective seriousness of the disturbance of the economy of the Member State concerned, on the one hand, and the appropriateness, necessity and proportionality of the aid to address it, on the other, whilst taking into account the possibly systemic importance and position of the beneficiary and the sector concerned and avoidance of undue negative effects on competition and trade between Member States.

7.3.1. *The economic situation in Greece*

- (210) The economic situation of Greece is objectively characterised by an unprecedented deep and prolonged crisis. Greece experienced in 2016 the ninth consecutive year of recession. The recession has been particularly deep in 2009, 2010, 2011 and 2012 (reduction of the real GDP by 3,1 %, 4,9 %, 7,1 and 6 %, respectively). In the period 2008-2016, GDP has contracted by more than 25 %. Greece's gross public debt were expected to peak in 2016 at 179,7 % of its GDP. The unemployment rate in Greece was 24,9 % on average, reaching in certain regions up to 30,7 %, compared to an EU28 average of 9,4 %. The Greek State has virtually no access to capital markets and its public finances are still dependent on the Eurogroup and other international creditors releasing new tranches of planned loans, which are still being discussed. Therefore, Greece's economy remains still highly vulnerable to uncertainties and shocks in June 2017.
- (211) As the Commission noted in its decision of 20 December 2011 applying Article 107(3)(b) of the Treaty to measures addressing the situation in Greece ⁽²⁾, the scale and duration of the economic contraction which Greece is experiencing goes well beyond the challenges experienced by Member States' economies in the context of the standard business cycle, in which economic slowdowns must be accepted as a part of the normal pattern of growth and development.

⁽¹⁾ Judgment of the General Court of 14 January 2004, *Fleuren Compost v Commission*, T-109/01, ECLI:EU:T:2004:4.

⁽²⁾ SA.34044 (2011/N)*EL*Prolongation of the Greek temporary scheme for loan guarantees (OJ C 29, 2.2.2012, p. 4.

- (212) The exceptional effects of the crisis and the ability of State aid granted to providers of energy services holding important positions on the Greek market to remedy or address its effects was also recognised by the Commission in 2013 and 2014 ⁽¹⁾. Moreover, the Commission views indeed the prolongation until 30 June 2017 of State aid support provided to the Greek financial sector as necessary to remedy a serious disturbance of the Greek economy, in application of Article 107(3)(b) of the Treaty ⁽²⁾. Those conclusions regarding the situation of the Greek economy since December 2011 remain still valid for the purposes of the application of State aid rules.
- (213) The Commission agrees with Greece that this situation has had an impact on the Greek railway sector, causing a number of disturbances, such as a decrease in demand for rail transport services for both passengers and freight due to the closure of certain undertakings, the inability of certain businesses to pay their bills (e.g. the Hellenic Sugar Industry or 'HSI') and reductions in the economic activity in certain areas, as well as the possible liquidation of TRAINOSE. The Commission observes that between 2008 and 2012 the served passenger-kilometres decreased by 49 % and the freight tonne-kilometres dropped by 64 %.
- (214) Disturbance in TRAINOSE's operations would create a heavy burden on the public transportation network in general and on the urban network of Athens (used by 8 million passengers per year), Thessaloniki and Patras, in particular. The significance of TRAINOSE as the sole provider of passenger and railway freight services in Greece was illustrated at the peak of the refugee crisis when certain train routes were partially closed or traffic reduced. When the Idomeni border was open, around eight freight trains ran daily back and forward to central Europe. After the closure of the border, this was cut to just four trains run along a longer route through neighbouring Bulgaria, meaning higher transport costs for Greek importers and exporters. A train pulling 34 cars would normally cost up to EUR 50 000 to transport a cargo to Central Europe in two to three days. But the longer route caused delays of up to 12 days, which increased the cost by almost 20 %. The direct extra costs for an exporters association in northern Greece, representing some 500 small businesses, have amounted to about EUR 5 million and have stunted efforts to restart the economy after six years of recession. It is essential for this purpose to ensure smooth transition to achieve the strategic aim of the upcoming sale of 100 % of share capital of TRAINOSE to the investor which must be seen as a milestone in implementing the programme agreed with the Eurogroup ⁽³⁾.

7.3.2. *The position of TRAINOSE in the economy of Greece*

- (215) As a result of the deep and prolonged economic crisis, TRAINOSE has suffered an unprecedented decrease of operating revenues and mounting debt, which is apparent in Table 1. Furthermore, a combination of unprecedented and extraordinary conditions has led to overdue payables in the Greek rail transport system, to overstaffing and to a backlog in investments in infrastructure, having also negative effects on OSE ⁽⁴⁾ and putting at risk the connectivity of the rail transport network in Greece.
- (216) The support provided by the measures subject to the present decision granted or planned to be granted to TRAINOSE as well as to OSE allowed them to maintain the Greek rail infrastructure network and to improve the underdeveloped infrastructure (such as to electrify the Athens-Tithorea line) as well as to continue providing passenger and freight transport services through the 2 554 km long urban and suburban railway network which runs from the South to the North of Greece passing through and servicing its largest cities and ports.
- (217) The Commission observes that TRAINOSE runs approximately 300 passenger services per day and that approximately 16 million passengers use TRAINOSE's services per annum. The PSO routes operated by TRAINOSE account for more than 98 % of all domestic passenger rail transport routes in Greece. Any cease/disruption of TRAINOSE's operations would necessarily deprive passengers of essential public routes, both urban and suburban. In that case, a possible emergency continuity of PSO would be the only option.
- (218) Also, any disruption of the rail transport services would create a heavy burden on the overall public transportation network, primarily in the urban network of Athens (used by 8 million passengers per year), Thessaloniki

⁽¹⁾ Commission Decision of 5 February 2013 in SA.34986 (2012/NN) — Greece — Liquidity support in the energy sector — DEPA, not yet published in OJ — further extended in SA.36871 (2013/NN), DEPA Liquidity support extension (OJ C 348, 3.10.2014, p. 1) and Commission Decision of 31 July 2014 in SA.36323 — Greece — Liquidity Support to Greek PPC (2013/NN) (OJ C 348, 3.10.2014, p. 7).

⁽²⁾ Commission Decision of 19 December 2016 in State aid case SA.46955 (2016/N) — Greece — Prolongation of the State Guarantee Scheme (Art. 2 law 3723/2008), not yet published in the OJ.

⁽³⁾ <http://www.consilium.europa.eu/en/press/press-releases/2016/05/25/eurogroup-statement-greece/>

⁽⁴⁾ Commission Decision in State aid case SA.32543 (2011/N) — Measures in favour of OSE group (not yet published in the OJ).

and Patras. Specific high traffic urban routes are exclusively serviced by TRAINOSE and thus such an event would not only deteriorate traffic conditions in urban areas but also force passengers to use other more expensive and polluting means of transportation, mostly in suburban routes, leading to an increase of passengers' costs of commuting. Moreover, the operation of TRAINOSE is also crucial for tourism, which plays an important role in the Greek economy (~ 8 % direct contribution to the GDP).

- (219) Furthermore, more than 300 million tonnes of freight is transported by TRAINOSE annually, out of which approximately 83 % is export freight, thereby contributing to exports by Greek companies. TRAINOSE connects the ports of Piraeus and Thessaloniki. Furthermore, certain products due to their size and tonnage can only be transported by rail and the interruption of rail transport services would have serious consequences in the supply chain in Greece, affecting companies such as HSI SA and VIOHALKO SA, and also the ports of Piraeus and Thessaloniki.
- (220) Furthermore, TRAINOSE provides transport for the Greek Armed Forces and plays an important role for mass mobilisation of the Greek Armed Forces in the event of a crisis.
- (221) TRAINOSE has 655 full time employees, possessing significant accumulated rail experience and expertise in the railway sector. It is a very important direct and indirect employer in Greece, where over 99 % of companies are SMEs. Unemployment rates are at historical highs and represent the most challenging variable to solve. In Greece SMEs face abnormal risks of economic volatility as a result of the unstable economic environment of the country and, in particular, the effect that has on access to finance, which is crucial for SMEs.
- (222) There was no reasonable prospect of TRAINOSE managing to come out of the financial distress in which it found itself and which has continuously worsened since 2008. The liquidation of TRAINOSE would be an inevitable consequence of not approving the aid subject to this decision. Its liquidation would not only affect TRAINOSE, but would also have negative effects on its suppliers. EESSTY, the rolling stock maintenance provider, would face significant difficulties and would most probably go out of business. EESSTY currently employs 416 employees and approximately 100 % of its annual revenues is generated by its business relation with TRAINOSE.
- (223) Given the fact that TRAINOSE is the sole rail operator and that OSE is the sole rail infrastructure manager, the risk of discontinuation which could ensue from TRAINOSE not being able to continue providing rail transport services would in turn put at risk the continuity of the supply of rail transport services for passengers and freight in Greece and, in turn, OSE's ability to maintain the rail infrastructure. OSE employs 1 595 people (1 396 employees at OSE and another 199 at ERGOSE, a subsidiary of OSE responsible for the development and upgrade of railway infrastructure), while track access charges collected from TRAINOSE in 2015 accounted for 86 % of OSE's annual track access revenues for that year.
- (224) Additionally, GAIAOSE, the manager of rolling stock and real estate assets, and a number of other private businesses, such as service providers and contractors for cleaning, catering and ticketing services, freight forwarders, etc., would also be negatively affected.
- (225) The Commission considers that the aid thus addresses a specific risk for the Greek railway system, and the dramatic consequences of discontinuation of the supply of rail transport services for the Greek economy and the population, beyond the situation of and benefits to TRAINOSE. In light of these extraordinary and specific circumstances which the Greek railway sector, being unequalled sector of the Greek economy as explained in the paragraph 230 below, is facing, the State aid to TRAINOSE is found to have the legitimate aim of remedying a serious disturbance of the Greek economy. It is therefore necessary to verify the adequacy, necessity and proportionality of the aid to address that serious disturbance, as well as its impact on competition and trade between Member States. The Commission recalls that the exceptional economic crisis the Greek economy is facing, as explained in the Section 7.3.1, in combination with the railway sector's vital role to the Greek economy, justifies the exceptional use of Article 107(3)(b) of the Treaty

7.3.3. Appropriateness, necessity and proportionality of the aid and avoidance of undue negative effects on competition and trade between Member States

- (226) Greece reiterated that the aid measures in favour of TRAINOSE are adequate, necessary and proportional, and will have no undue negative impact on competition and trade as regards the service and geographic markets on which TRAINOSE is and shall be active.

7.3.3.1. Appropriateness of the aid measure

- (227) As regards the appropriateness of the aid to TRAINOSE to remedy a disturbance of a whole economy, the Commission notes that this is justified due to the particularities of the Greek rail transport sector.
- (228) First, the railway sector in Greece is unique and not comparable with other industry sectors. TRAINOSE accounts *de facto* for the whole economic sector of rail transport for freight and passengers.
- (229) Second, transport by rail is vital for the functioning of other industry sectors which depend on the transport of goods and persons from one place to another at any given time. Therefore, the rail transport services have a strong potential for triggering detrimental knock-on effects on the entire economy, if a service is not provided. No other industry sector has such a vital role when assessing the dependence of the other market economy actors on the services it provides.
- (230) In view of the ongoing negotiations taking place between Greece and its creditors on the main outstanding issues ⁽¹⁾ that need to be solved in order to reach an agreement on the overall policy package which would allow the second review of the Greece's economic adjustment programme to be completed, a particular attention is needed to provide clarity for the planned sale of TRAINOSE.
- (231) Therefore, the aid is appropriate to address a specific risk for the railway system and averts discontinuation of provision of rail services to the Greek economy and the population, beyond the situation of and benefits to TRAINOSE. In light of the extraordinary and specific circumstances which the Greek railway sector is facing, the Commission considers that the aid to TRAINOSE is appropriate to remedy a serious disturbance of the Greek economy. This aid will be sufficient for the companies to return to viability or at last carry out their tasks reliably.

7.3.3.2. Necessity and proportionality of the aid

- (232) The support is limited in time as it consists mainly of one-off well circumscribed aid that was or will be primarily provided through a write-off of TRAINOSE's liabilities towards OSE, a capital increase of EUR 60 million in 2009, direct grants of EUR 50 million for the period 2011-2013 and a transfer of employees of TRAINOSE to other public employers. Without those measures totalling EUR 1,02 billion, TRAINOSE would go out of business causing serious disturbances and systemic implications for other Greek undertakings dependent on the transport services provided by TRAINOSE. Moreover, TRAINOSE will be fully privatised, which should allow the new ownership to reorient, to the extent necessary, the operations of the company to become more competitive once the problems on the railway market caused by the economic crisis in Greece are solved. The alleviation of the financial burden of part of past liabilities is a pre-condition for the privatisation to happen.
- (233) As far as the annual grants are concerned, the amounts appear to be proportionate since the grants are compensatory in nature and have furthermore been determined in agreement with the Troika. They have served to only partly cover operating losses incurred between 2008 and 2011 (see Table 1) and, therefore, have not provided TRAINOSE with additional resources which the company could have used to invest and/or expand its activities on other geographic or service markets. The same is true *mutatis mutandis* as far as the capital increase of EUR 60 million in 2009 and the planned write-off of liabilities towards OSE are concerned. The planned write-off is commensurate with the amount of debt TRAINOSE owes and, even combined with the past capital increase, will still fall short of absorbing past losses and bringing the debt to equity ratio of the company back to a strong solvency situation (see Table 1). The financial indicators of TRAINOSE throughout the period of economic crisis in Greece since 2008 show that the payments to OSE cannot be made from own resources at present. It would be unrealistic and detrimental in the context of disturbance of the Greek economy that TRAINOSE increased significantly its tariffs or prices to generate enough revenues in the short term in order to settle this debt.
- (234) As regards the transfer of 593 employees, the information provided by Greece shows that the measure has been confined and calibrated to alleviating the situation of overstaffing and reducing some of the legacy staff costs of TRAINOSE which stemmed from the specific quasi-civil servant status of its personnel and the past recruitment policy of the company. Other companies in Greece employing staff subject to common law, including actual or

⁽¹⁾ <http://www.consilium.europa.eu/en/meetings/eurogroup/2017/03/20/>

potential providers of railway services, do not bear costs of the same nature and amount. Therefore, the advantage provided to TRAINOSE through the transfer of 593 maintenance employees has not gone beyond putting TRAINOSE on a level playing field with actual and/or potential competitors as to staff costs.

- (235) Therefore, the Commission considers that the aid is necessary and proportionate with a view to allowing TRAINOSE to carry out its tasks reliably and avoiding that its possible dissolution worsens the serious disturbance of the economy which Greece is facing.

7.3.3.3. Avoidance of undue negative effects on competition and trade between Member States

- (236) As regards the avoidance of undue negative effects on competition and trade between Member States, it has to be noted that the measures are directly connected with ensuring the interim survival of Greek railways, TRAINOSE, until the implementation and completion of the take-over of the company and cannot be deemed to have significantly adverse negative spill-over effects on other Member States.
- (237) The measures in question do not and did not serve to increase the capacity of TRAINOSE. On the contrary, Greece has restructured and reorganised TRAINOSE in order to increase its efficiency and as far as it was possible to limit the negative effects of the disturbances mentioned above. With the privatisation of TRAINOSE to TRENITALIA, Greece has definitely cut the links between its rail infrastructure manager and the rail operator.
- (238) In addition, Greece has committed to enhance the opening of the Greek railway market, such as to establish an independent contracting authority for public service contracts for rail passenger transport according to Regulation (EC) No 1370/2007, as from 2021 to award the PSO contracts by the independent contracting authority via public tenders for service bundles with a duration of maximum 5 years each, to provide the participants in those first tenders for PSO with relevant information and with sufficient time to prepare bid and to synchronise the rolling stock lease contracts with the PSO contracts.
- (239) In view of the above considerations and commitments of Greece, the Commission considers that the aid does not have undue negative effects on competition and trade between Member States.

7.3.4. Conclusion

- (240) The Commission considers that the State aid to TRAINOSE has the legitimate aim of remedying a serious disturbance of the Greek economy; it is appropriate, necessary and proportional, and does not have any undue negative effects on competition and trade between Member States. Therefore, it is to be considered compatible with the internal market on the basis of Article 107(3)(b) of the Treaty.

7.4. Conclusions

- (241) In the light of the withdrawal of the notification regarding the transfer of terminals from OSE and the equity increase of EUR 65 million in favour of TRAINOSE (see part of Measure 2 and Measure 6), the formal investigation procedure under Article 108(2) of the Treaty in respect of the notified measures should be closed.
- (242) The Commission considers that the envisaged cancellation of debts of TRAINOSE amounting to EUR 748,6 million (Measure 1), the equity increase of EUR 60 million implemented in 2009 (part of Measure 2), the annual grants to TRAINOSE for the period from 2011 to 2013 amounting up to EUR 150 million (Measure 3) and the transfer of TRAINOSE's employees to other public sector employers (Measure 4) constitute State aid within the meaning of Article 107(1) of the Treaty and can be declared compatible with the internal market under Article 107(3)(b) of the Treaty on the grounds that their purpose is to remedy a serious disturbance in the Greek economy.
- (243) With regard to the SLAs between TRAINOSE and OSE (Measure 5), the Commission considers that the SLAs had been concluded on market terms and therefore they do not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

Following the withdrawal of the notification of the transfer of terminals from OSE to TRAINOSE and of the equity increase of EUR 65 million, the formal investigation procedure under Article 108(2) of the Treaty with respect to these notified planned measures in favour of TRAINOSE SA has become without object and is hereby closed.

Article 2

1. The State aid in the form of the cancellation of debts amounting to EUR 748,6 million in favour of TRAINOSE, which Greece is planning to implement, constitutes State aid, compatible with the internal market on the basis of Article 107(3)(b) of the Treaty. The implementation of the cancellation of these debts is accordingly authorised.
2. The equity increase of EUR 60 million implemented in 2009 in favour of TRAINOSE constitutes State aid, compatible with the internal market on the basis of Article 107(3)(b) of the Treaty.
3. The annual grants of up to EUR 150 million implemented in the period from 2011 to 2013 in favour of TRAINOSE constitute State aid, compatible with the internal market on the basis of Article 107(3)(b) of the Treaty.
4. The transfer of 593 employees to other public sector employers during the period from 2011 to 2013 is compatible with the internal market on the basis of Article 107(3)(b) of the Treaty.
5. The Service Level Agreements concerning the provision of rolling stock maintenance, the leasing of rolling stock, the personnel training, the office rental and the coach rental, do not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 3

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 16 June 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission
