COMMISSION DECISION (EU) 2019/1712

of 20 July 2018

on the public loan SA.29198 — (2010/C) (ex 2009/NN) granted by Slovakia for Železničná Spoločnosť Cargo Slovakia, a.s. (ZSSK Cargo)

(notified under document C(2019) 4723)

(Only the Slovak 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 pursuant to the provision(s) cited above ([1]),

Whereas:

1. PROCEDURE

(1) By letter dated 24 February 2010, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of a public loan to Železničná Spoločnosť Cargo Slovakia, a.s. ('decision to initiate the procedure').

(2) The Commission decision to initiate the procedure, as further explained therein, followed an earlier complaint from an anonymous competitor of 21 April 2009 and a notification made by Slovakia for reasons of legal certainty on 10 August 2009.

(3) The decision to initiate the procedure was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit comments on the public loan but received no such comments.

(4) By letter dated 16 June 2010, Slovakia submitted its comments on the decision to initiate procedure.

(5) The Commission sent additional requests for information to the Slovak authorities on 8 November 2010, 22 December 2010, 14 June 2011, 6 August 2012 and 25 August 2016. The Slovak authorities provided their replies on 6 December 2012, 20 and 22 January 2011, 11 July 2011, 17 September 2012 and 14 October 2016, respectively. On 20 December 2017, the Slovak authorities provided an additional submission, which was discussed at a meeting of 23 January 2018.

([1]) OJ C 117, 6.5.2010, p. 13.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Recipient (activities, ownership, market share etc.)

(6) Železničná Spoločnosť Cargo Slovakia, a.s. ('ZSSK Cargo') was established in 2005 after splitting the incumbent railway operator Železničná spoločnosť, a.s., into three separate railway companies: Železnice Slovenskej Republiky — infrastructure manager, Železničná spoločnosť Slovensko a.s. — passenger traffic and ZSSK Cargo — freight transport. The Slovak Government was and remains the founder and 100 % shareholder of ZSSK Cargo. The Ministry of Transport, Posts and Telecommunications of the Slovak Republic exercises the shareholder rights of the Government.

2.2. Description of the loan to ZSSK Cargo

(7) The loan of EUR 165 969 594,37 that is the subject to present proceedings was authorised by Government Decree No 173 of 4 March 2009, and paid to ZSSK Cargo on 6 April 2009 on the basis of a contract concluded on 31 March 2009 between the Ministry of Transport, Posts and Telecommunications and ZSSK Cargo [2]. The loan was granted for a period of 10 years with a grace period of two years before the first payment of instalment reimbursing the principal.

(8) The loan was non-collateralised. It was aimed at financing salaries and other staff costs, charges for use of railway infrastructure and financial charges in a context of a significant drop of operating revenues and ongoing and planned restructuring measures, which is further described below. Indeed, the loan was granted following a report drawn up in February 2009 on the economic situation of the company and railways of the Slovak Republic (Železnice Slovenskej republiky) describing the financial difficulties of ZSSK Cargo and attached as background document to the Government Decree No 173 of 4 March 2009.

(9) The variable interest rate on the loan was based on the 6 month Euro Interbank Offered Rate (EURIBOR) increased by the margin of 3,2 % per annum. On 6 April 2009, the agreed annual interest rate amounted to 4,844 % (1,644 % (6 month EURIBOR) + 3,2 % (margin)). According to the Slovak authorities, this rate was established on the basis of the opinion of the Slovak Debt and Liquidity Management Agency ARDAL [3].

(10) The Slovak authorities extended the initial two year grace period for repayment of the principal of the loan several times in 2011 and 2012 by 18 months in total, having regard to the continued financial situation of ZSSK Cargo and acknowledging its on-going restructuring efforts. Whereas the original repayment period was until 2019, ZSSK Cargo repaid the whole loan with all due interests in advance by November 2015.

2.3. Operating and financial performance of ZSSK Cargo

(11) The provision of railway freight services was opened to completion in Slovakia in 2007, in accordance with Council Directive 91/440/EEC [4] which liberalised international rail freight transport as from 1 January 2006 and all other rail freight transport services as from 1 January 2007.

(12) ZSSK Cargo provided and still provides rail freight traffic on its own or combined with road transport services as well as renting, maintenance and repair of the rolling stock. By 2010, 15 freight transport companies were active in the Slovak Republic. In 2008, ZSSK Cargo transported 44,5 tonnes of goods, which represented 93,7 % market share on the Slovak rail freight market. In the first half of 2009, ZSSK Cargo transported 15,3 million of tonnes representing 93 % share of the Slovak rail freight market.

[2] The contract is based on Act No 523/2004 of 23 September 2004, on budget rules of the public administration and on amendments and supplements to certain laws and Act No 278/1993 Coll. on Administration of State Property, as amended.

[3] ARDAL has been established as a budgetary organisation linked to the state budget via the budgetary chapter of the Ministry of Finance of the Slovak Republic under Article 14 of the Act No 291/2002 Coll. on State Treasury and on changes and amendments of some acts under the Act No 389/2002 Coll. on State Debt and State Guarantees. The goal and the purpose of the functioning of the Agency is 'providing liquidity and access to market in order to finance the needs of the State in a transparent, prudent and cost-effective manner, and, at the same time, minimise the debt service costs over the time, provided the debt portfolio inherent risks will remain on an acceptable level' (http://www.ardal.sk/index.php?page=1).

[4] Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25).

(13) ZSSK Cargo registered losses for the first three years after its creation in 2005 [5]. In 2005 and 2006 ZSSK Cargo registered net losses of respectively SKK 428 million (EUR 11,3 million) [6] and SKK 855 million (EUR 24,8 million) [7]. In 2007, ZSSK Cargo succeeded in reducing its net loss to SKK 154 million (EUR 4,5 million). In 2008, ZSSK Cargo registered net profit amounting to SKK 83 million (EUR 2,4 million), resulting mainly from the reduction of operating costs by more than SKK 600 million (EUR 17,4 million).

2.4. **Financial situation of ZSSK Cargo when the loan was granted**

(14) According to the information provided by the Slovak authorities, in 2008, the EBITDA of ZSSK Cargo (Earnings before Interest, Taxes, Depreciation and Amortization) increased by 6 % in comparison with 2007 reaching EUR 59,8 million. Over 2007 and 2008, other key financial indicators (revenues, equity, total indebtedness) remained either stable or slightly improved. The Debt-to-Equity ratio for instance decreased by 6 % to 43,9 % in 2008. Financial data of ZSSK in March 2009 used for S&P rating allows to conclude that ZSSK was not a firm in difficulty (C rating) and remained investment grade (BB rating).

(15) The 2008 annual report of ZSSK Cargo however mentions that, in the last quarter of 2008, the impact of the economic crisis fully displayed in the reduced demand for transportation and consequently caused the downturn in performance of ZSSK Cargo. Revenues from transportation of goods fell significantly by more than 30 % in that period. As a consequence, the financial situation of ZSSK Cargo deteriorated at the end of 2008 and thereafter. The company's revenues decreased by 38 % in the first half of 2009 compared with the same period in 2008. Similarly, the result of the company decreased from a net profit of EUR 22 million in the first half of 2008 to a net loss of EUR 47 million in the first half of 2009.

(16) In that context, the report on the economic situation of the company and railways of the Slovak Republic of February 2009 described the restructuring efforts that ZSSK Cargo had already undertaken in years 2006-2008. The report documented the need for the loan and included also the following additional measures considered necessary to improve the financial situation of ZSSK Cargo: (i) additional costs-cutting measures, (ii) temporary dismissals of employees, and (iii) long-term optimization of the number of employees and further restructuring of ZSSK Cargo's operations. Staff decreases by more than 10 % and other cost restructuring measures led to a reduction of operating costs by SKK 600 million (EUR 17,4 million) in 2007. The restructuring measures had led to significant reduction of losses in 2007 and to a positive result in 2008 despite the first negative effects of the crisis towards the end of the year. Based on these facts, the report concludes that ZSSK Cargo had been on the way to long-term competitiveness and profitability and that the expected financial losses in 2009 were mainly caused by the drastic but temporary decrease in the transport volumes due to the crisis that started the year before.

(17) Thereafter, on year-to-year performance (table below), net income remained strongly negative in 2010. However, already in 2011 the company already managed to significantly reduce losses with reduced revenues thereafter. In subsequent years staff decreased 44 % by 2016. ZSSK Cargo recovered by 2013 and is now posting modest profits, as shown in the table.

Selected financial figures of ZSSK Cargo 2008-2016

(EUR million)

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Revenues	458	340	378	371	315	369	296	284	278
Profit	2,7	– 126,6	– 122,6	–0,3	–23,9	+ 0,3	–5,5	+ 0,8	+ 0,1
Staff headcount	10 448	9 826	9 546	8 054	6 822	6 331	6 103	6 027	5 794

Source: Annual Reports of ZSSK Cargo, supplied by Slovak Republic, also available (from 2011) at (https://www.zscargo.sk/en/media/annual-reports

(5) Annual Reports 2005-2008 are published on the website of ZSSK Cargo: http://www.zscargo.sk/en/public/press/annual-report/.
(6) Exchange rate 1 EUR = 37,88 SKK published in OJ C 336, 31.12.2005, p. 1.
(7) Exchange rate 1 EUR = 34,435 SKK, published in OJ C 332, 30.12.2006, p. 1.

2.5. **Loan quotes from other banks and conditions of other loans from similar rating at the time**

(18) Before the loan was granted in March 2009, three commercial banks indicatively offered to ZSSK Cargo a loan of the same amount (EUR 166 million) and a repayment period (10 years) with interest rate of 6-month EURIBOR plus 295 b.p. ([commercial bank 1] (*)), 285-300 b.p. depending on maturity ([commercial bank 2]) or 425 b.p. ([commercial bank 3]) respectively, without any particular collateral.

(19) On the day of granting the loan, on 31 March 2009, around 32 companies with similar creditworthiness (BB-rating) as ZSSK Cargo entered into credit default swaps (CDS) contracts with a 10 year maturity period on financial markets. The majority of these contracts had spread rates between 305 and 916 b.p. ([8])

2.6. **Grounds for initiating the procedure**

(20) The Commission decided to initiate the procedure since it could not exclude that the public loan for ZSSK Cargo involved State aid within the meaning of Article 107(1) of the TFEU. The Commission considered that the loan might have been granted on terms more favourable than the rates set out in the Reference Rate Communication ([9]), adopted not long before the decision to initiate proceedings. The Commission also raised doubts as regards the compatibility of the loan with the internal market, in particular, on the following points.

(21) As regards the question whether the loan was in line with market conditions, the decision to initiate proceedings questioned the rationale of the interest rate based on a 6-month EURIBOR instead of 1-year IBOR set out in the Reference Rate Communication as well as the grace period of two years and its impact on the interest rate. The interest margin (320 b.p.) charged did not seem to take into account the deteriorating financial situation of ZSSK Cargo: as a company without credit history or any available rating and with financial difficulties, the margin for a loan with high collateral should according to the Reference Rate Communication be at least 400 basis points, whereas if the level of collateral is low, the margin should have been 1 000 basis points.

(22) The decision to initiate the procedure also raised doubts whether the loan, in case it constituted State aid, could be declared compatible with the internal market under Articles 107(3)(b) or (c) of the TFEU in light of the rules laid down in the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ([10]), Community guidelines on State aid for rescuing and restructuring firms in difficulty ([11]) or the Community guidelines on State aid for railway undertakings ([12]).

3. **COMMENTS FROM SLOVAKIA**

(23) The Slovak authorities claim that the loan was granted on market terms by the State as a prudent shareholder and therefore does not contain any State aid element.

(24) First, the Slovak authorities claim that in the same situation, any reasonable shareholder would have granted the loan to the company. The Slovak authorities argue that it can be expected that the shareholder would have granted the loan under market conditions using the interest rate at the lower limit offered by banks on loans with similar parameters. The shareholder's interest is not to grant a loan for the business of its own company at too high interest, as it could place a disproportionate burden on the company, which could subsequently lead to frustration of the loan purpose that is usually to bridge temporary economic problems or further develop the company's business. In fact, the shareholder primarily wants the company to make profits in the next periods and it is consequently not interested in earning interest on the loan granted to its own company under normal market

(*) Confidential information.

([8]) Database S&P Capital IQ Platform https://www.capitaliq.com. The CDS is a financial swap agreement that the seller of the CDS will compensate the buyer (usually the creditor of the reference loan) in the event of a loan default (by the debtor). In other words, the seller of the CDS insures the buyer against some reference loan defaulting. This instrument is as such very relevant to give an indication of what would be the risk premium/guarantee fee a market operator would require to ensure the risk of default of a loan.

([9]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

([10]) OJ C 83, 7.4.2009, p. 1.

([11]) OJ C 244, 1.10.2004, p. 2.

([12]) OJ C 184, 22.7.2008, p. 13.

conditions, but rather to support the company's business in order to make a profit from which it can subsequently pay out a dividend.

(25) Second, the Slovak authorities claim that according to the company's financial projections available at the moment of the granting of the loan, ZSSK Cargo would have sufficient free cash flow to repay the loan during the 10 year period. In fact, when deciding to provide the loan the Slovak Republic has carefully considered its amount and conditions of its provision to ZSSK Cargo in view of the current developments in the market and economy, taking also into account assumptions regarding future expectations. In this context, the Slovak Republic had ZSSK Cargo Crisis Management reports at its disposal, in which ZSSK Cargo described in detail the measures to make savings that constituted the basic prerequisite for further functioning of the company so that it does not get into difficulties, as well as the prerequisite for creating an opportunity to repay the loan. When providing the loan, the Slovak Republic was working on the assumption that once the adverse effects of the economic crisis are resolved, the economy will restart, which will also have a positive impact on the sector of rail freight transport, reflecting in an increased volume of the goods transported. The Slovak Republic points out that these expectations were subsequently confirmed and ZSSK Cargo recorded an increase in the number of transports made in the following periods and it again started to achieve good economic results and eventually also managed to repay in 2015 the entire loan along with interests, earlier than set out in the loan contract.

(26) The Slovak authorities also pointed to the fact that ZSSK Cargo was able to decrease its indebtedness in 2008 with the debt-to-equity ratio decreasing by almost 6 percentage points to 43,9 %. They also claim that ZSSK Cargo was not in difficulties and that the interest rate was calculated by the public Agency for Management of Debt and Liquidity (ARDaL) and in line with the Reference Rate Communication.

(27) Third, the Slovak authorities argued that they decided on the terms of the loan based on the offers of three commercial banks that had been requested to submit offers for granting a loan in the same amount as well as on other loans previously received by ZSSK Cargo.

(28) The use of 6-month EURIBOR rate was based on the fact that it would also be used by commercial banks providing loans on the market. The Slovak Republic was therefore interested in granting a loan at interest rate similar to that at which ZSSK Cargo could have borrowed on the market at that time, taking into account the most favourable conditions that could have been obtained on the market. Therefore, as private banks were willing to provide a loan to ZSSK Cargo on similar terms and one of the banks described ZSSK Cargo as a reliable and fair client among its important ones, the Slovak authorities argue that they acted as a private operator and therefore the loan does not constitute a financial advantage and so it did not give rise to a more favourable competitive position of ZSSK Cargo vis-à-vis other competitors.

(29) Fourth, in relation to the alleged unproven rating of ZSSK Cargo, the Slovak authorities argued that ZSSK Cargo had not been a company without a credit history or a rating at the time of granting the loan. ZSSK Cargo had a relatively good credit history at the time of providing the recoverable financial assistance, and the banks perceived ZSSK Cargo as a reliable client. This was also reflected in the offers by the commercial banks submitted to the Commission. These offers clearly show that the banks were willing to provide ZSSK Cargo with a loan under similar conditions as the Slovak Republic did, and with respect to the credit history and reliability of ZSSK Cargo, none of the banks asked for, or made granting the loan conditional upon, the provision of a collateral by ZSSK Cargo. Therefore, even in the case of ZSSK Cargo, the banks would not require any official credit rating for granting a loan in the normal market, and the banks were able to rate ZSSK Cargo themselves.

(30) Finally, the Slovak authorities argue that even though in case there are real offers by the banks there is no reason to apply alternative (reference) methods to establish whether the loan was granted on market terms, also applying the Reference Rate Communication shows that the terms of the loan were in line with reference rates:

(a) the 6-month EURIBOR rate was amounted to 1,67 % at that time, which together with the margin used (3,2 %) represents the rate of 4,87 %;

(b) the margin of 3,2 % corresponds to a margin that would be applied by commercial banks (the average margin according to the indicative offers provided by commercial banks is 3,35 %).

(31) ZSSK Cargo was not an undertaking with a high rating or a good rating and has not offered any collateral (in such case the margin of 100 basis points (1 %) would be sufficient), but it cannot be said that it was an undertaking without a credit history or with a rating requiring the margin of at least 400 basis points. Since ZSSK Cargo could have been rated as an undertaking with a better than good rating and a low collateral at that time, but with a credit history showing its ability to meet its liabilities, the Slovak authorities argue that it was reasonable to set a margin in line with the methodology specified in the Reference Rate Communication, ranging from 100 up to 220 basis points, which corresponds to the method used by the Slovak Republic in this case, even though the 6-month EURIBOR rate was applied as a calculation basis.

(32) In this respect, at that time, banks set interest rates using the 6-month EURIBOR rate with a margin of about 3 %, i.e. the interest rates similar to the terms of the loan. The interest rate was set on the basis of the assessment of the market conditions, including the indicative offers submitted by the commercial banks, i.e. reflecting market conditions and on the basis of a comparison with the interest rates at which the state borrowed (1,5 % p.a.), to which a credit margin of 1,7 % p.a. was added taking into account the credit risk of ZSSK Cargo, totalling a margin of 3,2 % p.a. Thus, the interest rate was set in accordance with the market conditions at the time, namely 6-month EURIBOR + margin of 3,2 % p.a.

(33) In conclusion, the Slovak Republic argues that it proceeded in accordance with the private investor principle in a market economy and thus the loan did not entail any advantage for ZSSK Cargo.

4. **ASSESSMENT — EXISTENCE OF STATE AID**

(34) By virtue of Article 107(1) of the TFEU 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

(35) The qualification of a measure as aid within the meaning of that provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States. The criteria laid down in Article 107(1) of the TFEU are cumulative, therefore, in this case, it is appropriate to confine the assessment to the question whether the loan (selectively) favoured ZSSK.

4.1. **Legal framework for the assessment of the presence of an economic advantage over market conditions**

(36) The Court of Justice has considered that the application of the market investor test allowing assessing whether an economic advantage unduly favouring a (public) undertaking is granted depends on whether the State acts as a shareholder or as a public authority. The Member State must establish unequivocally it acted as an investor seeking a return and support with objective and verifiable elements that contention. Those elements must be contemporary to the decision to grant the measure and show that the decision was grounded on economic evaluations similar to those which a market investor would have carried out with a view to determining the profitability of the investment ([13]). Both the existence and the amount of aid fall to be assessed in the light of the situation prevailing at the time the loan was granted ([14]).

(37) The conduct of a market investor with which the intervention of the public investor must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term. However, the conduct must at least be that of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectorial — and guided by prospects of profitability in the longer term ([15]).

([13]) Case C-124/10 P *Commission v EDF*, EU:C:2012:318, points 81 to 84.
([14]) Case T-318/00, *Freistaat Thüringen v Commission*, par. 125, EU:T:2005:363.
([15]) Case C-305/89, *Italian Republic v Commission*. par. 20, EU:C:1991:142.

(38) In the present case, the Slovak Republic claims that it acted as a prudent shareholder when granting the loan and has provided the evidence which was available to it and that it took into account before granting the loan (see section 3). It follows that, based on that evidence, the Commission has to examine the presence of a selective economic advantage. In particular, whether, in similar circumstances and based on the information available and examined, a market investor in a situation as close as possible to that of the Slovak Republic — through its competent Ministry of Transport, Posts and Telecommunications — might have provided funding to ZSSK Cargo in the form of a long term loan at the conditions the loan was granted ([16]).

(39) This examination requires assessing whether the terms of the loan provided by the Slovak Republic to the benefit of ZSSK Cargo conferred a selective economic advantage to the latter, that means under conditions which ZSSK Cargo would not have obtained on the market. To that effect, the Commission has to take into consideration in particular the financial situation of ZSSK Cargo and foreseeable developments at the moment of granting the loan, the shareholding position of the Slovak Republic and the conditions provided for the loan.

(40) The relevant test is therefore whether a market operator in the position of the Slovak Republic would have granted the loan under the same terms in March 2009. The relevant operator for the assessment is not a commercial bank with little or no past credit relationship granting a commercial loan but a market investor being the sole shareholder of ZSSK Cargo and granting the loan with a view to allowing its controlled company to meet operating costs after a sharp and unexpected decline in its activity and revenues.

(41) In that examination, the fact that ZSSK Cargo was able to fully repay the loan four years in advance of the original term already in 2015 and recorded operating profits thereafter does not on its own allow concluding that a market lender acting in lieu of the Ministry of Transport, Posts and Telecommunications would also have granted the loan with reasonable assurance of being repaid. The early repayment only confirms, *ex post*, the reasonableness of the assessment made by the public shareholder/creditor on the basis of the information that was available and examined before the loan was granted and is not decisive to conclude positively that another operator would also have granted the same loan.

4.2. **Assessment of the loan to ZSSK Cargo**

(42) Firstly, the evidence provided in the proceedings shows that three commercial banks indicatively offered to ZSSK Cargo a loan of the same amount (EUR 166 million) and repayment period (10 years) with interest rate of 6-month EURIBOR plus 295 b.p. ([commercial bank 1]), 285-300 b.p. ([commercial bank 2]) or 425 b.p. ([commercial bank 3]), respectively without any particular collateral. Therefore, two commercial banks were ready to offer to ZSSK Cargo even lower interest rate margins than the one charged by the Slovak Republic namely 320 b.p. These indicative offers were known to and examined by the Slovak Republic with a view to setting the interest rate of the loan under examination (see recitals 18 and 27). Therefore, the interest rate charged on the public loan was determined with a view to and in line with the remuneration that was adequate for market private lenders.

(43) The fact that the loan provided for a 2-year grace period for the repayment of the principal of the loan, later extended by additional 18 months, was unlikely to have significant effect on the assessment of the terms of the loan. Since the interests on the outstanding amount were paid on a 6-monthly basis since the beginning of the loan period, the benefit of the postponed repayment of the principal was outweighed by higher interest payments.

(44) In addition, the indicative offers also show that the use of a 6-month EURIBOR rate was a standard practice by the private banks and thus in line with market conditions. All these banks knew ZSSK Cargo based on loans provided in the previous years and [commercial bank 1] even explicitly described ZSSK Cargo in its offer as a reliable and trustworthy partner. In addition to these offers, ZSSK Cargo had a credit history with these three as well as other commercial banks, contrary to the preliminary position set out in the decision to initiate the procedure.

([16]) Joined cases C-278/92, C-279/92 and C-280/92, *Kingdom of Spain v Commission*, par. 21.
EU:C:1994:325.

(45) Finally, the benchmarking of the 320 b.p. interest margin charged on the loan against the CDS rates at the time the loan was granted, as described in recital 19, also shows that the interest margin can be considered as falling among actual market rates for companies with the same rating as ZSSK Cargo in March 2009. In other words the CDS-benchmarking does not corroborate the doubts raised in the decision to initiate the procedure. The ensuing conclusion is that the interest rate effectively charged is not shown to have provided ZSSK Cargo with an undue advantage over market conditions.

(46) Therefore, all available evidence indicates that ZSSK Cargo was likely to obtain financing on similar terms also from private commercial lenders thus dispelling the doubts raised in the decision to initiate the procedure. More even so since such market operators, contrary to the State, were not capable of recovering as shareholders any revenue hypothetically foregone from the loans at the conditions offered, purportedly low on first examination.

(47) Secondly, according to the evidence collected in the proceedings, at the time the loan was granted, ZSSK Cargo was not an undertaking in difficulty under the two quantified criteria of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty (point (10). Namely ZSSK Cargo at the time has not lost more than half of its registered capital, of which one quarter in the past 12 months and it was not meeting criteria for domestic insolvency proceedings. Moreover, despite the acute liquidity shortage in 2009, it also seems unlikely that ZSSK Cargo could be considered as being in difficulty under the non-quantified criteria of those guidelines (point 11, e.g. mounting debt, falling or nil asset value, excess capacity).

(48) Indeed, ZSSK Cargo recorded a small profit in 2008 and the accumulated losses from previous years (amounting as of 31 December 2008 to SKK 1 452 million (EUR 42,2 million)) were still relatively minor compared to the total equity of more than SKK 13 000 million (EUR 377,5 million). Even the significant loss subsequently recorded for the whole year 2009 did not eliminate more than half of its subscribed share capital. In addition, the indebtedness of ZSSK Cargo at the beginning of 2009 was rather modest with a debt-to-equity ratio of 0,44. By way of comparison, under the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (which are not applicable to this case), the ratio for the determination as undertaking in difficulty under specific rules for aid to undertakings in difficulty is 7,5, that is, seventeen times higher.

(49) The rating of ZSSK Cargo at the time when the loan was granted appears higher than a CCC-rating used for undertakings in difficulty in line with the 2008 Reference Rate Communication on which the decision to initiate the procedure relied to preliminarily indicate that the interest rate effectively charged was unduly low. On the contrary, the available evidence suggests that ZSSK Cargo would have been rated BB, thus having access to finance at lower cost than undertakings in difficulty. Furthermore, the non-negligible difference of 80 b.p. between the 320 b.p. interest margin of the public loan under scrutiny and the 400 b.p. proxy of market margin determined for undertakings rated BB with low collateral under the 2008 Reference Rate Communication is far lower than the 140 b.p. difference between the actual quotes of loan interest rates from commercial banks vis-à-vis ZSSK Cargo produced in the proceedings.

(50) It follows that, contrary to the preliminary views set out in the decision initiating the formal procedure, the difference in interest rate of the public loan as compared with the proxy of market rate provided in the 2008 Reference Rate Communication cannot be held to indicate that the latter was not granted in line with market conditions.

(51) Thirdly, the fact that the State held (and still holds) 100 % of ZSSK Cargo's shares needs to be taken into account. The State's economic considerations of the expected profit from the loan are not limited to the expected interest rate payments only, as in case of commercial banks, but necessarily need to take into account the fact that the loan would improve ZSSK Cargo's ability to reach future profits and thus increase — or maintain — the value of the State's shareholding. Indeed, one of the explicit reasons for the financing as indicated in the 2009 Report was to enable ZSSK Cargo to overcome the economic crisis and to restructure with the aim to achieving long-term profitability, which the same report indicated ZSSK Cargo was capable of achieving.

(52) In effect, the provision of the loan was one among a variety of mutually supporting actions and measures aimed at ensuring a long-term solution to the financial situation of ZSSK Cargo portrayed in recital 16 and which include (i) costs-cutting measures, (ii) temporary dismissals of employees, and (iii) long-term optimization of the number of employees and further restructuring of ZSSK Cargo's operations. A prudent market operator would have also supported the restructuring of its fully controlled company, since there were realistic prospects of its situation improving. Indeed, the February 2009 Report drawn-up and examined by the Slovak authorities before the loan was granted indicates that the State diligently verified the future prospects for development of ZSSK Cargo, including its ability to generate the cash-flows that were necessary to service and repay the loan, like a prudent market investor or lender would have also verified. As a matter of fact, based on the prospects and information available, the public shareholder chose to grant a fully reimbursable loan, albeit with a reasonable grace period, instead of other alternative financial instruments such as (non-reimbursable) equity or debt convertible into equity or other hybrid financing that could have shown anticipation of difficulties of ZSSK to reimburse.

(53) Like other private shareholders did during the financial and economic crisis started in 2008, the objective and verifiable evidence submitted by the Slovak Republic shows that, by granting the loan under examination, the Ministry of Transport, Posts and Telecommunications wished to act and effectively acted in its capacity of shareholder to maintain a potentially valuable shareholding through the continued operation of ZSSK Cargo in a difficult commercial environment characterised by sheer drops in volumes of freight and supported the continuation of the company allowing it to restructure, which the company eventually did.

4.3. **Conclusion**

(54) The conditions of the public loan granted to ZSSK Cargo were in line with market conditions and such loan would have also been granted by a market economy operator. It follows that the loan at issue cannot be deemed to have (selectively) favoured ZSSK Cargo. Since the conditions of Article 107(1) of the TFEU are cumulative, it is therefore not necessary to assess whether the loan involved State resources, distorted or threatened to distort competition, and affect trade between Member States. A fortiori, it is not necessary to assess whether the loan at issue could be declared compatible with the internal market pursuant to Article 107(3)(b) or (c) of the TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The loan granted by the Slovak Republic to Železničná Spoločnosť Cargo Slovakia, a.s., amounting to EUR 165 969 594,37 does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Slovak Republic.

Done at Brussels, 20 July 2018.

For the Commission

Margrethe VESTAGER

Member of the Commission