

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2021/1885

of 20 April 2021

on the State aid SA.43127 – 2018/C (ex 2015/NN) (ex 2015/N) implemented by Poland for Przewozy Regionalne sp. z o.o.

(notified under document C(2021) 855)

(Only the Polish 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 point (a) of Article 62(1) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 21 September 2015, Poland notified a restructuring aid for Przewozy Regionalne sp. z o.o. ('PR') in the amount of PLN 770,3 million (around EUR 181 million) ⁽²⁾ ('the notified restructuring aid'). The aid was granted on 30 September 2015 in the form of equity investment by the 100 % State-owned Industrial Development Agency ('IDA'). Since the aid was granted without prior authorisation by the Commission, it was registered as unlawful aid (2015/NN).
- (2) The Commission requested additional information on (i) 27 November 2015, (ii) 23 November 2016 and (iii) 30 June 2017, to which Poland replied on (i) 16 February 2016, 4 March 2016 and 3 June 2016, (ii) 9 January 2017 and (iii) 28 July 2017, respectively. In addition, Poland submitted information on 11 January 2017, 1 February 2017 and 20 June 2017. The Commission held meetings with Poland on 8 April 2016, 26 April 2016, 21 September 2016, 11 January 2017, 4 July 2017, and 13 September 2019.
- (3) During the preliminary assessment and prior to the initiation of the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU'), the Commission received letters from interested parties alleging that PR had already received State aid before the notified restructuring aid. Since those letters did not meet the conditions set out in Article 24(2) of Council Regulation (EU) 2015/1589 ⁽³⁾, the Commission registered them as general market information and took them into account in the preliminary assessment.

⁽¹⁾ OJ C 158, 4.5.2018, p. 10.

⁽²⁾ EUR 1 = PLN 4,25.

⁽³⁾ 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).

- (4) By letter dated 23 January 2018, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 108(2) TFEU. Further to the initiation of the procedure, Poland submitted comments on 25 April 2018. The Commission decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ⁽⁴⁾ on 4 May 2018. The Commission called on interested parties to submit their comments.
- (5) Between 20 June 2018 and 29 June 2018, two interested parties, the European Passenger Transport Operators, established in London (United Kingdom) ('EPTO') and Fundacja ProKolej, established in Warsaw (Poland) ('ProKolej') ⁽⁵⁾ provided the Commission with comments. On 9 July 2018 and 4 September 2018, the Commission forwarded those comments to Poland. Poland submitted observations on those comments on 2 October 2018.
- (6) On 28 January 2019 and 11 June 2019, the Commission held meetings with EPTO.
- (7) On 20 May 2019, 25 and 31 October 2019, 29 November 2019, on 4 December 2020 and 30 March 2021, Poland submitted additional information.

2. BACKGROUND AND DESCRIPTION OF THE MEASURES

2.1. The beneficiary

- (8) PR is the largest passenger regional rail operator in Poland, with approximately a 27 % share in the Polish market in terms of the number of passengers carried and 50 % in terms of traffic volume in train/km. Based in Warsaw, PR operates in 15 out of Polish 16 regions (voivodships) and is the sole provider of public passenger regional rail transport in seven voivodships, mostly the least economically developed.
- (9) PR was previously owned by 16 voivodship (regional) governments. As a result of granting the notified restructuring aid, it is currently owned by IDA, which has 50 % + 1 shares in PR, and by 16 voivodship (regional) governments. It employs approximately 9 000 people and is classified as a large enterprise. All regions in which PR operates are eligible for regional aid under point (a) of Article 107(3) TFEU.
- (10) PR's core activity is the provision of rail passenger transport services at regional level under public service contracts concluded with voivodship (regional) governments. In addition, on a much smaller scale, PR provides international and 'trans-border' transport services and rents and repairs rolling stock. In the past PR also provided commercial inter-regional transport services but ceased operating them in September 2015.

2.2. Regional rail transportation in Poland

- (11) Under Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽⁶⁾ public service contracts for domestic public passenger transport services by rail can be directly awarded until December 2023, for a maximum duration of 10 years, that is until December 2033. Some Member States have already opened (part of) their markets to competition based on the applicable national law. In Poland, the contracts awarded by way of a competitive tender accounted for around [4-30] % of total traffic volume scheduled in the 2016/2017 timetable. With a large majority of contracts not ending before the end of 2020, the market situation has not significantly changed since the 2016/17 timetable. In its letter of 29 November 2019, Poland confirmed (based on 2018 data) that the market situation has not significantly changed.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ See Section 5.

⁽⁶⁾ 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), as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail.

- (12) Under Polish law, rail transport at regional level is organised by voivodships and is provided based on a public service contract concluded between the organiser of such transport (the voivodship government) and the operator. The organiser can procure transport services either by way of direct award or through a competitive tender. In practice, the former has been most frequently used. In the 2016/2017 timetable, around [70-95] % of traffic volume is carried out under directly awarded contracts.
- (13) On 22 March 2018, the Polish legislative framework governing the procurement of public passenger rail transport services was amended by the adoption of the Act amending the Public Transport Act (the '2018 Act') ⁽⁷⁾. The 2018 Act provides, in particular, that:
- (a) 12 December 2020 will be the ultimate deadline for the conclusion by regions of public service contracts in regional rail transportation awarded directly (without a public tender);
- (b) 14 December 2030 will be the ultimate deadline for the duration of public service contracts in regional rail transportation awarded directly by regions (without a public tender).
- (14) PR's competitors include eight 'internal' (so called 'in-house') operators ⁽⁸⁾, operating essentially within a single voivodship and owned by that voivodship's authorities (voivodship governments), as well as one 'external' operator, Arriva RP, a subsidiary of Deutsche Bahn AG and a member of EPTO. The competitors of PR operate on selected routes, usually around larger cities. As a result, even in the regions where there is more than one operator, PR often has a significant share in the market.
- (15) According to Poland, where a competitive tender was organised in the past, PR was often the only bidder. This is because the other operators considered the routes under tender as not economically attractive or, in case of the 'in-house' operators, were not interested in bidding outside voivodships where they were the incumbent. According to Poland, apart from Arriva RP, no other external operator, domestic or foreign, has ever expressed interest in entering the Polish regional rail market.

3. THE COMMISSION DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

- (16) Under the opening decision, the Commission assessed the notified restructuring aid and expressed doubts about its compatibility with the internal market. Moreover, the Commission identified six additional measures that were granted to PR prior to the notified restructuring aid. Two of those six measures were found to constitute existing aid within the meaning of point (b)(i) of Article 1 of Regulation (EU) 2015/1589 and are therefore no longer assessed under this Decision. The four remaining additional measures were found to constitute new aid within the meaning of point (c) of Article 1 of Regulation (EU) 2015/1589. For those four additional measures the Commission expressed doubts about their compatibility with the internal market.
- (17) As a consequence, the Commission should solely assess the five measures described in recitals 18 to 22.

3.1. The measures under assessment

- (18) **Measure 1 (the notified restructuring aid):** On 30 September 2015, the State-controlled IDA acquired 50 % + 1 shares in PR for the consideration of PLN 770,3 million (around EUR 181 million). Part of the notification is a restructuring plan, which also refers to a write-off of interest by the State-owned railway infrastructure manager PKP Polskie Linie Kolejowe ('PKP PLK') in the amount of PLN [...] (around EUR [...]).
- (19) **Measure 2:** Prior to the notified restructuring aid, Poland granted to PR (i) in 2008 an amount of PLN 2 160 million (around EUR 508 million) and (ii) in 2006 and 2007, an amount of PLN 242,9 million (around EUR 57 million). On 4 December 2020, Poland clarified that those payments were made in the context of the on-going restructuring of PR, in order to cover losses generated in the past. Poland further indicated that such payments are of a different nature from the payments made under the public service contracts agreed between the voivodships and PR between 1 October 2001 and 30 April 2004. In the present decision, Measure 2 will be referred to as 'coverage of past losses'.

⁽⁷⁾ Official Journal of Laws of 2018, position 907.

⁽⁸⁾ Koleje Mazowieckie, Warszawska Kolej Dojazdowa, PKP Szybka Kolej Miejska, Koleje Śląskie, Koleje Wielkopolskie, Koleje Dolnośląskie, Łódzka Kolej Aglomeracyjna, Koleje Małopolskie.

- (20) **Measure 3:** Prior to the notified restructuring aid, on 29 March 2004, PR concluded a debt restructuring agreement with PKP PLK providing for the restructuring of PR's liabilities in the amount of PLN 1 902 million (around EUR 448 million), towards the State-owned PKP Group companies (PKP PLK, PKP S.A., PKP Cargo, PKP Energetyka and PKP Intercity). ⁽⁹⁾ The agreement envisaged a 40 % write-off of debt and postponement of repayment of the outstanding debt balance until 31 December 2007. The agreement was modified between 2005 and 2008 with the effect that the repayment period was extended until 29 November 2009.
- (21) **Measure 4:** Prior to the notified restructuring aid, between 2009 and 2014, PR concluded 25 agreements with the State-owned creditors (PKP S.A., PKP Energetyka, PKP Intercity, PKP PLK and the Social Security Institution ("ZUS")) providing for deferral of its overdue liabilities towards those creditors in the total amount of PLN [900-1 300 mln] (around EUR [235-282] million).
- (22) **Measure 5:** Poland granted PR: (i) between 2006 and 2010, training aid of PLN 0,97 million (around EUR 0,23 million); (ii) in 2012 and 2013, recruitment aid of PLN 39 000 (around EUR 0,01 million) and (iii) between 2010 and 2015 aid granted by Poland as *de minimis aid* of PLN 0,7 million (around EUR 0,17 million).

4. COMMENTS FROM POLAND ON THE OPENING DECISION

- (23) As regards Measure 1 and in particular the restructuring plan submitted as part of the notification, Poland explained that the planned write-off of interest by PKP PLK was part of an agreement between PKP PLK and PR dated 21 March 2013 resulting from mediation between them. Poland further explained that the decision to enter into an agreement was market-based. According to Poland, the conclusion of the agreement was more favourable to PKP PLK than the attempt to recover debts from PR through judicial proceedings. Poland added the write-off of interest is a measure that is commonly used in financial debt restructuring processes in order to maximise the expected recovery of the principal of the debt.
- (24) As regards the Measure 2, Poland initially submitted that the sum paid was rather the belated payment of an outstanding compensation, which was not paid earlier to PR due to budgetary constraints linked to the reform of the railway sector in Poland. Subsequently Poland complemented its initial submission by explaining that Measure 2 is a coverage of losses generated in the past and granted in the context of the on-going restructuring of the company concerned. Poland explained in that regard that the budgetary constraints, public finance deficits and the general economic situation in the early 2000s impeded the implementation of structural reforms of the railway sector in Poland. This had a direct impact on providing financing for PR's operations (delayed transfer of key assets, etc.) and led to a gradual deterioration in the company's financial situation and its deficit. Poland therefore took appropriate measures over the next few years to address the issues and situation arising from the implementation of structural reforms in the railway sector, including the abovementioned coverage of losses.
- (25) As regards Measure 3, Poland explained that the reform of the Polish railway sector led to the deficit of PR. A debt restructuring agreement was concluded on 29 March 2004 to solve PR's financial situation. The agreement was then modified between 2005 and 2008 but, according to Poland, the main terms of the agreement were maintained. Poland further explained it was more advantageous for creditors to modify the agreement than to seek redress through judicial proceedings. Poland provided a comparison of the present value of creditors' cash flows under two alternative scenarios (implementation of the modified agreement or judicial proceedings) to support its claims. Poland added that PR's activities accounted for a significant part of the creditors' respective revenues. At that time, other non-domestic players had not expressed any interest in entering the Polish market, and therefore they could not have compensated the loss of revenue from PR's activities.
- (26) As regards Measure 4, Poland disagreed with the Commission's preliminary findings according to which the debt restructuring agreements concluded between 2009 and 2014 constituted State aid because they were not concluded on market terms. Poland explained that for creditors it was common practice to assess which recovery method was more efficient and ensure a higher probability of a maximum return of the debt. According to Poland, the practice of the debt rescheduling and the reduction of interest was common and financial institutions used debt

⁽⁹⁾ In line with amended PKP Law, it was enough for PR to conclude the agreement only with PKP PLK because the latter held more than 50 % of PR's debt.

restructuring processes. Poland further explained that an independent consultant conducted an analysis based on conservative assumptions to identify the best recovery method. The results of the analysis showed that the debt restructuring agreement would be better than other recovery methods. Poland added that PR paid debts to the individual creditors in accordance with the signed settlements.

- (27) As regards Measure 5, Poland explained that during the 2009-2011 period, PR received an aid of PLN 1 177 421 (around EUR 277 040). Poland submitted that a part of the aid (PLN 350 007, around EUR 82 350) was *de minimis* aid. The remainder of the aid (PLN 827 414, around EUR 194 690) was granted on the basis of training aid scheme No X152/2009 ⁽¹⁰⁾ in accordance with Commission Regulation (EC) No 800/2008 ⁽¹¹⁾ ('2008 GBER'). Therefore, the *de minimis* aid threshold was not exceeded.
- (28) Beyond specific comments on the Measures identified in the opening Decision, Poland made the following comments.
- (29) Poland submitted that prior to 2015, PR could not be considered as a '*firm in difficulty*' within the meaning of point 10(a) of the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty (the '2004 Guidelines') ⁽¹²⁾. Poland explained that between 2004 and 2014, PR did not fully fulfil the requirements for '*firm in difficulty*' provided for in this provision, namely that: more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months. Poland argued that during the 2004-2014 period, PR lost more than half of its registered capital, but PR lost more than one quarter of that capital in 12 months only in 2005. According to Poland, notwithstanding that the requirements were both met in 2005, it cannot be assumed that PR was a '*firm in difficulty*' during the entire period between 2004 and 2014. Poland stated that the analysis of PR's financial data supports that finding. Poland added the requirements to be treated as a '*firm in difficulty*' under the 2004 Guidelines are not compatible with the specific situation of the reformed railway sector in Poland after 2004 in which PR was operating. Poland explained that the reformed railway sector was structurally underfunded, and, as a result of the reform, PR did not receive the financial resources corresponding to its public service obligations. Poland submitted that this background should be taken into account in the assessment.
- (30) As regards the volume of work resulting from the multi-annual service contracts assumed in the restructuring plan, Poland submitted that the current exploitation assumptions are consistent with the assumptions set out in the restructuring plan, namely the reduction of the annual operational work during the 2016-2020 period. Poland explained that the volume of operational work performed by PR under the multi-annual service contracts is not lower than the level set out in the restructuring plan. The operational work carried out by PR was slightly higher than the assumptions in the original restructuring plan, caused by non-foreseeable external factors, such as the inability of other operators to provide services planned by voivodships. Poland stated that PR is pursuing the objectives on operational work without negative deviations from the assumptions made in the restructuring plan. As requested in the opening decision, Poland provided data and explanations on the deviations from the restructuring plan. Poland explained that there were slight deviations from the assumptions in the restructuring plan due to circumstances independent from PR. Similarly, as requested by the Commission in the opening decision, Poland provided an update of the restructuring plan as well as a full financial projection in the worst-case scenario.
- (31) Poland explained that PR unsuccessfully attempted to obtain financing in order to invest in rolling stock for the 2010-2013 period. Poland explained that the public service contracts for the provision of rail passenger transport services are based on mechanisms designed to prevent overcompensation. The contracts provide for a maximum return on capital employed (ROCE) of 6 % and are regularly monitored and the settlement of the compensation subject to audits. Poland explained that the contracts contain provisions on the application and the settlement of compensation as well as on reporting and control. Poland added that the payment of the compensation is subject to audits by independent operators, and that no irregularities were detected.

⁽¹⁰⁾ In its comment, Poland also listed two more schemes (XT91/04 and X307/2009). XT91/04 was a scheme for training aid that ceased to apply in 2006. X307/2009 was an aid scheme for the recruitment of disadvantaged workers without any aid granted to PR in the period 2009-2011.

⁽¹¹⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

⁽¹²⁾ Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

- (32) Poland argued that the specificities of the railway sector in Poland should be taken into account in the assessment of the State aid under the Treaty and of the compensatory measures proposed by Poland. Poland essentially explained that the railway sector in Poland is characterised by a lack of competition and a lack of interest from 'new players' from other Member States. Those characteristics, coupled with the absence of risk of distortion of competition (which is non-existent) should be taken into account in the assessment of the aid.
- (33) As regards the market opening measures proposed by Poland and described in the opening decision recitals 180 and 181, Poland explained that its proposal to authorize the direct award of contracts until 12 December 2020, and to limit the duration of those contracts to 14 December 2030, was under examination before the Polish Parliament. ⁽¹³⁾ Poland stated that it had not committed to (i) ensure the expiry of directly awarded contracts on some of the routes, accounting for around [4-30] % of the market, before the end of 2030 and (ii) keep open to competition already liberalised routes, for which competitive award procedures were organised in the past, accounting for around [4-30] % of the market, based on the total traffic volume in train/km in the 2016/2017 timetable. Poland submitted that the sentence '*the rolling stock will be given back to the granting authority or will be remunerated at market terms*' at recital 181 of the opening decision is ambiguous. According to Poland, that sentence could be interpreted as meaning that any rolling stock, whether purchased by an organiser or by a carrier, is covered. Poland stated that that sentence should be interpreted as meaning that only the rolling stock purchased by the organiser is concerned.

5. COMMENTS FROM INTERESTED PARTIES

5.1. EPTO

- (34) EPTO submitted that the Commission should not only assess Measure 1 but also the obligation for certain voivodships to directly award five-year passenger contracts to PR. According to EPTO, that obligation constitutes State aid and should therefore be investigated by the Commission. EPTO added that the obligation to directly award contracts to PR would foreclose the Polish regional market for passenger rail transport services. EPTO argued that the alleged lack of interest in the Polish market from competitors should be further investigated. EPTO submitted that there are potential competitors who could enter the Polish market. EPTO further argued that the low level of competition is due to the '*anti-competitive market environment*' in Poland which results from the absence of business prospects for railway companies. That background should be taken into account by the Commission in its assessment.
- (35) EPTO submitted that the market opening measures proposed by Poland would not allow the market opening. EPTO considered that the market opening measures are not sufficiently described to allow it to provide comments. However, EPTO suggested that the Polish market should be progressively opened between 2020 and 2028 by running competitive tender procedures which would have to comply with a number of specific requirements.
- (36) EPTO's comments on the restructuring plan focused on Poland's argument according to which PR could not pursue any profitable activity because its core activity was loss-making and a reduction of that activity would have not benefited to any competitor due to a lack of competition. EPTO disagreed with that argument because (i) PR's activities should be profitable thanks to the financial support received, and (ii) there were competitors which would be interested in the opening of the market.
- (37) EPTO agreed that the Commission could adopt a new approach as regards the compatibility assessment to take into account the specific situation of the domestic passenger rail transport sector. However, EPTO submitted that a new approach could only be justified if it would come together with effective and immediate market opening measures.

⁽¹³⁾ As explained in recital 13, this proposal was implemented through the adoption by the Polish Parliament of the 2018 Act.

5.2. ProKolej

- (38) ProKolej submitted that the Commission's assessment should cover additional measures which constitute State aid, namely: (i) a subsidy of PLN 550 million (around EUR 129 million) granted to the voivodships for the purchase, repair and modernization of rolling stock for the 2016-2020 period; and, (ii) the award of five-year contracts to PR.
- (39) ProKolej argued that there were alternatives to the restructuring plan which would have had less negative effects. Firstly, the aid could have been granted without the obligation to award five-year contracts to PR. The voivodships could have awarded contracts through tenders. Secondly, PR could have been split into an operating company and a vehicle keeping company. Thirdly, the aid could have been linked with market opening measures, which would have been the *'legally preferred solution'* for ProKolej.
- (40) ProKolej indicated that the market opening measures proposed by Poland must ensure the effective, quick and noticeable opening of the market. To achieve this goal, ProKolej submitted that the market opening measures should fulfil a number of requirements, including on the volume of transport and the duration of the contracts.
- (41) ProKolej added that PR is already prepared for the opening of the market thanks to the aids received. ProKolej submitted that if the market opening takes place gradually pursuant to Regulation (EC) No 1370/2007, PR will be able to consolidate its position and therefore other companies will be disadvantaged. ProKolej submitted the aids received by PR would therefore distort competition in the near future. ProKolej requested that market opening measures should be swiftly put in place to prevent that.

6. OBSERVATIONS SUBMITTED BY POLAND ON THE COMMENTS FROM INTERESTED PARTIES

- (42) As regards the financing from the Rail Fund granted to the voivodships for the purchase, repair and modernization of rolling stock for the 2016-2020 period (see recital 38), Poland submitted that the Rail Fund was set up in 2005 to collect financial resources for investments in railway infrastructure, the renovation and maintenance of railway lines and the elimination of unnecessary railway lines. In 2009, legislative measures were enacted to enable voivodship self-governments to use financing from the Rail Fund for the purchase, modernisation and repair of rolling stock intended for passenger transport under a public service contract. That financial support was initially planned for the 2009-2015 period and was then extended to the 2016-2020 period. Poland explained in 2016 that several rail transport companies received financial support for the repair and maintenance of rolling stock. Therefore PR did not benefit from a privileged treatment compared to other companies.
- (43) As regards the direct award of multi-annual contracts for the provision of regional passenger rail transport to PR, Poland explained that that practice was compliant with European and national rules. Poland submitted that the conclusion of multi-annual contracts for the provision of regional rail passenger transport was left to the discretion of provincial authorities and did not constitute a State aid. Poland further explained that under a cooperation agreement between PR's shareholders and provincial authorities, the latter committed to conclude multi-annual contracts with PR. However, the cooperation agreement was not implemented by the authorities of all voivodships in which PR operates. According to Poland, that shows that there was no obligation to conclude multi-annual contracts with PR.
- (44) As regards the alternatives to the restructuring plan, Poland explained that the choice for restructuring was the outcome of in-depth analysis during which other options were considered. Poland disagreed with dividing PR into a transport company and a rolling stock company as an alternative to restructuring for several reasons. Poland notably explained the purchase of rolling stock could increase the operating costs for regional rail transport borne by local authorities, as part of the compensation paid to transport companies. Poland added that transport companies already significantly invested in rolling stock. Poland further added that qualified staff was necessary to provide rail transport services and therefore the mere ownership of rolling stock would not remove all the barriers to entry for potential competitors.

- (45) As regards the market opening measures, Poland explained that the market for regional rail transport was largely closed in a number of Member States. Poland further explained that the Polish market for regional rail passenger transport was not sufficiently attractive for new entrants and was thus characterised by a lack of competition. According to Poland, any market opening should take into account the specificities of the Polish market and be carefully conducted to avoid structural errors that would impede the functioning of the market. Poland argued that the proposed market opening measures should be considered appropriate in light of the characteristics of the Polish market.
- (46) Poland submitted that the selection of operators for the provision of regional rail transport services was left to the discretion of the contracting authorities, in line with Regulation (EC) No 1370/2007. The same Regulation provides for the direct award of contracts, as one of the modes of selection (along with tenders and service concessions) which contracting authorities can opt for. Poland explained that in the majority of past tenders, PR was the only bidder and thus winner, and therefore the outcomes of tenders were similar to the direct award of contracts. According to Poland, in those circumstances, tenders generate additional costs without ensuring that the quality of services tendered will be higher or their prices lower. Poland added that the claims of third parties regarding the requirements for tenders were not relevant. Some of those requirements were already provided for in the relevant Union law instruments, and other requirements should be left to the discretion of the contracting authorities. Poland added that third parties have the opportunity to appeal tender specifications pursuant to the rules applicable to procurements.

7. ASSESSMENT

7.1. Existence of aid

- (47) The Commission has to assess whether the measures covered by this procedure constitute State aid within the meaning of Article 107(1) TFEU.
- (48) Under Article 107(1) 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 internal market.
- (49) The qualification of a measure as State aid within the meaning of this provision therefore requires the following conditions to be cumulatively met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an economic advantage on an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and must affect trade between Member States.

7.1.1. Measure 1- Equity investment by IDA (the notified restructuring aid)

7.1.1.1. State resources and imputability

- (50) IDA is a 100 % State-owned government agency. The funds for the acquisition of shares in PR were transferred to IDA by the Ministry of Infrastructure and Development from the State budget based on a subsidy agreement. The measure hence clearly stems from State resources and is imputable to the State. For the reasons set out in recitals 81 to 83, the interest write off by PKP PLK is also imputable to the State and involves State resources.

7.1.1.2. Selectivity

- (51) The measure was granted to PR only, therefore it is selective. As the Union Courts have stated, where individual aid is at issue, the finding of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective⁽¹⁴⁾. This is so regardless of whether there are operators on the relevant markets that are in a comparable factual and legal situation.

⁽¹⁴⁾ See judgment of 4 June 2015 *Commission v MOL*, C-15/14 P EU:C:2015:362, paragraph 60.

7.1.1.3. Advantage

- (52) Before receiving the aid, PR was in difficult financial condition. For years, it had reported losses, negative equity and increasing debt and qualified as an undertaking in difficulty since 2005 (see Table 1). From the beginning of the reorganisation process in 2000, PR did not have sufficient internal liquidity, nor access to external financing, necessary to repay its debt and to finance its operations.
- (53) Prior to the granting of the notified restructuring aid, Poland had already tried to address the financial difficulties of PR by granting several other measures (Measures 2, 3, and 4, as described in recitals 19 to 21. However, the problem of indebtedness culminated in September 2015, when the two biggest creditors of PR, PKP PLK and PKP Energetyka, called upon the debtor to repay its debt within a week. The latter threatened to stop supplying energy. Without repaying its debt, PR would have become insolvent.
- (54) According to Poland, without the aid, PR would have been unable to repay its debt as it was not able to obtain the necessary financing on the market. That would have led to its insolvency and likely liquidation. Indeed, as explained in recital 53, the two biggest creditors called upon PR to repay its liabilities towards them at short notice.
- (55) It is in that context that Poland granted the notified restructuring aid to PR. On 30 September 2015, IDA acquired 50 % plus one share in PR for a consideration of PLN 770,3 million. The purpose of this equity investment was to finance the restructuring process, mostly the repayment of the above debt, with the ultimate goal of restoring long-term viability of PR. IDA was not a shareholder before buying into PR and thus had no previous exposure. While an existing shareholder might have taken a decision in view of his existing investment and any potential future profits, IDA decided to buy into a company with pertinent significant structural financial issues. Given the financial history of PR of failed attempts to ensure long-term viability and the request of its two main creditors for repayment of PR's debt at short notice, a market economy investor would not have made such a significant investment into PR.
- (56) Therefore, Measure 1 conferred an economic advantage on PR, since PR would not have been able to obtain such financing under normal market conditions, given its difficult financial situation.

7.1.1.4. Distortion of competition and effect on trade between Member States

- (57) In previous decisions taken before domestic passenger rail transport was liberalised under Union law, ⁽¹⁵⁾ the Commission held that aid granted to them had an effect on competition and trade. The reason was that international passenger transport has been liberalised and that some Member States have unilaterally opened their rail passenger transport markets. In this respect, it is worth noting that PR provides also international and trans-border transport services. In addition, there is inter-modal competition between regional rail and other means of transport in Poland. Furthermore, in several voivodships there is more than one regional rail operator, including a subsidiary of the company from another Member State. Therefore, the measure clearly threatens to distort competition and affects trade between Member States.

7.1.1.5. Conclusion

- (58) Based on those reasons, the Commission concludes that Measure 1 constitutes State aid within the meaning of Article 107(1) TFEU.

⁽¹⁵⁾ 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 (OJ L 186, 24.7.2018, p. 25); Commission Decision (EU) 2017/2372 of 16 June 2017 on the State aid SA.31250 – 2011/C (ex 2011/N) planned to be implemented by Bulgaria in favour of BDZ Holding EAD SA, BDZ Passenger EOOD and BDZ Cargo EOOD and other measures (OJ L 337, 19.12.2017, p. 35).

7.1.2. Measure 2 – Coverage of past losses granted in the context of the on-going restructuring of PR

7.1.2.1. State resources and imputability

(59) The coverage of past losses was granted from the State budget based, partially on the Law of 25 April 2008 amending the PKP Law ⁽¹⁶⁾, the agreement between PR and the minister responsible for transport concluded on 23 June 2008, and partially on the Law of 16 December 2005 on the Railway Fund ⁽¹⁷⁾ and regulations of the Minister of Finance. Thus, the measure clearly involves State resources and is imputable to the State.

7.1.2.2. Advantage

(60) As regards economic advantage, the measure was provided in the form of direct grants. The provision of a grant is not an act of a market economy operator, and it liberates the beneficiary from costs that would normally be borne from its own budget. The measure eased PR from financial pressure that resulted from losses generated over the years in the context of the on-going restructuring of PR. In this regard, the payments of 2006 and 2007 stabilised the operating results of the company and the payments of 2008 and 2009, supported the company's equity position.

(61) Therefore, the Commission finds that the coverage of past losses conferred an economic advantage on PR.

7.1.2.3. Selectivity, distortion of competition and effect on trade between Member States

(62) The conclusion concerning selectivity, the distortion of competition and the effect on trade made in recitals 51 and 57 with respect to Measure 1 apply accordingly to Measure 2.

7.1.2.4. Conclusion on the existence of aid

(63) Based on those reasons, the Commission concludes that Measure 2 constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.3. Measure 3 – Debt restructuring in 2004-2009

7.1.3.1. State resources and imputability

(64) All the creditors of the PKP Group that participated in the restructuring of PR's debt were public undertakings. In principle, the resources of public undertakings constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources. ⁽¹⁸⁾

(65) The State has traditionally exercised a high degree of supervision over the management and activities of the PKP Group companies, not least through its influence on selection of their boards of directors and management boards, whose composition often fluctuated in coincidence with changes in the political scene.

(66) In addition, the PKP Group companies had not been always autonomous in taking important business decisions. For example, the State was directly involved in structural reorganization of the railway sector, transfer of assets among the PKP Group companies or financial restructuring. In that regard, the State is capable of directing the use of the resources of PKP Group.

⁽¹⁶⁾ Law of 25 April 2008 amending the PKP Law (Official Journal of Laws of 2008, number 97, position 624).

⁽¹⁷⁾ Official Journal of Laws of 2005, number 12, position 61.

⁽¹⁸⁾ Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 38. See also judgment of the Court of Justice of 29 April 2004, *Greece v Commission*, C-278/00, ECLI:EU:C:2004:239, paragraphs 53 and 54, and judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia SpA v Commission*, C-328/99 and C-399/00, ECLI:EU:C:2003:252, paragraphs 33 and 34.

- (67) Furthermore, as envisaged in the amended PKP Law, the debt restructuring was initiated by the decision of the minister responsible for transport upon agreement of the minister responsible for public finance. Therefore, it was clearly imputable to the State.

7.1.3.2. Advantage

- (68) According to the original debt restructuring agreement signed on 29 March 2004 (2004 agreement), 40 % of the principal debt amount of PR and interest accrued until the entry into force of the agreement were to be written off, 19,18 % of the principal amount was to be repaid in three equal instalments on 30 April 2004, 31 May 2004 and 30 June 2004 and the remaining balance principal amount was to be repaid in 24 monthly instalments, payable from January 2006 to December 2007. Interest accrued after the entry into force of the agreement was to be written off on the final day of the implementation of the agreement, that is to say 31 December 2007 at the latest. Finally, PR was to repay in each calendar year at least 54 % of its current liabilities resulting from contracts signed with the PKP Group companies and to settle all outstanding current liabilities due from previous periods until 31 December 2007. ⁽¹⁹⁾
- (69) On 20 December 2005 and 28 December 2006, PR signed agreements with PKP PLK that confirmed the cancellation of interest accrued in 2005 and 2006. ⁽²⁰⁾ On 2 April 2007, PR signed with PKP Group companies an annex to the 2004 agreement (see recital 68), which envisaged notably an extension of the repayment period from 31 December 2007 until 29 November 2009. All new current liabilities were to be fully repaid as from 1 January 2008, as envisaged in the 2004 agreement. On 6 May 2008, PR signed an agreement with PKP PLK and on 29 July 2008, PR signed an agreement with PKP Cargo. Those agreements confirmed the amount of liabilities owed by PR to PKP PLK and PKP Cargo as on 31 December 2007 (PLN 1 908 million) and provided for a detailed schedule of repayment until 29 November 2009. It was also agreed that interest on debt restructured under the 2004 agreement will not accrue until 29 November 2009 (under the 2004 agreement interest was not to accrue until 31 December 2007).
- (70) As regards the 2004 agreement, considered on a stand-alone basis (i.e. without the subsequent modifications), there is no need to assess whether it conferred an economic advantage on PR, because it had been signed more than 10 years before the notification of the present restructuring aid, i.e. outside the limitation period for the recovery of aid by the Commission laid down in Article 17(1) of Regulation (EU) 2015/1589. Consequently, that aid is considered existing aid pursuant to Article 17(3) thereof.
- (71) When it comes to the subsequent modifications described in recital 69, in order to determine whether they conferred an economic advantage on PR, the Commission must establish whether by agreeing to postpone the repayment of debt on the agreed terms the creditors of PR behaved in a way comparable to that of a private creditor in a similar situation (the so called market economy creditor principle, or 'MECP'). The Commission's assessment focuses on the transaction from the perspective of the hypothetical prudent private creditor. ⁽²¹⁾
- (72) A rational private creditor would have normally compared the financial outcome of contemplated courses of action, i.e. (i) the extension of the debt repayment period and (ii) the enforcement of the 2004 agreement, in order to choose the one rendering the highest possible recovery amount.

⁽¹⁹⁾ Those terms of debt restructuring were applicable to the creditors from the PKP Group, accounting for 99,3 % of the restructured debt amount. Debt towards other creditors was to be restructured as follows: 30 % of principal amount, interest accrued until entry into force of the agreement and thereafter was to be written off and 70 % of principal amount was to be repaid in 28 monthly instalments, starting one year after the entry into force of the agreement. From the information provided by Poland it appears that the original terms of debt restructuring towards those creditors (not belonging to the PKP Group) agreed in 2004 were not subsequently modified.

⁽²⁰⁾ There were interpretation differences between PR and PKP PLK as regards provisions of the 2004 agreement concerning interest accrued after its entry into force. Finally, the parties confirmed the original interpretation according to which the 2004 agreement provided for write-off of all interest, including interest accrued from entry into force of the 2004 agreement until its final settlement.

⁽²¹⁾ Judgment of the Court of Justice of 20 September 2017, *Commission v Frucona Košice*, C-300/16P, ECLI:EU:C:2017:706, paragraph 28.

- (73) In the present case, Poland has not provided any evidence demonstrating that the creditors of PR performed any such comparative analysis, nor that the chosen course of action, i.e. modification of the original debt restructuring agreement, ensured the highest expected debt recovery. On the contrary, Poland considers the whole measure (i.e. both the 2004 agreement and its subsequent modifications) to constitute State aid and thereby implies that it conferred an economic advantage on PR.
- (74) The Commission notes that the modifications of the 2004 agreement described in recital 69, in particular those made in 2007 and 2008, effectively consist in a 23-months interest-free postponement of repayment of liabilities owed by PR to the PKP Group companies (as compared to the terms of the 2004 agreement) in the amount of at least PLN 1 908 million. ⁽²²⁾ Such interest-free postponement of the repayment period by almost two years relieved PR from meeting its payment obligations according to the original schedule under the 2004 agreement and thus provided PR with additional liquidity, which could have been used to finance PR's operations. PR would not have been able to raise such interest-free liquidity on the market from private creditors even if it was in a very good financial situation, let alone as a company in financial difficulties. In its practice, the Commission concluded that similar interest-free postponement of the repayment of debt constituted aid. ⁽²³⁾
- (75) In view of the above, the Commission concludes that the measure does not comply with the MECP and therefore confers an economic advantage on PR.

7.1.3.3. Selectivity, distortion of competition and effect on trade between Member States

- (76) The conclusion concerning selectivity, the distortion of competition and the effect on trade made in recitals 51 and 57 with respect to Measure 1 applies accordingly to Measure 3.

7.1.3.4. Conclusion

- (77) Based on those reasons, the Commission considers that Measure 3 constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.4. Measure 4 – Deferral of liabilities in 2009-2014

7.1.4.1. State resources and imputability

- (78) First of all, the Commission observes that all the creditors who signed deferral agreements with PR were either State-owned undertakings or a public institution (ZUS).
- (79) As regards ZUS, it is part of public administration, under full supervision by the State and is financed from the State budget. Therefore, there is no doubt that its decisions to defer PR's liabilities are imputable to the State and that those deferrals involve State resources.
- (80) As regards the remaining creditors, as explained in recital 64, resources of public undertakings constitute in principle State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of those resources. For the reasons explained in recitals 65 and 66, the State is able to direct the use of PKP Group's resources. The deferrals involve a potential loss of resources by those creditors. Therefore, they must be considered as involving State resources.

⁽²²⁾ This is the amount of liabilities owed to PKP PLK and PKP Cargo as of 31 December 2007, as confirmed by the agreements signed on 6 May 2008 and 29 July 2008, respectively. That amount does not include liabilities owed by PR to the remaining PKP Group companies (PKP S.A., PKP Intercity and PKP Energetyka) participating in the original debt restructuring agreement, whose repayment was also postponed (by the annex of 2 April 2007), as Poland did not provide the relevant amount.

⁽²³⁾ Commission Decision of 9 July 2014 in case SA.38324 *Restructuring aid for Alestis*, OJ C 418, 21.11.2014, p. 1, rec. 38-39.

- (81) Considering imputability, the Commission notes that in 2009-2014, PKP S.A., PKP Intercity, PKP PLK and PKP Energetyka all belonged to the PKP Group, which is 100 % owned by the State and is supervised by the minister responsible for transport. Although the mere fact that a measure is taken by a public undertaking is not per se sufficient to consider it imputable to the State, the imputability may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. ⁽²⁴⁾ Those indicators include e.g. the nature of the public undertaking's activities and the exercise of those activities on the market in normal conditions of competition with private operators, the degree of the supervision exercised by the public authorities over the management of an undertaking and whether an undertaking could autonomously take a decision in question or any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.
- (82) In this respect, the Commission observes that PR provides public transport services which are not exercised in normal market conditions, but are largely directly procured and financed by the State. Also the creditors, at least PKP PLK (the monopolist infrastructure manager) and PKP Intercity (to the extent it provided public inter-regional services), did not compete in normal market conditions with private operators. Moreover, insolvency of PR, the only provider of regional rail transport in almost half of the regions, could have led to serious disruption in the provision of important public service. Therefore, the State had particular interest in ensuring the liquidity of PR.
- (83) The State has traditionally exercised a high degree of supervision over the management and activities of the PKP Group companies, not least through its influence on selection of their boards of directors and management boards, whose composition often fluctuated in coincidence with changes in the political scene. In addition, in the past the PKP Group companies were not always autonomous in taking important business decisions. For example, the State was directly involved in structural reorganization of the railway sector, transfer of assets among the PKP Group companies or financial restructuring. Most notably, the State initiated the restructuring of PR's debt (Measure 3), which included the same creditors who later agreed to defer PR's liabilities. That is not surprising, given that the PKP Group is one of the largest employers in Poland (the creditors concerned employed more than 50 000 people in 2014) and plays an important role in shaping transport policy of the State.
- (84) Finally, taking into account the scope of the measure (the amount of deferred liabilities accounted for approximately [above 120] % of PR's average annual revenue in the period concerned), its impact on the creditors (PR was the third biggest customer of PKP PLK and PKP Energetyka), the strong organisational links between the debtor, the creditors and the State and, last but not least, the apparently non-market conditions on which the deferrals were granted (see recitals 86 to 95), it seems unlikely that the decisions of the public undertakings concerned to defer liabilities of PR could have been taken without any involvement whatsoever of the State.
- (85) For those reasons, the Commission is of the opinion that the public authorities can be considered as having been involved in one way or another in the decisions to defer PR's liabilities. Poland itself does not argue that the measure is not imputable to the State. Therefore, the Commission concludes that the measure is imputable to the State.

7.1.4.2. Advantage

- (86) In order to determine whether the measure conferred an economic advantage on PR, the Commission must establish whether by agreeing to defer liabilities of PR the creditors behaved in a way comparable to that of a private creditor in a similar situation. In that respect, the Commission has reached the following conclusions.
- (87) As a matter of fact, between 2009 and 2014, four State-owned undertakings and ZUS concluded with PR, a company in difficult financial situation and also owned by the State, 25 agreements to defer repayment of overdue liabilities in the total amount of PLN [900-1 300] million, accounting, as mentioned in recital 84, for [above 120] % of PR's average annual revenue in that period.

⁽²⁴⁾ Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 55.

- (88) Poland has not submitted any contemporaneous evidence demonstrating that the decision to defer liabilities on the agreed terms was more favourable to the creditors than alternative courses of action, such as e.g. execution of debt. The *ex-post* net present value (NPV) analysis cannot be considered as sufficiently reliable evidence because it was prepared *ex-post*, i.e. after the decisions to defer liabilities were taken. A rational market creditor would have assessed different scenarios before taking a decision to defer liabilities, with the aim to choose the one that would have guaranteed the highest expected recovery rate. Moreover, the *ex-post* analysis fails to properly address the financial difficulties of PR. In the years 2005 to 2010, PR had only once a positive operating result and a positive net result. In the years thereafter, the situation was similar. There was considerable uncertainty that PR could service and repay the liabilities. That was known to PR's creditors, in particular PKP PLK that already participated in the debt restructuring 2004 – 2009 (Measure 3). That risk should have had an impact on the credit rating for PR and a high interest rate and significantly better collateral. However, the study applies a rating 'B' (weak) in 2009-2013 and 'CCC' (bad/financial difficulties) from 2014 onwards. As described in recital 90, PR was a firm in difficulty and would have merited a worse rating than 'B'. The NPV analysis is not only performed *ex-post* facto but also erroneous.
- (89) Moreover, the terms underlying the deferrals were rather favourable, taking into account the poor financial condition of the debtor. More concretely, the deferral periods were long, ranging from 6 to 21 months, and in case of one agreement concluded with PKP PLK, that period amounted to [...] months, that is to say, much longer than the average period of the execution of debt from an insolvent debtor, as claimed by Poland. Notably, that agreement accounted for [...] % of the total deferred liabilities concerned. ⁽²⁵⁾ In addition, the interest rates applied by the creditors were low if compared to the plausible benchmark, such as the proxy market rates ('reference rates') resulting from the application of the Reference Rate Communication. ⁽²⁶⁾ In particular, under all the agreements the interest rates applied were lower than the reference rate applicable to a firm in difficulty, such as PR. ⁽²⁷⁾ In this respect, the Commission has to assess Poland's claim that PR was not a firm in difficulty in the entire period 2004-2014 period (see recital 29).
- (90) As Poland admits, PR fulfilled the conditions of a firm in difficulty under the 2004 Guidelines in 2005. In fact, more than half of the registered capital of PR had disappeared by then and more than one quarter of that capital had been lost over the preceding 12 months. Once the latter condition is fulfilled for a certain 12-months-period, the firm concerned remains in difficulty as the first condition remains fulfilled. That was the case of PR in the years from 2006 onwards. Therefore, for the period since 2005, PR is considered a firm in difficulty.
- (91) Even if assumed, as claimed by Poland, that PR merited a rating 'B' (weak) in 2009-2013 and 'CCC' (bad/financial difficulties) from 2014 onwards, the interest rates actually applied were lower than the corresponding reference rates under as many as 18 agreements, accounting for [...] % of total deferred liabilities. Moreover, under six agreements (accounting for [...] % of total deferred liabilities) the interest rates were even lower than the reference rate applicable to an 'AAA' (strong)-rated company. Finally, the collateral was weak under all but one agreement (see footnote 27) and consisted merely in the submission to execution. ⁽²⁸⁾ Under 18 agreements (accounting for [...] % of total deferred liabilities) there was no collateral at all.
- (92) Poland argues that PR was an important customer of PKP PLK and PKP Energetyka, therefore those creditors had a particular interest in continuing their business relations with PR. Indeed, as mentioned above, PR was the third biggest customer of PKP PLK and PKP Energetyka during the period concerned, accounting for an average of [...] % and [...] % of their revenue, respectively. That can be one of the factors that a private creditor would have taken into account, but it is not per se sufficient to justify market-conformity of the deferrals on the agreed terms. In any case, that argument does not apply to the remaining creditors, for whom PR was not such an important customer.

⁽²⁵⁾ The shares of liabilities provided in this recital have been calculated by the Commission on the basis of information provided by Poland.

⁽²⁶⁾ 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).

⁽²⁷⁾ The reference rate is established assuming 'low' collateral for all agreements (submission to execution or no collateral at all) except for one agreement with PKP PLK of 2013 where collateral might be considered as 'high' (pledge on rolling stock covering, according to Poland, 100 % of secured liability amount).

⁽²⁸⁾ Submission to execution, provided for in Article 777 of the Civil Proceedings Code, is a popular form of the collateral in Poland which enables a creditor to initiate the execution without the necessity to open court proceedings and to substantiate the creditor's rights. The court has three days to validate a registered claim of a creditor, upon which the creditor can ask a bailiff to implement the execution.

- (93) The argument of Poland that PKP PLK and PKP Energetyka concluded similar deferral agreements with other business partners is not sufficient evidence of market-conformity of their agreements with PR. Without knowing the precise conditions of those agreements and the financial situation of the debtors, it cannot be excluded that those deferrals were also not granted on market terms. In any case, what is clear is that those deferrals involved smaller amounts of liabilities and shorter repayment periods. In any event, in order to argue market-conformity, Poland would rather have to demonstrate that private creditors have or would have granted deferrals to PR on similar terms as the public creditors concerned. In that respect, the Commission notes that PR did actually sign deferral agreements with two private creditors. Nevertheless, those agreements do not seem to demonstrate market-conformity either, since they involved smaller amount of liabilities and, crucially, envisaged a combination of higher interest rate and shorter repayment periods than the deferral agreements signed by PR with PKP Group companies and ZUS.
- (94) Poland argues that the interest rates applied in the deferral agreements were set at levels comparable with the average interest rates charged in the non-financial sector in Poland ⁽²⁹⁾. This does not however suffice to justify that they were market-conform, because the average debtor in the non-financial sector could have been in a better financial condition and/or could have offered a better collateral, and thus could have had higher credit worthiness than PR. Likewise, the argument that late payment of liabilities is allegedly a common market practice in Poland does not prove that the terms of the deferral agreements were market-conform.
- (95) Therefore, the Commission considers that the measure conferred an economic advantage on PR.

7.1.4.3. Selectivity, distortion of competition and effect on trade between Member States

- (96) The conclusions concerning selectivity, the distortion of competition and the effect on trade made in recitals 51 and 57 with respect to Measure 1 apply accordingly to Measure 4.

7.1.4.4. Conclusion

- (97) Based on those reasons, the Commission concludes that Measure 4 constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.5. Measures 1 to 4 as a single intervention

- (98) In the case of several consecutive measures of State intervention, also if such measures have not the same but various forms, the Commission must examine whether those interventions are so closely linked that they are inseparable from one another and that therefore those interventions must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. ⁽³⁰⁾ The assessment as to whether several consecutive measures of State intervention are inseparable and thus constitute a single intervention must be carried out in the light of the criteria laid down by case law. Those criteria include the chronology of those interventions, their purpose and the circumstances of the beneficiary undertaking at the time of those interventions. ⁽³¹⁾
- (99) The Commission notes that the measures under assessment, though granted at different points in time and in different forms, are related to each other. They all aimed at addressing recurring liquidity problems of PR originating from the unsuccessful implementation of the structural reform of the railway sector initiated in the year 2000, based on the PKP Law, and to restore PR's long-term viability.

⁽²⁹⁾ According to the National Bank of Poland the average interest rate on enterprise loans with maturity of up to one year was 6,5 % in 2009, 6,2 % in 2010 and 2011, 6,4 % in 2012, 5,0 % in 2013 and 4,3 % in 2014.

⁽³⁰⁾ Judgment of the General Court of 15 January 2015, *France v Commission (Seafrance)*, T-1/12, ECLI:EU:T:2015:17, paragraph 33, and judgment of the Court of 19 March 2013, *Bouygues and Bouygues Télécom v Commission*, C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 103.

⁽³¹⁾ Judgment of the General Court of 15 January 2015, *France v Commission (Seafrance)*, T-1/12, ECLI:EU:T:2015:17, paragraph 34, judgment of the Court of 19 March 2013, *Bouygues and Bouygues Télécom v Commission*, C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 104, and Judgment of the Court of First Instance of 15 September 1998, *BP Chemicals v Commission*, T-11/95, ECLI:EU:T:1998:199, paragraph 171.

- (100) The amounts paid in the context of the on-going restructuring of PR between 2006 and 2009 for the coverage of past losses (Measure 2) addressed the financial deficit of PR created in the previous years when, due to budget constraints, PR received only a fraction of financing needed to cover its costs. Such a delayed payment deteriorated cash flows, making PR unable to service its debt. To address that problem, the amended PKP Law gave PR the possibility to conclude debt restructuring agreement with creditors. In March 2004, PR concluded such agreement with PKP Group companies, however it turned out to be insufficient as the company was unable to repay its debt even on the restructured terms. To further alleviate the debt burden, the agreement was modified in years 2005-2008 (Measure 3). Despite that, the liquidity problems of PR continued and it was unable to settle its liabilities on time. Between 2009 and 2014, the company concluded 25 agreements providing for deferral of its overdue liabilities (Measure 4). That also proved to be insufficient. PR's liabilities kept increasing reaching a level at which two creditors called for the immediate repayment of their receivables. To prevent PR's insolvency, Poland granted it additional funding in the form of the notified restructuring aid (Measure 1), most of which was used to repay overdue liabilities.
- (101) That shows that the measures under assessment were not independent, but that they were inseparable, in the sense that one alone was insufficient to tackle the liquidity problem and to restore long-term viability. They in fact complement each other until the last of them turned the company liquid and profitable. Seen from that perspective, the notified restructuring aid and the pre-restructuring measures can be regarded as forming part of one and the same reorganisation process. If it took longer than expected, it was not because PR was inherently unviable, but because it did not have enough resources to complete the reorganisation sooner.
- (102) Based on the reasons set out in recitals 99 to 101, the Commission considers that the measures under assessment constitute one single reorganisation, or intervention, measure, implemented at intervals. Therefore, it is appropriate to assess the individual measures not separately, but in combination.
- (103) Therefore, the Commission will assess whether Measures 1 to 4 as a single intervention that constitutes a State aid within the meaning of Article 107(1) TFEU.
- (104) As explained at recital 49, the qualification of a measure as State aid within the meaning of this provision requires the following conditions to be cumulatively met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an economic advantage on an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and must affect trade between Member States.

7.1.5.1. State resources and imputability

- (105) As explained in recitals 50, 59, 64 to 67, and 79 to 85, Measures 1 to 4 were individually taken either by different entities belonging to the public administration, or by public undertakings, and thus involve State resources.
- (106) The evidence on file also shows that decisions to grant Measures 1 to 4 were taken either directly by public authorities or that public authorities were involved in those decisions, or that imputability can be inferred from the indicators arising from the circumstances and the context in which the measures were taken. Consequently, Measures 1 to 4 were individually imputable to the State.
- (107) Each of Measures 1 to 4 involves State resources and is imputable to the State. Therefore, the Commission concludes that Measure 1 to 4 together as a single intervention, is imputable to the State and involves State resources.

7.1.5.2. Advantage

- (108) The single intervention covers the period from 2005, when Measure 3 was granted, to 2015, when Measure 1 was granted.

(109) The total amount of aid granted to PR under the single intervention significantly exceeded the book value of the company (see Table 1). Moreover, PR regularly reported losses and increasing debt between 2005 and 2015. A market economy operator would not have intervened so many times and so significantly over such a long period of time without any sign of an improvement in the situation of the company that was already in difficulties since at least 2005. The underlying aim of the intervention was the avoidance of a disruption in the provision of regional passenger rail services by trying to remedy the reoccurring liquidity issues of PR. Without the continuous intervention by the State PR would have not been able to provide its services and would have had, at some point in time, to file for insolvency. Therefore, the Commission considers that Measures 1 to 4 together as the single intervention conferred an economic advantage on PR.

7.1.5.3. Selectivity, distortion of competition and effect on trade between Member States

(110) The conclusion concerning selectivity, the distortion of competition and the effect on trade made in recitals 51 and 57 with respect to Measure 1 apply accordingly to the single intervention.

7.1.5.4. Conclusion

(111) Based on those reasons, the Commission concludes that Measures 1 – 4 as the single intervention constitute State aid within the meaning of Article 107(1) TFEU.

(112) Measures 1 to 4, either individually or together constitute State aid. Taking the measures as a single intervention or separately does not change the outcome of the assessment, as the nature of the individual parts of the intervention would not be different.

7.1.6. Measure 5 – Training, recruitment and *de minimis* aid granted from 2006 to 2015

7.1.6.1. State resources and imputability

(113) The measures which together form Measure 5 were granted by public authorities, such as the Polish Agency for Enterprise Development, Labour Office and the State Fund for Rehabilitation of the Disabled. It therefore clearly involves State resources and is imputable to the State.

7.1.6.2. Advantage

(114) Measure 5 was granted to PR only and covered costs that PR would have otherwise borne under normal market conditions. The measure therefore conferred on PR an undue economic advantage.

7.1.6.3. Selectivity

(115) The conclusion concerning selectivity made in recital 51 with respect to Measure 1 applies accordingly to Measure 5.

7.1.6.4. Distortion of competition and effect on trade between Member States

(116) Commission Regulation (EU) No 1407/2013 ⁽³²⁾ ('the *de minimis* Regulation') provides that aid granted to a single undertaking shall be deemed not to meet all the criteria of Article 107(1) TFEU if the total amount of such aid does not exceed EUR 200 000 over any period of three fiscal years. As recital 3 of that Regulation explains, aid granted to a single undertaking not exceeding that threshold should be deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition. In accordance with Article 7(1) thereof, that Regulation also applies to aid granted prior to its entry into force (i.e. 1 January 2014).

⁽³²⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

- (117) According to Poland (see recital 27), the aid granted to PR under Measure 5 did not exceed the *de minimis* threshold in the period from 2009 to 2011. While it amounted in total to PLN 1 177 421 (around EUR 277 040), only PLN 350 007 (EUR 82 355) out of this amount were granted as *de minimis* aid.
- (118) As explained at recital 22, Measure 5 consists of (i) training aid of PLN 0,97 million (around EUR 0,23 million); (ii) recruitment aid of PLN 39 000 (around EUR 0,01 million) and (iii) *de minimis* aid of PLN 0,7 million (around EUR 0,17 million). These aids together enable PR to train and recruit staff necessary in order to ensure the continuous provision of regional passenger rail services. Thus, they form together one single measure. Their respective amounts have to be taken into account cumulatively for the purpose of the *de minimis* Regulation. The total amount of Measure 5 exceeds the *de minimis* threshold in the period from 2009 to 2011. Therefore, the requirements of the *de minimis* Regulation were not met for that period.
- (119) Consequently, for the period from 2009 to 2011, Measure 5 constitutes State aid under Article 107(1) TFEU and, for the same reasons as set out in recital 57 with respect to Measure 1, Measure 5 distorted or threatened to distort competition and had an effect on trade between Member States.

7.1.6.5. Conclusion

- (120) For those reasons, the Commission considers that Measure 5 constitutes State aid within the meaning of Article 107(1) TFEU.

7.2. Lawfulness of the aid

7.2.1. Lawfulness of Measures 1 to 4 (the single intervention)

- (121) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision. Article 3 of Regulation (EU) 2015/1589 provides that aid shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.
- (122) To further assess the lawfulness of the aid, the Commission must examine whether it qualifies for any exemption from the notification obligation.
- (123) None of the measures under assessment (Measures 1, 2, 3 and 4) falls within the scope of the 2008 GBER, most importantly because an undertaking in difficulty, such as PR, is not eligible for GBER aid.
- (124) Measures 2, 3, and 4 were not notified to the Commission. Measure 1 was notified on 21 September 2015. However, Poland granted Measure 1 on 30 September 2015 (see recital 1) without waiting for the Commission's decision authorising the aid. In any case, even if Poland had waited for the Commission's decision authorising Measure 1, as laid down in recitals 99 to 102, the Commission considers that Measures 1 to 4 form one single intervention, this would not have had a bearing on the lawfulness of the aid, as Measures 2 to 4 were granted without any Commission decision authorising the aid.
- (125) In view of the above, the Commission concludes that the aid was not exempted from the notification obligation and was granted by Poland without the Commission's approval, in breach of Article 108(3) TFEU and Article 3 of Regulation (EU) 2015/1589. Therefore, it was granted unlawfully.

7.2.2. Lawfulness of Measure 5

- (126) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision. Article 3 of Regulation (EU) 2015/1589 provides that aid shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.
- (127) To assess lawfulness of the aid, the Commission must examine whether it qualifies for any exemption from the notification obligation.
- (128) The Commission notes that part of the aid granted under Measure 5 qualifies as *de minimis* aid, meeting all relevant conditions of the *de minimis* Regulation. The other part could have qualified for exemption from the notification obligation under the 2008 GBER had PR not been an undertaking in difficulty at the time the aid was granted.
- (129) Since PR has to be considered an undertaking in difficulty for the period since 2005 ⁽³³⁾ (see recitals 90 and 132), the Commission concludes that not all applicable conditions of the 2008 GBER were met. The training aid at issue and any aid not meeting the conditions of the *de minimis* Regulation were therefore not exempted from the notification obligation. Consequently, the aid was granted unlawfully.

7.3. Compatibility of the aid

- (130) Under Section 7.1, the Commission concluded that Measures 1 to 4, both individually (recitals 58, 63, 77, 97) and together as a single intervention measure (recital 111), and Measure 5 (recital 120) constitute an aid within the meaning of Article 107(1) TFEU. Therefore, while the Commission considers Measures 1 to 4 to form one single intervention (see recitals 99 to 102), in the alternative, the Commission will nonetheless assess the compatibility of the aid for Measures 1 to 4, both as a single intervention (Section 7.3.1) and individually (Section 7.3.2), and in any case separately for Measure 5 (Section 7.3.3).

7.3.1. Measures 1 to 4 (the single intervention)

- (131) Firstly, as laid down in recitals 99 to 102, the Commission considers that Measures 1 to 4 form one single intervention. Thus, the compatibility of the aid will not be assessed for each individual measure but for the single intervention as a whole comprising of the individual measures.
- (132) In principle, aid granted to an undertaking in difficulty, such as PR, should meet the conditions of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the '2014 Guidelines'). ⁽³⁴⁾ The single intervention covers the period between 2005 when Measure 3 was granted and 2015 when Measure 1 was granted. According to the information from Poland, PR had negative equity in each year of the period between 2005 and 2015, before the acquisition of the shares by IDA (Measure 1). Therefore, the Commission finds that PR was an 'undertaking in difficulty' between 2005 and 2015 within the meaning of point 20 of the 2014 Guidelines (also confirmed by Poland, see recital 29). The Commission notes part of the single intervention (namely, Measure 1) was granted in September 2015, that is after the publication of the 2014 Guidelines. Point 137 of the 2014 Guidelines provides that the Commission will assess the compatibility of any restructuring aid without its authorisation under the 2014 Guidelines 'if some or all of the aid is granted after [their] publication'. Therefore, the 2014 Guidelines would apply to this case.

⁽³³⁾ As described in recital 22, Measure 5 encompasses aid granted in the period 2006-2015. As set out in recital 132, the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty apply to rescue and restructuring aid that was granted partially after the publication of the Guidelines. This is the case for Measure 5, thus the Commission applies the 2014 Guidelines for the assessment whether or not PR was an undertaking in difficulty.

⁽³⁴⁾ Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

(133) However, the Commission is of the view that the market for domestic passenger rail services operated under public service contracts is in a specific situation, which justifies assessing the aid granted to undertakings in difficulty operating in this sector under a different legal basis.

(134) Some rail transport segments (such as international passenger) have already been fully liberalised at Union level. By contrast, the domestic passenger market, has been opened only in the context of the fourth railway package⁽³⁵⁾ formally with effect from January 2019.⁽³⁶⁾ As regards the modalities for awarding contracts under Regulation (EC) No 1370/2007, as mentioned in recital 11, domestic rail passenger services, including regional rail passenger services, provided under public service contracts can still be awarded directly for a transition period lasting until 24 December 2023 and for a duration not exceeding 10 years.⁽³⁷⁾ This transition period only applies to domestic rail passenger services provided under public service contracts. Domestic rail passenger services that are not provided under public service contracts do not benefit from this transition period and liberalisation took effect from January 2019⁽³⁸⁾. Most regional passenger services are provided under public service contracts. The transition period still can provide some protection for incumbents from new potential market entrants. Overall, the sector is still dominated by incumbents and there is little competition, save in those few Member States which (partially) opened their markets under national law.

(135) Furthermore, the market for regional rail passenger under public service contracts involves an important public service and presents specific features. Since incumbents may not always be timely and sufficiently replaced by other operators⁽³⁹⁾, their exit from the market would often lead to a disruption in the provision of rail passenger services and thus have serious economic and social consequences. This makes the sector of regional rail passenger under public service contracts different from sectors that have been previously liberalised in the Union, be it rail or other, such as e.g. telecommunication or airlines.

(136) It appears that some incumbents, just like PR, may struggle with a legacy of unfinished restructuring due to circumstances they were often unable to control, such as e.g. prolonged reorganisation by the State of the entire railway sector. As a result, they may have received aid that, although formally qualifying as restructuring aid, was not used to restore their long-term viability but to remedy recurring liquidity problems. They may not have had a chance to conduct proper restructuring ahead of the upcoming liberalisation of the sector in the Union. One last opportunity to restructure may be justified to ensure long-term viability and make them better prepared to compete on the market on their own.

⁽³⁵⁾ The fourth railway package is a set of six legislative texts adopted in 2016 designed to complete the single market for rail services, comprising Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 (OJ L 138, 26.5.2016, p. 1), Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union (OJ L 138, 26.5.2016, p. 44), Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (OJ L 138, 26.5.2016, p. 102), Regulation (EU) 2016/2337 of the European Parliament and of the Council of 14 December 2016 repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings (OJ L 354, 23.12.2016, p. 20), Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (OJ L 354, 23.12.2016, p. 22), Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ L 352, 23.12.2016, p. 1).

⁽³⁶⁾ See Directive 2012/34/EU as amended by Directive (EU) 2016/2370. For services provided under public service contracts, there is a transition period: while the competitive tendering procedure became the norm for the award of such contracts on 3 December 2019, the unconditional direct award of such contracts will remain possible until 24 December 2023. Directly awarded contracts can only have a 10-year duration, i.e. until December 2033 (see Article 8 of Regulation (EC) No 1370/2007 as amended by Regulation (EU) 2016/2338).

⁽³⁷⁾ Contracts that are directly awarded before 3 December 2019 can have their duration extended by 50 % pursuant to Article 4(4) of Regulation (EC) No 1370/2007.

⁽³⁸⁾ For commercial services, full liberalisation was effective as of the working timetable starting on 12 December 2020.

⁽³⁹⁾ This is also caused by the incomplete liberalisation which leads to other operators not being able to replace the sheer volume of traffic that the incumbents represent. Furthermore, the limited interoperability of rolling stock adds to the fragmentation of markets.

- (137) Moreover, the fact that the Commission has never applied to passenger railway companies the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings indicates awareness of the specific features of domestic passenger markets, in particular as regards regional services provided under public service contracts, which constitute the vast majority of domestic rail services.
- (138) It is recognised in the case-law ⁽⁴⁰⁾ that the Commission may depart from State aid guidelines, in particular where exceptional circumstances not envisaged in those guidelines distinguish a given sector from other sectors of the economy. In such case, the Commission may apply the Treaty provisions directly. In light of (i) the specific features of the sector (see recitals 134 to 136), (ii) PR's impact at both regional and national level (see recitals 147 and 152), in particular the impact on regions that are eligible for regional aid under point (a) of Article 107(3) TFEU, and (iii) the fact that the Commission has never applied the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings to passenger railway companies in difficulties (see recital 137), the Commission considers that it is justified to apply the Treaty provisions directly to assess the compatibility of the aid granted to PR (see recital 234).
- (139) In this respect, the Commission notes that point (c) of Article 107(3) TFEU provides that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market. Taking into account the nature of PR's activities and their economic impact at both regional and national level (see recitals 147 and 152), point (c) of Article 107(3) TFEU appears to be the most appropriate legal basis to assess compatibility.
- (140) Accordingly, the Commission has decided to assess the compatibility of Measures 1 to 4, taken as one combined measure, directly under point (c) of Article 107(3) TFEU, on the basis of general assessment principles.
- (141) Article 107(3)(c) TFEU states that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Thus, in order to be capable of being considered compatible with the internal market under that provision, State aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second, expressed in negative terms, being that it must not adversely affect trading conditions to an extent contrary to the common interest ⁽⁴¹⁾.
- (142) With regard to the first condition, the Commission examines whether the aid is intended to facilitate the development of certain economic activities or of certain economic areas. With regard to the second condition, the Commission has to weigh the positive effects of the aid on the development of activities that the aid intends to support against its negative effects of it on the internal market, in terms of distortions of competition and adverse effects of the aid on trading conditions.

7.3.1.1. Aid facilitates the development of an economic activity or an economic area

- (143) According to Poland, without the aid PR would have been unable to repay its debt, as it had not been able to obtain market financing prior to receiving the aid. That would have led to PR's insolvency and likely liquidation.
- (144) Poland argues that liquidation of PR would lead to the interruption to the continuity of the provision of a service of general economic interest (SGEI) as PR is the only regional rail operator in seven out of 16 voivodships and the only operator providing services countrywide. As such it could not be replaced to a sufficient extent in a short to medium term by a different provider.

⁽⁴⁰⁾ Judgment of the Court of Justice of 8 March 2016, *Hellenic Republic v Commission*, C-431/14 P, ECLI:EU:C:2016:145, paragraphs 70-72.

⁽⁴¹⁾ Judgment of the Court of Justice of 22 September 2020, *Austria/Commission (Hinkley point (C))*, C-594/18 P, ECLI:EU:C:2020:742, paragraphs 18-19.

- (145) Poland argues that the liquidation of PR would have caused serious social hardship by the interruption to the continuity of the provision of an SGEI. In Poland's view, it would have also increased unemployment and would have had negative effect on the economy. Poland estimates that the liquidation of PR would have brought about the loss of 15 000 to 17 500 jobs and cause accumulated decrease of value added in Polish economy of PLN 1 100-1 700 million within 2-3 years.
- (146) Poland analysed alternative scenarios to the aid assuming continuity of services, such as raising of private capital, asset disposal and debt reorganisation, but found them all to be unrealistic.
- (147) The Commission notes, firstly, that PR is indeed the only passenger regional rail operator in seven regions and has a significant market share (between 66 % and 95 %) in three others. Secondly, there are high barriers to entry in the sector (large initial capital investment required to begin operations), which limits the number of potential entrants. Thirdly, according to Poland, no 'external' operator, domestic or foreign (except Arriva, which has an estimated 2 % share in the market), has ever expressed interest in entering the Polish regional passenger railway market. In addition, the 'in-house' operators are not able to provide services outside their home regions, as by doing so they would lose their status as an 'internal operator'.⁽⁴²⁾ Fourthly, where in the past responsible authorities procured transport services by way of a competitive tender, PR was often the only bidder. On that basis, it is reasonable to conclude that, had PR gone bankrupt, no other operator would have been able to replace it on a sufficient scale in the short to medium term.
- (148) In view of the Commission, Poland's claim that without the aid PR would have become insolvent seems plausible, taking into account high indebtedness of PR, lack of sufficient internal liquidity and inability to generate market financing.
- (149) Poland's counterfactual analysis involving alternative scenarios, which led it to the conclusion that there was no real alternative to the aid (see recital 146) also appears plausible. It is unlikely that any private investor would have expressed interest in acquiring PR, taking into account its dire financial condition. Disposal of assets would have been insufficient to settle debts and, more importantly, would have undermined the restoration of viability, since most of the assets are necessary to continue operations. As regards debt reorganisation by existing creditors, it would have inevitably entailed further aid, given that the biggest creditors of PR were State-owned.
- (150) On the other hand, the aid enabled PR to reduce its debt and undertake the reorganisation with the aim to restore long-term viability. The process appears to have brought positive effects insofar as the company turned profitable in 2016, it has positive equity and is expected to generate profits until 2020. In addition, the aid induced the previously reluctant local authorities to conclude with PR long-term public service contracts for the period 2015-2021. That provides PR with financial stability, necessary to successfully complete the reorganisation process.
- (151) Finally, as noted in recital 9, all regions in which PR operates are eligible for regional aid under point (a) of Article 107(3) TFEU. Such regions are characterised by a standard of living that is abnormally low or with serious underemployment. PR directly employs around 9 000 staff and provides around 50 % of the annual train-kilometres. A liquidation of PR would have, next to the direct impact on the PR employees and contractors, a significant impact on the mobility of the labour force in all regions with a real threat to the existing employment possibilities.
- (152) In addition, the voivodships in which PR is the only operator or has a significant market share are relatively poorer, have higher unemployment rate and smaller choice of public transport alternatives than the remaining voivodships, in which the 'in-house' operators are active. Thus the bankruptcy of PR would have harmed more the former than the latter, further increasing regional disparities.
- (153) In view of the above, the Commission concludes that the aid facilitates the development of the regional rail services in Poland in that it prevents a likely interruption of the provision of those services in case of PR's bankruptcy. It also addresses inequalities between the regions that would have likely increased had PR gone bankrupt.

⁽⁴²⁾ 'Internal operators' as defined in point (j) of Article 2 of Regulation (EC) No 1370/2007.

7.3.1.2. Aid does not unduly affect competition and trading conditions to an extent contrary to the common interest

(154) In order to assess whether the aid does not unduly affect the competition and trading conditions it is necessary to examine the necessity of the aid, its appropriateness and proportionality. It is also necessary to examine the effects of the aid on competition and trade and weight the positive effects of the aid on the development of activities that the aid intends to support against its negative effects of it on the internal market.

7.3.1.3. Necessity of the aid, its appropriateness and proportionality

(155) First, as noted in recitals 143 to 146, according to Poland, without the aid PR would become insolvent and be liquidated. The liquidation of PR would have caused serious social hardship by the interruption to the continuity of the provision of an SGEI and the increase of unemployment. It would also have had overall negative effect on the economy. Finally, Poland concluded that alternative scenarios assuming the continuity of service without the aid were unrealistic.

(156) As observed in recitals 148 to 153, in view of the Commission, Poland's arguments are plausible. The Commission concludes therefore that the aid is necessary to prevent a serious social hardship related to the likely discontinuation in the provision of regional passenger rail transport services in case of PR's bankruptcy.

(157) Second, with regard to appropriateness of the aid, it is to be noted that before receiving the aid, PR was in difficult financial condition. For years, it had reported losses, negative equity and increasing debt and qualified as an undertaking in difficulty since 2005. From the beginning of the reorganisation process in 2000, PR did not have sufficient internal liquidity, nor access to external financing, necessary to repay its debt and to finance its operations. The problem of indebtedness culminated in September 2015, when the two biggest creditors of PR, PKP PLK and PKP Energetyka, called upon the debtor to repay its debt within a week. The latter threatened to stop supplying energy. Without repaying its debt, PR would have become insolvent. In that context, it is unlikely that any less distortive instrument than the aid, for instance regulatory changes alone, would have prevented PR's bankruptcy and thus ensured continuity of provision of regional passenger rail transport services.

(158) The financial difficulties of PR were primarily caused by losses cumulated over the years and over-indebtedness. The aid, which came in the form of the coverage of past losses and debt restructuring (including the deferral of liabilities) adequately addressed those difficulties. The equity investment in 2015 went beyond addressing the immediate liquidity problems by providing PR with the long-term financing, necessary to restore the long-term viability.

(159) From the actual financial results it appears that so far the aid is achieving the envisaged objectives as the company has turned profitable and rebuilt its equity (see Table 1). As a result it was able to obtain market financing (thus the increase of liabilities in 2017), which serves as an own contribution to the cost of reorganisation.

Table 1

Selected financial data of PR in 2011 – 2017 and a forecast for 2018, 2019 and 2020, in PLN million

	2011	2012	2013	2014	2015	2016	2017
Revenue	1 797,8	1 746,4	1 498,8	1 474,0	1 383,4	1 317,7	1 334,6
Operating result	10,2	- 74,0	- 31,1	10,0	- 96,1	51,0	68,2
Net result	- 52,7	- 44,3	- 54,0	- 5,5	- 88,4	51,2	75,2
Net margin	- 2,9 %	- 2,5 %	- 3,6 %	- 0,3 %	- 6,4 %	3,9 %	5,6 %
Equity	- 292,4	- 336,7	- 390,7	- 396,2	285,7	336,9	412,1

Liabilities	784,7	834,6	898	884,2	287,4	225,3	463,2
	2018(F)	2019(F)	2020(F)				
Revenue	[1 161,1-1 570,9]	[1 139,8-1 542]	[1 092,7-1 478,3]				
Operating result	[59,0 – 79,8]	[41,0 – 55,4]	[35,4 – 48,0]				
Net result	[41,7-56,4]	[22,7-30,7]	[23,5-31,9]				
Net margin	[3,1-4,1] %	[1,7-2,3] %					
Equity	[391,9-530,3]	[414,5-560,9]	[438,2-592,8]				
Liabilities	[592,5-801,6]	[510,3-690,5]	[311,8-421,8]				

Source: Financial statements of PR for years 2011-2017; 'F' – forecast according to the restructuring plan updated in December 2017 for years 2018-2020.

(160) On this basis, the Commission concludes that the aid is appropriate to achieve its objective.

(161) Third, as for the proportionality of the aid, the Commission notes that the large proportion of the aid was used to cover past operating losses or to reduce the burden of debt (debt restructuring and deferral of liabilities), which was ultimately repaid by PR. Thus, it did not provide PR with surplus liquidity that could be spent for purposes other than ensuring continuity of operations.

(162) As regards the equity investment in 2015, [...] % of its total amount was spent immediately to repay overdue debts towards PKP PLK and PKP Energetyka. The remaining amount of PLN [...] (around EUR [...]) was spent for the modernisation of rolling stock and employment restructuring, i.e. to remedy the other main causes of PR's difficulties (apart from high indebtedness), namely poor quality and insufficient quantity of rolling stock and low operating efficiency, with the aim to complete the reorganisation process and restore long-term viability.

(163) On the other hand, PR has assumed a significant burden of the reorganisation costs by generating considerable amount of own contribution in the form of external financing (bank loans on market terms). That own contribution, which PR will have to repay from its own resources, amounts to PLN [...] (around EUR [...]) and accounts for a significant portion of the total reorganisation costs.

(164) The actual financial results as well as the financial projections show that the aid was not excessive. The company generated net losses for nine consecutive years between 2008 and 2015, and negative equity each year since at least 2004 until 2014. In 2016 and 2017 it reported net profits, however the profit margin of 3,9 % and 5,6 %, respectively, does not seem to be unreasonably high ⁽⁴³⁾. Similarly, in the period 2018-2020 PR was expected to generate a rather moderate net margin of [1,7 to 4,1] %. The moderate profit margins show that PR is currently adequately compensated for its provision of passenger rail transport services.

(165) For those reasons, the Commission concludes that the aid is limited to what is necessary to reach its objective, and thus is proportionate.

⁽⁴³⁾ The profits do not seem to be unreasonable, as for example, the revenues are constant and the increased profitability is sustained by cuts in costs. Moreover, the profits are decreasing over time. For comparison, other incumbent national rail companies providing regional passenger rail services have a profit margin of around 4 % to 6 % and more.

7.3.1.4. Effects on competition and trade

- (166) Though the market for domestic regional passenger rail transport has not been fully liberalised under Union law yet, the Commission held in previous decisions that aid granted to passenger railway companies⁽⁴⁴⁾ had an effect on competition and trade, because international passenger transport has been liberalised and some Member States have unilaterally opened their rail passenger transport markets. In addition, there is inter-modal competition between regional rail and other means of transport in Poland. Furthermore, in several voivodships there is more than one regional rail operator, including operators from another Member State.
- (167) PR's share in the intra-regional rail services market has gradually decreased, from 50 % in 2014 to 42,5 % in the first half of 2017 (in terms of traffic volume in train/km). Moreover, according to the restructuring plan which covers the period ending 2020, PR plans to reduce its traffic volume by [...] % and its number of electric multiple units by [...] %. That should free additional capacity for competitors.
- (168) All 'in-house' competitors of PR (except PKP Szybka Kolej Miejska) have signed directly awarded long-term contracts with local authorities until at least November 2023. That means that PR cannot take over their routes for several more years. Arriva, the 'external' competitor of PR, had a contract running until December 2020.
- (169) Therefore, the measure has effects on competition and affects trade between Member States.⁽⁴⁵⁾

7.3.1.5. Weighing up the positive effects of the aid with the negative effect on the internal market

- (170) An aid measure is adequately construed when it facilitates the development of certain economic activities or of certain economic areas without adversely affecting trading conditions to an extent contrary to the common interest.
- (171) On the basis of the observation above it can be concluded the negative effects of the aid on the sector of regional passenger rail services in Poland are limited.
- (172) Moreover, as mentioned in recital 134, although subject to the principle of competitive award of public service contracts since December 2019, the market for regional rail passenger under public service contracts is still in a transition period under which the public service contracts can still be unconditionally directly awarded until 2023. Poland has committed to complete this process three years earlier (see recitals 33 and 213). This will lead to an accelerated market opening and contribute to the Union's objective of creating the single European railway area. The balancing of the effects of the Measure 1 to 4 has therefore take into account the commitments of Poland which are described and assessed in recitals 212 to 229 below.

7.3.2. Measures 1 to 4 as separate measures

- (173) For the reasons set out in recitals 138 and 139, the Commission believes that it is justified to apply the Treaty provisions directly to assess the compatibility of the aid granted to PR and that point (c) of Article 107(3) is the most appropriate basis for the compatibility assessment.

⁽⁴⁴⁾ The profits do not seem to be unreasonable, as for example, the revenues are constant and the increased profitability is sustained by cuts in costs. Moreover, the profits are decreasing over time. For comparison, other incumbent national rail companies providing regional passenger rail services have a profit margin of around 4 % to 6 % and more.

⁽⁴⁵⁾ As mentioned in recital 162, PR used almost the total amount of the aid to cover past operating losses and to repay its debts. That merely enabled the company to avoid insolvency rather than finance the extension of operations to the detriment of competitors. The remaining, relatively small amount of the aid ([...]), was also not used for market expansion, but to implement the measures necessary to complete the reorganisation process (modernisation of rolling stock and employment restructuring) and restore long-term viability.

7.3.2.1. Aid facilitates the development of an economic activity or an economic area

- (174) As explained in recital 153, State aid facilitates the development of an activity when it prevents the interruption of the provision of a service by restoring the long-term viability of an undertaking that without the aid would have exited the market. At the time of granting of each individual measure PR had been in difficulties, as defined in the 2004 Guidelines and the 2014 Guidelines (see recitals 29 and 132).
- (175) PR is the main operator of regional passenger rail services and faces competition solely from the 'in-house' operators of the regions, which only operate in their respective region, and to a very limited extent from Arriva.
- (176) High barriers exist for potential entrants. This increases the risk that in case PR would cease its operations, another operator would not be able to step in and replace PR quickly and at a sufficient scale (see recital 147).
- (177) Moreover, a liquidation of PR would have both a significant impact on, (i) PR employees and contractors, and (ii) the mobility of the labour force in regions that are eligible for regional aid under point (a) of Article 107(3) TFEU (see recital 151).
- (178) While performed by different actors, each individual measure has contributed to a common objective, namely: to ensure the continuation of PR's activities.
- (179) In view of the above, the Commission concludes that each of Measures 1 to 4 individually facilitates the development of the regional rail passenger services in Poland in that they prevent a serious social hardship related to the likely interruption of providing rail passenger services in case of PR's bankruptcy.

7.3.2.2. Aid does not unduly affect competition and trading conditions to an extent contrary to the common interest

- (180) The financial difficulties of PR were primarily caused by losses cumulated over the years and over-indebtedness. The first was adequately addressed by the coverage of past losses (Measure 2). The second, was addressed by the debt restructuring by PR's creditors (Measures 3 and 4) and ultimately by the shares acquisition by IDA (Measure 1), when the two biggest creditors of PR called for the repayment of the debt.
- (181) The instruments used were adequate to address the causes of the financial difficulties, i.e. the cumulated losses were addressed by coverage of past losses payments and the critical solvency situation of PR was addressed by instruments affecting the solvency of a company (debt restructuring, equity investment).
- (182) As described in recitals 147 to 152, PR has been the main provider of regional passenger rail services in Poland. At time of the granting and disbursement of the individual measures, the market for regional passenger rail services was not liberalised and there did not exist a large number of competitors within the individual regions and no competitor countrywide in Poland. In this context, as also stated in recital 157, it is unlikely that at any point in time any less distortive instruments, for instance regulatory changes alone, would have ensured continuity of provision of regional passenger rail services at a comparable level that would not have negatively affected the regions' economies in case of PR's bankruptcy.
- (183) As stated in recital 132, PR had negative equity in each individual year of the period between 2005 and 2015 (before the acquisition of the shares). Moreover, in the entire period, PR achieved a positive net result only once. With the exception of 2007, PR only produced losses. The situation is not significantly better when considering the result from operations. PR achieved an operating profit only three times (2007, 2011 and 2014). This means that in the majority of years PR's operations did not generate enough revenues to cover their costs.
- (184) As Poland stated (see recital 143), PR was not able to obtain market financing. Given the continuous precarious financial situation of the company, this seems plausible for the entire period. Moreover, it seems also unlikely that a private investor would have been interested in investing in PR. Despite the market not being liberalised and PR being the main player, PR was not able to generate net profits and thus was not able to disburse profits for its shareholders or increase the value of the shareholding.

- (185) As stated in recital 149, an asset disposal was also not realistic, since most of the assets were necessary to continue operations. Thus, the existing public creditors were the potential sources for a partial relief of the over-indebtedness (Measures 3 and 4). Concerning Measure 2, the historically accumulated losses contributed to the negative equity. The same limitation concerning the availability of other financing sources than the State for Measures 3 and 4 applies to Measure 2. With regard to Measure 1, as stated in recital 157, PR's main creditors already demanded the payment of the debt. In this situation, it is likely that there was no private investor or potential creditor to provide funds to PR without any participation by the State.
- (186) Any aid must be proportionate, which means it should be limited to the minimum possible. Measure 2 was addressed to cover past operating losses cumulated over the years, Measures 3 and 4 to reduce the burden of debt. As stated in recital 161, these measures did not provide PR with any surplus liquidity that could be spent for purposes other than ensuring continuity of operations. With regard to Measure 1, as explained in recitals 162 to 164, the vast majority of the total amount was spent to pay the overdue debt and PR generated a significant amount of own contribution. Moreover, the actual financial results as well as the financial projections show that the aid was not excessive.
- (187) As explained in recital 178, the individual measures shared a common objective, namely the continuation of PR's activity and achieving long-term viability of the company. As shown in recitals 148 to 150 and 182, it is plausible to assume that in the absence of the aid PR would have gone bankrupt, which would have led to a serious disruption in the provision of rail passenger transport services. In such a case the shared objective would not have been reached.
- (188) For those reasons, the Commission concludes that each aid granted under Measures 1 to 4 individually is appropriate and proportionate. Moreover, each aid is necessary to prevent a serious social hardship related to the likely discontinuation in the provision of regional passenger rail transport services in case of PR's bankruptcy.
- (189) With regard to the effects of the Measure 1 to 4 on competition and trade conditions, the observations made in recitals 170 to 172 with respect to these Measures taken together as the single intervention apply accordingly to each of Measures 1 to 4 individually.

7.3.3. Measure 5

- (190) The Commission notes that Measure 5 differs from Measures 1 to 4 in that it does not directly address the liquidity problems PR has been facing since at least 2005.
- (191) The objectives of Measure 5 were to support training for PR staff and to support recruitment activities and to provide general support in the form of *de minimis* aid.
- (192) As explained in recital 118, Measure 5 did not meet the conditions laid down in the *de minimis* Regulation during the 2009-2011 period and thus constituted an aid during that period.
- (193) As explained in recitals 132 and 133 in principle, an aid granted to an undertaking in difficulty, such as PR, should meet the conditions of the 2014 Guidelines. However, the Commission is of the view that aid granted to undertakings in difficulty operating in the market for domestic regional passenger services operated under public service contracts must be assessed under a different legal basis.
- (194) Since PR was an undertaking in difficulty at least since 2005 (see recital 90), in accordance with point (c) of Article 1(6) of the 2008 GBER it was not entitled to receive any block-exempted aid. That aid can therefore not be deemed compatible in accordance with that Regulation.
- (195) The Commission has therefore examined if any other compatibility provisions could apply to that aid and, in particular, whether the aid could be approved directly under point (c) of Article 107(3) of the Treaty.
- (196) In the assessment of the single intervention, the Commission has acknowledged that PR was significantly underfunded (see recitals 157 to 159). The Commission has also found that PR provides regional passenger rail transport services in a market where there is only limited competition because of its non-liberalised nature and the missing incentives for external operators to enter the market, and where an interruption of PR's activities could not

easily be replicated (see recitals 134 to 137 and 144 to 152). Although Measure 5 did not contribute to remedying the viability issues of PR, it contributed to PR's ability to provide its services in the regional passenger railway market (see recitals 197 to 201). Thus, taking into account the nature of PR's activities and their economic impact at both regional and national level, point (c) of Article 107(3) TFEU appears to be also the most appropriate compatibility basis for Measure 5.

7.3.3.1. Aid facilitates the development of an economic activity or an economic area

- (197) As explained in recital 165 State aid facilitates the development of an activity when it prevents the interruption of the provision of a service.
- (198) The Commission notes that although the aid granted under Measure 5 did not directly address PR's liquidity problems, it nevertheless contributed to facilitating the provision of passenger rail transport services by PR.
- (199) Passenger rail transport is subject to stringent safety requirements. Trained and skilled staff significantly participate in meeting those requirements by ensuring that passenger rail transport is safely operated. Staff is therefore a key asset for passenger rail transport companies which are unable to operate without it.
- (200) The aid granted under Measure 5 aimed at ensuring that PR could rely upon trained and skilled staff for its operation. Given PR's financial difficulties, it seems plausible that, absent Measure 5, PR would not have been able to train and recruit staff in an adequate manner, and thus to pursue its activities. That could have led to a significant interruption of regional passenger rail transport services if for safety reasons trains could not have been operated. The aid granted under Measure 5 therefore ensured that PR continued to provide regional passenger rail transport services. In the same way as the single intervention, Measure 5, by allowing PR to continue to provide its services, contributes to facilitating the development of regional passenger railway services in Poland. It also addresses inequalities between the regions that would have likely increased had PR not been able to provide regional passenger railway services (see recital 152).
- (201) It appears plausible that in the absence of the aid granted under Measure 5, PR would not have had the ability to train and recruit staff, which would have likely led to a discontinuation in the provision of public transport services.
- (202) In view of the above, the Commission concludes that Measure 5 facilitates the development of the regional passenger railway services in Poland in that it prevents a serious social hardship related to the likely interruption of providing rail services.

7.3.3.2. Aid does not unduly affect competition and trading conditions to an extent contrary to the common interest

- (203) As explained in recital 154, it is necessary to examine the necessity of the aid, its appropriateness and proportionality. It is also necessary to examine the effects of the aid on competition and trade and weight the weight the positive effects of the aid on the development of activities that the aid intends to support against its negative effects of it on the internal market.
- (204) Concerning the necessity and appropriateness of the aid, as explained in recitals 90 and 157, PR was in difficult financial condition. That might have hindered PR's ability to train and recruit staff, which was necessary for PR to continue providing regional passenger rail services. Given PR's financial situation, taking into account high indebtedness of PR, lack of sufficient internal liquidity and inability to generate market financing, it appears plausible that without the aid granted under Measure 5, PR would not have been able to train and recruit staff necessary for its operations. That would have negatively affected PR's ability to provide passenger rail transport services and thus, ultimately undermined the restoration of PR's viability. The Commission notes that PR's provision of public passenger rail transport services was not interrupted between 2005 and 2013.

- (205) Therefore, the Commission considers that the aid granted under Measure 5 was necessary and appropriate to achieve its objective, by ensuring that PR could train and recruit on the staff necessary for the provision of public passenger rail services.
- (206) With regard to proportionality, the Commission notes that the aid granted under Measure 5 amounted to around PLN 1 million (around EUR 240 000) in the period from 2006 to 2013. The Commission notes that the total amount of aid granted under Measure 5 is significantly lower than even [...] % of the annual revenue of PR.
- (207) Moreover, there is no indication that PR used the aid for purposes other than providing training or recruiting staff.
- (208) For those reasons, the Commission concludes that the aid granted under Measure 5 is limited to what is necessary to reach its objective, and thus is proportionate.
- (209) Concerning the effect on competition and trade, for the reasons explained in recitals 166 to 169, the aid granted under Measure 5 has some effect on competition and affects trade between Member States.
- (210) However, the Commission notes that the distortive effects of that aid should, given its relatively small amount of around PLN 1 million (around EUR 240 000), be more limited than the ones of the single intervention.
- (211) In the light of the above, the positive impact of Measure 5 on the development of the economic activity and regions concerned outweighs the potential negative effects of the aid on the competition and trade conditions. The latter are therefore not adversely affected to an extent contrary to the common interest.

7.3.4. Market opening measures committed to by Poland

7.3.4.1. Description of the market opening measures committed to by Poland

- (212) On 7 July 2017, Poland proposed market opening measures in order to offset the distortive effects of the aid granted under Measures 1 to 4 and Measure 5. Those market opening measures are described in recitals 180 and 181 of the opening decision.
- (213) In the course of the procedure, Poland revised the proposed market opening measures. On 31 October 2019, Poland submitted a letter including the schedule for the market opening to take place before 2031 (the 'market opening schedule').⁽⁴⁶⁾ On 29 November 2019, Poland submitted the final version of the market opening measures. Poland commits to introduce the three following market opening measures (hereafter respectively, 'Commitment 1', 'Commitment 2' and 'Commitment 3'):
1. The end of 2020 will be the ultimate deadline for the conclusion by regions of public service contracts awarded directly (without a public tender). Poland confirms (data for 2018) that the market situation has not substantially changed since 2016/2017.
 2. With respect to the period by the end of 2030:
 - a) Poland undertakes to conduct competitive tenders by the end of 2020 for the performance of regional passenger rail services concerning routes of operational work size at a level of a minimum of [4 000-30 000] thousand train-kilometres (which corresponds to approx. [4-30] % of total operational work measured in train-kilometres provided for in the timetable for the year 2016/2017). The value will be achieved as a result of competitive tenders being conducted in at least two of the following voivodships: Kujawsko-Pomorskie, Podlaskie, Podkarpackie and Lubuskie.

⁽⁴⁶⁾ Letter EU-WEH-336/2019/UUEEU; the market opening schedule includes the voivodships covered by the market opening, the amount of train-kilometres by voivodship covered by the market opening and the year of the market opening. The market opening will start in 2021/22, instead of 2020/21, as initially indicated in the market opening measure schedule.

b) Poland undertakes to conduct additional competitive tenders by the end of 2030 for the performance of regional passenger rail services concerning routes of operational work size at a level of [4 000-30 000] thousand train-kilometres (which corresponds to approx. [4-30] % of total operational work measured in train-kilometres provided for in the timetable for the year 2016/2017). This value will be achieved as a result of competitive tenders being conducted in one or more of the following voivodships:

- [...];
- [...];
- [...];
- [...];
- [...].

The operational work realized on the basis of contracts concluded as a result of tenders mentioned above, will be introduced gradually. A specific commitment regarding the bullets in the schedule of the market opening was set out in the letter SP-EU-WEH-336/2019/UEEU ([RESTREINT UE/EU RESTRICTED]) date October, 31st 2019 with clarification that first opening will take place from 2021/2022. With regard to regions' competences as the transport organizers, these bullets in the schedule constitutes an annex of the commitment 2 and remains restricted.

3. Confirmation of the principle that each rolling stock purchased by the organizer from state funds should be made available to individual carriers and used exclusively to provide public services; the rolling stock should be handed over to the operator/carrier at arm's length (and returned or duly remunerated after the termination of the public services contract).'⁽⁴⁷⁾

(214) The Commission notes that Commitment 2 expressly refers to the market opening schedule as an annex to Commitment 2. The market opening schedule is therefore an integral part of Commitment 2 and is reproduced in the Annex to this Decision.

(215) On 4 December 2020, Poland sent to the Commission information relating to the execution of the Commitment 2a). Poland informed the Commission that it was assumed that the competitive tenders would be held in the Podkarpackie and Kujawsko-Pomorskie voivodships. A tender procedure was conducted by Podkarpackie voivodship and covered more than 4 000 000 train-kilometres. However, in the current unprecedented ongoing COVID-19 pandemic, Kujawsko-Pomorskie voivodship has not managed to conduct a tender that would lead to the selection of a public service provider before the end of 2020.

(216) Due to this situation, Kujawsko-Pomorskie voivodship has submitted a statement in which it undertakes to conclude a public service contract for regional passenger rail transport in a tender procedure from the 2021/2022 timetable. According to the position taken by Kujawsko-Pomorskie voivodship, the volume of operational work to be contracted as a result of the tender is estimated at a minimum of 5,8 million train-kilometres for each timetable (i.e. ca. 5,8 % of the operational work measured in train-kilometres on the 2016/2017 timetable). As a result, the first stage of liberalisation of transport operations (over [4 000 000-30 000 000] train-kilometres) would be completed at the end of 2021, instead of 2020, as originally planned.

7.3.4.2. Assessment of the market opening measures committed by Poland

Commitment 1

(217) As explained in recital 13, the Act amending the Public Transport Act was adopted on 22 March 2018. The 2018 Act provides, in particular, that:

(a) 12 December 2020 will be the ultimate deadline for the conclusion by regions of public service contracts in regional rail transportation awarded directly (without a public tender);

⁽⁴⁷⁾ The original letter from Poland send in English.

- (b) 14 December 2030 will be the ultimate deadline for the expiry of public service contracts in regional rail transportation awarded directly by regions (without a public tender).
- (218) It follows that the whole Polish regional passenger rail market will be open to competition by 14 December 2030, that is three years before the deadline set in the fourth Railway Package.
- (219) Furthermore, Article 8(2)(ii) of Regulation (EC) No 1370/2007 provides that Article 5, concerning awards of public service contracts, shall apply to public passenger transport services by rail from 3 December 2019. Article 8(2)(iii) of Regulation (EC) No 1370/2007, provides that Article 5(6) and 7(3), that allow direct awards for public service contracts, shall cease to apply from December 2023. Commitment 1 therefore reduces the period during which public service contracts can be directly awarded, limiting it to 12 December 2020. It thus reduces the opportunity for voivodships to directly award contracts, which could both limit the scope of and delay the effective market opening.
- (220) In light of above, account taken of the specific context of the ongoing opening of the Polish regional passenger rail market the Commission considers that Commitment 1 is appropriate. It ensures an earlier effective opening of that market compared to Poland's legal obligations under Regulation (EC) No 1370/2007.

Commitment 2

- (221) Commitment 2 ensures that the market opening will gradually expand by 14 December 2030:
- (a) First, Commitment 2 a) ensures that the market opening process will rely on a strong basis, as a threshold of at least [4 000-30 000] thousand (that is [4-30]) train-kilometres, corresponding to approximately [4-30] % of total operational work in the timetable for the year 2016/2017, will be achieved by competitive tenders by the end of 2020, in different regions. In that regard, it is noted that the unprecedented crisis caused by the COVID-19 outbreak provoked a delay in the execution of that commitment (see recitals 215 and 216). It is also noted that, the first stage of market opening process should be completed in the Kujawsko-Pomorskie voivodship by the end of 2021.
- (b) Second, Commitment 2 b) will build on the part of the market that is already open by ensuring that an additional and significant market opening will gradually take place between the end of 2020 and the end of 2030. That additional market opening will be carried through competitive tenders in a number of regions. It will account for [4 000-30 000] thousand (that is [4-30]) train-kilometres, corresponding to approximately [4-30] % of total operational work in the timetable for the year 2016/2017. Consequently, by the end of 2030, the size of the market open to competition will have more than doubled, from around [4-30] % by the end of 2020 to around [10-35] % by the end of 2030. Therefore, around a fifth of the overall market will be open for competition not only from within Poland (in-house operators) but also from other Member States ⁽⁴⁸⁾.
- (222) Moreover, the market opening process appears to create attractive opportunities to new entrants. According to the market opening schedule that is part Commitment 2, the market opening will take place gradually over a 10-year period and in a number of different voivodships. New entrants will therefore have the opportunity to participate in, and possibly win, several tenders. Furthermore, the regions covered by the schedule appear to be economically dynamic (based on purchasing power standards per capita) where regional passenger rail services are more likely to develop.
- (223) In the specific context of the ongoing opening of the Polish regional passenger rail market, the Commission considers Commitment 2 is also satisfactory. It ensures that the market opening will gradually expand by 14 December 2030. While the first phase of the process of the market opening will partially be completed only 2021, instead of 2020, that delay is justified by unprecedented crisis.

⁽⁴⁸⁾ Currently around 2 % of the market are served by one external operator.

Commitment 3

- (224) Commitment 3 ensures that the voivodships will make available rolling stock purchased with public funds to the operator of public service contracts on a non-discriminatory manner and arm's length basis, during the public service contracts. That Commitment is line with the requirements set out in Article 5a of Regulation (EC) No 1370/2007, which provides for an obligation for the competent authorities to assess whether measures are necessary to ensure effective and non-discriminatory access to suitable rolling stock.

7.3.4.3. Conclusion

- (225) For those reasons, the Commission finds that the commitments proposed by Poland will ensure an earlier and significant opening of the market for regional passenger rail services.
- (226) The Commission observes that, in the specific context of the ongoing opening of the Polish regional passenger rail market, the commitments proposed by Poland will enable PR's actual and potential competitors to bid for contracts earlier than required by Union law and thus will to some extent mitigate the distortive effects of the aid.
- (227) For those reasons, the Commission concludes that the aid granted under Measures 1 to 4 and Measure 5 does not unduly distort competition and affect trade among Member States.
- (228) The commitments proposed by Poland are designed to remedy the negative effect on competition and trade of the entire aid granted both under the single intervention (Measures 1 to 4) and Measure 5.
- (229) As each of Measures 1 to 4 individually has a smaller distortive effect than Measures 1 to 4 together as a single intervention, the Commission concludes that the commitments proposed by Poland are sufficient to mitigate the distortive effect of each Measure 1 to 4 individually.

7.3.5. Conclusion on the compatibility of the aid

- (230) On balance, in the view of the Commission, the positive effects of the aid granted under Measures 1 to 4, both as the single intervention and individually, and Measure 5, respectively, on the development of the economic activity and regions concerned outweighs the potential negative effects of these Measures on competition and trade conditions. The latter are therefore not adversely affected to an extent contrary to the common interest. [...].
- (231) [...].
- (232) Poland must communicate to the Commission annual reports on the measures taken to comply with the commitments proposed by Poland and imposed also as conditions, on a yearly basis until 31 December 2030.
- (233) This Decision is without prejudice to any future assessment that may be carried out as regards the compatibility of public service contracts for regional passenger railway transport services of voivodships, including the funding of rolling stock under public service obligations, under Regulation (EC) No 1370/2007.
- (234) The Commission points out that the present decision applies a new standard of assessing compatibility of State aid measures to firms in difficulty in the sector of regional passenger rail transport. ⁽⁴⁹⁾The Commission will apply in the future the same standard to comparable cases that present the same features and, for reasons of transparency and predictability, envisages to clarify accordingly the pertinent Guidelines in this respect.

⁽⁴⁹⁾ See in particular recitals 131-140 and the commitments set out at recitals 212-229.

8. CONCLUSION

(235) The Commission regrets that Poland put the aid into effect, in breach of Article 108(3) TFEU. The Commission concludes that the aid granted under Measures 1 to 4 and 5 constitutes State aid within the meaning of Article 107(1) TFEU, which was granted unlawfully, in breach of Article 108(3) TFEU and Article 3 of Regulation (EU) 2015/1589, and which is compatible with the internal market under Article 107(3)(c) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The following measures implemented by Poland in favour of Przewozy Regionalne sp. z o.o. ('PR') constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

- (a) Equity investment by IDA on 30 September 2015 (the notified restructuring aid, Measure 1)
- (b) Coverage of past losses granted between 2006 and 2008 in the context of the on-going restructuring of PR (Measure 2)
- (c) Debt restructuring in 2004-2009 (Measure 3)
- (d) Deferral of liabilities in 2009-2014 (Measure 4)
- (e) Training, recruitment and *de minimis* aid granted from 2006 to 2015 exceeding the *de minimis* threshold in the period from 2009 to 2011 (Measure 5)

Article 2

The measures set out in Article 1 are compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union subject to the conditions set out in Article 3 and Article 4.

Article 3

Poland shall comply with the following conditions:

1. The end of 2020 is the ultimate deadline for the regional authorities to award directly public service contracts (without a public tender). Poland confirms that, on the basis of data concerning year 2018, the market situation has not substantially changed since 2016/2017.
2. With respect to the period by the end of 2030:
 - (a) Poland undertakes to conduct competitive tenders by the end of 2021 for the performance of regional passenger rail services concerning routes of operational work size at a level of a minimum of [4 000-30 000] thousand train-kilometres (which corresponds to approx. [4-30] % of total operational work measured in train-kilometres provided for in the timetable for the year 2016/2017). The value will be achieved as a result of competitive tenders being conducted in at least two of the following voivodships: Kujawsko-Pomorskie, Podlaskie, Podkarpackie and Lubuskie.
 - (b) Poland undertakes to conduct additional competitive tenders by the end of 2030 for the performance of regional passenger rail services concerning routes of operational work size at a level of [4 000-30 000] thousand train-kilometres (which corresponds to approx. [4-30] % of total operational work measured in train-kilometres provided for in the timetable for the year 2016/2017). This value will be achieved as a result of competitive tenders being conducted in one or more of the following voivodships:
 - [...];
 - [...];
 - [...];

- [...];
- [...].

The operational work realized on the basis of contracts concluded as a result of tenders mentioned above, will be introduced gradually. A specific commitment regarding the bullets in the schedule of the market opening was set out in the letter SP-EU-WEH-336/2019/UEEU (RESTREINT EU/EU RESTRICTED) date October, 31st 2019 with clarification that first opening will take place from 2021/2022. With regard to regions' competences as the transport organizers, these bullets in the schedule constitutes an annex of the commitment 2 and remains restricted.

3. Confirmation of the principle that each rolling stock purchased by the organizer from state funds should be made available to individual carriers and used exclusively to provide public services; the rolling stock should be handed over to the operator/carrier at arm's length (and returned or duly remunerated after the termination of the public services contract).

Article 4

Poland shall communicate to the Commission annual reports on the measures taken to comply with the conditions laid down in Article 3, on a yearly basis until 31 December 2030.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels, 20 April 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission
