

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2021/2182

of 6 March 2020

SA.41727 (2016/C) (ex 2016/NN) (ex 2015/CP) on the measures in favour of Empresa de Manutenção de Equipamento Ferroviário, S.A. (EMEF)

(notified under document C(2020) 1254)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 27 April 2015, Bombardier Transportation Portugal S.A. ('Bombardier' or 'the Complainant') filed a State aid complaint against Empresa de Manutenção de Equipamento Ferroviário, S.A. ('EMEF'), alleging that EMEF had benefited from illegal State aid through its parent company CP – Comboios de Portugal, E.P.E ('CP'), the State-owned Portuguese passenger rail operator.
- (2) The complaint was forwarded to the Portuguese authorities for comments together with a request for information on 3 June 2015. Portugal replied on 17 July 2015 and 24 July 2015.
- (3) A meeting with the Portuguese authorities took place on 9 June 2015.
- (4) The Commission requested additional information from the Portuguese authorities by letter of 29 October 2015. The Portuguese authorities provided their reply on 21 December 2015.
- (5) By letter dated 2 June 2016, the Commission notified Portugal that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the alleged State aid measures, ('the opening decision').

⁽¹⁾ OJ C 284, 5.8.2016, p. 36.

- (6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the opening decision.
- (7) Following an extension of the deadline, the Portuguese authorities provided their comments on the opening decision on 3 August 2016.
- (8) The complainant submitted its comments on 5 September 2016. There were no other comments from third parties.
- (9) On 2 December 2016, the Commission forwarded the comments of the complainant to Portugal, which was given the opportunity to react, together with a request for further information.
- (10) Portugal's observations on the comments submitted by the complainant and the reply to the information request were received by letter dated 27 January 2017.
- (11) A technical meeting with the Portuguese authorities took place on 2 February 2017 during which the Portuguese authorities provided further clarifications.
- (12) Portugal submitted additional information on 10 March 2017.
- (13) The Commission sent another request for information to Portugal on 30 March 2017.
- (14) Portugal's reply to the information request was received on 1 June 2017.
- (15) Following the Commission's request for information on 13 September 2017, Portugal submitted its reply on 29 September 2017.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Background of the investigation and context of the measures

2.1.1. *The alleged beneficiary*

- (16) EMEF is a Portuguese company specialized in the repair and maintenance of railway rolling stock offering, in particular, heavy maintenance, upgrading and refurbishment of railways rolling stock and its related equipment, as well as freight wagon design, manufacturing and upgrading.
- (17) EMEF is 100 % owned by CP, the Portuguese passenger rail operator, which is entirely owned by the Portuguese State.
- (18) EMEF was founded in 1993 by way of spin-off from its parent company, CP, though it appears to have remained operated as an in-house department of CP until at least 2004 ⁽³⁾.
- (19) Prior to the spin-off, the maintenance activities of CP were carried out in-house and CP did not use external service providers. Following the spin-off, EMEF continued to be the exclusive service provider of the maintenance services. In 2017, still 80 % of EMEF's revenue ⁽⁴⁾ came from services provided to CP, its parent company, despite having reduced over recent years ⁽⁵⁾.
- (20) The evidence submitted by Portugal shows that besides the parent subsidiary relationship, both CP and EMEF were captive to each other: without EMEF, CP would not have been able to fulfil its public service obligation of providing passenger rail services; and at the time the measures at issue were granted, EMEF's only major customers were CP and its then subsidiary CP Carga.

⁽²⁾ Cf. footnote 1.

⁽³⁾ This can be concluded from the study concerning the operation of EMEF titled the 'Plan of economic and financial facilitation of EMEF' prepared in 2004 by 'SaeR – Sociedade de Avaliação de Empresas e Risco', an external consulting company.

⁽⁴⁾ In 2016 the revenue of EMEF was EUR 63 million.

⁽⁵⁾ EMEF no longer provides services for CP Carga, now MEDLOG, the rail freight subsidiary of CP, which was privatised in 2015.

- (21) The other customers of EMEF included Bombardier/Prometro, EMEF/Siemens ACE and RENFE.
- (22) EMEF is the only rail maintenance service provider in Portugal not vertically integrated with manufacturing, and is competing with vertically integrated multinational competitors, like Bombardier, Siemens, Alstom and Comsa, which in many cases tend to limit their maintenance to the rolling stock they manufacture.

2.1.2. *The complaint*

- (23) The Complainant alleged that since 2003 EMEF has received financial support on numerous occasions from CP in the form of additional paid-in capital cash payments to cover losses, loans and State guarantees for bank loans.
- (24) The Complainant also alleged that it was possible that CP has granted State aid to EMEF by purchasing services from EMEF above market price.

2.1.3. *Limitation period*

- (25) According to Article 17 of Council Regulation (EU) 2015/1589 ⁽⁶⁾ the powers of the Commission to recover aid are subject to a limitation period of 10 years and any action taken by the Commission with regard to the unlawful aid shall interrupt the limitation period. The Commission forwarded the complaint to Portugal on 3 June 2015. Therefore, the formal investigation and this decision cover only the measures granted after 3 June 2005.

2.2. **The measures under investigation**

- (26) The formal investigation procedure concerned three measures including their sub-measures (together referred to as the 'Measures'): 'Measure 1 – capital increases in EMEF' totalling EUR 47,6 million ('Measure 1'), 'Measure 2 – loans granted to EMEF' totalling EUR 19,5 million ('Measure 2') and 'Measure 3 – financial guarantees granted to EMEF' totalling EUR 23 million ('Measure 3').
- (27) As regards 'Measure 4 – purchasing repair and maintenance services from EMEF above market prices' ('Measure 4'), it was found market conform in the opening decision. More precisely, based on the evidence provided by Portugal, in the opening decision the Commission considered that the purchase prices paid by CP to EMEF were market conform or below the market price and that, therefore, no advantage was granted to EMEF. The Commission thus concluded that no State aid had been granted to EMEF as regards the purchase of repair and maintenance services by CP from EMEF.

2.2.1. *Measure 1: Capital increases in EMEF*

- (28) CP injected capital into EMEF totalling EUR 47,6 million, consisting of:
- EUR 5,2 million supplementary capital contributions made between 23 May 2007 and 12 January 2012;
 - EUR 42,4 million conversions of loans into equity made between 31 December 2006 and 29 June 2012 as follows:
 - EUR 28,6 million, converted into equity on 31 December 2006 consisting of the following loans:
 - EUR 3,6 million granted in April 2004
 - EUR 5,3 million granted in December 2004
 - EUR 1,2 million granted in March 2005
 - EUR 1 million granted in August 2005
 - EUR 0,3 million granted in November 2005

⁽⁶⁾ 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).

- EUR 3 million granted in September 2006
- EUR 14,2 million granted in October 2006
- EUR 3,5 million converted into equity on 20 August 2009 consisting of two loans of EUR 2,5 million and EUR 1 million respectively, both granted in May 2007;
- EUR 7,8 million granted in July 2009 and converted into equity on 20 August 2009;
- EUR 2,5 million granted in December 2010 and converted into equity on 29 June 2012.

2.2.2. Measure 2: Loans granted to EMEF

(29) CP granted loans to EMEF totalling EUR 19,5 million, consisting of:

- EUR 6 million granted in November 2008 at an interest rate of Euribor 1M+ 1,5 % (the loan was reimbursed in April 2009);
- EUR 5 million granted in May 2010 at an interest rate of Euribor 6M+2,5 %;
- EUR 5,5 million granted in March 2012 at an interest rate of Euribor 3M+7,5 %; and
- EUR 3 million granted in January 2014 at an interest rate of Euribor 3M+ 7 %.

2.2.3. Measure 3: Financial guarantees granted to EMEF

(30) CP provided financial guarantees to EMEF totalling EUR 23 million, consisting of:

- A guarantee of EUR 10 million awarded in May 2006 for a loan priced at Euribor 6M+0,625 % (loan agreement dated 23 May 2006);
- A guarantee of EUR 6 million awarded in March 2009 for a loan priced at Euribor 6M+2,5 %;
- A guarantee of EUR 7 million awarded in March 2009 for a loan priced at Euribor 6M+2,5 %.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (31) In its opening decision, the Commission initiated investigations concerning possible State aid in favour of EMEF through Measure 1, Measure 2 and Measure 3.
- (32) Prior to the opening decision, Portugal did not address the imputability aspect of the Measures at all, therefore the Commission preliminarily considered that the Measures were imputable to the State.
- (33) Prior to the opening decision Portugal claimed that the financial support from CP in the form of Measure 1, Measure 2 and Measure 3 was conducted on market terms and, thus, did not constitute State aid.
- (34) However, concerning Measure 1, Portugal did not submit all necessary information to justify its claim that CP acted as market economy operator as regards the capital increases.
- (35) Concerning Measure 2, Portugal did not provide sufficient evidence to demonstrate that the loans were granted on market terms.
- (36) Concerning Measure 3, Portugal did not provide sufficient evidence to demonstrate that the financial guarantees were granted on market terms.

- (37) Therefore, the Commission provisionally concluded that Measure 1, Measure 2 and Measure 3 could only be deemed compatible as rescue and/or restructuring aid within the meaning of the 2004 R&R Guidelines. However, Portugal had not put forward any evidence that would ensure compliance with the necessary requirements for finding restructuring aid for EMEF compatible. Consequently, the Commission had doubts on the compatibility of Measure 1, Measure 2 and Measure 3 with the internal market.

4. COMMENTS FROM INTERESTED PARTIES

- (38) In its letter dated 5 September 2016, the complainant submitted that Portugal's assertion that the Measures were conform to the market economy operator principle ('MEOP') has to be refuted by the fact that EMEF has never paid any dividends to CP.
- (39) The complainant also claimed in its letter that the Bombardier Group had no longer revenues in Portugal due to the incurred competitive disadvantage caused by public support to EMEF. As a consequence, Bombardier has been forced to shut down its operations in Portugal, and to lay off employees with a workforce downsized from 75 in 2015 to solely 5 in 2016 (restricted to a role of representation).

5. COMMENTS FROM PORTUGAL

5.1. Portugal's position concerning imputability

- (40) Following the opening decision, Portugal argued extensively that the Measures were not imputable to the State. Portugal's position can be summarised as follows:

5.1.1. Legal status of CP

- (41) Portugal submitted that CP is a public undertaking, 100 % directly owned by the State and it falls under the legal framework of 'State-owned enterprises' within the 'State enterprise sector'.
- (42) The Portuguese authorities submitted (7) that within the 'State public sector' there are three categories of entities or sub-sectors that are essentially distinguished by their level of integration into the State and their varying degrees of autonomy vis-a-vis the Government.
- (43) The 'State enterprise sector' consists of public undertakings and affiliated companies. These public undertakings include commercial businesses whose control inherent to the shareholder function is exercised by the State, or by another public undertaking.
- (44) Besides the 'State enterprise sector', two other categories of State-owned entities exist in Portugal based on their level of integration into the State and their varying degree of autonomy vis-a-vis the government: (i) 'direct State public sub-sector', which is made of bodies integrated into the State and which fall under the control of the Portuguese Government; and the (ii) 'indirect State public sub-sector' (notably consisting of 'public institutes'), which although not part of the State, indirectly pursues its objectives, and is subject to the oversight power of the government.
- (45) Portugal submitted that the Portuguese administrative law provides for three different ways the Government can exercise its administrative control function over the public sector: 'the power of management', 'the power of oversight' and 'the power of supervision'. The power of management is the strongest, the power of supervision, which is applicable to CP, is the weakest and the power of oversight is between the two.
- (46) The 'power of management' (which involves the power to give orders and instructions) is applicable to entities that form part of the State's central administration and that are hierarchically subordinated to the government. The 'power of oversight' (the power of guidance, which involves the power to issue directives and recommendations) is exercised over entities that form part of the so-called 'indirect administration', like public institutes. The 'power of supervision' (which involves functions of administrative supervision) is exercised in respect of entities that form part of the so-called 'autonomous public sector', which includes the 'State enterprise sector'.

(7) Pages 5-16 of the submission dated 1 June 2017.

- (47) As regards the State enterprise sector, Portugal submitted that the State's supervisory power ('power of supervision') is defined by the law and that in essence it entails issuing management guidelines, carrying out financial control (exercised by the Court of Auditors and by the Inspectorate-General of Finance), and establishing reporting obligations of the companies for certain documentary evidence. In addition to these powers provided for in law, the State exercises the usual rights inherent to its shareholder function in the companies concerned according to the proportion of its voting rights and in accordance with the relevant commercial law. According to Article 25 of Decree law 133/2013 of 3 October 2013 ⁽⁸⁾ ('DL 133/2013'), public undertakings enjoy autonomy of management in their relationship with the State and independence in the implementation of their corporate strategy.

5.1.2. *Portugal's comments concerning formal State control over CP and EMEF*

- (48) EMEF is a 100 % owned subsidiary of CP and therefore, according to Portugal, the State has only indirect control over EMEF. There is no legal provision concerning State supervision of subsidiaries of State owned companies, like EMEF. The legal provisions only apply to the parent company, CP.
- (49) The Portuguese authorities stated that CP is a public undertaking subject to private law, which carries out and manages its activities independently of the State, particularly as regards its relationship with undertakings in which CP has a participation, such as EMEF.
- (50) Portugal indicated that according to Article 1(1) of CP's Articles of Association ⁽⁹⁾, CP is a public corporation, with autonomy in managing its administration, finances and assets, and legal capacity to cover all the rights and obligations, which are necessary or appropriate in the pursuit of its objective ⁽¹⁰⁾. Thus, although CP is part of the State-owned enterprise sector, it is specifically governed by private law (civil, tax, commercial and company law).
- (51) The exercise of economic and financial supervision over CP by the Portuguese authorities in the period when the Measures were granted is based on the provisions of Decree-Law 558/99 of 17 December 1999 ⁽¹¹⁾ ('DL 558/99'), in force until December 2013, and Decree-Law 133/2013. Thus, DL 558/99 governed relations in the State enterprise sector during most of the period in which Measures 1, 2 and 3 were granted.
- (52) Article 22 of the Articles of Association of CP describes the control that can be exercised over CP by the Portuguese authorities.
- (53) The Portuguese authorities stated that the economic and financial supervision framework established in Article 22 of CP's Articles of Association derives directly from the legal framework established in Article 29 of DL 558/99.
- (54) Article 22 of the Articles of Association states:
- (1) 'The economic and financial supervision of CP E.P.E ⁽¹²⁾, is exercised by the government ministers responsible for finance and transport, without prejudice to the relevant power of supervision.
 - (2) Supervision covers, specifically:
 - (a) approval of activity and investment plans, budgets and accounts as well as capital investments, subsidies and compensatory payments, other than those governed by contractual arrangements pursuant to Article 9(2), paragraph c);
 - (b) approval of the pricing or tariffs policy to be set by the company, restricted to the public service of passenger transport, pursuant to special legislation.
 - (3) CP EPE is subject, in general terms, to financial control exercised by the Inspectorate General of Finance (IGF), the purpose of which is to verify the legality, economies, efficiency and effectiveness of its management.'

⁽⁸⁾ Decreto-Lei n.º 133/2013, of 3 October (Diário da República, 1.ª série, n.º 191, of 3.10.2013).

⁽⁹⁾ Decreto-Lei n.º 137-A/2009, of 12 June (Diário da República, 1.ª série, n.º 112, of 12.6.2009).

⁽¹⁰⁾ The objective of CP being the provision of passenger rail services on the national railway network.

⁽¹¹⁾ Decreto-Lei n.º 558/99, of 17 December (Diário da República n.º 292/1999, Série I-A of 17.12.1999).

⁽¹²⁾ E.P.E stands for 'entidade pública empresarial', which means publicly owned company.

- (55) The Portuguese authorities also stressed that the supervision/reporting requirements applicable to CP apply to all publicly owned companies (so called 'E.P.E') in Portugal. The annual reports are sent by CP to the Government (more precisely, to the responsible ministries). However, these reports are not formally, or in any other way, approved by the Government/responsible ministries.

5.1.3. *Portugal's comments concerning actual State control over CP*

- (56) Portugal explained that according to Article 22 of the Articles of Association of CP, the supervision by the Portuguese authorities formally includes the approval of the investment plans of CP. However, the last time CP asked for such approval concerning investment in EMEF was in 2001, i.e. before the period under assessment, to which CP did not receive any reply. ⁽¹³⁾ Afterwards CP has not asked for approval. Therefore, Measures 1, 2 and 3 were decided by the Management Board of CP, upon request by EMEF to intervene, without any approval by the Government.

- (57) Concerning the actual supervision of CP exercised by the Government, the Portuguese authorities stated that in the period when the Measures were granted the supervisory power actually exercised by the State in respect of CP was extremely diluted. It consisted mainly of:

- (1) Outlining the strategic guidelines for the rail transport sector. These guidelines consisted of generic public policy guidelines (e.g. on accessibility and mobility) for internal sector coordination (infrastructure and transport), as well as coordination with European policies;
- (2) Reviewing the annual activity plans and budget ('PAO'). PAOs were prepared by CP in accordance with the guidelines defined by its Management Board. They were then sent for information to the Ministry of Finance, which did not issue any formal position or approval regarding PAOs in the period in which Measures 1, 2 and 3 were granted. Only from 2016 onwards did the Ministry of Finance approve PAOs of CP, which is after the latest measure under investigation was granted (January 2014);
- (3) Receiving reports and accounts. Until December 2013 CP was required to send documents only for information, no approval was necessary.

5.1.4. *Concerning the appointment of CP's Management*

- (58) Portugal submitted that in the period when the Measures were granted the management board of CP was appointed by means of an administrative decision ('resolução') taken by the Portuguese Council of Ministers.

- (59) The Portuguese authorities noted that the members of CP's Management Board, while performing their duties as members of CP's Management Board, are subject to legal incompatibilities and impediments provided for in the Statute of Public Management Bodies. The Statute, which is in place since 1976 and was modified by two subsequent acts, regulates the appointment and performance of duties in service of managers appointed in public companies ('public managers'). In the period under investigation CP's management were subject to two different Statutes of Public Management Bodies: the Statute of Public Management bodies of 1982, approved by Decree law No 464/82 of 9 December ⁽¹⁴⁾, and the Statute of Public Management bodies of 2007, approved by Decree-Law 71/2007, of 27 March ⁽¹⁵⁾. Both of these Statutes provide ⁽¹⁶⁾ that the public managers shall declare any conflict of interest, carry out their work in total independence and autonomy, and exclusively in the interest of the company, whereby they need to observe the economic efficiency and pursue the objectives of the company. It is also required ⁽¹⁷⁾ that public managers work full time for the public company, unless the Minister of Treasury and the Finance Minister provide for a different mandate, which was not the case for CP managers. This prevents, among other, that public managers exercise other management positions in the public administration or independent regulatory bodies.

⁽¹³⁾ Page 8 of the submission dated 27 January 2017.

⁽¹⁴⁾ Decreto-Lei n.º 464/82, of 27 March (Diário da República n.º 283/1982, Série I of 9.12.1982).

⁽¹⁵⁾ Decreto-Lei n.º 71/2007, of 27 March (Diário da República n.º 61/2007, Série I of 27.3.2007).

⁽¹⁶⁾ Article 8 and 9 of Decree Law 464/82 and Article 10, 12, 20 and 22 of Decree Law 71/2007.

⁽¹⁷⁾ Article 10 of Decree Law 464/82 and Article 20 of Decree Law 71/2007.

- (60) Portugal submitted that the executive members of CP's Management Board carry out their activity on an exclusivity basis, i.e. they may not cumulate political or governmental positions or any executive position in a private or public company while holding a seat as members of CP's Management Board, to guarantee their independence and focus to the maximum extent. While in seat as members of CP's Management Board, they may only: (i) hold a position as a board members of a subsidiary, for example, as a director of EMEF (without remuneration); (ii) hold positions in an entity where by law they are to hold a mandatory position ('funções em regime de inerência'), for example, in an advisory/supervisory board, or (iii) perform lecturing activity in public higher education, hold conferences, lectures or writing academic literature.
- (61) Therefore, any of CP's Management Board members who could have held a political, governmental and/or municipal position before being appointed to CP's Management Board are under a strict obligation to resign from such position before joining CP's Management Board under the penalty of criminal, civil and/or financial liability.
- (62) The Portuguese authorities explained that the criteria used to select the members of CP's Management Board included extensive expertise in the transport sector and/or management experience, a relevant academic background and absence of private interests.
- (63) The Portuguese authorities provided the Commission with information about the expertise of the current and previous CP's Management Board members, including the CVs of CP's Management Board members. Portugal also provided several minutes of CP's Management Board meetings.
- (64) The Portuguese authorities emphasised that, whilst the Management Board members of CP are appointed by the Government, this does not affect CP's autonomy as the appointed persons are neither former civil servants nor politicians.

5.1.5. *Concerning whether the State was requested to approve the Measures*

- (65) Portugal submitted that according to Article 2(4) and Article 26(1) of CP's Articles of Association, CP was entitled to establish subsidiaries and had the responsibility to collect fees for the provision of passenger rail services and carry out payments to meet its objective.
- (66) Article 2(4) of the Articles of Association of CP reads: 'In the performance of the objective set out in the preceding paragraph, [CP's main objective is the provision of passenger rail transport services on the national railway network] CP E.P.E may:
- (a) Establish companies or acquire holdings in accordance with the law;
 - (b) Establish agreements deemed necessary or convenient with other companies or entities to better satisfy public needs and service requirement, which are its responsibility; (...)
 - (c) Undertake all actions deemed necessary or convenient to achieve its objective.'
- (67) Article 26(1) of the Articles of Association of CP reads: 'It is the exclusive responsibility of CP E.P.E to collect revenue from its activity which is provided for in accordance with these Articles of Association and the law, as well as to carry out all the expenditure required to meet its objective.'
- (68) The Portuguese authorities emphasised that the Portuguese Government has not interfered directly or indirectly with the management of EMEF, not even by means of the sole shareholder's position of CP.
- (69) Portugal submitted that CP's decisions to invest in EMEF were, following the initiative of EMEF, adopted by CP's Management Board and formally endorsed at EMEF's annual general meeting (in its capacity of sole shareholder), and not by government acts. The shareholder position in EMEF is carried out by CP, and not by the Portuguese governmental authorities, under which terms CP has the same powers of any other private controlling shareholder provided for by private company law.

- (70) Similarly, CP's decisions concerning its subsidiaries involve no direct or indirect intervention by the State: they are taken by CP's Management Board without direct or indirect intervention by the government, which does not interfere in CP's management decisions.
- (71) There are no specific reporting requirements of CP to the Portuguese Government as regards specifically EMEF and the actions undertaken with regard to EMEF. The Portuguese authorities noted that the specific investments made by CP in EMEF were not included in the PAOs. In fact, until 2011 references to EMEF in those documents are indirect, and were made in relation to the cost of maintenance of rolling stock.
- (72) Portugal stated that CP's decisions to invest in EMEF were not communicated to, decided or approved by the Portuguese government. The decisions to invest in EMEF were made by CP within the scope of its autonomy and independence in corporate management in particular as regards its relationship with its subsidiary companies. These decisions were taken by CP in line with the undertaking's self-sustainability and through self-financing.

5.1.6. *Concerning the role of the Inspectorate-General of Finance*

- (73) The Portuguese authorities submitted that financial control over CP exercised by the Inspectorate-General of Finance (IGF), did not involve decisions on the Measures taken by CP in respect of EMEF. IGF receives on an annual basis the annual reporting of CP (i.e. the reports and annual accounts for each year), so that IGF can issue an opinion and then submit those documents for review to the government ministers responsible for finance and transport. Those documents provide no information on CP's considerations of investments in EMEF.

5.1.7. *Concerning the financing of CP at the time of the granting of the Measures*

- (74) The Portuguese authorities also informed the Commission that in the period when the Measures were granted the State made no capital increases nor granted any direct loans to CP.
- (75) It was also explained that the financial resources invested in EMEF in the period when the Measures were granted essentially came from loans obtained by CP from Portuguese commercial banks.

5.1.8. *Concerning EMEF's decision making bodies*

- (76) The Portuguese authorities explained the structure of EMEF's decision making bodies, which are the General Shareholders Meeting and the Board of Directors. Between 2005 and 2010, EMEF also had an Executive Committee consisting exclusively of persons who did not belong to CP's management.
- (77) The General Shareholders' Meeting consists of EMEF's shareholder, i.e. CP. As of March 2013, the Board of Directors consists of two members, who are selected out of the five ⁽¹⁸⁾ members of the CP's Management Board. The members of the Board of Directors are elected at the EMEF's General Shareholders' Meeting. For the period prior to 2013, the Board of Directors of EMEF comprised three to five members, who were not necessarily representatives of its sole shareholder CP.
- (78) The Portuguese authorities stressed that, unlike the Management Board members of CP (who are appointed by the government), the members of the Board of Directors of EMEF are elected at EMEF's General Shareholders' Meeting and are not appointed by the State.

⁽¹⁸⁾ Until February 2013, the Board of Directors of CP consisted of five members, from February 2013 out of four members.

5.2. Portugal's position concerning MEOP compliance of the Measures

- (79) After the opening decision, Portugal submitted two due diligence reports by 'SaeR – Sociedade de Avaliação de Empresas e Risco' ⁽¹⁹⁾ (SaeR) ⁽²⁰⁾, minutes of the meeting and three *ex-post* studies prepared by Deloitte & Associados SROC, S.A. assessing Measures 1, 2 and 3 separately.
- (80) Portugal argued that CP's capital contributions were made and decisions were taken as a private market economy operator would have done. Portugal claimed that CP took all of its decisions concerning EMEF based on a strategic *ex-ante* and in-depth analysis of EMEF's activities, with the aim of supporting EMEF, taking into account its market needs and future perspectives leading to profitability.
- (81) Portugal emphasized that the following specific circumstances should be taken into account for the assessment of CP's conduct with the MEOP:
- (1) EMEF operated in a loss-making sector, which was characterised by an incipient national railway repair market with limited opportunities and extremely dependent on State client for a long time;
 - (2) There has been an absence of competing operators with installed capacity and alternative know-how comparable to those of EMEF;
 - (3) CP's overriding need to maintain its fleet in order to comply with the public service obligation to provide passenger rail services;
 - (4) EMEF was not set up *ex novo* but it inherited unsuitable personnel and costs structure which partly compromised its performance and immediate sustainability;
 - (5) The majority of EMEF's work was performed in favour of CP;
 - (6) EMEF's relationship with CP, which had to comply with public service obligations, had a significant impact on EMEF's maintenance and repair services, mainly up to 2006, as it was difficult and time-consuming for EMEF to achieve the desired autonomy with respect to setting prices, defining its activity and enjoying organisational freedom.

5.3. Portugal's position concerning qualifying EMEF as a firm in difficulty

- (82) Portugal argued that if the Commission wished to analyse the Measures with respect to the 2004 R&R Guidelines, it would be necessary to assess whether EMEF would have the capacity – taking into consideration its own resources and those which CP would be willing to provide – to bear the losses it was suffering, and to restore viability of its business model without the intervention of the government in the form of State aid.

6. ASSESSMENT OF THE MEASURES

6.1. Introduction

- (83) According to 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'. The criteria laid down in Article 107(1) TFEU are cumulative. In order to determine whether a measure constitutes State aid, the following conditions have to be fulfilled:
- the measure is granted by the State and through State resources,
 - the measure confers an advantage to an undertaking,

⁽¹⁹⁾ SaeR – Sociedade de Avaliação de Empresas e Risco is a Portuguese consulting company, which advised EMEF and CP on restructuring EMEF.

⁽²⁰⁾ Due diligence report, dated 25 June 2004, and Plan EMEF/SaeR. Three-year period 2006-2008, dated December 2005, including a review dated August 2006.

- the advantage is selective, and
- the measure distorts or threatens to distort competition and is liable to affect trade between the Member States.

(84) The first condition to be considered is whether CP's financial support to EMEF was granted by the State or through State resources. According to the case-law of the Court of Justice in the Stardust Marine case ⁽²¹⁾, this criterion is fulfilled if, on the one hand, it concerns State resources, and if, on the other hand, their granting is imputable to the State, that is to say Portugal.

6.2. Aid granted through State resources

- (85) State resources within the meaning of Article 107(1) TFEU are the resources of a Member State and of its public authorities as well as the resources of public undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence.
- (86) As pointed out by the Court of Justice, 'since the resources of public undertakings are subject to the control of the State and are therefore at its disposal, those resources fall within the scope of the concept of 'State resources', within the meaning of Article 107(1) TFEU' ⁽²²⁾.
- (87) CP is 100 % owned by the State. The Commission therefore concludes that CP's financial support to EMEF implied the use of State resources even if in the period when the measures were granted CP financed itself not by direct grants from the State but through credits obtained on the commercial market.

6.3. Imputability to the State

- (88) As regards imputability, in Stardust Marine the Court stated that 'Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. [...] Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures' ⁽²³⁾.
- (89) It is therefore clear from the case-law of the Court of Justice that the criterion of imputability to the State must be examined by the Commission on a case-by-case basis. Imputability cannot be inferred exclusively from factors of an organic nature, which link the public undertaking to the State.
- (90) The Court of Justice indicated that 'the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken' ⁽²⁴⁾. In its case-law, the Court referred to indicators, such as the fact that the public undertaking which granted the aid could not take that decision without taking account of the requirements of the public authorities, the fact that the undertaking was linked to the State not only by factors of an organic nature, but it had to take account of directives issued by an inter-ministerial committee, the integration of the public undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains' ⁽²⁵⁾.

⁽²¹⁾ Judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294.

⁽²²⁾ Case C-656/15 P, *Commission/TV2 Denmark*, point 47.

⁽²³⁾ Case C-482/99, paragraph 52.

⁽²⁴⁾ Case C-482/99, paragraph 55.

⁽²⁵⁾ Case C-482/99, paragraphs 55 and 56; see also case T-305/13, *SACE*, paragraph 46 and case C-472/15 P, *SACE*, paragraph 36.

- (91) In the opening decision (recital 29), since Portugal had not claimed that CP's financing of EMEF was not imputable to the State, the Commission provisionally concluded that the Measures taken by CP were imputable to the State.
- (92) Based on the submissions and further clarifications provided by Portugal following the opening decision, the Commission investigated the circumstances of the granting of the Measures and the various indicators of possible involvement of the Portuguese authorities in the granting decisions.
- (93) The Commission will therefore assess if the involvement of the Portuguese authorities in the decision to grant the Measures at issue was based on a set of indicators that, considered as a whole, demonstrate the exercise of the actual influence or control by the State.

6.3.1. *The legal status of CP*

- (94) Although CP is 100 % directly owned by the State and is therefore a public undertaking falling under the regime of 'State-owned enterprises' in Portugal, it is governed by private law according to Articles 3 and 7 of Decree-Law 558/99 and, as from December 2013, by Decree Law 133/2013. CP has a high level of autonomy in its operations.
- (95) Regarding the degree of autonomy from the government, CP is an undertaking over which the government has the 'power of supervision', which means that CP has the freedom and independence to manage its business without direct or indirect involvement of the Portuguese authorities.
- (96) The Portuguese authorities clarified that, according to Portuguese administrative law, while the power of oversight consists of defining and guiding the conduct of an entity, the power of supervision is the mere power to audit the regularity or adequacy of the functioning of a certain entity.
- (97) Therefore, CP, the grantor of the Measures, which belongs to the group of enterprises that is least integrated into the public sector, enjoys the highest degree of autonomy and has the least level of control exercised by the government, as only the power of supervision applies to it.
- (98) The Commission notes that, as pointed out in recital (88), the mere fact that CP is under State control is not sufficient to conclude that the Measures are imputable to the State.

6.3.2. *Intensity of the supervision exercised*

- (99) Pursuant to the Articles of Association of CP, which are in accordance with the provisions of Decree Laws 558/99 and 133/2013, the economic and financial supervision of CP is exercised by the ministry of finance and the ministry of transport. This supervision implies:
- (a) The approval of the activity and investment plans, budgets and accounts as well as capital investments, subsidiaries and compensatory payments; and
 - (b) The approval of the tariffs to be set by the company for the public service of passenger transport.
- (100) However, according to the information provided by the Portuguese authorities, in the period during which the Measures under investigation were granted (2006-2014) ⁽²⁶⁾, the supervisory control actually exercised by the State in respect of CP was limited. It consisted, mainly, of outlining the strategic guidelines for the rail transport sector and receiving the annual activity plans and budgets, the so-called PAOs. Only from 2016 onwards did the relevant ministry approve the PAOs of CP ⁽²⁷⁾. As described in recital (56), Portugal stated that the last time CP has asked for approval concerning investments in EMEF was in 2001, i.e. before the period under investigation in the present case, and even then it did not get any reply from the Portuguese authorities.

⁽²⁶⁾ See recitals from (28) to (30) of the present decision.

⁽²⁷⁾ As indicated in recital (29) of the present decision, the last measure under assessment was granted in January 2014.

- (101) CP's governance also includes a supervisory body. From 2006 to 2013, the supervisory body was the *Comissão de Fiscalização*, with no member active in the public administration, except the president that acted from 2005 to 2007 as an external consultant to the Court of Auditors. In November 2013 the *Comissão de Fiscalização* was replaced by the *Conselho Fiscal*, with four members appointed by the Ministries for Finance and Economy, active at the same time in the public administration (the IGF and the Directorate-General of the Treasury and Finance). Based on information submitted by Portugal, those bodies acted in a similar way as an audit body of a private company and, as such, did not and could not intervene in the decision-making process, which led to the adoption of the Measures at issue, as they had to be independent.
- (102) Portugal submitted that the investments planned by CP and reported to the relevant ministries did not contain specific references to the Measures, nor did CP request authorization or any decision on the matter. This indicates that the Portuguese authorities had no knowledge about the specific Measures granted by CP to EMEF.
- (103) According to Portugal, in practice, until December 2013 when Decree Law 133/2013 entered into force, the annual accounts and reports sent to the IGF and to the Directorate-General of the Treasury and Finance were never followed by any approval. Since December 2013 according to Decree Law 133/2013, the reports and accounts must be approved. However, as Portugal submitted, these annual accounts and reports did not include information about the investment of CP in EMEF.
- (104) The Commission observes that the only sub-measure granted after December 2013 is the EUR 3 million loan granted in January 2014 by CP to EMEF. Based on the information submitted by Portugal, even this sub-measure, which is part of Measure 2, was not approved by the State, as only 1 month had elapsed since the entry into force of the new provisions established by Decree Law 133/2013. The Commission considers that this is plausible. Moreover, even after the entry into force of Decree Law n. 133/2013, the information included in the annual accounts and reports sent to the IGF did not allow extrapolating the amounts of the loans and of the financial guarantees granted to EMEF, and not even of the conversions of loans into equity.
- (105) Based on the above, the Commission considers that the supervisory framework in place in the period under investigation and the way it was concretely applied did not prevent CP from exercising its management functions in full autonomy and did not limit its corporate independence. The level of involvement of the responsible ministers in CP's governance was, in practice, well below what was provided by the applicable legislation and the Articles of Association of CP. The limited role of the State in the present case, with specific reference to the Measures under investigation, was not such as to lead to a situation where the State could be considered involved in the adoption of a specific measure.

6.3.3. *Public authority not involved in the granting of the Measures*

- (106) According to Portugal, CP's decision to invest in EMEF were not communicated to, decided or approved by the Portuguese Government. The decisions about the Measures were taken by CP within the scope of its autonomy and independence.
- (107) According to Article 2(4) and article 26(1) of the Articles of Association of CP as described in paragraph (65), CP was entitled to set up a subsidiary and decide how to allocate the resources required to meet its objective, i.e. the provision of passenger rail transport in Portugal.
- (108) Based on the information received, the investment measures provided to EMEF were not included in the PAOs. Until 2011 the reference to EMEF in those documents were made in connection with the maintenance costs of the rolling stock paid by CP to EMEF, as the maintenance was provided by EMEF and did not include information about funding measures provided to EMEF. After 2011, CP mentioned in the annual reports that action was needed to 'reduce the losses of CP's affiliated companies' and mentioned the prospects of EMEF becoming a competitive company.

- (109) According to the minutes of CP's Management Board meetings provided by Portugal, the decisions taken during CP's Management Board meetings were preceded by information, requests and memos prepared and sent by EMEF. No references were made to a possible State intervention. Therefore, the Commission considers that the initiative for the adoption of the Measures under assessment came from EMEF.
- (110) This stance is also supported by the fact that EMEF's financial size is relatively limited compared to the CP group: EMEF's turnover (EUR 55 million in 2014) and total assets (EUR 45 million in 2014) were very limited compared to the CP group (EUR 320 million of turnover and EUR 975 million of total assets for the consolidated CP group in 2014 ⁽²⁸⁾).
- (111) CP's investment decisions were taken by CP's Management Board.
- (112) Consequently, the Commission concludes that, based on the information submitted by the Portuguese authorities, in light of the specific and particular features of the present case, the Measures were not decided or approved by the Portuguese authorities and there is no indication that the government or any other public authority was involved in any way in the decision of CP to grant the Measures to EMEF.

6.3.4. *Appointment of the Management Board members of CP and EMEF's Board of Directors*

- (113) In the period when the Measures were granted the Management Board of CP was appointed by administrative decisions ('resolução') of the Portuguese Council of Ministers, as provided by CP's Articles of Association.
- (114) Based on the information provided in recitals (61) to (67), despite being appointed by the State, the Management Board members were managers who were not allowed to accumulate different stewardship roles during their term of office. This means that members of the Government or of any other public authority could not sit in CP's Management Board while exercising public functions at the same time, nor could they sit in EMEF's Board of Directors.
- (115) Since 2011, the appointment of public managers, such as CP's, and other senior civil servants in Portugal has been subject to the non-binding approval of their CVs by an independent evaluation body, namely the Public Administration Recruitment and Selection Committee.
- (116) Portugal has provided the list of all Management Board members of CP, and their CVs for the period under investigation. The Commission observes that according to those CVs, only two Management Board members had extensive past experience within the Portuguese central administration (either at political level or as senior officials within ministries). The Commission considers therefore that the majority of the Management Board members were not appointed based on political or administrative merits linked to those members having past experience within the Portuguese public administration.
- (117) EMEF's Board of Directors members are elected at EMEF's General Shareholdings Meeting, and are entrusted with the powers of administration of the undertaking.
- (118) On the basis of the information submitted, it results that neither members of the Government nor any delegate from any public authority were appointed in CP's or EMEF's decision making bodies. The selection and the appointment of the Management Board of CP did not impact CP's ability to exercise its financial and operational autonomy. Therefore, in the absence of any evidence of specific links between CP and the public authorities, the Commission concludes that there are no indications of the involvement of the public authorities in the adoption of the Measures under assessment.

6.3.5. *The circumstances underlying the adoption of the Measures*

- (119) CP relied on its subsidiary EMEF to fulfil its public service obligation, in a context where EMEF's almost only customers were CP, its parent, and its (then) subsidiary CP Carga ⁽²⁹⁾. The fact that CP could pay to EMEF remunerations below market prices for the services provided as described in recital (27) is another reason explaining CP's interest to keep EMEF in business. The decisions by CP to grant the Measures to EMEF were driven by business rational. As already indicated above, those Measure were taken at the level of CP, without any specific involvement of the State.

⁽²⁸⁾ Source: Orbis/Bureau van Dijk.

⁽²⁹⁾ See footnote 5.

Conclusion on imputability

- (120) Having regards to the circumstances and the context of the present case, on the basis of the direct and indirect indicators examined as a whole, the Commission considers that there is no evidence of any specific involvement of the Portuguese authorities in the granting of the Measures. The State did not initiate, did not approve and was not informed about the specific Measures and their details. The evidence provided indicates that the State's supervision over the activity of CP was focused on ensuring that CP fulfilled its public service obligations and met its reporting obligations, and it did not cover the Measures granted by CP to EMEF. In light of the above, in the absence of sufficient indicators of the exercise of actual influence or control by the State, the Commission therefore concludes that the Measures are not imputable to the Portuguese State.

7. CONCLUSION

- (121) The Commission finds that the Measures are not imputable to the Portuguese State. Since the criteria laid down in Article 107(1) TFEU in order to determine whether a measure constitutes aid are cumulative, the Commission does not need to assess whether the other conditions are met.
- (122) Therefore, the Commission concludes that the Measures do not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

Measure 1 (capital increases in EMEF), Measure 2 (loans granted to EMEF) and Measure 3 (financial guarantees granted to EMEF) do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 6 March 2020.

For the Commission
Margrethe VESTAGER
Member of the Commission
