

DECISIONS

COMMISSION DECISION

of 27 March 2014

on the State aid SA.34572 (13/C) (ex 13/NN) implemented by Greece for Larco General Mining & Metallurgical Company S.A.

(notified under document C(2014) 1818)

(Only the English text is authentic)

(Text with EEA relevance)

(2014/539/EU)

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 provisions cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) In the context of its economic adjustment programme, Greece has undertaken a privatisation programme ⁽²⁾. Larco General Mining & Metallurgical Company S.A. ('Larco') has been earmarked as a State-owned company for privatisation.
- (2) In March 2012 the Hellenic Republic Asset Development Fund ('HRADF') ⁽³⁾ informed the Commission about the proposed privatisation of Larco. In order to clarify whether any State aid issues could arise in the context of the privatisation project, the Commission opened a case *ex officio* and initiated a preliminary assessment in April 2012.
- (3) In the context of those discussions, it became apparent from the Greek authorities' reply to a questionnaire on 16 March 2012 that Larco had already benefited from State measures. The Commission requested further information by e-mails dated 18 April 2012, 24 April 2012, 5 July 2012, 22 August 2012 and 7 December 2012, and by letters of 4 May 2012 and 14 January 2013, to which the Greek authorities replied on 20 April 2012, 26 April 2012, 3 October 2012, 13 November 2012, 15 November 2012, 7 December 2012, 24 December 2012 and 18 January 2013. Meetings between the Commission services and representatives of the Greek authorities took place on 30 April 2012 and 11 September 2012 in Athens and on 25 January 2013 in Brussels.
- (4) By letter dated 6 March 2013 ('the decision of 6 March 2013'), the Commission informed Greece that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of certain aid measures described in Section 2.2 below ('the formal investigation procedure').

⁽¹⁾ OJ C 136, 15.5.2013, p. 27.

⁽²⁾ See the *Second Economic Adjustment Programme for Greece — First Review December 2012*, http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf

⁽³⁾ The Hellenic Republic Asset Development Fund (HRADF) is an S.A. entity established on 1 July 2011 in order to manage the privatisation process.

- (5) The decision of 6 March 2013 was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited the Greek authorities and interested parties to submit their comments on the aid measures.
- (6) The Commission received comments from the Greek authorities on 30 April 2013. It received no comments from interested parties.
- (7) By e-mail of 21 January 2014, the Greek authorities informed the Commission that they agreed with the adoption of the decision in English.

2. DESCRIPTION OF THE AID MEASURES

2.1. The beneficiary

- (8) Larco is specialised in the extraction and processing of laterite ore, extraction of lignite and production of ferro-nickel and by-products. Its activities include exploration, development, mining, smelting and trading of its products worldwide. Larco is one of the largest ferronickel producers in the world. In 2012 it had 960 employees, and therefore qualified as a large enterprise ⁽⁵⁾.
- (9) At the time of the formal investigation procedure, 55,2 % of Larco's shares were owned by the Greek State through HRADE, 33,4 % by the National Bank of Greece S.A. ('NBG', a private financial institution) and 11,4 % by Public Power Corporation S.A. ('PPC', the incumbent electricity producer in Greece, of which the State is the majority shareholder).
- (10) Larco operates a smelting plant in Larymna, in central Greece. Larco also holds mining rights in various locations in Greece in four bundles: the Agios Ioannis mines (near Larymna), the Evia mines, the Kastoria mines and the Servia lignite mine.
- (11) Larco was established in 1989 as a new corporate entity following the liquidation of Hellenic Mining and Metallurgical S.A. of Larymna ('Old Larco'). Old Larco is still under liquidation, but its assets were contributed to Larco along with the corresponding liabilities in 1989. Old Larco is therefore a creditor of Larco.

2.2. Description of the measures

2.2.1. Measure 1: non-collection of debt to the Ministry of Finance

- (12) In April 1998, a debt settlement agreement was reached between Larco and its major creditors, namely Old Larco, PPC and the Greek State. According to the 1998 agreement, Larco's liability to those creditors was supposed to be serviced with an interest of 6 % *per annum* ('p.a.'). However, the debt to the Greek State has remained stable or increased slightly at least since 2004 ⁽⁶⁾, whereas the debt to PPC and Old Larco has been eliminated or decreased ⁽⁷⁾.
- (13) It thus appears that the State treated its credit to Larco in a different manner from the other two creditors.

2.2.2. Measure 2: the 2008 State guarantee

- (14) On 22 December 2008 the State provided a guarantee for a loan of EUR 30 million from ATE Bank to Larco. The guarantee covered 100 % of the loan for up to 3 years and had a guarantee premium of 1 % p.a.

2.2.3. Measure 3: the 2009 capital increase

- (15) In 2009, in the light of its negative equity, Larco's Board of Directors proposed, and the three shareholders approved, a share capital increase of EUR 134 million. However, only the Greek State exercised its rights in full, whilst NBG exercised its rights in part and PPC did not participate at all in the share capital increase. No new shareholders contributed to the share capital increase.

⁽⁴⁾ Cf. footnote 1.

⁽⁵⁾ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

⁽⁶⁾ In 2004 it was EUR 10,3 million and has been increasing steadily, reaching EUR 13,5 million in 2011.

⁽⁷⁾ PPC: EUR 39 million in 2004, zero in 2011; Old Larco: EUR 48,3 million in 2007, EUR 43,8 million in 2011.

- (16) The actual share capital increase only amounted to EUR 65,5 million, with the State contributing approximately EUR 45 million (69 % of the total capital injection) and NBG EUR 20,5 million (31 %). Despite Larco's bad financial situation, it appears that the capital increase was not based on a restructuring plan to restore the company's viability, whereas NBG appears to have written-off the book value of the company 'because the Group does not foresee to recover the book value of the investment, given that the company encounters significant financial difficulties' ⁽⁸⁾ (see recital 45 of the decision of 6 March 2013).

2.2.4. Measure 4: the 2010 State guarantee

- (17) On 10 May 2010 the State provided a guarantee, to cover a letter of guarantee that NBG would provide to Larco for the amount of approximately EUR 10,8 million. The guarantee covered 100 % of the letter of guarantee and had an indefinite duration and a guarantee premium of 2 % p.a.

2.2.5. Measure 5: letters of guarantee instead of pre-payment of a tax fine in 2010

- (18) In 2010 the Greek tax authorities audited Larco's financial statements and rejected the accounting treatment of certain losses resulting from hedging contracts for the price of nickel. As a result of the wrongful registration of the losses, a tax fine of EUR 190 million was imposed ⁽⁹⁾.
- (19) Larco subsequently challenged the imposition of the tax fine in the Greek courts. According to Greek law ⁽¹⁰⁾, an entity liable for a tax fine must pre-pay 25 % of the amount in question, in order to challenge the imposition of the tax fine in court (in this case the 25 % would amount to EUR 47 million).
- (20) However, in the case of Larco, a Greek administrative court decided to alleviate the company from the obligation to pre-pay 25 % of the tax fine, replacing it with the obligation to deposit letters of guarantees of just EUR 1,5 million.

2.2.6. Measure 6: the 2011 State guarantees

- (21) On 30 December 2011, the State provided two guarantees for two loans of EUR 30 million and EUR 20 million from ATE Bank. One of the loans (of EUR 20 million) was overdue at the time the guarantee was granted. The guarantees provided 100 % coverage and had a premium of 1 % p.a.

2.3. Grounds for initiating the formal investigation procedure

- (22) In the decision of 6 March 2013 (recitals 18-25), the Commission reached the preliminary conclusion that Larco could be considered a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines ⁽¹¹⁾ since 2007. Against that background, the Commission reached the preliminary conclusion that all six measures constituted State aid and it expressed doubts as regards their compatibility with the internal market.
- (23) If the measures identified were to constitute State aid, they would have been granted in breach of the notification and stand-still obligations established in Article 108(3) of the Treaty.

3. COMMENTS FROM GREECE

3.1. Firm in difficulty

- (24) In its comments in the context of the formal investigation procedure, the Greek authorities argued that Larco was not a firm in difficulty during the years 2008 and 2009, because the registered losses were due to the decrease of the global price of ferronickel during those years. The Greek authorities claimed that Larco has only been a firm in difficulty since 2010.

⁽⁸⁾ Note 24: participations in linked companies.

⁽⁹⁾ The Greek authorities clarified subsequently that the measure in question concerns an additional tax, rather than a tax fine. Thus, Measure 5 is understood to refer to an additional tax and not to a tax fine, as erroneously mentioned in the decision of 6 March 2013.

⁽¹⁰⁾ Greek Income Taxation Code law 2238/1994 (Official gazette FEK A/151/16.9.94), Article 74(9).

⁽¹¹⁾ Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

3.2. Measure 1: non-collection of debt to the Ministry of Finance

- (25) The Greek authorities argued that the credit of the State towards Larco did not amount to State resources, since it was originally a private credit provided by the Organisation for Enterprise Restructuring S.A. ('OER'). When OER was liquidated, according to Law 2741/1999, all its claims were transferred to the State.
- (26) In addition, they explained that the 1998 debt settlement agreement contained specific rules for the treatment and collection of the outstanding debt which would be applicable at the end of each financial year as follows:
- a. if Larco had profits during a financial year, the interest accrued (6 % p.a.) would be repaid to the creditors first, before the repayment of the debt's principle;
 - b. after any repayment of interest, Larco would keep a certain amount from the profits for investments;
 - c. After applying (a) and (b), any remaining profit in Larco's accounts would be allocated proportionally to Larco's creditors.
- (27) If Larco did not make any profits after 1999, the creditors had the right to pursue the repayment of their debt through various means, such as considering the payment due, capitalising the debt etc. However, the creditors were not entitled to any forced execution of the outstanding debt, such as seizing the company's assets or forcing the launch of the bankruptcy procedure against the company.
- (28) Until 2003, the creditors received the accrued interest, as agreed. For the period 2004-2007, Larco did not make any profits and there was therefore no repayment of the interest accrued. In 2007 PPC concluded a raw material agreement with Larco, agreed by all creditors, whereby Larco provided lignite to PPC, which reduced the debt accordingly. The debt to PPC was completely eliminated in 2011.
- (29) The administrator of Old Larco has been pursuing the collection of the debt through judicial means and it appears that certain amounts have already been paid. By 2011, Old Larco had collected EUR 5 million of its outstanding debt under the 1998 agreement. Since Old Larco also has debts towards the Greek State, the latter collected the entire amount of those EUR 5 million.
- (30) As regards Larco's direct debt to the Greek State, the State has regularly sent invoices for the annual amount of the debt, including the annual accrued interest, to Larco.
- (31) Thus, the Greek authorities argued that the debt stemming from the 1998 agreement could not amount to State resources and in any event that there was no selective advantage in favour of Larco.

3.3. Measure 2: the 2008 State guarantee

- (32) The Greek authorities invoked the Guarantee Notice⁽¹²⁾ and in particular Section 3.2 of the Notice, which includes the conditions, under which the Commission can rule out the presence of State aid in an individual guarantee. According to the Greek authorities:
- a. Larco was not a firm in difficulty at the time of the guarantee was granted;
 - b. the extent of the guarantee could be properly measured when it was granted;
 - c. the guarantee was granted for a debt security (bond loan), and could therefore exceed 80 % of the outstanding loan;
 - d. the 1 % premium paid for the guarantee was a market-oriented price, reflecting Larco's financial standing.
- (33) Thus, the Greek authorities argued that the 2008 State guarantee did not constitute State aid.
- (34) The Greek authorities clarified that measure 2 was granted by virtue of the ministerial decision YA 2/93378/0025 dated 22 December 2008 and covered the exact amount of EUR 30 000 000.

⁽¹²⁾ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

3.4. Measure 3: the 2009 capital increase

- (35) The Greek authorities argued that the State's participation in the capital increase was intended to protect the value of the company, in view of its upcoming privatisation and in order to implement a restructuring plan. In its decision, the State took into account the potential growth of Larco, the value of its assets and the general situation in the ferronickel market as well as restructuring and cost-cutting measures.
- (36) NBG contributed 31 % of the capital increase. Unlike the State NBG decided to exercise its rights only in part. The Greek authorities argued that NBG's objective was to maintain a certain control over the company and thus its actions should not be viewed as a lack of trust in Larco's future. Indeed, NBG reduced its shareholding in Larco to the minimum necessary under Greek law in order to have a veto over certain important decisions in the Board of Directors.
- (37) The third shareholder, PPC, explicitly decided not to participate in the capital increase, accepting that its shareholding would be diluted. The Greek authorities argued that PPC did not participate because its intention was to allow the State to have a larger shareholding majority, in view of the privatisation of the company.
- (38) In conclusion, the Greek authorities argued that the State acted like a market economy investor and that, therefore, the 2009 capital increase did not constitute State aid.
- (39) As regards the granting date, the Greek authorities did not provide conclusive information. The minutes of the shareholders meeting show that the Greek State provided EUR 15 000 000 towards the capital increase on 15 April 2009, by virtue of the document Οικ2/27694/0025 of the Ministry of Finance in view of the total contribution of the State to the share capital increase, which amounted to EUR 44 999 999,40. The 2009 financial statement of Larco shows that the capital increase was decided on 14 May 2009, but does not clarify when the actual injection of the new capital took place.

3.5. Measure 4: the 2010 State guarantee

- (40) The Greek authorities explained that in the context of the 1998 agreement, Old Larco had been pursuing the repayment of Larco's debt in the Greek courts and there has been a series of court judgments and annulments, inter alia, regarding a debt of approximately EUR 10,5 million ⁽¹³⁾.
- (41) In the context of an appeal by Larco and because of the danger of irreparable damage, the Greek Supreme Court suspended the payment of the debt of approximately EUR 10,5 million, until final judgment by the relevant court. The suspension was granted on condition that Larco provided a letter of guarantee to Old Larco for the suspended amount. NBG provided the letter of guarantee for approximately EUR 10,8 million (EUR 10,5 million of the originally contested debt + EUR 0,3 million for legal fees and expenses) to Larco. The letter of guarantee was in turn covered by a State guarantee for the entire amount with a premium of 2 % p.a. for an unlimited period.
- (42) The Greek authorities explained that that measure was provided by the State as a shareholder with the intention of fulfilling the conditions of the suspension and protecting its investment from debts being declared overdue. Otherwise, the suspension would not have been applicable and Old Larco would have had the right to pursue the collection of the debt, possibly by seizing Larco's assets. Larco could then have become insolvent. According to the Greek authorities, NBG would not have granted the letter of guarantee without the State guarantee.
- (43) The Greek authorities clarified that measure 4 was granted by virtue of the ministerial decision YA 2/923/0025 dated 10 May 2010 and covered the exact amount of EUR 10 510 824,95 and EUR 310 000 for legal fees and expenses, thus in total EUR 10 820 824,95.

3.6. Measure 5: letters of guarantee instead of pre-payment of a tax fine in 2010

- (44) The Greek authorities clarified that the measure in question concerns an additional tax, rather than a tax fine. The additional tax was imposed because the tax authorities did not agree that the losses resulting from hedging contracts should be deducted from Larco's net revenue, as Larco argued. The Greek authorities also clarified that Larco was asked by the court to provide letters of guarantee of a total value of EUR 4,7 million.

⁽¹³⁾ According to Old Larco, this represents the interest accrued to the principle recognised by the 1998 agreement.

- (45) The Greek authorities provided evidence that Larco was authorised to replace the pre-payment of the additional tax by letters of guarantee on the basis of a general legal provision. The court judgment allowing Larco to replace the pre-payment of the additional tax by letters of guarantee, in accordance with the national law ⁽¹⁴⁾, applied a balancing test, taking into account the benefits of the creditor (the State) and the viability of the debtor (Larco) and thus decided on the temporary suspension of the obligation to pre-pay EUR 47 million (that is to say, 25 % of the additional tax), replacing it with letters of guarantee of EUR 4,7 million in total. That suspension was to apply until a final judgment was delivered, in respect of the litigation lodged by Larco against the State for the imposition of the additional tax.
- (46) In addition, the Greek authorities argued that decisions of national courts cannot be imputable to the State.
- (47) The Greek authorities also explained that, despite the temporary suspension, the State had in practice overruled the financial effect of that suspension, by offsetting the additional tax due by Larco against amounts due by the State to Larco, such as income tax or VAT returns. This has been allowed by recent legislation for the acceleration of the collection of taxes in Greece.
- (48) Thus, the State appeared in effect to have already collected at least EUR 16,1 million of the amount due in respect of the pre-payment of Larco's additional tax.

3.7. Measure 6: the 2011 State guarantees

- (49) The Greek authorities clarified that neither of the two loans for which the guarantees were provided was overdue. The loan of EUR 20 million was provided by ATE Bank as a refinancing of an older loan of EUR 20 million, which was overdue.
- (50) The Greek authorities argued that the two State guarantees did not involve State resources, as the State owed EUR 60 million to Larco from VAT returns. Thus, if the guarantees were called, the amounts could offset the outstanding debt from the State.
- (51) The authorities also argued that, if the measure did constitute aid, it should be considered compatible with the internal market, as it complied with the Temporary Framework ⁽¹⁵⁾ and the relevant temporary Greek scheme for loan guarantees ('temporary guarantee scheme') ⁽¹⁶⁾. In particular, the authorities considered that, apart from the fact that Larco was a firm in difficulty at the time the measure was granted, the other conditions of the scheme were met:
- Larco was a large company;
 - the EUR 30 million loan was an investment loan, whereas the EUR 20 million was a loan refinancing an older loan, which was granted for investment purposes;
 - the guarantees were granted before the end of 2011;
 - the total amount of the two guaranteed loans exceeded the annual wage bill of Larco only by EUR 3 million;
 - the guarantees covered 100 % of the loan, but such a measure was the only possibility for Larco to access financing, due to the particular situation of the Greek economy.
 - the guarantees included a 1 % p.a. premium, which should be considered as a market premium.
- (52) Finally, the Greek authorities argued that if the Commission concluded that the measure constituted aid and that the conditions of the temporary guarantee scheme were not met, the measures should be considered as rescue aid. Such aid should have been considered notified, as the Commission was made aware of the measure in the reply of 16 March 2012 to the questionnaire, when it was at the stage of the *ex-officio* preliminary investigation.
- (53) According to the Greek authorities, the aid complied with the requirements of the Rescue and Restructuring Guidelines, since:
- it was liquidity support in the form of loan guarantees;
 - it was warranted on the grounds of serious social difficulties and had no undue adverse spill over effects on other Member States;

⁽¹⁴⁾ Articles 200-205 of the Administrative Procedures Code.

⁽¹⁵⁾ Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

⁽¹⁶⁾ N 308/2009, adopted on 30 June 2009.

- c. the Greek authorities were preparing a restructuring plan in cooperation with the Commission;
 - d. it was restricted to the amount needed to keep the firm in business for a limited period;
 - e. it respected the 'one time, last time' condition, as Larco had not been subject to rescue or restructuring aid in the past;
 - f. Larco presented a business plan to the State, justifying the necessity of the funding of EUR 30 million for investments.
- (54) The Greek authorities clarified that measure 6 was granted by virtue of (i) the ministerial decision YA 2/95156/0025 dated 30 December 2011 covering the exact amount of EUR 30 000 000 and (ii) the ministerial decision YA 2/95161/0025 dated 30 December 2011 for the exact amount of EUR 20 000 000.

4. ASSESSMENT

- (55) This Decision addresses as a preliminary point the issue of whether Larco is a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines. Subsequently, the Decision will assess whether the measures under scrutiny constitute State aid to Larco within the meaning of Article 107(1) of the Treaty and, finally, whether such aid might be compatible with the internal market.

4.1. Difficulties of Larco

- (56) In the Decision of 6 March 2013 and in particular recitals 18-25 thereof, the Commission concluded on a preliminary basis that Larco was a firm in difficulty at the time the 6 measures in question were provided. Larco's key financial data during the period 2007-2011 are set out in the table:

Larco's key financial data 2007-6/2012 (EUR million)

	2007	2008	2009	2010	2011	H1 2012 (*)
Turnover	549,3	284	98,8	239	311	154,6
EBT	23	- 116	- 105	6,4	6,5	- 12,2
Registered capital	163,8	163,8	109	109	109	109
Own equity	104	- 0,4	- 35	- 31	- 26	- 39
Total Debt	141,2	230,1	233,9	261,8	262,7	326,0
Debt/Equity (ratio)	1,3	- 575,0	- 6,6	- 8,3	- 10,1	- 8,4

(*) Data submitted by HRADF.

- (57) Point 10(a) of the Rescue and Restructuring Guidelines states that a limited liability company is considered to be in difficult when 'more than half of registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. This reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term (as set out in point 9 of the Rescue and Restructuring Guidelines).
- (58) Furthermore, according to point 11 of the Rescue and Restructuring Guidelines, a firm may be considered to be in difficulty 'where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value'. In this respect, according to the General Court, 'the existence of negative own capital which [...] may be considered to be an important indicator that an undertaking is in a difficult financial situation' ⁽¹⁷⁾.

⁽¹⁷⁾ Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-585, paragraph 106.

- (59) According to the financial statements of Larco for the period 2007-H1 2012, the registered capital of the company did not decrease by more than half. However, over the same period the company's own equity turned negative. In previous cases the Commission has considered that where a company has negative equity, this implies that the entire registered capital of that company has been lost and there is an *a priori* assumption that the criteria of point 10(a) of the Rescue and Restructuring Guidelines are met ⁽¹⁸⁾.
- (60) In the case of Larco, the Commission considers that its registered capital only appears not to have been decreased by more than half, because the company did not adopt appropriate measures, as normally foreseen by Greek legislation ⁽¹⁹⁾. Such appropriate measures aim at turning a company's own equity from negative to positive and, at the same time, at increasing it to an adequate level. Such appropriate measures could be either the capitalisation of losses or a capital increase or both.
- (61) In this respect, the Commission considers that a capitalisation of losses would have resulted in the loss of the entire registered capital of the company, since the accumulated losses were higher than the registered capital. For this reason the Commission considers that the criteria in point 10(a) of the Rescue and Restructuring Guidelines have been met in this case since 2008.
- (62) In addition, as regards the criteria in point 11 of the Rescue and Restructuring Guidelines, Larco incurred a significant decrease of turnover from 2007 until 2009 and significant losses in 2008 and 2009, with a total amount of EUR 221 million (EUR 116 million and EUR 105 million respectively). In 2010 and 2011 the company had increased turnover and earnings, but those increases were not sufficient to allow Larco's financial recovery. During the same period its equity remained negative and its debt continued to grow. Furthermore, Larco's operations again became loss-making in H1 2012.
- (63) The Commission does not agree with the argument of the Greek authorities that Larco was not in difficulty during the years 2008 and 2009 because the losses were due to the decreased price of ferronickel.
- (64) First, the fact that a decrease in the price of ferronickel led to losses and contributed to Larco's difficulties does not in itself mitigate the finding that Larco showed the usual signs of a firm being in difficulty. A healthy firm would need to adapt its costs to such price changes in order to avoid losses.
- (65) Secondly, in the years 2008 and 2009 the company had negative equity and increasing debt (63 % increase between 2007-2008). Although the price of ferronickel and turnover increased significantly after 2010, the subsequent financial results of Larco indicate that its difficulties persisted. Thus, it cannot be concluded that the losses of 2008 and 2009 were only the result of low ferronickel prices.
- (66) In the light of the above, it is concluded that Larco was a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines at the time the 6 measures in question were granted.

4.2. Existence of State aid

- (67) Article 107(1) of the Treaty provides that 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.
- (68) According to the settled practice of the Commission and as confirmed by the case law, the criterion for assessing whether a transaction between a public body and an undertaking amounts to State aid is the market economy investor or creditor principle ('MEIP' or 'MECP') ⁽²⁰⁾. It follows from that principle that, when the State acts in a market as a commercial operator, it must do so in a way comparable to a private operator. If the State does not do so, State aid could be involved. In other words, the benchmark for appreciating whether a transaction involves State aid is whether a private operator placed in a similar situation would have behaved in the same way. In applying this principle, non-economic considerations cannot be taken into account as reasons for granting support measures.

⁽¹⁸⁾ Commission Decision in case C 38/2007 *Arbel Fauvet Rail* (OJ L 238, 5.9.2008, p. 27), Commission Decision in case C 27/2010 *United Textiles* (OJ L 279, 12.10.2012, p. 30).

⁽¹⁹⁾ According to Article 47 of Greek Law 2190/1920, where a company's own equity falls below 50 % of its share capital, the company's shareholders must decide (within 6 months from the expiry of the relevant fiscal year) either to dissolve the company or to adopt other measures.

⁽²⁰⁾ See, e.g., Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECR II-0000, paragraph 48.

4.2.1. Measure 1: non-collection of debt to the Ministry of Finance

- (69) Based on the information available, the Commission cannot agree with the argument of the Greek authorities that the credit from OER was a private credit. According to Greek law 1386/1983 (Article 1) ⁽²¹⁾ establishing OER, 'OER will operate to the benefit of the social interest and under the supervision of the State'. According to Article 3 of the same law, the State was the only shareholder of OER. In addition, the State had the possibility to directly appoint the chairman along with 2 out of 8 members of the Board of Directors and, indirectly, another 4 members. It follows from the above that the resources of OER amount to State resources and thus any credit from OER seems to be imputable to the State.
- (70) The evidence provided by the Greek authorities show that Larco's debt to OER (subsequently transferred to the State) had been regularly reported and invoiced, in accordance with the 1998 debt settlement agreement agreed under the 1998 debt settlement agreement. Part of the debt was collected, when the profitability of the company allowed it. Larco undertook investments during that period, which reduced repayments, but those investments were agreed by all creditors. According to the agreement, the creditors were not entitled to any forced execution of the outstanding debt.
- (71) In the light of the above, it is concluded that Measure 1 complied with the MECP, since the State, as creditor, acted in a way comparable to that of a private creditor, since it used all the means at its disposal and within the contractually agreed framework, in order to collect its debt.

4.2.2. Measure 2: the 2008 State guarantee

- (72) State guarantees put State resources at risk, as their call is paid through the State budget. Moreover, any guarantee that is not properly remunerated implies a loss of financial resources for the State. Thus, the criterion of State resources and imputability to the State is fulfilled for this measure and this is not disputed by the Greek authorities.
- (73) The Commission disagrees with the argument of the Greek authorities that the conditions of Section 3.2 of the Guarantee Notice are fulfilled. The Commission has established that Larco was a firm in difficulty in 2008. In addition, an annual guarantee premium of 1 % cannot be considered as reflecting the risk of default for the guaranteed loans, given the significant financial difficulties of Larco and in particular its high debt to equity ratio.
- (74) The Commission considers that a reasonable market creditor would not have provided Larco with a guarantee under those conditions. Since the measure was provided selectively to Larco, the Commission concludes that the 2008 State guarantee provided a selective advantage to the beneficiary.
- (75) Larco is active in a sector in which products are traded among Member States and itself exports most of its production to other Member States. In addition, there is nickel mining, smelting and refining in 6 Member States apart from Greece, namely in Austria, Finland, France (New Caledonia), Spain, Sweden and the United Kingdom ⁽²²⁾. Nickel is traded in almost all Member States ⁽²³⁾.
- (76) The measures in question enable Larco to continue operating so that, unlike other competitors with financial difficulties, it does not have to face the consequences normally deriving from its difficult financial results. This distorts competition as other companies active in the same markets need to operate without such State support.
- (77) Thus, it is concluded that Measure 2 constitutes State aid within the meaning of Article 107(1) of the Treaty. The Commission considers that the aid is equal to the amount of the guaranteed loan, because it is doubtful that Larco, in view of its economic difficulties, would have found any funding in the market irrespective of the conditions. In other words, the Commission considers that Larco received an advantage equal to the amount of the guaranteed loan, because without the State guarantee it would not have been able to receive that financing from the market.
- (78) The Commission does not have any information indicating that the guarantee has been triggered.

4.2.3. Measure 3: the 2009 capital increase

- (79) The participation of the State in Larco's 2009 share capital increase involves State resources and is imputable to the State. Thus, this criterion is fulfilled and is not disputed by the Greek authorities.

⁽²¹⁾ Hellenic Republic Official Journal FEK A-107.

⁽²²⁾ Sources: British Geological Survey, European Mineral Statistics 2006-2010, <http://www.bgs.ac.uk/>; also Nickel Institute, <http://www.nickelinstitute.org>

⁽²³⁾ Source: British Geological Survey, European Mineral Statistics 2006-2010, <http://www.bgs.ac.uk/>

- (80) The Commission has not received any convincing evidence from the Greek authorities which would justify their argument that the State acted as a reasonable market investor. Indeed, minutes of the shareholders meetings provided as evidence suggest that no restructuring plan was provided to the shareholders prior to the capital increase, despite Larco being a firm in difficulty. In addition, the final amount of the capital increase was eventually insufficient to cover the negative equity of Larco and could thus not be seen as a measure protecting the company's value and supporting its restructuring.
- (81) As regards the participation of NBG, the Commission recalls the Court's clarification that 'simultaneity cannot in itself, even where significant private investments have been made, suffice for a finding that there has been no aid within the meaning of Article 87(1) EC without taking into consideration the other relevant facts and points of law.' ⁽²⁴⁾.
- (82) Indeed, the partial participation of NBG cannot be used as evidence of concomitance between State and private shareholders because NBG was exposed to Larco not only as a shareholder, but also as a creditor. Its decision to participate partially in the capital increase was thus a means to protect not only the value of its investment but also its position as a creditor.
- (83) Furthermore, the State had already provided Larco with the 2008 State guarantee. Thus, as established by relevant case law, the provision of the State's participation to the 2009 capital increase cannot be seen in isolation, but must be considered in the context of other aid measures ⁽²⁵⁾.
- (84) Finally, the minutes of the shareholders' meetings do not support the argument of the Greek authorities that PPC's intention was to allow the State a large shareholding majority. Instead, PPC simply declared that it would not participate in the share capital increase.
- (85) Thus, the Commission considers that a reasonable market investor would not have participated in Larco's share capital increase under those conditions. Since the measure was provided selectively to Larco, the Commission concludes that the State's participation in the 2009 capital increase provided the beneficiary with a selective advantage.
- (86) For the reasons set out in recitals 75-76 above, the measure has the potential to affect trade between Member States and to distort competition.
- (87) Thus, it is concluded that measure 3 constitutes State aid within the meaning of Article 107(1) of the Treaty. Since it is not disputed that the State exercised its full rights to the share capital increase [unclear], the value of Measure 3 amounts to EUR 44 999 999,40.
- (88) As regards the granting date, it follows from the minutes of the shareholders meeting of 14 May 2009 that the Greek State provided EUR 15 000 000 to the capital increase on 15 April 2009 ⁽²⁶⁾, with a view to the total contribution of the State to the share capital increase[unclear], which amounted to EUR 44 999 999,40. The Commission does not have information about the date on which the remaining amount of the State's contribution to the Company's share capital increase was granted.

4.2.4. Measure 4: the 2010 State guarantee

- (89) For the same reasons as for Measure 2, the criterion of State resources and imputability to the State is fulfilled for Measure 4 and this was not disputed by the Greek authorities.
- (90) The Commission acknowledges that it may be common business practice for shareholders to provide guarantees in circumstances similar to this case. However, since NBG was also a shareholder of Larco, the Commission considers that it would be normal for shareholders to share proportionately the exposure stemming from the guarantee in question. Instead, the State assumed the entire risk, providing a guarantee for a debt, while Larco was in difficulty and already had mounting debt.
- (91) As for Measure 2, the conditions of Section 3.2 of the Guarantee Notice are not fulfilled for this measure either, since a 2 % premium cannot be considered as reflecting the risk of Larco's default.

⁽²⁴⁾ Case T-565/08 *Corsica Ferries v Commission*, judgment of 11 September 2012, paragraph 122.

⁽²⁵⁾ Joined Cases C-399/10 P and C-401/10 P *Bouygues SA, Bouygues Télécom SA v Commission*, and Case T-11/95 *BP Chemicals v Commission* [1998], paragraph 171.

⁽²⁶⁾ By virtue of the document Οικ2/27694/0025 of the Ministry of Finance.

- (92) Thus, the Commission considers that a reasonable market creditor would not have provided Larco with a guarantee under those conditions. Since the measure was provided selectively to Larco, the Commission concludes that it provided a selective advantage to the beneficiary.
- (93) For the reasons set out in recitals 75-76 above, the measure has the potential to affect trade between Member States and to distort competition.
- (94) Thus, it is concluded that measure 4 constitutes State aid within the meaning of Article 107(1) of the Treaty. The Commission considers that the amount of the aid is equal to the guaranteed amount, because it is clear that, irrespective of the conditions, no reasonable market player would have been able to guarantee that amount for Larco, in view of its economic difficulties. In other words, the Commission considers that Larco received an advantage equal to the guaranteed amount, because without the State guarantee it would not have been able to receive any guarantee by the market.
- (95) The Commission does not have any information indicating that the guarantee has been triggered.

4.2.5. Measure 5: letters of guarantee instead of pre-payment of an additional tax in 2010

- (96) The Commission takes note of the clarifications provided by the Greek authorities as regards the factual background of Measure 5.
- (97) In the light of the evidence provided by the Greek authorities, the Commission agrees that the right to replace the pre-payment of the additional tax with letters of guarantee was granted to Larco by the court on the basis of objective criteria, which would have applied to any company in a similar situation. Thus, it is concluded that Measure 5 did not involve a selective advantage to Larco.

4.2.6. Measure 6: the 2011 State guarantees

- (98) The Commission takes note of the clarifications provided by the Greek authorities as regards the factual background to Measure 6.
- (99) The Commission disagrees with the Greek authorities that Measure 6 does not involve State resources. First, as explained in respect of Measure 2, State guarantees put State resources at risk, as their call is paid through the State budget. Moreover, any guarantee that is not properly remunerated with a market premium implies a loss of financial resources for the State. Furthermore, the argument about the outstanding debt of EUR 60 million in VAT seems contradictory to the comments provided in respect of Measure 5, whereby the Greek authorities argued that they legally and intentionally did not return VAT due, in order to offset the suspension of the pre-payment of the additional tax.
- (100) Thus, the Commission considers that the criterion of State resources and imputability to the State is fulfilled for this measure.
- (101) Similar to Measures 2 and 4, the conditions of Section 3.2 of the Guarantee Notice are not fulfilled for this measure either.
- (102) Thus, the Commission considers that a reasonable market creditor would not have provided Larco with a guarantee under those conditions. Since the measure was provided selectively to Larco, the Commission concludes that it provided a selective advantage to the beneficiary.
- (103) For the reasons set out in recitals 75-76 above, the measure has the potential to affect trade between Member States and to distort competition.
- (104) Thus, it is concluded that Measure 6 constitutes State aid within the meaning of Article 107(1) of the Treaty. As for Measure 2, the Commission considers that the amount of the aid is equal to the amount of the guaranteed loans, because it is doubtful that Larco, in view of its economic difficulties, would have found any funding in the market irrespective of the conditions.
- (105) The Commission does not have any information indicating that the guarantee has been triggered.

4.2.7. Conclusion on existence of State aid

- (106) In the light of the above, the Commission considers that Measures 1 and 5 do not constitute State aid, whereas Measures 2, 3, 4 and 6 constitute State aid within the meaning of Article 107(1) of the Treaty.
- (107) Thus, the State aid comprised in Measure 2 amounts to EUR 30 000 000, granted on 22 December 2008. The State aid comprised in Measure 3 amounts to EUR 44 999 999,40, but the granting date(s) need to be clarified by the Greek authorities. The State aid comprised in Measure 4 amounts to EUR 10 820 824,95, granted on 10 May 2010 and the total State aid comprised in Measure 6 amounts to EUR 50 000 000 (resulting from EUR 30 000 000 + EUR 30 000 000) granted on 30 December 2011.

4.3. Unlawful aid

- (108) The Measures 2, 3, 4 and 6 constitute State aid and were granted in breach of the notification and stand-still obligations established in Article 108(3) of the Treaty. Thus, those measures constitute unlawful State aid.

4.4. Compatibility of the aid

- (109) Inasmuch as certain measures constitute State aid within the meaning of Article 107(1) of the Treaty, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (110) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ⁽²⁷⁾.

4.4.1. Compatibility of measures 2, 4 and 6

- (111) For Measures 2 and 4 the Greek authorities did not invoke any possible grounds of compatibility, because they argued that the measures did not constitute State aid.
- (112) Given that the measures constitute State aid, they should be assessed with regards to their compatibility under Article 107(3)(c) of the Treaty and in particular under the Rescue and Restructuring Guidelines, since Larco has been a firm in difficulty at least since 2008. According point 20 of the Rescue and Restructuring Guidelines, 'a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Commission considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if the conditions set out in these Guidelines are met.'
- (113) However, the relevant conditions of the Rescue and Restructuring Guidelines (Section 3.1) are not fulfilled in this case. The guarantees were not terminated after 6 months and the Greek authorities did not notify a restructuring plan that would restore the company's viability, whilst there were no compensatory measures implemented in order to mitigate the distortions of competition. Finally, there is no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary. The authorities did not provide a liquidation plan.
- (114) As regards Measure 6, the Greek authorities have argued that it was compatible with the Temporary Framework and the temporary guarantee scheme and in any event that it qualified as rescue aid.
- (115) The Commission disagrees with the arguments of the Greek authorities. It considers that the conditions of the Temporary Framework and the temporary guarantee scheme were not met, since Larco was a firm in difficulty. The total amount of the two guarantees exceeded Larco's annual wage bill, the guarantee exceeded 90 % of the loan and 1 % p.a. could not be considered as a market premium, reflecting the risk of default for the guaranteed amount.
- (116) As regards the argument that the measure amounted to rescue aid, although the Commission has held discussions with the Greek authorities concerning Larco since 2011, the authorities never mentioned that the 2011 guarantees should be considered as rescue aid and never provided any notification to that effect. Indeed, in their reply of 16 March 2012 to the questionnaire, the Greek authorities explicitly declared that the company had not benefited from rescue and/or restructuring aid for the past 10 years.

⁽²⁷⁾ Case C-364/90, *Italy v Commission*, [1993] ECR I-2097, paragraph 20.

- (117) The relevant conditions of the Rescue and Restructuring Guidelines are in any event not fulfilled in this case either. The 2011 guarantees were not terminated after 6 months and the Greek authorities did not notify a restructuring plan or a liquidation plan. The business plan justifying the need for EUR 30 million for investments cannot form the basis of a compatible restructuring plan for the purposes of the Rescue and Restructuring Guidelines. That is because that plan did not aim to restore the company's viability, and there were no compensatory measures envisaged or implemented in order to mitigate the distortions of competition. Finally, there was no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary. The authorities did not provide a liquidation plan either.
- (118) The Commission has not identified any other possible grounds for the compatibility of Measures 2, 4 and 6.
- (119) In the light of the above, the Commission considers Measures 2, 4 and 6 to be incompatible with the internal market.

4.4.2. Compatibility of measure 3

- (120) The Greek authorities did not identify any possible grounds for the compatibility of Measure 3, because they argued that the measure did not constitute State aid.
- (121) Given that the measure constitutes State aid, it should also be assessed with regard to its compatibility under the Rescue and Restructuring Guidelines, for the reasons set out in recital 112 above. However, the relevant conditions of the Rescue and Restructuring Guidelines are not fulfilled in this case either. The Greek authorities never notified a restructuring plan that would restore the company's viability, and there were no compensatory measures implemented in order to mitigate the distortions of competition. Finally, there is no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary.
- (122) The Commission has not identified any other possible grounds for the compatibility of this measure.
- (123) Against this background, the Commission considers Measure 3 to be incompatible with the internal market.

4.5. Recovery

- (124) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽²⁸⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽²⁹⁾. In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³⁰⁾.
- (125) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ⁽³¹⁾ stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]'.
- (126) Thus, given that none of the measures in question were notified to the Commission, in violation of Article 108 of the Treaty and are, therefore, to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.

5. CONCLUSION

- (127) Measures 1 and 5 do not constitute aid within the meaning of Article 107(1) of the Treaty.
- (128) Greece unlawfully implemented Measures 2, 3, 4 and 6 in breach of Article 108(3) of the Treaty.

⁽²⁸⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽²⁹⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽³⁰⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64 and 65.

⁽³¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

- (129) In particular, Measures 2, 4 and 6 (State guarantees of 2008, 2010 and 2011) in favour of Larco constituted State aid within the meaning of Article 107(1) of the Treaty and were incompatible with the internal market, because the relevant conditions of the Rescue and Restructuring Guidelines were not met and no other compatibility grounds were identified.
- (130) Measure 3 (the State's participation in the 2009 capital increase of Larco) also constituted State aid and was incompatible with the Treaty, because the relevant conditions of the Rescue and Restructuring Guidelines were not met and no other compatibility basis was identified.
- (131) The Commission notes that Greece has agreed the present decision to be adopted in the English language,

HAS ADOPTED THIS DECISION:

Article 1

The non-collection of debt to the Ministry of Finance and letters of guarantee instead of pre-payment of additional tax in 2010, which Greece has implemented for Larco, do not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 2

The State aid amounting to EUR 135 820 824,35 in the form of State guarantees to Larco General Mining & Metallurgical Company S.A. in 2008, 2010 and 2011 and the State's participation to the company's capital increase in 2009, unlawfully granted by Greece in breach of Article 108(3) of the Treaty is incompatible with the internal market.

Article 3

1. Greece shall recover the incompatible aid referred to in Article 2 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽³²⁾, as amended.
4. As regards measure 3, Greece shall provide the exact date(s) when it provided its contribution to the 2009 share capital increase.
5. Greece shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Greece shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Greece shall submit the following information:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

⁽³²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 27 March 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary — measure	Total amount of aid received	Total amount of aid to be recovered (Principal)	Total amount already reimbursed	
			Principal	Recovery interest
Larco — measure 2	30 000 000	30 000 000	0	0
Larco — measure 3	44 999 999,40	44 999 999,40	0	0
Larco — measure 4	10 820 824,95	10 820 824,95	0	0
Larco — measure 6	50 000 000	50 000 000	0	0