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**Subject: State aid No SA 32544 (N/2011) – Greece**  
**Restructuring of the Greek Railway Group – TRAINOSE S.A.**

Sir/Madam,

The Commission wishes to inform Greece that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

## **1. PROCEDURE**

- (1) Following pre-notification contacts since October 2010, on 9 February 2011, Greece notified several measures in favour of the Greek Railway company TRAINOSE S.A. (hereinafter: "TRAINOSE"). The Commission requested further information by letter dated 5 April 2011, to which the Greek authorities replied on 6 May 2011.

## **2. BACKGROUND INFORMATION ON THE RAILWAY RECOVERY PROGRAMME**

- (2) On 3 May 2010, in the context of receiving EU financial assistance loans, Greece signed two Memoranda of Understanding (hereinafter: "MoUs") with the European Commission, the European Central Bank and the International Monetary Fund (hereinafter: "Troika"). The disbursements of financial assistance from Euro area Member States are subject to quarterly reviews based on quantitative performance criteria, as well as a positive valuation of progress with respect to the MoUs.

- (3) In the context of the above MoUs and as regards in particular the railway sector, Greece committed to fully implement a recovery plan for TRAINOSE, make its activities viable, and privatise the company by the end of 2011.

### 3. THE BENEFICIARY

- (4) TRAINOSE is a large company, active in the provision of rail freight and passengers transport services, and, as non-core activity, international coach services. In 2010 it had a turnover of EUR 102.7 million, with losses of EUR 187.3 million, and about 1.532 employees. It is the sole provider of railway transport services in Greece. According to the Greek authorities, it has a market share of 1% in the passenger transport market and 3% in the freight transport market in Greece, if the markets were to be defined as comprising all modes of land transport.
- (5) TRAINOSE was established in 2005, as a subsidiary of OSE S.A. (hereinafter: "OSE"). Until 2005, OSE was the infrastructure manager and the sole provider of rail transport services in Greece, operating both freight and passenger trains. It was then transformed into a holding company and its operations were divided among subsidiary companies. In December 2008, in order to further enhance the physical separation between infrastructure management and transport operations, as well as to open up the transport operations market to competition, TRAINOSE became a completely separate legal entity, entirely independent from OSE and owned 100% directly by the State. TRAINOSE is incorporated under civil law (as an S.A.).
- (6) As presented in detail in paragraphs (65)-(70) below, TRAINOSE's financial situation has constantly deteriorated since 2007, having negative EBT,<sup>1</sup> negative own equity and mounting debt. Since at least 2007, the company is eligible for being dissolved according to Greek legislation.<sup>2</sup> However, the State, in its quality of exclusive owner, has not yet adopted such decision. As further explained in recitals (18)-(27), TRAINOSE is currently under restructuring.

### 4. DESCRIPTION OF THE MEASURES AND THE PROPOSED RESTRUCTURING PLAN

- (7) The State support measures that Greece notified to the Commission are summarised in the table below (Table 1):

**Table 1: Notified State support measures**

Measure	Amount (EUR)
Write-Off of Debt	714,000,000

<sup>1</sup> Earnings Before Tax (net profit).

<sup>2</sup> According to Article 47 of Greek Law 2190/1920, in case that 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 measures for redressing it.

Assets transfer	110,000,000
Employee transfers	120,000,000
Equity increase	125,000,000
PSO compensation 2011-2013	143,624,060
Service Level Agreements (SLAs)	n.a. <sup>3</sup>
<b>Total</b>	<b>1,212,624,060</b>

#### 4.1. Measure 1: Write-off of 2007-2010 liabilities

- (8) The Greek authorities envisage writing off a debt of EUR 714 million towards OSE for infrastructure charges, provision and maintenance of rolling stock and other services, accrued by TRAINOSE over the period 2007-2010.

#### 4.2. Measure 2: Assets transfer from OSE

- (9) The submitted Restructuring Plan provides for the transfer of five freight terminals from OSE to TRAINOSE, with a total estimated value of EUR 110.056.769, as follows:
- the Thessaloniki Freight Terminal, land and buildings: estimated value EUR 80.6 million;
  - the Thessaloniki-Trigono Magnisias property, land and building: estimated value EUR 13.1 million;
  - the Oinoi Rail Station, land and building: estimated value EUR 2.2 million;
  - the Thessaloniki-Trigono Lahanokipon property, land and building: estimated value EUR 1.8 million;
  - the Thessaloniki distribution centre, land and building: estimated value EUR 12.3 million.
- (10) The value of the five terminals was estimated in November-December 2010 by the consultancy Savills Hellas. The freight terminals will be transferred free of charge.
- (11) It seems at this stage that TRAINOSE could use free of charge the terminals from the moment of the spin-off until this day.

#### 4.3. Measure 3: Employee transfers

- (12) The Restructuring Plan designed by Greece for TRAINOSE provides for the transfer of 620 of its current employees, who enjoy quasi-civil servant status and privileges<sup>4</sup>, to other public sector employers, and to reduce the salaries of employees who remain in TRAINOSE (hereinafter the "Remaining employees") by 37%. Future new employees

<sup>3</sup> Not quantifiable on the basis of the information provided in the notification.

<sup>4</sup> On the basis of national laws 2515/1997 and 2671/1998, as well as the company's Collective Employment Agreements of 1993-2008 (for OSE and TRAINOSE).

will be hired on private sector salaries (average annual salary 50% of the average for the Remaining employees), and will be subject to ordinary Greek labour law.

- (13) The Greek authorities claim that TRAINOSE's employees hired before the entry into force of Law 3429/2005 on 31 December 2005<sup>5</sup> have a quasi-civil servant status: first of all, they explain that their wages have been set through laws and binding Collective Employment Agreements between the company's administration and the workers' representatives.<sup>6</sup> As a general rule, those collective agreements offered higher salaries and benefits than in the rest of the public or private sector. In addition, they argue that TRAINOSE's employees have enhanced protection against termination of their employment.<sup>7</sup>

#### **4.4. Measure 4: Equity increase**

- (14) According to the notification, the Greek authorities increased the equity of TRAINOSE in 2009 with EUR 60 million, and intend to perform a second injection of capital, of EUR 65 million, in 2011.

#### **4.5. Measure 5: PSO compensations for 2011-2013**

- (15) The Greek authorities envisage starting compensating TRAINOSE for carrying out a passenger transport public service obligation (hereinafter: "PSO"). In that regard, the recently adopted Greek Railways law<sup>8</sup> provides that where there are no requests to operate a route or where such requests do not correspond to the regional transportation need, a PSO contract can be awarded in accordance with the provisions of Regulation 1370/2007/EC<sup>9</sup> (hereinafter "the PSO Regulation"). In the MoU, the amount of these PSO compensations is restricted to a maximum of EUR 50 million per year. So far, the Greek authorities have only provided the Commission with a draft contract on the basis of this law.

#### **4.6. Measure 6: SLAs between TRAINOSE and OSE**

- (16) TRAINOSE will conclude with OSE a number of Service Level Agreements (hereinafter: "SLAs"), concerning various services required for its operations. These SLAs will concern: a) the provision of rolling stock maintenance; b) the provision of rolling stock leasing; c) personnel training; d) office rental; and e) coach rental. According to the Greek authorities, all SLAs will be concluded on market terms and conditions. With the exception of the rolling stock leasing SLA (see next recital), the Greek authorities estimate the SLA's cost for TRAINOSE at EUR 32 million for 2011.

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<sup>5</sup> Law 3429/2005 allowed OSE/TRAINOSE to hire new employees under ordinary labour law.

<sup>6</sup> See fn. 4 above.

<sup>7</sup> Cp. Article 13 Ministerial decision dated 11 October 1972 establishing OSE's general employment statute, as changed by Law 2671/1998.

<sup>8</sup> Law 3891/2010 on the restructuring, reorganisation and development of the OSE Group and TRAINOSE and other provisions for the railway sector, FEK A 188/4.11.2010.

<sup>9</sup> Regulation (EC) NO 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70, OJ L 315 of 3.12.2007, pp. 1-13.

- (17) In particular, in January-February 2011, TRAINOSE already concluded with OSE, the public-owned railway infrastructure manager, a 2-years leasing contract for at least part of OSE's rolling stock – 50 diesel locomotives, 13 electric locomotives, 58 railcars, 111 passenger rolling stock and 1 823 freight rolling stock. OSE estimated to receive EUR 27.5 million in 2011 on the basis of this leasing agreement, comprising hiring charges (based on rolling stock annual book depreciation) plus a loan interest rate per category as follows: diesel locomotives 5.09%; electrical locomotives 4.84%; diesel railcars 5.67%; electrical railcars 5.59%, passenger vehicles 4.86%; cargo vehicles 5.69%.

#### **4.7. The proposed Restructuring Plan**

- (18) The Greek authorities submitted a Restructuring Plan, originally drafted in September 2010, first updated in November 2010, and partially modified through the notification of February 2011. The plan includes financial projections for 2011-2013 and a sensitivity analysis. According to the plan, TRAINOSE should become viable by 2011, due to the "front-loaded" approach of the proposed restructuring measures.
- (19) The Restructuring Plan identifies as main problems to be tackled for returning the company to viability the company's over-inflated personnel and operating costs.
- (20) As regards personnel costs, the Greek authorities plan to significantly reduce the number of TRAINOSE employees by transferring part of them to other public sector employers. In addition, new employees will receive a significantly lower wage and will be hired on an "as needed basis". There will be no new hires until the end of 2011. The Greek authorities have not provided clear information on possible new hires after this date. In the Restructuring Plan, the Greek authorities foresee to lower the overall personnel cost of TRAINOSE by 48% until the end of 2011 compared to the level of 2010, resulting in overall personnel costs of EUR 48.5 million for the same year. According to an updated calculation provided after the notification, the company's personnel cost will be lowered by 54% until the end of 2011, resulting in overall personnel costs of EUR 42.6 million for the same year. However, this estimate is based on the assumption that the proposed personnel transfer would have been completed by April 2011, which apparently did not happen.
- (21) As regards operating costs, its main components are rolling stock rent and maintenance, third party services, fuel and electricity and infrastructure charges. In order to lower the operating costs, the Greek authorities propose to suspend certain loss-making lines, as described at recital (25) below.
- (22) As regards revenue, the recently adopted Greek railway law<sup>10</sup> enables TRAINOSE to freely set its prices. According to the Restructuring Plan, the base passenger fares (excluding supplements) would be increased as of January 2011 on certain routes so as to arrive at levels between 50% and 100% of the prices applied by direct competitors from the coach transport segment. As of 2012 onwards, the passenger base ticket prices

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<sup>10</sup> See fn. no. 8 above.

(excluding supplements) will be further increased by 3% per year. Freight prices will be increased by 4% per year.

- (23) According to the calculations submitted, the above would lead to an increase in sales revenue from passenger transport of 20% in 2011 compared to 2010, and of 46% compared to the data of 2009. In 2012, the sales revenue is planned to increase by 7% compared to 2011 and in 2013 it should grow by 5% compared to 2012. This estimated growth also relies on the assumption that the number of passengers will increase by 3% each year as of 2012, due to an ameliorated level of services. Finally, TRAINOSE will abolish all free and discount tickets for passenger transport. The Greek authorities have not submitted any information on expected revenues from freight transport.
- (24) The Restructuring Plan foresees three alternative scenarios for return to viability: the so-called "optimistic", "base case" and "pessimistic" scenarios, which are a function of the number of routes that would continue to be operated and of the actual impact of the measures proposed for reducing personnel and operational costs. In essence, the optimistic and pessimistic scenarios are deviations from the base case scenario, in case of a different impact of the proposed price increase measures on passenger demand. The Greek authorities have not provided any sensitivity analysis that would model changes in passenger numbers or freight volume as a result of price increases.
- (25) Under the base case scenario, TRAINOSE would close 8 out of the current 26 lines operated, and PSO compensation would be paid throughout the restructuring period for the remaining 18 lines, which according to Greece, are all non-profitable. Under the pessimistic scenario, the restructuring would start by closing 15 lines, of which 6 would be reactivated in 2012 and 2013. In addition, all freight activities would be suspended.
- (26) In concrete, the proposed restructuring measures are:
- a. a significant payroll decrease (planned to decrease by 50% or EUR 46 million between 2010 and 2013 in the base scenario and by 68% or EUR 63 million in the pessimistic scenario);
  - b. the institution of PSO compensations for a number of lines under a cap set by the Troika (EUR 50 million per year until 2013);
  - c. suspension of operation of a number of lines (planned to decrease operating costs by 24% or EUR 47 million in the base scenario and by 39% or EUR 77 million in the pessimistic scenario); and
  - d. an increase in prices charged to customers for passenger and freight transport and optimisation of operations (price increase of tickets, suspension of all types of discount and free tickets, planned increase in sales revenue from passenger transport by 34% or EUR 41 million between 2010 and 2013 in the base scenario and planned decline of sales by 13% or EUR 15 million in the pessimistic scenario).
- (27) The key indicators of the three viability scenarios are summarised in the table below (Table 2):

**Table 2: Viability scenarios (EUR millions)**

**Base Scenario**

Revenues and costs	2009 actual data	Base case 2010	Base scenario 2011	Base scenario 2012	Base scenario 2013
Revenues	99	121	144	154	161
PSO Compensation	0	0	50	48	45
Other operating income	7	5	6	6	6
<b>Total income</b>	<b>106</b>	<b>126</b>	<b>200</b>	<b>208</b>	<b>212</b>
Personnel cost	116	93	49	49	48
Operating cost	221	196	150	154	156
<b>Total cost</b>	<b>337</b>	<b>289</b>	<b>199</b>	<b>203</b>	<b>204</b>
<b>EBITDA</b>	<b>-231</b>	<b>-163</b>	<b>1</b>	<b>5</b>	<b>8</b>

**Optimistic Scenario**

Revenues and costs	2009 actual data	Base case 2010	Optimistic scenario 2011	Optimistic scenario 2012	Optimistic scenario 2013
Revenues	99	121	150	161	170
PSO Compensation	0	0	45	43	39
Other operating income	7	5	6	6	6
<b>Total income</b>	<b>106</b>	<b>126</b>	<b>201</b>	<b>210</b>	<b>215</b>
Personnel cost	116	93	49	49	47
Operating cost	221	196	151	154	157
<b>Total cost</b>	<b>337</b>	<b>289</b>	<b>200</b>	<b>203</b>	<b>204</b>
<b>EBITDA</b>	<b>-231</b>	<b>-163</b>	<b>1</b>	<b>7</b>	<b>11</b>

**Pessimistic Scenario**

Revenues and costs	2009 actual data	Base case 2010	Pessimistic scenario 2011	Pessimistic scenario 2012	Pessimistic scenario 2013
Revenues	99	121	89	102	106
PSO Compensation	0	0	50	42	40

Other operating income	7	5	5	6	6
<b>Total income</b>	<b>106</b>	<b>126</b>	<b>144</b>	<b>150</b>	<b>152</b>
Personnel cost	116	93	44	31	29
Operating cost	221	196	99	119	122
<b>Total cost</b>	<b>337</b>	<b>289</b>	<b>143</b>	<b>150</b>	<b>151</b>
<b>EBITDA</b>	<b>-231</b>	<b>-163</b>	<b>1</b>	<b>0</b>	<b>1</b>

## 5. COMMENTS FROM GREECE

(28) In the notification submitted in February 2011, Greece argues that the measures described at recitals (7)-(16) above do not involve State aid within the meaning of Article 107(1) TFEU. Greece also considers that, should the Commission nevertheless conclude that these measures do involve State aid within the meaning of Article 107(1) TFEU, be it in part or in totality, then the aid should be retained compatible with the Treaty, either directly on the basis of Article 107(3) (c) TFEU, or on the basis of the Rescue and Restructuring Guidelines.

### 5.1. No State aid within the meaning of Article 107(1) TFEU

(29) In support of the claim that the notified measures do not involve State aid, Greece presents the following arguments:

#### *Measure 1: Write-off of 2007-2010 liabilities*

(30) The write-off of liabilities accumulated by TRAINOSE over the period 2007-2010 (see recital (8) above) should compensate TRAINOSE for the unprofitable operation of 26 passenger routes as a result of service and pricing obligations imposed through Greek law. According to Greece, these liabilities are not related to TRAINOSE's inefficiencies.

(31) Through decrees 674/1970 and 404/1972, and subsequently, through law 2671/1998, the State imposed on TRAINOSE service and tariff obligations. Yet the State never respected its own corresponding obligation to compensate TRAINOSE for the costs and losses deriving from respecting these obligations. Greece therefore argues that the write-off of these liabilities does not constitute an advantage to TRAINOSE, because the company would at any rate be entitled under national law to claim these costs as compensatory damages. As established by the Court *inter alia* in the *Asteris* judgment,<sup>11</sup> and held by the Commission in a case relating to the expropriation of German farmers,<sup>12</sup> compensation for damages incurred for acts/lack of action imputable to the State does not constitute State aid.

#### *Measure 2: Asset transfer from OSE*

<sup>11</sup> Joined Cases C-106/87 to 120/87 *Asteris and Others v. Greece and EEC* [1988] ECR I-5515, paras 24-25.

<sup>12</sup> Commission Decision 1999/268/EC, OJ L 107, 24.4.1999 p. 21.

- (32) OSE shall transfer to TRAINOSE five terminal real estate properties for a total estimated value of EUR 110.056.769 (see recital (9) above). Greece argues that the five terminals should have been transferred by OSE to TRAINOSE from the moment of its establishment, as these assets are intrinsically linked to TRAINOSE's transport activities. The transfer of the assets should therefore not imply an advantage for TRAINOSE, because the measure only aims at rectifying an omission from TRAINOSE's balance through the *ex post* application of Greek corporate law.

*Measure 3: Employees transfer*

- (33) As explained in recital (12) above, in the context of the restructuring of TRAINOSE, Greece envisages transferring 620 of its employees towards other State sectors in the base case scenario - while in the pessimistic scenario a total of 920 employees would be transferred. For the remaining 902 employees (or 602 employees in the pessimistic scenario), In March and December 2010, Greece imposed by law salary reductions for the remaining 902 employees. However, their salaries remain on average about 22% higher than for equivalent jobs in the private sector. The combination of these measures should reduce the company's payroll in 2011 to approximately EUR 48.5 million, i.e. a reduction of 48% by reference to 2010. TRAINOSE does not have the financial means to offer to its personnel a Voluntary Retirement Scheme (VRS), as it was done in similar past cases, e.g. *OTE*<sup>13</sup> and *Olympic Catering*.<sup>14</sup>
- (34) In relation to the transfer of employees to other State sectors, Greece argues first that, in line with the *Combis* judgment,<sup>15</sup> this measure does not entail an advantage to TRAINOSE, because it does not alleviate the company of burdens normally assumed in an undertaking's budget, but rather of burdens (redundancy restrictions and above-market salaries) which were imposed by the State. Greece considers that, on the substance, both *Combis* and the present measure relate to the removal of a structural disadvantage stemming from a period when the company was a State monopoly.
- (35) In addition, Greece underlines that any advantage to be derived by TRAINOSE from the employee transfer would at any rate be offset by the losses that the company shall continue to incur as a result of the privileged status of its employees as imposed by the State: even after the proposed collective salary reduction agreement, the remaining 902 employees would still retain salaries higher than the market average.
- (36) To support this second argument, Greece compares the costs that TRAINOSE would have avoided (avoided redundancy costs of a hypothetical private operator) had it offered a VRS to the 620 transferred employees, estimated at approx. EUR 37 million, with the

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<sup>13</sup> Commission Decision of 10 May 2007 on State aid C 2/06 (ex N 405/05) *Voluntary retirement scheme of OTE*, OJ L 243, 11.9.2008, p. 7.

<sup>14</sup> Commission Decision on State aid N 487/2009, *Greece contribution to voluntary retirement scheme of Olympic Catering S.A.*, OJ C 29, 5.2.2010, p. 1.

<sup>15</sup> Case T-157/01 *Danske Busvognmaend v. Commission* [2004] ECR II-00917.

"abnormal costs" generated by continuing employment for the remaining 904 employees, estimated at approximately EUR 62 million.<sup>16</sup>

- (37) The present value (PV) of a hypothetical VRS for TRAINOSE, discounted at the rate of 5.8% (the estimated rate of borrowing for Greece under the upcoming agreement with the Troika), is of approx. EUR 120 million. Greece underlines, however, that this cost is higher than what a private company would have had to bear for a similar VRS, because the salaries of the TRAINOSE are about 22% higher than for equivalent jobs in the private sector and employees are more protected against redundancy. Because of these "abnormal" elements, TRAINOSE would have to bear an additional "abnormal" cost for the VRS scheme, estimated at about EUR 83 million. Therefore Greece is of the opinion that the actual advantage, if any, of the employee transfer, should only be the cost that a private company would have to bear for such a VRS, i.e. EUR 37 million. However, as explained in recital (36) above, Greece considers that this advantage is at any rate offset by the additional costs that TRAINOSE will continue to bear for maintaining the rest of the workforce.

*Measure 4: Equity increase*

- (38) In relation to the equity increases described in recital (14) above, Greece argues that the equity increase performed in 2009 for the value of EUR 60 million, and respectively, the further equity increase of EUR 65 million that is now proposed to be carried out, do not involve State aid within the meaning of Article 107(1) TFEU, insofar as these measures are conform with the Market Economy Investor principle. Any private investor in a similar situation to the one of the State, i.e. the sole owner of the company, would have chosen to support a company facing difficulties on similar terms in order to support its restructuring efforts.

*Measure 5: PSO Compensation for 2011-2013*

- (39) Greece adopted in October 2010 a new Railway Law (effective as of 4 November 2010),<sup>17</sup> which introduces a system of compensation for the public service obligations performed by TRAINOSE that, according to the Greek authorities, complies with the PSO Regulation:<sup>18</sup>

- PSO compensation shall be granted through the conclusion of public service contracts ("PSCs");
- the use of subsidies for any other operation of the railway undertaking is strictly prohibited, and

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<sup>16</sup> The estimates were made by the consultancy PWC choosing 31 March 2011 as reference date – assuming that a VRS would be implemented on this date.

<sup>17</sup> See fn. no. 8 above.

<sup>18</sup> See fn. no. 9 above.

- the total amount of PSO compensation for all routes shall not exceed EUR 50 million per year until 2013, and at any rate shall not exceed the 10-year limitation imposed by the PSO Regulation;
- (40) In addition, the Greek Railway Law stipulates conditions for the calculation of the PSO compensation that satisfy the conditions stemming from the *Altmark* ruling:<sup>19</sup>
- PSCs shall clearly define the nature and the geographical scope of the PSO;
  - the nature of exclusive rights (if any) and the parameters for the calculation of the PSO compensation shall be clearly established in advance;
  - the arrangements for the allocation of costs connected with the provision of PSO services shall be clearly determined;
  - over-compensation is prohibited by transposing into Greek law the conditions established in this sense by the PSO Regulation.
- (41) Greece also commits not to grant PSO compensation for the operation of routes that are estimated to become profitable as a result of foreseen fare increases, i.e. the routes Athens-Thessaloniki and Athens-Larisa as of 2012 onward.
- (42) For the above reasons, Greece considers that the proposed PSO compensation until 2013 does not involve State aid.

*Measure 6: SLAs between TRAINOSE and OSE*

- (43) According to the Greek authorities, all SLAs between TRAINOSE and OSE (rolling stock maintenance, rolling stock leasing, personnel training, coach rental and office rental) were concluded on market terms, therefore there is no advantage for TRAINOSE, and consequently the SLAs do not entail State aid in the sense of Article 107(1) TFEU.
- (44) In particular, the Greek authorities submit the following arguments which in their view support the absence of an advantage in favour of TRAINOSE:
- (a) *Rolling stock maintenance*: According to the Greek authorities, the cost of rolling stock maintenance will be a function of the cost of materials as well as the average OSE maintenance personnel cost, which is equal to EUR 37.840 per year per employee. The latter is higher than the average personnel cost of the entire Athens Metro company (hereinafter: "AMEL"), equal to EUR 35.674. Therefore, the Greek authorities claim that there is no advantage granted to TRAINOSE, since the latter will pay a price which is a function of relatively higher salaries of OSE personnel.
  - (b) *Rolling stock leasing*: In January-February 2011 TRAINOSE concluded with OSE, the public-owned railway infrastructure manager, a 2-years leasing contract for part of OSE's rolling stock. According to the Greek authorities, the leasing price is

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<sup>19</sup> Case C 280/00 *Altmark Trans and Regierungspräsidium Magdenburg* [2003] ECR I-7747.

calculated on the basis of depreciation, adjusted by a certain factor, and funding cost. The Greek authorities consider this calculation to reflect market rates, therefore not to entail an advantage to TRAINOSE. In addition, the leasing agreement is claimed to be non-discriminatory vis-à-vis other operators who might be interested to also lease from OSE.

- (c) *Personnel training*: According to the Greek authorities, the average hourly cost of personnel training ranges between EUR 18 and EUR 24. This range is comparable to the subsidies and prices for equivalent technical seminars, ranging between EUR 10 and EUR 60. Therefore, the Greek authorities claim that there is no advantage granted to TRAINOSE from personnel training, since its rates correspond to the market.
- (d) *Office rental*: The Greek authorities claim that there is no advantage to TRAINOSE, because the monthly rent is set at the market value of the offices, using the 2005 valuation of OSE's real estate property and adjusting it for 2011 using an independent report for the real estate market in Athens and Thessaloniki.<sup>20</sup>
- (e) *Coach rental*: The Greek authorities claim that there is no advantage to TRAINOSE, since the annual rental cost is a function of the vehicles' current value, which is estimated by their suppliers.

## 5.2. Compatible State aid

- (45) While arguing in principal that the proposed measures do not involve State aid within the meaning of Article 107(1) TFEU, Greece also provides in subsidiary arguments in the sense that, should any of the proposed measures be qualified as State aid, at least in part, such aid would at any rate be compatible with the Treaty under the relevant applicable rules.

## 5.3. Measure 1: Debt write-off

- (46) Greece argues that, should the proposed debt write-off be qualified as involving State aid, the aid should in any event be considered compatible with the Treaty as *ex-post* PSO compensation: the compensation was calculated in compliance with the criteria stemming from Regulation 1191/69<sup>21</sup> and the *Altmark* judgment<sup>22</sup> for the period 1 January 2007 to 3 December 2009, and respectively, from the PSO Regulation<sup>23</sup> for the period 3 December 2009 to end 2010.

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<sup>20</sup> Eurobank Properties Services report, July 2010.

<sup>21</sup> Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 156 of 28.06.1969, pp. 1-7.

<sup>22</sup> See fn. no. 19 above.

<sup>23</sup> See fn. no. 9 above.

- (47) Greece calculated the *ex post* compensation allegedly due to TRAINOSE using as a proxy the year 2011 - i.e. the year in which, according to the notified Restructuring Plan, TRAINOSE should have eliminated all inefficiencies. Based on the assumption that in 2011 the company would maintain the same volume of operations as in 2010, the estimated operating losses that Greece considers attributable to the "obligation to carry", calculated as total revenues minus total expenses, would amount to EUR 85 million. To this amount, Greece adds the losses resulting from the price restrictions (calculated as total revenues without price restrictions, minus total revenues with price restrictions), which are estimated for 2011 to be between EUR 35 million and EUR 60 million. Thus, the total annual PSO compensation for 2011 was estimated within the range of EUR 120 million - EUR 145 million. Applying this proxy to the 2007-2010 period,<sup>24</sup> Greece thus estimated a total of approximately EUR 543 million of *ex post* PSO compensation. In this amount, Greece did not take into account any reasonable profit that may be due to TRAINOSE.
- (48) With regard to the difference between TRAINOSE's total pending debt of EUR 714 million and the estimated *ex post* PSO compensation of EUR 543 million, i.e. EUR 171 million, Greece claims that this amount should at any rate be considered compatible with the Treaty under the *Rescue and Restructuring Guidelines*.

*Measures 2-4: Assets and Employees Transfers, Equity Increases*

- (49) Greece considers that, should the measures described at recitals (8)-(17) above be nevertheless qualified as involving State aid, be it in part or totally, such aid would at any rate be compatible with the Treaty under the *Rescue and Restructuring Guidelines*.

Eligibility for rescue and/or restructuring aid

- (50) Greece shows that TRAINOSE is a firm in difficulty in the sense of Points 9-11 of the *Rescue and Restructuring Guidelines*. The company has accumulated losses since the beginning of its operations in 2007. The ratio of its costs to revenues has been 2:1 for 2007 and more than 3:1 for 2008 and 2009. In 2009 the company had net losses of almost EUR 231 million, current liabilities of EUR 564 million, and a negative equity of approx. EUR 443 million. Given its situation, the company cannot recover through own resources or with funds obtained from the market.
- (51) The company is not newly established in the sense of Point 12 of the *Rescue and Restructuring Guidelines*: it was legally established in December 2005, and became fully operational in January 2007. Furthermore, TRAINOSE is no longer part of a group, since it exited the OSE group in December 2008. Therefore, according to Greece, the requirements of Points 12(b) and 13 in the *Rescue and Restructuring Guidelines* are also satisfied.

"One time, last time" principle

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<sup>24</sup> It is underlined that the annual 2011 PSO compensation is realistic as a proxy, as TRAINOSE itself had projected in its 2007 Restructuring Plan an annual PSO compensation of EUR 120 million.

- (52) Greece claims that the "one time, last time" principle (Points 73-75 of the *Rescue and Restructuring Guidelines*), as well as Point 23 of the *Rescue and Restructuring Guidelines* (according to which recipient of previous unlawful aid are not eligible for rescue or restructuring aid), are respected, as TRAINOSE never received restructuring aid or any other kind of aid in the past. Furthermore, when the company was separated from OSE, according to Greece, it did not inherit from the OSE group any undue advantage.

#### Restoration of long-term viability

- (53) As indicated in paragraphs (18)-(27) above, Greece proposed a Restructuring Plan aimed at ensuring TRAINOSE's long-term viability through a mix of "rationalisation" and financial measures - the latter comprise the five notified measures. This mix of restructuring measures should improve TRAINOSE's operating margin from -235% in 2009 to 5% in 2013. By the end of the restructuring period it is foreseen that TRAINOSE's profit margin for passenger transport should be comparable to those of SNCB (Belgium), RENFE (Spain) and TRENITALIA (Italy), and the ratio of PSO compensation/costs should even be better than for operators such as SNCB or PKP (the Polish rail operator).

#### Compensatory measures

- (54) In relation to Points 38-42 of the *Rescue and Restructuring Guidelines*, it is argued that the compensatory measures to be eventually imposed on TRAINOSE should reflect the fact that the restructuring of TRAINOSE has limited adverse effects on trade and intra-EU competition, given the company's extremely low market share. By difference to other countries, in Greece trains are used only by 1.3% of the passengers, whereas coaches, buses and trolley buses are used by 17.9% of the passengers, and 80.8% of the passengers use their own cars. Furthermore, TRAINOSE only operates suburban and interurban rail passenger transport, which accounts for about 1% of the total railway passenger transportation in Greece. For freight transport, TRAINOSE only has a 3% of the market, while the rest is held by road transportation. Finally, the country's regions are classified as "assisted areas" under Article 107(3)(a) or (c) of the TFEU, which justifies a less stringent approach to the application of compensatory measures. To conclude, Greece is of the view that requirements on compensatory measures should reflect the company's low market share, the reduced impact of its restructuring on the transport market, and the Greek region's status of "assisted areas".
- (55) Greece proposes to take into account as compensatory measures the following:
- i) the closure of 8 out of 26 loss-making train routes under the base scenario of the Restructuring Plan (to be eventually complemented by further transport capacity closures if the pessimistic scenario of the Restructuring Plan is activated);
  - ii) the closure of all non-viable international coach routes;
  - iii) the reduction of total number of employees from 1661 to 1210, and the reduction of the average salary from EUR 54 000 to EUR 40 000 in 2011;

iv) the tendering of the suspended routes (subject to respecting the EUR 50 million PSO compensation cap);

v) the privatisation of TRAINOSE;

vi) the commitment that TRAINOSE will neither reactivate non-viable international coaches services, nor expand to other business segments such as truck transport services, etc.

#### Aid limited to the minimum / own contribution

(56) Greece notes from the outset that TRAINOSE has very limited possibilities of providing a significant own contribution as required at Points 43-45 of the *Rescue and Restructuring Guidelines*. The company is entirely State-owned, it has no significant non-core assets or activities to divest, and its difficult financial condition renders unlikely the prospects of obtaining funding from the market without State support. Furthermore, Greece considers that the circumstances of particular hardship that the country is now confronted with justify an own contribution rate lower than 50%, as foreseen by Point 44 of the *Rescue and Restructuring Guidelines*.

(57) TRAINOSE's own contribution would thus result principally from increased revenues as of 2010, the disposal of minor unnecessary assets, and the generation of positive cash flow as of 2010. In addition, in line with the Bank Burgenland precedent,<sup>25</sup> Greece proposes to also take into account payroll reductions (by 20% in 2010) and the running down of its reserves. Finally, Greece proposes to take into account as own contribution the private funds to be brought into the company following its privatisation.

#### *Measure 5: New PSO Compensation*

(58) Greece decided to award the public service contracts ("PSCs") directly to TRAINOSE until 2014. It considers that this direct contracting practice is in compliance with the PSO Regulation. Indeed, Article 5 of the PSO Regulation requires that PSCs be awarded through public tenders, yet Article 5(6) of the Regulation allows the possibility to award the PSCs directly, and Article 8(2) of the same Regulation allows for a transitional period until 2019 for the Member States to adapt with the provisions of the PSO Regulation, whereas Greece will shorten this "transitional period" until 2014.

(59) In addition, the PSCs to be awarded to TRAINOSE for the period 2011-2013 shall respect the mandatory requirements of the PSO Regulation regarding the possibility of legal review of the award decisions, annual reporting on the parameters of financial compensation and quality standards for directly-awarded PSCs, etc.

(60) Finally, Greece commits to calculate PSO compensation to be granted to TRAINOSE for the period 2011-2013 in compliance with the requirements of the PSO Regulation and the

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<sup>25</sup> Commission Decision on State aid C 44/2003 *Bank Burgenland* [2004] OJ L 263, p. 8, para. 108.

criteria of the *Altmark* ruling,<sup>26</sup> particularly by excluding the possibility of over-compensation:

- The compensation shall not exceed the costs incurred in relation to PSO minus revenues generated by the PSO plus a reasonable profit;
  - To avoid overcompensation where the operator carries out other transport activities beyond the PSO, any quantifiable financial effects of the operator's network shall be taken into account;
  - The company shall keep separate accounts for PSO and for non-PSO activities;
  - The compensation method should promote effective management and a sufficiently high quality of passenger services.
- (61) Particularly related to the last aspect, i.e. that PSO compensation should not cover management inefficiencies, Greece considers that the implementation of the Restructuring Plan guarantees that PSO compensation shall not be used to cover operational inefficiencies.
- (62) Greece also underlines that the annual PSO compensation shall not include any "reasonable profit", but shall only cover operating losses on each route that shall continue to be operated in the base case scenario, estimated to total the following annual sums: EUR 50 616 737 for 2011, EUR 48 359 089 for 2012; and EUR 45 265 971 for 2013. Furthermore, as of 2012, no PSO compensation shall be paid for the two routes that are estimated to become profitable as of that date in the base case scenario: Athens-Thessaloniki and Athens-Larisa.

*Measure 6: SLAs between TRAINOSE and OSE*

- (63) Greece argues that the terms and conditions of the SLAs do not confer an advantage to TRAINOSE. In subsidiary, should an advantage be identified, Greece considers that the aid should be declared compatible with the Treaty under the Rescue and Restructuring Guidelines.

## **6. ASSESSMENT**

- (64) The Commission will first examine whether the measures notified and some partially already implemented constitute State aid for TRAINOSE in the meaning of Article 107 (1) TFEU (see below Point 6.2), and consequently, whether such aid might be compatible with the internal market (see below Point 6.3). This decision addresses as a preliminary point the issue of whether TRAINOSE is a company in difficulty, which is relevant both for the assessment of existence of aid and the compatibility assessment (see below Point 6.1).

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<sup>26</sup> See fn. no. 19 above.

## 6.1. Company in difficulty

- (65) According to the information submitted by Greece, TRAINOSE fulfils the criteria under national law for being subject to collective insolvency proceedings since at least 2007. Therefore, it is, pursuant to point 10(c) of the Rescue and Restructuring Guidelines, a company in difficulty.
- (66) The Commission observes furthermore that, as set out in detail in table 3 below, the company's operating and financial performance deteriorated significantly in the period 2007-2010.

**Table 3: TRAINOSE' key financial data (EUR millions)**

	2007	2008	2009	2010
Turnover	103.8	108.0	98.7	102.7
EBT	-155.1	-232.2	-231.1	-187.3
Accumulated losses	192.3	424.5	655.6	842.9
Registered capital	153.0	153.0	213.0	213.0
Own equity	-39.2	-271.5	-442.6	-629.9
Debt	162.2	441.0	566.6	779.9
Debt/equity	-4.13	-1.62	-1.28	-1.23

Data from TRAINOSE's 2007-2010 annual reports.

- (67) Point 10(a) of the Rescue and Restructuring Guidelines stipulates that a company is in difficulty 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 provision 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 stipulated in Point 9 of the same Guidelines).
- (68) In the case of TRAINOSE, as it appears in its financial statements for the years 2007-2010, the registered capital was not lost, but it actually increased from 2008. However, the Commission notices that over the same period the company's equity was negative. At the same time, the company did not adopt appropriate measures in order to tackle the decrease of its own equity, as foreseen by Greek legislation.<sup>27</sup> In earlier cases<sup>28</sup> the Commission concluded that, where a company has negative equity, there is an *a priori* assumption that

<sup>27</sup> See fn. no. 4 above.

<sup>28</sup> Commission Decision in State aid case C 38/2007 *Arbel Fauvet Rail*, OJ L 238 of 5.09.2008, p. 27.

the criteria of Point 10(a) are met. The General Court also concluded in a recent judgment<sup>29</sup> that a company with negative equity is a company in difficulty.

- (69) Finally, as regards Point 11 of the Rescue and Restructuring Guidelines, the usual signs of a firm being in difficulty, such as increasing losses and mounting debt, have been present since 2007.
- (70) Accordingly, the Commission is of the view that TRAINOSE can be considered at least since 2007 as a company in difficulty.

## 6.2. Existence of State aid

- (71) Article 107(1) TFEU stipulates 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 and affects trade among Member States is incompatible with the Internal Market. It follows that, for a State measure to be qualified as State aid within the meaning of Article 107(1) TFEU, four cumulative criteria should be met: use of State resources; selective advantage to the beneficiary; and (potential) distorting effects on competition and intra-EU trade.
- (72) Greece argues that the measures described at recitals (8)-(18) do not involve State aid within the meaning of Article 107(1) TFEU. As these arguments relate mainly to the selective advantage condition, accordingly, this issue is addressed first (Section 6.2.1 below). The other conditions for establishing the existence of State aid, i.e. use of State resources, effect on competition and intra-EU trade, are subsequently examined in Sections 6.2.2 to 6.2.3 below.

### 6.2.1. *Selective Advantage*

- (73) To involve State aid, a measure must confer a selective advantage (that an undertaking would not have obtained under normal market conditions. First, it is assessed whether the measures under assessment confer such an advantage. In a second step, it is examined whether such an advantage is selective.

#### 6.2.1.1. Advantage

##### *Measure 1: Write-off of 2007-2010 liabilities*

- (74) As explained in recitals (30)-(31) above, this measure aims to write off debts accumulated by TRAINOSE towards OSE. According to the Greek authorities, TRAINOSE did not have financial means to serve its debts towards OSE due to the fact that in the past it never received compensation for performing its public service tasks. Moreover, still according to the Greek authorities, the company could obtain this compensation through

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<sup>29</sup> Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T 120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-0000.

national court proceedings, by claiming damages under Greek corporate law. In this respect, Greece refers to Court and Commission practice according to which such damage compensation would not be considered State aid.

- (75) Indeed, the Court held in the *Asteris* judgement<sup>30</sup> that damages which the national authorities of a Member State may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute State aid. The Commission stated in a decision relating to the expropriation of German farmers that no aid is involved if the advantage, i.e. the compensation for the operator, did not exceed the losses suffered by the operator as a result of such action.<sup>31</sup>
- (76) However, having assessed the information Greece has adduced so far, the Commission takes the preliminary view that it is questionable that these arguments are acceptable in the case at hand.
- (77) First of all, the Commission notes that the debts are written off by OSE, and not by the Greek State. There is no indication that TRAINOSE would have a claim against OSE on the basis of alleged PSO imposed by Greece.
- (78) Second, part of the debts seems to be related to freight transport, for which Greece has never claimed a PSO. Therefore, only a part of the debt would result from PSO.
- (79) Third, the laws invoked by Greece, and which allegedly constitute the legal basis for PSO, do not contain any mentioning of an entitlement for OSE to be compensated. Although it cannot be ruled out that damages may be awarded without relying on a specific provision in the laws invoked by Greece, this entitlement to damages appears questionable at this stage, based on the information available.
- (80) Fourth, at this stage it is still hypothetical that the company would indeed be awarded damage compensation for discharging past PSOs which were not clearly defined at the time, because Greece did not provide up to present evidence that such litigation could be successful under national law.
- (81) Fifth, it is also not certain that the amount of damage compensation possibly quantified by a court would be equal to the losses that Greece now proposes to write off. At this stage, no Court enforcement action has been initiated by TRAINOSE and the entitlement of TRAINOSE to obtain such damage compensation is therefore so far only hypothetical.
- (82) In addition, the question of whether the *ex-post* PSO compensation would entail an undue advantage to TRAINOSE should also be assessed on the basis of the criteria stemming from the *Altmark* ruling,<sup>32</sup> where the Court established that an undertaking does not receive an economic advantage – i.e. no aid is involved - where the compensation for a public service complies with four cumulative criteria:

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<sup>30</sup> Cases C-106 to 120/87 *Asteris and Others v. Greece* [1988] ECR 5515 paragraphs 24-25.

<sup>31</sup> Commission Decision 1999/268/EC, OJ 24.4.1999 L 107 p. 21, p. 36.

<sup>32</sup> See fn. no. 19 above.

- i) the PSO to be discharged must be clearly defined;
  - ii) the parameters for calculating the compensation should be clear and transparent and established in advance;
  - iii) the compensation should be limited to covering the difference between revenues and costs associated with discharging the PSO, plus a reasonable profit; and
  - iv) if the PSO were not entrusted by public tender, the level of compensation must not exceed the costs that a typically well-run undertaking performing the same tasks would incur.
- (83) Since the four criteria laid down by the *Altmark* judgment are cumulative, failure to comply with one of those criteria is sufficient to verify that the measure under review confers an advantage. Based on the information provided so far, the Commission takes the preliminary view that none of the four cumulative criteria are met:
- (a) At this stage, it is unclear whether the PSO imposed through Greek law to TRAINOSE for the period 2007-2010 were sufficiently clearly defined (first *Altmark* criterion). So far, Greece has not demonstrated that the "obligation to carry" and "pricing obligation" imposed through Greek law<sup>33</sup> can be interpreted as clearly defined PSOs.
  - (b) The Commission doubts that the parameters on the basis of which the *ex-post* PSO compensation is now calculated were established in advance in an objective and transparent manner (second *Altmark* criterion). Indeed, Greece has not submitted so far clarifications with respect to the objectivity and transparency of the parameters for calculating the PSO compensation resulting from the above-mentioned national law. It would appear that the law does not contain any mention of compensation payments, and therefore the parameters have not been defined in advance.
  - (c) It is questionable that the method proposed by the Greek authorities for calculating the *ex-post* PSO compensation, i.e. using as a basis estimated PSO costs for 2011 and extrapolating these costs to the previous 3 years, ensures that the level of compensation offered for the period 2007-2010 excludes the possible over-compensation that could be derived from "internalising" past internal inefficiencies (third *Altmark* criterion).
  - (d) Furthermore, as TRAINOSE has been a company in difficulties during the relevant period, it would seem that its costs are not comparable to those of a typically well-run undertaking performing the same tasks, as the fourth *Altmark* criterion requires.
- (84) Therefore, the Commission considers on the basis of the information available so far concerning the PSOs carried out by TRAINOSE in the past that none of the four *Altmark* criteria is met. Accordingly, at this stage the Commission takes the preliminary view that the intended debt write-off provides an advantage to TRAINOSE.

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<sup>33</sup> See Legislative Decree 674/1970, Decree 404/1972, Law 2671/1998 and Law 3429/2005.

### Measure 2: Asset transfer

- (85) Concerning the transfer of assets, the Greek authorities argue that the freight terminal buildings are intrinsically linked to transport activities and should have been transferred from OSE to TRAINOSE earlier, when the company was created by spin-off from OSE (see above recital (32)).
- (86) The Commission first of all points out that the presence of an advantage has to be assessed at the point in time at which the transfer takes place, based on the effects of the transfer. Therefore, in order to establish whether the transfer of the terminals confers an advantage on TRAINOSE, it is necessary to compare the financial situation of the company before the transfer with the financial situation of the company after the transfer. It is clear that the terminals have a positive economic value, and TRAINOSE would receive them for free, and therefore, after the transfer, the company's financial situation might be improved.
- (87) The Commission furthermore points out that Article 6 of Directive 91/440/EC on the development of the Community's railways forbids the transfer of assets from the infrastructure manager to railway operators.<sup>34</sup> Therefore, even if the transfer was foreseen at the time of the spin-off, it would in any event have been contrary to EU legislation.
- (88) Last but not least, if the assets had been transferred to TRAINOSE at the moment of the spin-off, also liabilities would have had to be transferred.
- (89) In addition, on the basis of the information available at this stage, TRAINOSE might have received an advantage in the past, as long as it was able to use the freight terminals free of charge.

### Measure 3: Transfer of employees

- (90) According to the Greek authorities, the reduction of workforce through the transfer of employees is a one-off compensation for the structural disadvantage that TRAINOSE will continue to bear in relation to the Remaining employees. Greece relies on the *Combus* judgement<sup>35</sup> to argue that this measure does not involve State aid (for details see above recital (34)).
- (91) The Commission observes in this regard that, according to settled case-law, the concept of aid encompasses advantages granted by public authorities which, in various ways, mitigate the charges which are normally included in the budget of an undertaking.<sup>36</sup> The Court of Justice has held in this respect that a partial reduction of social charges devolving upon an undertaking constitutes aid within the meaning of Article 107(1) TFEU, if that

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<sup>34</sup> OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2007/58/EC.

<sup>35</sup> See fn. no. 15 above.

<sup>36</sup> See, inter alia, the judgments in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR I; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 34; and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19.

measure also has the effect to exempt the undertaking from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system.<sup>37</sup>

- (92) In *Combust*, the civil servants who had opted for the change to employment on a contractual basis received a payment from the company *Combust* that was funded by the Danish State. In this context, the Court of First Instance held in an *obiter dictum* that "*the intention was thus to free Combust from a structural disadvantage it had in relation to its private sector competitors [...]*". According to the Court of First Instance, such a measure did not provide an advantage to the company and "*the Danish government could have obtained the same result by reassigning those officials within the public administration, without paying any particular bonus [...]*".<sup>38</sup>
- (93) With regard to the applicability of this part of the *Combust* judgment, the Commission first recalls that Greece relies on an *obiter dictum*, which has not been confirmed by the Court of Justice.<sup>39</sup>
- (94) Certain judgments of the Court of Justice tell against the assumption that the provision of compensation for a structural disadvantage means that a measure cannot be categorised as aid. In its settled case-law, the Court of Justice has decided that the extent to which a measure constitutes aid must be determined according to the effects of the measure and not by reference to its causes or aims.<sup>40</sup> The Court has also decided that any measure exempting an undertaking from the charges which are normally included in its budget constitutes state aid.<sup>41</sup> The Court has made clear that this includes, for example, the costs linked to employee pay.<sup>42</sup> In the light of these considerations, the Court has rejected the notion that a measure does not give an advantage to the undertaking solely because it compensates some disadvantage which the undertaking has suffered in the past.<sup>43</sup>

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<sup>37</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 15; to the same effect, judgment in Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

<sup>38</sup> See fn. no. 15 above, paragraph 57.

<sup>39</sup> See Commission Decision in State aid case C 43/2006 of 10.10.2007, OJ L 63 [2008] p. 16, para. 145.

<sup>40</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; Case C-130/85 *Deufil*, [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

<sup>41</sup> Case 387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; Case C-241/94 *France v Commission*, [1996] ECR I-4551, paragraph 34.

<sup>42</sup> Case C-5/01 *Belgium v Commission* [2002] ECR I-1191, paragraph 39.

<sup>43</sup> Case C-30/59 *Gezamenlijke Steenkolenmijnen* [1961] ECR 3, paragraphs 29-30; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraphs 12-13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraphs 40 and 46-47; See also Case T-109/01 *Fleuren Compost* [2004] ECR II-127, paragraph 54.

- (95) Furthermore, at this stage the Commission has doubts that the context of the proposed transfer measure is comparable with the *Combus* situation. It considers that at this stage, the Greek authorities have not demonstrated the existence of a structural disadvantage. The Commission points out in this regard that Greece so far has not demonstrated that the State has imposed quasi civil servant status for the employees of TRAINOSE.
- (96) The Greek authorities have not explained which part of the staff has been hired after the entry into force of the law of 2005, which enabled TRAINOSE to hire staff under conditions that differed from the collective agreements. At the latest as of that point, any decision to hire staff under the more generous conditions has been a free decision of the undertaking, which was no longer imposed by the State.
- (97) The Greek authorities also argue in the subsidiary that, should any advantage be derived by TRAINOSE from the employee transfer, this advantage would at any rate be offset by the losses that the company shall continue to incur because of the fact that it must still retain 902 privileged-status employees, whose salaries remain higher than in the private sector even after their reduction by law. Greece estimates that the "abnormal costs" the company shall thus continue to bear for the remaining privileged-status employees are approximately EUR 62 million, whereas the potential advantage that the company would derive from the employee transfer is of only EUR 37 million, i.e. the cost that Greece estimates for a hypothetical similar VRS scheme for a private company.
- (98) The Commission observes that Greece has not clarified the exact nature of the privileges retained by the 902 Remaining employees. Furthermore, at this stage the Commission also has doubts on the quantification of the alleged disadvantage deriving from employing the Remaining employees. The estimate of EUR 62 million does not reflect the various uncertainties linked to the actual period of time over which TRAINOSE will continue to bear extra costs for the Remaining employees (e.g. future evolution of number of employees and of salary levels, further possible transfers to the wider public sector, for example in the context of privatisation).
- (99) In sum, it seems at this stage that the transfer of employees might give an advantage to TRAINOSE. For the reasons set out in the *La Poste* decision,<sup>44</sup> the Commission has doubts that the methodology proposed by the Greek authorities to quantify the advantage is appropriate.

Measure 4: equity increase

- (100) The Greek authorities argue that the equity increases, as described at recital (38), do not involve an advantage to TRAINOSE, because they were respectively will be performed on terms comparable to what a private economy investor in a similar situation would have also done in the given circumstances (the Market Economy Investor principle).

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<sup>44</sup> Commission Decision in State aid case C 43/2006 of 10.10.2007, OJ L 63 [2008] p. 16 recitals 136 and following.

- (101) According to an established jurisprudence,<sup>45</sup> in order to determine whether investment made by the public authorities in the capital of an undertaking, in whatever form, may constitute State aid, it is necessary to consider whether in similar circumstances a private investor might have provided injections of capital of such an amount. Although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not to be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral - and guided by prospects of profitability in the longer term. Furthermore, the considerations guiding a private investor who already has an involvement in the company may be slightly different from those of a private investor without any previous involvement in the company. In that sense, a majority shareholder who subscribes the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation, could be considered as private market economy investor intending to secure its investment done in the past.<sup>46</sup>
- (102) Based on the information available so far, the Commission doubts that a private investor in a similar situation to the one of the Greek State, i.e. the exclusive owner of a company experiencing serious difficulties, would have decided to further support the company on similar terms.
- (103) Concerning the first equity increase, for the amount of EUR 60 million, performed in 2009, at the time when the State decided to inject further public capital it was evident that the company was experiencing serious financial difficulties: losses were increasing from one year to the other, and the company's equity was negative (see recital (65) above). Yet it seems that the State decided to perform the capital increase operation without assessing the risk of the investment and the expected return of investment, nor did it seek to identify the sources of the company's difficulties and propose a new business strategy destined to bring it back on track.
- (104) Concerning the second equity increase, for the amount of EUR 65 million, to be performed in the future, Greece argues in essence that, given that the company shall be restructured, the return that the State as owner would obtain from this operation would be 138% of the investment within 3 years. Greece however did not provide any calculation for this. Furthermore, it has to be noted that the State intends to further increase its participation into a company with serious difficulties and which it seemingly intends to privatise in the short run. Greece did not submit so far explanations about why the capital increase of EUR 65 million is necessary in the context of the proposed Restructuring Plan, or in view of its privatisation, and how this measure links to the other measures proposed in order to redress the company's financial situation. In the light of these factors, at this

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<sup>45</sup> See e.g. Case C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603, para. 20, and Case T-296/97 *Alitalia v. Commission* [2000] ECR II-3871, para. 96.

<sup>46</sup> Cp. Case C-303/88 *Italy v. Commission - State aid to undertakings in the textile and clothing sector (ENI Lanerossi)*, [1991] ECR I-1433.

the Commission takes the preliminary view that the proposed capital injection constitutes an advantage for TRAINOSE.

#### Measure 5: new PSO compensation

- (105) In relation to the PSO compensation to be paid for the period 2011-2013 (see recitals (39)-(42) above), Greece argues in essence that this compensation shall be established on the basis of criteria that are in full compliance with the *Altmark* ruling<sup>47</sup> and the PSO Regulation,<sup>48</sup> and therefore, the measure should either be considered as involving no undue advantage to TRAINOSE, or at most, be considered compatible with the Treaty on the basis of the PSO Regulation.
- (106) The question of whether the PSO compensation for the period 2011-2013 entails an advantage to TRAINOSE should be assessed on the basis of the criteria stemming from the *Altmark* ruling. The criteria stemming from this ruling were outlined in recital (82).
- (107) The Commission first of all notes that Greece has not transmitted the final PSO contracts for the years 2011-2013. Therefore, it is not possible for the Commission to establish whether the PSO payment of 50 million EUR per year foreseen complies with the *Altmark* criteria.
- (108) Furthermore, since the four criteria laid down by the *Altmark* judgment are cumulative, failure to comply with one of those criteria is sufficient to verify that the measure under review confers an advantage. Similar to the doubts raised in relation to the *ex post* PSO compensation (see recitals (82)-(84) above), on the basis of the information provided so far, it is questionable that the fourth *Altmark* criterion is met for the future PSO compensation. Under this criterion, when the PSO is not established on the basis of a tendering procedure, in order to be able to conclude that the PSO trustee does not derive an advantage in the form of an over-compensation for the services provided, the level of compensation would have to be determined on the basis of an analysis of the costs incurred by a typical, well-run undertaking appropriately equipped with means of transport. First, it needs to be noted that TRAINOSE is at the moment a company in difficulty (see recital (65)(70) above). In addition, the estimates for the PSO compensation due to TRAINOSE for the years 2011-2013 are based on assumptions linked to the proposed Restructuring Plan. It is unclear at this stage that the assumptions on which the Restructuring Plan is based are solid (see recitals (136)-(137) below) and therefore it is still unclear whether compliance with the fourth *Altmark* criterion shall be secured.

#### Measure 6: SLAs between TRAINOSE and OSE

- (109) According to the Greek authorities, all the service level agreements (SLAs) between TRAINOSE and OSE (rolling stock maintenance, rolling stock leasing, personnel training, coach rental and office rental) (as described at recital (16) above) are concluded on market terms, therefore there is no pricing advantage for TRAINOSE.
- (110) As regards the rolling stock maintenance agreement, the Greek authorities claim that the price charged by OSE to TRAINOSE reflects *inter alia* salary costs of OSE, which are

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<sup>47</sup> See fn. no. 19 above.

<sup>48</sup> See fn. no. 9 above.

higher than those of a comparable company such as AMEL. The Commission doubts that this comparison is pertinent. First, the argument relies on a comparison with AMEL's average salary costs at the level of the entire company, and not only for its maintenance section. Indeed, AMEL is active not only in the maintenance of rolling stock, but principally in the operation of the Athens metro transport. Above all, this argumentation does not answer to the question, which is whether the rolling stock maintenance contract confers an advantage to TRAINOSE through preferential lower pricing.

- (111) Furthermore, the Commission observes that the maintenance of rolling stock is a market open to competition, on which several operators are active across the EEA. Therefore, it takes the preliminary view that the market price for the provision of rolling stock maintenance should not depend on the cost structure of OSE, but on the rates normally charged for this kind of service on the market.
- (112) As regards the rolling stock leasing, the Greek authorities calculate the lease on the basis of annual depreciation, adjusted by a certain factor (multiplication of depreciation by 2/3). It is unclear how this depreciation factor was chosen, and how it ensures a market-conform price for the leasing contract. The Commission also observes that leasing of rolling stock is a market open to competition, on which several operators are active across the EEA. Furthermore, the market price for rolling stock should not depend on the book value of the rolling stock, but on supply and demand for the asset. This has recently been confirmed by the General Court for aircraft leasing.<sup>49</sup> The reasoning of the General Court appears to be transferable to rail transport.
- (113) As regards personnel training, the Greek authorities claim that the rates correspond to the market, since their range is comparable to the prices for equivalent technical seminars (EUR 18 to EUR 21, in comparison with EUR 10 to EUR 60). However, the Greek authorities have not provided a detailed comparison between the specific training provided to TRAINOSE and similar trainings by other providers. Such a comparison should be more accurate than the submitted broad comparison between ranges of subsidies and fees. Therefore at this stage it is unclear whether the personnel training fees reflect market rates.
- (114) As regards office rental, the Greek authorities claim that the monthly rent is set at the market value of the offices, using the 2005 valuation of OSE's real estate property, and adjusting it for 2011. They then used an independent report for the real estate market in Athens and Thessaloniki to determine the monthly rent. Such a reference to estimates of market values, sourced from independent evaluators, could reduce the possibility of an advantage to TRAINOSE. Yet on the basis of the information provided so far in relation to this aspect, it seems that the adjustment of the estimate of the real estate value was not done by an independent expert, but by TRAINOSE itself. Therefore, it cannot be excluded at this stage that TRAINOSE might derive an advantage from this contract.
- (115) As regards coach rental, the Greek authorities claim that the annual rental cost is a function of the vehicles' current value, which is estimated by their suppliers. The

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<sup>49</sup> T-415/05, paragraph 221

Commission observes that leasing of coaches is a market open to competition, on which several operators are active across the EEA. Furthermore, the market price for coaches should not depend on the book value of the rolling stock, but on supply and demand for the asset. This has recently been confirmed by the General Court for aircraft leasing.<sup>50</sup> The reasoning of the General Court appears to be transferable to coaches.

- (116) To conclude, on the basis of the above considerations, at this stage it is not excluded that at least some of the SLAs between TRAINOSE and OSE might confer an advantage to TRAINOSE.

#### 6.2.1.2. Selective advantage

- (117) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods. The measures under assessment will be granted to TRAINOSE, one specific company. Therefore, the Commission considers that the measures taken constitute a selective advantage to the beneficiaries.

#### 6.2.2. State resources and imputability

- (118) The measures will be granted by the Greek State. Accordingly, they stem from State resources and are imputable to the State.
- (119) As regards measure 1, the write-off of liabilities accumulated in the years 2007-2010 shall be done by OSE on the basis of Article 13 of the Greek Railway Law.<sup>51</sup> This appears to be a clear indication that the criteria for establishing imputability of a measure implemented by a different body than a State institution, as stemming from the jurisprudence,<sup>52</sup> are met.

#### 6.2.3. Distortion of competition and effect on trade

- (120) The Commission has to consider whether the measures taken by the Greek authorities in favour of TRAINOSE are likely to distort competition and affect trade between Member States, by providing this company with an advantage over (potential) competitors not receiving public support.
- (121) The EU rail freight market was first opened to competition on 15 March 2003 on the trans-European rail freight network with the first railway package.<sup>53</sup> The second railway package liberalised all international freight transport on 1 January 2006, and national rail

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<sup>50</sup> T-415/05, point 221

<sup>51</sup> See fn. 8 above.

<sup>52</sup> Case C-482/99 *French Republic/Commission (Stardust Marine)* [2002] ECR I-4397, para. 55.

<sup>53</sup> Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 75 of 15.3.2001, p. 1.), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ L 75 of 15.3.2001, p. 26), Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75 of 15.3.2001, p. 29, Directive as last amended by Directive 2007/58/EC (OJ L 315 of 3.12.2007, p. 44)).

freight from 1 January 2007.<sup>54</sup> Notwithstanding the liberalisation of freight transport, in Greece, TRAINOSE is so far the sole provider of such services. Yet any potential undue advantage to TRAINOSE might place at disadvantage from the outset potential new entrants on the freight transport market. In addition, rail freight is in competition at least with road freight transport, and therefore road freight transporters might also be affected.

- (122) With regards to passenger transport, as from 1 January 2010, the third railway package opened the market for international passenger transport. While this only concerns international services, it does include the *cabotage* on these lines.<sup>55</sup> At any rate, as established by the Court in the *Altmark Trans* judgment, the fact that a transport company is active only in one Member State does not exclude the possibility of aid having distorting effects on intra-EU trade. In this respect, it must be noted that since 1995 several countries have, opened unilaterally their rail passenger transport. In this respect, any advantage granted to a rail transport company in one Member State may reduce the possibility for a competitor from another Member State to trade on this geographic market. Furthermore, there is no lower threshold or percentage in terms of the size of the company or the amount of aid under which effect on intra-EU can be excluded.<sup>56</sup>
- (123) Greece argues that TRAINOSE has a rather reduced market share for both freight and passenger transport (see recital (54) above): only 1% for freight transport (the rest being held by road freight carriers), and only 1.3% for passenger transport, whereas coaches, buses and trolleys allegedly would have 17.9%, and 80.8% of the passengers use their own cars. In addition, Greece considers that air transport is not a substitute for passenger rail and road transport in Greece, because even on those few routes where rail and air transport coexist, the time difference of travel to destination eliminates the possibility of substitutability (e.g. Athens Thessaloniki: 4.5 hours by train v. 50 minutes by airplane).

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<sup>54</sup> Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (OJ L 164 of 30.4.2004, p. 1), Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 164 of 30.4.2004, p. 44), Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system (OJ L 164 of 30.4.2004, p. 114) and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 164 of 30.4.2004, p. 164).

<sup>55</sup> A third package was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 (OJ L 315 of 3.12.2007, p. 1), Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315 of 3.12.2007, p. 14), Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315 of 3.12.2007, p. 44) and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community (OJ L 315 of 3.12.2007, p. 51).

<sup>56</sup> See fn. 19 above, paras. 77-81.

- (124) The arguments and evidence presented by the Greek authorities so far to support their argument that TRAINOSE has a very reduced market share for both passenger and freight transport, and therefore the distorting potential of the proposed measures (if any) would be limited, therefore have to be rejected, in line with the *Altmark* judgement and for the reasons set out above in recitals (121)-(122).

#### 6.2.4. Conclusion on the existence of State aid

- (125) On account of the arguments above, the Commission considers at this stage that the proposed measures might involve State aid within the meaning of Article 107(1) TFEU to TRAINOSE.

### 6.3. Compatibility of the aid

- (126) State aid measures to land transport companies can be considered compatible on the basis of the exceptions laid down in Articles 93, 107(2) and 107(3) TFEU.
- (127) As explained in recitals (29)-(44) above, the Greek authorities argue in the main that the proposed measures do not constitute State aid within the meaning of Article 107(1) TFEU. In subsidiary, Greece provides arguments in the sense that, should the proposed measures be qualified as aid, be it in part or totally, the aid should be declared compatible with the Treaty as aid for public service compensations, and respectively restructuring aid.
- (128) As indicated in recitals (71)-(124) above, at this stage, it is doubtful that the proposed measures can be qualified not to involve, at least in part, an undue advantage to TRAINOSE. Therefore, it is necessary to also examine at this stage whether the proposed measures may be declared compatible with the Treaty under the relevant State aid rules.
- (129) In this context it must be noted that the burden of proof of the compatibility of aid with the common market, by way of derogation from Article 107(1) TFEU is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied.<sup>57</sup>
- (130) The Commission will first assess whether part of the measures can be declared compatible on the basis of Article 93 TFEU, while acknowledging that they are intrinsically linked to the Restructuring Plan.
- (131) The Commission will then assess the compatibility of the proposed measures with Article 107(3)(c) TFEU and the Rescue and Restructuring Guidelines.<sup>58</sup> It must be noted that under Point 20 of the Rescue and Restructuring Guidelines, given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until the restoration of its viability.

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<sup>57</sup> E.g. Case T-68/03, *Olympiaki Aeroporia Ypiresies AE v Commission*, 2007 ECR II-02911, para. 34-37.

<sup>58</sup> According to the *Community Guidelines on State aid for railway undertakings*, OJ C 184 of 22.7.2008, p. 13, the Commission assesses the compatibility of State aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 Guidelines on State aid for restructuring.

- (132) Greece has not invoked a possible compatibility on the basis of Article 107(3)(b) TFEU. Given the particular difficulties that the Greek economy is currently confronted with, the Commission cannot exclude that the aid may be declared, at least in part, compatible on the basis of Article 107(3)(b) TFEU, which stipulates that the Commission may declare compatible with the internal market aid to remedy a serious disturbance in the economy of a Member State. The Commission will therefore also shortly assess this possibility.

#### *6.3.1. Rescue and Restructuring Guidelines*

- (133) As explained in recitals (71)-(125) above, on the basis of the information currently available, at least part of the proposed measures could *prima facie* be considered to involve State aid. At this stage the Commission doubts that the identified aid could be declared compatible with the Rescue and Restructuring Guidelines, because it seems that several of the conditions and principles of the latter might not be met. The basic conditions and principles of the Guidelines are outlined in what follows, with an indication of those aspects which seem to be problematic at this stage.

##### *Eligibility*

- (134) Under Point 33 of the Rescue and Restructuring Guidelines, only companies in difficulty are eligible for rescue and restructuring aid. As described above at recitals (65)-(70), it seems that TRAINOSE can indeed be considered as company in difficulty within the meaning of Points 9-11 of the Guidelines, and that the conditions of Points 12 and 13 are also met.

##### *Restoration of long-term viability*

- (135) According to Points 34 and 35 of the Rescue and Restructuring Guidelines, restructuring aid is linked to a viable Restructuring Plan, restoring the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions.
- (136) Whereas the Greek authorities have submitted a Restructuring Plan for TRAINOSE, the Commission has doubts whether this plan meets the above conditions. In particular, the Commission doubts that the Restructuring Plan is sufficiently solid so as to restore the long-term viability of TRAINOSE. First, it seems that the Restructuring Plan relies exclusively on personnel and cost reductions and increases in revenues from higher ticket pricing, but it does not seem to explore sufficiently whether the company also has other inefficiency issues to be addressed. Second, some of the assumptions on which the Restructuring Plan relies, e.g. the impact of proposed price increases on demand, seem not to be based on generally-acknowledged market data. Third, some of the assumptions of the Restructuring Plan seem to be outdated at this stage, e.g. the transfer of employees was supposed to have occurred by April 2011, and to this date, it seems that only 60% of the personnel were transferred. Fourth, the viability calculations appear to rely on a very fragile income-cost balance, which makes the Restructuring Plan very sensitive to the smallest variations in revenues and costs. At this stage, it cannot be excluded that the proposed restructuring might be insufficient, and the company might need further support

in the medium term. Fourthly, the restructuring plan lacks any sensitivity analysis for changes in demand, and any explanations on the assumptions for rail freight.

#### Compensatory measures

- (137) According to Points 38 to 42 of the Rescue and Restructuring Guidelines, restructuring must be accompanied by compensatory measures in proportion to the distortive effects of the aid and, in particular, to the size and the relative importance of the beneficiary firm on its market.
- (138) The Greek authorities argue that TRAINOSE's market share is negligible (1% in passenger transport, 3% in freight transport). However, at this stage, it still needs to be further explored whether the Greek authorities estimated well the size and relative importance of TRAINOSE on the relevant markets. As regards passenger transport, Greece should further substantiate its claims regarding the inclusion of car passenger transport in this market as well as the non-substitutability of rail and air passenger transport on certain routes. With respect to freight transport, the impact of the eventual aid on potential competition in an already-liberalised market segment must be further analysed. The Commission also invites third parties to comment on the competitive position of TRAINOSE.
- (139) Furthermore, it is doubtful whether the compensatory measures proposed by Greece (see recital (55) above) might be considered as appropriate and/or sufficient. First, the closure of 8 out of 26 loss-making lines and of the non-viable international coach routes (see points i) and ii) of recital (55) above) does not appear to be acceptable as a compensatory measure, because the closure of such lines might at any rate be necessary to restore viability (Point 40 of the Rescue and Restructuring Guidelines). Second, the same can be said about the reduction of employees from 1661 to 1210 and the reduction of the remaining employees average annual salaries from EUR 54 000 to EUR 40 000 (point iii) of recital (55) above). Third, Greece has not explained why, in its view, the privatisation of TRAINOSE could be qualified as compensatory measure for the purposes of Point 40 of the Rescue and Restructuring Guidelines. As to the tendering of the suspended routes (subject to the overall EUR 50 million PSO cap) and the commitment not to expand in other business segments (road transport), Greece has not provided so far evidence to substantiate that these measures would be sufficient to compensate for the potential distorting impact of the restructuring aid that might eventually be involved in the operation.

#### Own contribution

- (140) According to Points 43 to 45 Rescue and Restructuring Guidelines, aid beneficiaries are expected to make a significant contribution to the Restructuring Plan from their own resources, including the sale of assets that are not essential to the firm's survival, or through external financing on market conditions. External financing in particular would be a sign that the markets believe in the feasibility of the Restructuring Plan. No matter of its form, the own contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.

- (141) The Commission will normally consider the following contributions to the restructuring to be appropriate: at least 25 % of the overall cost of the restructuring operation in the case of small enterprises, at least 40 % for medium-sized enterprises, and at least 50 % for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a lower contribution.<sup>59</sup>
- (142) In relation to the own contribution condition, Greece underlines that TRAINOSE has very limited own resources (no significant non-core assets to divest), and that, given the company's difficulties, external financing is also difficult to obtain. Given these circumstances, Greece proposes as own contribution the cash flow to be generated as of 2010, the divestiture of minor unnecessary assets, payroll reductions, the reduction of own reserves, and the private funds to be brought in the company following its privatisation. Finally, Greece also requests the application of the more lenient approach foreseen by Point 44 of the Guidelines, which allows for the reduction of the own contribution in circumstances of particular hardship demonstrated by the Member State.
- (143) However, at this stage the Commission doubts that, even under the more lenient approach foreseen by Point 44 of the Guidelines, the company would be able to match the own contribution requirements of the Guidelines in light of the potentially notable amounts of aid that might be involved in the restructuring operation – theoretically up to EUR 1.07 billion in the hypothesis that all proposed measures, would qualify as aid.
- (144) In addition, it is doubtful that the proposed own contributions are acceptable under Point 44 of the Guidelines. For example, this Point clearly excludes the possibility of considering future cash flows as own contribution. By the same token, payroll reductions seem to be necessary restructuring measures rather than an own contribution. It is also doubtful that a company with negative equity since years ago has reserves that can be used for own contribution. Finally, at this stage it is unclear how much private funding could be provided through funds to be eventually brought into the company by a potential buyer. Nonetheless, it is important to underline that, according to the information available so far about the restructuring operation, bringing private funds into the company via privatisation appears to be the only realistic way for TRAINOSE to be able to bring in the own contribution required by Point 44 of the Guidelines, in light of the company's current difficult financial situation.

*One time last time principle*

- (145) At this stage, the information available is not conclusive on whether the "one time last time" principle established by Points 72 to 77 of the Guidelines is met, i.e. whether the

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<sup>59</sup> See, e.g., Commission Decision of 14.12.2010 in State aid case C 8/2010 *Restructuring aid to Varvaressos*, not yet published, and Commission Decision of 22 July 2009 on State aid C 18/05 *Restructuring aid to Stocznia Gdańsk*, OJ L 21 of 26.03.2010, p. 19.

company has indeed not received rescue and restructuring aid during the previous ten years. Greece argues that the company did not receive rescue and restructuring over the past 10 years, but the information provided so far does not enable at this stage the Commission to conclude that indeed this criterion is respected.

Preliminary conclusion on compatibility with the Guidelines

- (146) For the reasons explained in recitals (135)-(145) above, at this stage, the Commission has several doubts concerning compliance with the conditions of the Rescue and Restructuring Guidelines.

6.3.2. *PSO compensation*

- (147) As explained in recitals (82)-(84) and (105)-(107) above, at this stage there are doubts that at least one of the four cumulative criteria stemming from the *Altmark* ruling are met for Measures 1 and 5. In this hypothesis, the compatibility with the Treaty of Measures 1 and 5 could also alternatively be assessed on the basis of the PSO Regulation, while acknowledging that they are intrinsically linked to the Restructuring Plan (see recital (129) above).

- (148) Indeed, Article 93 TFEU provides that aid shall be compatible if it "*meets the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*" This Article is a *lex specialis* in relation to Articles 106(2), and 107(2) and (3) of the TFEU.

- (149) Article 93 TFEU was first implemented by Regulation (EEC) No 1191/69 concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (hereafter: "old PSO Regulation")<sup>60</sup>, and Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway.<sup>61</sup> On 3 December 2009, the Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (hereinafter: "PSO Regulation")<sup>62</sup> entered into force and repealed the old PSO Regulation and (EEC) No 1107/70 concomitantly.

Measure 1: write-off of 2007-2010 liabilities

- (150) The Greek authorities argue that Measure 1, i.e. the write-off of liabilities up to EUR 714 million incurred by the company allegedly as a result of discharging passenger transport obligations over the period 2007-2010, if it were to be considered State aid, be it in part or totally, then the aid could also alternatively be found compatible with the Treaty as an *ex-post* PSO compensation complying with the conditions of the old PSO Regulation, while acknowledging that they are intrinsically linked to the Restructuring Plan (see recital (129) above).

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<sup>60</sup> OJ L 156, 28.6.1969, p.1.

<sup>61</sup> OJ L 130, 15.6.1970, p. 1.

<sup>62</sup> See fn. no. 9 above.

- (151) The Commission has doubts whether to the measure under assessment the old PSO Regulation would be applicable. Following the Commission Decision *Danske Statsbaner*,<sup>63</sup> the PSO Regulation should be considered as applicable in the present context (see recitals (147)-(149)). However, it is unclear at this stage if the compatibility conditions stemming from Articles 4 and 5 of the PSO Regulation are met. For example, Article 4 of the PSO Regulation seeks to avoid the payment of overcompensation for the PSO provided. Therefore, the compensation should not exceed the amount required to cover the net financial effects on costs incurred and revenues generated in discharging the PSO. Yet, the methodology proposed by Greece for calculating the *ex post* compensation (see recital (47) above) might not ensure that this condition is met. In particular, with respect to compensation calculation criteria established in the Annex to the PSO Regulation, Greece has not substantiated so far that the methodology used for calculating *ex-post* a PSO compensation for 2007-2010 does not exceed the difference between the costs incurred minus any positive financial effects generated within the network operated under the PSOs, minus receipts from tariffs or any other revenue generated while fulfilling the PSO. It is noted that Greece declares not to have included in the calculation also a reasonable profit, but the other elements previously mentioned for the calculation of the net financial effect have not been substantiated.
- (152) Furthermore, the proposed calculation methodology is questionable to the extent that it relies on cost assumptions made under the Restructuring Plan for the year 2011, whose results are then retroactively applied for the period 2007-2010. It is unclear at this stage whether the cost calculations for 2011 do reflect indeed the costs incurred for the carrying out of PSOs for the period 2007-2010.

*Measure 5: PSO compensation for 2011-2013*

- (153) The Greek authorities argue that Measure 5, the PSO compensation for 2011-2013, will be compatible as PSO compensation according to the PSO Regulation.
- (154) According to Article 4(1)(a) of the PSO Regulation, public service contracts should clearly define the PSOs with which the entrusted operator is to comply with and the geographical areas concerned. As so far, Greece has not submitted a final version of the public service contract, at this stage, it could not be verified if this condition will be met.

*6.3.3. Article 107(3)(b) TFEU*

- (155) Under Article 107(3)(b) TFEU, aid that contributes to remedy a serious disturbance in the economy of a Member State may be considered compatible with the internal market. The jurisprudence<sup>64</sup> establishes that this Treaty provision must be applied restrictively and the

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<sup>63</sup> Commission Decision of 24 February 2010, C 41/2008, OJ L 7, 11.1.2011, p. 1.

<sup>64</sup> See Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v. Commission* [1999] ECR II-3663, para. 167, thereafter applied in several Commission Decisions, e.g. Case C 28/2002 *Bankgesellschaft Berlin*, OJ L 116 of 4.5.2005, p. 1, Case C 50/2006 *BAWAG*, OJ L 83 of 26.03.2008, p.7, Case NN 70/2007 *Northern Rock*, OJ C 43 of 16.2.2008, p.1.

aid must be necessary to remedy a serious macroeconomic disturbance that a Member State might be facing.

- (156) Greece is indeed currently confronted with a serious macroeconomic disturbance, which it seeks to tackle with EU and IMF financial assistance under the supervision of the European Commission, the European Central Bank, and the International Monetary Fund. As explained in recitals (2)-(3), the release of the financial assistance to Greece is conditional on the country achieving quantitative performance criteria, and on respecting the commitments undertaken in the Memoranda of Understanding concluded with the three mentioned international institutions. In this context, Greece committed *inter alia* to fully implement a plan for the recovery of TRAINOSE and to privatise the company by the end of 2011.
- (157) The Commission will therefore explore whether the notified measures could be compatible aid under Article 107(3)(b) TFEU. The Commission observes in this regard that, depending on the organisation of the transport system, rail transport may constitute an essential service for the functioning of the economy of a Member State, and that an interruption in rail transport may trigger systemic knock-on effects on the entire economy of a Member State, in particular due to interruptions in the supply chain. These effects could be particularly severe in countries undergoing macroeconomic restructuring. The Commission is at this stage not in a position to take a view on the question as to whether this is the case of the Greek railway system. It therefore invites Greece and interested parties to submit any relevant information in this regard.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Greece to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Greece that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Greece that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
B-1049 Brussels

Fax No: +32-2-296.1242

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-President of the Commission

## **TEXT OF SUMMARY**

*Subject: State aid SA 32544 (ex N/2011) Restructuring of the Greek Railways – TRAINOSE S.A.*

### **I. Procedure**

On 9 February 2011, Greece notified several measures in favour of the Greek Railway company TRAINOSE S.A. The Commission requested further information by letter dated 5 April 2011, to which the Greek authorities replied on 6 May 2011.

### **II. Description**

Beneficiary of the measures in question is TRAINOSE S.A., the Greek railway service provider. The company is active in both national and international passenger and freight transport. TRAINOSE S.A. has been facing financial difficulties for several years.

Greece is currently confronted with a serious macroeconomic disturbance, which it seeks to tackle with EU financial assistance under the supervision of the European Commission, the European Central Bank and the International Monetary Fund. Those international institutions, together with Greece, set up a macroeconomic recovery programme for Greece, of which details are laid down in the so-called Memoranda of Understanding. The release of the financial assistance to Greece is conditional on the country achieving quantitative performance criteria, and on respecting the commitments undertaken in the Memoranda of Understanding. In this context, Greece committed inter alia to fully implement a plan for the recovery of TRAINOSE and to privatise the company by the end of 2011.

Accordingly, Greece set up a Restructuring Plan for TRAINOSE that aims at the restoration of long-term viability of the company, identifying as main issues the company's over-inflated personnel and operating costs. The proposed restructuring measures are a significant payroll decrease, the institution of Public Service Obligation compensations for a number of lines under a cap set by the Troika (EUR 50 million per year until 2013), suspension of operation of a number of lines and an increase in prices charged to customers as well as optimisation of operations.

To support the implementation of this Restructuring Plan, several measures in favour of TRAINOSE are foreseen: (i) a write-off of debts, (ii) the transfer of assets, (iii) the transfer of employees to other public sector employers, (iv) a capital increase, (v) compensation for Public Service Obligations of the company and (vi) Service Level Agreements between TRAINOSE and OSE S.A., the infrastructure manager. Those measures, amounting totally to approximately EUR 1.2 billion, were notified to the Commission.

Greece considers that the notified measures either do not involve State aid, or at most they involve State aid that would be compatible either directly on the basis of Article 107(3) TFEU, or on the basis of the Rescue and Restructuring Guidelines

### **III. Assessment**

Given the information provided, at this stage, it is doubtful that the proposed measures can be qualified not to involve, at least in part, an undue advantage to TRAINOSE. Accordingly, the notified measures might entail State aid in the meaning of Article 107(1) TFEU.

Therefore, it is necessary to also examine whether the proposed measures are likely to be compatible with the Treaty under the relevant State aid rules.

Since the measures are proposed in relation to a Restructuring Plan, the Commission must assess their likely compatibility with Article 107(3)(c) TFEU and the Rescue and Restructuring Guidelines. At this stage, it is doubtful that the proposed measures, if they were qualified to involve aid, could be compatible as restructuring aid, as not all of the requirements of the Rescue and Restructuring Guidelines seem to be met.

In relation to the measures involving Public Service Obligation compensation, their compatibility with the Treaty might also alternatively to be assessed on the basis of the Public Service Obligation Regulation 1370/2007/EC, while acknowledging that they are intrinsically linked to the Restructuring Plan. At this stage, the information submitted so far by Greece does not allow verifying if the conditions laid down in that Regulation are met.

Finally, it also needs to be considered whether the particular difficulties that the Greek economy is currently confronted with would justify assessing the proposed measures under Article 107(3)(b) TFEU.

### **IV. Conclusion**

In the light of the foregoing considerations, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) TFEU in respect of the measures described above.