



EUROPEAN
COMMISSION

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COMMISSION DECISION

of 25.7.2016

**ON THE STATE AID
SA.37185 (2015/C) (ex-2013/N)
which Spain has granted and partially implemented
for the funding of the Centro de ensayos de alta tecnología ferroviaria de Antequera
(CEATF)**

(Text with EEA relevance)

(Only the Spanish version is authentic)

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PUBLIC VERSION

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THE EUROPEAN COMMISSION,

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

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

After giving notice to the parties concerned to submit their comments pursuant to the provisions cited above¹ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 5 August 2013, Spain prenotified to the Commission an aid for the funding of a test centre for high technology railway in Antequera ("*Centro de Ensayos de Alta Tecnología Ferroviaria de Antequera*", the "CEATF"). The notification was registered on 30 September 2013. The Commission requested supplementary information by letters dated 28 November 2013, 28 March, 25 July and 5 December 2014, to which the Spanish authorities answered by letters dated 6 February, 20 May, 15 October 2014 and 23 January 2015.
- (2) By letter dated 23 March 2015, the Commission notified Spain of its decision to initiate proceedings pursuant to Article 108(2) of the Treaty on the above-mentioned measure.

¹ OJ C 188, 05.06.2015, p. 10.

- (3) The decision of the Commission to initiate proceedings ("the opening decision") was published in the *Official Journal of the European Union*². The Commission invited interested parties to submit their comments on the aid.
- (4) At the request of the Commission, a meeting was held with the Spanish authorities on 28 May 2015. Spain submitted its observations on the opening decision on 2 July 2015. The Commission requested additional information by letters dated 8 September, 15 October 2015 and 15 January 2016, to which the Spanish authorities replied by letters dated 28 September, 13 November 2015 and 21 January 2016.
- (5) The Commission received comments from companies operating in the railway sector on 7, 9, 10, 16, 17 and 23 July 2015. Those ten companies are railways operators, rolling stock manufacturers or companies which provide virtual testing facilities or which test materials.
- (6) The Commission forwarded those comments to Spain by letter dated 24 September 2015, to which Spain replied by letter dated 14 October 2015.
- (7) Finally, on 26 July 2013, the Spanish authorities submitted the project, in the form subsequently notified to DG Competition on 30 September 2013, to Directorate General Regional and Urban Policy of the Commission as a "Major Project" to be financed under a Multi-Regional Operational Programme in force in Spain at the time³. They withdrew the project by letter dated 14 April 2015.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Objective and description of the CEATF project

- (8) The notified measure concerns the public financing of a research infrastructure designed to operate as a test centre for high-speed rolling stock and related equipment. The objective of the CEATF project is to provide a unique infrastructure in Europe to allow the required testing, validation and approval processes to be carried out for high-speed rolling stock.
- (9) The CEATF project consists of a railway circuit where trains can run at very high speeds (up to 520 km/h) and auxiliary installations that allow research, approval and tuning of mobile rail equipment, infrastructure and superstructure elements. More specifically, the facilities of the centre allow research on railway dynamics, on the new generation of traction and braking for trains, and on signalling systems of rail infrastructure.
- (10) The railway circuit is a ring of 58 km in length with a straight section of 9 km that allows speeds of up to 520 km/h to be reached. The circuit comprises curves of large radius that, combined with specific cant, allow running at a certain speed and lateral acceleration.
- (11) Spain indicated that the railway circuit is designed to be used for the type approval of rolling stock that travels up to 520 km/h, corresponding to type approval on large and very large radius curves⁴.

² Cf. footnote 1.

³ Multi-regional Operational Programme "Research, Development and Innovation (R&D&I) for and by Enterprises – Technology Fund" adopted by the Commission on 7 December 2007 (Decision C/2007/6316). The Programme engages Community support in all Spanish regions within the framework of the Convergence and Regional Competitiveness and Employment Objectives.

⁴ Second submission of the Spanish authorities, received and registered on 20 May 2014, p.12, confirmed in their submission of 22 January 2015.

- (12) The circuit is also equipped with two sections of double tracks and platforms that can be used for type approval of rolling stock that travels at 250 km/h⁵ or under, as well as for infrastructure and superstructure tests.
- (13) The circuit is equipped with connection branches, which can be used for type approval on small and very small curves.
- (14) The auxiliary installations include the Integrated Centre for Rail Services ("*Centro Integral de Servicios Ferroviarios*", "the CISF") which hosts laboratories, offices and training rooms. The laboratories consist of a multifunctional workshop and test preparation area that should facilitate assembly and disassembly of train equipment, tasks of development of the different on-board systems and research, development and innovation activities ('R&D&I'). A part of this area is dedicated to tests on optimal rolling stock behaviour for future validation and approval of railway vehicles.
- (15) The auxiliary installation also include rails for specific testing, a multitension substation to provide energy to the circuits, and a traffic control centre.
- (16) The construction and operation of the railway circuit would be entrusted to a Public-Private Partnership (PPP), grouping ADIF (*Administrador de Infraestructura ferroviaria*, see recital (24) below) and a consortium of undertakings. The consortium of undertakings should take the legal form of a Special Purpose Vehicle (SPV, "*Sociedad de Propósito Específico*" - "*SPE*")⁶, which will be responsible for the construction of the test centre and then for its operation for 25 years. ADIF is appointed as the owner of the CEATF.
- (17) Before the invitation to tender which was published in the Spanish official journal on 2 July 2013⁷, the Spanish authorities indicated that meetings were held with potential interested companies and that coordinated surveys were carried out. According to them, the replies confirmed a high level of interest within the private sector in the implementation of the project⁸. The companies that showed major interest in the project are companies from the building sector (40.43% of the questionnaires received) and rolling stock manufacturers (12.76% of the questionnaires received). They indicated their interest in participating in the project and taking risks subject to some guarantees on their investment, since the information available on the profitability at the time of the study was not sufficient to commit firmly⁹.
- (18) However, the first call for tender to select the SPV was declared void in October 2013, as no bidder had expressed interest in the project. The process of selecting a bidder was then suspended while awaiting the final decision of the Commission on the project.
- (19) The Spanish authorities confirmed that only economic activities are to be performed at the CEATF. If ADIF or its subsidiary ADIF Alta Velocidad were to use the centre for their own tests, they would do so under the same conditions as other users, during the 25 years of the contract period.

⁵ As described in section 2.3.1 below, the project underwent technical design changes during the preliminary feasibility study phase until it reached its final form in April 2013, when ADIF submitted the project to the Ministry of Public Works and Transports.

⁶ See section 2.4 of the opening decision for a more detailed description.

⁷ Spanish official journal (BOE) No 157, 2 July 2013.

⁸ Deloitte, "*Final conclusions on the questionnaires received on the project for the development, construction, maintenance and operation of ADIF's railway ring in Antequera under public-private partnership*", 8 October 2012.

⁹ Executive summary of the Deloitte report, reproduced in the submission of the Spanish authorities of 22 January 2015.

- (20) The Spanish authorities indicated that three railway test centres are currently in operation in Europe (Cerhenice (Velim) in the Czech Republic, Wildenrath in Germany and Valenciennes in France). According to them, those facilities only allow for testing at lower speeds (see Table 1 below).

	Velim (Czech Republic)	Wegberg- Wildenrath (Germany)	Valenciennes ¹⁰ (France)	TTCI - Puebla (USA)	CEATF (Spain)
Year of construction	1963	1997	1999	1998	To be built
Number of circuits	2	5	4	4	1
Length (km)	3.9 and 13.3	From 0.4 to 6.1	From 1.6 to 2.7	From 5.6 to 21.7	9 straight 58 ring
Top speed (km/h)	210	160 (large circuit)	110	265 (large circuit)	520
Owner	Railway Research Institute, branch of the national rail operator	Siemens	CEF SA (61 % owned by Alstom)	Association of American railroads	National rail operator – ADIF

1. Table 1 : Comparison between other operating railway test centres in Europe, one in the US and the CEATF (source : Spanish authorities)

- (21) The Spanish authorities indicated that the Spanish rolling stock manufacturers most commonly use, for on track-testing, the facilities offered by Velim and Wildenrath, but also the test centre TTCI of Puebla in the United States.
- (22) Testing of high-speed rolling stock is also carried out on railways in commercial use that have a maximum design speed of 350 km/h, with tests being carried out at up to 385 km/h as required by the standard (10% over the nominal speed of the train). The tests are performed at night when there are no commercial passenger train services.

2.2. The beneficiary

- (23) ADIF, as intended owner of the Centre, has requested public funding for the construction of the CEATF.
- (24) ADIF, created in 2005, is a 100% state-owned company that operates under the responsibility of the Ministry of Public Works and Transport ("*Ministerio de Fomento*"). ADIF is the owner of the Spanish railway infrastructure and is responsible for its management (construction, maintenance, repair and administration).
- (25) A new publicly-owned company named ADIF-Alta Velocidad was created by Royal Decree-Law 15 of 13 December 2013 on the restructuring of ADIF¹¹. As a result, the branch responsible for the construction and management of the conventional national railway network (ADIF) is now separate from the branch in charge of the management of high-speed railway lines (ADIF Alta Velocidad).
- (26) According to the Spanish authorities, ADIF's activities include the construction and administration of rail infrastructure comprising tracks, stations and freight terminals, managing rail traffic, distributing capacity to rail operators, collection of fees for infrastructure, station and freight terminal use and operation of its own assets (such as industrial and intellectual property portfolio). Those activities constitute economic activities. Other economic activities include rental of space for shops, trade fairs,

¹⁰ Source : <http://www.c-e-f.fr/>

¹¹ *Ley 39/2003 del Sector Ferroviario*, Published in the Spanish official journal (BOE) No 299, of 14 December 2013.

exhibitions, stands, promotions or shows in ADIF stations¹². Those activities represent 99.97% of ADIF's revenue. The Spanish authorities however indicated that ADIF may also perform other activities that, in their view, are of a non-economic nature, for example research and development (R&D).

2.3. Description of the aid measure

2.3.1. Design of the project, legal basis and financing

- (27) In February 2009, the Ministry of Public Works and Transport entrusted ADIF with the task of identifying feasible options for a rail-testing facility that would allow R&D&I for advanced solutions in the high-speed railway sector.
- (28) On 15 December 2009, ADIF and the Council of Andalucía ("*Junta de Andalucía*", via its Council of Innovation, Science and Enterprises) formalised a Memorandum of Understanding, setting out the commitment of both institutions to create the Railway Technology Centre ("*Centro de Tecnologías Ferroviarias*", "the CTF"¹³) at the Andalucía Technology Park and a rail-testing facility, namely the CEATF, in the province of Malaga.
- (29) A first version of the project which was presented to the Ministry of Public Works and Transport on 1 June 2010 involved the construction of a main ring circuit of 57 km length for high-speed trains (with a maximum testing speed of 450 km/h) and two secondary circuits (20 km and 5 km length) for testing metros and tramways (with a maximum speed of 220 km/h). Different locations for the main circuit and different design options were under examination. The initial document presented four alternatives for the main circuit and two for the secondary circuits and was elaborated in order to launch the environmental impact assessment of the project.
- (30) In parallel with ADIF's studies designed to identify the most suitable option for a high-speed railway test centre, Spain included proposals for such a project in its Operational Programme (under Council Regulation No 1083/2006¹⁴), in order to obtain ERDF funds¹⁵.
- (31) On 1 December 2010, ADIF provisionally approved the "*Informative study for Testing and experimentation facilities associated with the ADIF railway technology centre in Malaga*". The document presented a multicriteria analysis of two alternatives for the main circuit (1A and 1B) and two alternatives for the secondary circuit (1B1 and 1B2). The document concluded that alternatives 1B and 1B1 were the most appropriate.
- (32) An agreement ("*convenio de colaboración*") for the financing of the construction and equipment of a high-speed technology railway centre was signed between the Ministry of Science and Innovation and ADIF on 27 December 2010. In particular, the State agreed to provide financing to ADIF in the form of loans and a grant. The grant was qualified as an "advance" from the ERDF funds¹⁶.

¹² Commercially managed by ADIF's Passenger Stations Department (Source: www.adif.es).

¹³ The railway technology cluster operating in the same region, see recital (12) of the opening decision

¹⁴ Council Regulation No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210 of 31.7.2006, p.25).

¹⁵ Minutes of the meeting of the "*Comité de seguimiento del programa operativo de I+D+I por y para el beneficio de las empresas – Fondo tecnologico 2007-2013*" – 11 June 2010. The Committee is chaired by the General Director for ERDF in the Spanish Ministry of Economy and attended by representatives of the participants in the Operational Programme (both public administrations and companies) and the Commission.

¹⁶ The Spanish authorities submitted the text of the agreement by email dated 2 July 2015.

- (33) ADIF started to receive transfers from the State in January 2011. According to the Spanish authorities¹⁷, those advances were partly used for feasibility studies and partly for the construction of laboratories (the CISF) at the location where the CEATF project was intended to be established in the region of Antequera.
- (34) After a long administrative and consultative process, and following some comments during the first public consultations, ADIF decided to reconsider the scope of the project. A new alternative (1C) consisting of a circuit where trains can reach a speed of 520 km/h on the straight section and removing the secondary circuits (and replacing them by two portions of connected tracks to the main circuits) was introduced in the documents and further analysed.
- (35) ADIF then carried out an additional investigation and drew up the "*Basic Plan for the test and research facilities of the ADIF Railway Technology Centre in Malaga. Main and secondary circuit and connections*". This document, based on alternative 1C, presented the project as described in section 2.1 above. This plan was submitted to the Directorate General for Railways of the Ministry of Public Works and Transport, which decided to launch a public consultation on 8 April 2013¹⁸.
- (36) Following the public consultation, the project was approved at ministerial level on 27 June 2013 (by the Directorate General for Railways of the Ministry of Public Works and Transport), subject to the final approval of the Council of Ministers.
- (37) On 28 June 2013, the Council of Ministers formally approved the project¹⁹ and its financing and authorised the Ministry of Public Works and Transport to launch the tender, via ADIF, for the construction and exploitation of the CEATF²⁰.
- (38) Consequently, the financing of the notified project was first based on the agreement of 27 December 2010 and then on the Decision of the Council of Ministers of 28 June 2013.

2.3.2. *The aid instrument*

- (39) According to the Decision of 28 June 2013, the total costs of the project amount to EUR 358.6 million²¹. The public financing covers the full costs of the project and is to be granted by the Ministry of Economy and Competitiveness in the following way:
- (a) EUR 99.6 million in the form of loans (EUR 91.3 million from Convenio INNVENTA 2010, EUR 1.7 million from Programa INNPLANTA 2010 and EUR 6.6 million from programa INNPLANTA 2011)²².
 - (b) EUR 259 million in the form of a grant, paid from the general State budget and qualified as "advances" from the funds of the European Regional Development Fund (ERDF) (EUR 253.2 million from Convenio INNVENTA 2010, EUR 3.9

¹⁷ Spanish authorities' emails of 1 and 8 June 2015 confirmed in submission of 13 November 2015, page 5 and annexes to it.

¹⁸ Publication on the Spanish Official Journal (BOE), 17 April 2013.

¹⁹ In accordance with the technical characteristics set out as definite (maximum speed, number and shape of circuit, location and type of rolling stock to be tested on).

²⁰ Resolution of the State Department for Infrastructure, Transport and Housing endorsing the project and presenting its objectives and the forthcoming process. See recital (10) of the opening decision.

²¹ The exact amount is EUR 358 552 309.00 rounded up to EUR 358.6 million; see the Decision of the Council of Ministers of 28 June 2013.

[http://prensa.adif.es/ade/u08/GAP/Prensa.nsf/0/80A8FA05AE117307C1257B9B00284BC1/\\$file/130628%20Anillo%20Ferroviario%20Antequera%20Consejo%20Ministros.pdf?OpenElement](http://prensa.adif.es/ade/u08/GAP/Prensa.nsf/0/80A8FA05AE117307C1257B9B00284BC1/$file/130628%20Anillo%20Ferroviario%20Antequera%20Consejo%20Ministros.pdf?OpenElement)

²² Source: p.85 of the notification memorandum (September 2013) complemented by email of 2 July 2015 and submission of 13 November 2015. The structure of the financing in the form of a grant (qualified as "advance grant") and loans originates from the agreement signed in 2010 but the budget has been updated after the decision taken on 28 June 2013.

million through calls from programa INNPLANTA 2010 and EUR 1.9 million from Programa INNPLANTA 2011).

- (40) Concerning the loans to be granted to ADIF for the project and described in recital (39)(a) above, the Spanish authorities provided the following details:

PROGRAMME	INTEREST RATE	REPAYMENT PERIOD	MAXIMUM SUM (EUR million)
INNVENTA 2010	1.17 %	2016-2024	91.3
INNPLANTA 2010	1.17 %	2015-2025	1.7
INNPLANTA 2011	0.00 %	2014-2018	0.8
	3.06 %	2015-2025	5.8
			99.6

Table 2: Structure and repayment of the loans of the CEATF project (source: Spanish authorities)

- (41) The loans are remunerated at different rates, depending on the tranches and programmes under which they are granted.
- (42) In order to compare the interest rates of the above-mentioned loans with the actual market rates, the Spanish authorities provided a list of commercial loans granted to ADIF/ADIF Alta velocidad over the past five years, together with their conditions²³ (EIB excluded):
- (a) In 2010, ADIF was granted seven loans: three with a fixed interest rate of 4.036% to 4.580%, the four others were granted at variable interest rates calculated on the Euribor rate at 3 to 12 months, to which a margin of 100 to 170 basis points was applied depending on the duration of the loan;
 - (b) In 2011, ADIF was granted 11 loans with a variable interest rate calculated on the Euribor rate at 3 to 6 months to which a margin of 210 to 250 basis points was applied depending on the duration of the loan. For instance, on 8 April 2011, ADIF was granted a loan of EUR 75 million with a duration of seven years with a variable interest rate calculated on the Euribor rate at six months, to which a margin of 230 basis points was applied (with a three year grace period and semestral reimbursement);
 - (c) The Commission notes that the basis points margin applied to the loans granted to ADIF increased in 2013 and 2014, up to 450 basis points²⁴.

2.3.3. The funds already disbursed to ADIF

- (43) Spain also indicated that, by November 2015, ADIF had received a total net amount of EUR 139.9 million comprising "advance grants" and loans. Tables 3, 4 and 5 below describe in detail the financing received by ADIF from January 2011 onwards:

	INNVENTA	INNPLANTA 2010	INNPLANTA 2011	TOTAL (net) (EUR million)
Advance grants	130.0	3.9	1.25	135.2

²³ They listed all the loans obtained by ADIF and ADIF-Alta Velocidad but with effect from 1 January 2013, the date on which ADIF split into ADIF and ADIF-Alta Velocidad. Assets related to the railway circuit have remained within ADIF.

²⁴ In 2012, the fixed interest rate was 4.884 % and the variable interest rate was calculated on the Euribor rate at 3 to 6 months to which a margin of 275 to 400 basis points was applied depending on the duration of the loan. In 2013, the fixed interest rate was 6.28 % and the variable interest rate was calculated on the Euribor rate at 6 months to which a margin of 400 to 450 basis points was applied depending on the amount of the loan.

	INNVENTA	INNPLANTA 2010	INNPLANTA 2011	TOTAL (net) (EUR million)
Loans	-	1.7	3.0	4.7
TOTAL	130.0	5.6	4.2	139.9

Table 3: Updated figures of amounts received by ADIF – November 2015 (Source: Spanish authorities).

ADVANCE GRANTS				
	Date	Activity		Amounts (in EUR)
Convenio Innventa				
(1)	17/01/2011			30 000 000
(2)	17/01/2012			100 000 000
			Total Innventa (1+2)	130 000 000
Programa Innplanta 2010				
(3)	17/01/2011	Act 2		3 023 790
(4)	11/01/2012	Act 2		966 210
(5)	28/02/2013	Act 2	<i>reimbursement</i>	-25 084
			Total Innplanta 2010 (3+4+5)	3 964 916
Programa Innplanta 2011				
(6)	02/05/2012	Act 16		161 000
(7)	13/02/2013	Act 16		857 500
(8)	10/01/2014	Act 16		857 500
(9)	16/07/2014	Act 16	<i>reimbursement</i>	- 627 591
			Total Innplanta 2011 (6+7+8+9)	1 248 409
(10)	Total all programmes disbursed (1+2+3+4+6+7+8)			135 866 000
(11)	Total all programmes reimbursed (5+9)			- 652 675
	Total all programmes remaining (net) (10+11)			135 213 325.00

Table 4: Details of the tranches of the grants (Source: Spanish authorities)

LOANS					
	Date	Activity	Interest rate		Amounts (in EUR)
Convenio Innventa					
				Total	00
Programa Innplanta 2010					
(1)	17/01/2011	Act 2	1.17%		1 295 910
(2)	11/01/2012	Act 2	1.17%		414 090
(3)	28/02/2013	Act 2	1.17%	<i>reimbursement</i>	-10 750

				Total Innplanta 2010 (1+2+3)	1 699 250
Programma Innplanta 2011					
(4)	02/05/2012	Act 13	3.06%		236 000
(5)	13/02/2013	Act 13	3.06%		5 087 000
(6)	27/11/2013	Act 13	3.06%	<i>reimbursement</i>	- 2 839 388
(7)	02/05/2012	Act 16	3.06%		69 000
(8)	13/02/2013	Act 16	3.06%		367 500
(9)	10/01/2014	Act 16	3.06%		367 500
(10)	16/07/2014	Act 16	3.06%	<i>reimbursement</i>	- 268 467
				Total Innplanta 2011 (4+5+6+7+8+9+10)	3 019 145
(11)	Total all programmes disbursed (1+2+4+5+7+8+9)				7 837 000
(12)	Total all programmes reimbursed (3+6+10)				- 3 118 605
	Total all programmes remaining (net) (11+12)				4 718 395

Table 5: Details of the tranches of the loans with interest rate to be applied (Source: Spanish authorities)

- (44) The total²⁵ amount disbursed by the Spanish State to ADIF is EUR 143 703 000, which consists of EUR 135 866 000 in grants and EUR 7 837 000 in loans. The Commission notes that in the period 2011 – 2014 according to the information, provided by the Spanish authorities, ADIF has already paid back EUR 652 675 of the grants and EUR 3 118 605 of the loans. According to Spanish authorities, EUR 139 931 720 (net) remains outstanding, including EUR 135 213 325 in grants and EUR 4 718 395 in loans. The Spanish authorities indicated that, of that sum, ADIF has already spent EUR 20.46 million²⁶.
- (45) In the context of the formal investigation, the Spanish authorities confirmed that the EUR 20.46 million which had already been spent originated from the above-mentioned programmes (INNVENTA 2010, INNPLANTA 2010 and 2011) and that no expenditure has been covered by ADIF's resources originating from its economic activities. In addition, they provided a list of the contracts signed and works performed (see recital (33) above referring to the works performed). Each contract was categorised depending on its object and the component of the overall project in respect of which it was concluded. ADIF spent EUR 6.54 million on studies and preliminary works for the test circuits and EUR 13.92 million on the construction and equipment of the CISF.

3. THE DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE

- (46) In its opening decision, the Commission expressed doubts as regards:

(a) The alleged absence of aid:

- at the level of ADIF. In this respect, the Commission noted that ADIF is a public undertaking pursuing both economic and non-economic activities, receiving public financing disbursed by the Ministry of Economy and Competitiveness (State resources). Since the aid is granted to ADIF for the purposes of carrying out economic activities (renting out the facilities to third parties, see recital (19) above) and since ADIF is designated as the owner of the infrastructure outside any tendering

²⁵ The figure of 139 931 720 is already net of the partial reimbursement of the loans and grants.

²⁶ EUR 19.8 million mentioned in submission of 20 May 2014, Annex II “*negative consequences of the non-realisation of the project*”, p.10. Updated to EUR 20.46 million in the submission of the Spanish authorities of 28 September 2015.

process, the measure appeared to amount to State aid within the meaning of Article 107(1) of the Treaty in favour of ADIF;

- at the level of the SPV. While the absence of State aid could be presumed if the tender procedure were to allow for the most economically advantageous offer to match the value of the concession, the tender launched in July 2013 was declared void in October 2013 and no further competitive selection process had been launched. Therefore, the opening decision raised doubts as to the presence of aid at this level²⁷;
- at the level of the users of the CEATF centre. Although the infrastructure would be open to all potential users, the absence of a viable business plan led the Commission to raise doubts as to whether the envisaged access prices would effectively reflect market levels.

(b) The legality of the aid:

- Based on the information available at the date of the adoption of its opening decision, the Commission noted that EUR 19.8 million had been spent before the notification of the measure to the Commission, and inquired about the private or public nature of the resources used for the work carried out before the notification of the measure at issue;

(c) The compatibility of such financing with the Commission's Framework for state aid for research and development and innovation (the "R&D&I Framework")²⁸:

- the Commission expressed concerns regarding the contribution of the project to a well-defined objective of common interest, its necessity and appropriateness, the incentive effect of the aid and its proportionality. In addition, the Commission indicated that undue negative effects on competition and trade could not be excluded.

4. COMMENTS FROM INTERESTED PARTIES

- (47) As mentioned in recital (5) above, ten companies operating in the railway sector submitted their comments during the formal investigation procedure.
- (48) Firstly, most respondents questioned the existence of demand for a testing facility operating at such high speed (namely above 385 km/h), pointing out that currently the high-speed rail sector in Europe is limited to 320/350 km/h²⁹. According to a railway operator, a speed of 300 km/h represents an optimal balance between energy consumption and travelling time in terms of market effectiveness.
- (49) From a technical point of view, two companies indicated that high-speed lines are now ballasted tracks that enable rolling stock to circulate at up to 350 km/h. A significant increase in the commercial speed would require the infrastructure to be modified and existing tracks to be replaced by concrete slabs, which would entail prohibitive investment and operating costs. As the exploitation and maintenance costs for commercial railway tracks increase with the rise of the speed, the resulting ticket prices for travellers would make operations uncompetitive in comparison with air transport.

²⁷ See recital (43) of the opening decision.

²⁸ OJ C 198 of 27.6.2014, p.1.

²⁹ Commercial speed up to 350 km/h would require tests to be carried out at maximum speed of 385 km/k

- (50) Secondly, as regards the testing itself, a rolling stock manufacturer stressed that, even when such facilities allow advanced testing, validation and approval for high-speed rolling stock equipment, infrastructure and superstructure elements, some specific tests can be carried out better directly on commercial railways, that is to say on the real infrastructure. Moreover, another rolling stock manufacturer indicated that the trains produced would be additionally tested on the regular network in the country of destination. Both comments illustrate the absence of demand.
- (51) In addition, a company which provides a testing environment notes that virtual testing through advanced ICT platforms can already be performed and might be a cost-effective solution for future high speed testing, as operating and maintenance costs of the physical testing facilities will be avoided thereby strongly reducing the R&D budgets of railway companies.
- (52) Thirdly, only one company, which also provides testing for material stated that the CEATF would be an opportunity for new development projects. Two other companies indicated that should the test facility be built, they would make use of it.
- (53) One of those two companies stated that it could be a competitive advantage to Spanish rolling stock manufacturers established within the national territory to have a local test centre.
- (54) Fourthly, as regards the building and operating of the test centre, some interested parties emphasised that a clear and robust business case supporting the investment would be needed in order to go forward with such a project. Many of the submissions stressed also the necessity for the test centre, should it be built and become operational, to provide open and non-discriminatory access at market terms.
- (55) Finally, several third parties commented on the geographical location of the CEATF facility. They stress that southern Spain is far from the vast majority of European railway undertakings and rolling stock manufacturers. Such a location bears significant risks and costs as transport of prototype trains is very costly which would inevitably provide an advantage to Spanish rolling stock manufacturers.

5. COMMENTS FROM SPAIN

5.1. Existence of aid

- (56) The Spanish authorities partially reviewed their position as regards the existence of aid, with particular regard to the potential distortion of competition arising from the aid. They indicated that three ranges of speed testing could be distinguished in which the CEATF project may, or may not, compete with other facilities located in the European Union:
- (a) Tests at speeds below 210 km/h: the Spanish authorities confirmed that such tests performed on the CEATF could compete with tests performed at other facilities in Europe. However, they stated that the CEATF centre would not have any advantage in respect of such tests, as the fixed costs for exploitation and maintenance in Antequera would be too high compared to other centres designed to operate at those speeds;
- (b) Tests at speeds between 210 and 385 km/h: the Spanish authorities recognised that there might be competition within this segment between tests performed on the CEATF and tests performed on existing commercial railway tracks. However, the Spanish authorities indicated that those tests represent only a small part of all the tests regarding elements of tracks infrastructure and superstructure, rolling stock and their interactions. Such tests would therefore

be limited to certain types of rolling stock tested in "classical" conditions of use. In addition, as already stated above, the Spanish authorities indicated that the costs of those tests would be too high to be competitive at the CEATF facility;

- (c) Tests at speeds above 385 km/h: the Spanish authorities maintain that, as no market exists for testing at such speeds, the part of the financing corresponding to the construction of the test facility for tests above 385 km/h should not be regarded as aid.
- (57) The Spanish authorities insisted on the fact that the distinction between tests at different speeds should be considered theoretical as, in practice, the possibility to perform tests below 210 km/h or between 210 and 385 km/h at the CEATF would be limited due to high maintenance and operational costs.
- (58) In conclusion, by partially reconsidering its initial position as regards the existence of aid, Spain considers that only the financing of the construction of the elements of the CEATF which allow for testing below 385 km/h should be regarded as State aid and should be assessed in accordance with the R&D&I Framework. In their submission of 2 July 2015, the Spanish authorities provided an evaluation and indicated that those costs represented 25.1% of the project's costs, and amounted to EUR 90.2 million, excluding VAT. They therefore estimated that the section of the CEATF's facilities dedicated to testing at speeds above 385 km/h, which amounts to EUR 240.6 million, should not be regarded as aid³⁰.

5.2. Compatibility

- (59) In their observations, the Spanish authorities also reiterate their position on the compatibility of the State aid:
- (a) The CEATF facility would contribute to an objective of common interest as, by increasing R&D&I investments, it would fit in the Smart Growth Operational Programme for Spain, adopted in February 2015³¹, one of the objectives of which is to upgrade R&D&I infrastructures in order to strengthen Spain's capacity to innovate. According to Spain, the country has the most extended high-speed network in Europe and such a test facility could clearly lead to new technological breakthroughs;
 - (b) The Spanish authorities justify the need for State aid for this project on the basis of the multidisciplinary nature of the technical tests to be carried out. In their opinion, due to the diverse field of activities of the companies involved in those tests (for example civil works, communication, signalisation, traction, rolling stocks companies) no company would reach the critical mass or have the financial capacity to make an investment comparable to the one needed for the CEATF and which could attract and federate other companies. As regards the financing of the project and existence of a market failure in the form of imperfect and asymmetric information, the Spanish authorities confirmed that no source of financing other than public financing is available for the construction of the CEATF *"taking into account the profitability studies made by ADIF"*;

³⁰ As the Spanish authorities admit that there are additional costs which are common to both sections of the CEATF facility and cannot be precisely separated and allocated to each of the sections, those values should not be considered as a precise cost allocation.

³¹ https://ec.europa.eu/commission/2014-2019/cretu/announcements/new-eu-regional-funds-programme-will-transform-spain-smarter-and-more-competitive-economy_en

- (c) In light of the above, Spain confirmed that the aid measure is appropriate, as there is no other suitable aid instrument than public financing due to the fact that project's cash flows would only cover 8.13% of the investment (financing deficit would be 91.87%). The cash flow situation explains also the failure of the first tender to select the SPV as the companies estimated the cash flow insufficient to cover the initial investment;
 - (d) According to the Spanish authorities, the aid has an incentive effect. Spain insisted on the fact that, even though the economic analysis of the project reveals a negative Net Present Value ("NPV") of EUR -362.5 million, it would have, from a socio-economic point of view, a positive NPV of EUR 17.3 million (taking into account the employment created and other activities induced by the establishment of the CEATF in the region);
 - (e) The Spanish authorities indicated that in order to calculate the State aid amount and the maximum aid intensity applicable to the project, only the part of the investment that corresponds to the part of the project that might effectively compete with other facilities should be taken into account (that is to say EUR 90.2 million in their view). As mentioned in recital (58) above, the Spanish authorities consider that this part represents 25.1% of the total investment. In their view, as the aid intensity allowed for a research infrastructure performing economic activity is 60%, as set out in point 89 of the R&D&I Framework, ADIF would have to provide only 10% of the investment ($0.4 \times 25.1\% = 10\%$). Despite this, they indicate that ADIF, by providing directly EUR 39.2 million, would ensure a bigger financing, equal to 20% of the part not covered by the income generated by the project, through a loan given at an interest rate of 1.17%. Moreover, according to Spain, the tendering and contracting procedures guarantee that the aid is limited to the minimum. Hence they consider the aid to be proportionate and limited to the minimum necessary;
 - (f) According to Spain, undue negative effects on competition and trade will be avoided, due to the relative competitive disadvantages of CEATF caused by its high operational and maintenance costs for testing at speeds below 210 km/h. As the exploitation and maintenance costs of a high-speed line are multiplied by 3 compared to a normal exploited line, *de facto*, the CEATF would be excluded of the market for such testing;
 - (g) Spain guarantees that the aid will comply with all transparency requirements as requested by the applicable Union regulations.
- (60) As indicated in recital (6) above, the comments received from third parties were sent to the Spanish authorities on 24 September 2015. The Spanish authorities observed in their reply dated 14 October 2015 that those comments were very general in nature as regards the perspective of using the CEATF centre, and were based on each company's conception of the evolution of the railway testing market.

6. ASSESSMENT OF THE AID

6.1. Existence of aid

- (61) Article 107(1) of the Treaty states that *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”*.

(62) The Commission will consider whether the funds granted to ADIF on the basis of the agreement of 27 December 2010 as well as the total financing granted for the project on the basis of the decision of the Council of Ministers of 28 June 2013 qualify as aid.

6.1.1. *Economic activity*

(63) The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.³² The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

(64) The General Court recognised, in 1999, that "*the provision of infrastructures by entities responsible for their management*" can constitute an economic activity³³. Thus, it is clear that the construction of infrastructure that is going to be commercially exploited constitutes an economic activity³⁴.

(65) In the present case, the construction of the CEATF is directly linked to its exploitation and the Spanish authorities confirmed that the testing activities to be performed on the CEATF are of an economic nature. Those activities indeed involve services that will be offered on the market.

(66) The Commission considers that the construction and exploitation of the CEATF are therefore economic activities.

6.1.2. *State resources*

(67) The project is funded through advance grants and loans from the Ministry of Economy and Competitiveness. Those are State resources.

6.1.3. *Selective economic advantage*

6.1.3.1. In favour of ADIF

(68) The measure is granted to only one undertaking, ADIF³⁵, and is therefore selective.

(69) By contributing to the financing of CEATF through advance grants and loans, the measure gives ADIF an advantage.

(70) First, the advance grants constitute a direct transfer of State resources to ADIF that clearly constitutes an economic advantage.

(71) Second, as regards the loans granted to ADIF, it is necessary to determine whether the interest rate corresponds to the market rate.

(72) The Communication on the revision of the method for setting the reference and discount rates³⁶ ("the Communication of 2008") provides a proxy for the market rates applicable to loans. In their submission of November 2015, the Spanish authorities

³² Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

³³ Judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, as confirmed on appeal by judgment of the Court of Justice of 24 October 2002 in *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617, paragraphs 75 to 80.

³⁴ See judgment of the Court of Justice of 19 December 2012 in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraphs 43 and 44, and judgment of the Court of Justice of 14 January 2015 in *Eventech*, C-518/13, ECLI:EU:C:2015:9, paragraph 42.

³⁵ ADIF, as the owner of infrastructure designed to be used for economic activities, is considered as an "undertaking" for State aid purposes. The Spanish authorities did not contest this in the course of the formal investigation.

³⁶ OJ C 14, 19.1.2008, p. 6.

indicated that they had followed this methodology and applied a margin of 100 points to the applicable rate for Spain. They then made an estimation of the interest saved as a result of the difference between the market rate and the interest rate of the programme, taking into account the specific conditions of each loan (amortisation, duration and grace period). They came to the conclusion that the market rates applicable, for the tranches disbursed under the Innplanta 2010 Programme, are higher than the interest rate applied under the Programme but are lower than market rates applicable for the tranches disbursed under the Innplanta 2011 Programme (3.06 %)³⁷.

- (73) The margins applied to the rates calculated under the Communication of 2008 depend on the rating of the company and the level of collateral on offer. In this regard, the Commission notes that the rating of ADIF is intrinsically linked to the rating of the Spanish State³⁸. In addition, the Commission notes that the Spanish authorities did not provide specific information as regards the collateral offered for the loans obtained under the different programmes. It is clear from Table 6 below that at some point in the early half of 2012, ADIF was downgraded from an 'A' rating to a 'B' rating. The Spanish authorities applied a margin of 100 basis points to all of the loans granted to ADIF. It should be noted that for a company with an 'A' rating, such a margin implies a low level of collateral. For a company, whereas for a company with a 'B' rating, however, a margin of 100 basis points implies a normal level of collateral (rather than a low level).
- (74) In the course of the formal proceedings, the Commission asked the Spanish authorities to provide information on the loans that ADIF obtained on the market between 20 July 2010 and 20 July 2015 (EIB excluded). The Spanish authorities provided a list of commercial loans granted to ADIF/ADIF Alta velocidad over the past five years, together with their associated conditions³⁹ (EIB excluded)⁴⁰.
- (75) These loans, obtained on the market, provide sufficient information to determine, for each of the years from 2011 to 2014, an appropriate market interest rate.

Date of the disbursement	Interest rates of the loans disbursed to ADIF	ADIF's credit rating	Communication of 2008		Spanish authorities' suggestion for calculation of the market interest rates	Commercial loans obtained by ADIF	Calculation of the market interest rate based on the commercial loans' terms
			Base rate	Basis points to be added for normal to low collateralisation			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
17.01.2011	1.17%	Aa1	1.49%	75-100	2.49%	For 2011: Euribor 6M (03.01.2011)+ 227 bp (average)	1.224%+2.27% =3.494%

³⁷ The base rate, to which 100 basis point are added as a minimum margin according to the Communication of 2008, was 2.49% for January 2011, 3.07% for January 2012, 2.67% for May 2012, 1.66% for February 2013 and 1.53% for January 2014.

³⁸ <https://www.moodys.com/credit-ratings/Administrador-de-Infraestruct-Ferrovias-credit-rating-3010>
ADIF's credit rating has been fixed in relation to the Spanish government's rating.

³⁹ They listed all the loans obtained by ADIF and ADIF-Alta Velocidad but, with effect from 1 January 2013, the date on which ADIF split into ADIF and ADIF-Alta Velocidad, assets relating to the railway circuit have remained within ADIF. They provided information on date of disposal, expiration date, bank, project to be financed, amount, interest rate for repayment and grace period.

⁴⁰ See recital (42) above

Date of the disbursement	Interest rates of the loans disbursed to ADIF	ADIF's credit rating	Communication of 2008		Spanish authorities' suggestion for calculation of the market interest rates	Commercial loans obtained by ADIF	Calculation of the market interest rate based on the commercial loans' terms
			Base rate	Basis points to be added for normal to low collateralisation			
11.01.2012	1.17%	Aa2	2.07%	75-100	3.07%	For 2012: Euribor 6M (02.01.2012)+ 352 bp (average)	1.606%+3.52% =5.126%
02.05.2012	3.06%	Baa1	1.67%	100-220	2.67%	"- (02.05.2012)	0.992%+3.52% =4.512%
13.02.2013	1.17% / 3.06%	Ba1	0.66%	100-220	1.66%	For 2013: Euribor 6M (01.02.2013) + 425 bp (average)	0.38%+4.25% =4.63%
10.01.2014	3.06%	Ba1	0.53%	100-220	1.53%	For 2014 : Euribor 6M (02.01.2014) + 215 bp (average)	0.387%+2.15% =2.537%

Table 6: Details of the calculation of market interest rate to be applied to the loans disbursed to ADIF

(76) It can be observed from Table 6 that the market interest rates based on the commercial loans obtained by ADIF (right-hand column) are consistently higher than the rates suggested by Spain. Since the Communication of 2008 provides only a proxy of market rates, no evidence was provided by Spain to support a conclusion on the level of collateral available, and the consistent evidence in the file shows that the rates that ADIF actually paid on the market were significantly higher, the Commission considers that the latter provide the appropriate benchmark for determining whether the loans in relation to the project confer an advantage on ADIF.

(77) It can be concluded from Table 6 that the interest rates of the loans granted to ADIF in relation to the project are lower than the relevant market interest rates calculated on the basis of the terms of commercial loans obtained by ADIF, except for the loans granted in 2014. Thus, the terms for the various loans granted to ADIF in the period 2011-2013 and amounting to EUR 7 469 500 confer an advantage on ADIF within the meaning of Article 107(1) of the Treaty.

6.1.3.2. In favour of the SPV and future users of the CEATF

(78) In the opening decision⁴¹, the Commission explained that the absence of State aid can only be presumed if the tender procedure allows for the most economically advantageous offer to match the market value of the concession and if the Member State concerned checks that the resulting concession fees are in line with market prices by carrying out a discounted cash flow analysis and a comparison with fees paid for similar services elsewhere⁴². The Commission indicated that, even if certain basic components of the fee structure have been set by Spain *ex ante*, this is not in

⁴¹ See recitals (43) and (44) of the opening decision.

⁴² Case SA.38302 *Investment aid to the port of Salerno*, decision of 27 March 2014, [recital 46](#).

itself sufficient not to question the open and non-discriminatory character of the process.

- (79) The Commission also considered the possible existence of an indirect advantage at the level of the users of the infrastructure.
- (80) Since the SPV has not been selected due to the failure of the first tender and there are no indications that a second tender will be launched, it is not possible to draw definitive conclusions as to the existence of an advantage at the level of the SPV. Similarly, no firm conclusions as to the existence of aid at the level of the users can be drawn.

6.1.4. *Distortion of competition and effect on trade*

- (81) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid⁴³.
- (82) It is clear that the advantages granted to ADIF strengthen the position of that undertaking compared with other undertakings competing in intra-Union trade.
- (83) As indicated in section 5.1 above, the Spanish authorities recognise that the CEATF may compete with other European facilities for tests below 210 km/h and with existing lines opened to traffic for tests between 210 and 385 km/h. As a consequence, they now consider that only the financing of the construction of CEATF's parts which allow for testing below 385 km/h should be regarded as State aid and should be assessed in accordance with the R&D&I Framework. In this respect, they also claim that the public funding for the latter activities would be limited to EUR 90.2 million.
- (84) The CEATF would compete with other facilities in the European Union that offer high-speed railway testing services, since it is perfectly capable of offering tests at speeds below 385 km/h. Since the evidence suggests that there is very little or no demand for tests at higher speeds (see in detail recitals (48) to (51) above), testing at speeds below 385 km/h is likely to become CEATF's main activity.
- (85) As a result, the State resources granted to ADIF for the construction of the CEATF would be used for subsidising the entry on the market of a new competitor.
- (86) In light of the considerations set out in recitals (82) to (85) above, the aid granted to ADIF is liable to distort competition and affect trade between Member States.

6.1.5. *Conclusion on the existence of aid*

- (87) The Commission considers that the public resources granted to ADIF for the construction of CEATF on the basis of the Decision of 28 June 2013 and the agreement of 27 December 2010 qualify as State aid within the meaning of Article 107(1) of the Treaty.

6.2. **Legality of the aid**

- (88) The Spanish authorities notified the measure on the basis of Article 108(3) of the Treaty on 20 September 2013. They have also indicated that the railway circuit will not be constructed until it is approved by the Commission⁴⁴.

⁴³ Judgment of the Court of Justice of 14 January 2015, *Eventech*, C-518/13, ECLI:EU:C:2015:9, paragraph 66, and judgment of the Court of Justice, *Libert and Others*, C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77.

⁴⁴ See submission of Spanish authorities of 06.02.2014, answer to question 7, provided by the Spanish ministry of finance and public administration, page 13.

(89) Spain granted the aid on the basis of the agreement of 27 December 2010 and the Decision of the Council of Ministers of 28 June 2013. Part of that aid has already been paid out, as described in recital (44) above.

(90) Since the aid was granted before being approved by the Commission, it must be considered as unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 2015/1589⁴⁵.

6.3. Compatibility

(91) Having established that the measure involves State aid within the meaning of Article 107(1) of the Treaty, the Commission now has to assess whether it can be found compatible with the internal market.

(92) The Court of Justice has held that *"where the Commission decides to initiate a formal investigation procedure, it is for the Member State and the potential beneficiary of new aid to provide the Commission with evidence capable of showing that the aid is compatible with the common market"*⁴⁶. As set out further below, the Spanish authorities and the beneficiary ADIF did not provide convincing evidence to this effect neither in the notification and following submissions, nor in their comments to the opening decision and in the submissions provided during the formal investigation phase.

(93) The Spanish authorities indicated that the public funding of CEATF, to the extent that such funding constitutes aid within the meaning of Article 107(1) of the Treaty, should be declared compatible with the internal market in view of its overall R&D&I objective and in light of the rules of the R&D&I Framework applicable to R&D&I infrastructures⁴⁷.

(94) It follows from the conclusion in section 6.2. above that the aid is unlawful. Point 126 of the R&D&I Framework states that *"unlawful R&D&I aid will be assessed in accordance with the rules applicable at the date on which the aid was awarded"*.

(95) At the time of the grant of the aid, the 2006 R&D&I Framework was in force⁴⁸.

(96) The 2006 R&D&I Framework does not contain specific provisions as regards aid to research infrastructures. Consequently the Commission considers that the assessment of the aid measure should be based directly on Article 107(3)(c) of the Treaty. That provision states that *"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"* may be considered to be compatible with the internal market.

(97) The Commission, in order to determine the compatibility of a measure under Article 107(3)(c) of the Treaty, performs a balancing test, weighing positive effects in terms of a contribution to the achievement of well-defined objectives of common interest

⁴⁵ Council Regulation (EC) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248 of 24.09.2015, p. 9).

⁴⁶ Judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione v Commission*, C-480/09 P, ECLI:EU:C:2010:787, paragraph 99 and the case law cited therein.

⁴⁷ According to point 15 (ff) of the R&D&I Framework *"'research infrastructure' means facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or set of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be 'single-sited' or 'distributed' (an organised network of resources)"*.

⁴⁸ Community Framework for State aid for research and development and innovation (OJ C 323 of 30.12.2006, p. 1).

and negative effects on trade and competition in the common market. In this regard, the Commission will consider the following principles⁴⁹:

- (a) contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty;
- (b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
- (c) appropriateness of the aid measure: the proposed aid measure must be an appropriate policy instrument to address the objective of common interest;
- (d) incentive effect: the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity, which it would not carry out without the aid or would carry out in a restricted or different manner or location;
- (e) proportionality of the aid: the amount and intensity of the aid must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned;
- (f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive;
- (g) transparency of aid: Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder.

6.3.1. *Contribution to a well-defined objective of common interest*

- (98) The Spanish authorities emphasised in their notification and in the response to the opening decision (see recital (59) of the opening decision and section 5.2 above) that the project contributes to increased R&D&I investment in Spain, which is one of the objectives of common interest of the EU 2020 Strategy, and fits into the Smart Growth Operational Programme for Spain, adopted in February 2015. They claim that the CEATF is a scientific and technical infrastructure which will allow multidisciplinary technical aspects to be tested in the rail sector. The Spanish authorities also claim that the investment in the CEATF will strengthen the economic development of a region, Andalucía, which faces a high unemployment rate.
- (99) First, such claims, should be assessed in view of the demand for such a research facility and in view of the R&D&I activities which could be carried out therein.
- (100) As detailed in recitals (60) to (62) of the opening decision, the Commission questioned the existence of demand from rolling stock and railway equipment manufacturers for this specific research infrastructure. In particular, the Commission referred to the failure of the first tender for the construction and operation of CEATF, as well as to the high costs of construction and operation of railway networks, designed to provide commercial transport services at speeds above 350 km/h, which

⁴⁹ For example, SA 32835 (2011/N) - Northwest Urban Investment Fund (JESSICA) (OJ C 281 of 24.09.2011, p.2, http://ec.europa.eu/competition/state_aid/cases/240234/240234_1247477_97_2.pdf and SA 38769 (2015/N) - Green Deal for Electric Vehicle Charging Infrastructure, to be published, http://ec.europa.eu/competition/state_aid/cases/258489/258489_1710979_137_2.pdf

would not be economically viable in the present market conditions and in the foreseeable future⁵⁰.

- (101) The comments received from third parties in response to the opening decision confirm the Commission's position that a research infrastructure dedicated to very high speed train tests (testing performed above 385 km/h for commercial transport services provided at speed above 350 km/h) is not needed by the market.
- (102) No rolling stock producers envisage developing products running at such very high speeds due to the lack of market demand for the commercial operation of such trains. Some railway operators point out the market effectiveness arguments (balance between energy consumption and travelling time) which cap the commercial exploitation of high-speed trains in Europe at much lower speeds (average in Europe – 280-300 km/h, maximum – 320-350km/h), as well as the exponential increase of the infrastructure's investment, exploitation and maintenance costs for speeds above 300 km/h, which would make the train tickets' prices uncompetitive compared to airplane tickets. No evidence suggests that there is market demand for the construction of new commercial railway lines and/or for the upgrading of the existing tracks for the purposes of providing transport services at speeds exceeding 320-350 km/h – and therefore for a rail testing facility specifically dedicated to speeds exceeding such limits⁵¹.
- (103) Additional specific arguments for the lack of demand for CEATF infrastructure stem from its geographical location, which, according to some of the respondents, will induce significant time and transportation expenses.
- (104) Finally, the arguments regarding the availability of more advanced and cost effective solutions for a possible future high speed testing, such as virtual testing through ICT based solutions also run against the necessity of a dedicated physical testing facility.
- (105) Therefore, the claim that the notified aid would have induced additional R&D&I activities in the railway sector through the construction of an infrastructure for high speed testing facility is contradicted by the information collected by the Commission.
- (106) Second, other policy-related objectives, invoked by the Spanish authorities, notably the socio-economic benefits resulting from the creation of new jobs in the region of Antequera⁵² are not relevant for the assessment of the contribution of the notified aid to an objective of common interest in the R&D&I field. Although the Spanish authorities claim that, considered from a socio-economic perspective, the CEATF project would achieve a positive NPV of EUR 17.3 million, they have not provided any convincing evidence of benefits that would be of such a magnitude so as to offset the construction costs and the operating losses that the planned infrastructure would generate during its whole period of operation. The claimed benefits seem to be limited to the creation of jobs in the construction sector during the construction phase of the infrastructure. This means that, far from contributing to a long-term objective

⁵⁰ With respect to the argument brought up by the Spanish authorities recalling that a questionnaire was sent out to more than 80 companies, out of which 47 replied and 26 indicated they would be ready to take part of the project's risks, it should be observed that the latter were mostly companies from the construction sector whose business interest is linked to the construction phase of the project, but not to the R&D&I activities to be performed therein. Moreover, none of them confirmed their real interest by ultimately submitting an offer in the tender organised in 2013, which was declared void due to the lack of participants.

⁵¹ It is not surprising that the only company that expressed favorably in support of the project is a Spanish company which, as confirmed by other respondents' comments, could *de facto* enjoy a preferential access to the facility due to its proximity to the location of the centre. Its comment seems therefore to be inspired by the possibility to gain competitive advantage rather than by objective evaluation of the necessity of the facility.

⁵² See also footnote 17 in the opening decision.

of promoting a sustainable development of the Andalucía region, the project would only have short-term, transitory effects on the local economy⁵³.

(107) In light of the considerations set out in recitals (98) to (106) above, the Commission considers that Spain did not provide sufficient evidence in order to prove that the project contributes to a well-defined objective of common interest.

6.3.2. *Need for State intervention*

(108) The Spanish authorities justify the need for State aid to this project by the multidisciplinary nature of the technical tests to be carried out. According to them, due to the diverse fields of activities of the companies potentially involved in those tests (for example civil works, communication, signalisation, traction, and rolling stock companies) no company would reach, on a stand-alone basis, the critical mass or have the financial capacity to make an investment as large as the one needed for the CEATF or could attract and federate other companies into such investment. As regards the financing of the project, the Spanish authorities stated that no source of financing other than public financing is available for the construction of the CEATF "*taking into account the profitability studies made by ADIF*".

(109) The argument raised by the Spanish authorities points to an alleged market failure in the form of a coordination problem for the financing of the construction of the envisaged facility. It seems to assume that, since no individual company would have an incentive to embark upon the financing of the project due to the imbalance between its costs and the expected benefits (at the level of the individual firm), the only possible way to sustain the investment would be through the creation of a consortium gathering various companies operating in different technical fields which could ensure the full exploitation of the facility's potential through a joint use.

(110) However, nothing in the file suggests that companies potentially interested to enter into such a collaboration would have been prevented from doing so due to objective difficulties hindering effective collaboration amongst them. Quite to the contrary, the fact that the Spanish government intervened in order to facilitate the creation of a Special Purpose Vehicle (SPV) via the organisation of an open tender and that such tender process failed suggests instead that the real problem affecting the financing of the notified project lay elsewhere, namely in its lack of financial viability. The weakness of the argument put forward by the Spanish authorities is confirmed by the fact that, even when the Spanish government decided to proceed with the allocation of public funding to ADIF to start the works, no private independent investor showed an interest in participating in the funding.

(111) The Commission therefore concludes that Spain has not provided sufficient evidence of the existence of a market failure in the form of a coordination failure at the level of the financing of the CEATF.

(112) In addition, it should be noted that the Commission's decisional practice in the R&D&I field refers to three types of specific market failure: imperfect and asymmetric information, coordination and network failures for R&D&I activities

⁵³ For example, the Guidelines on regional State aid for 2014-2020 (OJ C 209, 23.7.2013, p.1), which specifically envisage job creation, place that objective in the wider context of delivering inclusive and sustainable growth (emphasis added). Indeed, even when the Commission had specific guidelines on aid for job creation (Guidelines on aid to employment, OJ C 334, 12.12.1995, p. 4), it was acknowledged that aid to create jobs that is limited to one or more sensitive sectors experiencing overcapacity or in crisis is also generally viewed less favourably with the result that its adverse effects on employment in competing sectors in other Member States generally outweighed the common interest involved in active measures to reduce unemployment (see point 23).

and knowledge spillovers. However, the Spanish authorities have not shown that any of these specific market failures occurs in the present case.

- (113) Concerning the difficulties affecting the financing of the CEATF project, no evidence was provided that the private sector would be deterred from financing the project due to a possible lack of or asymmetry of information specifically linked to identifiable and risky R&D&I activities. As to coordination and network failures in R&D&I, it is clear from the Spanish authorities' statements that no cooperation was planned between ADIF and the industry in the test centre. It seems that the aid aims at attracting companies in participating either in the design or in the use of the CEATF infrastructure but does not trigger specific cooperation between them in order to perform collaborative R&D&I activities in the centre. Finally, Spain has provided no elements proving the existence of knowledge spill-overs benefitting third parties that might arise from the CEATF project.
- (114) Spain has provided no other arguments in support of a conclusion that the aid can bring about a material improvement that the market cannot deliver itself.
- (115) In light of the considerations set out in recitals (108) to (113) above, the Commission concludes that the need for State intervention has not been proved.

6.3.3. *Appropriateness of the aid measure*

- (116) Member States can make different choices with regard to policy instruments and State aid control does not impose a single way to intervene in the economy. However, State aid under Article 107(1) of the Treaty can only be justified by the appropriateness of a particular instrument to meet the public policy objective and contribute to one or more of the common interest objectives⁵⁴.
- (117) The Commission normally considers that a measure is an appropriate instrument where the Member State has considered whether alternative policy options exist which are equally suitable to achieve the common interest objective but at the same time less distortive to competition than the selective State aid and where it can demonstrate the appropriateness of the measure in targeting efficiency and/or equity objectives.
- (118) The Spanish authorities did not provide any information as regards possible alternative policy instruments or other aid instruments to finance the project. In response to the concerns expressed in the opening decision, they confined themselves to stating that, in light of the alleged financing deficit of 91.87% of the project, no instrument other than public financing would be appropriate in this case.
- (119) The Commission observes that the fact that the notified project remains vastly loss making even when aided is not sufficient to demonstrate that State aid is an appropriate instrument.
- (120) Moreover, as it has not been demonstrated that the project contributes to the objective of common interest of increasing R&D&I activities, the appropriateness of the investment instrument chosen by the Spanish government has also not been proved. Other measures that would actually bring about increased R&D&I activities would be more appropriate instruments to meet that objective of common interest.
- (121) Similar considerations apply in relation to the other objectives of common interest invoked by Spain. As noted above in recital (106), new jobs would be mainly limited

⁵⁴ See for a discussion of appropriateness Cases C 25/2004 — DVB-T Berlin-Brandenburg (OJ L 200, 22.7.2006) or N 854/2006 — Soutien de l'agence de l'innovation industrielle en faveur du programme mobilisateur pour l'innovation industrielle TVMSL, OJ C 182, 4.8.2007.

to the construction sector and temporary in nature. State aid for the construction of infrastructure that is unlikely to be used is not an appropriate policy instrument to create growth and jobs.

6.3.4. *Incentive effect*

- (122) State aid must have an incentive effect. The required incentive effect is present if the aid changes the behaviour of the beneficiary in relation to reaching the objective of common interest and addressing the identified market failure.
- (123) The Spanish authorities indicated that without the aid, the CEATF would not be built: they argue that the aid has an incentive effect since the project would never be realised without the aid.
- (124) However, in the present case, the Commission notes that the aid enables the construction of a railway testing facility that is being put at the disposal of ADIF, as future owner, but does not seem to trigger any change in the behaviour of ADIF or others in terms of additional R&D&I activities to be performed at the testing facility.
- (125) In the course of the formal investigation procedure, the Spanish authorities did not provide any new information or argumentation regarding the change of behaviour of ADIF due to the aid. While the available data indicate that the notified project will remain loss-making even with aid, the Spanish authorities have failed to demonstrate that it would nevertheless generate important R&D&I-related benefits for society. On the contrary, the comments received from potential users of the infrastructure during the formal investigation suggest that, as currently designed, the project does not match unfulfilled requirements on the demand side from companies engaged in R&D&I activities within the railway sector.
- (126) No grounds have been brought forward that would justify that the Commission deviate from its initial assessment, as expressed in the opening decision. In essence, far from creating an incentive effect, the aid targets the construction of an infrastructure whose added value compared to existing alternatives (namely test-runs on the regular railways networks) has not been demonstrated.

6.3.5. *Proportionality of the aid*

- (127) The Commission considers that the aid is proportionate if the same result could not be achieved with less aid.
- (128) The Spanish authorities notified the project as being in line with the R&D&I Framework, which indicates that the maximum aid intensity allowed for covering investments in research infrastructures used for economic purposes is limited to the net extra costs up to a cap of 60% of the eligible costs (point 89 of the R&D&I Framework). In the present case, the public support will cover 100% of the costs.
- (129) Due to the absence or the insufficiency of private investments in the CEATF infrastructure, the aid at issue does not seem to be proportionate.

6.3.6. *Avoidance of undue negative effects on competition and trade between Member States*

- (130) Article 107(3)(c) of the Treaty requires that the positive developments generated as a result of a given measure be balanced with its negative effects on trade and competition.
- (131) The Commission considers that the Spanish authorities have not proven the existence of positive effects induced by the present measure. The Commission consequently concludes that the construction of the CEATF will fail to achieve its objective to increase R&D in the specific field of very high-speed rail transport services as

market demand for such infrastructure and related R&D services is weak at best or non-existent. The Commission also concluded that there is no demonstrated market failure nor proof that the measure contributes to a meaningful change of behaviour of the beneficiary.

- (132) As to the other positive effects of the measure on which Spain relies, the Commission considers that the temporary creation of jobs, mainly in the construction sector, comes at a very high cost and carries limited positive value.
- (133) In addition, as the measure allows the entrance on the market of a new competitor through the use of massive public financing, the Commission considers that it will have a negative effect on competition. The aid would call into question previous investments made by competitors at their testing facilities as well as reducing future investments in maintenance or improvement of such infrastructures.
- (134) The market impacted by the aid is the market for services for railway equipment testing in the European Union. On this market, as already pointed out in the opening decision, three railway test centres are currently in operation in the European Union: Cerhenice (Velim) in Czech Republic, Wildenrath in Germany and Valenciennes in France, on which testing up to speeds of 210 km/h is performed. Testing of high-speed rolling stock is carried out on lines in commercial use⁵⁵ that have a maximum design speed of 350 km/h, with tests being carried out at up to 385 km/h as required by the standard (10% over the nominal speed of the train).
- (135) It follows that there is not a perfect substitutability between the testing services of CEATF on the one hand and other test facilities and tests on commercial networks on the other hand due to the different maximum testing speeds. However, the already existing possibility of testing at speeds up to 385 km/h on commercial networks captures the actual and potential demand for testing services up to this commercially viable speed. As regards the future potential demand for testing at speeds up to 520 km/h, the information available and the comments received from the market participants suggest that this is not going to be a commercially viable option, at least in the foreseeable future. Therefore, the CEATF testing facility will be a direct competitor to both those existing facilities and the public rail networks as well. The Commission therefore considers that the measure is designed to subsidise the entry on the market of a new competitor entirely through State resources and is liable to significantly distort competition on that market as a result.
- (136) The competition on the downstream markets of railway products to be tested (including rolling stock and equipment) could also be negatively affected by this aid measure. As pointed out in the comments received on the opening decision, the geographical location of the facility may create *de facto* competition advantages in favour of the national rolling stock producers which would be more likely to use CEATF for testing, without incurring significant transport costs
- (137) Having regard to the lack of sufficiently proven positive effects of the notified aid, as observed by the Commission in sections 6.3.1 to 6.3.5, the negative effects of the measure in terms of actual and potential distortion of competition are considered such as to outweigh its claimed efficiencies.

6.3.7. *Transparency of aid*

- (138) In the light of the previous considerations it is not necessary to consider to what extent the aid is transparent.

⁵⁵ For example – Rete Feroviaria Italiana in Italy, SNCF in France, DB Bahn in Germany.

6.3.8. *Conclusions on compatibility of the aid*

(139) In light of the considerations set out in sections 6.3.1 to 6.3.7 above, the Commission concludes that the notified aid measure cannot be declared compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

6.4. Recovery of the incompatible aid

(140) In line with well-settled case-law, Article 16(1) of Regulation (EC) No 2015/1589 states that "*where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (...)*".

(141) The Courts of the Union have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation⁵⁶. In this context, the Courts of the Union have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid (including interest), thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored⁵⁷.

(142) The Commission has concluded that the aid granted by Spain to ADIF is unlawful and is incompatible with the internal market. As a result, the aid must be recovered in order to re-establish the situation that existed on the market prior to its granting. Recovery should cover the time from when the advantage accrued to the beneficiaries, that is to say when the aid was put at the disposal of the beneficiaries and the sums to be recovered should bear interest until effective recovery.

(143) On the basis of the information provided by Spain and summarised in recitals (43) and (44), and in Tables 3, 4 and 5 above, the total of the funds disbursed to ADIF in the period 2011 - 2014 amounts to EUR 143 703 000 (including EUR 135 866 000 in grants and EUR 7 837 000 in loans).

(144) The Commission has calculated the interest rate that would have been available on the market on the basis of the information provided by Spain concerning the commercial loans actually contracted by ADIF in the relevant period. However, the Commission appreciates that the result of its calculation could be affected by the existence of other loans of which it has not been made aware. Thus, for the purposes of calculating the difference between the interest rates actually fixed in the loans granted to ADIF and the market interest rate, and therefore the aid element that is to be recovered, Spain has a period of two months from the date of the adoption of this decision within which it may provide the Commission with evidence of any other commercial loans contracted by ADIF in the relevant period.

(145) Spain must therefore recover from ADIF both the advance grants actually disbursed and not yet reimbursed by ADIF and the aid element contained in the loans granted in 2011, 2012 and 2013, which, without prejudice to the possibility referred to in the preceding paragraph, is the difference between the interest rate of the loan and the market interest rate indicated in Table 6 above (see recital (75) above). The total amount to be recovered shall include recovery interest as of the moment that each grant or loan was disbursed and until the moment of its reimbursement.

⁵⁶ See *inter alia* judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, paragraph 75.

⁵⁷ See *inter alia* judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, Case C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

- (146) While for the grants the recovery interest should be calculated on the basis of the principal of the grant, the recovery interest for the loans should be calculated on the basis of the aid element contained in the loans.
- (147) No new payments should be made by Spain in relation to the project at hand.
- (148) As indicated in recital (88) above, the Spanish authorities stated that the CEATF railway circuit would not be constructed without approval of the Commission. In view of this, the Commission considers that there should be no reason for ADIF to keep the loans given that they were granted solely for this specific project. For this reason, the Commission requests the immediate termination and repayment of the loans granted to ADIF.

7. CONCLUSION

- (149) The advance grants and loans provided to ADIF by Spain constitute aid within the meaning of Article 107(1) of the Treaty. That aid was granted by Spain in violation of the notification and standstill obligations in Article 108(3) of the Treaty.
- (150) The Commission has concluded that the aid is incompatible with the internal market.
- (151) Therefore, the aid should be recovered from the beneficiary, ADIF, together with recovery interest,

HAS ADOPTED THIS DECISION:

Article 1

The public financing granted by Spain to Administrador de Infraestructura ferroviaria (ADIF) on the basis of the agreement of 27 December 2010 and the Decision of the Council of Ministers of 28 June 2013 for the construction of the CEATF, in the form of loans at rates that are below market interest rates and grants, amounting to EUR 358 552 309, constitutes State aid within the meaning of Article 107(1) of the Treaty.

Article 2

The aid referred to in Article 1 is unlawful as it was granted in breach of the notification and standstill obligations stemming from Article 108(3) of the Treaty.

Article 3

The aid referred to in Article 1 is incompatible with the internal market.

Article 4

1. In so far as the aid referred to in Article 1 has been disbursed to ADIF, Spain shall recover it immediately.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of ADIF until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004⁵⁸. The amounts to be repaid shall bear interest from the date on which they were made available to the beneficiaries, that is to say from the date of payment of the grant and loans installments, until actual recovery.
4. Spain shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.
5. Spain shall request the termination and repayment of the loans granted to ADIF.

Article 5

Spain shall ensure that this decision is implemented within four months of the date of notification of this Decision.

Article 6

1. Within two months of the date of notification of this Decision, Spain shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from ADIF;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that ADIF has been ordered to repay the aid.
2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from ADIF.

Article 7

This Decision is addressed to the Kingdom of Spain.

⁵⁸ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1), as amended.

Done at Brussels, 25.7.2016

For the Commission

Margrethe VESTAGER
Margrethe VESTAGER
Member of the Commission

