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Subject: State Aid SA.50233 (2018/N) – Greece
State aid for the construction of Lamia-Xiniada section of the E65
Motorway

Sir,

1. PROCEDURE

- (1) Following pre-notification contacts, on 24 January 2018 Greece notified to the Commission aid in favour of Kentriki Odos SA, the concessionaire of the Central Greece Motorway project ("E65 Motorway"). The Commission services sent a request for information on 21 March 2018, to which the Greek authorities replied on 5 and 18 April 2018. On 6 June 2018 the Commission services sent a new request for additional information to which Greece replied on 18, 19 and 22 June, as well as 18 July 2018 following a telephone call that took place on 13 June 2018. On 24 July 2018 the Commission services sent another request for information to which Greece replied on 27 July 2018. On 20 September the Commission services sent the last request for information and Greece replied on 1 October 2018.

2. DETAILED DESCRIPTION

2.1 The E65 Motorway project and the beneficiary

- (2) The Greek section of the pan-European Motorway, i.e. the E65 Motorway project is a 30 years' concession which concerns:

Κύριος Νίκος ΚΟΤΖΙΑΣ
Υπουργός Εξωτερικών
Βασιλίσσης Σοφίας 5
Grèce - 10671 Αθήνα

- a) the design, construction, operation, maintenance and commercial exploitation of a 181.5 km motorway linking the existing Athens-Thessaloniki motorway (PATHE) with Egnatia Odos in the north of Greece.
This motorway is divided in the following sections: (i) section from Lamia (PATHE semi-interchange) until Xyniada I/C of a length of 32.5 km ("Southern section"), (ii) section from Xyniada I/C until Trikala I/C of a total length of 78.5 km ("Middle section"), (iii) section from Trikala I/C until Egnatia I/C, of a total length of 70.5 km ("Northern section").
 - b) The operation and maintenance and commercial exploitation of a section of the Athens – Thessaloniki Motorway between Skarfia and Raches (57 km) that had already been constructed by the Greek State.
- (3) The Central Motorway is included in the Trans-European Transport Network (TEN-T)¹. The works on the Central Motorway are expected to improve traffic speed, capacity, safety, as well as interconnection with other modes of transport and other EU Member States both for passengers and cargo. In particular, the E65 Motorway will connect parts of the Greek Thessaly region with the two main motorway axes in Greece and subsequently with Athens (the capital and major hub for sea, air and railway transport), Thessaloniki (regional capital and sea, air and railway transport hub).
- (4) The E65 Motorway is carried out by a Special Purpose Vehicle Company, "Kentriki Odos S.A." which according to the Greek authorities' submission, currently² has the following shareholders:
- a) Ferrovial S.A. (former Cintra Concesiones de Infraestructuras de Transporte S.A.) 33,34%, and
 - b) GEK-Terna Holding Real Estate Construction S.A. 66.66 %.

2.2 The 2007 concession agreement ("CA")

- (5) In 2007, following a competitive tender, the Greek State and Kentriki Odos S.A.³ signed the CA for the construction, operation and maintenance of the E65 Motorway. Under this agreement the concessionaire would construct, operate and maintain the motorway, while the ownership of the motorway would lie with the Greek State. The concession commenced on 31 March 2008 and was initially foreseen to have a duration of 30 years, thus ending on 31 March 2038.
- (6) The construction of the E65 Motorway was envisaged to be financed partly by private sources and partly by public sources. This was based on the premise that, in view of the negative financial net present value (FNPV), the E65 Motorway could not be constructed unless financed, in part, with public funds. The public sources envisaged at the time were as follows:
- a) A grant of EUR 518 million by the State ("State Financial Contribution") which included grants from the State and the EU funds;

¹ Decision 661/2010/EU of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network, OJ L 204, 5.8.2010, p.1.

² Following transfer of shares, permitted under the CA and approved by the Hellenic Republic.

³ At the time, Kentriki Odos S.A. had the following shareholders: Cintra S.A./Ferrovial S.A. (33.34%), GEK – Terna (33.33%), Iridium Concesiones de Infraestructuras S.A. (1.33%) and Dragados S.A. (32%).

- b) The motorway revenues from the existing motorway section (i.e. the section Skarfia-Raches) constructed by the State.
- (7) The private sources were envisaged to be:
- a) EUR 155 million by the Concessionaire in the form of equity, including shareholders' loans;
 - b) EUR 1,190 million from commercial loans by a group of Greek and international financial institutions. The commercial loans would be drawn progressively during the construction period (T1) and would be repaid during the operation period (T2).
- (8) As regards its operation, the E65 Motorway was considered from conception as requiring an ongoing State subsidy throughout its term. This subsidy was intended to cover the difference between the anticipated traffic revenues and the actual costs of the operation/maintenance and financing of the motorway, including a return to the investors. Therefore the E65 Motorway was tendered on the basis of an availability of a subsidy payment the maximum amount of which was determined on the basis of the first tenders' offer (approximately EUR 1,645 million).
- (9) The State support in favour of the E65 Motorway was the subject of a Commission decision which found that there was no State aid in favour of the Concessionaire⁴.

2.3 The 2013 Reset agreement and the 2013 Commission no objection decision

- (10) Due to the economic crisis, there was a steep decline in traffic throughout Greece and in the expected toll income for the concessionaire (at least 60% lower than predicted). This resulted in a serious disturbance of the financial balance of the CA and consequently in the withdrawal of support from the banking sector. Thus the works on the project stopped. In order to unblock the situation, and given that a termination of the concession would not be an economically sound option, the Greek State renegotiated the concession contract with the concessionaire. This resulted in 2013 to the amendment of the CA ("Reset"), which involved:
- a) the deferral of the construction of the northern and southern sections to a later stage, as the financing sources of Kentriki Odos S.A. would not be sufficient for the conclusion of the entire project.
 - b) EUR 231.4 million⁵ additional State support in order to bridge the financing gap created due to the crisis for the construction of the middle section of the E65, and
 - c) the replacement of the operating subsidy by a so called "recycling mechanism" which would cover the operating costs, loan servicing and IRR of the concessionaire through the State's share of the toll revenues resulting from the operation of the E65, as well as of the Ionia odos motorway⁶. The total potential amount corresponding to these toll revenues was estimated at EUR 1,199 million for the E65 Motorway.

⁴ Commission decision of 30.01.2008 in case N 565/2007, OJ 70, 15.03.2008, p. 4.

⁵ See recitals 40 and 41, as well as footnote 16 of the 2013 Commission approval decision.

⁶ Conceded under another concession agreement to a special purpose company, including the same shareholders. See recitals 25 and 45 of the 2013 Commission no objection decision.

- (11) In exchange, the Concessionaire accepted a capped IRR of 7.49%⁷ through the whole period of the concession⁸. Moreover, if one year before the end of the concession (i.e. 2037), the Concessionaire has not achieved this Base IRR over the whole concession period, the concession period could be extended for three years after 2038.
- (12) In addition the operating and maintenance costs of the middle section were capped at a specific amount in aggregate for the duration of the concession period.
- (13) Given the guarantees provided by the elements of the Reset agreement, the lending financial institutions accepted to commit commercial loans, which had significantly lower principal amounts and higher interest margins than the previously committed loans⁹.
- (14) Following notification by Greece, the Commission raised no objections as regards the measures involved in the Reset¹⁰. The Greek authorities committed to notify any additional State resources, if they became necessary for the construction and/or operation of the E65 deferred parts.

2.4 The construction of the southern section and the notified measure

- (15) Greece has now notified the aid in the form of a EUR 305.7 million¹¹ grant to cover the construction costs of the E65 southern section. The project includes the full construction (main road, service roads/connecting roads and supplementary works) of a total length of 32,5 km.

2.4.1. The construction and funding of the southern section

- (16) According to section C of annex K of the Special Conditions of Contract ("SCC")¹², the State is entitled, within three years after the completion of the T1 period (construction period of the middle section), to decide whether it would take the deferred sections out of the concession or whether it would instruct the concessionaire to proceed with the construction works, while undertaking the obligation to fully fund the relevant design and construction costs.
- (17) According to section D of the same annex, in case for a time period of 3 years after the date of the Reset (i.e. 20 December 2013), (i) the average of the actual total revenues is equal or higher than the total CTA Forecasted Revenues increased by 20% and (ii) at the end of the same period and for the next 5 years the then forecast of the actual total revenues, for each year, is at least 20% higher than the corresponding total forecasted revenues of the Reset financial model ("T2 DC Constructions Activation Factor"), the concessionaire would have to partially fund

⁷ Under the Reset agreement the capped IRR corresponded to 8.45%, but it was revised downwards on the basis of an Amendment agreement between the concessionaire and the Greek State that was ratified by law 4354/2015.

⁸ Greece had provided at the time a benchmark analysis of market prices related to infrastructure concessions in Greece and in other countries for projects realised in years 1996-2010, which showed that concessionaires of similar projects usually expected an IRR between 11%-13% in nominal terms.

⁹ See recital 38 of the 2013 Commission no objection decision.

¹⁰ Commission decision of 13.12.2013 in case SA. 36893 (2013/N) – Greece – Reset of Greek Motorway concession projects – Central Motorway (E65), OJ C 50, 21.02.2014, p.1.

¹¹ In nominal values. This corresponds to EUR 232.7 million in discounted values.

¹² This annex complemented the provisions of the CA with regards to the deferred sections, under the 2013 Reset agreement.

the construction of the deferred sections in accordance with the provisions of section B of the same annex. According to the estimates submitted by the Greek authorities, the conditions of the T2 DC Constructions Activation Factor have not been met.

- (18) On the basis of this annex, a Ministerial decision¹³ was issued with which Greece notified to the concessionaire its intention to fully fund the construction works of the southern deferred section, and requested that the concessionaire submits to the State updated data regarding this section, such as updated designs, traffic forecasts, revenue projections, estimated operation and maintenance expenditure etc., on the basis of the CA financial models.
- (19) Following the submission by the concessionaire of the requested data, a new ministerial decision¹⁴ was issued, awarding the notified aid to the concessionaire to cover the construction costs of the southern section, subject to Commission approval.

2.4.2. The notified measures

- (20) Greece notified an aid amount of EUR 305.7 million (nominal) ("investment grant"), i.e. EUR 300 million to cover the construction costs of all the works that are necessary for the completion of the southern section and EUR 5.7 million intended to cover the costs related to the rehabilitation of the construction works already executed on the southern section prior to the Reset.
- (21) The costs for the construction of the project have been estimated on the basis of the prices submitted in the concessionaire's offer for the project in 2007, included in Appendix K of the CA, and indexed with the official Consumer Price Index ("CPI") until May 2018.
- (22) On the basis of these estimates the construction costs correspond to EUR 310.9 million, excluding rehabilitation works. However the relevant aid amount was limited to a lump sum of EUR 300 million, as the concessionaire agreed to a price reduction of 3.5% following negotiations.
- (23) Moreover, on the basis of this agreement, the concessionaire is, on the one hand, not allowed to request additional payments in case the construction cost increases beyond this figure and, on the other hand, any savings cannot be claimed by the State.
- (24) The investment grant shall be made available to the concessionaire through pre-agreed payments every three months on the basis of milestones related to the progress of construction works executed; the concessionaire shall be entitled to payment of the investment grant upon achievement of specific construction milestones and following a relevant certification of all works executed by the Independent Engineer.
- (25) The investment grant shall be funded through the Greek Public Investment Program and is eligible to be co-funded by the European Union through Priority Axis 03 "Trans-European Road Network and Road Safety" of the Operational Program (OP) "Transports Infrastructures, Environment and Sustainable

¹³ Ministerial decision A/6/00/01/01/oik 4336/17.08.2015.

¹⁴ Ministerial decision A/6/00/01/01 oik. 12263/16.12.2016.

Development" of NSRF 2014-2020, under the conditions that result from the applicable ESIF rules and regulations.

- (26) Moreover, under the CA the State has undertaken the obligation to provide the concessionaire with vacant possession¹⁵, i.e. a greenfield area in view of the works. To this end, the State has undertaken the contractual obligation to assume all relevant costs for the works related to expropriations, archaeological findings and relocation of public utility networks. To this purpose, during the implementation of the CA the States' competent services shall be assisted by specialised consultants. These works/services and their estimated costs are as follows:

Works/services	Estimated amount (in million EUR and nominal)
Archaeology	3.8
Expropriations	13.1
PUO networks relocation ¹⁶	5
Consultancy costs	2.5
Total	24.4

- (27) Since the relevant amounts concern obligations undertaken by the State under the CA (archaeology, expropriations, PUO networks relocation, upgrade of safety barriers) or to the assistance of the State's competent services (consultancy services) the Greek authorities argue that the relevant amounts do not constitute State aid. These costs could be eligible for financing by the ESIF funds, under the conditions that result from the applicable ESIF rules and regulations..

2.4.3. The conditions relating to the operation of the southern section

- (28) Following construction of the project and throughout the term of the CA the concessionaire shall be responsible for the operation and maintenance ("O&M") of this section bearing all the risks, as it has waived its right to the recycling mechanism for the southern section, as well as to any other type of operating State subsidy as regards the operating and maintenance costs of this section.
- (29) The project shall generate revenues since tolls will be levied on the users at the frontal toll station of this section. According to the CA the concessionaire may impose a maximum toll per kilometre for the whole E65 motorway, including the deferred sections¹⁷. The tolls shall be collected by the concessionaire and shall be accounted separately for each of the sections. Moreover, the concessionaire would create a separate bank account solely for the purposes of the southern section activities, which will include only the southern section's cash flows. In addition, the southern section has been explicitly excluded from the lender's securities and the concessionaire is obliged to obtain separate insurance covers for the deferred section.
- (30) The revenues from the operation of the southern section, which are estimated to EUR 63 million (in discounted values) throughout the concession period, will be used solely for the operation and maintenance of the same section while any

¹⁵ As defined under article 3.1 of the CA "Vacant Possession" (Ελεύθερη Χρήση) means the exclusive right of the Concessionaire for use and possession of the Project Site for any purpose or activity permitted by Articles 4.1.1 and 4.2.

¹⁶ PUO stands for Public Utilities Organisations.

¹⁷ eg. EUR 0.04/km in base reference day prices (1st January 2003) and pre-VAT for vehicles in category 2, according to article 24 of the CA.

outstanding balance after deduction of O&M costs¹⁸ from the section's revenues shall be reimbursed to the State on the basis of a claw-back mechanism. In particular, in case the revenues from the operation of the southern section turn out to be higher than its operating and maintenance costs, the surplus will be put in a reserve account for a 5 year rolling period in order to cover possible losses in the next 5 year rolling period. Following this 5 year rolling period, any surplus will be returned to the State.

- (31) Moreover, the CA¹⁹ provides for a capped O&M expenditure, both as a total nominal amount up to the end of the concession period (amounting to EUR 115.2 million) and per every 6 month calculation period for the deferred sections.
- (32) According to the CA as amended with Reset, the internal rate of return of the concessionaire, currently being estimated at 6.67%²⁰, has been capped at a nominal return of 7.49%. Therefore, in case there is an increase in traffic to the middle section due to the construction and operation of the southern section or of other works that may enhance the attractiveness of this corridor, the concessionaire's IRR cannot exceed the cap set. Moreover, neither the CA, nor the current regulatory framework provide for any kind of mechanism guaranteeing a minimum IRR. Thus the maximum IRR of the concessionaire for the E65 Motorway is not guaranteed, but will depend on future traffic of the E65 and the Ionia odos motorway, given that the latter is the one expected to be relatively more profitable and not the E65 motorway.
- (33) The Greek authorities indicated that all the new elements, such as the waiver of the right of the concessionaire to the recycling mechanism or any additional operating subsidy, as well as the relevant claw-back mechanism and the other safeguards mentioned above in recital 29 and 30, will be included in the CA, through a new agreement between the parties that will amend the existing CA in all necessary aspects. In this respect they have also submitted the CA with the relevant draft amendments.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of State aid

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

3.1.1. Notion of undertaking

- (35) State aid rules only apply where the recipient of an aid is an 'undertaking'. According to settled case law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed²¹. Any

¹⁸ The estimated amount corresponds to EUR 65.3 million throughout the concession period.

¹⁹ Article 25.4.1 (d) in combination with clause E.1 of Annex K.

²⁰ The IRR values have been presented in nominal prices and post-tax for the company. The Greek authorities submitted relevant calculations included in an updated financial model of the Reset agreement.

²¹ Joined cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.

activity consisting in offering goods and/or services in a given market is an economic activity²². In the *Aéroports de Paris* judgment²³ the General Court ruled that the operation of an airport had to be seen as an economic activity. Moreover, the *Leipzig/Halle* judgment²⁴ confirmed that as long as an airport runway will be used for economic activities, its construction also constitutes an economic activity. While these cases relate specifically to airports, the principles developed by the Union Courts are also applicable to the construction of other infrastructures that are indissociably linked to an economic activity²⁵. In this case the beneficiary is Kentriki Odos S.A., a special purpose vehicle that is held jointly by Ferrovial S.A. and GEK-Terna Holding Real Estate Construction S.A. which will operate the E65 Motorway southern section against the payment of tolls. Thus it conducts an economic activity. Therefore the Commission considers the beneficiary to be an undertaking within the meaning of State aid rules.

3.1.2. Measure imputable to the State and existence of State resources

- (36) The measure in favour of the undertaking has to be granted by a Member State or through State resources and as such it has to be imputable to the State. Resources coming from the Union, as for example structural funds, are considered as State resources if national authorities have discretion as to the use of these resources²⁶. In the case under assessment all measures involving ERDF funds and State funds have been decided and are granted by the State in a discretionary manner to the beneficiary. Therefore the Commission concludes that the funds from both sources amount to State resources and are imputable to the Greek State.

3.1.3. Existence of a selective advantage

- (37) According to constant case law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions, i.e. in the absence of State intervention²⁷. Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention²⁸. To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation if the measure had not been introduced. The notion of aid encompasses not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being

²² Cases 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7, C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36, joint cases C-180/98 to C-184/98, *Rec.2000, p.I-6451*.

²³ Judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 125, confirmed by the Court of Justice in its Judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617.

²⁴ Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others v Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117; upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821,.

²⁵ Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821, para. 43,44. Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, para. 40.

²⁶ See paragraph 60 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ("NoA"), OJ C 262, 19.7.2016, p.1.

²⁷ Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41.

²⁸ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13.

subsidies in the strict meaning of the word, are similar in character and have the same effect²⁹.

3.1.3.1. Concerning the EUR 305.7 million grant

- (38) The State will award a EUR 305.7 million grant to the concessionaire in order to cover its total construction costs for the completion of the southern section. The Commission considers that this grant entails a selective advantage in favour of the beneficiary, as, under normal market conditions the construction of the E65 southern section would have to be financed through the concessionaire's own resources. This advantage is provided outside the context of a tender process as this grant was not included in the 2007 tender. Moreover, the aid will enable the construction and operation of the southern section, which will de facto result in additional traffic in the middle section of the E65 motorway. Thus it cannot be excluded that the concessionaire may enjoy an additional indirect advantage due to the increase in revenues it may derive from the middle section of the E65 motorway.

3.1.3.2. Concerning the State costs relevant to its obligations from the CA

- (39) The Commission notes that the State will conduct the works relevant to the contractual obligations it undertook towards the concessionaire within the CA. In particular the State assumed the obligation to put at the disposal of the concessionaire a greenfield area, so that the beneficiary proceeds with the construction of the southern section. As the responsibility of expropriations and researches relevant to the protection of archaeology, as well as the PUO networks are in principle under the responsibility of the State, the Greek authorities indicate that it is common practice that the State assumes the relevant obligations within public contracts. The Commission takes note of the fact that this type of works are the responsibility of the State and that such obligations are in principle common practice within public contracts. Moreover, it considers that as in any contract between normal market operators, said State obligations, although they involve the coverage of the relevant costs, do not entail a selective advantage in favour of the concessionaire, as the latter will not be alleviated from the costs it would have to bear in any case, as according to the Greek authorities the State undertakes the same obligation for all Greek motorway concessions.

3.1.3.3. Conclusion

- (40) Therefore, the Commission concludes that the conduct of works on behalf of the State in view of the necessity to have a greenfield area for the construction of the motorway do not constitute State aid. Consequently, the Commission's analysis below will focus only on the EUR 305.7 million grant the State has awarded to the concessionaire, as it entails a selective advantage in its favour.

3.1.4. Distortion of competition and effect on trade

- (41) A measure that constitutes a selective advantage may constitute State aid if it distorts or threatens to distort competition and in so far as it affects trade between Member States. According to settled case law, a selective advantage granted by the

²⁹ Cases C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 38; C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34.

State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes³⁰. A distortion of competition within the meaning of Article 107 TFEU is thus assumed inasmuch as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition³¹.

- (42) As explained in the Notice on the notion of aid³², in order for the distortion of competition to be excluded in the particular case of bundled construction and operation of motorway infrastructure, as in this case, there has to be a natural monopoly and the bundled construction and operation has to be tendered out in compliance with public procurement rules. Moreover, it should be ensured that the funding cannot be used to cross-subsidise or indirectly subsidise other economic activities. In this case although the concession of the bundled construction and operation of the E65 motorway was initially (in 2007) agreed following a competitive tender procedure, the features of the concession and the public contribution were modified in 2013 and were (approved by the Commission in 2013. These modifications were not the result of a competitive tender. Thus an advantage in favour of the concessionaire cannot be excluded.
- (43) Moreover the concessionaire's shareholders are companies active in infrastructure works in several sectors and with an international presence. Therefore an indirect advantage to other activities of the companies involved cannot be excluded either. As a result the Commission concludes that the notified measure is liable to distort competition. In addition, taking into account the nature and international dimension of the sector concerned, which is the construction, maintenance and operation of motorways against tolls, as well as the number of operators active in the sector, the Commission considers that the measure is liable to affect trade between Member States.

3.1.5. Conclusion

- (44) On the basis of the foregoing assessment, the Commission concludes that the notified measure corresponding to EUR 305.7 million grant constitutes State aid within the meaning of Article 107 (1) TFEU.

3.2. Legality of the aid

- (45) The Commission notes that Greece has not implemented the aid measure pending approval by the Commission. Greece has thus fulfilled the obligation under Article 108(3) of the Treaty by notifying the measure prior to its implementation and making it subject to Commission approval.

3.3. Compatibility of the aid

3.3.1. Applicable legal basis for assessment

³⁰ Case 730/79 Philip Morris [1980], ECR 267, paragraph 11, joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, Alzetta Mauro and others v. Commission, [2000] ECR II-2325, paragraph 80.

³¹ Joined cases T-298/97, T-312/97 etc. Alzetta [2000] ECR II-2325, paragraphs 141 to 147, case C-280/00, Altmark Trans [2003] ECR I-7747.

³² See recital 220 in combination with recital 211 and 212.

- (46) In derogation from the general prohibition of State aid laid down in Article 107(1) TFEU, aid may be declared compatible if it can benefit from one of the derogations enumerated in the Treaty. The Greek authorities invoked Article 107(3)(c) TFEU as basis for the assessment of the compatibility of the aid measure at stake.
- (47) The Commission observes that, according to established case practice, the appropriate legal basis for assessing compatibility of State aid to infrastructure may be Article 107(3)(c) TFEU, which stipulates 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 found compatible with the internal market.
- (48) On this basis, the Commission will examine whether the notified aid measure meets a clearly-defined objective of common interest, is necessary and proportionate to this objective, and does not affect trade between Member States to an extent contrary to the common interest. The Commission will assess these compatibility conditions which derive from its case practice on infrastructure projects, taking into account in this particular case its precedent decisions concerning the E65 Motorway and the exceptional circumstances that led to the Reset in 2013.

3.3.1.1. Objective of common interest

- (49) An objective of common interest is an objective which has been recognised by the European Union as being in the common interest.
- (50) According to the Greek authorities the construction and operation of the E65 Motorway, which will be enabled also through the construction of the southern section, will contribute to both European and national objectives of common interest.
- (51) The Commission notes that the southern section of the E65 motorway is eligible for co-financing under the Operational Program "Transport Infrastructure, Environment and Sustainable Development", under the conditions that result from the applicable ESIF rules. The strategic objectives of this programme are related to the main principles mentioned in the White Paper on Transport³³. The strategic goal, to which the project contributes, is the promotion of the completion of the infrastructures of the core TEN-T network and the further development/upgrade of the comprehensive TEN-T, which pursues the specific objectives of ensuring the sustainable mobility of persons and goods under the best possible social, environmental and safety conditions.
- (52) The project increases the accessibility to the regions of Sterea Ellada, Thessalia and Western Macedonia, as it improves the interoperability and the accessibility of the region's road network and increases the road safety levels. The project shall also promote Greece's connectivity with the European Union since the international traffic towards EU countries will be improved, both via the countries of West Balkans and via Italy.

³³ WHITE PAPER Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final.

- (53) In addition, the southern section is located and is servicing mainly Sterea Ellada region which is an Article 107(3)(a) region of Greece³⁴. It is designed to assist the development of this region by supporting investment and job creation in a sustainable context. It is expected to promote the expansion, rationalization, modernization and diversification of the economic activities of companies located in the region and to encourage firms to set up new establishments there. It will also contribute to the reduction of the level of unemployment in the area.
- (54) In this context the completion of the southern section is expected to have a significant socio-economic impact on the areas affected, as it will increase the traffic capacity of the road transport system of Sterea Ellada and Thessalia in particular. Because of its current weaknesses, this road transport system creates important disincentives at the development of the productive and socio-economic activities, since it gives rise to obstacles in the utilization of the available growth potential of these two regions in particular. According to the Greek authorities the project will also create employment during both the construction phase and the operation period in Sterea Ellada.
- (55) Therefore the Commission considers that the completion of the southern section which will be enabled through the aid under assessment, will have an impact on the economic, social and territorial cohesion, EU objectives that are recognised in Article 174 TFEU.
- (56) The above elements demonstrate that the project contributes to objectives of common EU interest and in particular the EU transport policy and the economic convergence and cohesion. Therefore the Commission considers that the measure pursues a genuine objective of common interest.

3.3.1.2. Incentive effect

- (57) The aid granted through the envisaged measure must have an incentive effect. State aid provides an incentive effect if it changes the behaviour of the undertaking concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner.
- (58) The Commission considers that the aid does not present an incentive effect for the beneficiary in all cases where work on the project had already started prior to the aid application by the beneficiary to the national authorities. The Greek authorities have confirmed that the works on the project have not yet started, pending authorisation from the Commission.
- (59) In addition, the Greek authorities state that given the fact that the construction of the southern part of the E65 Motorway is not economically viable, the incentive effect of the measure is already present, because the aid enables the beneficiary to implement the project whereas, in the absence of the public support, neither the beneficiary nor any other market investor or financial institution would have financed the project. The Commission considers that in the absence of the notified measure the project could indeed not have taken place, as further developed in the next section.

³⁴ Since its GDP/CAP is below 75% of the EU-28 average level. See SA.46230 (2016/N) – Greece - Amendment to the regional aid map for Greece (2014-2020) for the period 2017-2020, OJ C 36, 3.2.2017, p. 1.

3.3.1.3. Necessity of the aid

- (60) The Commission's assessment as regards the necessity and proportionality of the notified aid measure has to be conducted in the context of the conditions accepted by the Commission in its 2013 decision related to the Reset, due to the exceptional circumstances of the financial crisis in Greece.
- (61) The Commission notes that upon Reset, the State agreed with the concessionaire to defer the southern and northern motorway sections, as due to the financial crisis, their construction was not feasible. The Reset foresaw the conditions under which the construction and additional funding of these sections could be feasible at a later stage, with or without the participation of the concessionaire, depending on the future revenues and availability of funding.
- (62) The Commission observes that according to annex K of the CA, the concessionaire would fund the deferred sections, and hence bear further risks, only in case it reached a certain level of revenues (see recital 17 of this decision), given that a structurally non-profitable concession was faced with additional financial difficulties due to the financial crisis. Even in the case where such funding would be possible, according to the same annex, the concessionaire would have to partially finance these sections and hence bear part of the risk of the project.
- (63) On the basis of the updated estimates on traffic and forecasted revenues of the concessionaire, submitted by the Greek authorities, the concessionaire at this stage, is not in a position to finance alone any deferred section and in particular the southern section. In particular the estimates submitted by the Greek authorities demonstrate that the operating revenues of the southern section would not even cover the operating and maintenance costs of this section. Therefore the Commission considers that the aid that the Greek State awards to the concessionaire in order to cover the construction costs of the completion of the southern section is necessary, as otherwise this section would not be constructed.

3.3.1.4. Proportionality of the aid

- (64) A State aid measure is proportional if the aid amount is limited to the minimum needed to incentivise the additional investment or activity in the area concerned.
- (65) As regards proportionality the Greek authorities submit that the aid to be granted to the concessionaire for the construction of the southern section should be considered proportionate since the objective of completing the TEN-T project could not be achieved with less aid and the amount of the aid was limited to the minimum necessary in order to allow the completion of the project. The Greek authorities justify the aid intensity by referring to the public debt crisis in Greece which led to a sharp decrease of the forecasted traffic on the southern section of the E65 motorway.
- (66) The Commission notes that Greece set out safeguards in order to ensure that the concessionaire's financial advantages from the public funding of the southern section are mitigated:
 - a. The aid amount corresponds to the construction costs determined as in the 2007 tender and CA**

- (67) According to the data submitted by the Greek authorities the envisaged EUR 305.7 million capital grant was calculated on the basis of the total design-construction costs of the E65 Motorway as defined in the CA that corresponded to the southern section costs³⁵. From this amount were deducted the costs of the works already completed on site until the works were suspended, i.e. in 2011. Finally the resulting amount was indexed on inflation on the basis of the Greek Consumer Price Index.
- (68) The Commission notes that according to the data submitted by the Greek authorities the envisaged EUR 305.7 million grant was estimated on the basis of the total design-construction costs of the E65 Motorway as defined in the concessionaire's offer in the context of the 2007 tender and updated to May 2018. Thus in view of the fact that the original estimates were the result of a competitive, transparent, non-discriminatory and unconditional tender procedure, as confirmed in the 2008 Commission decision, it can be concluded that the construction cost was in line with market conditions at the time the concession was agreed. The Commission further notes that the Reset did not change anything on this aspect of the concession, as the same cost estimates were taken also into account in 2013 as regards the middle section. Moreover, according to the Greek authorities the unit costs of construction per kilometre are comparable with those of the other Greek and European motorway construction projects for similar work categories.
- (69) Taking into account the fact that these cost estimates were the result of a competitive, transparent and non-discriminatory tender procedure, the fact that the 2013 Reset did not alter this element of the CA, as well as the fact that these estimates were updated on the basis of objective and verifiable parameters, although these prices include de facto a profit margin in favour of the concessionaire, the Commission can conclude that these estimates can be considered as appropriate in view of the assessment of the proportionality of the aid.

b. Clear separation of the southern section from the middle section

- (70) The Commission observes that the Greek authorities have clearly separated the southern section's cash flows from those of the middle section.
- (71) To this end, they introduced separate termination clauses regarding events of default related to the deferred sections and they excluded the southern section from the lender's financing under the CA and consequently, from any debt servicing obligations the concessionaire has.
- (72) Finally, in order to safeguard the financial separation of the southern section with regard to the middle section and to exclude the possibility of any spill-over or cross-subsidisation, according to draft article 25.4A of the CA, the concessionaire shall maintain within its accounting system separate accounts for each section for monitoring and reporting the cash flows that relate to the different activities of the construction and operation of the southern and middle section.
- (73) On this basis, the Commission can conclude that the Greek authorities have indeed separated the revenues and expenditure of the two motorway sections thereby

³⁵ See recitals 21 and 22 of this decision.

ensuring that there would be no direct advantage passed from the southern section to the middle section.

c. Operation and maintenance of the southern section

- (74) The Commission further notes that the complete E65 Motorway concession was ab initio conceived as requiring an ongoing State subsidy to be paid by the State throughout its term in view of the low traffic volumes forecasted that wouldn't allow for the revenues generated to cover operation and maintenance costs. Moreover, the Greek authorities indicated that the forecasted traffic experienced a sharp decrease, as a result of the financial crisis Greece went through, with a significant impact on the anticipated revenues, which, according to the submissions of the Greek authorities, have not been reinstated since.
- (75) However, as explained by the Greek authorities, following negotiations on the southern section, the concessionaire has accepted to waive its right, deriving from the CA, to receive any kind of financial support for the operation of the southern section either indirectly through the Recycling mechanism or directly from the State budget. In addition, according to the updated traffic forecasts submitted by the Greek authorities, the estimated revenues that will be generated from the operation of the southern section barely cover the estimated operation and maintenance costs of this section. Therefore, no advantage is expected to stem from the operation phase of the project.
- (76) Therefore in the Commission's view, the concessionaire will undertake the risk to cover any financing shortfall that may occur during the operation period of the southern section. Consequently the Greek State shall be relieved from any obligation to support the operation and maintenance of this section.
- (77) In addition, the Greek authorities have put in place a claw-back mechanism in the event that the operation and maintenance of the southern section turns out to be profitable³⁶. Finally as the O&M costs are capped in accordance with the provisions of the CA, an additional safeguard exists, to avoid inflation of the relevant revenues and ensure that the claw-back mechanism may indeed generate revenues for the State.
- (78) On this basis, the Commission considers that the safeguards put in place as regards the operation phase of the southern section may indeed ensure that the concessionaire will get no benefit from the operation and maintenance of the southern section.
- (79) Concerning the indirect benefit that the concessionaire may derive due to the increased traffic in the middle section, induced by the operation of the southern section, the Commission notes that the IRR is capped at 7.49%, a level which was considered as appropriate already under the Reset, on the basis of a benchmark analysis presented by the Greek authorities. According to the updated financial model the concessionaire has developed in June 2017, the currently expected IRR corresponds to 6.67%. Thus on the basis of these estimates, possible additional revenues in the middle section due to additional traffic may in the best case scenario result in maximum increase of 0.82% of the IRR of the concessionaire.

³⁶ See recital 29 of this decision.

Any extra profits above this level will flow back to the State through the claw-back mechanism foreseen in the CA as regards the middle section, ensuring that the concessionaire will not benefit from excessive revenues. It is finally to be noted that such indirect advantage would have existed anyhow irrespective of whether the construction of the southern section would have been done by the State, the current concessionaire or another concessionaire, in view of the specific circumstances that led to 2013 Reset.

- (80) On the basis of the safeguards set out above, the Commission can conclude that the aid is proportionate to the objective pursued and that the safeguards that the Greek authorities have committed to implement mitigate to the minimum possible the advantages the concessionaire may get from the aid under assessment.

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

- (81) For the aid to be compatible with the internal market, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member states must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest.
- (82) According to the Greek authorities the socio-economic benefits of the construction of the project outweigh any potential adverse effect on competition or trade between Member States given the safeguards in place to minimize the latter.
- (83) The Commission considers that the measure under assessment will enable the construction of a motorway section which, as explained above will generate important benefits for the economic development of the relevant region, in terms of interconnection, growth and employment. Moreover it will contribute to the promotion of the EU's transport policy and social cohesion objective.
- (84) Taking into account the safeguards put in place by the Greek authorities in order to mitigate the advantages the concessionaire may have from the completion of the southern section, the distortion of competition induced by the measure can be considered as mitigated accordingly.
- (85) In the light of the above the Commission concludes that the positive effects of the measure may outweigh potential significant distortions of competition, since the safeguards in place may sufficiently limit the latter without impeding the achievement of the objective of common interest.

3.3.1.6. Transparency of the aid

- (86) The Greek authorities confirmed that the full text of the aid granting decision will be available on the following websites:
- www.espa.gr
 - webgate.ec.europa.eu/competition/transparency/public/search/home/
 - www.ymeperaa.gr
 - www.diavgeia.gr
- (87) The information published will contain the full text of the individual granting decision and its implementing provisions (or a link to it), the identity of the aid granting authority, the identity of the individual beneficiary, the aid instrument and

the amount of aid granted, the objective of the aid, the date of granting, the type of undertaking, the Commission's aid measure reference number, the region where the beneficiary is located (at NUTS 2 level) and the principal economic sector of the beneficiary (at NACE group level). The information must be published after the decision to grant the aid has been taken, must be kept for at least ten years and must be available to the general public without restrictions.

3.4. Conclusion

(88) The Commission concludes therefore that the notified EUR 305.7 million grant can be considered compatible with the internal market by virtue of Article 107(3)(c) TFEU³⁷.

4. CONCLUSION

The Commission has accordingly decided:

- to consider as no aid the State costs for the works related to expropriations, archaeological findings and relocation of public utility networks, as well as relevant consulting services, under the CA;
- not to raise objections to the aid grant for the construction of the southern section on the grounds that it is compatible with the internal market pursuant to Article 107 (3)(c) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

³⁷ This conclusion is without prejudice to any future Commission assessment of any funding Greece may provide for the northern E65 motorway section, which will have to be assessed on its own merits.