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**Subject: State Aid SA.57055 (2020/N) – Poland - anti-crisis measures - COVID-19 – equity instruments**

Excellency,

## **1. PROCEDURE**

- (1) Following pre-notification contacts that started on 15 April 2020, by electronic notification of 7 May 2020 Poland notified a scheme on aid in the form of equity instruments (acquisition of shares directly and via subscription warrants) and hybrid instruments (bonds and loans convertible into equity) (“the measure”) under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (“the Temporary Framework”).<sup>1</sup>
- (2) By electronic mails of 12, 15 and 20 May 2020, the Commission requested additional information on the measure. Poland replied by electronic mails of 14, 18 and 22 May 2020. The Commission and the Polish authorities held teleconferences on 15 and 25 May 2020. Subsequently, Poland amended and supplemented the

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<sup>1</sup> Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020, OJ C 91I, 20.3.2020, p. 1, as amended by Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 112I, 4.4.2020, p. 1, and Communication from the Commission C(2020) 3156 final of 8 May 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 164, 13.5.2020, p. 3.

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notification on 26 May 2020. The Commission sent additional questions on 28 May, 4, 6 and 8 June, to which Poland replied on 2, 5, 8 and 9 June respectively.

- (3) The Polish authorities confirm that the notification does not contain confidential information.
- (4) Poland exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union (“TFEU”), in conjunction with Article 3 of Regulation 1/1958,<sup>2</sup> and to have this Decision adopted and notified in English.

## **2. DETAILED DESCRIPTION OF THE MEASURES**

- (5) Poland considers that the COVID-19 outbreak has started to affect the real economy. The measure aims at ensuring that the disruption of the economy does not undermine the viability and solvency of undertakings that were not considered to be in difficulty before the outbreak, and thereby to preserve the continuity of economic activity during and after the COVID-19 outbreak.
- (6) The purpose of the aid granted under the measure is to enable the beneficiary to restore a stable financing structure that has been compromised, in particular, due to the need to reduce or stop production or provision of services and due to the demand shocks resulting from the COVID-19 outbreak. The COVID-19 outbreak has caused a significant decrease in the revenue of undertakings with the simultaneous need to cover the fixed costs of operations (e.g. employee costs). This causes a significant deterioration in the undertakings’ financing structure and, as a result, prevents them from settling their liabilities and obtaining financing on market terms, e.g. through banking channels, resulting in the medium term in their insolvency and, consequently, bankruptcy. Numerous bankruptcies would have an adverse impact on the Polish economy and indirectly on the European Union as a whole, while, at the same time, translating into serious social difficulties and disturbances in the internal market.
- (7) Poland has designed the measure to be compatible with the internal market under Article 107(3)(b) TFEU, as interpreted by section 2 of the Temporary Framework and in light of the detailed requirements in its section 3.11.

### **2.1. The nature and form of aid**

- (8) The measure is a part of the wider “Anti-crisis shield” package of measures aiming to tackle the economic impact of the COVID-19 outbreak in Poland. The measure foresees the granting of aid in the form of equity support and in the form of convertible bonds and loans.

### **2.2. National legal basis**

- (9) The legal basis for the notified measure is Article 21a(1) of the Act of 4 July 2019 on the system of development institutions (“Act on SDI”)<sup>3</sup>, as amended by the Act

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<sup>2</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

<sup>3</sup> Polish Journal of Laws, item 1572, as amended:  
<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20190001572/U/D20191572Lj.pdf>.

of 31 March 2020<sup>4</sup>, as well as the following acts adopted on the basis of the Act on SDI:

- (a) the Resolutions of the Polish Council of Ministers of 27 April 2020 establishing the financial support programme entitled “Financial shield for large enterprises”, as amended (“the Programme”), insofar as it sets the framework for the measure assessed in this Decision<sup>5</sup>;
- (b) Internal rules for the implementation of the part of the Programme related to the measure (to be adopted by the aid-granting authority, “the Implementing Rules”).

### **2.3. Administration of the measure**

- (10) The aid-granting authority responsible for administering the measure is the Polish Development Fund (Polski Fundusz Rozwoju, “PFR”)<sup>6</sup>. The PFR is a joint stock company wholly owned by the Polish State Treasury. Funds granted under the measure will be distributed directly by the PFR.
- (11) The aid can be granted only on the basis of the application by the beneficiary. The PFR will check aid applications and will decide on granting the aid based on the documents submitted by the beneficiary. In particular, the beneficiary will provide documents proving its eligibility to receive aid under the measure, its multiannual strategy or a restructuring plan indicating a recovery of the beneficiary’s financial viability, financial projections and the calculation of the financial loss<sup>7</sup> as a result of the COVID-19 outbreak.
- (12) Beneficiaries will be able to apply either directly to the PFR or via the application form at [www.pfr.pl](http://www.pfr.pl), where all relevant information will be available. The provision of financial support to the beneficiaries will follow the order in which the PFR accepts applications and signs the transaction documentation. The PFR will give priority of recognition and acceptance to those proposals that, in accordance with the applicable procedures, are complete and not subject to deficiencies that hinder their speedy processing.
- (13) If the PFR decides to grant aid under the measure, it will conclude an agreement with the beneficiary setting out all the specific terms and conditions of the aid and the obligations of the beneficiary.

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<sup>4</sup> Polish Journal of Laws, item 569.

<sup>5</sup> Apart from setting the framework for the measure, the programme sets out the framework for two other aid schemes under the Temporary Framework, which were approved respectively by Commission decision C(2020) 3535 final of 25 May 2020 in case SA.57306(2020/N), and Commission decision C(2020)3656 final of 29 May 2020 in case SA.57054(2020/N).

<sup>6</sup> [www.pfr.pl](http://www.pfr.pl).

<sup>7</sup> Realised and forecasted cash loss on sales, covering a period of 12 months from the month in which the decrease in revenue caused by the COVID-19 disease occurred, where the cash loss on sales is the net loss on sales reflected in the profit and loss account, excluding in particular the depreciation costs, provisions and write-downs or the result on the revaluation or sale of assets (EBITDA less other operating items), provided that in the cases justified by the specific nature of the business (e.g. infrastructure companies), the financial costs and the result arising from write-downs caused by the COVID-19 outbreak on the value of assets may also be included in the calculation of the cash loss on the sales.

## 2.4. Basic elements of the measure

- (14) The aid will take the form of (i) an increase of the share capital of the beneficiary via the subscription by the PFR for newly issued shares of the beneficiary, or via the exercise of subscription warrants by the PFR with regard to such newly issued shares (“equity instruments”); and (ii) bonds and loans, convertible into equity of the beneficiary (“hybrid instruments”).
- (15) The PFR will ensure that the selected equity and hybrid instruments and the conditions attached to them are appropriate to address the beneficiary's recapitalisation needs, while at the same time minimising distortions to competition.

### 2.4.1. Proportionality and maximum aid amount

- (16) The maximum amount of aid granted by the PFR to a beneficiary under the measure will be calculated based on the financial forecasts of the beneficiary's results, which will not go beyond 31 December 2021, and not exceed the financial loss<sup>8</sup> of that beneficiary as a result of the COVID-19 outbreak. When calculating the amount of aid, State aid received or planned in the context of the COVID-19 outbreak will be taken into account, by including it in the beneficiary's financial forecasts.
- (17) For the calculation of the amount of aid, the beneficiary's financial forecasts will be compared to the average of the beneficiary's debt-to-equity ratios for 2018 and 2019. In addition, other ratios that include a liquidity component may be used in such a comparison, but only in a complementary way. In any event, the maximum amount of aid will not exceed the minimum needed to ensure the viability of the beneficiary, and will not go beyond what is necessary to restore the capital structure of the beneficiary to that predating the COVID-19 outbreak, i.e. the situation existing on 31 December 2019.
- (18) The maximum amount of aid for a beneficiary is limited to PLN 1 billion (ca. EUR 220 million)<sup>9</sup>, depending on the needs and scale of the business activity of the beneficiary. Poland will notify individual aid above EUR 250 million to the Commission separately.

### 2.4.2. Detailed arrangements for equity instruments

- (19) The PFR will usually acquire newly-issued ordinary shares of the beneficiary, with all rights vested in such shares (voting, right to dividends, etc.) having the same characteristics as those of the existing shares. In certain cases, where the risk profile of the beneficiary would so require, the PFR will acquire preferred shares, which are preferred with respect to dividends or to liquidation.
- (20) If the PFR acquires shares in a listed company, that acquisition will be conducted based on a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection, reduced by a discount described in recital (31). If the beneficiary is not a publicly listed

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<sup>8</sup> Cf. footnote 7.

<sup>9</sup> 1 EUR = 4.54 PLN; amounts in PLN are converted in EUR only for reasons of comparison.

company, an independent expert is to establish an estimate of its market value, and then the acquisition will be conducted based on that market value, reduced by a discount described in recital (31).

- (21) In certain cases, along with the acquisition of shares in the beneficiary, the PFR will also obtain (at no additional cost) subscription warrants giving the PFR the option to acquire additional shares of the beneficiary for a predetermined exercise price if the conditions for exercising the warrants are met.
- (22) Subscription warrants will be used for the following purposes:
- (a) To ensure the security of the PFR's funds, in case the value of the beneficiary's shares decreases after the initial investment of the PFR (so-called "equity-kicker" warrant). The exercise price of the "equity kicker" warrants would be set at the moment of the initial investment by the PFR and would be the smallest price that is legally possible ("Minimal Price")<sup>10</sup>. The PFR will pay the price at the moment of exercising the warrant;
  - (b) As a tool to incentivize the beneficiary or its owners to redeem the shares owned by the PFR as early as possible (see recital (31)(a));
  - (c) To facilitate investment in tranches in the equity of the beneficiary, when the PFR chooses such an investment method. In that case, the PFR will pay the exercise price for the subscription warrant at the moment of exercising the warrant and such exercise price will be set by one of the following methods:
    - i) Price established on the basis of the TERP (Theoretical Ex-Rights Price) method, at the moment the PFR exercises the warrant (for listed companies);
    - ii) Price established by independent valuation at the moment the PFR exercises the warrant or at the time the PFR makes the initial investment (for non-listed companies).
- (23) The PFR will obtain separate subscription warrants for each purpose indicated in recital (22) to ensure the clarity and transparency of the investment by the PFR. The beneficiary's shares acquired by the PFR via the exercise of subscription warrants will have the same vested rights and nominal value as all other shares of the beneficiary.
- (24) The maximum amount of aid to the beneficiary, as calculated at the moment of the initial transaction, will include the exercise price of subscription warrants to ensure the maximum amount of the aid is not exceeded.

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<sup>10</sup> The minimal price will be equal to the nominal value of the beneficiary's share to be issued for exercising the warrant. If such a nominal value of the beneficiary's share is less than at a 90% discount to the fair market value of such a share at the moment of the initial investment by the PFR, then the nominal value of beneficiary's share (and the share capital of the beneficiary) will be reduced to bring the nominal value of share to a level of at least 90% discount to the fair market value of such share at the moment of investment by the PFR.

- (25) The PFR will not exercise the “equity kicker” subscription warrants later than 31 December 2020, and it will not exercise the subscription warrants to facilitate investments in tranches later than 30 June 2021.
- (26) The PFR will exercise the “equity kicker” warrants and warrants to facilitate investments in tranches only if the exercise price of those warrants is “in the money”, i.e. if the exercise price of the warrant is lower than the market value of the beneficiary’s shares acquired via the exercise of the warrant.
- (27) The beneficiary may buy back the PFR’s equity stake at any time. To ensure that the PFR receives appropriate remuneration for the investment, the buy-back price will be the higher amount of the following options:
- (a) The nominal investment by the PFR increased by an annual interest rate (which consists of the rate defined in recital (29)(e)), plus 200 basis points; or
  - (b) The market price at the moment of the buy-back.
- (28) The PFR may sell at any time its equity participation at market price to purchasers other than the beneficiary of the recapitalisation. Any such sale requires an open and non-discriminatory consultation of potential purchasers or a sale on the stock exchange. The PFR may give existing shareholders priority rights to buy at the price resulting from the public consultation.

#### 2.4.3. *The detailed arrangement for hybrid instruments*

- (29) The hybrid instruments of the PFR for COVID-19 recapitalisation will have the following characteristics:
- (a) Maturity up to three years, as a general rule, and a maximum maturity of seven years;
  - (b) Rank senior to ordinary shares (before conversion);
  - (c) A coupon calculated based on the nominal value of the hybrid instrument. Coupon payments are to be calculated each year, but their payment may be deferred until maturity. In case of such a deferral, the interest is compounded;
  - (d) Conversion at maturity in case of non-repayment at maturity or at predetermined events<sup>11</sup>, except for situations in which it would be in PFR’s best interest to remain as a debtor;
  - (e) The minimum remuneration of hybrid instruments until their conversion into equity will be at least equal to the base rate of 1 year WIBOR<sup>12</sup>, plus the following premiums:

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<sup>11</sup> E.g. when it is difficult to evaluate the price for beneficiary’s equity due to high uncertainty of the businessplan of the beneficiary, and the parties agree that the PFR obtains the convertibles and the conversion happens once the beneficiary reports agreed financial results.

<sup>12</sup> As at the time of signing the agreement with the beneficiary and updated for each of the settlement / remuneration periods.

Type of beneficiary	Credit risk margin above 1-year WIBOR +			
	1 <sup>st</sup> year	2 <sup>nd</sup> and 3 <sup>rd</sup> year	4 <sup>th</sup> and 5 <sup>th</sup> year	6 <sup>th</sup> and 7 <sup>th</sup> year
SMEs	225 bps	325 bps	450 bps	600 bps
Large enterprises	250 bps	350 bps	500 bps	700 bps

- (f) Early repayment permitted at any time without additional conditions;
  - (g) In case of listed companies, the conversion of hybrid instruments into equity will be at 5% or more below the TERP at the time of the conversion;
  - (h) In case of non-listed companies, the PFR and the beneficiary will choose two reputable and independent valuers, each of whom will value the beneficiary's equity with at least two different methods. The conversion of the hybrid instruments into the beneficiary's equity will be conducted at the price of 5% or more below the TERP based on the market value of the beneficiary's equity calculated as an average between the two valuers.
- (30) Convertible bonds may be issued as tools to incentivize the beneficiary or its owners to redeem the shares owned by the PFR as early as possible (see recital (31)(b)).

2.4.4. *Incentives for early redemption of the PFR's investment*

- (31) If the PFR has not sold at least 40% of its equity participation four years after the equity injection (or five years if the beneficiary is not publicly listed), the PFR will receive additional shares of the beneficiary of at least 10% in addition to its remaining participation (first step-up) at no additional cost (resulting in a corresponding dilution of the stakes of the other shareholders), by one of the following methods:
- (a) By exercising the subscription warrants mentioned in recital (22)(b). The exercise price of such subscription warrants will be the Minimal Price<sup>13</sup> set at the moment of the initial investment by the PFR. The PFR will prepay the exercise price when it makes the initial investment, but gets a discount on its initial investment, proportionate to the prepaid exercise price of the subscription warrants (recital (20));
  - (b) By converting into equity the convertible bonds issued by the beneficiary to the PFR mentioned in recital (30). Those bonds will be issued by the beneficiary to the PFR at the Minimal Price set at the moment of the initial investment by the PFR. As in the case described in recital (31)(a), the PFR

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<sup>13</sup> Cf. footnote 10.

gets a discount on its initial investment, proportionate to the price paid for those bonds (recital (20)).

- (32) As an alternative to the step-up tools described in recital (31), the PFR may choose to exercise the drag-along mechanism with a liquidation preference (“Drag-Along”). That mechanism gives a right to the PFR to initiate the sale of all the shares of the beneficiary and to get a 10% increase from proceeds received by it for its investment from that sale. If the sale via the Drag-Along is not successful, the PFR will use the step-up tools described in recitals (31)(a) and (31)(b).
- (33) In addition, if the PFR has not sold in full its equity participation six years after the equity injection (or seven years if the beneficiary is not publicly listed), the PFR will receive additional shares of the beneficiary of 10% of the remaining participation resulting from the PFR’s equity injection (second step-up), by using the methods described in recital (31). The PFR will receive those additional shares at no additional cost. The additional shares obtained during the second step-up will result in a corresponding dilution of the stakes of other shareholders.
- (34) As an alternative to the step-up tools referred to in recital (33), the PFR may choose to use the Drag-Along, as indicated in recital (32).
- (35) In case of an investment by the PFR via hybrid instruments that are subsequently converted into equity of the beneficiary, where the PFR owns that equity two years after the conversion, the PFR will receive additional shares of the beneficiary in addition to its remaining participation resulting from the conversion of the hybrid instruments. Those additional shares will be at a minimum 10% of the remaining participation resulting from the PFR’s conversion of the hybrid instruments. To achieve that, the PFR will use the same tools as indicated in recital (31), or as an alternative the Drag-Along as indicated in recital (32).

#### 2.4.5. Governance and prevention of undue distortion of competition

- (36) The Polish authorities confirmed that the PFR will ensure the application of *inter alia* the following limitations until the complete redemption of the hybrid instruments and/or complete exit of the PFR from the beneficiary’s equity:
  - (a) In order to prevent undue distortions of competition, beneficiaries must not engage in aggressive commercial expansion financed by State aid or take excessive risks<sup>14</sup>;
  - (b) The level of remuneration<sup>15</sup> of each member of the management board and the supervisory board will be limited to a fixed amount not exceeding the remuneration as at 31 December 2019, and there will be no increase in the remuneration of, and no payments of bonuses and other variable or comparable remuneration elements to, the management board and the supervisory board members. If new members of the management board or the supervisory board are appointed, the remuneration of the new member(s) of the body will not exceed the lowest fixed remuneration of a

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<sup>14</sup> As a general principle, the smaller the equity stake of the Member State and the higher the remuneration, the less there is a need for safeguards.

<sup>15</sup> Remuneration received within the beneficiary's corporate group.

member of the management board or the supervisory board, respectively, as at 31 December 2019;

- (c) Beneficiaries of the recapitalisation will not make dividend payments, or non-mandatory coupon payments, or buy back shares, other than in relation to the PFR;
- (d) Beneficiaries of the recapitalisation will be prohibited from carrying out mergers or acquisitions until the complete redemption of the PFR's recapitalisation. In exceptional circumstances, and without prejudice to merger control, beneficiaries may acquire a more than 10% stake in operators upstream or downstream in their area of operation or even in competitors, but only if the acquisition is necessary to maintain the beneficiary's viability. The Commission may authorise the acquisition if it is necessary to maintain the beneficiary's viability. The acquisition may not be implemented before the Commission has taken a decision on that issue;
- (e) Beneficiaries may not use the received recapitalisation to cross-subsidise other economic activities of integrated undertakings that were in economic difficulties on 31 December 2019. Clear account separation or relevant rules (all intra-group transactions at arm's length basis, required transfer pricing documentation) will be put in place in integrated companies to demonstrate that the recapitalisation measure does not benefit those activities;
- (f) Beneficiaries may not refer to the aid received in their advertisements or use references to the aid received in their marketing strategy in any other way.

#### *2.4.6. Exit strategy and beneficiary's reporting obligations*

- (37) The exit strategy will be included in the aid agreement between the PFR and every beneficiary of the measure. Such agreements may include, in particular:
  - (a) the investment agreement to be concluded between the PFR and the beneficiary/its shareholders (or main shareholders), as the case may be;
  - (b) the shareholders' agreement to be concluded between the PFR and the beneficiary and/or its shareholders (if applicable); and
  - (c) other documents, which may be necessary for the implementation of the PFR's investment.
- (38) The exit strategy for large enterprises that have received a recapitalisation of more than 25% of equity at the moment of intervention will lay out:
  - (a) the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the PFR, including a payment schedule of the remuneration and redemption of the PFR's investment (together 'the repayment schedule'); and
  - (b) the measures that the beneficiary and the PFR will take to abide by that repayment payment schedule.

- (39) Beneficiaries must report to the PFR on the progress in the implementation of the repayment schedule and compliance with the conditions described in recitals (36)(a) to (36)(f) within 12 months of the repayment schedule's presentation, and thereafter periodically every 12 months.
- (40) As long as the recapitalisation by the PFR has not been fully redeemed, beneficiaries other than SMEs will, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, that information will include information on how their use of the aid received supports their activities in line with Union objectives and national obligations linked to the green and digital transformation, including the Union objective of climate neutrality by 2050.
- (41) Poland will provide annual reporting to the Commission regarding the implementation of the repayment schedules and compliance with the obligations described in recitals (36)(a) to (36)(f). Where a beneficiary has received a recapitalisation above EUR 250 million<sup>16</sup>, the report will include information on compliance with the conditions set in point 54 of the Temporary Framework.
- (42) If before the end of a period of six years from the date of recapitalisation in case of a listed company or of seven years from the date of recapitalisation in case of a non-listed company, the PFR's shareholding is not reduced below 15% of the equity, the beneficiary will have to submit a restructuring plan to the PFR in accordance with the Commission's Guidelines on rescuing and restructuring of undertakings<sup>17</sup> ("Rescue and Restructuring Guidelines"). Poland will submit any such restructuring plan to the Commission for approval.

## **2.5. Budget and duration**

- (43) The estimated budget of the measure is PLN 7.5 billion (ca. EUR 1.65 billion). Poland indicated that it may reallocate up to 20% of the budget to other measures under the Programme<sup>18</sup> and vice versa.
- (44) The aid may not be granted before the Commission has adopted a decision declaring the measure compatible with the internal market. The aid may be granted no later than 30 December 2020, except for equity instruments related to investment in tranches (see recitals (22)(c) and (25)), which can be granted no later than 30 June 2021.

## **2.6. Beneficiaries**

- (45) The final beneficiaries of the measure are enterprises (przedsiębiorcy) within the meaning of Article 4 of the Polish Entrepreneurs Law dated 6 March 2018 (Journal of Laws of 2019, item 1292, as amended) which fall within the following categories:

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<sup>16</sup> Investments exceeding EUR 250 million are not covered by this Decision and would be subject to a separate notification.

<sup>17</sup> Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, p. 1.

<sup>18</sup> Cf. footnote 5.

- (a) large enterprises that employ more than 249 employees (as at 31 December 2019) excluding the owner, and/or (ii) have an annual turnover in 2019 of more than EUR 50 million and a balance sheet for 2019 of more than EUR 43 million; or
  - (b) small and medium-sized enterprises (“SMEs”)<sup>19</sup> that employ over 150 employees<sup>20</sup> (on 31 December 2019) excluding the owner, and their annual turnover in 2019 exceeds PLN 100 million, as long as (i) their financing gap under the financial projections exceeds PLN 3.5 million and the undertaking has exhausted the maximum financing possibilities of the PFR programme "Financial Shield of the Polish Development Fund for SMEs"<sup>21</sup>; and/or (ii) their financing concerns the sectoral programme in relation to the COVID-19 epidemic in the form of, e.g. a financing programme regarding medical technologies<sup>22</sup>.
- (46) Aid may be granted under the measure to enterprises meeting all of the following criteria:
- (a) Enterprises that without the State intervention would go out of business or would face serious difficulties to maintain its business activity<sup>23</sup>;
  - (b) Enterprises with regard to which the PFR concludes that it is in a common interest to intervene. The PFR will assess whether the loss of the financial stability of such enterprises may involve serious social difficulties or significant market failures, inter alia by using the criteria outlined in the Rescue and Restructuring Guidelines (section 3.1.1);
  - (c) Enterprises that prove that they have exhausted the possibilities of finding financing on the markets and the aid measures existing in Poland to help cover their liquidity needs are insufficient to ensure their survival<sup>24</sup>;
  - (d) Enterprises that were not already in difficulty<sup>25</sup> on 31 December 2019;

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<sup>19</sup> SMEs are defined in line with Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

<sup>20</sup> For the purposes of establishing the status of the beneficiary, an employee is understood as a person employed based on employment contract, provided that employees on maternity, parental, childcare leaves and employed to obtain occupational training are excluded.

<sup>21</sup> Approved by the Commission decision C(2020) 2822 final of 27 April 2020 in the State aid case SA.56996 (2020/N) – Poland COVID-19: repayable advance scheme for micro, small and medium-sized enterprises.

<sup>22</sup> Sectoral programmes implement the Polish Act on the National Development Plan adopted on 20 April 2004 (Journal of Laws of 2019, item 1465) and are prepared by the Minister responsible for the development of a particular sector that is important for the Polish and the EU economies, including research and development, IT, smart systems and innovative technologies in medicine and pharmaceuticals. Sectoral programmes are dedicated to undertakings or groups of undertakings active in a given sector.

<sup>23</sup> To assess that, as well as debt/equity ratio, the PFR (or its advisors) will also use net debt/EBITDA or EBITDA-to-interest coverage ratios and compare them to historical ratios of the beneficiary and levels that secure the viability of the beneficiary.

<sup>24</sup> The PFR will verify this by inter alia liaising with the financing partners of such a beneficiary.

- (e) Enterprises that on the date of submission of the application or on the date of signing the aid agreement with the PFR, were not subject to bankruptcy, liquidation or restructuring proceedings under Polish law;
- (f) Enterprises which (i) have a tax residence in the European Economic Area ('EEA'), (ii) are registered in Poland and (iii) whose primary beneficial owner, within the meaning of Article 2, clause 2, item 1) of the Act on Counteracting Money Laundering, does not have tax residence in the so-called 'tax havens' within the meaning of the EU Council conclusions on the revised list of non-cooperating countries for tax purposes<sup>26</sup>. A deviation from that latter rule is only possible if the aid beneficiary and/or its main beneficial owner commit to transfer their tax residence to the EEA within nine months from the date of granting aid under the scheme;
- (g) Enterprises that, on 31 December 2019 or on the date of signing the aid agreement with the PFR, were not in arrears with the payment of taxes and social security contributions. The following are considered as arrears: (i) the payment of instalments or deferrals or (ii) the delay in the payment of taxes and social security contributions which does not exceed the tripled amount of the fee collected by the designated operator within the meaning of the Postal Law for treating a postal item as a registered mail;
- (h) Enterprises that conducted a business activity on 31 December 2019;
- (i) Enterprises that have successfully passed a simplified due diligence analysis, including the "know your client" analysis, carried out by the PFR (or its advisers). However, this can take the form of a confirmatory due diligence analysis or vendors' due diligence;
- (j) Enterprises that have received the consent of the relevant competition authorities, where required;
- (k) Enterprises which meet one of the following conditions:
  - they have recorded a decline in revenue of at least 25% in any given month after 1 February 2020 as compared with a preceding month or an analogous month from a previous year in relation with the economic disruptions caused by the COVID-19 outbreak;
  - they have lost their capacity to produce goods, provide services or to receive goods or services provided by contractors in relation to the unavailability of components and resources caused by COVID-19;

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<sup>25</sup> As defined in Article 2(18) of Commission Regulation (EU) No 651/2014; Article 2(14) of Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 193, 1.7.2014, p. 1; and Article 3(5) of Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 369, 24.12.2014, p. 37.

<sup>26</sup> Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes (OJ C 64, 27.02.2020, p. 8).

- they did not receive sales payments in excess of 25% of the due amounts as a result of COVID-19;
- they do not have access to the capital market or credit limits for new contracts as a result of a disruption of the financial market;
- they participate in sectoral programmes entailing the provision of funds which are significant in light of combating the COVID-19 epidemic in the form of e.g. a financial programme with respect to medical technologies.

(47) Aid under the measure will not be granted to enterprises that:

- (a) Conduct business activity in the field of products or services that may result in the restriction or violation of individual freedoms and/or human rights;
- (b) conduct business activity carried out by credit institutions, cooperative savings and credit unions, investment firms, lending institutions, insurance companies, reinsurance companies, pension funds, investment funds and other collective investment undertakings, asset management entities, providers or payment services and other financial institutions as well as rating agencies;
- (c) conduct business activity in areas questionable for ethical and moral reasons (e.g. gambling or testing on animals);
- (d) conduct activities in commercial property and real estate development fields.

(48) Financing granted to a partnership (*spółka osobowa*) may depend on its transformation into a company (*spółka kapitałowa*).

## **2.7. Sectorial and regional scope of the measure**

(49) The measure applies to the whole territory of Poland and is open to all sectors of economy with exclusion of the business activities as listed in recital (47).

## **2.8. Cumulation**

(50) The Polish authorities confirm that aid granted under the measure may be cumulated with aid under de minimis Regulations<sup>27</sup> or the Block Exemption

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<sup>27</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p.1), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45) and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

Regulations<sup>28</sup> provided the provisions and cumulation rules of those Regulations are respected.

- (51) The Polish authorities confirm that aid granted under the measure may be cumulated with aid granted under other measures approved by the Commission under other sections of the Temporary Framework, provided the provisions in those specific sections are respected.

## **2.9. Monitoring and reporting to the Commission**

- (52) The Polish authorities confirm that they will respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (including the obligation to publish relevant information on each individual aid granted under the measure on the comprehensive State aid website or Commission's IT tool within 12 months from the moment of granting<sup>29</sup>).

## **3. ASSESSMENT**

### **3.1. Lawfulness of the measure**

- (53) By notifying the measure before putting it into effect, the Polish authorities have respected their obligations under Article 108(3) TFEU.

### **3.2. Existence of State aid**

- (54) For measures to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measures must be imputable to the State and financed through State resources. Second, the measures must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measures must distort or threaten to distort competition and affect trade between Member States.
- (55) The measure is financed through State resources and is imputable to the State, since it is administered and financed by the PFR, which is a public company fully owned by the State as described in recital (10), and it is based on the instruments set out in recital (9).
- (56) The measure confers an advantage on its beneficiaries in the form of providing equity instruments or hybrid instruments to the beneficiaries in a situation where no private market economy investor would have made the investment. The measure thus confers an advantage on those beneficiaries by providing access to capital that they would not have received under normal market conditions.
- (57) The advantage granted by the measure is selective, since only undertakings affected by the economic repercussions of COVID-19 outbreak and meeting the criteria described in recitals (45)-(48) are eligible.

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<sup>28</sup> Commission Regulation (EU) No 651/2014, Commission Regulation (EC) No 702/2014 and Commission Regulation (EU) No 1388/2014.

<sup>29</sup> Referring to information required in Annex III to Commission Regulation (EU) No 651/2014 and Annex III to Commission Regulation (EU) No 702/2014 and Annex III to Commission Regulation (EU) No 1388/2014. For repayable advances, guarantees, loans, equity and other forms of aid, the nominal value of the underlying instrument shall be inserted per beneficiary.

- (58) The measure is liable to distort competition, since it strengthens the competitive position of the beneficiaries. The measure also affects trade between Member States, since those beneficiaries are active in sectors in which intra-Union trade exists.
- (59) In view of the above, the Commission concludes that the measure constitutes aid within the meaning of Article 107(1) TFEU. The Polish authorities do not contest that conclusion.

### **3.3. Compatibility assessment**

- (60) Since the measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether it is compatible with the internal market.
- (61) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid “*to remedy a serious disturbance in the economy of a Member State*”.
- (62) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that “*the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings*”. By adopting the second amendment to the Temporary Framework on 8 May 2020, the Commission acknowledged that “*otherwise viable non-financial undertakings subject to a temporary liquidity crisis due to the COVID-19 outbreak may face longer-term solvency issues. For a large number of these undertakings, the emergency measures put in place to control the spread of the COVID-19 outbreak have resulted in a decrease or even suspension of their production of goods and/or the provision of services, as well as a significant demand shock. The resulting losses will be reflected in a decrease of undertakings’ equity and will negatively affect their ability to take on loans from financial institutions*”. As a result, the second amendment of the Temporary Framework introduces section 3.11, which sets out the criteria under which Member States may provide public support in the form of equity or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak.
- (63) The measure notified by the Polish authorities is a part of the wider “Anti-crisis shield” package of measures aimed to tackle the economic impact of the COVID-19 outbreak. The measure aims at facilitating the access of undertakings to external finance and restoring their capital at a time when the normal functioning of credit and capital markets is severely disturbed by the COVID-19 outbreak and when that outbreak is affecting the wider economy and leading to severe disturbances of the real economy of Member States.
- (64) Furthermore, the measure has been designed to meet the requirements of a specific category of aid, “Recapitalisation measures for non-financial undertakings”, described in section 3.11 of the Temporary Framework.
- (65) Therefore, the Commission will next assess whether the measure meets the requirements of section 3.11 of the Temporary Framework.
- (66) Equity and hybrid instruments are to be granted at the latest by 31 December 2020, except in case of investments in tranches by the PFR, when such investments can

be carried out no later than 30 June 2021 (recital (44)). Therefore, the measure complies with point 48 of the Temporary Framework.

- (67) Equity and hybrid instruments are only provided to companies that would otherwise go out of business or would face serious difficulties to maintain their operations, which will be checked by the PFR before granting the aid (recital (46)(a)). Therefore, the measure complies with point 49(a) of the Temporary Framework.
- (68) Equity and hybrid instruments will only be provided where it is in the common interest to intervene, as investments are only provided to companies whose failure would likely involve social hardship or market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company or the risk of disruption to an important service. In order to assess the social hardship or the market failure, the PFR will assess whether the loss of the financial stability of such an enterprise may involve serious social difficulties or significant market failures, inter alia by using the criteria outlined in section 3.1.1 of the Rescue and Restructuring Guidelines (recital (46)(b)). Therefore, the measure complies with point 49(b) of the Temporary Framework.
- (69) Equity and hybrid instruments are provided to companies which have exhausted the possibilities of finding financing on the markets and the aid measures existing in Poland to help cover their liquidity needs are insufficient to ensure the survival of such enterprises (recital (46)(c)). Therefore, the measure complies with point 49(c) of the Temporary Framework.
- (70) Undertakings already in difficulty on 31 December 2019 are excluded from benefitting from the measure (recital (46)(d)). Therefore, the measure complies with point 49(d) of the Temporary Framework.
- (71) The financing under the measure will be granted by the PFR only on the basis of the written request by the beneficiary and as a result of a positive outcome of a simplified due diligence procedure (recitals (11) and (46)(i)). Therefore, the measure complies with point 50 of the Temporary Framework.
- (72) A separate notification will be made for individual aid above the threshold of EUR 250 million (recital (18) and footnote 16). Therefore, the measure complies with point 51 of the Temporary Framework.
- (73) The financing under the measure will be granted in the form of equity instruments and hybrid instruments (as described in recitals (14), (15), (19) and (21) to (29)), which is in line with point 52 of the Temporary Framework.
- (74) The financing under the measure will not exceed the minimum needed to ensure the viability of the beneficiary, and will not go beyond restoring the capital structure of the beneficiary to that predating the COVID-19 outbreak. The cap for recapitalisation will be set at the differential between the capital structure of the beneficiary on 31 December 2019 and at the time of the transaction. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak will be taken into account (recitals (16) to (17)). Therefore, the measure complies with point 54 of the Temporary Framework.

- (75) A capital injection by the PFR will be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection (or an estimation of its market value by an independent expert if the beneficiary is not publicly listed), and reduced by a discount proportionate to the prepaid price for the step-up tools (recitals (20) and (31)). Therefore, the measure complies with point 60 of the Temporary Framework.
- (76) The measure includes a step-up in the form of additional shares (via the exercise of subscription warrants or convertible bonds) or an increased amount from the sale of the beneficiary's shares (via the Drag-Along mechanism), corresponding to an increase of 10% in remuneration if the State has not sold a minimum percentage of its shareholding (recitals (31) to (34)). Therefore, the measure complies with point 61 of the Temporary Framework.
- (77) The capital injection can be bought back by the beneficiary at any time, while taking into account an appropriate remuneration (recital (27)). Furthermore, the PFR may sell at any time its equity participation at market prices to purchasers other than the beneficiary, following an open and non-discriminatory consultation (recital (28)). Therefore, the measure complies with points 63 and 64 of the Temporary Framework.
- (78) The Commission notes that the conditions of the hybrid instruments notified by Poland embed limited risk characteristics (e.g. the maturity is limited to seven years, the coupon payments are mandatory with limited exceptions, the PFR has a conversion option in case of certain predetermined events). The Commission considers that it is therefore appropriate to not require additional extra margins above the minimum rates reflected in the table included in point 66 of the Temporary Framework. The margins notified by Poland comply with the minimum remuneration of that table (recital (29)(e)). Therefore, the measure complies with the remuneration provisions included in points 65 and 66 of the Temporary Framework.
- (79) The conversion options for hybrid instruments are to be conducted at 5% or more below the TERP at the time of the conversion (recitals (29)(g) and (29)(h)). Therefore, the measure complies with point 67 of the Temporary Framework.
- (80) After conversion of the hybrid instrument into equity, a step-up mechanism increases the remuneration of the PFR by 10% (via the additional shares or the increase in remuneration from their sale) to incentivise beneficiaries to buy back the equity (recital (35)). Therefore, the measure complies with point 68 of the Temporary Framework.
- (81) Beneficiaries are not allowed to take excessive risks and to engage in aggressive commercial expansion financed by State aid granted by the PFR (recital (36)(a)). Therefore, the measure complies with point 71 of the Temporary Framework.
- (82) Beneficiaries are not allowed to advertise the investment by the PFR for commercial purposes (recital (36)(f)). Therefore, the measure complies with point 73 of the Temporary Framework.
- (83) Beneficiaries of the recapitalisation will be prohibited from carrying out mergers or acquisitions until the complete redemption of the PFR's recapitalisation. In exceptional circumstances, and without prejudice to merger control, beneficiaries

may acquire a more than 10% stake in operators upstream or downstream in their area of operation or even competitors, only if the acquisition is necessary to maintain the beneficiary's viability and upon Commission's prior approval. Therefore, the measure complies with points 74 and 75 of the Temporary Framework.

- (84) Beneficiaries are prohibited from using the funds received via the recapitalisation to cross-subsidise other economic activities of integrated undertakings that were already in economic difficulties on 31 December 2019 and will introduce clear account separation or other appropriate measures to ensure no cross-subsidisation (recital (36)(e)). Therefore, the measure complies with point 76 of the Temporary Framework.
- (85) As long as the investment of the PFR has not been fully repaid, beneficiaries cannot make dividend payments, or non-mandatory coupon payments, or buy back shares, other than in relation to the PFR (recital (36)(c)). Therefore, the measure complies with point 77 of the Temporary Framework.
- (86) As long as the investment of the PFR has not been fully repaid, a cap on the remuneration of management is applied as envisaged in point 78 of the Temporary Framework (recital (36)(b)). Therefore, the measure complies with point 78 of the Temporary Framework.
- (87) The exit strategy will be contained in the aid agreement between the PFR and every beneficiary of the measure. It will lay out (i) the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including the repayment schedule, and (ii) the measures that the beneficiary and the PFR will take to abide by the repayment schedule (recitals (37) and (38)). Therefore, the measure complies with points 79 to 81 of the Temporary Framework.
- (88) Beneficiaries of the recapitalisation will have to report to the PFR on the progress in the implementation of the repayment schedule as well as compliance with the obligations described in recitals (36)(a) to (36)(f) within 12 months of the repayment schedule's presentation, and thereafter periodically every 12 months (recital (39)). Therefore, the measure complies with point 82 of the Temporary Framework.
- (89) As long as the recapitalisation by the PFR has not been fully redeemed, beneficiaries of the recapitalisation, other than SMEs, will, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, such publications will include information on how their use of the aid received supports their activities in line with Union objectives and national obligations linked to the green and digital transformation, including the Union objective of climate neutrality by 2050 (recital (40)). Therefore, the measure complies with point 83 of the Temporary Framework.
- (90) Poland will report annually to the Commission regarding the PFR's activities, the implementation of the repayment schedules and compliance with the obligations described in recitals (36)(a) to (36)(f). Where a beneficiary has received a recapitalisation above EUR 250 million, the report will include information on compliance with the conditions set in point 54 of the Temporary Framework

(recital (41)). Therefore, the measure complies with point 84 of the Temporary Framework.

- (91) If by 31 December 2024 in the case of a public listed company, or 31 December 2025 in the case of a private company, the PFR's shareholding is not reduced below 15% of the beneficiary's equity, the beneficiary will have to submit a restructuring plan to the PFR, which will be submitted to the Commission for approval, in accordance with the Rescue and Restructuring Guidelines (recital (42)). Therefore, the measure complies with point 85 of the Temporary Framework.
- (92) The Polish authorities confirm that the monitoring and reporting rules laid down in section 4 of the Temporary Framework will be respected (recital (52)). Therefore, the measure complies with section 4 of the Temporary Framework.
- (93) The Polish authorities confirm that aid under the measure may only be cumulated with other aid provided the specific provisions in the sections of the Temporary Framework are respected and the cumulation rules of the relevant Regulations are respected (recitals (50) and (51)). Therefore, the measure complies with point 20 of the Temporary Framework.
- (94) The Commission therefore considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State pursuant to Article 107(3)(b) TFEU and meets all the relevant conditions of the Temporary Framework.

#### **4. CONCLUSION**

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) TFEU.

The decision is based on non-confidential information and is therefore published in full on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

