COMMISSION DECISION (EU) 2017/2372

of 16 June 2017

on the State aid SA.31250 — 2011/C (ex 2011/N) planned to be implemented by Bulgaria in favour of BDZ Holding EAD SA, BDZ Passenger EOOD and BDZ Cargo EOOD and other measures

(notified under document C(2017) 4051)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to those provisions ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 18 May 2011 Bulgaria notified the Commission of certain measures in favour of BDZ Holding EAD SA ([2]) ('BDZ Holding') and its subsidiaries, BDZ Passenger EOOD ('BDZ Passenger') and BDZ Cargo EOOD ('BDZ Cargo').

(2) By letter dated 20 May 2011, Bulgaria provided the Commission with further information. By letters dated 15 July 2011 and 28 September 2011, the Commission requested further information. Bulgaria provided the Commission with further information by letters dated 5 September 2011 and 7 October 2011.

(3) By letter dated 9 November 2011, the Commission informed Bulgaria that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measures ('Opening Decision'). By letter dated 12 January 2012, Bulgaria provided comments on the Opening Decision.

(4) The Opening Decision was published in the *Official Journal of the European Union* ([3]). The Commission called on interested parties to submit their comments.

(5) The Commission received comments from one interested party. It forwarded them to Bulgaria by letter dated 16 May 2012 and Bulgaria was given the opportunity to react. Bulgaria's comments were received by letter dated 13 June 2012. By letter of 10 December 2012, the Commission informed the interested party that the non-confidential version of its observations had been transmitted to Bulgaria.

(6) By letters dated 12 April 2012, 24 July 2012, 10 December 2012, 7 May 2013, 5 November 2013, 6 May 2014, 6 June 2014, 29 July 2014, 29 April 2015, 14 December 2015, 26 April 2016, 15 September 2016, 20 October 2016 and 3 April 2017, the Commission requested further information from Bulgaria.

(7) Bulgaria provided the Commission with further information by letters dated 7 June 2012, 28 September 2012, 31 January 2013, 1 February 2013, 30 May 2013, 2 October 2013, 15 October 2013, 2 December 2013, 3 January 2014, 6 February 2014, 22 April 2014, 14 May 2014, 23 June 2014, 4 August 2014, 20 August 2014, 1 September 2014, 13 September 2014, 23 September 2014, 1 June 2015, 9 December 2015, 20 January 2016, 31 May 2016, 12 October 2016, 7 November 2016.

([1]) OJ C 10, 12.1.2012, p. 9.
([2]) Hereafter in this decision the term 'BDZ Holding' is used to mean both 'BDZ EAD' prior to the change of the business name on 22 October 2011 and 'BDZ Holding EAD SA' thereafter. See footnote 4.
([3]) See footnote 2.

(8) By letters dated 22 April 2014 and 12 October 2016, Bulgaria withdrew its notification regarding the restructuring aid to BDZ Holding, which was part of the measures referred to in recital 1. By letter dated 5 April 2017, Bulgaria modified its notification by reducing the amount of debt that it planned to cancel through the debt cancellation measure which was part of the measures referred to in recital 1.

(9) By letter dated 7 November 2016, Bulgaria agreed exceptionally to have this Decision adopted and notified in English only.

2. **DESCRIPTION OF THE MEASURES**

2.1. *THE BENEFICIARY*

(10) The beneficiary of the measures is BDZ Holding and its subsidiaries, BDZ Passenger and BDZ Cargo, 100 % State-owned companies, providing passenger and freight rail transport services against remuneration in Bulgaria.

(11) BDZ Holding ([4]), a joint stock company, was created in 2001, when the Bulgarian National State Railways were split into a railway infrastructure company, National Railway Infrastructure Company ('NRIC') and a transport service provider ('BDZ Holding').

(12) In 2007, BDZ Holding was reorganised into a holding structure and it set up three subsidiaries active in freight transport, passenger transport and traction services. The parent company BDZ Holding owned passenger and freight wagons, and locomotives, which it leased to its subsidiaries. The latter were responsible for the maintenance of the rolling stock. BDZ Holding was also responsible for servicing debts incurred prior to the reorganisation. As this structure turned out to be inefficient, in 2010, the traction services were merged into BDZ Holding.

(13) In 2011 the ownership of the passenger and cargo wagons and locomotives was transferred from BDZ Holding to the subsidiaries BDZ Passengers and BDZ Cargo. BDZ Holding remained the owner of all non-operating assets.

(14) BDZ Holding has its registered office in Sofia, Bulgaria, and operates its freight and passenger services throughout the territory of Bulgaria, which is entirely eligible for regional aid pursuant to Article 107(3)(a) of the Treaty.

(15) BDZ Cargo, a limited liability company, is active in the international and national freight rail transport market. Bulgaria liberalised the freight rail market in 2007. Since then, several private operators have entered the market. In 2016, BDZ Cargo's market share (in net-tonne kilometres) amounted to 43 % and its main competitors were Bulgarian Railway Company (25 %), DB Schenker Rail Bulgaria (18 %), Bulmarket (6 %) and Rail Cargo (4 %).

(16) BDZ Passenger, a limited liability company, is the only provider of national passenger transport services in Bulgaria. BDZ Passenger discharges a public service obligation ('PSO') amounting to approximately 90 % of the passenger rail transport market. BDZ Passenger's PSO Contract was signed in 2009 with duration of 15 years (2010-2025).

2.2. *DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE*

(17) In the Opening Decision, the Commission identified four measures as potentially constituting State aid to BDZ Holding and its subsidiaries, BDZ Passenger and BDZ Cargo:

(a) Measure 1: Restructuring aid consisting of six capital increases into BDZ Holding amounting to BGN 550 million (EUR 281 million ([5]));

(b) Measure 2: Cancellation of the debts incurred prior to 2007;

(c) Measure 3: Non-payment by BDZ Holding of overdue debts towards the infrastructure manager (NRIC);

(d) Measure 4: Reimbursement of the value added tax ('VAT') by the State to BDZ Holding.

([4]) By Protocol decision No 151 of 22 October 2011 issued by the Minister of Transport, information technology and communications, the company's name was changed from BDZ EAD to Holding Bulgarian State Railways (BDZ) EAD ('BDZ Holding').

([5]) Exchange rate used in this decision is EUR 1 = BGN 1,9558 (OJ C 304, 20.8.2016, p. 2).

2.2.1. MEASURE 1: RESTRUCTURING AID

(18) Bulgaria envisaged granting restructuring aid in the form of six capital increases in BDZ Holding amounting to BGN 550 million (EUR 281 million) in the years 2011-2016 and notified that restructuring aid to the Commission in 2011. However, to date, the relevant public authorities have not taken a definitive decision to grant the aid and the funds have not been paid to BDZ Holding.

(19) In the Opening Decision, the Commission considered that the restructuring aid would constitute State aid within the meaning of Article 107(1) of the Treaty and expressed doubts as to whether that aid would be compatible with the internal market.

2.2.2. MEASURE 2: CANCELLATION OF THE DEBTS INCURRED PRIOR TO 2007

(20) According to the information submitted by Bulgaria, prior to Bulgaria's accession to the Union on 1 January 2007, BDZ Holding and its subsidiaries had outstanding liabilities and provisions amounting to BGN 806 729 558 (EUR 412 million) on 31 December 2006.

(21) The liabilities and provisions of BDZ Holding concerned: (i) loans from financial institutions such as Kreditanstalt für Wiederaufbau ('KfW'), European Bank for Reconstruction and Development ('EBRD') and International Bank for Reconstruction and Development ('IBRD'), the purpose of which was mainly the rehabilitation of rolling stock; but also (ii) trade-related obligations, including towards the Bulgarian rail infrastructure operator NRIC, provisions and obligations towards staff and insurance providers as well as other liabilities, including the liabilities resulting from an agreement for the purchase of rolling stock concluded between BDZ Holding, Siemens and KfW in 2005. The amounts of those liabilities and provisions are broken down as follows in Table 1.

Table 1

Overview of liabilities and provisions of BDZ Holding and its subsidiaries on 31 December 2006

(in BGN million)

	Total liabilities of BDZ Holding and its subsidiaries on 31 December 2006
Liabilities towards financial institutions	201,1
SIEMENS/KfW Agreement	307,5
Trade obligations	244,5
Obligations towards staff and insurance providers	26,4
Other liabilities, including tax and provisions	27,2
Total liabilities	**806,7**

(22) Bulgaria envisaged taking over part or all of the liabilities incurred before 1 January 2007 by BDZ Holding and its subsidiaries.

(23) In the Opening Decision, the Commission considered that the cancellation of liabilities would constitute State aid within the meaning of Article 107(1) of the Treaty and expressed doubts as to whether that aid would be compatible with the internal market. Bulgaria did not invoke the application or justify whether the measure was in line with the relevant requirements Railway Guidelines ([6]). The Commission was therefore unable to take a position on the compatibility of this aid with the internal market.

([6]) Community Guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13).

2.2.3. MEASURE 3: NON-PAYMENT BY BDZ HOLDING AND ITS SUBSIDIARIES OF OVERDUE DEBTS TOWARDS THE INFRASTRUCTURE MANAGER (NRIC)

(24) According to the information provided by Bulgaria, BDZ Holding and its subsidiaries had not been paying all the infrastructure charges due to NRIC. As a consequence, the Opening Decision recorded outstanding trade liabilities owed to NRIC amounting to BGN 45 million.

(25) Since Bulgaria did not clarify the origin and evolution of those trade liabilities, the Commission considered in the Opening Decision that the non-enforcement of those debts could potentially involve State aid within the meaning of Article 107(1) of the Treaty. In this regard, the Commission noted that according to the case law, the non-enforcement of liabilities by public undertakings ([7]) might involve State aid if a hypothetical market economy operator in the same position would not have behaved in the way the public undertakings did and would have enforced them ([8]). However, the Commission did not possess precise factual indications that NRIC had not taken the steps that a diligent creditor in the same situation would have taken. Therefore, the Commission invited Bulgaria to provide information as to whether and how NRIC had tried to enforce the outstanding liabilities.

(26) To the extent that the measure was found to involve State aid, the Commission also expressed doubts as to its compatibility with the internal market in the context of the then notified restructuring aid and accompanying restructuring plan. In that respect, the Commission invited Bulgaria to complement the restructuring plan by providing information as to how these debts with NRIC would be settled.

2.2.4. MEASURE 4: REIMBURSEMENT OF WRONGFULLY CHARGED VAT BY THE STATE TO BDZ HOLDING

(27) According to the information provided by Bulgaria, Bulgaria had reimbursed value added tax ('VAT') amounting to BGN 72 million (EUR 36,7 million) to BDZ Holding in the past.

(28) Since at the stage of the Opening Decision Bulgaria did not clarify the reasons for the VAT reimbursement and whether it complied with Council Directive 2006/112/EC ([9]), the Commission considered that the VAT reimbursement could potentially involve State aid within the meaning of Article 107(1) of the Treaty. In this regard, the Commission noted that according to case law, the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. Therefore, the Commission invited Bulgaria to provide further information on the reasons for the reimbursement of VAT to BDZ Holding.

3. **COMMENTS FROM AN INTERESTED PARTY**

(29) A competitor of BDZ Cargo active in the provision of rail freight services, which did not want to have its identity disclosed, submitted observations on two measures identified in the Opening Decision.

(30) With regard to the planned restructuring aid (Measure 1), the competitor suggested that unused locomotives of BDZ Holding and its subsidiaries, BDZ Passenger and BDZ Cargo should be sold as a compensatory measure. The competitor stated that BDZ Holding was not granting access to its unused fleet to the competitors, who had no other available source from which to acquire or lease locomotives.

(31) With regard to non-payment by BDZ Holding and its subsidiaries of overdue debts towards NRIC (Measure 3), the competitor stated that although all freight transport carriers are obliged to pay the same fees, the non-enforcement of the accumulated liabilities towards NRIC generates a competitive advantage to BDZ Holding and its subsidiaries. In addition, the competitor requested that compensatory measures under the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty and the Railway Guidelines be imposed on BDZ and that BDZ Cargo be privatised on market terms.

([7]) Commission Directive 2006/111/EC of 16 November 2006 on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

([8]) Judgment of the Court of Justice of 29 June 1999, *Déménagements-Manutention Transport SA (DMT)*, C-256/97, ECLI:EU:C:1999:332, paragraphs 25-28.

([9]) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

4. COMMENTS FROM BULGARIA

(32) In its reply to the Opening Decision and subsequent information, Bulgaria provided comments and further clarifications on the facts referred to in the Opening Decision.

4.1. *MEASURE 1: RESTRUCTURING AID — WITHDRAWAL OF THE NOTIFICATION*

(33) By letter dated 22 April 2014, Bulgaria withdrew the notification of the restructuring aid. However, the restructuring aid was mentioned in subsequent submissions and was finally withdrawn by letter dated 7 November 2016.

(34) Bulgaria indicated that, instead of granting the restructuring aid to BDZ Holding, it intended to refinance BDZ Holding's liabilities by cancelling part of the debts incurred and outstanding prior to Bulgaria's accession.

4.2. *MEASURE 2: CANCELLATION OF THE DEBTS INCURRED PRIOR TO 2007*

(35) Bulgaria explained that, on 31 December 2006, 1 day before its accession to the Union, the total amount of liabilities and provisions of BDZ Holding amounted to BGN 806,7 million (EUR 412 million), as shown in Table 1. Whilst taking into account the liabilities repaid by BDZ Holding and its financial needs, Bulgaria envisaged cancelling liabilities of BDZ Holding amounting to BGN 601,9 million (EUR 307,1 million). However, by letter dated 5 April 2017, Bulgaria modified its notification and requested the Commission to approve a debt cancellation amounting to BGN 223,45 million (EUR 114,25 million). Following the amendment of the notification, the debts planned to be cancelled, including penalty interest, concern: (i) still outstanding pre-accession debt towards KfW IPEX Bank; and (ii) debts incurred towards bond holders related to bond issue ISIN BG2100032072 from 19 November 2007 and towards the Ministry of Finance in order refinance pre-accession debts towards KfW IPEX Bank, EBRD, IBRD NRIC and NEC AD. Bulgaria provided the Commission with the outstanding amounts still due and explanations, as follows (see Table 2).

Table 2

Liabilities of BDZ Holding on 31 December 2006 envisaged to be cancelled

Creditor category/Amounts in BGN as of 31 March 2017	Amount of BDZ's debts in BGN outstanding on 31 December 2006 (pre-accession debts)			Loan or other debt instrument through which the pre-accession debts was refinanced
	Outstanding pre-accession debts	Outstanding debts refinancing BDZ's pre-accession debts	Penalty interest	
(a) **International financial creditors**	**30 967 919**	**105 642 950**	**24 901 981**	
KfW IPEX Bank 80 % DMU	0	76 529 380		Second bond issue with ISIN: BG2100032072, in accordance with Debt tender offer from October 2007
EBRD	0	20 980 115		Activated state guarantee for debt repayment which caused BDZ to incur debt to the Ministry of Finance.
IBRD	0	8 133 455		Activated state guarantee for debt repayment which caused BDZ to incur debt to the Ministry of Finance.
KfW IPEX Bank 85 % EMU	30 967 919	0		

Creditor category/Amounts in BGN as of 31 March 2017	Amount of BDZ's debts in BGN outstanding on 31 December 2006 (pre-accession debts)			Loan or other debt instrument through which the pre-accession debts was refinanced
	Outstanding pre-accession debts	Outstanding debts refinancing BDZ's pre-accession debts	Penalty interest	
(b) **Suppliers**	**0**	**53 884 257**	**8 051 694**	
NRIC	0	26 292 761	3 928 815	Second bond issue with ISIN: BG2100032072, in accordance with Debt tender offer from October 2007
NEC AD	0	27 591 496	4 122 879	Second bond issue with ISIN: BG2100032072, in accordance with Debt tender offer from October 2007
Total	**30 967 919**	**159 527 207**	**32 953 675**	

Source: Submission of Bulgaria dated 5 April 2017

(36) Regarding the liabilities towards IBRD and EBRD, Bulgaria explained that these loans contracted in 1995 were secured by a 100 % State guarantee. Since BDZ Holding defaulted on due payments, the State guarantee was activated and the Ministry of Finance had to service the debts. Consequently, pursuant to the Government debt Act ([10]), as from the date of payments under the State guarantee, the Government acceded to the creditor's rights vested in the loan agreements vis-à-vis BDZ Holding up to the amount of payments made. BDZ Holding is obliged to reimburse in full the amounts paid to IBRD and EBRD by the State, including penalty interest. Regarding the other debts refinanced through the bond issue ISIN BG2100032072 from 19 November 2007, Bulgaria provided evidence of the debt payments made to KfW IPEX Bank, NRIC and NEC AD.

(37) Bulgaria does not contest that the debt cancellation would involve State aid to the benefit of BDZ Holding. However, Bulgaria considers that the cancellation of debts would be compatible with the internal market, pursuant to points 56 to 60 of the Railway Guidelines, as follows.

(38) First, all the liabilities were clearly determined and individualised and were incurred prior to the accession of Bulgaria to the Union. They were either recorded in the Consolidated Financial Statement of BDZ Holding before the accession date and/or stemmed from contracts irrevocably concluded before that date.

(39) Secondly, all the liabilities, for which the cancellation is envisaged, were directly linked to the activity of passenger and freight rail transport and mainly incurred as loans for the purchase of diesel and electric multiple units and for the repair and modernisation of cargo wagons owned by the company and to cover outstanding obligations related to the provision of railway services, such as obligations towards NRIC.

(40) Thirdly, in 2016, BDZ Holding was over-indebted and fulfilled all the criteria laid down in Bulgarian legislation to initiate insolvency proceedings against it. The excessive indebtedness has been preventing the company from operating on a stable financial basis. The company has not been able to meet its capital needs from its own operations due to the accumulated overdue liabilities. The international creditors of the company refused to accept a rescheduling of the debts without a State guarantee, which according to Bulgaria, was likely to raise additional State aid concerns. BDZ Holding's business plan shows that the cancellation of the debts incurred prior to accession would be necessary to improve its financial indicators.

(41) Fourthly, the sole objective of the debt cancellation is to relieve BDZ Holding from debts incurred prior to the accession of Bulgaria to the Union and to normalise the financial situation of the company. The cancellation of those debts does not exceed what is reasonably needed to restore the financial viability of the company.

([10]) Bulgarian Gazette No 93/2002.

(42) Fifthly, the cancellation of the liabilities would not give BDZ Holding a competitive advantage preventing the development of effective competition on the market. It would neither increase the capacity of BDZ Holding nor change its market position or enable it to enter new markets in other Member States. In addition, new operators were not deterred from entering the market since eight operators, in addition to BDZ Cargo, are currently active on the Bulgarian rail transport market ([11]).

(43) Furthermore, Bulgaria explained that the difficult financial situation of the company limited its possibilities for investment. Due to the lack of resources, only essential (either routine or emergency) repairs have been carried out and major repairs have been postponed. 94 % of passenger coaches are older than 15 years and 90 % of freight wagons are older than 29 years. 90 % of diesel multiple units and 45 % of electric multiple units are older than 30 years. The productivity of the rolling stock and the locomotives that belong to the company are considerably lower than the Union average. The limited repairs have resulted in a steady deterioration of rail services and the cancellation of trains.

(44) Bulgaria also pointed out that BDZ Holding was threatened by coercive recovery action such as the sale of its assets or suspension of its bank accounts by the international creditors after the High Court of Justice in London ordered the payment of their claims.

4.3. *MEASURE 3: NON-PAYMENT BY BDZ HOLDING AND ITS SUBSIDIARIES OF OVERDUE DEBTS TOWARDS THE INFRASTRUCTURE MANAGER (NRIC)*

Overview of BDZ Holding's debts to NRIC

(45) In response to the invitation in the Opening Decision to provide information as to whether and how NRIC had enforced past debts and intended to recover or enforce outstanding debts, Bulgaria asserted that BDZ Holding and its subsidiaries had been and were still serving their debts towards NRIC on a regular basis. To support its contention, Bulgaria provided information on the development of the amounts due by BDZ Holding and its subsidiaries to NRIC for infrastructure charges, electricity supply and other accompanying services, as calculated on the basis of NRIC's schedule of charges which was applied to all railway operators.

(46) Bulgaria noted that, after the Opening Decision, between November 2011 and August 2016, BDZ Holding has paid a total amount of BGN 503,2 million (EUR 257 million) to NRIC. The payment was made by bank transfers, offsetting of NRIC's debts towards BDZ Holding and debt-to-asset swaps.

Actions taken by NRIC to enforce and/or recover debts from BDZ Holding

(47) Bulgaria asserts that NRIC has taken all the necessary steps to collect the overdue obligations from BDZ Holding and its subsidiaries, but without initiating legal proceedings. Bulgaria notes that meetings between NRIC and BDZ Holding had been regularly held to discuss the payment of the outstanding obligations. Likewise, NRIC has regularly sent letters, including a notarised notice ([12]), to BDZ Holding requesting the payment of the outstanding obligations and requesting the payment of interest for the overdue obligations ([13]).

(48) NRIC has charged late payment interest on the overdue liabilities in accordance with Decree No 100 on the calculation of statutory interest for late payments in national and foreign currency ([14]) ('Decree No 100') of the Council of Ministers of 29 September 2012. Bulgaria stated that according to Decree No 100, the annual statutory interest rate for late payment of liabilities in BGN consists of the basis interest rate of the Bulgarian National Bank in force since 1 January or 1 July of the respective year plus a risk premium of 10 %. As of September 2016, the interest charges due amount to BGN 23,3 million (EUR 12 million).

(49) Bulgaria alleges that NRIC acted as a market economy creditor, since it was more economically sensible to collect outstanding liabilities recognised by both parties instead of initiating a bankruptcy procedure and risking the

([11]) For example DB Schenker Rail Bulgaria received a license in May 2010, Port Rail in April 2012.
([12]) According to Article 569(3) of the Code of Civil Procedure the notarised notices constitute means of voluntary, out of court, settlement of financial relations between two parties before these are resolved by the court.
([13]) For example Minutes of NRIC's management board meeting No 109 of 25 September 2009 or Minutes of NRIC's management board meeting No 145 of 3 June 2010.
([14]) Bulgarian Gazette No 42/2012.

activity of the debtor ceasing. Bulgaria stated that NRIC would have to bear the costs of legal proceedings amounting to 4 % of the claimed amount in stamp duty. Moreover, if legal proceedings had been initiated, NRIC would have been unable to fully enforce its claim, because BDZ Holding and its subsidiaries would have had to repay all its liabilities without preference for a particular creditor. According to Bulgaria, since BDZ Holding and its subsidiaries are NRIC's major clients as evidenced by the fact that 77 % of NRIC's revenue could be attributed to BDZ Holding and its subsidiaries in 2015, the bankruptcy of BDZ Holding would have had a negative impact on NRIC's profitability and its ability to adequately maintain the national rail network.

Debts owed by NRIC to BDZ Holding

(50) NRIC owed monies to BDZ Holding for services provided relating, inter alia, to free and reduced travel passes and tickets for NRIC's employees and their families, the rental of outdoor and indoor facilities and premises that were the property of BDZ Holding, supply of traction power, transport of goods by rail, transhipment and servicing of work trains. Bulgaria stated that, during the period 2008 to 2011, NRIC had incurred debts towards BDZ Holding and its subsidiaries for services provided amounting in total to BGN 45 532 415 (EUR 23,8 million) as summarised in Table 3. As of August 2016 the outstanding receivables of NRIC towards BDZ Holding were BGN 1 094 367 (EUR 0,6 million).

Table 3

Debts owed by NRIC to BDZ Holding 2008-2011

Receivables from NRIC in BGN	2008	2009	2010	2011	Total
BDZ Holding	15 695 566	4 364 383	12 907 606	13 564 860	46 532 415

Debt-to-asset swaps

(51) In response to the invitation in the opening decision to provide information as to whether and how NRIC intended to recover or enforce outstanding debts, Bulgaria stated NRIC and BDZ Holding entered into agreements on 1 December 2012 and 31 May 2013 according to which NRIC and BDZ Holding recognised certain reciprocal claims and decided to partially repay outstanding liabilities through a debt-to-asset swap transaction. The objective of the debt-to-asset swap was to extinguish recognised obligations of BDZ Holding and its subsidiaries towards NRIC through the provision of assets that would be useful for NRIC and which had a good level of liquidity. That operation was allowed under the national legislation, in particular Article 65, paragraph 2 of the Contracts and Obligations Act and its legal basis were the decisions of the Council of Ministers.

(52) Bulgaria stressed in its submission dated 7 November 2016 that, in the period 2013-2016, the total amount of swapped assets, including VAT, was BGN 25,9 million (EUR 13,3 million). The first stage of the swap, amounting to BGN 23 million (EUR 11,8 million), was implemented in December 2013 on the basis of decision No 481/12.08.2013 of the Council of Ministers. In addition, in December 2015 and August 2016, on the basis of decisions No 965/10.12.2015 and No 626/29.07.2016 of the Council of Ministers, properties for the amounts of BGN 1,1 million (EUR 0,58 million) and BGN 1,8 million (EUR 0,9 million) respectively were swapped. The specific assets subject to the swaps had been specified in advance depending on the needs of the parties for their subsequent use. Bulgaria stated that on this basis NRIC had acquired 16 properties, among which were facilities at Varna Ferry Boat Complex and the office building in Stara Zagora.

(53) Bulgaria also stated that NRIC independently decided on the assets which had commercial interest for it. To support this claim, Bulgaria noted that in August 2016 NRIC rejected a proposed debt-to-equity swap in relation to certain assets, and therefore BDZ swapped assets of BGN 1,8 million (EUR 0,9 million) instead of BGN 10 million (EUR 5,1 million). The process was transparent. The swapped assets were subject to evaluation by independent evaluators holding certificates issued by the Chamber of Independent Appraisers in Bulgaria. The determination of the value of the assets was based on market principles and methods in accordance with international and European valuation standards laid down in Bulgarian legislation. According to Bulgaria, those assets can be sold on the real estate market at the indicative price established by the independent evaluators. The final prices agreed by BDZ Holding and NRIC were of a similar magnitude to those in the evaluations.

(54) Consequently, Bulgaria considers that NRIC has acted as a market economy creditor and the debt-to-asset swaps had been agreed and were implemented under normal market conditions.

4.4. *MEASURE 4: REIMBURSEMENT OF ERRONEOUSLY CHARGED VAT BY THE STATE TO BDZ HOLDING*

(55) Bulgaria submits that, due to an incorrect interpretation and application of the national legislation in force by BDZ Holding, the company had erroneously paid VAT of BGN 72 million (EUR 36,8 million) on the amount of PSO compensations for the period 1 December 2004 to 29 February 2008. The error was detected in the audit report performed by the National Revenue Agency in 2009. Bulgaria explains that BDZ Holding took the necessary legal action under the Tax Insurance Procedure Code ('DOPK') for the recovery of the unduly paid VAT through reimbursement. The amount of unduly paid tax was determined by acts issued by the national revenue and tax administration.

(56) Bulgaria further states that the company was entrusted with a PSO through a PSO contract of 29 June 2004, signed in September 2004, between the Bulgarian Ministry of Transport and Communication and BDZ Holding. The PSO compensation under the PSO contract was granted to cover losses incurred in providing transport services. In addition, according to the terms of the contract, the provision of the service and the compensation were subject to compliance with conditions related to the number of trains, seats and hours. Moreover, the compensation could be reduced if the specified requirements regarding kilometres, seats and hours were not met.

(57) Bulgaria explains that, according to Article 29 of the Value Added Tax Act ('ZDDS') in place until 31 December 2006, the taxable amount on the supply of services also includes all financial means received and absorbed by the supplier of the services and directly related to the supply of those services, including subsidies. Bulgaria further explained that according to Article 20(6) of the ZDDS, all financial means (for example, subsidies) directly linked to the supply of goods or services are to be considered to be grants from the State budget or other entity, constituting an additional payment for goods or services. On the basis of statements from the National Revenue Agency ([15]) Bulgaria submitted that the subsidies received to cover the losses, the costs or the acquisition of assets are outside the scope of the ZDDS, which is the case with the PSO contract. In this context, Bulgaria clarified that national provisions allowed VAT to be refunded on the basis of a VAT assessment issued by the revenue authorities following an *ex-post* verification and revision. Furthermore, Bulgaria asserted that before Bulgaria's accession to the Union it was not obliged to fully harmonise its VAT law.

(58) According to Bulgaria, since 1 January 2007, when the new ZDDS entered into force, the Bulgarian VAT law provisions have been fully harmonised with Directive 2006/112/EC. Bulgaria stated further that according to Article 26(3) of the new ZDDS the taxable amount on the supply of services also includes all financial means (for example, subsidies) received and absorbed by the supplier of the services and directly related to the supply of those services. Bulgaria further explained that according to the new ZDDS, all financial means (for example, subsidies) directly linked to the supply of goods or services shall be considered to be grants from the State budget or other entity, constituting an additional payment for goods or services. According to Bulgaria, however the subsidies received to cover the losses or expenses, including the acquisition or the liquidation of assets are outside the scope of the new ZDDS.

(59) According to Bulgaria, the error, consisting in incorrectly charging VAT on revenue from the provision of the PSO services for the period 1 December 2004 to 29 February 2008, had been detected by the relevant tax authorities in the course of an inspection. In this regard, Bulgaria explained that those findings of the relevant tax authorities resulted in decisions ordering the reimbursement and a tax audit report number 29010038 of 7 February 2011 in accordance with the Bulgarian Tax Insurance Procedure Code ([16]). Bulgaria further explained that the VAT reimbursement procedures were set out in Articles 128 and 129 of the Bulgarian Tax Insurance Procedure Code.

([15]) Letter from the National Revenue Agency with reference number 24-34-350/20.07.2007 and 24-00-39/17.08.2007.

([16]) Tax reimbursement decision number 100337 of 12 August 2010 and tax decision number 290100380 of February 2011 amounting to BGN 36 877 000 for the period December 2004 to April 2007; tax reimbursement decision number 2900180 of 14 January 2009 amounting to BGN 19 167 000 for the period May 2007 to February 2008; tax reimbursement decision number 290900153 of 8 July 2009 amounting to BGN 16 000 000 for the period March 2008 to October 2008.

(60) Therefore, according to Bulgaria, the reimbursement of the wrongfully charged VAT did not constitute State aid.

5. **WITHDRAWAL OF THE NOTIFICATION**

(61) As stated in recitals 32 and 34, Bulgaria withdrew its notification concerning the restructuring aid to BDZ Holding (Measure 1). Bulgaria indicated that it intended instead to cancel debts incurred by BDZ Holdings prior to Bulgaria's accession to the Union on 1 January 2007 (Measure 2).

(62) According to Article 10 of Council Regulation (EU) 2015/1589, the Member State concerned may withdraw the notification in due time before the Commission has taken a decision on the aid. According to Article 10(2) of Regulation (EU) 2015/1589, in cases where the Commission has already initiated the formal investigation procedure when a notification is withdrawn, the Commission must close the procedure.

(63) The Commission notes that the restructuring aid has not yet been granted. Since Bulgaria has withdrawn its notification and will not grant the restructuring aid of BGN 550 million to BDZ Holding, the formal investigation procedure under Article 108(2) of the Treaty should be closed in respect of the notified restructuring aid measure.

6. **ASSESSMENT OF THE MEASURES**

(64) By virtue of Article 107(1) of the Treaty '…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.'

(65) The criteria in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether a State measure constitutes aid within the meaning of Article 107(1) of the Treaty all of the following conditions need to be fulfilled:

(a) the beneficiary is an undertaking within the meaning of Article 107(1) of the Treaty, which implies that it engages in an economic activity;

(b) the measure is financed by State resources and is imputable to the State;

(c) it confers an economic advantage;

(d) this advantage is selective;

(e) the measure in question distorts or threatens to distort competition and may affect trade between Member States.

6.1. *MEASURE 2: CANCELLATION OF THE DEBTS INCURRED PRIOR TO 2007*

6.1.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (THE 'TREATY')

6.1.1.1. ***Economic activity and notion of undertaking within the meaning of Article 107(1) of the Treaty***

(66) According to settled case law, the Commission must first establish who will be the beneficiary(ies) of Measure 2. Article 107(1) of the Treaty refers to the concept of undertaking in defining the beneficiary of the aid. As confirmed by the Union Courts, an undertaking for the purposes of that provision does not have to be a single legal entity, but may encompass a group of companies ([17]). The key criterion in determining whether there is an undertaking within the meaning of that provision is whether an 'economic unit' is involved. An economic unit may be composed of several legal persons. That economic unit is then considered to be the relevant undertaking. In this respect, the Union Courts consider the existence of a controlling share and other functional, economic and organic links to be relevant ([18]).

([17]) Judgment of the Court of Justice of 14 November 1984, *Intermills/Commission*, C-323/82, ECLI:EU:C:1984:345, paragraphs 11 et seq.
([18]) Judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione SpA* v *Commission*, C-480/09 P, ECLI:EU:C:2010:787, paragraphs 47 to 55; Judgment of the Court of Justice of 10 January 2006, Cassa di Risparmio di Firenze SpA and Others, C-222/04, ECLI: EU:C:2006:8, paragraph 112.

(67) In the case at hand, Bulgaria stated that BZD Holding is the legal entity whose debts incurred prior to 2007 will be cancelled. In fact, as stated in recitals 34, 35 and 36, Bulgaria considers that BDZ Holding is the sole beneficiary of Measure 2. However, several elements indicate that the relevant undertaking is not confined to the legal person of BDZ Holding alone.

(68) First, in terms of ownership relations, it has to be noted that BDZ Holding holds 100 % of the shares of both BDZ Passenger and BDZ Cargo. BDZ Holding therefore controls all business activities of BDZ Passenger and BDZ Cargo, formulates a common management policy and sets targets for both subsidiaries.

(69) Secondly, the main purpose of the initial loans was the purchase and repair of assets used by both BDZ Cargo and BDZ Passenger, such as locomotives, freight wagons and passenger coaches. The cancellation of debts relates, therefore, to rail transport services provided by both subsidiaries. While after the 2007 reorganisation, BDZ Holding owned the rolling stock and rented it out to BDZ Cargo and BDZ Passenger, following the 2011 reorganisation the rolling stock was transferred to the subsidiaries BDZ Cargo and BDZ Passenger (see recitals 12 and 13). Therefore, Measure 2, which was granted for the cancellation of debts financing the rolling stock, effectively benefits BDZ Cargo and BDZ Passenger.

(70) In the light of these considerations, in addition to BDZ Holding, its subsidiaries BDZ Passenger and BDZ Cargo must also be regarded as beneficiaries of the debt cancellation. It follows from the description of the activities of BDZ Passenger and BDZ Cargo set out in section 2.1 that both companies are a single economic unit under control of BDZ Holding and both provide services against remuneration in Bulgaria. The Commission thus considers that by providing passenger and freight transport services, as well as management and coordination of those activities, BDZ Holding and its subsidiaries BDZ Passenger and BDZ Cargo are performing an economic activity and therefore constitute undertakings within the meaning of Article 107(1) of the Treaty.

6.1.1.2. ***State resources and imputability to the State***

(71) In order to constitute State aid, the measure in question has to be financed from State resources and the decision to grant the measure must be imputable to the State ([19]).

(72) The debt cancellation will be financed directly from the Bulgarian State budget and will be granted by the central authorities of that Member State.

(73) Therefore, the debt cancellation involves the use of State resources, which is also decided by and imputable to the State.

6.1.1.3. ***Economic advantage***

(74) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say, in the absence of State intervention ([20]). Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention ([21]).

(75) In this case, Bulgaria will cancel BGN 223,45 million (EUR 114,25 million) of debts directly related to railway activities of BDZ Holding. No reasonable market economy operator would cancel liabilities of such a magnitude without any remuneration. In addition, the measure will relieve BDZ Holding from its debt payment obligations, thus freeing funds which BDZ Holding and its subsidiaries can use to develop their operations and improving their financial indicators.

(76) Therefore, it is concluded that Bulgaria's decision to cancel BDZ Holding's liabilities will confer an economic advantage on BDZ Holding, BDZ Passenger and BDZ Cargo which they would not have obtained under normal market conditions.

([19]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission* ('Stardust Marine'), C-482/99, ECLI:EU:C:2002:294.

([20]) Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others* v *La Poste and others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; judgment of the Court of Justice of 29 April 1999, *Kingdom of Spain* v *Commission of the European Communities*, C-342/96, ECLI:EU:C:1999:210, paragraph 41; judgment of the Court of Justice of 16 May 2002, *France* v *Commission* ('Stardust Marine'), C-482/99, ECLI:EU:C:2002:294, paragraph 69.

([21]) Judgment of the Court of 2 July 1974, *Italian Republic* v *Commission of the European Communities*, C-173/73, ECLI:EU:C:1974:71, paragraph 13.

6.1.1.4. ***Selectivity***

(77) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid. The debt cancellation will benefit only BDZ Holding and its subsidiaries and is, therefore, selective within the meaning of Article 107(1) of the Treaty.

Conclusion

(78) It is concluded that the planned debt cancellation will provide a selective economic advantage to BDZ Holding and its subsidiaries BDZ Passenger and BDZ Cargo.

6.1.1.5. ***Distortion of competition and effect on trade***

Distortion of competition

(79) There is an assumption that there is a distortion of competition within the meaning of Article 107(1) of the Treaty whenever the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([22]).

(80) In this respect, Bulgaria opened the market for rail freight transport to other domestic operators established in Bulgaria, in 2002. The Union rail freight market was first opened to competition on the trans-European rail freight network on 15 March 2003 by the first railway package ([23]). The second railway package liberalised all international freight transport on 1 January 2006, and national rail freight from 1 January 2007 ([24]). However, several Member States had unilaterally liberalised their national markets prior to that date.

(81) BDZ Cargo's market share on the Bulgarian rail freight market amounted to 43 % in 2016. BDZ Cargo directly competes with other rail freight operators on that market, as noted in recital 15.

(82) With regard to passenger transport, from 1 January 2010, the third railway package opened the market for international passenger transport ([25]). While this only concerns international services, it does include the activities of the beneficiaries on those lines. At any rate, as established by the Court in the *Altmark Trans* judgment, the fact that a transport company is active only in one Member State does not exclude the possibility of aid distorting on

([22]) Judgment of the General Court of 15 June 2000, *Alzetta and others* v *Commission*, T-298/97, ECLI:EU:T:2000:151, paragraphs 141 to 147.

([23]) Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 75, 15.3.2001, p. 1), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ L 75, 15.3.2001, p. 26), Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29).

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

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

intra-Union trade ([26]). In this respect, it must be noted that since 1995 several Member States have unilaterally opened their rail passenger transport and that any advantage granted to a rail transport company in one Member State may reduce the possibility for a competitor from another Member State to trade on that geographic market.

(83) The Commission therefore concludes that the measure will distort or will threaten to distort competition in the internal market.

Effect on trade between Member States

(84) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ([27]). It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ([28]).

(85) In this case, the beneficiary provides services in competition with other undertakings providing transport services in the internal market and some of those services are cross-border. Therefore, the selective economic advantage granted through the planned debt cancellation to BDZ Holding and its subsidiaries strengthens its economic position, as it will relieve the railway operator from debts incurred prior to 2007. Consequently BDZ Holding and its subsidiaries will be providing railway transport services in the internal market without bearing all of the investment and operating costs they incurred.

(86) Therefore, the Commission concludes that the planned debt cancellation is liable to affect trade between Member States.

6.1.1.6. ***Conclusion***

(87) In the light of the foregoing, the Commission considers that the debt cancellation that Bulgaria plans to implement constitutes State aid within the meaning of Article 107(1) of the Treaty.

6.1.2. LAWFULNESS OF THE AID

(88) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(89) Since the debt cancellation in favour of BDZ Holding and its subsidiaries has not yet been implemented, the Commission considers that Bulgaria has respected the obligations flowing from Article 108(3) of the Treaty ([29]).

6.1.3. COMPATIBILITY OF THE AID

(90) Since the debt cancellation constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission must assess whether that aid can be found compatible with the internal market.

(91) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. Article 107(3)(c) of the Treaty 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 considered to be compatible with the internal market.

(92) In this regard, Section 4 of the Railway guidelines provides a framework for assessing whether the Commission should declare aid to railway undertakings for the cancellation of debts compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

([26]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdenburg*, C-280/00, ECLI:EU:C:2003:415, paragraphs 77-81.
([27]) See, in particular, Judgment of the Court of 17 September 1980, *Philip Morris* v *Commission*, C-730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 21; Judgment of the Court of Justice of 29 April 2004, *Italy* v *Commission*, C-372/97, ECLI:EU:C:2004:234, paragraph 44.
([28]) Judgment of the General Court of 30 April 1998, *Het Vlaamse Gewest* v *Commission*, T-214/95, ECLI:EU:T:1998:77.
([29]) Judgment of the General Court of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, ECLI:EU:T:2004:4.

(93) The Commission agrees with Bulgaria as regards the applicability of Section 4 of the Railway Guidelines for assessing the compatibility of the debt cancellation. Indeed, according to point 54 of the Railway Guidelines, 'In the light of Article 9 of [Council] Directive 91/440/EEC ([30]), the Commission also considers that, under certain circumstances, it should be possible to authorise [State] aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.' According to point 56 of the Railway Guidelines, in the case of Member States which acceded to the Union after the entry into force of Directive 2001/12/EC, the date of accession should be considered as the date from which that Directive applies to those Member States. The relevant date for the purposes of determining which pre-accession debt can be cancelled in compliance with the Railway Guidelines is, therefore, 1 January 2007.

(94) Bulgaria claims that the planned debt cancellation complies with all the compatibility conditions laid down in the Railway Guidelines. Consequently, the Commission has to assess this claim. Indeed, according to points 55 to 61 of the Railway Guidelines, aid to cancel debts incurred prior to Bulgaria's accession to the Union can be regarded as compatible with the internal market pursuant to Article 107(3)(c) of the Treaty if the following five cumulative conditions are met:

(a) Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. In cases where the Member States joined the Union after 15 March 2001, the relevant date is that of accession to the Union. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at Community level had yet to be taken.

(b) Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. […]

(c) Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition on the market would not allow them to rectify their financial situation within a foreseeable future. […]

(d) Fourthly, the aid must not go beyond what is necessary for the purpose. […]

(e) Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market, for example by deterring outside undertakings or new players from entering certain national or regional markets.

(a) **The aid must serve to offset clearly determined and individualised debts incurred prior to the accession of Bulgaria to the Union**

(95) The Railway Guidelines require that the debt(s) to be cancelled be clearly determined, individualised and, in the case of Bulgaria, incurred before its accession to the EU. It follows from the Railway Guidelines that aggregate or undetermined debt cannot be offset. Offsetting would not be permitted, for instance, if generic items of debt, e.g. 'debt to all suppliers' were planned to be cancelled. Likewise, offsetting would not be permitted either if aggregate items of debt towards a single creditor, e.g. 'total liabilities vis-à-vis a particular bank' stemming from various components such as overdrafts, guarantees or long term loans were planned to be cancelled altogether without distinction.

(96) Bulgaria envisages cancelling BGN 223,45 million (EUR 114,25 million) of BDZ Holding's debt. As described in recital 35 and Table 2, the amount of BGN 223,45 million subject to cancellation stems from financial obligations incurred prior to the accession of Bulgaria to the Union and which were outstanding at the date of accession or from subsequent debt incurred by BDZ Holding which substituted or refinanced debt incurred prior to the accession of Bulgaria to the Union, as documented by the Consolidated financial Statement of BDZ Holding for 2006, and/or information on the relevant loan payments. Each of the debts which are planned to be cancelled can be individualised as stemming from loan contracts (financial creditors KfW IPEX Bank, EBRD, IBRD) or from regular contractual relations with specific suppliers of rail infrastructure services (NRIC) or electricity services (NEC AD) prior to accession.

([30]) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25).

(97) The same is true as regards BDZ Holding's individualised debt obligations towards bond holders of the bond issue ISIN BG2100032072 from 19 November 2007 and the Ministry of Finance, when the latter became creditor of BDZ Holding (see recitals 35 and 36 and Table 2). Both debts are well individualised and also the proceeds were used to refinance well specified pre-accession debt which BDZ Holding could not meet and settle with its own resources. It follows that the amounts currently outstanding constitute, in economic terms, a mere carry-over of the past legacy debt.

(98) Finally, since the amount of BGN 223,45 million debt planned to be cancelled stems from clearly determined and individualised debts incurred prior to the accession of Bulgaria to the EU, it is not necessary to take position on whether other debts including provisions and trade obligations of BDZ Holding also identified by Bulgaria as pre-accession debt (Table 1 and recitals 35 and 20), and which amount to the difference between BGN 806,7 million and BGN 223,45 million, could also be lawfully cancelled under the Railway Guidelines. The debt amounting to that difference is excluded from the scope of the present decision.

(99) It is therefore concluded that the measure at stake aims at cancelling BGN 223,45 million of clearly determined and individualised debts incurred prior to the accession of Bulgaria to the Union.

(b) **The debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure.**

(100) Bulgaria stated that all the debts incurred by BDZ Holding were directly linked to the activity of passenger and freight rail transport (see recital 39).

(101) The Commission observes that the debts to be cancelled were indeed incurred to finance the renewal and repair of rolling stock, such as the purchase of diesel and electric multiple units or modernisation of cargo wagons owned by the company. Alternatively, the debts such as the outstanding obligations towards NRIC also financed the provision of BDZ Holding's railway services. Those activities are the core business of BDZ Holding and its subsidiaries and are directly linked to the activity of rail transport.

(102) Therefore, the Commission considers that the debts concerned are directly linked to the activity of rail transport.

(c) **The cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition on the market would not allow them to rectify their financial situation within a foreseeable future.**

Excessive indebtedness of BDZ Holding, which is hindering its sound financial management

(103) Bulgaria asserted that BDZ Holding qualified as insolvent and over-indebted according to the applicable Bulgarian legislation and fulfilled all the criteria laid down in Bulgarian legislation to initiate insolvency proceedings against it. This is a valid indication of excessive indebtedness. Furthermore, Bulgaria stated that the company had not been able to meet its financial obligations because of its indebtedness.

(104) The total debts of BDZ Holding amounted to BGN 806,7 million on 31 December 2006 and accounted for 78 % of BDZ Holding's total capital (equity and debts), with a Debt-to-Equity Ratio of 4. The financial situation of BDZ Holding deteriorated considerably since 2007. As from 2011, BDZ Holding's Debt-to-Equity Ratio increased above 7,5 (9), to reach 14 in 2012, 15 in 2013, – 209 in 2014 and – 33 in October 2015 ([31]). Moreover, in October 2015, BDZ Holding's outstanding obligations, namely BGN 499,1 million (EUR 255 million) represented 86 % of the book value of the assets amounting to BGN 582,4 million (EUR 298 million).

([31]) According to point 20(d) of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, the debt-to-equity ratio higher than 7,5 for 2 consecutive years is one of the indicators showing that the undertaking is in difficulty.

(105) The Commission further observes that despite the fact that BDZ Holding repaid BGN 724 million (EUR 370 million) of outstanding debts during the period from 1 January 2007 until 28 September 2016, the company has not been able to fully meet its financial obligations. Due to its overdue obligations towards international creditors, on 20 July 2015, the High Court of Justice in London ordered BDZ to pay EUR 66,7 million (BGN 30,4 million) with 8 % per annum in late payment interest ([32]).

(106) Moreover, considering the excessive level of indebtedness of BDZ Holding, without the debt cancellation, the company would have serious difficulties in meeting its obligations and could eventually be liquidated.

(107) On the basis of the foregoing, the Commission considers that BDZ Holding is facing an excessive level of indebtedness which is hindering its sound financial management.

Necessity of the aid

(108) In addition, the aid must be necessary to remedy the situation of excessive indebtedness, insofar as the likely development of competition on the market would not allow BDZ Holding and its subsidiaries to rectify their financial situation within a reasonable period.

(109) Due to its indebtedness, BDZ Holding has not been able to meet all its financial obligations and has a backlog in investments into modernisation of its rolling stock. Due to the backlog in investments into the modernisation of the rolling stock and maintenance, the fleet of the company is over-aged and partially obsolete. In this regard, the Commission observes that 82 % of BDZ Passenger's carriages are older than 20 years and 74 % of its locomotives are older than 25 years. In 2015, approximately 50 % of BDZ Cargo's locomotives were either under repair or not operational. Similarly, approximately 51 % of the freight wagons of BDZ Cargo were not operational and required repair in 2015.

(110) Without the aid, BDZ Holding would not be able to repay the still outstanding debts incurred prior to Bulgaria's accession to the Union, nor would it be able to use its own resources to invest into the modernisation of its rolling stock.

(111) By way of illustration, based on the company's reported earnings in 2016 (BGN 336,2 million), a one-off price and/or tariff increase of 66 % on average would be needed, other things being equal, to generate the BGN 223,45 million operating revenue in the short term which is necessary to repay the debt planned to be cancelled. However, in the meantime, BDZ Holding's subsidiaries only operate on a geographic area which is entirely eligible for regional aid pursuant to Article 107(3)(a) of the Treaty. Sizeable tariff increases in such geographic areas may have stronger negative social effects than in wealthier areas of the Union. Accordingly, hypothetical tariff increases aimed at boosting BDZ Holding's revenues and alleviating its debt to the extent needed, if at all legally possible as concerns passenger services subject to PSO and commercially sustainable in a competitive environment as concerns freight services, could have disproportionate social impacts on Bulgarian rail passengers or companies using BDZ's cargo services.

(112) Consequently, no other credible hypothetical policy measure than the planned debt cancellation would allow the company to continue its operation. It follows that the measure at stake is necessary to remedy BDZ Holdings' indebtedness, insofar as the likely development of competition on the market would not allow BDZ Holding and its subsidiaries to rectify their financial situation within a foreseeable future.

(d) **The aid must not go beyond what is necessary for the purpose**

(113) The Commission notes that in view of the financial situation of BDZ Holding, the amount of the debt cancellation is the minimum necessary to ensure the survival of the company and is a pre-condition for its financial sustainability. The amount is essentially needed for the outstanding payments towards the creditors — international financial institutions and NRIC. BDZ Holding and its subsidiaries have still outstanding liabilities incurred before 1 January 2007 which, if not paid, would put the beneficiary at risk of liquidation. The financial indicators show that the payments cannot be made from own resources at present and it would be unrealistic to expect that the company could increase significantly its tariffs or prices to generate increased revenues in the short term.

([32]) Orders of 20 July 2015, CL-2015-000309 FMS Wertmanagement AöR vs BDZ Holding; CL-2015-000214 Dexia Credit Local vs BDZ Holding; CL-2015-000090 KA Finanz AG vs BDZ Holding.

(114) Furthermore, the Commission notes that during the period since accession, BDZ Holding has repaid BGN 166 million of liabilities incurred before 1 January 2007 from its own resources stemming mainly from sales of assets. As those amounts were potentially eligible for cancellation, it is reasonable to consider that BDZ Holding could have used those resources for the development and the modernisation of the rolling stock and the services provided. The company was lagging behind the development of the railway sector as regards technical characteristics and information systems. Therefore, insofar as BDZ Holding has also relied on its own resources to repay part of the pre-accession debt, the debt cancellation cannot be considered as going beyond what is necessary even if it frees it from repayment obligations and allows financial room to invest in future modernisations or repair activities.

(115) In view of these considerations, the Commission finds that the implementation of the debt cancellation cannot be considered to place BDZ Holding in a situation more favourable than that of an average well-managed undertaking with the same activity profile.

(e) **The cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market, for example by deterring outside undertakings or new players from entering certain national or regional markets.**

(116) The proposed debt cancellation will only allow BDZ Holding to normalise financing of the company's operating activities and will not allow BDZ Holding or of its subsidiaries to expand or enter new markets. In that sense, the aid will not prevent the development of effective competition on the market. It will not affect the competitors' market position and they will be able to continue competing with BDZ Holding under the same conditions.

(117) The Commission also considers that the cancellation of debts will not unduly distort competition and trade between Member States, because it will only allow BDZ Holding to stabilise its financial situation, which was hindered by liabilities incurred prior to liberalisation of the market. Furthermore, the Commission finds that the new market players are not deterred from entering the Bulgarian transport market. As described in recitals 15 and 42, in addition to BDZ Cargo, eight cargo operators are currently active on the Bulgarian rail transport market. There is no evidence that the debt cancellation measure will modify this competitive situation.

Conclusion

(118) In view of the foregoing, the Commission concludes that the State aid in the form of debt cancellation (Measure 2) amounting to BGN 223,45 million (EUR 114,25 million) which Bulgaria plans to implement satisfies the conditions for compatibility with the internal market set out in chapter IV of the Railway Guidelines.

6.2. *MEASURE 3: NON-PAYMENT BY BDZ HOLDING AND ITS SUBSIDIARIES OF OVERDUE DEBTS TOWARDS THE INFRASTRUCTURE MANAGER (NRIC)*

(119) Since Bulgaria did not clarify the origin and evolution of BDZ Holding's outstanding liabilities towards NRIC before the Opening Decision, the non-enforcement of those overdue liabilities has been considered to potentially involve State aid according to Article 107(1) of the Treaty.

(120) According to the information provided by Bulgaria (see Section 4.3), part of BDZ Holding's outstanding liabilities towards NRIC constituted liabilities incurred by the company prior to Bulgaria's accession to the Union. A portion of this pre-accession debt (up to BGN 26,3 million) was subsequently refinanced with proceeds from a bond issue of 19 November 2007, which is still outstanding debt and, therefore, subject to assessment under 'Measure 2: Cancellation of the debts incurred prior to 2007' in Section 6.1. In other words, NRIC was paid.

(121) In addition, and with a view to explaining the situation in relation to the remaining outstanding liabilities, Bulgaria provided further information on the enforcement arrangements and steps undertaken by NRIC (see Section 4.3). According to Bulgaria, NRIC had undertaken all the necessary steps to collect the overdue obligations from BDZ Holding and its subsidiaries to maximise the recovery of the amounts due, but without initiating legal proceedings.

(122) In order to verify whether NRIC unduly favoured BDZ Holding as regards the delay and the arrangements for the payment of overdue liabilities, the Commission has to assess whether it could have benefited from such arrangements under normal market conditions ([33]). To that effect, the Commission has to assess whether a hypothetical market economy creditor in a situation similar to NRIC, seeking to obtain the maximum payment of the amounts owned to it, would have accepted the delay and entered into the renegotiation of the payment of overdue liabilities on similar terms and conditions ([34]). In other words, the Commission has to assess whether NRIC acted with the same due diligence as a market economy creditor, before choosing between an individual and amicable enforcement of its claims or the initiation of a collective recovery procedure leading eventually to the bankruptcy of BDZ Holding and its subsidiaries.

(123) The Commission notes that in order to identify the most advantageous alternative a diligent market economy creditor would assess the advantages and the disadvantages of each of the alternatives, taking into account, inter alia, the recoverable amounts, its prior economic exposure, the duration of the recovery process and the costs ([35]).

(124) The Commission first observes that the debts towards NRIC arose in the context of a regular and long-term commercial relationship between (State-owned) undertakings: BDZ Holding and its subsidiaries were key customers of NRIC and generated more than 70 % of its operating revenue. The origin of BGN 46,5 million of debt owed by NRIC to BDZ Holding accumulated between 2008 and 2011 for various services provided to NRIC (Table 3) also provides additional evidence that there is continuous interaction and interdependence between NRIC and BDZ Holding. A possible market exit of BDZ Holding and its subsidiaries resulting from collective insolvency proceedings would therefore have had a serious immediate negative impact on NRIC's financial situation. In turn, the bankruptcy of BDZ Holding would have reduced NRIC's profits and its ability to adequately maintain the national rail network, thus risking further decreases of commercial revenues accruing from other clients, in addition to BDZ Holding's subsidiaries.

(125) It follows that a market creditor engaged like NRIC in a similar commercial relationship with its debtor(s) like BDZ Holding would thus have approached with circumspection any hypothetical enforcement action leading to its main client disappearing from the market, unlike a creditor having one-off debt claims and not commercially and financially dependent on its debtor remaining active on the market after enforcement of its claims.

(126) Second, NRIC's claims towards BDZ Holding and its subsidiaries could not have been enforced as preferential claims under hypothetical collective insolvency proceedings, in which no particular preference for repayment of NRIC among other creditors could have been implemented (see recital 49). Moreover, the debt identified in the Opening Decision as owing to NRIC (BGN 45 million) was smaller than the debt owed to other creditors (see Table 1). What is more, the book value of BDZ Holding's assets would need to be reduced by a liquidation discount in a forced sale under the collective insolvency proceedings. Depending on the type of the assets, the liquidation discount can amount to up to 75 % of the asset value. Therefore, it is very likely that the liquidation value of BDZ Holding's assets would not have been sufficient to cover the liquidation costs, the salaries of its employees and all its outstanding liabilities Taking 2011 as an example, liquidation costs, salaries of employees and all outstanding liabilities amounted to BGN 778 million whereas the book value of BDZ Holding's assets was BGN 933 million. Consequently, NRIC could realistically expect to recover only a minor fraction of its outstanding claims, if collective insolvency proceedings had been initiated.

(127) Furthermore, the Commission considers, in line with settled case-law, that the costs, together with the length of court proceedings, may influence a creditor's decision whether to proceed with the liquidation of a company ([36]). In this context, the Commission agrees that NRIC had a particular interest in continuing its cooperation with BDZ Holding and its subsidiaries, not only on account of future commercial revenues generated by BDZ Holding but also with the aim of maximising the recovery of the outstanding non-preferential liabilities accumulated until November 2011 instead of initiating the liquidation of the company. The Commission concludes that the

([33]) Judgment of the Court of Justice of 11 July 1996, SFEI and Others, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

([34]) 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 (2016/C 262/01), point 74; Judgment of the Court of Justice of 22 November 2007, *Spain* v *Commission*, C-525/04 P, ECLI:EU:C:2007:698; Judgment of the Court of Justice of 24 January 2013, *Frucona* v *Commission*, C-73/11 P, ECLI:EU:C:2013:32, paragraph 78; Judgment of the Court of Justice of 29 June 1999, DMTransport, C-256/97, ECLI:EU:C:1999:332; Judgment of 30 April 1998,Cityflyer, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the Court of Justice of 21 March 2013, *Commission* v *Buczek Automotive and Poland*, C-405/2011, ECLI:EU:C:2013:186, paragraphs 54-60.

([35]) *Frucona* v *Commission*, C-73/11 P, paragraph 78, ECLI:EU:C:2013:32; *Commission* v *Buczek Automotive and Poland*, C-405/2011, ECLI:EU:C:2013:186, paragraph 54-60; Case C-124/10P *European Commission* v *Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraph 85.

([36]) Judgment of the Court the Justice of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, ECLI:EU:C:2013:186, paragraph 59.

initiation of lengthy collective insolvency proceedings leading to a forced liquidation of the group with an uncertain and low recovery rate would not have been a valid and realistic option for NRIC with a view to maximising the recovery of its debt claims.

(128) Indeed, the Commission observes that BDZ Holding and its subsidiaries have been regularly serving their debts towards NRIC and NRIC has not been treated differently from other private creditors of the group. Where late payments occurred, BDZ Holding has not been advantaged by the postponement of repayment since late payments to NRIC have attracted a sizeable margin of 1 000 basis points on top of the basis interest rate of the Bulgarian National Bank (see recital 48). By way of illustration, the Commission considers that 1 000 basis points is a proxy of market-conform interest margin on a loan with low quality collateral to a company in financial difficulties, such as BDZ Holding ([37]). Overdue liabilities were repaid through regular direct bank transfers, offsetting of liabilities of NRIC towards BDZ Holding and its subsidiaries and debt-to-asset swaps. For example, between 2011 and 2016 BDZ Holding and its subsidiaries paid an amount of BGN 503 million (EUR 257 million) for services provided by NRIC. Compared with a low likelihood of recuperating a proportion, minor if at all, of NRIC's claims if BDZ Holding had been liquidated, the amount of debt repaid to NRIC since 2011 confirms *a posteriori* that the choice made by NRIC not to enforce its claims was the most rational one.

(129) Moreover, although information is not specific to the pre-accession debt mentioned in the Opening Decision, the Commission notes, for example, with regard to the payment of the liabilities through the debt-to-asset swaps implemented after the Opening Decision, NRIC entered into agreements with BDZ Holding and its subsidiaries on an arm's length basis, as described in recitals 51, 52 and 53, which recognised the overdue debts and thus facilitated their reimbursement.

(130) On the basis of the additional information and supporting evidence provided by Bulgaria and in view of the foregoing, the Commission considers that NRIC has acted as a market economy creditor, and therefore, the postponement of repayment of debts and the arrangements agreed between NRIC and BDZ Holding and its subsidiaries, have not provided the latter with any undue economic advantage, from which they would not have benefited under normal market conditions.

(131) Consequently, the Commission concludes that the manner in which BDZ Holding and its subsidiaries dealt with their overdue debts towards the infrastructure manager (NRIC) before November 2011 did not constitute State aid within the meaning of Article 107(1) of the Treaty.

(132) Since the necessary conditions determining the existence of State aid within the meaning of Article 107(1) of the Treaty are cumulative, its provisions do not apply if one of them is not met. There is therefore no need to assess whether the non-payment by BDZ Holding and its subsidiaries of overdue debts towards NRIC in the past meets the other conditions of Article 107(1) of the Treaty.

6.3. *MEASURE 4: REIMBURSEMENT OF VAT BY THE STATE TO BDZ HOLDING EAD*

(133) The Commission initiated the investigation into Measure 4 because Bulgaria did not clarify the reasons for the reimbursement of VAT and whether it complied with Directive 2006/112/EC. Thus, the Commission considered that the VAT reimbursement could potentially involve State aid according to Article 107(1) of the Treaty. Therefore, the Commission invited Bulgaria to provide further information on the reasons for the VAT reimbursement to BDZ Holding.

(134) After the Opening Decision Bulgaria clarified that Measure 4 concerned the reimbursement of unduly charged and paid VAT amounting to BGN 72 million (EUR 36,7 million) on PSO compensations received from the Ministry of Transport for the period 1 December 2004 to 29 February 2008 (see recitals 55 to 59). Bulgaria clarified further that the administrative error was detected during a revision by the competent national tax authorities in compliance with the applicable provisions of the national legislation. The error was corrected by tax reimbursement decisions number 2900180 of 14 January 2009, 290900153 of 8 July 2009, 100337 of 12 August 2010 and 290100380 of February 2011.

([37]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

(135) The Commission notes that not only the granting of positive economic advantages is relevant for the notion of State aid. Relief from economic burdens, such as tax advantages, can also constitute an advantage. It must therefore be examined whether the reimbursement of the VAT on PSO compensations received from the Ministry of Transport provided an economic advantage to BDZ Holding through mitigation of charges normally included in the budget of an undertaking ([38]), or whether the VAT on the PSO compensation was indeed unduly levied. There is no advantage in the case of reimbursement of illegally levied taxes ([39]).

(136) According to Article 73 of Directive 2006/112/EC, the supply of services, including passenger transport services, is subject to VAT and the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier, in return for the service provided, either from the customer or a third party, including compensation or subsidies directly linked to the price of the supply. Furthermore, according to Article 132 of that Directive, undertakings entrusted with a PSO do not fall under the exemptions from the VAT.

(137) Therefore, it needs to be assessed whether the PSO compensation received by BDZ Holding was directly linked to the price of the services provided. The PSO compensation was aimed at compensating losses stemming from the provision of the passenger transport service under specific conditions, such as train kilometres, seats, frequencies and other qualitative criteria. In particular, the PSO compensation would be reduced in case of deviations in, inter alia, the kilometres, seats and hours and other qualitative criteria which were determined for the services provided. Therefore, the PSO compensation cannot be regarded as directly linked with the price for the provision of the transport services, but rather as compensation for losses stemming from the discharging of a PSO.

(138) Moreover, the Bulgarian VAT legislation does not provide for PSO compensation related to the coverage of the losses to be subject to VAT. The error was detected by the relevant tax authorities in the wake of an inspection and culminated in several decisions of the tax authorities (see recital 59), which are in accordance with Bulgarian Tax Insurance Procedure Code.

(139) Consequently, the VAT was unduly charged on BDZ Holding's PSO compensation for the period from 1 December 2004 to 29 February 2008. Therefore, the Commission considers that the reimbursement of the unduly levied VAT does not provide an economic advantage to BDZ Holding.

(140) In view of the fact that the necessary conditions determining the existence of State aid within the meaning of Article 107(1) of the Treaty are cumulative, the absence of any one of them is decisive. There is therefore no need to assess whether Measure 4 meets the other conditions of Article 107(1) of the Treaty.

(141) Therefore, the Commission concludes that Measure 4 does not constitute State aid within the meaning of Article 107(1) of the Treaty.

7. **CONCLUSION**

(142) In the light of the withdrawal of the notification regarding the restructuring aid to BDZ Holding (see Measure 1, Section 5), the formal investigation procedure under Article 108(2) of the Treaty in respect of the notified restructuring aid measure should be closed.

(143) With regard to the cancellation of debts of BDZ Holding and its subsidiaries amounting to BGN 223,45 million (EUR 114,25 million) (Measure 2, Section 6.1) constitutes State aid within the meaning of Article 107(1) of the Treaty and satisfies the compatibility conditions in the Railway Guidelines. Therefore, Measure 2 should be declared compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

([38]) Judgment of the Court of Justice of 15 March 1994, Banco Exterior de España, C-387/92, ECLI:EU:C:1994:100, paragraph 13; Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy* v *Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, Heiser, C-172/03, ECLI:EU:C:2005:130, paragraph 36.

([39]) Judgment of the Court of Justice of 27 March 1980, Amministrazione delle finanze dello Stato, 61/79, ECLI:EU:C:1980:100, paragraphs 29 to 32.

(144) With regard to the non-payment of BGN 45 million in overdue debts towards NRIC (Measure 3, Section 6.2), NRIC acted as a market economy creditor. Measure 3 therefore does not constitute State aid.

(145) With regard to the reimbursement of the wrongfully paid VAT (Measure 4, Section 6.3), since the VAT was unduly charged, its reimbursement does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

Following the withdrawal of the notification of restructuring aid by Bulgaria, the formal investigation procedure under Article 108(2) of the Treaty with respect to the notified planned restructuring aid in favour of BDZ Holding EAD SA has become without object and is hereby closed.

Article 2

1. The State aid in favour of BDZ Holding EAD SA in the form of a cancellation of debts amounting to BGN 223 448 801, which Bulgaria is planning to implement, is compatible with the internal market on the basis of Article 107(3) c) of the Treaty. The implementation of the cancellation of debts is accordingly authorised.

2. The manner in which the National Railway Infrastructure Company treated, before November 2011, BGN 45 million in overdue debts owed by BDZ Holding EAD SA, BDZ Passenger EOOD and BDZ Cargo EOOD does not constitute State aid within the meaning of Article 107(1) of the Treaty.

3. The reimbursement of BGN 72 million erroneously paid value added tax does not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 3

This Decision is addressed to the Republic of Bulgaria.

Done at Brussels, 16 June 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission