Commission Decision (EU) 2019/1712 of 20 July 2018 on the public loan SA.29198 — (2010/C) (ex 2009/NN) granted by Slovakia for Železničná Spoločnosť Cargo Slovakia, a.s. (ZSSK Cargo) (notified under document C(2019) 4723) (Only the Slovak text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2019/1712

of 20 July 2018

on the public loan SA.29198 — (2010/C) (ex 2009/NN) granted by Slovakia for Železničná Spoločnosť Cargo Slovakia, a.s. (ZSSK Cargo)

(notified under document C(2019) 4723)

(Only the Slovak 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 the provision(s) cited above[1],

Whereas:

1. PROCEDURE

(1) By letter dated 24 February 2010, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of a public loan to Železničná Spoločnosť Cargo Slovakia, a.s. ('decision to initiate the procedure').

(2) The Commission decision to initiate the procedure, as further explained therein, followed an earlier complaint from an anonymous competitor of 21 April 2009 and a notification made by Slovakia for reasons of legal certainty on 10 August 2009.

(3) The decision to initiate the procedure was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit comments on the public loan but received no such comments.

(4) By letter dated 16 June 2010, Slovakia submitted its comments on the decision to initiate procedure.

(5) The Commission sent additional requests for information to the Slovak authorities on 8 November 2010, 22 December 2010, 14 June 2011, 6 August 2012

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1712. (See end of Document for details)*

and 25 August 2016. The Slovak authorities provided their replies on 6 December 2012, 20 and 22 January 2011, 11 July 2011, 17 September 2012 and 14 October 2016, respectively. On 20 December 2017, the Slovak authorities provided an additional submission, which was discussed at a meeting of 23 January 2018.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Recipient (activities, ownership, market share etc.)

(6) Železničná Spoločnosť Cargo Slovakia, a.s. ('ZSSK Cargo') was established in 2005 after splitting the incumbent railway operator Železničná spoločnosť, a.s., into three separate railway companies: Železnice Slovenskej Republiky — infrastructure manager, Železničná spoločnosť Slovensko a.s. — passenger traffic and ZSSK Cargo — freight transport. The Slovak Government was and remains the founder and 100 % shareholder of ZSSK Cargo. The Ministry of Transport, Posts and Telecommunications of the Slovak Republic exercises the shareholder rights of the Government.

2.2. Description of the loan to ZSSK Cargo

(7) The loan of EUR 165 969 594,37 that is the subject to present proceedings was authorised by Government Decree No 173 of 4 March 2009, and paid to ZSSK Cargo on 6 April 2009 on the basis of a contract concluded on 31 March 2009 between the Ministry of Transport, Posts and Telecommunications and ZSSK Cargo[(2)]. The loan was granted for a period of 10 years with a grace period of two years before the first payment of instalment reimbursing the principal.

(8) The loan was non-collateralised. It was aimed at financing salaries and other staff costs, charges for use of railway infrastructure and financial charges in a context of a significant drop of operating revenues and ongoing and planned restructuring measures, which is further described below. Indeed, the loan was granted following a report drawn up in February 2009 on the economic situation of the company and railways of the Slovak Republic (Železnice Slovenskej republiky) describing the financial difficulties of ZSSK Cargo and attached as background document to the Government Decree No 173 of 4 March 2009.

(9) The variable interest rate on the loan was based on the 6 month Euro Interbank Offered Rate (EURIBOR) increased by the margin of 3,2 % per annum. On 6 April 2009, the agreed annual interest rate amounted to 4,844 % (1,644 % (6 month EURIBOR) + 3,2 % (margin)). According to the Slovak authorities, this rate was established on the basis of the opinion of the Slovak Debt and Liquidity Management Agency ARDAL[(3)].

(10) The Slovak authorities extended the initial two year grace period for repayment of the principal of the loan several times in 2011 and 2012 by 18 months in total, having regard to the continued financial situation of ZSSK Cargo and acknowledging its on-going restructuring efforts. Whereas the original repayment period was until 2019, ZSSK Cargo repaid the whole loan with all due interests in advance by November 2015.

2.3. **Operating and financial performance of ZSSK Cargo**

(11) The provision of railway freight services was opened to completion in Slovakia in 2007, in accordance with Council Directive 91/440/EEC[(4)] which liberalised international rail freight transport as from 1 January 2006 and all other rail freight transport services as from 1 January 2007.

(12) ZSSK Cargo provided and still provides rail freight traffic on its own or combined with road transport services as well as renting, maintenance and repair of the rolling stock. By 2010, 15 freight transport companies were active in the Slovak Republic. In 2008, ZSSK Cargo transported 44,5 tonnes of goods, which represented 93,7 % market share on the Slovak rail freight market. In the first half of 2009, ZSSK Cargo transported 15,3 million of tonnes representing 93 % share of the Slovak rail freight market.

(13) ZSSK Cargo registered losses for the first three years after its creation in 2005[(5)]. In 2005 and 2006 ZSSK Cargo registered net losses of respectively SKK 428 million (EUR 11,3 million)[(6)] and SKK 855 million (EUR 24,8 million)[(7)]. In 2007, ZSSK Cargo succeeded in reducing its net loss to SKK 154 million (EUR 4,5 million). In 2008, ZSSK Cargo registered net profit amounting to SKK 83 million (EUR 2,4 million), resulting mainly from the reduction of operating costs by more than SKK 600 million (EUR 17,4 million).

2.4. **Financial situation of ZSSK Cargo when the loan was granted**

(14) According to the information provided by the Slovak authorities, in 2008, the EBITDA of ZSSK Cargo (Earnings before Interest, Taxes, Depreciation and Amortization) increased by 6 % in comparison with 2007 reaching EUR 59,8 million. Over 2007 and 2008, other key financial indicators (revenues, equity, total indebtedness) remained either stable or slightly improved. The Debt-to-Equity ratio for instance decreased by 6 % to 43,9 % in 2008. Financial data of ZSSK in March 2009 used for S&P rating allows to conclude that ZSSK was not a firm in difficulty (C rating) and remained investment grade (BB rating).

(15) The 2008 annual report of ZSSK Cargo however mentions that, in the last quarter of 2008, the impact of the economic crisis fully displayed in the reduced demand for transportation and consequently caused the downturn in performance of ZSSK Cargo. Revenues from transportation of goods fell significantly by more than 30 % in that period. As a consequence, the financial situation of ZSSK Cargo deteriorated at the end of 2008 and thereafter. The company's revenues decreased by 38 % in the first half of 2009 compared with the same period in 2008. Similarly, the result of the company decreased from a net profit of EUR 22 million in the first half of 2008 to a net loss of EUR 47 million in the first half of 2009.

(16) In that context, the report on the economic situation of the company and railways of the Slovak Republic of February 2009 described the restructuring efforts that ZSSK Cargo had already undertaken in years 2006-2008. The report documented the need for the loan and included also the following additional measures considered

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1712. (See end of Document for details)*

necessary to improve the financial situation of ZSSK Cargo: (i) additional costs-cutting measures, (ii) temporary dismissals of employees, and (iii) long-term optimization of the number of employees and further restructuring of ZSSK Cargo's operations. Staff decreases by more than 10 % and other cost restructuring measures led to a reduction of operating costs by SKK 600 million (EUR 17,4 million) in 2007. The restructuring measures had led to significant reduction of losses in 2007 and to a positive result in 2008 despite the first negative effects of the crisis towards the end of the year. Based on these facts, the report concludes that ZSSK Cargo had been on the way to long-term competitiveness and profitability and that the expected financial losses in 2009 were mainly caused by the drastic but temporary decrease in the transport volumes due to the crisis that started the year before.

(17) Thereafter, on year-to-year performance (table below), net income remained strongly negative in 2010. However, already in 2011 the company already managed to significantly reduce losses with reduced revenues thereafter. In subsequent years staff decreased 44 % by 2016. ZSSK Cargo recovered by 2013 and is now posting modest profits, as shown in the table.

Selected financial figures of ZSSK Cargo 2008-2016

(EUR million)

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Revenues	458	340	378	371	315	369	296	284	278
Profit	2,7	-126,6	-122,6	-0,3	-23,9	0,3	-5,5	0,8	0,1
Staff headcount	10 448	9 826	9 546	8 054	6 822	6 331	6 103	6 027	5 794

Source: Annual Reports of ZSSK Cargo, supplied by Slovak Republic, also available (from 2011) at (https://www.zscargo.sk/en/media/annual-reports

2.5. **Loan quotes from other banks and conditions of other loans from similar rating at the time**

(18) Before the loan was granted in March 2009, three commercial banks indicatively offered to ZSSK Cargo a loan of the same amount (EUR 166 million) and a repayment period (10 years) with interest rate of 6-month EURIBOR plus 295 b.p. ([commercial bank 1][8]), 285-300 b.p. depending on maturity ([commercial bank 2]) or 425 b.p. ([commercial bank 3]) respectively, without any particular collateral.

(19) On the day of granting the loan, on 31 March 2009, around 32 companies with similar creditworthiness (BB-rating) as ZSSK Cargo entered into credit default swaps (CDS) contracts with a 10 year maturity period on financial markets. The majority of these contracts had spread rates between 305 and 916 b.p.[9]

2.6. **Grounds for initiating the procedure**

(20) The Commission decided to initiate the procedure since it could not exclude that the public loan for ZSSK Cargo involved State aid within the meaning of Article 107(1) of the TFEU. The Commission considered that the loan might have been granted on terms more favourable than the rates set out in the Reference Rate Communication[10], adopted not long before the decision to initiate proceedings. The Commission also raised doubts as regards the compatibility of the loan with the internal market, in particular, on the following points.

(21) As regards the question whether the loan was in line with market conditions, the decision to initiate proceedings questioned the rationale of the interest rate based on a 6-month EURIBOR instead of 1-year IBOR set out in the Reference Rate Communication as well as the grace period of two years and its impact on the interest rate. The interest margin (320 b.p.) charged did not seem to take into account the deteriorating financial situation of ZSSK Cargo: as a company without credit history or any available rating and with financial difficulties, the margin for a loan with high collateral should according to the Reference Rate Communication be at least 400 basis points, whereas if the level of collateral is low, the margin should have been 1 000 basis points.

(22) The decision to initiate the procedure also raised doubts whether the loan, in case it constituted State aid, could be declared compatible with the internal market under Articles 107(3)(b) or (c) of the TFEU in light of the rules laid down in the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis[11], Community guidelines on State aid for rescuing and restructuring firms in difficulty[12] or the Community guidelines on State aid for railway undertakings[13].

3. COMMENTS FROM SLOVAKIA

(23) The Slovak authorities claim that the loan was granted on market terms by the State as a prudent shareholder and therefore does not contain any State aid element.

(24) First, the Slovak authorities claim that in the same situation, any reasonable shareholder would have granted the loan to the company. The Slovak authorities argue that it can be expected that the shareholder would have granted the loan under market conditions using the interest rate at the lower limit offered by banks on loans with similar parameters. The shareholder's interest is not to grant a loan for the business of its own company at too high interest, as it could place a disproportionate burden on the company, which could subsequently lead to frustration of the loan purpose that is usually to bridge temporary economic problems or further develop the company's business. In fact, the shareholder primarily wants the company to make profits in the next periods and it is consequently not interested in earning interest on the loan granted to its own company under normal market conditions, but rather to support the company's business in order to make a profit from which it can subsequently pay out a dividend.