V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – WĘGRY

Pomoc państwa SA.48556 (2019/C) (ex 2018/N) – Regionalna pomoc inwestycyjna dla Samsung SDI

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2022/C 82/03)

Pismem z 29 czerwca 2021 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Węgry o swojej decyzji w sprawie przedłużenia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianych środków pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środków, w odniesieniu do których Komisja przedłuża postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

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Otrzymane uwagi zostaną przekazane władzom węgierskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

TEKST STRESZCZENIA

W dniu 14 października 2019 r. Komisja wszczęła formalne postępowanie wyjaśniające ze względu na wątpliwości, czy regionalna pomoc inwestycyjna w wysokości 108 mln EUR, którą Węgry zamierzają przyznać przedsiębiorstwu Samsung SDI na inwestycję w wysokości 1,2 mld EUR mającą na celu zwiększenie przepustowości istniejącego zakładu w Göd (Węgry) produkującego baterie do pojazdów elektrycznych, jest zgodna z rynkiem wewnętrznym. Na etapie wstępnego badania Węgry twierdziły, że pomoc jest uzasadniona koniecznością wyrównania ocenionej na kwotę 173 mln EUR różnicy netto między kosztami lokalizacji inwestycji na Węgrzech w porównaniu z alternatywną lokalizacją inwestycji w Xi'an (Chiny), gdzie Samsung SDI kontroluje za pośrednictwem spółki joint venture inny zakład produkcji baterii do pojazdów elektrycznych.

W decyzji o wszczęciu postępowania ([1]) Komisja wstępnie przyjęła, że pomoc nie miała kluczowego znaczenia dla podjęcia pozytywnej decyzji o lokalizacji na rzecz Węgier ze względu na wątpliwości odnośnie do wielkości i istnienia rzekomej luki w rentowności na korzyść Chin oraz wiarygodności alternatywnego scenariusza inwestycyjnego.

([1]) Pomoc państwa – Węgry – Pomoc państwa SA.48556 (2019/C) (ex 2018/N) – Regionalna pomoc inwestycyjna dla Samsung SDI – Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. C 112 z 3.4.2020, s. 12).

W swoich uwagach przekazanych w następstwie wszczęcia formalnego postępowania wyjaśniającego Samsung SDI i Węgry przedstawiły nowe argumenty i dowody w odniesieniu do czynników, które miały znaczenie dla podjęcia przez Samsung decyzji o zainwestowaniu na Węgrzech, wycofując tym samym sprzeczne oświadczenia złożone wcześniej i znacząco zmieniając opis uzasadnienia pomocy.

Węgry uważają, że należy dokonać przeglądu nie tylko elementów, odnośnie do których Komisja wyraziła wątpliwości w decyzji o wszczęciu postępowania (tj. różnicy kosztów inwestycji oraz wiarygodności lokalnego zaopatrzenia itp.), ale również innych czynników, w tym nowych, których nie przedstawiono wcześniej, a które mogły wpłynąć na ryzyko związane z przedsięwzięciem w kontekście rozpatrywanych scenariuszy lokalizacji.

W świetle nowych informacji przedstawionych przez Węgry i Samsung SDI Komisja rozszerza zakres pierwotnej decyzji o wszczęciu postępowania, aby przedstawić nowe elementy oraz wynikające z nich wątpliwości, a także aby umożliwić wszystkim zainteresowanym stronom trzecim przedstawienie uwag na temat nowych dowodów przedstawionych przez Węgry i Samsung SDI.

Węgry i Samsung SDI przedstawiają zasadniczo cztery nowe argumenty i udostępniają na poparcie tych argumentów dodatkowe dowody w postaci dokumentów. *Po pierwsze*, przyznają, że bardziej realistyczny scenariusz zaopatrzenia lokalnego w Chinach polegałby na założeniu, że beneficjent mógłby pozyskać od [25–30] (*) do [31–35] % (w porównaniu ze 100 %) sprzętu inwestycyjnego na poziomie lokalnym. *Po drugie*, twierdzą, że beneficjent mógł skorzystać w Chinach z dotacji inwestycyjnej w wysokości [15–20] % kwalifikowalnych kosztów inwestycji, o czym świadczy nieformalna oferta dotacji otrzymana od chińskiego samorządu lokalnego przed podjęciem decyzji inwestycyjnej. *Po trzecie*, twierdzą, że uzasadnione byłoby zastosowanie przez Samsung SDI – przy ocenie scenariusza chińskiego – znacznie niższej średniej stawki podatku od osób prawnych (CIT) wynoszącej 15 % (w porównaniu ze stawką faktycznie stosowaną w wysokości 25 %), co znacznie zwiększyłoby przewagę komparatywną chińskiej inwestycji alternatywnej. *Po czwarte*, w odpowiedzi na zawarte w decyzji o wszczęciu postępowania wezwanie do ponownego obliczenia różnicy w rentowności w oparciu o bardziej realistyczne założenia dotyczące zaopatrzenia na poziomie lokalnym, Węgry i Samsung SDI twierdzą, że ponowne obliczenie różnicy w rentowności w oparciu o podejście oparte na prawdopodobieństwie (również z uwzględnieniem opisanych powyżej nowych elementów) stanowiłoby bardziej realistyczne odzwierciedlenie procesu decyzyjnego Samsunga. I wreszcie, Komisja zauważa, że z nowych dowodów w postaci dokumentów, które zostały udostępnione przez Węgry, wynika, że na etapie poszukiwania lokalizacji dla projektu inwestycyjnego uwzględniono także kilka niezagospodarowanych terenów inwestycyjnych w Europie (w Polsce, na Słowacji, na Węgrzech i w Republice Czeskiej) oraz jeden teren w Azji. Po przeprowadzeniu wewnętrznej oceny wydaje się, że przynajmniej na pierwszym etapie zachowano jako konkurencyjny jeden niezagospodarowany teren w Polsce – położony w regionie kwalifikującym się do pomocy regionalnej zgodnie z art. 108 ust. 3 lit. a) TFUE, obok lokalizacji w Göd (Węgry) i w Xi'an (Chiny).

Dodatkowe wątpliwości odnośnie do zgodności środka pomocy z rynkiem wewnętrznym

Komisja wyraża dodatkowe wątpliwości odnośnie do wszystkich nowych elementów przedstawionych przez władze węgierskie i beneficjenta.

Po pierwsze, na obecnym etapie Komisja ma wątpliwości co do tego, czy można uznać, że założenia dotyczące zaopatrzenia lokalnego w Chinach na poziomie od [25–30] do [31–35] % były realistyczne w momencie podejmowania decyzji inwestycyjnej. Wynika to z faktu, że dowody przedstawione przez beneficjenta w celu uzasadnienia powyższych liczb opierają się na doświadczeniach związanych z mniej innowacyjnymi i mniejszymi inwestycjami realizowanymi w Chinach, których nie można, na pierwszy rzut oka, przełożyć na zgłaszaną inwestycję i które – przynajmniej częściowo – nie mogły być znane beneficjentowi w momencie podejmowania decyzji inwestycyjnej, ponieważ dowody powstały i zostały zgromadzone *ex post*. Komisja ma również wątpliwości, czy podczas ponownego obliczenia luki w rentowności w scenariuszu węgierskim poprawnie zastosowano marżę zysku i czy jej wielkość wynosząca [18-22]% jest właściwa.

Po drugie, na podstawie dostępnych dowodów Komisja ma wątpliwości, czy przywołana oferta dotacji inwestycyjnej w wysokości [15–20]% w Chinach stanowiła istotny czynnik wpływający na decyzję inwestycyjną. Przedstawione dowody wskazują bowiem, że oferta pomocy w Chinach odnosiła się do projektu inwestycyjnego, który różni się od przedstawionego scenariusza alternatywnego. Ponadto przedłożone nowe dokumenty wewnętrzne przedsiębiorstwa Samsung SDI wydają się wskazywać na fakt, iż w momencie podejmowania decyzji inwestycyjnej beneficjent realizował strategie inwestycyjne o zasięgu regionalnym, które wymagały stworzenia oddzielnych i dodatkowych mocy produkcyjnych służących wytwarzaniu baterii do pojazdów elektrycznych zarówno w Europie, jak i w Chinach, oraz iż obsługiwał zarówno EOG (plus […]), jak i odpowiednio chiński rynek geograficzny.

Po trzecie, na obecnym etapie Komisja uważa, że początkowe wykorzystanie przez Samsung SDI stawki podatku od osób prawnych w Chinach w wysokości 25 % na potrzeby obliczenia luki w rentowności stanowiło należyte podejście ostrożnościowe. Opierając się na dostępnych dowodach, Komisja nie widzi przekonujących argumentów, dlaczego Samsung SDI mógłby/powinien był uczynić inaczej. Komisja zauważa, że podstawy prawne obu przywołanych zwolnień podatkowych przestały obowiązywać z końcem 2020 r. i nie jest jasne, dlaczego beneficjent uważa, że w momencie podejmowania decyzji inwestycyjnej w listopadzie 2017 r. mógł przyjąć założenie, że jedna z nich zostanie przedłużona – mając na uwadze, że większość przychodów z inwestycji zostałaby zrealizowana po tej dacie.

(*) *Informacje poufne.*

Powyższe wątpliwości dotyczące wiarygodności przywołanych publicznych środków wsparcia w Chinach dodatkowo pogłębia fakt, że beneficjent nie określił ich ilościowo, ani nawet o nich nie wspomniał w sprawozdaniach złożonych na kluczowych etapach decyzji, tj. 26 października i 27 listopada 2017 r.

Komisja uważa, że powyższe wątpliwości, jak również fakt, że Samsung SDI nie poinformował chińskich władz o decyzji w sprawie inwestycji na Węgrzech, lecz prawdopodobnie kontynuował negocjacje w sprawie dotacji co najmniej do maja 2018 r., kiedy otrzymał nową i lepszą – aczkolwiek nieformalną – ofertę dotacji w Chinach, wskazuje, że Samsung nie planował dokonania w Chinach realnej inwestycji alternatywnej, która konkurowałaby z inwestycją w Europie, lecz realizował w momencie podejmowania decyzji inwestycyjnej strategie inwestycyjne o zasięgu regionalnym, które wymagały umiejscowienia mocy produkcyjnych na każdym z rynków docelowych (tj. w Chinach, w Europie, i […]). W związku z tym Komisja ma wątpliwości odnośnie do wiarygodności inwestycji alternatywnej w Chinach.

Po czwarte, Komisja uważa na tym etapie, że podejście oparte na prawdopodobieństwie, którego przyjęcie proponuje się na potrzeby ponownego obliczenia luki w rentowności, nie wydaje się być zgodne z pochodzącymi z 2016 r. wytycznymi przedsiębiorstwa Samsung SDI w sprawie instrumentu inwestycyjnego oraz nie odzwierciedla rzeczywistego procesu decyzyjnego.

I wreszcie, Komisja zauważa, że przedłożone nowe dokumenty wewnętrzne wskazują (w sprzeczności z pierwotnymi argumentami beneficjenta), że rozważano dodatkowy konkurencyjny obiekt europejski – w Polsce, i że na tym etapie nie można wykluczyć, iż pomoc na rzecz węgierskiego zakładu, kwalifikująca się do pomocy regionalnej na podstawie art. 107 ust. 3 lit. c) TFUE, mogłaby mieć negatywny wpływ na spójność, odciągając inwestycje ze słabiej rozwiniętego regionu w Polsce.

W związku z powyższym Komisja ma wątpliwości co do zgodności pomocy ze wspólnym rynkiem i uważa, że konieczne jest rozszerzenie zakresu formalnego postępowania wyjaśniającego na powyższe nowe elementy i odnośne wątpliwości.

Zainteresowane strony proszone są o przedstawienie uwag na temat pomocy, a zwłaszcza na temat kwestii wskazanych bardziej szczegółowo w załączonym piśmie do Węgier.

TEKST PISMA

The Commission wishes to inform Hungary that, having examined the comments on the opening decision on the measure referred to above submitted by your authorities and by the aid beneficiary, as well as the additional information submitted subsequently by your authorities, it has decided to extend the scope of the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

(1) On 14 October 2019, the Commission adopted a decision (hereinafter 'the Opening Decision') [1] to initiate the formal investigation procedure in relation to a regional investment aid measure (hereinafter 'the measure' or 'the notified measure') in favour of Samsung SDI Magyarország Zrt (hereinafter 'Samsung SDI' or 'the beneficiary').

(2) Hungary submitted comments on the Opening Decision on 30 January 2020, presented its observations on third party comments on 9 July 2020, and replied on 3 November 2020 to a request for information from the Commission dated 25 August 2020. Samsung SDI submitted comments on the Opening Decision on 3 May 2020.

2. DESCRIPTION OF THE FACTS RELEVANT FOR THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

2.1 Subject matter of the Opening Decision and doubts raised as to the compatibility of the measure with the internal market

(3) The Opening Decision was based on the information at the disposal of the Commission at the moment of its adoption, as provided by Hungary. On that basis, the Commission raised doubts regarding the incentive effect of the aid and the credibility of the alternative (Chinese) investment scenario presented by Hungary (see section 3.4.1.4 of the Opening Decision). In particular, the Commission took the preliminary view that the proposed regional aid was not crucial for a positive location decision in favour of Hungary. This was because the Commission had doubts as to the size and existence of the claimed gap of EUR 173 million in the net present value ('NPV') of the investment in favour of China, which was largely based on significant differences in investment costs between the two alternative investment locations, justified by Hungary and the beneficiary on the basis of a 'local sourcing policy' [2] which however was *prima facie* considered unrealistic by the Commission in the Opening Decision. In addition, the Commission could not exclude that a combination of strategic factors such as the quickly expanding European market, the proximity to European customers, the risk of forced transfer of technology and the hostile political and economic climate in China to South Korean undertakings, would not have constituted overriding strategic considerations that would have led the company to locate its investment in Hungary in any event, even in the absence of aid.

(4) The Commission also raised doubts regarding the contribution of the aid to regional development (see section 3.4.1.1 of the Opening Decision), the appropriateness of the form of aid (see section 3.4.1.3 of the Opening Decision), and the proportionality of the aid (see section 3.4.1.5 of the Opening Decision). Finally, the Commission could not exclude that the investment concerned caused a relocation of Samsung SDI's battery pack production activities from Austria to Hungary, which would constitute a manifest negative effect on trade within the meaning of paragraph 122 of the Guidelines on regional State aid for 2014-2020 ('the RAG') [3] (see section 3.4.2.4 of the Opening Decision).

2.2 Additional information submitted by Hungary and Samsung SDI after the adoption of the Opening Decision

(5) In their comments on the Opening Decision, Hungary and Samsung SDI rescinded certain statements (see recital (13)) made during the preliminary assessment phase and presented new claims and evidence concerning the assumptions made by the beneficiary in the counterfactual scenario. That new information had not been shared with the Commission in the course of the preliminary examination, and was thus not reflected in the Opening Decision. Partially, the new statements contradict earlier information reflected in the Opening Decision, or underpinning the tentative Commission conclusions in it.

(6) Hungary claims the newly submitted information was relevant for Samsung SDI's decision to invest in Hungary as it related to factors that could affect the entrepreneurial risks of the location scenarios under consideration. Therefore, Hungary contends that the Commission is required to consider such new information when conducting the comprehensive assessment of the counterfactual scenario in order to verify the incentive effect of the proposed aid, as required by paragraph 69 of the RAG.

(7) The new evidence and claims are summarised in sections 2.2.1 to 2.2.4 below:

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[1] OJ C 112, 27.3.2020, p. 12.

[2] The 'local sourcing policy' required the company to buy from local sources the equipment and machinery and the other inputs necessary for the investment.

[3] OJ C 209, 23.7.2013, p. 1.

2.2.1. *Local sourcing in Xi'an (China) between [25-30]* (*) *% and [31-35] %*

(8) Hungary explained that, although Samsung SDI's local sourcing counterfactual analysis was based on a premise which reflected the company's settled policy (i.e. full local sourcing), Samsung SDI's Investment Committee ex-ante assessment '*may have been* […] *too presumptive regarding its local sourcing capabilities*'. At the same time, Hungary challenges the Commission's assumption that Samsung SDI would not have sourced **any** equipment in China if it had chosen Xi'an as the investment location. Instead, it claims that, based on Samsung SDI's ex-post calculations ([4]), a proportion of local sourcing of equipment /assets between [25-30] % and [31-35] % ([5]) of the eligible investment expenditure would have been realistic in Xi'an.

(9) The minimum local sourcing of [25-30] % is based on the hypothesis that:

a) Samsung SDI would have sourced about [15-20] % of the value of the equipment necessary for the counterfactual investment in Xi'an from Chinese suppliers from which Samsung SDI had already purchased similar equipment in China for its factory in Tianjin ([6]). In support of this claim, Hungary and Samsung SDI provided the names of [5-10] Chinese suppliers for equipment and machinery which had supplied its Tianjin factory and provided partial records on equipment transactions spanning from 2015 to 2019, as well as summaries of the technical characteristics of those equipment.

and

b) Samsung SDI would have sourced about [10-15] % of the value of the equipment necessary for the counterfactual investment in Xi'an from Chinese suppliers without a transaction record with Samsung SDI in China, but that had sold to other Chinese customers, including EV battery manufacturers, equipment based on the same technology as used in the counterfactual investment project. In support of this claim, Hungary provided the names of 4 Chinese producers, summaries of the technical characteristics of their respective equipment, as well as summaries of meetings with them that took place in between 2014 and 2019.

(10) The upper local sourcing bound of [31-35] % is based on the hypothesis that, in addition to the scenarios described in recital (9) a) and b) above

c) Samsung SDI would have also sourced about [3-8] % of the value of the equipment necessary for the counterfactual investment in Xi'an from Chinese suppliers without a transaction record with Samsung SDI in China, but that had sold to other Chinese customers, including EV battery manufacturers, equipment used in the same production processes as those used in the counterfactual investment project. In support of this claim, Hungary provided the names of 2 Chinese producers and summaries of meetings with them that took place in between 2014 and 2019.

(11) Hungary presents two further arguments in support of its claim that local sourcing in China was realistic at the time of the investment decision in November 2017. First, it contends that during 2015-2016 Samsung SDI had achieved a local sourcing ratio of machinery/equipment between [10-15] % and [25-30] % in its Tianjin plant. ([7]). Hungary considers that those investments constituted a relevant benchmark for the notified investment project because the respective manufacturing lines have '*similar characteristics*' and '*rely on analogous machinery and equipment*'. Second, Hungary presents circumstantial evidence on the level of technological development in the Chinese equipment/machinery market in 2017, namely: (1) evidence as to the number of patent filings related to the manufacturing of batteries in China which, according to Hungary, had increased by 323.3 % over the period 2010-2016, and (2) evidence regarding China's share of the world battery electric vehicle market which, according to Hungary, had increased from 9 % in 2013 to 64 % in 2017.

(*) *Confidential information.*

([4]) In these calculations, Samsung SDI outlined the machinery and equipment actually supplied by Korean producers for the investment in Göd (Hungary) up to September 2020. For each machinery/equipment it identifies a Korean supplier and the actual price paid by Samsung SDI. Then, for the same machinery/equipment, Samsung SDI identifies corresponding Chinese suppliers which it considers would have been able to provide comparable machinery/equipment if the investment would have been located in Xi'an. The price Samsung SDI estimates it would have paid to these Chinese suppliers is not based on actual price offers but on the rough estimation that that price would have been about [70-75] % of the price actually paid to the Korean suppliers in Göd, Hungary. Samsung SDI explains that this coefficient reflects the assumptions underlying the counterfactual analysis, which used the indexes calculated on the basis of a market report (see recital (43) of the Opening Decision). Samsung SDI's assumption is that, if the investment would have been located in Xi'an, Samsung SDI would have indeed sourced from these identified Chinese suppliers, and not from elsewhere.

([5]) In Samsung SDI's comments of 3 May 2020 to the Opening Decision, a range of [25-30] % to [30-40] % was considered realistic. Upon questioning by the Commission, the upper bound of the range was corrected by Samsung SDI and Hungary, on 3 November 2020, to [31-35] % .

([6]) Samsung SDI's Tianjin plant is in operation since 1996 and manufactures cylindrical batteries for mobile devices.

([7]) See footnote 7.

(12) Concerning the share of local sourcing that could have been more credibly assumed in Göd, Hungary does not present any new evidence and maintains that it has '*no ground to question that local sourcing was a credible ex-ante assumption for Samsung SDI at the time it decided to invest in Göd*'. It considers that it is '*irrelevant how the sourcing of equipment and machinery for Hungary played out ex post, compared to what Samsung had initially envisaged in line with its settled local sourcing policy*'. Finally, Hungary contends that since the assumed costs of local sourcing from South Korean suppliers were virtually identical to those of sourcing in the European Economic Area ('the EEA') (barring the transport costs), a local sourcing percentage lower than 100 % in Hungary would have a very limited impact on the ex-ante NPV outcome of the investment in Hungary.

2.2.2. *Public support for the proposed alternative location in China*

(13) The Commission notes that, when it inquired — during the preliminary assessment phase — about potential public support for the investment project in its alternative location in China, the Hungarian authorities answered on 11 December 2018 that although '[…] *there were some unofficial and informal discussions on possible subsidies in China, there is no documentation on these discussions. The Chinese system is a considerably different system than the strongly formalized European one — as there are no written general rules. Central and local governments act case by case […]. Furthermore, HQ* [Samsung SDI's Headquarters team in South Korea] *had difficulties in Xi'an because the Chinese Government sanctions the xEV* [hybrid electric vehicles] *battery industry. The Chinese Government does not provide any subsidy for xEV, which has battery cells manufactured by non-Chinese companies. […]. During the decision-making procedure, the beneficiary didn't get any subsidy offer or documentation from the Chinese Government. As such a huge investment needs exact timing and planning this would have been hard to execute with […] Chinese aid possibilities.*'

(14) In their comments on the Opening Decision, the Hungarian authorities and Samsung SDI retracted the above statement and explained that Samsung SDI's local management team in Hungary — which had been responsible for supporting Hungary with the notification — were ignorant of HQ strategy and the situation in China. They declared that major errors, misunderstandings, and the transmission of wrong information had occurred, and subsequently changed substantial parts of the narrative justifying the necessity of the aid by introducing two new claims, namely that (1) a direct investment grant covering [15-20] % of the investment costs would have been available in China and (2) if the investment had been carried out in China it would probably have benefitted from a corporate income tax (CIT) rate of 15 % (instead of a standard rate of 25 %).

2.2.2.1. Potential investment grant in China of [15-20] % of investment costs

(15) In contradiction with statements made during the preliminary examination phase (please see recital (13) above), Hungary now submits that Samsung SDI could also benefit in China from an investment grant of '*up to* [8] *[15-20] % of investment costs*', as evidenced by an unsigned, unstamped subsidy offer from the Gaoxin local government, dated 23 February 2017.

(16) Hungary explained that, in the document referred to above, the Gaoxin local government offered essentially two options [9] to the beneficiary. The **first option** provided for '*preferential policies*' pursuant to which the aid grantor would provide funds '*of [15-20] % of the total project investment*' and ensure that (unspecified) '[…] *the past MoU* [10] *would be complemented with additional aid*'. It would also exempt Samsung SDI from '*infrastructure costs in Xi'an*', which averaged '*[200-300] yuan/m²*'. In addition, the Gaoxin government would provide some unquantified service support relating to the […]. The document also specifies that Samsung SDI is expected to construct a […] at its own cost. Under the **second option**, the aid grantor offers to construct […]. However, under this option, none of the subsidies offered under the first option would be available. The offer from the Gaoxin local government does not provide any details on the characteristics of the aided investment project, nor the financial terms under which the buildings would be subsequently leased/sold to Samsung SDI.

(17) In addition to the Chinese subsidy offer described in recital (16), the Hungarian authorities submitted, at the Commission's request, further evidence documenting the course of the negotiations between Samsung SDI and the Gaoxin local government from January to July 2017, as well as the internal documents concerning Samsung SDI's investment plan for its second plant in Xi'an from the same period. Hungary also provided an updated (but still unstamped and unsigned) aid offer dated 23 May 2018 in which the Gaoxin local government commits to provide subsidies 'on a similar scale to the first project' (i.e. [25-30] % of eligible investment costs) for Samsung SDI's second battery plant in Xi'an, as well as a […] dedicated for the beneficiary's use.

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(8) The Hungarian authorities argue that this translation provided by the aid beneficiary is imprecise: "up to" should be replaced by "of".

(9) A third option, i.e. 'Construction by […]' is described in the document but this is not retained as a relevant by Samsung SDI in a Directors' meeting to discuss the 'incentive negotiation result' on 3 March 2017.

(10) The "past MoU" refers to an investment agreement between Samsung SDI and the Gaoxin local government, according to which Samsung's Joint Venture in Xi'an (Samsung SDI-ARN Power Battery Co. Ltd.) had benefited from a [25-30] % subsidy for its first (2014) investment in Xi'an (please see also recital (39) and footnote 13 of the Opening Decision).

(18) The investment in Xi'an, China, as demonstrated by the documentary evidence submitted by Samsung SDI and the Hungarian authorities, either in the course of the preliminary assessment phase or later on, after the opening of the formal investigation procedure, would have the following characteristics:

(a) Firstly, the Chinese counterfactual investment notified to the Commission has investment costs of EUR [850-950] million and consists of [6-10] production lines. At the same time, several Samsung SDI internal documents ([11]) submitted after the Opening Decision describe an investment project in Xi'an with investment costs of around USD [650-750] million (app. EUR [500-600] million), consisting of '[2-5] additional production lines'.

(b) Secondly, according to the implementation timeline envisaged for the Xi'an counterfactual investment by Samsung SDI on 21 September 2017 ([12]), construction works were planned to start in […] 2018 and the start of production was planned for […] 2020. At the same time, as evidenced by an email report of 21 July 2017 documenting the subsidy negotiation process with the Gaoxin local government ([13]), the timeline of the allegedly same Xi'an investment appears to be aligned with and dependent on the timing of the expected withdrawal of the subsidies for the acquisition of electric vehicles in China (and thus aligned and dependent on the opening of the Chinese EV market to foreign battery producers). Thus, the respective email report explains that '*…in practice, since SDI already operates a factory in Xi'an, SDI will make additional investment in Xi'an if the investment is decided, and the investment period will be before December 2018, at the latest,* ***considering that the subsidy will be abolished from January 2021***'. In this case start of works is thus envisaged six months later than the notified counterfactual investment (i.e. at the latest by end of 2018), and the start of production envisaged one year later than the notified counterfactual investment (i.e. by […] 2021). Finally, as described in point (c) below, the full implementation of the investment in Xi'an was not to take place before — and therefore was dependant on — the '*resolution of Chinese policy risk*', which the Commission understands to mean the withdrawal of the Chinese protectionist measures against foreign EV battery manufacturers targeting the Chinese battery market (see recitals (137) and (139) of the Opening Decision).

(c) Thirdly, as described in the notification (see recital (9) of the Opening Decision), although the counterfactual investment was located in China, it was intended to provide electric batteries only for the EEA and […] geographical market, and not the Chinese geographical market. However, the Commission notes that a report from Samsung SDI's Directors' meeting of 3 March 2017 to discuss incentive negotiation results for the second plant in Xi'an suggests that the investment subject to the subsidy discussions with the Gaoxin local Government was in fact targeting the Chinese geographical market. In particular, the above-mentioned report indicates that '*… minimizing […] is necessary until resolution of Chinese policy risk*'. It results from this document that Samsung SDI was attempting to hedge against the mentioned '*Chinese policy risk*' by trying to convince the Chinese local government to provide a subsidy of [25-30] % of the investment costs and construct, from its own resources, the fixed assets (i. e. […]) needed by Samsung in Xi'an. Upon finalization of the construction, Samsung intended to […] the respective fixed assets until the '*resolution of the policy risk*', at which point Samsung would be prepared to buy them. Given the refusal of the Chinese aid grantor to meet both of Samsung's demands (see the options described in recital (16)), Samsung's planning team proposes to accept the Chinese option 1 (i.e. the [15-20] % subsidy) but hold off '[…]' until '*policy risk resolution*'. Instead, it proposes to proceed only with land purchase, the construction planning phase (e.g. designs, authorisation), and the construction of the […]. According to this action plan, the investment decision was to be made only once the policy risk is resolved. On the basis of the above, the Commission understands the above-mentioned '*Chinese policy risk*' to refer to the Chinese protectionist measures in force at that time against foreign EV battery manufacturers who were seeking to sell their products on the Chinese market (see recitals (137) and (139) of the Opening Decision). This interpretation is coherent with the comments of Hungary and Samsung SDI on the Opening Decision claiming that this Chinese policy risk would not have been relevant enough to hold up the investment decision if that respective investment was targeting export markets.

(19) Hungary claims that although the Chinese subsidy offer was not specific to a certain investment project, Samsung SDI had nevertheless sufficient reasons to expect that it would receive a subsidy of at least [15-20] % and possibly more for any ramp-up investment in Xi'an, given that its 2014 investment agreement for the construction of Samsung SDI's first Chinese EV battery plant stipulated that funding '*will increase by the same ratio*' if Samsung SDI's Chinese Joint venture were to make additional investments in Xi'an. ([14]) In answer to the question why the alleged aid offer was not presented to Samsung SDI's decision-makers, Hungary and the beneficiary provided internal documents, for the first

([11]) An internal document of 5 January 2017 entitled 'Xi'an Plant #2 Investment Plan', the minutes of a 9/10 January 2017 business trip to China where Samsung representatives aimed to 'persuade partners regarding Xi'an Plant 2 investment and to negotiate incentives',

([12]) According to the 21 September 2017 report 'New investment review for EU/[…]'

([13]) The report is contained in an email of 21 July 2017 sent by a Samsung SDI employee to its colleagues in Samsung's headquarters to brief them on the results of a meeting with the Deputy Director of the Chinese aid grantor on 20 July 2017.

([14]) According to article 2 of the Support Policy annexed to the Memorandum of Understanding between the Xi'an Hi-tech Industries Development Zone (referred to as 'A') and Samsung Huaxin (Xi'an) Power Battery Co., Ltd.(referred to as 'B'), '*Xi'an Hi-tech Zone grants a specialized fund, equivalent to [25-30] % of the total investment of the PJT* [i.e. Samsung SDI's automotive power battery project], *to enterprises that satisfy the requirements. A makes the payment at the same rate as the rate of investment by B. […]. If the PJT Company increases investment, this fund will increase at the same ratio. […]*'.

time disclosed to the Commission on 3 May 2020 (i.e. after the adoption of the Opening Decision), which reveal that an additional step in the decision-making process (see section 2.12.4. of the Opening Decision) took place during an internal meeting to discuss '*New investment review for EU/[…]* ([15])', held on 21 September 2017 and attended by a number of senior Samsung SDI managers, including Samsung SDI's CFO. The report presented in that meeting and prepared by the Automotive and ESS ([16]) Business Division's planning team contains — among others — a brief reference to an incentive offer of '*[15-20] % of the investment amount offered by the Chinese Government in Feb 2017*', which shows — in Hungary's opinion — that Samsung SDI was aware of the potential Chinese subsidy.

(20) The Commission notes that the minutes of that meeting do not contain any indication that the respective subsidy offer was discussed, nor do they indicate instructions for follow-up. However, the respective minutes do contain an instruction for Samsung's planning team that they should '*develop plan to exploit the existing sites' merits*', '*review final site candidates (Göd in Hungary and Xi'an in China)*', and '*keep in mind the factor that it could be helpful to diversify major sites in each continent so that production capability is not concentrated in one or two sites when it comes to suggestion for the new location. Cell production currently concentrated in Ulsan and Xi'an.*'

(21) Hungary explains in its comments of 30 January 2020 on the Opening Decision that the quoted Chinese offer did not constitute '*sufficiently firm assurances that it* [Samsung] *might benefit from an attractive additional subsidy in China if it were to invest further in Xi'an*', but nevertheless maintains that '*the possibility that the granting of such aid would materialize was by no means unrealistic*'. The fact that Samsung SDI's did not quantify and include the Chinese subsidy in the viability gap comparison is, according to the Hungarian authorities, the result of a '*conservative approach in view of the uncertainty surrounding the Chinese offer compared to the Hungarian offer*'.

(22) Hungary submits that on 23 May 2018 ([17]), i.e. almost six months after Samsung SDI's location decision of 27 November 2017 in favour of Hungary, the Chinese authorities — who had allegedly not yet become aware of the fact that Samsung SDI had already opted for Göd as the location for its investment — on their own initiative, reiterated and improved ([18]) their offer for the ramping up of the investment in Xi'an (see recital (17)).

(23) To the question why Samsung SDI had not informed the Chinese authorities of its decision to implement the investment project in Hungary, Hungary answered that '*Samsung SDI never excluded that, depending on market circumstances, there could subsequently also be additional investment projects in EV battery production, including possibly in China*', and thus it was not in Samsung's '*best interest to inform the Chinese authorities of the investment in Göd*'. The Commission notes that, according to several press reports ([19]), ([20]), Samsung SDI did indeed pursue an important ramp-up investment in Xi'an at the end of 2018.

2.2.2.2. Corporate income tax in China of 15 % instead of 25 %

(24) In its comments on the Opening Decision, Hungary explained that Samsung SDI's assumption — in the NPV calculations submitted in the notification — of a corporate income tax ('CIT') rate differential of 16 percentage points between Hungary (CIT rate: 9 %) and China (CIT rate: 25 %) that generated a NPV advantage of approximately [480-520] million euros (in present value) in favour of Hungary was based on a rather conservative estimate of the CIT in China. Hungary claims that it would have been legitimate for Samsung SDI to take a much lower average tax rate of 15 % in China as basis for its NPV calculations, and explains that this lower Chinese CIT rate would have significantly increased the advantage of an investment in Xi'an.

(25) Hungary further submits that a 10 percentage points reduction from the basic corporate income tax rate of 25 % was offered under the Chinese law in application at the time of the location decision, up until 31 December 2020, to any enterprise located in the Western Regions ([21]) that applied for it, was engaged in certain industrial activities, and achieved 70 % of its revenues from its main business. It appears that Samsung SDI had qualified and benefited from this lower CIT rate of 15 % for the years 2011 to 2016, until the Chinese tax authorities decided (without stating any specific reasons for this change) to remove the production of EV batteries from the Foreign Investment Industrial Guidance Catalogue for the years 2017/2018, with the effect that in those years the basic CIT rate of 25 % applied to EV battery producers located in the 'Western Regions', including Samsung SDI. The reduced corporate income tax rate of 15 % was applied again to Samsung SDI, after the catalogue was revised again by the Chinese Government in 2019.

([15]) European Union /[…].
([16]) Energy Storage Systems.
([17]) The Commission notes that by that time the protectionist measures referred to in recital (18)(c) had been lifted.
([18]) Promising to grant a subsidy of [25-30] % of the investment costs and to build the required […].
([19]) Online press report of 10 December 2018 (National Business Daily) titled 'Samsung begins construction of second-phase power battery project in Xi'an' available at: http://m.nbdpress.com/articles/2018-12-10/5778.html
([20]) Online press report of 11 December 2018 (Yicai Global) titled 'Samsung Unit to Invest USD1.5 Billion, Restart Xi'an Power Battery Project', available at: https://www.yicaiglobal.com/news/samsung-unit-to-invest-usd15-billion-restart-xian-power-battery-project-
([21]) Where Xi'an is located.

(26) Samsung SDI explained — but did not provide any documentary evidence to that effect — that it expected in 2017 the delisting from the catalogue to be reverted by 2019, when it estimated that the Chinese government would want to support the domestic EV battery cell production industry (because such a measure would not only benefit Samsung SDI, but also its Chinese competitors). Furthermore, the Commission notes that Samsung SDI and Hungary did not provide any documentary evidence or justification as to why they consider that it was foreseeable — at the time of the location decision in November 2017 — that the legislative provisions for this advantageous, time-limited derogation (until 2020) from the normal CIT rate would be renewed and become applicable also after 2020, when most revenues from the envisaged counterfactual investment would have been generated.

(27) Hungary submitted that Samsung SDI had also considered ([22]), in June 2017, an alternative possibility to benefit from a reduced corporate tax rate, again of 15 %, under the 'High and New Technology Enterprise' (HNTE) regime ([23]), which was also limited to a time period ending by December 2020. The benefit of that advantageous tax regime was subject to certain conditions ([24]) (of which two were not fulfilled by Samsung SDI at that time ([25]) that, according to Samsung SDI, could have been met *'through further actions'*. Samsung SDI claims that it was reasonably confident that it would be able to benefit from the HNTE regime even though, ultimately, it decided not to pursue the HTNE track since it expected low profits in 2017-2018.

(28) Samsung SDI submits that the allegedly foreseeable change of the Chinese CIT rate as a result of Samsung SDI's future qualification under the HNTE regime was considered by the SDI Headquarters planning team ([26]) — and mentioned on 21 September 2017 in the internal meeting ([27]) mentioned in recital (19) — but that this element was ultimately not factored into the viability gap calculations submitted to SDI's Investment Committee and to Samsung SDI's Chief Executive Officer in the successive decision-making steps leading to the location and investment decision.

(29) Just as for the invoked CIT reduction for Western Regions, Samsung SDI and Hungary did not provide evidence as to why they consider that it was foreseeable — at the time of the location decision in November 2017 — that the validity of the HTNE regime (expiring in 2020) would be prolonged and remain applicable after 2020, when most revenues from the envisaged counterfactual investment would have been generated.

2.2.3. *Discrete and probabilistic approach for plausible viability gap calculations*

(30) In its Opening Decision, the Commission considered that the viability gap presented by the Hungarian authorities in the notification documents should be recalculated based on the more realistic hypothesis of 0 % local sourcing for both investment scenarios (i.e. Hungary and China).

(31) Hungary's position is that a recalculation is not needed *'essentially because the cost of local sourcing in the EEA for Göd was almost identical to the cost of local sourcing from South Korea'* and thus any share of local sourcing assumed in Hungary would have a minimal impact on the NPV of the investment to be made in Hungary. However, Hungary explained that it was prepared to compare a few other plausible viability scenarios, strictly on a *'without prejudice basis'*, with the purpose to illustrate how the viability gap between Hungary and China would remain significant in these scenarios and that, as a result, the State aid offered to Samsung SDI by the Hungarian authorities would maintain its incentive effect. More specifically, Samsung SDI recalculated the NPV gaps, envisaging two approaches: a 'discrete' approach and a 'probabilistic' one.

(32) Under the discrete approach, Samsung SDI calculated two NPV gaps without any local sourcing in China or Hungary (i.e. the Commission's suggestion in the Opening Decision), but taking into account either a local Chinese grant of [15-20] % of the investment, or a 15 % CIT rate. Samsung argues that these recalculations lead to viability gaps that are comparable or in excess of the original gap of EUR 173 million, which was submitted to the Investment Committee and based on which the location decision of 27 November 2017 was made. A third NPV gap recalculated based on [31-35] % local sourcing in China (and 0 % local sourcing in Hungary, no subsidy and a 25 % CIT rate in China) leads to an NPV gap that is lower than the original one but on par with the amount of State aid proposed by Hungary. Finally, a fourth NPV gap recalculated based on [25-30] % local sourcing in China (and 0 % local sourcing in Hungary, no subsidy and a 25 % CIT rate in China) leads to an NPV gap that is lower than both the original NPV gap and the amount of State aid proposed by Hungary.

([22]) As documented in a Samsung SDI internal report dated 5 June 2017 and titled *'Discussion on responding to revision on China's Catalogue for the Guidance of Foreign Investment Industries'*

([23]) Notice of the Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on Revising and Issuing the Measures for the Administration of the Certification of High-tech Enterprises (2016).

([24]) Linked, among other things, to the number and share of employees working on research and development, costs of research and development activities, ownership of intellectual property rights.

([25]) Namely: […].

([26]) In support of this statement Samsung SDI submits documentary evidence in the form of a report titled 'Review for new production investment to EU&[…]', dated 21 September 2017, and the minutes of the respective meeting.

([27]) The meeting was attended by a number of senior Samsung SDI managers, including Samsung SDI's Chief Financial Officer, an executive vice president, a senior vice president and five vice-presidents. Its purpose, as suggested by the title of the report, was to discuss 'New investment review for EU/[…]'.

(33) Samsung SDI argues that the discrete methodology above does not accurately reflect the decision-making process leading to the investment. Instead, it considers that a probabilistic approach would be a more realistic reflection that takes into account all factors that were relevant to Samsung SDI when it decided on the location of the investment.

(34) The three 'probabilistic scenarios' proposed by Samsung SDI combine the three different factors (i.e. local sourcing of [25-30] % in China, a [15-20] % Chinese grant, and a 15 % CIT rate) to which different probability coefficients are applied to reflect the uncertainty relating to the materialisation of these factors. The proposed probability coefficients are 100 % for the factor relating to [25-30] % local sourcing in China for all three scenarios, and alternatively 25 % or 0 % for the other two factors (in two scenarios) or both 25 % (in the third scenario). Samsung explains all three resulting recalculated NPV gaps are in the range of the original NPV gap, and all three are higher than the amount of State aid proposed by Hungary. In view of the above, Hungary argues the State aid that it proposed to Samsung SDI maintains its incentive effect.

(35) The Commission notes that in Samsung SDI's NPV recalculation scenarios above, the NPV of the investment to be made in Hungary is recalculated (and thus significantly reduced) on the basis of a 0 % local sourcing policy which leads to investment costs increased by [18-22] % as compared to the notified values due to the application of a [18-22] % mark-up justified by Samsung on the basis of the fact that its headquarters in South Korea needs to act as intermediary in the procurement of equipment sourced from South Korea.

2.2.4. *Additional potential locations in the EEA*

(36) In its comments on the Opening Decision, Samsung SDI submitted new documents ([28]) that show that the location search for the investment project had not only included Samsung SDI's existing three battery cell plants in China, South Korea, and Hungary (as claimed in the notification and during the preliminary assessment phase), but that also greenfield investment sites had been considered in China (Wuxi), Poland (Środa), Slovakia (Sereď), Hungary (Tatabánya) and the Czech Republic (Most Joseph). Samsung SDI explained that these other possibilities were excluded '*at an early stage*' in the decision-making process. The Commission notes that except for the locations mentioned above, no other locations in Asia or in America ([29]) are considered.

(37) The internal Samsung SDI document cited above shows thus that several sites in Europe and China were assessed using a quantitative evaluation (taking into accounts investment costs and annual costs) and a qualitative evaluation (taking into account *'labor environment, industrial infrastructure, State aid, others'*). While the Czech, Slovak, and another Hungarian greenfield sites appear to have been excluded after these evaluations, a possible greenfield site in Poland appears to have been retained, at least in a first stage, (together with the Hungarian existing site in Göd and the existing Chinese site in Xi'an) as competitive after these two evaluations.

(38) The Commission notes that the retained alternative EEA site (i.e. the greenfield site in Środa, Poland) is located in a more disadvantaged area than the chosen Göd area in Hungary. ([30])

2.2.5. *Conclusions*

(39) In the light of new information presented by Hungary and Samsung SDI, the Commission extends the scope of the formal investigation procedure initiated by the Opening Decision to cover the new elements submitted by Hungary and Samsung SDI, as well as the Commission's doubts concerning those new elements, and to allow all interested third parties to comment on the new evidence presented by Hungary and Samsung SDI as relevant for the compatibility assessment.

3. ASSESSMENT

3.1. Local sourcing in Xi'an (China) between [25-30] % and [31-35] %

(40) The Commission notes that Samsung SDI and the Hungarian authorities currently admit that the hypothesis of 100 % local sourcing in China might have been unrealistic at the moment of the location decision, and that a correction to substantially reduced quotas of [25-30] % to [31-35] % is proposed instead. The evidence put forward to justify these numbers (see recitals (9) to (11)) is based on:

(a) the sourcing experience with [5-10] Chinese suppliers, from 2015 to 2019 (so partly after the location 2017 decision), of another factory in Tianjin (China) owned by Samsung SDI which was set up in 1996 and produced batteries for mobile devices ([31]);

([28]) A report titled 'Review for new production investment to EU&[…]', dated 21 September 2017 and presented in a meeting attended by several Samsung SDI Managers and its Chief Financial Officer, as well as the minutes of the respective meeting.

([29]) A quarter of the new capacity to be created by the investment targets sales on the […] market (see recital (9) of the Opening Decision).

([30]) The former was designated in accordance with Article 107(3)(a) TFEU while the latter: in accordance with Article 107(3)(c) TFEU.

([31]) Mobile phones, laptops, tablets, wearable devices, scooters, power tools, etc.

(b) partly ex-post evidence regarding the capabilities achieved by 4 Chinese suppliers of equipment/machinery using 'the same technology' as Samsung SDI and

(c) mostly ex-post evidence regarding the capabilities of other 2 Chinese suppliers offering 'equipment used in the same production processes' as the ones employed by Samsung SDI in the notified investment project.

(41) With regards to point (a) of recital (40), the Commission considers that it is doubtful that Samsung SDI's experience concerning significantly smaller ([32]) investments for less sophisticated batteries for mobile devices would be fully transferable to the EV pouch battery cells manufacturing business based on innovative processes and equipment introduced in the sector for the first time world-wide (see recital (21) of the Opening Decision). The Commission further notes that the invoked [10-15] % to [25-30] % local sourcing rates in the Tianjin factory were only achieved after nearly 20 years of operation of the plant and some of the invoked transactions occurred after the location decision. It is also not clear to what extent the respective numbers cover machinery/equipment or also spare parts or services used in the production process.

(42) Concerning the arguments under points (b) and (c) of recital (40), the Commission observes that they rely on ex-post assembled evidence (partially referring to experiences in 2018 and 2019) that were mostly not available to Samsung SDI at the moment when the investment and location decision was prepared in 2017. The Commission recalls that in the course of the preliminary examination, when the Commission inquired why Samsung did not choose to source (significantly cheaper) equipment and machinery from China for the Hungarian investment, the Hungarian authorities answered on 31 May 2019 that '[…] *notwithstanding the improvements compared to the past, the contacted Chinese suppliers did still not fully meet SDI's […] requirements*'. The Commission notes that the above conclusion was based on Samsung SDI's technical assessment ([33]) of five Chinese equipment manufacturers (which are however different from the ones invoked in recitals (9) and (10)) in January 2017 (i.e. preceding the investment decision) (please see also recital (50) of the Opening Decision).

(43) Furthermore, the Commission notes that the shares of local sourcing proposed under points (a) to (c) of recital (40) are based on estimations that take account of only a sample ([34]) and not the entire equipment required for the investment project. The Commission considers at this stage that this sample cannot be considered representative of the entire investment project since it appears to correspond, to a large extent, to the first (and less innovative) of the two successive phases of the investment project ([35]). It is thus not clear why Samsung SDI considers that its local sourcing simulation covering largely the first investment phase would be transferable to the second (more innovative) phase of the investment ([36]).

(44) The Commission also notes that the Samsung SDI's 'local sourcing policy' does not seem to have been applied in the past for greenfield investments based on new innovative technologies (such as, for example, their first EV battery investments in Xi'an and Göd). The Commission recalls that the technology for phase 2 was still under development in Samsung SDI's South Korean research facilities at the time of the preliminary examination (see recital (20) of the Opening Decision). The Commission therefore strongly doubts at this stage that any local sourcing could have been assumed in November 2017 (i.e. at the time of the location decision) to take place in China with regard to equipment for phase 2 of the investment that should reflect some [50-60] % of all investment expenditure. The Commission also notes that the disclosure of details of needed equipment for phase 2 would entail a strong risk of intellectual property theft (see recital (43) of the Opening Decision).

(45) The Commission considers at this stage that, if the scenario of partial local sourcing in China — for phase 1 of the investment — should be assessed as realistic at the time of the investment/location decision to a certain extent, Hungary does not convincingly explain why the machinery/equipment needs in Hungary should not be sourced from much cheaper Chinese suppliers (instead from South Korea). In such a case the viability gap between the two locations would *prima facie* be limited to differences in transport costs for the concerned machinery/equipment.

(46) Finally, the Commission notes that Hungary does not submit any data as to the share of local sourcing that could have reasonably been assumed in the Hungarian investment scenario on the basis of the justification that a share of local sourcing below 100 % would have had a minimal impact on the NPV of the Hungarian project. The Commission has serious doubts with regard to that assessment and notes that in all viability gap recalculations, the Hungarian investment costs for machinery and equipment are increased by [18-22] % (in Hungary's comments to the Opening

([32]) The local sourcing rates of [10-15] to [25-30] % in Tianjin are based on investments that are more than 10 times smaller than the size of the investment in equipment envisaged in Xi'an.

([33]) Specifically, the Hungarian authorities explained that in January 2017, Samsung's production engineers and purchasing staff had technical meetings with five Chinese companies producers of equipment related to winding, coater/press, welding and charge/discharge. Their conclusion was that, while they had made significant technical improvements compared to 2014/2015 '… *further developments were required to satisfy the requirements in automation/quality and precision. For example, […]'*

([34]) The sample consists of the equipment that was put in place in Hungary between the start of the investment project (scheduled for December 2017 (see recital (11) of the Opening Decision)) and September 2020.

([35]) According to the information provided by the Hungarian authorities in the notification, approximately [40-50] % of the investment costs were assigned to phase 1, and the remaining [50-60] % to phase 2.

([36]) See section 2.3.1 of the Opening Decision which describes the highly innovative character of the investment as well as Table 1 which describes the breakdown into phases of the investment.

Decision) compared to the initial prices (as presented in the planning documents and notification), which has a significant (negative) impact on the NPV of the investment project to be made in Hungary (please see recital (37) of the present decision). Hungary informs that this is due to the application of the assumption that all equipment for the Hungarian scenario would be sourced via the Samsung headquarters in South Korea (i.e. that there would be no local sourcing in Hungary). The Commission notes that the [18-22] % mark-up used is substantially higher than the medial value of the mark-up calculated by a December 2018 Deloitte study submitted by Samsung SDI (medial value of [13-18] %). That study also shows that the mark-up used for SDI Hungary in 2017 was [14-18] % (not [18-22] %). It is also unclear why the mark-up used for Hungarian subsidiary was higher than the mark-up (of [12-15] %) used for similar transactions with Samsung SDI's joint venture in China.

(47) On the basis of the above, the Commission has doubts as to the correct application of the [18-22] % mark-up in the recalculation of the viability gap and maintains its doubt expressed in the Opening Decision on whether the [18-22] % mark-up results in a market conform price and does not artificially inflate the eligible costs of the scenario in which the investment is located in Hungary.

3.2. **Public support for alternative location in China**

3.2.1. *Potential investment grant in China of [15-20] % of investment costs*

(48) The Commission notes that the invoked Chinese grant aid offer from February 2017 was neither signed, nor stamped, nor was it specific ([37]) to the envisaged counterfactual investment project, and is conditional upon the construction of a […] by Samsung SDI, which would likely imply important additional investment costs.

(49) The Commission also notes a number of inconsistencies between the investment project described in reports documenting the subsidy negotiation with the Gaoxin local government and the counterfactual Chinese investment described in the notification. These inconsistencies refer to essential characteristics of the investment project, i.e. its scope and investment amount (see recital (18) point (a)), the implementation timeline (see recital (18) point (b)), and its target market (see recital (18) point (c)) — and suggest that the Chinese subsidy offer and the entire negotiation with the Chinese local authorities concerned — contrary to what Samsung SDI and the Hungarian authorities claim — a different investment project than the Chinese counterfactual to the Hungarian investment.

(50) The Commission therefore has strong doubts that the Chinese aid offer described in recital (16) refers to the counterfactual Chinese investment notified to the Commission. At this stage, it rather appears that the Chinese aid offer and the respective negotiation process with the Chinese authorities in 2017 envisaged a smaller investment, with a different timeline, aiming to ramp up EV battery production capacity in Xi'an to serve the Chinese market, and not for the notified counterfactual investment that was aiming to supply EV batteries for the European and […] markets.

(51) The Commission notes that, although the Chinese aid grant offer was very briefly mentioned in a single internal company document submitted for the decision-making steps of the notified investment (see section 2.12.4. 'The decision making process' in the Opening Decision and the additional step described in recital (19)), it was never actually included in the NPV comparisons between the alternative investment scenarios. By contrast, the Hungarian aid offer was included in the respective comparisons and is presented as a key factor justifying the investment decision in favour of Hungary. At this stage, the Commission interprets the minutes of the meeting of Samsung directors of 21 September 2017 where the Chinese subsidy offer was presented (see recitals (19) and (20)) as guidance from Samsung SDI's top management that overall production capacity should not remain concentrated in Ulsan (South Korea) and Xi'an (China), as was the case at the time ([38]), despite the many advantages of the Xi'an site described in the report. The Commission notes that, possibly in implementation of the above guidance to prioritise a regional diversification of the undertaking's global production capacities, in the forth and fifth(last) decision-making steps which followed the September meeting (see recitals (68) and (69) of the Opening Decision) no reference whatsoever is made to the Chinese subsidy offer although the Hungarian aid offer of EUR 106 million features in the documents submitted to Samsung SDI's Chief Executive Officer on 27 November 2017 as a 'decision factor'.

(52) The Commission notes that Samsung SDI admits (see recital (23)) that after it had taken the location decision in favour of Hungary, it never informed the Chinese authorities about it. The Commission notes that according to Samsung SDI, no negotiations took place with the Chinese authorities between the location decision for Hungary in November 2017 and May 2018 when the second subsidy offer was received (see recital (22)). The Commission considers it highly unlikely that the Chinese authorities, on their own initiative and without further discussions with Samsung SDI suddenly increased their subsidy offer of February 2017 in May 2018, i.e. more than 8 months after the last documented interaction ([39]) between Samsung SDI and the Chinese aid grantor. The Commission therefore invites Hungary to submit all communication, whatever its form, between Samsung SDI, respectively its joint venture in Xi'an, and the responsible local government authorities in China that took place after July 2017.

([37]) The aid offer refers only to '*Samsung Huanxin Power Battery's project to build a 2nd plant*' and does not include any other information regarding the characteristics of the investment.

([38]) Samsung SDI's presence in Hungary at the time consisted of its initial battery cell manufacturing facility, with a very limited production capacity, which was not yet operational at that time.

([39]) I.e. an email of 21 July 2017 referred to in recital (18)(c).

(53) The Commission considers at this stage that the corroboration of the facts and doubts expressed above suggests that Samsung was not envisaging in China a real counterfactual investment, competing with an investment in Europe, but was pursuing, at the latest as from July 2017, regionalised investment strategies that required manufacturing capacity to be located in each of its target markets (i.e.China, Europe, and […]). This doubt is further reinforced by the minutes of the internal high-level Samsung meeting on 21 September 2017 (see recitals (20) and (21)) which might be understood as guidance to the '[…]', by a high level steering group charged with reviewing investment strategies to serve the rapidly expanding EU and […] markets, to enable a positive location decision in favour of Europe. This guidance might explain why the grant offer of February 2017, and the claimed possibility of a reduced CIT rate (see section 2.2.2.2), both mentioned in the documents for the high-level meeting of 21 September 2017, were not factored in into the calculations submitted for the following planning steps, or even mentioned there.

(54) The Commission reminds that Samsung SDI in fact admits that it never excluded (see recital (23)) an additional investment ([40]) in China, which appears to be a plausible explanation of why Samsung SDI did not inform the Chinese authorities of the investment in Göd.

(55) Under the hypothesis of regionalised investment strategies, the investment decision for the Chinese market (ramping up of the Xi'an facility) appears to have been delayed not because the aid proposed by Hungary rendered the implementation of the investment in Europe more viable, but because the conditions to open the access of South Korean EV battery producers to the domestic Chinese market were not yet given.

(56) Indeed, the Commission notes that, according to a press report, China's pledge to phase out subsidies for electric cars and plug-in hybrids by 2020 and the publication in May 2018 of a new 'white list' ([41]) of approved battery suppliers by two Chinese auto industry associations constituted important signals that China was starting to open its car battery market to foreign producers. The timing of the second Chinese subsidy offer of May 2018 appears thus to have not been coincidental. It appears that in June 2019, China decided to not apply anymore the respective 'white list' ([42]), ([43]).

(57) In view of the above, the Commission considers, at this stage, that only the regionalised investment strategy can explain why Samsung SDI decision-makers — although at least the planning team and senior executives were aware of it — dismissed the Chinese subsidy offer of [15-20] % in the course of the decision-making process for the notified investment while putting a significant emphasis on the aid offer of 9.1 % from Hungary, which was presented as a 'key decision factor' in the report to Samsung SDI's Chief Executive Officer in November 2017.

3.2.2. *Corporate income tax (CIT) in China of 15 % instead of 25 %*

(58) Hungary and Samsung SDI also argue that a CIT rate of 15 % instead of 25 % could have been legitimately used in the calculations underpinning the NPV viability gap, and anticipated by Samsung SDI at the time of the investment decision, either on the basis of the Chinese policies for the Western Regions, or based on the possibility that Samsung SDI could have qualified for a reduced CIT rate under the HNTE regime.

(59) The Commission notes that Samsung SDI does not provide convincing arguments as to why it could have reasonably foreseen in 2017 that any of the abovementioned favourable measures would have been prolonged, under the same or comparable conditions, beyond their expiration date in 2020, when most of the revenues from the notified investment would have been generated.

(60) It appears in fact that the rules for qualifying for the invoked reduced CIT rate for the Western Regions were highly volatile at the moment of the investment decision, as evidenced by the fact that its benefits were unexpectedly withdrawn to the EV battery industry that qualified for it in China in 2017 and 2018 without any official justification (see recital (25)). It would thus *prima facie* appear implausible to assume that Samsung SDI, instead of adopting a sound precautionary approach, instead chose to rely on an extension of such favourable tax treatment without any grounds for such reliance.

(61) Concerning the alternative possibility to benefit from a reduced CIT rate under the HNTE regime invoked by Samsung SDI, the Commission notes that — as it results from its internal analysis — Samsung SDI did not comply at the moment of the investment decision with two of its conditions (see footnote 26). *Prima facie*, it appears doubtful that Samsung SDI would have been prepared to fulfil the respective conditions, in particular the required transfer of intellectual property rights to a Chinese joint venture (see footnote 26), and the implementation of a major effort in research and development, exceeding 3 % of sales.

([40]) According to press reports (LG Chem, Samsung SDI gain access to China's EV market, dated 10 April 2019, available at: https://www.argusmedia.com/en/news/1882342-lg-chem-samsung-sdi-gain-access-to-chinas-ev-market; and Samsung SDI to invest $1.15 bn to expand battery facility in China, dated 12 December 2018, available at: https://pulsenews.co.kr/view.php?year=2018&no=776192), Samsung SDI made informal announcements in December 2018 (when it was still discussing investment details) of plans to ramp-up Chinese battery production in Xi'an.

([41]) That 'white list' included South Korean producers such as Samsung SDI, LG Chem or a venture between SK Innovation and China's BAIC Group.

([42]) On line press report of 28 June 2019 (Neware battery testing system expert) titled 'China's "white list" of power battery companies abolished', available at: https://newarebattery.com/chinas-white-list-of-power-battery-companies-abolished/

([43]) On line press report of 1 July 2019 (Roskill) titled 'Batteries: China opens its battery market to foreign companies', available at: https://roskill.com/news/china-opens-its-battery-market-to-foreign-companies/

(62) Finally, the Commission considers at this stage that, if Samsung SDI had seen in 2017 a realistic chance to benefit from a continued tax reduction, it would have probably pointed out the significant effect of that reduction in quantitative terms in the NPV comparisons between the alternative investment locations.

3.3. **Discrete and probabilistic approach for plausible viability gap calculations**

(63) Hungary argues that that even if it were to admit — as the Commission suggests in the Opening Decision — that local sourcing was not credible at all in either investment scenario, a recalculation of the viability gap on the basis of either a Chinese grant of [15-20] %, or a CIT rate of 15 % in China, would result in an NPV viability gap comparable to the original one of EUR 173 million. With regard to the above, the Commission evokes the doubts it already raised in sections 3.2.1 and 3.2.2 regarding both invoked public support measures in China.

(64) Hungary and Samsung SDI equally argue that a recalculated viability gap based on [25-30] to [31-35] % local sourcing in China and 0 % local sourcing in Hungary would result in a viability gap of EUR [80-85] to [105-110]. The gap based on [31-35] % local sourcing in China, although smaller than the original one, would nevertheless remain higher than the aid proposed by the Hungarian authorities, which means that its incentive effect would be maintained. The Commission notes however that a recalculated gap based on the lower bound of the [25-30] % local sourcing estimation in China (i.e. [25-30] %) would lead to an updated NPV gap of EUR [80-85] which is lower than the proposed aid (i.e. EUR 108 in present value, see recital (26) of the Opening Decision, which means the respective aid is not proportionate, as it would not be limited to the minimum required to compensate for the net disadvantage of Hungary (see recital (145) of the Opening Decision). The Commission also points to the doubts entertained in relation to the [25-30] to [31-35] % local sourcing hypothesis in China and described in section 3.1.

(65) Finally, Samsung SDI submits three probabilistic approaches (see recital (34)) for the recalculation of the NPV viability gap in which it assigns probability estimates of 100 % to the revised local sourcing of [25-30] % in China and probability estimates of 25 % and 0 % (in the first scenario), 0 % and 25 % (in the second scenario) and 25 % and 25 % (in the third scenario) to the other two invoked factors, namely the [15-20] % Chinese grant and the reduced CIT rate in China. All three approaches result in a recalculated NPV gap similar to the one originally submitted by Hungary.

(66) The Commission notes that a probabilistic approach to calculating the NPV viability gap does not appear to be compatible with Samsung SDI 2016 Guidelines on Facility Investment, which contain guidance for the decision-making process concerning investments in new plants or for the expansion of existing plants in excess of KRW […] billion (app. EUR […] million). Samsung did not provide any contemporary internal documents on the location choice that would support this weighing approach. In addition, the value of the proposed probability factors appears at this stage arbitrary and has not been substantiated by the beneficiary.

3.3.4. *Additional potential locations in the EEA*

(67) From the documents submitted by Samsung SDI in response to the Opening Decision, it was revealed that the location search for the investment project had not only included Samsung SDI's existing three battery cell plants in China, South Korea, and Hungary (as claimed during the preliminary assessment phase), but that also other greenfield investment sites had been considered in China, Poland, Slovakia, Hungary, and the Czech Republic. Samsung SDI explains that these other possibilities were excluded at an early stage in the decision-making process and refers to an internal document in support of this fact that had not been shared with the Commission before the adoption of the Opening Decision (see recital (36)).

(68) The Commission notes that the newly submitted information shows however that greenfield investments had been considered in the EEA (Poland, Slovakia, and the Czech Republic ([44]) in a rather **late stage** of the decision making process (i.e. on 21 September 2017). In particular, the report presented during that meeting shows that several sites were assessed using a quantitative evaluation (taking into account investment costs, total estimated operating costs for 2022, and the time required to complete the investment) and a qualitative evaluation (taking into account 'labor environment, industrial infrastructure, State aid, others'). While the Czech and Slovak greenfield sites (and a second Hungarian greenfield site) were excluded after these evaluations, the possible greenfield site in Poland (Środa) appears to have been retained in a first stage (together with the Hungarian existing site in Göd and the existing Chinese site in Xi'an).

(69) It appears that the Polish location was not assessed under the next step i.e. a 'detailed analysis of the final candidates' involving a profit and loss simulation, timeline simulation and the potential for expansion, but it is not clear exactly on what basis it was dismissed. It is thus necessary to precisely determine at which stage and for which reasons the alternative locations in Poland (Środa) was discarded and to which extent it could have constituted a credible alternative location for the investment.

([44]) Member States in which regions are mostly eligible for regional aid pursuant to Article 107(3)(a) TFEU i.e. in which regions are more disadvantaged (with higher or similar aid intensity) than the chosen Hungarian c-region.

(70) In recital (175) of the Opening Decision, the Commission noted — on the basis of the information available to it at the time when that decision was adopted — that Hungary considered the Chinese location (existing site in Xi'an) as constituting the counterfactual scenario for the purpose of the compatibility assessment and that no other area in the EEA was considered as a feasible location, so that no 'counter-cohesion effect' could occur. In recital (39) of the Opening Decision, the Commission noted that the aid beneficiary excluded **from the outset** (this does not appear to be confirmed however by the 21 September 2017 report) a greenfield investment due to time constraints.

(71) The Commission recalls in this context that in accordance with paragraph 121 of the RAG, where without State aid the investment at hand would have been located in a region in the EEA with a regional aid intensity which is higher or the same as that of the target region, such circumstance would constitute a negative effect that is unlikely to be compensated by any positive effect because it would run counter to the very rationale of regional aid ([45]).

(72) Accordingly, the Commission at this stage cannot exclude that aid to the Hungarian site, eligible for regional aid pursuant to Article 107(3)(c) TFEU might have had a counter-cohesion effect by attracting investments away from a less-developed Polish region, eligible for regional aid pursuant to Article 107(3)(a) TFEU.

4. CONCLUSION

(73) For the reasons set out above, in addition to the doubts raised in the Opening Decision, the Commission, after a preliminary assessment of the new information submitted by the beneficiary and the Hungarian authorities, is therefore of the preliminary view that the regional aid was not crucial for a positive location decision in favour of Hungary and raises doubts on the incentive effect of the aid and on the credibility of the counterfactual investment scenario. More specifically, the Commission has doubts about the credibility of the [25-30] % to [31-35] % local sourcing hypothesis in China, the sourcing and investment costs assumptions in Hungary considering that alleged availability of significantly cheaper equipment from Chinese producers, the correct application and the size of the mark-up in the Hungarian scenario, the credibility of the counterfactual investment scenario in Xi'an in light of the regionalised investment strategies likely applied by the beneficiary, the credibility of the public support measures invoked by the beneficiary in China, as well as regards the acceptability of the probabilistic approach in the recalculation of the viability gap. In addition, the Commission considers that it cannot be excluded that the aid may have a counter-cohesion effect by attracting investments away from a less developed Polish region.

(74) Consequently, the Commission extends the procedure laid down in Article 108(2) of the TFEU to cover the elements summarised in recital (73). The extension will give the opportunity to third parties whose interests may be affected by the granting of the aid to provide comments in light of the new information provided by Hungary and Samsung SDI after the adoption of the Opening Decision. In light of both the information submitted by the Member State concerned and that provided by third parties, the Commission will assess the measure and will take its final decision.

(75) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Hungary to submit its comments on the additional doubts raised by the Commission in the present decision and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It requests the Hungarian authorities to forward a copy of this letter to the potential recipient of the aid without delay.

(76) The Commission wishes to remind Hungary that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

(77) The Commission warns Hungary that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

(78) Finally, the Commission notes that Hungary exceptionally agreed to have the present decision adopted in the English language.

([45]) See also paragraph 117 of the Communication from the Commission Guidelines on regional State aid 2021 (OJ C 153, 29.4.2021, p. 1).