II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 16 December 2003
on the aid scheme implemented by France for the takeover of firms in difficulty

(notified under document number C(2003) 4636)

(Only the French text is authentic)

(Text with EEA relevance)

(2004/343/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 provisions cited above [1],

Whereas:

I. PROCEDURE

(1) Within the framework of the notice on the application of the state aid rules to measures relating to direct business taxation [2] (hereinafter called the notice) the Commission examines and reviews tax aid schemes in force in the Member States [3]. The present proceeding is to be viewed in this context.

(2) By letter dated 12 September 2001 (D/53716), the Commission sent a request for information to France concerning the tax exemption provided for in Article 44 septies of the General Tax Code. This tax exemption was not notified prior to its implementation as required by Article 88(3) of the Treaty. By letter dated 19 September 2001 (VB/myg No 2540), the French authorities requested an additional period of one month in which to supply the information, which was granted by the Commission on 1 October 2001 (D/54025). On 29 November 2001, the Commission sent a reminder (D/54953) with a view to obtaining the requested information. On 21 December 2001 (VB/myg No 3640), the French authorities provided part of the information requested by the Commission. By letter dated 15 March 2002 (D/51147), the Commission requested the missing information, which was furnished on 15 April 2002 (VB/myg 1116).

(3) By letter dated 19 August 2002, the Commission initiated the formal investigation procedure. The decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received no comments from interested parties. By letter dated 10 September 2002, the French authorities asked for a 20-day extension of time to submit their comments, which was granted by the Commission. The comments by the French Government were finally received on 16 December 2002.

Detailed description of the scheme

(5) Article 44 septies of the General Tax Code was introduced by Article 14A of the Budget Law for 1989 [5]. The article provides for exemption from corporation tax for a period of two years for companies created to take over the activities of industrial firms in difficulty. Article 44 septies has been amended five times: in 1990, 1991, 1992, 1994 and 2000. Various amendments clarified the conditions of application of the tax exemption (1991) and extended its scope to complete and autono-

[1] OJ C 284, 21.11.2002, p. 5.
[2] OJ C 384, 10.12.1998, p. 3.
[3] See point 37 of the notice.
[4] See footnote 1.
[5] Law No 88-1149 of 23.12.1988, Official Journal of the French Republic, 28 December 1988, p. 16320.

mous branches of industrial activity forming the subject of a transfer (1990) and to firms in difficulty not forming the subject of a transfer ordered by a court (1992). The amendment introduced in 1994 concerns only the conditions of application of Law No 85-98 of 25 January 1985 on the restructuring and judicial liquidation of the firms to which Article 44 septies originally referred. The amendment made in 2000 replaced the reference to Law No 85-98 with a reference to the articles of the Commercial Code codifying that law.

(6) Exemption is granted automatically where the takeover concerns a firm in difficulty forming the subject of a transfer ordered by a court, as part of insolvency proceedings, pursuant to Articles L 621-83 et seq. of the Commercial Code.

(7) Exemption may also be granted with the consent of the Minister for Budgets in the following three cases:

(a) where the restructuring procedure has not been implemented;

(b) where the takeover, carried out as part of a transfer ordered by a court pursuant to Law No 85-98, concerns, not an entire enterprise, but complete branches of industrial activity;

(c) where the takeover affects one or more industrial establishments in difficulty of an industrial firm that is not in difficulty.

(8) The Minister's decision is necessary only in cases involving an industrial programme worth over FF 50 million (approximately EUR 7,6 million) before tax or firms with an annual turnover in excess of FF 1 billion (approximately EUR 150 million) and whose capital is held more than 50 % by a firm whose consolidated turnover exceeds FF 1 billion. In all other cases, the decision is taken by the head of the tax office in the département where the firm has its registered office.

(9) Consent is given only if all of the following conditions are met:

(a) the takeover must have as its object an industrial firm, one or more complete and autonomous branches of industrial activity or an establishment which performs an industrial activity;

(b) the status of 'firm in difficulty' must be a confirmed one, consisting of a financial situation that renders the cessation of business imminent;

(c) the new company must have been created for the sole purpose of taking over the industrial activity in difficulty;

(d) the capital of the new company may not be directly or indirectly held by partners/associates, managers or indirect holders of more than 50 % of the capital of the firm in difficulty during the year preceding the takeover;

(e) in the event of the takeover of one or more industrial establishments in difficulty of an industrial firm, the newly created company must be legally and economically independent of the transferor firm.

(10) Finally, in accordance with Articles 1383 A, 1464 B and 1464 C of the General Tax Code, firms benefiting from exemption under Article 44 septies may also benefit, with the agreement of the competent local authorities, from exemption from business tax and property tax for a period of two years.

(11) The French authorities have provided information on the size of some beneficiaries under the measures (Table 1) and on the amount of aid granted between 1997 and 1999 (Table 2). The data relate only to cases in which consent was given by the Minister or the tax administration and do not therefore concern cases in which the benefit of the scheme was granted automatically.

Table 1

Number of employees	Number of firms	
	1991 to 1996	After 1.1.1997
Fewer than 10 employees	70	2
Between 11 and 50 employees	106	10
Between 51 and 250 employees	22	12
More than 250 employees	2	11
Firms for which the information is not available	25	11
Total	225	38

Table 2

	1997	1998	1999
Number of beneficiary firms	151	182	60
Cost (EUR million)	64	80	55

Reasons for the initiation of the procedure

(12) In its decision to initiate the formal procedure, the Commission considered that the exemption from taxes granted to companies taking over firms in difficulty could amount to aid falling under Article 87(1) of the

EC Treaty. In particular, it took the preliminary view that the scheme conferred an advantage on beneficiaries because it relieved them of charges normally borne by French firms, namely corporation tax, property tax and business tax, which entailed a forgoing of tax revenue. The Commission expressed doubts about the compatibility of the measure with the guidelines on aid to firms in difficulty and the regional aid guidelines.

Comments from France

(13) By letter dated 13 December 2002, the French authorities submitted their comments to the Commission. Those authorities consider that the provisions do not constitute State aid within the meaning of Article 87 of the Treaty. Alternatively, if the scheme were to be considered State aid, they deem the scheme to be justified under the Community guidelines on aid for rescuing and restructuring of firms in difficulty.

(14) According to the French authorities, the exemption provided for in Article 44 septies of the General Tax Code cannot be considered State aid because it benefits all new firms resulting from a transfer of assets, independently of their sector of activity. The French authorities provided some information about the sectors to which the beneficiaries of the exemption belong: these include, among others, shipbuilding, the motor industry, holding companies, the printing industry, the leather industry, the paper industry, the chemical industry and the production of telecommunications equipment. In the French authorities' opinion, the exemption does not constitute a derogation from the general tax regime.

(15) As regards the exemptions from business tax and property tax, the French authorities consider that they are not reserved for certain firms. They justify the need for a decision of the local authorities by reference to the financial autonomy of those authorities, which are said not to have any discretion in applying the exemptions. The exemptions are applicable to all firms established in their territory.

(16) The French Government argues that these exemptions can be considered neutral from the point of view of intra-Community trade for two main reasons: their temporary nature, and the low level of the aid compared with the cost of purchasing a firm in difficulty.

(17) In case the Commission might wish to examine the measures in the light of the guidelines on aid for rescuing and restructuring of firms in difficulty, the French authorities put forward a number of arguments. First of all, they emphasise that the granting of the exemptions has always been conditional on the existence of a restructuring programme. The viability of the programme has to be examined either by the judge hearing the insolvency matter or by the tax authorities authorising the exemptions. The restructuring plan must also ensure that the agreed exemptions do not exceed the minimum necessary to sustain the firm during the restructuring period. Secondly, the French authorities point out that the two-year time limit on exemption renders the measure insufficient to cover all the financial needs of the new firm.

Assessment of the aid

(18) This Decision concerns the scheme as such and does not examine the aid granted in each individual case. However, in some instances, the Commission has decided to examine certain categories of individual case which may merit separate assessment.

(19) Having considered the observations of the French authorities, the Commission maintains its position, as expressed in its letter of 19 August 2002 initiating the formal procedure, that the scheme under examination constitutes State aid within the meaning of Article 87(1) of the Treaty.

(20) The Commission considers that the measure contained in Article 44 septies of the French General Tax Code fulfil all the criteria laid down in Article 87(1) of the Treaty.

Advantage

(21) First of all, the measure must confer an advantage. The Commission, relying on the established case law of the Court of Justice, considers in its decision-making practice that the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([1]). Article 44 septies grants exemption from corporation tax on the profits earned, during the two years following its creation, by a new company taking over a firm in difficulty. The measure is, contrary to what the French authorities maintain, a derogation from the general French tax system, which provides for payment of the tax by 'all legal persons carrying on a business or a lucrative economic activity' ([2]). Therefore, corporation tax is a charge normally borne by French

([1]) Judgment in Case C-143/99 Adria-Wien Pipeline [2001] ECR 8365, paragraph 38.
([2]) Article 206.1, last paragraph, of the General Tax Code.

companies. The exemption relieves companies newly created to take over the assets of a firm in difficulty of a cost borne by their competitors [1], thereby conferring on them an advantage. As stated in point 9 of the Commission notice, an exemption from tax is considered a form of advantage.

(22) Additionally, Articles 1383A, 1464B and 1464C of the General Tax Code provide that firms benefiting from exemption from corporation tax under Article 44 septies may also benefit, with the agreement of the competent local authorities, from exemption from business tax and property tax for a period of two years. These exemptions also constitute an advantage in so far as such charges are normally borne by firms in France.

State resources

(23) Secondly, the measure must be financed through State resources. Point 10 of the notice states that a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. By exempting these new companies from corporation tax on their profits and from property and business tax, the French authorities, both central and local, are forgoing revenue that constitutes State resources. The French authorities have thus estimated that, for the years 1997 to 1999, exemption from corporation tax alone resulted in a cost of almost EUR 200 million. The measure is therefore granted through State resources.

Effect on intra-Community trade

(24) Thirdly, the measure must affect intra-Community trade and distort, or threaten to distort, competition. According to the information provided by the French authorities, the firms benefiting from the measures at issue belong to very different sectors of activity, among them several exposed to strong competition within the Community, such as shipbuilding, the motor industry, chemicals, paper and textiles. Contrary to what the French authorities assert, the Commission does not believe that the measures are neutral from the point of view of intra-Community trade on account of their temporary nature and small amount compared with the cost of taking over a firm in difficulty. Two arguments support this view. First, as pointed out in the notice and confirmed by established case law [2], the fact that aid is relatively small in amount does not alter its nature [3]. Second, aid given to newly created companies is still aid that affects intra-Community trade even if it is authorisable in certain cases. For these reasons, the Commission considers that the measures at issue, especially when applied to certain highly competitive sectors as is the case here [4], affect intra-Community trade and distort or threaten to distort competition.

Selectivity of the aid

(25) Lastly, the measure must be selective. The measures at issue are applicable only to companies newly created to take over the industrial activity of firms in difficulty. The conditions that must be met in order to benefit from the exemptions are very strict: only new companies taking over a failing firm as part of an insolvency procedure or obtaining the consent of the Ministry of Finance and/or local authorities can benefit from them. The French authorities maintain that the measure is open to all sectors. In its decision to initiate the procedure, the Commission noted, however, that the benefit of the measure was expressly limited to the industrial sector, thereby excluding the service sector, which, as the Commission observed in its decision, accounts for 70 % of GDP and 65 % of all jobs in France. This in itself suggests that the measure is selective [5]. Information supplied subsequently by the French authorities shows that at least one holding company and two firms of consultants have also benefited from the corporation tax exemption, despite not belonging to the industrial sector. However, the existence of such cases does not show that the measures were open under the same conditions to firms not involved in industrial activities. At all events, even if all sectors of activity can benefit from the provisions of Article 44 septies, those provisions do not cover all firms, despite the fact that the general rule in France is that all firms have to pay corporation tax, business tax and property tax. As confirmed by the Court of First Instance [6], the mere fact that an advantage is limited to newly created companies excludes all other companies and the advantage must therefore be considered selective. This is all the more true where such newly created companies also have to fulfil other requirements in order to qualify for exemption, such as the taking over of the industrial activity of a firm in difficulty and independence from previous partners/associates, managers or majority shareholders or, where appropriate, from the transferor firm.

[1] Case 30/59 Steenkolenmijnen [1961] ECR 1.
[2] See, most recently, the judgment in Case C-280/00 Altmark Trans, not yet reported, paragraph 81.
[3] Point 11 of the notice.
[4] See paragraph 14 of this Decision.
[5] Case C-143/99 Adria-Wien Pipeline, cited above, paragraphs 39 et seq.
[6] Joined Cases T-92/00 and T-103/00 Territorio Histórico de Álava [2002] ECR II-1385, paragraphs 48 and 49.

The selective character of the measure is borne out, moreover, by the relatively small number of firms that have benefited from the measure upon the granting of consent — only 263 between 1991 and 2002 — compared with the number of firms liable to the taxes in question, not to mention with the number of firms newly created in France during that period.

(26) The French authorities have not put forward any argument to justify the measure based on the nature or general scheme of the French tax system. The Commission considers that such a justification cannot be relied on in the present case.

(27) On the other hand, the Commission considers that local authorities do not exercise any discretionary power when they grant exemptions from business and property tax to new companies taking over activities in difficulty. From the information furnished by the French authorities, it is clear that the granting of exemption by local authorities holds good for any company newly created to take over a firm in difficulty established in their territory. Nevertheless, this fact does not alter the conclusion as to the selective character of the exemptions. Even if these exemptions from business and property tax are not granted on a case-by-case basis, as indicated above they still apply to a particular group of undertakings, namely those fulfilling the strict conditions set out in Article 44 septies of the General Tax Code.

(28) To conclude, inasmuch as all the elements inherent in the concept of State aid are present, the measures in question constitute a State aid scheme within the meaning of Article 87(1) of the Treaty.

De minimis

(29) The advantages in question are not limited in their amount and the scheme does not therefore come under the *de minimis* provisions. It cannot be ruled out, however, that in certain individual cases the advantages may have been granted in accordance with the conditions laid down in the Community rules on *de minimis* aid.

(30) It was in the Community guidelines on State aid for small and medium-sized enterprises adopted by the Commission on 20 May 1992 [1] (hereinafter called the SME guidelines) that a definition was given for the first time of what is meant by *de minimis* aid. Point 3.2 sets the scope of the *de minimis* rule at an aid amount of EUR 50 000 per firm over a period of three years for certain broad types of expenditure (e.g. investment, training). As a result, one-off payments of aid of up to EUR 50 000 in respect of a given type of expenditure and aid schemes under which the amount of aid paid to firms for a given type of expenditure over a three-year period was limited to that figure were no longer subject to prior notification under Article 88(3) (former Article 93(3)) of the Treaty. There was, however, a proviso, namely that the individual notification or the aid scheme had to include an express condition that any further aid the same firm might receive in respect of the same type of expenditure from other sources or under other schemes must not take the total aid the firm receives above the EUR 50 000 limit. Point 3.2 states that the *de minimis* rule does not apply to the sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry).

(31) The Commission's 1996 notice on *de minimis* aid [2] modified the *de minimis* rule as set out in the SME guidelines. The total maximum amount of *de minimis* aid was increased to EUR 100 000 over a three-year period beginning when the first *de minimis* aid is granted. This ceiling applied to the total of all public assistance considered to be *de minimis* aid and did not affect the possibility of the recipient obtaining other aid under schemes approved by the Commission. The rule did not apply to the industries covered by the ECSC Treaty, to shipbuilding, to transport or to aid towards expenditure in connection with agriculture or fisheries.

(32) Article 1 of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [3] extends the scope of the *de minimis* rule to all sectors with the exception of the transport sector and activities linked to the production, processing or marketing of products listed in Annex I to the Treaty, aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, and aid contingent upon the use of domestic over imported goods. Under Article 2 of the Regulation, the total *de minimis* aid granted to any one enterprise must not exceed EUR 100 000 over any period of three years. This ceiling applies irrespective of the form of the aid or the objective pursued.

(33) In line with the interpretation adopted by the Commission [4], the scrutiny of non-notified measures, even where they predate the entry into force of Regulation (EC) No 69/2001, must be carried out in the light of that regulation, whereas the rules in force when the aid measure was implemented must be applied where the aid is not exempted under the regulation.

[1] OJ C 213, 19.8.1992, p. 2.

[2] OJ C 68, 6.3.1996, p. 9.

[3] OJ L 10, 13.1.2001, p. 30.

[4] See, *inter alia*, Commission Decision 2003/626/EC of 27 November 2002 on the aid scheme implemented by Germany — Thuringia loan programme for small and medium-sized enterprises (OJ L 223, 5.9.2003, p. 32).

(34) Consequently, instances of implementation of the measures in question do not constitute State aid where they comply with the conditions laid down in Regulation (EC) No 69/2001 or, alternatively, with the *de minimis* rules in force when the advantages were granted.

Compatibility

General remarks

(35) Inasmuch as the measure constitutes an aid scheme within the meaning of Article 87(1), its compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(36) The exceptions laid down in Article 87(2) and Article 87(3), points (b), (d) and (e), are clearly not applicable and have not been invoked by the French authorities. On the other hand, the exceptions relating to the development of certain areas or of certain sectors, laid down in Article 87(3), points (a) and (c), must be examined. As regards aid to promote the development of certain sectors, in view of the nature of the measures at issue the only relevant criteria are those concerning aid for rescuing and restructuring firms in difficulty and those concerning aid for small and medium-sized enterprises.

(37) Consequently, as announced in the decision initiating the formal investigation procedure, the Commission will analyse the measure in the light of the Community guidelines on State aid for rescuing and restructuring of firms in difficulty and of those on regional aid. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid (1), the measure must be examined in the light of the guidelines in force at the time when the aid was granted. The Commission must also examine the aid in question in the light of the rules applicable to aid for small and medium-sized enterprises. In this connection, the rules applicable are first and foremost those of the exemption regulation in force today, and it is only in the alternative that the notices in force at the time when the aid was granted will be applied (2).

Aid for rescuing and restructuring firms in difficulty

(38) With regard to the rules on aid for rescuing and restructuring firms in difficulty, three sets of provisions are applicable in the present case owing to the fact that the measure, which was enacted in 1989, is still in force today. These are: points 227, 228 and 177 of the Commission's Eighth Report on Competition Policy (1979); the Community guidelines on State aid for rescuing and restructuring firms in difficulty published in 1994 (3); and the new guidelines published in 1999 (4).

(39) In this respect, the French authorities put forward a ‘subsidiary’ argument to justify the measures under the guidelines: they stress that the application of the exemption is always dependent on the existence of an appropriate restructuring programme, approved by a judge, in cases where a judicial procedure is open, or by the tax authorities, where judicial intervention is not necessary.

(40) First of all, it should be pointed out that firms which do not correspond to the Community concept of firm in difficulty might benefit from the measures in question. Even in the absence of an express definition, the guidelines of 1994 (5) and 1999 (6) list typical symptoms and signs of such firms which correspond basically to the criteria applied previously. Now, the very mechanism of the aid in the form of exemption from corporation tax presupposes that the beneficiary can make profits within two years of its being taken over. It is doubtful whether a firm generating profits so quickly can be deemed to be a firm in difficulty.

(41) Secondly, with regard to the period before 1994, it should be pointed out that the national measures cannot be authorised as rescue aid. Such aid must, according to the Commission's Eighth Report on Competition Policy, consist of cash aid in the form of loan guarantees or loans bearing normal commercial interest rates, be restricted to the amount needed to keep the firm in business, be paid only for the time needed (generally six months) to draw up the recovery measures and not have any adverse effects on the industrial situation in other Member States. These conditions are clearly not met by the measures in question.

(42) In the case of restructuring aid, the report requires the submission of a sound restructuring programme capable of restoring the viability of the activity concerned. The intensity and amount of the aid must not exceed the

(1) OJ C 119, 22.5.2002, p. 22.
(2) These criteria, which result from the interpretation of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33) and from the abovementioned notice, are henceforth set out expressly in paragraph 1a of Article 10, inserted by the regulation adopted in principle by the Commission on 10 December 2003.
(3) OJ C 368, 23.12.1994, p. 12.
(4) OJ C 288, 9.10.1999, p. 2.
(5) Point 2.1.
(6) Point 2.1.

minimum needed to support the firm during the restructuring period and must be limited in time and gradually reduced. The report also stresses the need to reduce to a minimum the distortions of competition that might result from this type of aid, particularly in the most sensitive sectors.

(43) These conditions are not met either by the measures in question. As far as the restructuring programme is concerned, within the judicial procedure, Article L 621-85 of the French Commercial Code sets forth the requirements that all offers to purchase the firm (or branch of activity) in difficulty must satisfy if they are to be approved by the judge. Such offers must include operational and financing forecasts, the transfer price and the method of payment, the level and prospects of employment that the business activity will create, the guarantees obtained in order to ensure the execution of the offer, and forecasts of asset sales during the first two years following the transfer. According to the Code, the determining criteria are the maintenance of employment and the guarantees as to the payment of creditors. Thus, contrary to what is required by the rules on State aid for restructuring firms in difficulty as set out in the Commission's Eighth Report on Competition Policy, no account is taken of the effect of the aid on competition. Neither the market situation nor the impact on competitors nor the existence of other aid is taken into account as part of the judicial procedure. Similarly, where the appraisal of the restructuring programme is to be carried out by the tax authorities, the only factor taken into account is the capacity of the restructuring programme to ensure a lasting maintenance of business activity; competition considerations are entirely absent. In addition, the intensity of the aid is neither limited to what is strictly necessary nor gradually reduced, as is required by the abovementioned rules. Consequently, the amount of the aid will depend solely on the capacity of the firm to generate profits. The larger the profits, the larger the amount of aid.

(44) Regarding the period between 1994 and 1999, the 1994 Community guidelines contain essentially the same rules on rescue aid as the Eighth Report on Competition Policy. Consequently, the measure at issue cannot be declared compatible under these rules for the reasons already given in paragraph 41.

(45) In relation to restructuring aid, the 1994 guidelines contain the same principle of avoidance of undue distortions of competition as the rules set out in the Eighth Report on Competition Policy. Those guidelines require, moreover, the limitation of aid to the strict minimum needed and compliance with the specific implementing rules concerning the sensitive sectors, rules which are not complied with in this case as is clear from paragraph 43 above.

(46) A scheme of aid to firms in difficulty might, under certain conditions, be justified on the basis of the 1994 guidelines if the measure were to benefit only SMEs. Point 3.2.4 of the guidelines defines SMEs as enterprises which have no more than 250 employees and an annual turnover not exceeding ECU 20 million (or a balance sheet total not exceeding ECU 10 million) and are not more than 25 % owned by companies which are not SMEs. According to the information provided by the French authorities, there is no restriction on large firms benefiting and at least five such firms have benefited from the measure as part of the consent procedure. Similarly, all consents granted by the Finance Ministry must relate to firms whose turnover is higher than EUR 150 million. On the basis of the criteria in the 1994 guidelines, such firms could never have come under an aid scheme and the aid they received should have been individually notified (point 4.2).

(47) With respect to SMEs, the Commission states in point 3.2.4 of the 1994 guidelines that, in view of the limited negative impact such aid has on competition, it does not require restructuring aid to SMEs to meet the same strict conditions as aid for restructuring large firms, particularly as regards capacity reductions and employment obligations. However, point 4.1 of the same guidelines stipulates that, to be approved, SME aid schemes must clearly identify the firms eligible, the circumstances under which aid may be granted and the maximum amount available. Point 3.2.2 requires the submission of a plan which can restore viability within a reasonable time scale and which is based on internal factors. The plan should take into account in particular the possible adverse effects on competitors and provide for aid in proportion to the restructuring costs and benefits. The French measure, for its part, does not set a ceiling on the aid amount. The identification of eligible firms is only relative as it is for the judge or the tax authorities to give their agreement to the new entities taking over the activities in difficulty benefiting from exemption. As has already been pointed out, neither the judge nor the tax administration considers questions of competition. Restructuring programmes are approved on the basis of their stability and viability, and their impact on competition is not evaluated. Consequently, the scheme under which aid was granted between 1994 and 1999 to SMEs newly created on the basis of Article 44 septies does not satisfy the requirements of the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty.

(48) Lastly, with regard to the period from 1999 to the present day, point 3.1 of the 1999 guidelines limits the form, duration and amount of rescue aid and requires that there be no serious overspill effects in other Member States. For the reasons given in recital 41, the French scheme clearly does not fulfil these conditions.

(49) In relation to restructuring aid, point 3.2.2 of the 1999 guidelines requires that measures be taken to mitigate as far as possible any adverse effects of the aid on competitors and that the aid be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. A scheme which, like the one at issue, takes no account of the effects of the aid and which determines its amount solely by reference to the taxes which would otherwise be due cannot, therefore, as has already been shown in recitals 43 and 47, be approved on this basis.

(50) As to the possibility of approving aid schemes for restructuring small and medium-sized enterprises, as provided for in Part 4 of the 1999 guidelines, suffice it to say that the French scheme is not reserved for such enterprises and that, even in the case of SMEs, it does not ensure that the aid amount is limited to the strict minimum as required by point 4.4(c) of the said guidelines.

(51) In addition, point 7 of the 1999 guidelines expressly provides that a newly created company is not eligible for rescue and restructuring aid where it emerges from the liquidation of a previous firm or merely takes over such firm's assets. The position is different only in the event of the creation by a company of a subsidiary merely as a vehicle for receiving some of its assets and, possibly, its liabilities. According to the information provided by the French authorities, the tax benefit is granted exclusively to firms whose sole purpose is to restart a failing business, being newly created just for that reason, without being limited to the case where a subsidiary is created as a takeover vehicle. Furthermore, persons who previously held, directly or indirectly, the failing firm's capital cannot hold more than 50 % of the new entity, which has to be legally and economically independent of the transferor entity. Therefore, tax exemptions granted after 1999 under Article 44 septies of the General Tax Code cannot be justified under the terms of the 1999 guidelines on rescue and restructuring aid.

Regional aid

(52) Secondly, the measure must be examined in the light of the provisions on regional aid. The instruments relevant to this examination are, first, the 1979 Commission communication on regional aid systems [1] for the period from 1991 to 1998, then the 1998 guidelines on national regional aid [2], for the period from 1998 to the present.

(53) The 1979 communication provides in point 18(i) of its annex that initial investment may include 'investment in fixed assets by way of takeover of an establishment which has closed or which would have closed had such takeover not taken place'.

(54) It follows from the same communication that aid for initial investment could be authorised within the limits laid down in point 2 of the communication. Thus, in the case of France, a ceiling of 75 % net grant equivalent of initial investment applied to the overseas departments. In that part of France which receives the regional development premium [3], the communication authorised aid of an intensity differentiated according to the regions.

(55) Subsequently, while the ceiling applicable to the overseas departments remained at 75 %, the eligible regions and the ceilings applicable in mainland France were set by the regional planning grant map approved by Commission Decision 85/18/EEC of 10 October 1984 demarcating the areas that could benefit under the regional planning grant scheme in France [4] and by the subsequent amendments thereto [5].

(56) In the present case, in those instances where the exemption from corporation tax is directly applicable because the transfer of the establishment takes place as part of an insolvency procedure, it can be considered that the establishment would have closed had it not been taken over. The same holds true where the exemption is granted by the tax administration inasmuch as one of the conditions that must be met in order to obtain its consent is that the firm's financial situation renders the cessation of business imminent. The provisions of the 1979 communication are therefore applicable in the present case.

(57) Consequently, the Commission considers that it is possible to declare compatible with the Treaty aid granted before the entry into force of the 1998 communication up to the amount of the ceilings of intensity applicable in the region concerned and at the time it was granted, increased, where appropriate, by the bonus provided for in the case of aid to SMEs [6].

[1] OJ C 31, 3.2.1979, p. 9.
[2] OJ C 74, 10.3.1998, p. 9.
[3] As listed in Annex 1 to Decree No 76/325 of 14 April 1976 — Official Journal of the French Republic No 90 of 14 April 1976.
[4] OJ L 11, 12.1.1985, p. 28.
[5] See *inter alia* the Commission decisions in Cases N 515/94, N 699/94 and N 45/2000.
[6] See point 4.1 of the 1992 Community guidelines on State aid for small and medium-sized enterprises and point 4.2.1 of the 1996 Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 23.7.1996, p. 4).

(58) As far as the 1998 guidelines are concerned, point 4.4 thereof states that the purchase of an establishment which has closed or which would have closed had it not been purchased may be regarded as initial investment, unless the establishment concerned belongs to a firm in difficulty. This last exception was abolished by point 7.1 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty. For the reasons already given above, the Commission considers that what is involved in the present case is in fact the takeover of an establishment which 'has closed or which would have closed had such takeover not taken place'. Even during the period between March 1998 and October 1998 when the abovementioned exception was applicable, the measure constitutes a tax exemption which benefits solely the new company taking over the activity, and it cannot be deduced that it would confer an advantage on a firm in difficulty transferring the activity.

(59) The 1998 guidelines provide, in point 4.10, that aid for initial investment must be made conditional on the maintenance of the investment in question for a minimum period of five years.

(60) In the present case, it cannot be ruled out, in certain individual instances, that exemptions covering part of the price paid for an establishment or for certain assets (such as land, buildings, plant or machinery) may be considered compatible aid if it is conditional on the maintenance of the investment for a minimum period of five years. This last condition, which is not expressly laid down by Article 44 septies, might nevertheless have been fulfilled in certain specific situations.

(61) Lastly, according to point 4.8 of the guidelines, the intensity of aid must be adapted to take account of the nature of the aided regions. For the period 2000-2006, the eligible regions and the ceilings of intensity applicable in France result from the regional aid map approved by the Commission's decision of 13 March 2000 in Case N 45/2000. The scheme forming the subject-matter of the present Decision provides for no limit to the intensity of aid in the form of a tax advantage. However, there are grounds for considering that the aid granted under this scheme is compatible with the common market in so far as it has been granted to firms situated in eligible regions up to the intensity authorised in those regions, and on condition that the investment in question has been maintained for a minimum period of five years.

Aid to SMEs

(62) Thirdly, with regard to the rules applicable to aid to SMEs, it should be pointed out straight away that the French measures are not limited to SMEs and that, therefore, the scheme cannot be declared compatible on that basis.

(63) However, in certain individual instances, aid might be in keeping with the conditions laid down by Regulation (EC) No 70/2001 or, alternatively, with the earlier provisions on aid to SMEs ([1]).

(64) Article 4 of Regulation (EC) No 70/2001 declares compatible and exempt from the notification requirement aid for investment in tangible assets carried out by small enterprises, up to an intensity of 15 %, or by medium-sized enterprises, up to an intensity of 7.5 %, subject to fulfilment of the conditions it lays down. Pursuant to Article 2, point (c), of the Regulation, an investment in fixed assets undertaken in the form of the takeover of an establishment which would have closed had it not been purchased is to be regarded as investment in tangible assets.

(65) For the reasons given in recital 56 the Commission considers that the French scheme applies to instances of the takeover of an establishment which has closed or which would have closed had it not been purchased. This being so, aid granted to SMEs under the scheme is compatible with the common market in so far as it fulfils the other conditions laid down in Regulation (EC) No 70/2001.

(66) Inasmuch as the conditions laid down by the 1992 and 1996 frameworks are not more favourable than those of Regulation (EC) No 70/2001, it is not necessary to analyse them in greater detail.

Conclusion as to compatibility

(67) Viewed as a whole, the scheme is incompatible with the common market. However, aid granted under the scheme which fulfils the criteria of the 1979 communication on regional aid systems and of the 1998 guidelines on national regional aid and aid granted in accordance with Regulation (EC) No 70/2001 can be declared compatible with the common market.

Recovery and monitoring of repayment

(68) The measures at issue were introduced in 1989. The Commission requested information on them for the first time in September 2001, thereby interrupting the 10-year limitation period provided for in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([2]). Inasmuch as the tax exemptions constitute unlawful aid because they were not notified to the Commission, any aid granted after September 1991 must therefore be recovered.

([1]) See the Sixth Report on Competition Policy (1976), points 253 to 255, and the 1992 and 1996 Community frameworks.
([2]) OJ L 83, 27.3.1999, p. 1.

(69) Having never been notified, the aid scheme is unlawful. Aid outside the scope of Regulation (EC) No 69/2001, the previously applicable *de minimis* rules and Regulation (EC) No 70/2001 is likewise unlawful.

(70) By virtue of the Commission's established decision-making practice, any aid which has been granted unlawfully and which is incompatible in the light of Article 87 of the Treaty must be recovered from the beneficiaries. This practice has been confirmed by Article 14 of Regulation (EC) No 659/1999.

(71) Pursuant to that Article, the Member State concerned must take all necessary measures to recover the aid from the beneficiary. In order to establish the number of cases in which recovery must be effected, and in keeping with the duty of loyal cooperation between Member States and the Commission, the latter considers that France must draw up a list of enterprises which fall outside the scope of Regulation (EC) No 69/2001, the other *de minimis* rules and Regulation (EC) No 70/2001 and which do not fulfil the criteria of the 1979 communication on regional aid systems and of the 1998 guidelines on national regional aid.

Conclusions

(72) The Commission finds that France has unlawfully implemented an aid scheme by granting a tax exemption to companies taking over the activities of firms in difficulty in breach of Article 88(3) of the Treaty. It considers that the scheme cannot be justified either on the basis of the guidelines applicable to aid for rescuing and restructuring firms in difficulty or on the basis of the rules applicable to regional aid and that it is therefore incompatible with the common market.

(73) (42) The Commission considers that France must take all necessary measures to recover the aid from the beneficiaries of the scheme, without prejudice to cases coming under Regulation (EC) No 69/2001 or the other *de minimis* rules and without prejudice to individual cases in which the amounts of aid granted have been found to be wholly or partly compatible in accordance with the 1979 communication on regional aid systems, the 1998 guidelines on national regional aid or Regulation (EC) No 70/2001.

(74) The Commission would ask France to return to it the attached questionnaire concerning the current status of the recovery procedure and to draw up a list of beneficiaries to which the recovery relates,

HAS ADOPTED THIS DECISION:

Article 1

The State aid scheme provided for in Article 44 septies of the General Tax Code in the form of a scheme of tax exemptions for companies taking over the assets of firms in difficulty that France has implemented in breach of Article 88(3) of the Treaty is incompatible with the common market, without prejudice to Articles 2 and 3.

Article 2

The exemptions granted under the scheme referred to in Article 1 does not constitute State aid if they fulfil the conditions laid down by Regulation (EC) No 69/2001 or by the *de minimis* rules applicable at the time of grant.

Article 3

Aid granted under the scheme referred to in Article 1 which fulfils the conditions laid down by the 1979 communication on regional aid systems or by the 1998 guidelines on national regional aid or by Regulation (EC) No 70/2001 is compatible with the common market to the amount of the admissible intensities.

Article 4

France shall abolish the aid scheme referred to in Article 1.

Article 5

France shall take all necessary measures to recover from its beneficiaries aid granted under the scheme referred to in Article 1, other than that referred to in Articles 2 and 3, and unlawfully made available to those beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid, on a compound basis in accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered.

Article 6

France shall inform the Commission, within two months of notification of this Decision, of the measures taken and to be taken in order to comply with it.

Article 7

France shall furnish this information on the basis of the attached questionnaire and shall draw up an exhaustive list of companies granted exemption under the scheme referred to in Article 1 and of the amounts paid in each case.

France shall draw up a list of companies in receipt of aid under the scheme referred to in Article 1 which does not fulfil the conditions laid down by Regulation (EC) No 69/2001, by the *de minimis* rules applicable at the time of grant of the aid, by Regulation (EC) No 70/2001, by the 1979 communication on regional aid systems or by the 1998 guidelines on national regional aid. The list shall also specify the amount of aid each company has received.

Article 8

This Decision is addressed to the French Republic.

Done at Brussels, 16 December 2003.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

Information sheet on the recovery of unlawfully granted aid

1. What is the total number of aid recipients?
2. What is the total amount of aid granted?
3. What is the total amount of aid to be recovered?
4. How will your authorities calculate the amount of aid to be recovered?
   — principal
   — interest [1]
5. What measures are to be taken to secure the immediate and effective repayment of the aid in accordance with Article 14 of Council Regulation (EC) No 659/1999? Please specify the legal basis for those measures.
6. What measures have already been taken to secure the immediate and effective repayment of the aid in accordance with Article 14 of Council Regulation (EC) No 659/1999? Please specify the legal basis for those measures.
7. By what date should all the aid have been recovered?
8. Other comments.

(1) In accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21), the reference rate will be applied on a compound basis. The calculation of compound interest on an annual basis uses the formula Interest = [Capital (1 + Interest rate) Number of years] – Capital.