

COMMISSION DECISION

of 8 July 2008

concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM)

(notified under document C(2008) 3182)

(Only the French text is authentic)

(Text with EEA relevance)

(2009/611/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, in particular the first paragraph of Article 88(2) thereof,

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

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

Whereas:

1. PROCEDURE

(1) On 18 February 2002, the French Republic notified the Commission of the planned restructuring aid for *Société Nationale Maritime Corse-Méditerranée* (SNCM) ⁽²⁾, completed on 3 July 2002 ⁽³⁾. The restructuring aid consisted in the recapitalisation of SNCM by the *Compagnie Générale Maritime et Financière* (CGMF) ⁽⁴⁾ for the sum of EUR 76 million.

(2) By letter of 19 August 2002, the Commission notified the French authorities of the decision to initiate the formal investigation procedure pursuant to Article 88(2) EC laid down in Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁵⁾.

(3) On 8 October 2002 ⁽⁶⁾, the French authorities communicated to the Commission their comments on the decision of 19 August 2002 ⁽⁷⁾.

(4) At the request of the French authorities, meetings were organised with the Commission on 24 October 2002, 3 December 2002 and 25 February 2003.

(5) In the context of initiating the procedure, the Commission received observations from two undertakings, namely *Corsica Ferries France* (CFF) on 8 January 2003 ⁽⁸⁾ and the *Stef-TFE* group on 7 January 2003, and from various French regional and local authorities on 18 December 2002 and 9 and 10 January 2003. It

sent those observations to France for its comments by letters of 13 and 16 January and 5 and 21 February 2003.

(6) The French authorities submitted their comments on the observations of CFF and *Stef-TFE* on 13 February 2003 ⁽⁹⁾ and 27 May 2003 ⁽¹⁰⁾.

(7) On 16 January 2003, the Commission sent a request for additional information to which the French authorities replied on 21 February 2003.

(8) By letter of 10 February 2003 ⁽¹¹⁾, the French authorities expanded their arguments seeking to demonstrate that the planned aid complied in every respect with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹²⁾ (the 1999 Guidelines).

(9) At the Commission's request, on 25 February 2003 ⁽¹³⁾, the French authorities forwarded a copy of the shareholders agreement binding SNCM and the *Stef-TFE* group.

(10) By decision 2004/166/EC of 9 July 2003 (the 2003 decision) ⁽¹⁴⁾, the Commission approved, under certain conditions, the grant of restructuring aid to SNCM payable in two parts, one of EUR 66 million and the other of a maximum amount of EUR 10 million to be determined on the basis of net products arising from disposals of assets made after the adoption of the 2003 decision.

(11) On 13 October 2003, CFF brought an action for annulment of the 2003 decision before the Court of First Instance of the European Communities (the CFI) (Case T-349/03).

(12) On 8 September 2004, the Commission decided to regard the amendments requested by France on 23 June 2004, namely the swap of the vessel *Aliso* with the vessel *Asco* in the list of vessels which SNCM was authorised to use following the 2003 decision and the sale of the *Aliso* instead of the *Asco*, were not such as to call into question the compatibility with the common market of the restructuring aid authorised by the 2003 decision ⁽¹⁵⁾.

- (13) By decision of 16 March 2005 (the 2005 decision), the Commission approved the payment of the second part of the restructuring aid, for EUR 3,3 million, which brought the total amount of restructuring aid to EUR 69 292 400.
- (14) On 15 June 2005, in Case T-349/03, the CFI annulled the 2003 decision on account of an incorrect assessment of the minimal nature of the aid. That judgment resulted in returning the Commission back to the formal investigation procedure initiated by decision of 19 August 2002 and rendering inoperative the decisions of 8 September 2004 and 16 March 2005, which were based on the annulled 2003 decision.
- (15) On 25 October 2005 ⁽¹⁶⁾, the French authorities sent the Commission information relating to the financial situation of the company since the notification of the planned restructuring aid of 18 February 2002.
- (16) On 17 November 2005 ⁽¹⁷⁾, the French authorities provided information relating to the updating of the 2002 restructuring plan and the rebuilding of SNCM's capital ⁽¹⁸⁾.
- (17) On 15 March 2006, a briefing note on the market, the business plan (revenue part) and the account of the provisional results were delivered to the Commission by the French authorities ⁽¹⁹⁾. Other documents were delivered to the Commission on 28 March 2006 and 7 April 2006 ⁽²⁰⁾. In the latter mail, the French authorities also called on the Commission to classify, on account of its 'public service compensation' nature, a part of the 2002 restructuring aid, in particular the amount of EUR 53,48 million, not as a measure taken under a restructuring plan but as non-aid in accordance with the *Altmark* ⁽²¹⁾ case-law or as an autonomous measure independent of the restructuring plan pursuant to Article 86(2) EC.
- (18) On 21 April 2006, a planned merger under which the undertakings Veolia Transport (VT) ⁽²²⁾ and Butler Capital Partners (BCP) acquired joint control of SNCM ⁽²³⁾, was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 ⁽²⁴⁾. A decision approving the merger process was adopted by the Commission on 29 May 2006 ⁽²⁵⁾.
- (19) On 21 June 2006 ⁽²⁶⁾, the French authorities sent the Commission the order of 26 May 2006 of the Ministry of Economics, Finance and Industry approving financial transactions carried out by CGMF, Decree No 2006-606 of 26 May 2006 transferring SNCM to the private sector and the order of 26 May 2006 approving financial transactions carried out by SNCF.
- (20) Information concerning the public service delegation and the aid of a social nature relating to the operation of services to Corsica was sent to the Commission on 7 June 2006 ⁽²⁷⁾.
- (21) On 13 September 2006, the Commission decided to initiate the procedure laid down in Article 88(2) EC concerning the new measures implemented in favour of SNCM while integrating the restructuring plan notified in 2002 ⁽²⁸⁾ (the 2006 decision).
- (22) On 16 November 2006, France sent the Commission its comments on the 2006 decision ⁽²⁹⁾.
- (23) On application by a number of interested parties to extend the time-limit for submitting comments by one month ⁽³⁰⁾, the Commission decided to grant that additional period to all interested parties ⁽³¹⁾.
- (24) The Commission received comments from CFF ⁽³²⁾ and *STIM d'Orbigny* (STIM) ⁽³³⁾ which were forwarded to the French authorities by post on 20 February 2007. A third party also sent comments which were also forwarded to the French authorities, and withdrawn by that party on 28 May 2008.
- (25) The French authorities sent their observations on the comments of the interested third parties on 30 April 2007 ⁽³⁴⁾.
- (26) On 20 December 2007, CFF lodged a complaint in respect of State aid against SNCM which completed the sending of information of 15 June 2007 and 30 November 2007. That complaint concerns Article 3 of the new public service delegation agreement signed in June 2007 between the *Collectivité territoriale de Corse* (Corsican regional authorities) and the *Compagnie Méridionale de Navigation-SNCM* group for 2007 to 2013. According to CFF, the application of that clause would mobilise new financial resources for SNCM in the region of EUR 10 million for 2007. Furthermore, it stated that the compensation paid to SNCM in respect of public service obligations is State aid which is, moreover, unlawful since it has not been notified to the Commission.
- (27) Since a certain amount of information was sent to the Commission after expiry of the time-limit initially set for 13 February 2007 ⁽³⁵⁾, the Commission informed the interested parties of its decision to extend the period for submitting comments of third parties to 14 March 2008.
- (28) On 26 March 2008, the Commission forwarded the comments of the interested third parties to France, which communicated its comments on 28 March 2008, 10 April 2008 and 28 April 2008.

2. IDENTIFICATION OF THE RECIPIENT OF THE MEASURES COVERED BY THIS DECISION

- (29) The recipient of the measures covered by this decision is the *Société Nationale Maritime Corse-Méditerranée* (SNCM), which groups together several subsidiaries in the maritime sector and operates sea transport of passengers, cars and heavy goods vehicles on the routes between mainland France and Corsica, Italy (Sardinia) and the Maghreb (Algeria and Tunisia).
- (30) SNCM is a limited liability company which came into being in 1969 with the merger of the *Compagnie Générale Transatlantique* and the *Compagnie de Navigation Mixte*, both established in 1850. At that time called *Compagnie Générale Transméditerranéenne*, it was renamed *Société Nationale Maritime Corse-Méditerranée* in 1976, after the *Société Nationale des Chemins de Fer* (SNCF) had acquired a share in its capital. The company was chosen by the French Government to implement the principle of territorial continuity with Corsica, bringing maritime transport fares into line with SNCF rail transport fares on the basis of an agreement concluded on 31 March 1976 for a term of 25 years. The French Government had already entrusted the *Compagnie Générale Transatlantique* with the operation of services to Corsica through an earlier agreement of 23 December 1948.
- (31) At the time of the notification of the recapitalisation in 2002, 20 % of SNCM was held by SNCF and 80 % by CGMF. As a result of the flotation of the capital of SNCM on 30 May 2006 (see paragraph 18 of this decision), BCP and VT hold 38 % and 28 % respectively of SNCM's capital, while CGMF retains capital in the amount of 25 % (9 % of the capital is reserved to employees).
- (32) The main subsidiaries of SNCM are *Compagnie Méridionale de Navigation* (CMN) ⁽³⁶⁾, the *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH) ⁽³⁷⁾, *Aliso Voyage* ⁽³⁸⁾, *Sud-Cargos* ⁽³⁹⁾, the *Société Aubagnaise de Restauration et d'Approvisionnement* (SARA) ⁽⁴⁰⁾, *Ferrytour* ⁽⁴¹⁾ and *Les Comptoirs du Sud* ⁽⁴²⁾.
- (33) Following the disposal of the high-speed vessels *Aliso* in September 2004 and *Asco* ⁽⁴³⁾ in May 2005, the SNCM fleet comprises 10 vessels (5 car-ferries ⁽⁴⁴⁾, 4 mixed vessels (freight and passenger) ⁽⁴⁵⁾ and a high-speed vessel (NGV) operating principally from Nice ⁽⁴⁶⁾), 7 of which it holds in its name ⁽⁴⁷⁾.
- (34) For the sake of completeness, it should be recalled that the regular sea transport services between the ports of mainland France and Corsica have been operated since 1948 under a public service operated by SNCM and CMN between 1976 and 2001 pursuant to a

framework agreement concluded originally for 25 years. In accordance with the Community rules in force ⁽⁴⁸⁾ and following the European invitation to tender ⁽⁴⁹⁾ organised by the Corsican regional authorities ⁽⁵⁰⁾, SNCM and CMN jointly secured the public service delegation to operate services from Marseille to Corsica in exchange for financial compensation during the period 2002 to 2006.

- (35) Since the public service delegation expired at the end of 2006, the aforesaid public service by sea, being the subject of a new European invitation to tender ⁽⁵¹⁾, was awarded to the SNCM – CMN group from 1 May 2007 to 31 December 2013 for a subsidy of approximately EUR 100 million per annum.
- (36) Similarly, obligations relating to the frequency of services are imposed on all operators providing services to the island from Toulon and Nice. On those routes, since 2002 Corsican residents and other categories of passengers are entitled until 2013 to social aid established pursuant to Commission decisions of 2 July 2002 ⁽⁵²⁾ and 24 April 2007 ⁽⁵³⁾.

3. COMPETITIVE ENVIRONMENT

- (37) SNCM operates primarily on two distinct markets for both passenger traffic and goods traffic: services to Corsica and the Maghreb, from France, and, to a lesser extent, services to Italy and Spain.

3.1. Services to Corsica

Passenger transport

- (38) The operation of passenger transport services to Corsica is a market characterised by the fact that it is highly seasonal. It is distinguished by seasonal peaks of passenger numbers which may be up to ten times those of the slackest periods, which requires operators to provide a fleet which can absorb those peaks. Half of the turnover is made in July and August. Further, there is an imbalance in respect of the direction of the route, even in peak periods: in July, for example, departures from the mainland are full whereas the return is almost empty. As a result, the average annual passenger rates of the vessels are relatively low.
- (39) SNCM is the very first operator to link Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under a public service delegation; the other third of its activities are routes with other departure points or destinations (Nice-Corsica, Toulon-Corsica, international routes to Sardinia or the Maghreb).

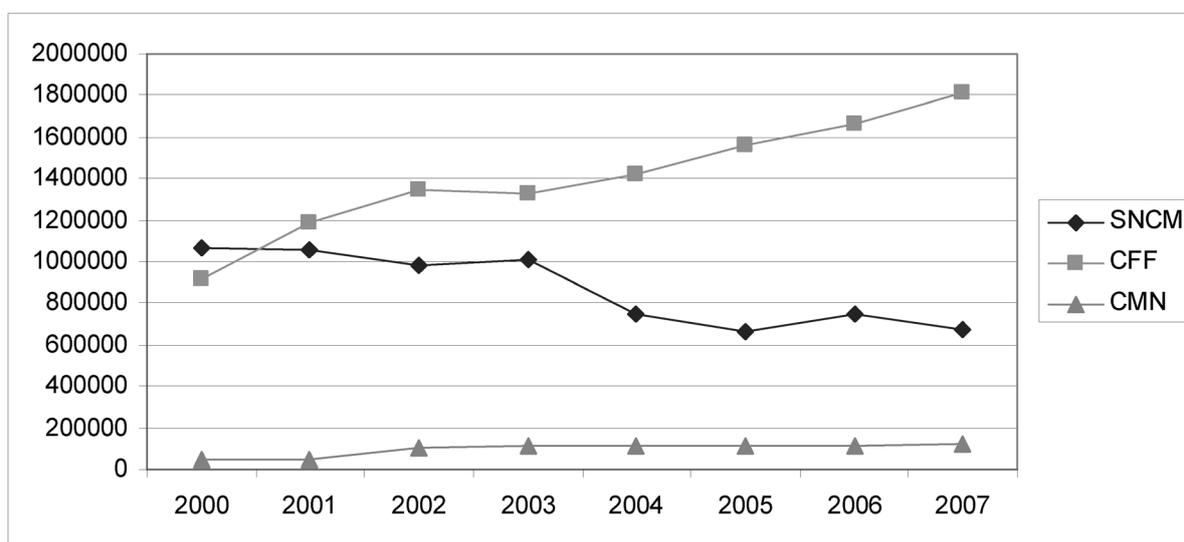
(40) SNCM has always had a monopoly over its principal activity. Since 1996, however, it has faced competition which has grown very quickly. Accordingly, *Corsica Ferries France* (CFF) is the dominant player in services by sea between the mainland and Corsica and its market share has not stopped increasing. Although it has only been present on that market since 1996, CFF has seen its 'passenger' traffic increase [...] (*) per year between 2000 and 2005, and that growth continues. Thus, today, nearly [...] passengers by sea between the mainland and Corsica take a CFF ferry, whereas only

[...] use a SNCM service, and CMN transports the remaining passengers, that is [...].

(41) The position attained by CFF over seven years on the market under consideration is also reflected in the number of passengers transported per season between Corsica and mainland France. The diagram below shows that CFF's market share went from 45 % in 2000 to [...] % in 2007 and SNCM's from 53 % to [...] % during the same period, with a difference of more than a million passengers transported.

Diagram 1

Number of passengers transported per season (May-September) between mainland France and Corsica — 2000 to 2007 seasons



Source: Observatoire régional des transports de la Corse

(42) The other minor competitors to SNCM operating services to Corsica are *Compagnie Méridionale de Navigation* (CMN), Moby Lines, Happy Lines and TRIS.

that context, the rise in turnover in 2007 is reassuring for the viability of the undertaking although it has ceded considerable market share to the advantage of its only competitor, whose market share is easily greater today.

(43) In 2006 and 2007, SNCM's capacity and its market shares for services to Corsica have decreased, with a reduction of [...] % on the availability of seats (- [...] % for services from Nice and [...] % for services from Marseille).

(45) Passenger transport by sea between the mainland and Corsica has grown on average by 4 % over the last 15 years; its growth should continue, with an increase of [...] % also forecast for 2008 for moderate growth over the next years. None the less, new players do not appear to be seeking to enter that market. At the time of the call for tenders put out by the Office des Transports de Corse to award the public service delegation to operate services by sea to a number of Corsican ports over the period 2007 to 2013, no candidates other than CFF and SNCF-CMN came forward, even though part tendering on a given route was possible.

(44) However, the continued reduction of market shares demonstrates that the renewal of confidence on the part of passengers, which had been greatly damaged by the strikes and disruptions caused by the social conflicts of 2004 and 2005, in particular at the time of the privatisation of the undertaking, is very slow. It is a necessary condition for curbing the reduction of SNCM's market share recorded in those recent years. In

(46) CFF, SNCM's main competitor, greatly increased its passenger capacity from 500 000 to [...] million between 1999 and 2007 (of which [...] % increase between 2006 and 2007), which enabled it to increase its traffic (from [...] million in 2005 to [...] million in 2007) and its market share. For structural reasons, that policy results nonetheless in lower passenger rates for CFF than for SNCM, with a difference in the region of [...] percentage points in 2007. For SNCM, the average passenger rate in 2007 was [...] %, which is normal having regard to the fact that the market is very seasonal (see above).

Transport of freight

(47) As regards freight traffic to Corsica, in 2005 SNCM held around [...] % of the Marseille-Toulon market to Corsica.

(48) SNCM and CMN have a de facto near-monopoly for unaccompanied general goods transport. Under the public service delegation contract, the two firms operate frequent services from Marseilles to all Corsican ports.

(49) For accompanied trailers loaded onto ferries, accounting for 24 % overall of general goods transport measured in linear metres, there is competition among all the passenger transport operators. SNCM and CMN also have the main share of the market in this accompanied transport. The other operators, in particular CFF, have a 10 % share, that is 2 % of the overall market.

(50) For accompanied automotive vehicles⁽⁵⁴⁾ loaded onto ferries (approximately 24 % of general goods traffic in 2003), SNCM and CMN also hold the majority of the relevant market. However, since 2002 CFF has been developing its services and holds approximately [...] % of the market.

3.2. Services to the Maghreb

(51) Tunisia and Algeria are an important market of approximately 5 million passengers, with air transport predominating. In that connection, transport by sea represents about 15 % of traffic. While Algeria represents a significant maritime market of approximately 560 000 passengers, Tunisia is a smaller market in the region of 250 000 passengers.

(52) The French maritime transport market to the Maghreb has seen steady growth over recent years, of around 13 % between 2001 and 2005. Having regard to the prospects for growth in tourism in that region, maritime transport should see an annual growth rate of around 4 % by 2010.

(53) In Algeria, SNCM fills the position of second operator on the market to Tunisia after the *Entreprise Nationale de Transport Maritime de Voyageurs* (ENTMV), an Algerian public undertaking. The market share of SNCM has increased from 24 % in 2001 to [...] % in 2005.

(54) SNCM fills the position of second operator on the market to Tunisia after the *Compagnie tunisienne de navigation* (CTN). Although SNCM has lost market share to CTN since 2001, going from 44 % to [...] % in 2004, an improvement was, however, recorded in 2005 ([...] %).

4. DESCRIPTION OF THE MEASURES COVERED BY THIS DÉCISION

4.1. The 2002 recapitalisation of SNCM

4.1.1. Description

(55) Following the Commission decision of 17 July 2002 to authorise rescue aid to SNCM⁽⁵⁵⁾, the French authorities notified the Commission on 18 February 2002 of planned restructuring aid to SNCM. That measure involved the recapitalisation of SNCM, through its parent company, CGMF, for the sum of EUR 76 million, EUR 46 million of which was for restructuring costs⁽⁵⁶⁾. That capital increase was intended to increase SNCM's capital from EUR 30 million to EUR 106 million.

(56) In accordance with the 1999 guidelines, the French authorities submitted to the Commission a restructuring plan⁽⁵⁷⁾ for SNCM concerning 5 points:

(i) a reduction in the number of crossings and the redeployment of its vessels between the different routes (a reduction in services to Corsica and an increase in those to the Maghreb)⁽⁵⁸⁾;

(ii) a reduction of four vessels of its fleet which was to provide EUR 21 million of liquid assets;

(iii) the transfer of certain property assets;

(iv) a reduction in staff⁽⁵⁹⁾ of approximately 12 % which, combined with a fair wage policy, was to make it possible to reduce crew costs from EUR 61,8 million in 2001 to [...] EUR [...] million on average from 2003 to 2006 and ground costs from EUR 50,3 million in 2001 to EUR [...] million over the same period;

(v) the closure of two of its subsidiaries, the *Compagnie Maritime Toulonnaise* and the *Corsica Marittima* company, the residual activities of which would be taken over by SNCM.

(57) Following the observations made by the Commission in its decision of 19 August 2002, the French authorities, in their letter of 31 January 2003, set out the improvements made to the restructuring plan on the following points:

- commitments and details concerning wage policy,
- a plan for reducing costs in intermediate purchases,
- a commitment that SNCM would not initiate a fares war with its competitors operating services to Corsica.

(58) On the last point, the French authorities state that 'SNCM makes that commitment without reservations, because it takes the view that a fares war of its own making would be inconsistent neither with its strategic positioning nor its interest because it would lead to a reduction in its receipts, its usual practices and its expertise'.

(59) In their restructuring plan, the French authorities submitted to the Commission a detailed financial model for 2002 to 2007 on the basis of median hypotheses relating to a series of variables⁽⁶⁰⁾. The financial projections show, inter alia, a return to profitability from 2003.

Table 1

Financial model for 2002-2007

(EUR million)

	2000	2001	2002	2002	2003	2004	2005	2006	2007
	Realised	Realised	Plan	Realised	Plan	Plan	Plan	Plan	Plan
Turnover	204,9	204,1	178	205,8	[...]	[...]	[...]	[...]	[...]
Operating subsidies	85,4	86,7	74,5	77,7	[...]	[...]	[...]	[...]	[...]
Current result	- 14,7	- 5,1	1,2	- 5,8	[...]	[...]	[...]	[...]	[...]
Net result	- 6,2	- 40,4	23	4,2	[...]	[...]	[...]	[...]	[...]
Capital	67,5	29,7	119	33,8	[...]	[...]	[...]	[...]	[...]
Net financial debt (excl. leasing)	135,8	134,5	67,7	144,8	[...]	[...]	[...]	[...]	[...]
Financial ratios					[...]	[...]	[...]	[...]	[...]
Current results/turnover + SUBSIDIES	- 5 %	- 2 %	0 %	- 2 %	[...]	[...]	[...]	[...]	[...]
Capital/debt on balance sheet	50 %	22 %	176 %	23 %	[...]	[...]	[...]	[...]	[...]

Figures for 2000, 2001 and 2002 taken from 2001 and 2002 SNCM annual reports.

(60) According to the French authorities, the EUR 76 million capital contribution and the return to profitability, expected from 2003, should make it possible to raise the company's capital from its level of about EUR 30 million at the end of 2001 to EUR 120 million in the short term (2003) and then to EUR [...] million at the end of the period covered by the plan (2006 to 2007). That was to lead to a reduction in debt from EUR 145 million in 2002 to levels of EUR [...] million to EUR [...] million from 2003 to 2005. In the last years of the plan, an increase in debt was forecast by the company because of the replacement of one or two vessels (unrestricted ownership).

(61) The French authorities also provided a sensitivity study of expected results in relation to working hypotheses in respect of traffic on different routes. On that basis, the different simulations show that SNCM ought to return to profitability in the situations contemplated.

4.1.2. Determination of the amount of the recapitalisation

- (62) The method chosen by the French authorities ⁽⁶¹⁾ to determine the amount of the recapitalisation involves calculating the need for financing on the basis of the average capital/debt ratio of 5 European shipping companies recorded in 2000. In spite of the differences in the balance sheets of those undertakings, the average found by the French authorities comes to 79 %. The French authorities submit that the financial projections for 2002 to 2007 give an average capital/debt ratio of 77 % with capital to reach EUR 169 million in 2007. Such a level of capital was to be obtained by means of a recapitalisation of EUR 76 million and the success of the action provided for in the restructuring plan.

4.2. Measures subsequent to the 2002 recapitalisation

4.2.1. Preliminary remark

- (63) The recapitalisation and the restructuring plan of 2002 did not have the results expected and, from 2004, the economic and financial situation of SNCM greatly deteriorated. Both internal factors (social conflicts, insufficient and belated achievement of productivity objectives, loss of market share) and external factors (reduced appeal of Corsica as a destination, acquisition of market share by CFF, management errors by the State) ⁽⁶²⁾ as well as the increase in the cost of fuel contributed to this deterioration.
- (64) Accordingly, SNCM's ordinary profits come to EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. Net profit was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005.
- (65) The deterioration in SNCM's economic and financial situation led the French authorities to sell assets over and above what was laid down in the 2002 restructuring plan and required by the 2003 decision and to initiate a procedure to seek private partners.

Table 2

List of assets sold by SNCM since 2002 ⁽⁶³⁾

	Proceeds of disposal	Date
Disposals proposed in the notification (in EUR)	25 165 000	
Aliso (replacing Asco, in accordance with the decision of 8 September 2004 of the Commission)	[...]	30.9.2004
Napoléon	[...]	6.5.2002
Monte Rotondo	[...]	31.7.2002
Liberté	[...]	27.1.2003
All Schuman property	[...]	20.1.2003
Additional disposals required by the Commission in its decision of 9 July 2003 (in EUR)	5 022 600	
SCI Espace Schuman	[...]	24.6.2003
Southern Trader	[...]	22.7.2003
Someca	[...]	30.4.2004
Amadeus	[...]	12.10.2004
CCM	[...] ⁽¹⁾	—

	Proceeds of disposal	Date
Additional disposals occurring after the decision of July 2003 (in EUR million)	12,6	
Asco	[...]	24.5.2005
Sud-Cargos	[...]	15.9.2005
Sales of flats of SNCM's housing stock (formerly occupied by SNCM staff)	[...]	September 2003 to 2006
Total (EUR million)	42,385	

(¹) [...]

4.2.2. Measures subsequent to the 2002 recapitalisation

(66) Following an open, transparent and non-discriminatory selection procedure (⁶⁴), an agreement was finally reached on 13 October 2005 between the State, BCP and VT in a very difficult social and financial context. Thus VT is SNCM's industrial operator (28 % holding) whereas BCP is the key shareholder with a holding of 38 %. The State undertook, in particular as regards salaried staff, to retain a shareholding in the company of 25 % (⁶⁵). BCP and VT drew up a business plan for SNCM which was notified to the European Commission on 7 April 2006.

The content of the memorandum of understanding

(67) The memorandum of understanding, under which 75 % of SNCM's capital is to be sold to private purchasers, was signed on 16 May 2006 by the parties (BCP, VT and CGMF).

(68) Section II of the memorandum of understanding provides that CGMF undertakes to approve, subscribe to and fully pay up an increase in SNCM's capital totalling EUR 142,5 million.

(69) Following the increase in capital, it is envisaged that SNCM's share capital be reduced by cancellation of shares to be brought back to the legal minimum for a limited liability company not making a public offer.

(70) In addition to the increase in capital, CGMF undertakes to make EUR 38 million available to SNCM, in the form of a current account advance. That current account advance, which will be paid by SNCM to a trustee (the bank CIC), is intended to finance the part of the 'generosity' cost which is in addition to amounts payable under provisions of law and those relating to agreements in the event of a plan to reduce staff implemented by the purchasers (⁶⁶). The payment of compensation over and above compensation paid in accordance with statutory provisions and provisions under agreements is done on an individual and case-by-case basis corresponding to salaried staff who have left the

undertaking and whose employment contract was terminated.

(71) Section III of the memorandum of understanding provides that CGMF, following those transactions, is to sell to private purchasers its shares representing 75 % of the shares making up the share capital of the undertaking and the [...] intended to finance the part of the planned redundancy scheme over and above any obligations under agreements or statutory obligations.

(72) Section III of the memorandum of understanding also provides for the joint and concurrent subscription by the purchasers and CGMF of new shares totalling EUR 35 million and a current account contribution of EUR 8,75 million by BCP/VT, made available to SNCM on the basis of its cash requirements. Paragraph III.2.7 of the memorandum of understanding provides that the value of the shares of CGMF is to be equal, at all times, to their original nominal value increased by [...] % of their paid up nominal value, multiplied by $J/365$, J being the number of days since the date of realisation, subject to deduction of all amounts paid (for example dividends). Those conditions do not apply in the case of receivership or liquidation of the company by the court.

(73) The memorandum of understanding (Section III.5) includes a right to sell SNCM which may be exercised concurrently by the purchasers should one of the following events occur inasmuch as they have the effect of calling into question the credibility of their business plan and the viability of the company:

— Non-award of the public service delegation for public services by sea to Corsica for the period commencing 1 January 2007 [...],

— Any negative decision of the European Commission or a judgment of the Court of First Instance or of the Court of Justice, such as a refusal of the transaction or the imposition of conditions having a substantial impact on the value of the company [...].

(74) Section VII of the memorandum of understanding provides that CGMF is to pay a part of the labour commitments of SNCM in terms of the costs of mutual benefit societies of its retired workers for an amount valued at EUR 15,5 million from the day of the transfer of ownership of the undertaking.

(75) The detailed rules of governance of the undertaking are set out in Section IV of the memorandum of understanding. It provides that there will be a change in the way that SNCM is managed; it will be converted into a limited liability company with a board of directors and a supervisory board. The latter will be made up of 10, then 14 members. It will be chaired provisionally by a representative of the State. If the DSP is entrusted to SNCM, the President of the supervisory board will be replaced by a representative of BCP. The board of directors has the task of carrying out the operational management of SNCM.

(76) On 26 May 2006, the French Government confirmed the sale of SNCM as well as the measures cited above.

The measures

(77) In the light of the foregoing, the memorandum of understanding contains three types of state measures justifying an examination as regards the Community system of State aid:

— the sale of 100 % of SNCM at a negative price of EUR 158 million (capital contribution of EUR 142,5 million and payment of the costs of mutual benefit societies for a total of EUR 15,5 million),

— the current account advance by CGMF for the sum of EUR 38,5 million for staff laid off by SNCM,

— the increase in capital of EUR 8,75 million to which CGMF subscribed jointly and concurrently with the contribution in the amount of EUR 26,25 million of VT and BCP.

5. SUBJECT MATTER OF THE PRESENT DECISION

(78) This final decision relates to the measures implemented by France in favour of SNCM since 18 February 2002, namely:

— the capital contribution of CGMF to SNCM for the sum of EUR 76 million in 2002 (including EUR 53,48 million for public service obligations and the balance for restructuring aid),

— the negative sale price of SNCM by CGMF for the sum of EUR 158 million,

— CGMF's contribution of EUR 8,75 million,

— payment by CGMF of certain additional social measures for the sum of EUR 38,5 million.

(79) This decision does not concern the examination of financial compensation paid or to be paid to SNCM for public service obligations for the period 2007-2013, which is the subject of a separate procedure.

6. GROUNDS LEADING TO THE ADOPTION OF THE COMMISSION DECISIONS OF 2002 AND 2006

6.1. Initiation of the 2002 formal investigation procedure

(80) In its decision to initiate the procedure of 19 August 2002, the Commission, while recognising that SNCM was an undertaking in difficulty, expressed its uncertainty as to the compatibility of the measure notified with the criteria set out in point 3.2.2 of the 1999 guidelines in force at the time.

(81) The Commission voiced certain doubts regarding the restructuring plan having regard to the absence of an analysis of the causes for the undertaking's losses. In particular, the Commission raised questions concerning the links between the losses and the public service obligations, the impact of SNCM's policy of purchasing vessels on its income statements and the measures contemplated for increasing the undertaking's productivity.

(82) Moreover, the Commission noted certain lacunae in the restructuring plan, in particular the absence of specific measures to reduce the amount of intermediate consumption and the absence of a reference to SNCM's future pricing policy.

(83) The Commission also raised questions regarding the relevance of the calculation method adopted by the French authorities to determine the amount of the recapitalisation and regarding some of the hypotheses on which to base financial simulations.

6.2. The extension of the 2006 formal investigation procedure

(84) By its decision of 13 September 2006, the Commission decided to extend the 2002 formal investigation procedure to the measures laid down in connection with the sale of SNCM to the private sector.

(85) First of all, in view of the invitation of the French authorities of 7 April 2006 (see recital 17 of this decision) to examine a part of the 2002 capital contribution in the light of the *Altmark* case-law, the Commission raised uncertainty in that regard as to compliance with the conditions (in particular the second and the fourth) laid down by the Community court in that judgment⁽⁶⁷⁾.

- (86) In the event that that amount is categorised as aid compatible with Article 86(2) EC, the Commission took the view, in its decision of 2006, that the new amount of aid to be assessed in the light of the guidelines for restructuring aid was EUR 15,81 million. In so far as the amount of restructuring aid is noticeably lower than that notified in 2002 and approved in 2003, the Commission expressed doubts as to whether it was appropriate to maintain all of the compensatory measures imposed on SNCM by the 2003 decision.
- (87) The Commission also expressed doubts as to whether the conditions imposed by the 2003 decision had been complied with, namely the principle of price leadership and the frequency of services to Corsica.
- (88) As regards the negative price at which SNCM was sold, the Commission had doubts regarding compliance of the recapitalisation by the State prior to the sale of SNCM with the principle of the private investor in a market economy. In particular, the Commission expressed doubts as to the validity of the calculation of the liquidation costs which the State shareholder would be required to pay in the event of the liquidation of SNCM.
- (89) The Commission questioned whether the financial measures might be justified under the guidelines on rescue and restructuring aid.
- (90) It also cast doubts concerning the second recapitalisation of EUR 8,75 million so far as concerns observance of the principles of concomitance of the individual and public investment and the similarity of the subscription conditions within the meaning of the case-law.
- (91) Finally, the Commission expressed doubts as to whether the additional social measures of EUR 38,5 million of aid could constitute an indirect advantage for the undertaking. It also noted the risk of conflict with the supplementary redundancy payments as part of the risks borne by reasonable investors.
- nature for the period 1991 to 2001, a part of the capital increase of 2002, namely EUR 53,48 million, does not constitute State aid in the light of *Altmark*, considering that the four conditions laid down in that judgment are fulfilled in the present case.
- (93) As regards, specifically, the second condition in *Altmark*, the French authorities note that under the *Altmark* judgment, only the parameters of the calculation must be established in advance in an objective and transparent manner. In the present case, they state that the amount of EUR 53,48 million was paid in November 2003 on the basis of calculation parameters established prior to the period in question (1991-2001) ⁽⁶⁸⁾.
- (94) Accordingly, in the opinion of France, the fact that the payment of the revaluation for under-compensation occurred *a posteriori* does not call into question its conclusion that the parameters on the basis of which the compensation of EUR 53,48 million is calculated were clearly established in an objective and transparent manner prior to the performance of public service tasks.
- (95) In respect of the fourth condition in *Altmark*, the French authorities take the view that that refers to characteristics of an undertaking entrusted with a public service task fitting the description of average good management but, on the other hand, makes no reference to any requirement of minimum or average profitability of the undertaking in question.
- (96) In that regard, the French authorities consider that SNCM may be entitled to a 'presumption of sound management' in the period 1991 to 2001 and that no 'presumption of poor management' can be made against it by the mere fact of financial losses suffered in the period 1991-2001. According to the French authorities, SNCM's losses are not to be ascribed to poor management but to the rigidity of the agreements signed in 1991 and 1996 and to the sudden disruption in the historic market of that company owing to the transition from a monopoly to a highly competitive environment. SNCM therefore acted as an averagely well-run undertaking would act.
- (97) France notes that the public operator was the only undertaking capable of taking on those obligations in terms of annual regularity and frequency of service and did so in spite of the arrival in 1996 of a private operator, which only operated certain lines and only during the high season. Moreover, no other undertaking existed in the strict sense whose costs could be used as a reference for determining whether or not the level of compensation granted to SNCM exceeded the costs necessarily incurred in the performance of public service obligations. According to the French authorities, it would therefore be difficult to compare the costs structure of SNCM and that of other shipping companies, having regard to the specific nature of the activity of the latter and the market on which it operates.

7. POSITION OF THE FRENCH AUTHORITIES

7.1. The 2002 recapitalisation

7.1.1. The sum of EUR 53,48 million in the light of the *Altmark* case

7.1.1.1. Fulfilment of the four *Altmark* criteria

- (92) In their letter of 7 April 2006 and in connection with the comments submitted following the 2006 decision, the French authorities called upon the Commission to find that, on account of its 'public service compensation'

- (98) In spite of the practical impossibility of finding an undertaking which could be used as a reference point for that period, France believes that it sought to provide, during its dealings with the Commission which took place in 2005 and 2006, objective and justifiable evidence proving the nature of SNCM as a 'typical well-run and adequately equipped undertaking' and demonstrating that the fourth criterion laid down in the *Altmark* judgment is fulfilled ⁽⁶⁹⁾.
- (99) France considers, moreover, that a comparison based on the evidence available relating to the costs structure of CFF and that of SNCM is far from being inconsistent with the presumption of SNCM's good management, above all because it does not make it at all possible to take into account a not inconsiderable part of the costs of the public service activity which relates to the transport of goods.
- (100) In addition, France states that, in a case like this, it is possible to take the view that the case-law which led to the judgment in *Altmark* (and in particular the *Ferring* case) must be understood as a review only as to the absence of overcompensation. In that respect, the French authorities state that the subsidies granted did not exceed the costs actually borne by SNCM on account of the public service obligations with which it is entrusted, as the Commission pointed out in its decision of 30 October 2001 ⁽⁷⁰⁾.
- (101) Finally, the French authorities maintain that the fact that the *Altmark* case-law applies to the public service agreement of 2002 to 2006 should contribute to dispelling the doubts concerning the applicability of that case-law to the compensation for public service costs relating to the period from 1991 to 2001. According to France, the compensation granted from 1991 to 2001 and from 2002 to 2006 is similar inasmuch as the parameters for defining it, namely onerous public service requirements, the presence of only one undertaking in a position to assume those requirements and a pattern of taking into account operating costs, are identical.
- (102) In conclusion, France takes the view that the existence of public service obligations, in conjunction with the absence of over-compensation in the period 1991 to 2001, confirms that the 4 conditions in *Altmark* are fulfilled.

7.1.1.2. The compatibility of the amount of EUR 53,48 million in the light of Article 86(2) EC

- (103) If the Commission were to conclude that that intervention were State aid within the meaning of Article 87(1) EC, the French authorities submit that the

autonomous and independent measure of the 2002 restructuring plan is compatible in terms of Article 86(2) EC, since that basis of compatibility was not challenged by the Court of First Instance in its judgment in Case T-349/03.

- (104) The French authorities point out that, in this case, the amount in question is a measure which should not be assessed in the light of the guidelines on restructuring aid of 1999 or 2004 and, in particular, should not be taken into account when evaluating the conditions imposed in the 2002 plan. According to France, the 2004 guidelines on restructuring aid (point 68) cannot justify the inclusion of EUR 53,48 million into restructuring aid.
- (105) In that respect, France states that the amount of EUR 53,48 million covering compensation for public service costs for the period 1991 to 2001 is not a measure granted during restructuring, irrespective of whether it relates to the restructuring plan notified in 2002 or its updating, but rather a measure preceding the restructuring plans in question. Moreover, the French authorities submit that a measure designed to offset the costs burdening undertakings on account of their public service obligations is not in the nature of restructuring aid as defined in the guidelines.
- (106) The French authorities submit that, even if that amount was notified in connection with the total cash injection in respect of restructuring aid, the Commission is not bound by the classifications adopted by the Member States and that, on the other hand, it is for the Commission to reclassify a measure, depending on the circumstances, as non-State aid, or, on the contrary, to classify a measure as State aid even though the Member State in question did not present it in that manner.

7.1.2. The balance notified for restructuring aid

- (107) In the light of the foregoing, France takes the view that, if the amount of EUR 53,48 is considered to be free from aid elements or if it is classified as aid compatible with Article 86(2) EC, the amount of aid which must be considered to be restructuring aid under the 2002 notification would amount, not to EUR 76 million, but to EUR 15,81 million.

7.2. Measures subsequent to the 2002 recapitalisation

- (108) France recalls, first, that the seriousness of the industrial action of 2004 to 2005 and the deterioration in the economic and financial situation of SNCM led the State shareholder to launch a procedure for selecting private investors in January 2005 and to implement urgent measures (in particular the sale of Asco and the shareholding in Sud Cargos ⁽⁷¹⁾).

7.2.1. *The negative transfer price of SNCM*

- (109) Pursuant to the relevant Community case-law, the French authorities call upon the Commission to consider that the negative sale price of SNCM of EUR 158 million does not contain any measure which may be classified as aid within the meaning of Article 87(1) EC in so far as the French State acted like a private investor in a market economy.
- (110) First of all, France observes that the final price of EUR 158 million, which is lower than the negative price which the purchasers asked for initially at the time of their audit of SNCM, is the result of a negotiation of transfer of control conducted in connection with an open, transparent and non-discriminatory competitive tendering procedure and, on that ground, does in fact constitute a market price.
- (111) France takes the view that, in so far as that search for a private partner for SNCM was made in an open, transparent and non-discriminatory competitive tendering procedure, at the end of which the best bid was chosen, the sale price is a market price.
- (112) According to the French authorities, the negative sale price of EUR 158 million took place in the most favourable conditions for the State in accordance with Community case-law and the Commission's line of decisions and contains no aid element. France takes the view that that negative price is lower than the liquidation cost which the State would have to bear in the event of the liquidation of the undertaking.
- (113) That is the only conclusion which can be reached irrespective of whether the approach followed is that stemming from the case-law of the Court of Justice of the European Communities (the *Gröditzter* case-law⁽⁷²⁾) or that based on the analysis of the actual liquidation costs of SNCM (the *ABX* decision⁽⁷³⁾).
- (114) As regards the first method, based on the *Gröditzter* case-law, France states that that judgment confirmed the Commission's assessment in its decision of 8 July 1999, to the effect that 'the cost of liquidation comprises only the liquidation value of the asset's⁽⁷⁴⁾.
- (115) In that respect, the reports of CGMF⁽⁷⁵⁾ and Oddo-Hastings⁽⁷⁶⁾ estimate the liquidation value of the assets at a minimum of EUR [...] million on 30 September 2005⁽⁷⁷⁾.
- (116) Accordingly, in so far as the State as the owner and shareholder of a company is responsible for its debts only up to a maximum of the liquidation value of their assets (the *Hytasa* case⁽⁷⁸⁾), France asserts that the liquidation value of the assets of the company estimated at EUR [...] million is considerably higher than the negative sale price of EUR 158 million.
- (117) On the second method, France states that it follows from the Commission decision on the State aid implemented by Belgium for *ABX Logistics*, in which the Commission examined a negative sale price, having, as in this case, the character of a market price, by comparing it to the costs which the State shareholder would actually bear in the event of a voluntary liquidation or compulsory liquidation as assessed by an independent third party. According to France, the Commission recognises in particular in that decision the legality of a certain number of costs which can result from an action 'en comblement de passif' (to make good liabilities) by creditors or from the liquidation for other branches of the group liquidating its subsidiary.
- (118) On the basis of the CGMF and Oddo-Hastings reports cited above, the French authorities submit that the actual costs which the French Republic would have to bear as a shareholder amounted to between EUR [...] and [...] million on 30 September 2005.
- (119) That method takes account, in particular, of the risk that the French State would be called upon 'en comblement de passif' if the court were to consider it to be managing de facto SNCM. The French authorities believe that the risk of an action 'en comblement de passif' cannot be averted, particularly in light of a precedent of the Cour de Cassation (Court of Cassation) in France⁽⁷⁹⁾. Accordingly, in several letters to the Commission, the French authorities submitted that a situation in which a national court orders the State to make good the liabilities of the undertaking which it manages is a scenario which is more than plausible and that it had to be taken into account in calculating the actual cost of a possible liquidation of SNCM.
- (120) On 30 September 2005, the residual value of SNCM's assets (EUR [...] million) was, after payment of preferential debts, EUR [...] million. Other cost elements taken into account under the action 'en comblement de passif' against the State include, inter alia, the costs of termination of the principal operating contracts, the costs related to the cancellation of the lease purchasing conditions of vessels and the payment of unsecured debts, which would lead to a shortfall in assets of EUR [...] million. The French authorities consider that the State would have been ordered to pay between [...] and [...] % of that amount.
- (121) Furthermore, the French authorities take the view that, because of its dependency on SNCM, and in accordance with another French case⁽⁸⁰⁾, the liquidation of the undertaking might have led the court to order the payment of damages to employees. According to that case-law, the French authorities believe that it would be very likely that a court would fix the amount of additional compensation on the basis of the compensation which would be paid under a social plan submitted prior to the liquidation.

- (122) Applying the *Aspocomp* case-law to the present case, France considers that the State would have been called upon to pay additional redundancy payments for a total cost of between EUR [...] and [...] million, which would have led ultimately to a total liquidation cost chargeable to the State of between EUR [...] and [...] million.
- (123) According to that approach, the analysis of actual costs which would have been paid by the State shareholder shows that the cost to the State of the sale of SNCM at a negative price of EUR 158 million is lower than the actual cost which it would have had to bear in the event of the compulsory liquidation of the undertaking.
- (124) In conclusion, the French authorities consider that that amount cannot be classified as State aid.

7.2.2. *The joint capital contribution of the shareholders*

- (125) France takes the view that, through that shareholding, it acted like a well-informed investor because, first, it intervened concurrently as a minority shareholder alongside BCP and VT and, secondly, that shareholding enjoys a fixed capital return of [...] % per year, which exempts the State from exposure in respect of performance of the business plan. France states that that rate of return is very satisfactory for a private investor⁽⁸¹⁾. It states, however, that no payment would be due in the event that SNCM is put into receivership or compulsory liquidation or the cancellation clause is exercised by the purchasers.

7.2.3. *The additional social measures (aid to individuals)*

- (126) France takes the view that, by relying on the Commission's practice in previous decisions, in particular the *SFP – Société française de production* file⁽⁸²⁾, that that financing constitutes aid to individuals which does not benefit the undertaking. Accordingly, the implementation from public funds of additional social measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social policy of the Member States and is not State aid.

7.2.4. *Conclusion*

- (127) If the Commission were, however, to classify part or all of the new measures as State aid, France draws the Commission's attention to the fact that the new measures, by ensuring that SNCM becomes viable again, allows competition to be maintained on the markets in question, in particular the market in services to Corsica. According to France, that aspect is one of the principles of the guidelines in the rescue of an undertaking in difficulty as noted, in the present case, by the Commission (recital 283 of its annulled decision) and by the Court of First Instance in its judgment in Case T-349/03. In particular, the latter pointed out that the

Commission could consider, in exercising its wide discretion, that the presence of an undertaking was necessary to prevent the emergence of an increased oligopolistic structure of the markets in question.

- (128) As regards the determination of any compensatory measures to be imposed on SNCM, France suggests that the Commission take into account the structure of the market. Accordingly, a reduction in SNCM's capacity would be such as to strengthen the position of CFF on the market of services to Corsica as dominant from then on⁽⁸³⁾.
- (129) According to the French authorities, the restructuring plan, as updated, complies with the compatibility criteria set out by the Commission in its 1999 and 2004 guidelines. All of the measures laid down in the context of SNCM's privatisation also serve to restore SNCM's long term viability from the end of 2009 and are restricted to the minimum necessary for that return to viability.

7.3. **The lifting of the restrictions placed by the annulled decision of 2003**

- (130) The French authorities recall, on the one hand, that the conditions imposed by decision of 2003 were all implemented and complied with in the period from 2003 to 2006. On the other hand, the French authorities consider that those measures are no longer necessary to prevent a distortion of competition and that their continuation would be contrary to the principle of proportionality having regard to the limit on the amount of restructuring aid, henceforth reduced to EUR 15,81 million. In particular, the French authorities take the view that it is necessary to lift the conditions which might still apply, namely those relating to the prohibition on modernising SNCM's fleet, the observance of the principle of price leadership in tariff matters and the maintenance of frequency of services.

8. COMMENTS OF INTERESTED PARTIES

8.1. **The decision to initiate the 2002 formal investigation procedure**

8.1.1. *Comments of Corsica Ferries (CFF)*

- (131) Disputing, first, that SNCM is an undertaking in difficulty within the meaning of the guidelines⁽⁸⁴⁾, CFF raises the question whether SNCM can become profitable on the non-subsidised routes. Moreover, CFF notes that, contrary to what is stated in the restructuring plan⁽⁸⁵⁾, services are still operated to Livorno.
- (132) On the subject of cost reduction, CFF regrets that it does not have access to particular parts of the restructuring plan about which its representatives have levelled criticism⁽⁸⁶⁾.

(133) CFF is of the view that the calculation by the French authorities resulting in the sum of EUR 76 million is purely notional⁽⁸⁷⁾ while the capital to debt ratio of 79 % decided upon by the French authorities seems exaggerated⁽⁸⁸⁾. So far as concerns SNCM's shareholdings, CFF notes that some of the subsidiaries are of no relevance to the activities of the shipping company's activities⁽⁸⁹⁾.

(134) CFF concludes that the planned aid circumvents the cabotage regulation and renders the invitation to tender for Marseilles to Corsica services meaningless. CFF emphasises that the planned aid should not result in facilitating a more aggressive commercial bid on the part of SNCM. It suggests that restructuring aid should not be granted until 2007 and only if SNCM loses the next tender in 2006, which would be the only scenario that would genuinely put the public shipping company in difficulty.

8.1.2. *Comments of the Stef-TFE group*⁽⁹⁰⁾

(135) According to the Stef-TFE group, SNCM's shares in CMN should be analysed as purely financial assets. According to the *Stef-TFE* group, CMN and SNCM are independent and in competition with each other on routes other than those from Marseilles, even though both are co-contractors under the public service delegation contract.

(136) The letter states that the Stef-TFE group would undertake 'to buy back all or part, and preferably all, of SNCM's shares in CMN', whose value it estimates at between EUR 15 and 17 million, if the Commission were to take the view, under conditions it might impose in its final decision, that 'such a transfer is necessary to ensure that the restructuring plan is properly balanced'.

8.1.3. *Comments of representatives of local authorities*

(137) The mayor of the city of Marseille, the president of the general council of *Bouches-du-Rhône* and the president of the regional council of *Provence-Alpes-Côte d'Azur* pointed out the economic importance of SNCM's role in the regional economy.

(138) The president of the regional council of *Provence-Alpes-Côte d'Azur* added that the conditions for SNCM's restructuring plan to guarantee viability appear to be satisfied.

(139) The president of the executive council of the Assembly of Corsica submitted a resolution of that assembly of 18 December 2002 at which that assembly issued 'a favourable opinion' regarding SNCM's planned recapitalisation.

8.1.4. *Comments of the Corsica Transport Office*

(140) The Corsica Transport Office (OTC)⁽⁹¹⁾ emphasised that the tender issued for the public service delegation contract had resulted in only one bid being submitted, namely that of the CMN and SNCM group. Wishing to maintain a reliable high-quality service, the Corsican regional and local authorities included in the contract financial mechanisms for compensation or correction linked with the efficiency and reliability of services. Moreover, it noted that the Corsican regional and local authorities took account of supply trends since 1996 in services from ports in mainland France in order to limit the public service obligations to services operated from Marseilles.

(141) The OTC also notes that the disappearance of SNCM 'would immediately lead to a major reduction in services' as it is currently the only company capable of meeting the requirements of the contract with regard to passenger transport. It notes, in addition, the influence of SNCM in the Corsican economy.

8.2. **The decision to extend the procedure of 2006**

8.2.1. *Comments of Corsica Ferries (CFF)*

(142) CFF notes the size of the amounts in question, their disproportionate nature in relation to SNCM's turnover and the fact that they were paid to SNCM before the Commission took a view on classification pursuant to Article 87(1) EC.

(143) CFF draws the Commission's attention to the fact that the French State's support for SNCM is a strategic step in the development of CFF. Those unauthorised measures enable SNCM to have a very aggressive tariff policy on the routes in respect of which CFF has been present for 10 years and on which, for the first time since it was set up, it is losing market share.

(144) CFF takes the view that there are alternatives to the presence of SNCM on all the routes at issue, falling within and outwith the public service delegation, which have various advantages both for SNCM and for competition in general. As regards the public service delegation⁽⁹²⁾, CFF takes the view that SNCM should reduce its services in respect of the routes operated under the public service delegation in order to prevent abuse of its dominant position on that market and avoid new investments and in order to implement a social plan restricted to 120 seasonal positions without having to terminate contracts for an indefinite term, which are more costly. So far as concerns the routes outwith the public service delegation, CFF suggests that SNCM withdraw a seasonal vessel.

8.2.1.1. The 2002 recapitalisation

- (145) In respect of the amount of EUR 53,48 million, CFF wonders whether, there might be double counting in the calculation of the compensation of EUR 787 million authorised by the decision of the Commission in 2001.
- (146) CFF considers that, in spite of the fact that *Altmark* is subsequent to the signing of the public service delegation, the compensation paid pursuant to the latter must be examined in the light of the criteria laid down by that case-law. In that respect, CFF submits that, with the exception of the first criterion, the criteria in *Altmark* are not satisfied.
- (147) In respect of the fourth criterion in *Altmark*, CFF shares the Commission's doubts as to whether SNCM may be regarded as having been a well-run and adequately equipped undertaking. In that regard, CFF draws the Commission's attention to the fact that nearly 50 % of SNCM's losses were concentrated in the years 2000 and 2001, which suggests that SNCM's losses were not attributable exclusively to the public service obligations.
- (148) As for the possibility of assessing that amount in the light of Article 86(2) EC, CFF considers that the Court of First Instance called upon the Commission to make an assessment merely as to the classification of that amount as aid and not as to whether it was justified pursuant to that article. The Commission was required to determine whether that amount was excessive in relation to the additional costs entailed by the public service obligations.

8.2.1.2. Measures subsequent to the 2002 recapitalisation

- (149) In respect of the process of competitive tendering for the transfer of the company, CFF takes the view that it was not fully transparent in so far as the undertaking selected, namely BCP, no longer controls the operations of SNCM, having handed over to the VT group. Furthermore, since the financial conditions had changed to become much more favourable to the purchasers, CFF raise the question of the principle of the equal treatment of investors which ought to have prevailed throughout the transaction.
- (150) As regards the negative transfer price of EUR 158 million, CFF is uncertain whether the criterion of the well-informed investor in a market economy applies to the present case. First, CFF wonders whether the view can be taken that the transaction at issue was managed by the State at the same time as a significant and concurrent action of private operators involved in comparable circumstances, although the State recapitalised the company before the joint recapitalisation of the shareholders and the new restructuring plan. On the other hand, CFF considers that, in the face of the serious financial circumstances of SNCM, a well-informed investor would have acted sooner in order not to have his investment depreciate⁽⁹³⁾.

- (151) CFF takes the view that the reference to the *ABX Logistics* case is irrelevant. Besides the fact that the circumstances of that case cannot be transposed to the present case, SFF notes a significant contribution of the recipient of the aid in that case, which was clearly not the case with SNCM. Furthermore, according to CFF, the decision of the Commission in 2006 did not take account of the costs related to the risk of action by the court in a liquidation of the undertaking concerned. In that respect, CFF submits that the national case-law relied on by France to justify the costs related to SNCM's liquidation do not apply to the present case⁽⁹⁴⁾.
- (152) CFF takes the view that the application of the Community case-law in *Gröditz* and *Hytasa* to the present case can only lead to the conclusion that the State did not act like a private investor in so far as, in terms of that case-law, the capital contribution of the State was related to the sale of 75 % of its holding in SNCM, reducing accordingly the prospects of profit in return.
- (153) Finally, CFF considers that the comparison between the liquidation costs and the recapitalisation costs should take into account the value of the assets, which is, in both cases, transferred to the purchaser. CFF submits that the value of the asset sold to the purchasers varies between EUR 640 million and EUR 755 million⁽⁹⁵⁾, compared to the market value of the fleet used by SNCM which CFF valued at between EUR 644 million and EUR 664 million in August 2006.
- (154) As regards the determination of the measures subsequent to the recapitalisation of 2002 as restructuring aid, CFF is of the opinion that, although SNCM fulfils the conditions of an undertaking in difficulty under the 2004 guidelines in the period preceding the first recapitalisation of EUR 142,5 million, that classification becomes very questionable for the period preceding the second increase of capital of EUR 8,75 million inasmuch as the undertaking's capital was built up again.
- (155) As regards the viability of the undertaking, CFF notes that the sale of SNCM is only partial and is not irrevocable having regard to the cancellation clauses negotiated with the purchasers. Those factors are important elements of uncertainty as regards the will and the ability of the purchasers to turn SNCM around and therefore secure the prospects of the undertaking's long-term viability. Further, CFF states that, unlike what is required by the 2004 guidelines, the French authorities did not contemplate discontinuation of the activities which remained structurally poor even after the restructuring⁽⁹⁶⁾. In addition, CFF expresses its scepticism regarding the plan for reducing costs despite the fleet becoming larger⁽⁹⁷⁾ and the planned reduction of staff in particular in the light of the failure of the 2002 social plan.

(156) CFF is in doubt as to whether the new aid is limited to the minimum on account, first, of a lack of clarity as to what the social costs cover and, secondly, the content of the minutes of SNCM's meeting of 28 April 2006 according to which a part of that aid would be used to cover the operating losses of the company in 2006 and 2007. CFF also considers that the purchasers of SNCM do not contribute substantially to the restructuring of the undertaking.

(157) In order to prevent unwarranted distortions of competition, CFF considers it necessary to renew and specify the compensatory measures imposed on SNCM in 2003 and to add new measures relating to the reduction of SNCM's presence on the market⁽⁹⁸⁾. CFF considers, moreover, that a part of the measures imposed on SNCM by the 2003 decision were not complied with⁽⁹⁹⁾.

(158) Regarding the nature of the second recapitalisation of EUR 8,75 million, CFF takes the view that, in addition to the concurrence of public and private investment, the private action must be significant and carried out in comparable conditions in order that the State action is validated. In the present case, those two conditions are not satisfied. First, the shareholding of the purchasers, closely linked to the first increase of capital of EUR 142,5 million, is not significant. Secondly, the action of the purchasers was not carried out in comparable conditions to those of the state action, in particular by virtue of the cancellation clauses and the expected profitability of the minority shareholdings of CGMF.

(159) As regards the social measures of EUR 38,5 million, CFF disputes the classification of that amount as aid to individuals. Although it true that that amount directly benefits SNCM's employees, CFF submits that that measure could give rise to indirect positive effects for SNCM, in particular in terms of calming of social relations.

8.2.2. Comments of STIM d'Orbigny (Stef-TFE group)

8.2.2.1. The 2002 recapitalisation

(160) STIM submits that through payment of the sum of EUR 53,48 million as public service compensation the State compensated SNCM twice for the same public service obligations. Moreover, STIM takes the view that that payment does not satisfy the criteria laid down in *Altmark*.

(161) As regards, specifically, the second and fourth criteria in *Altmark*, STIM disputes, first, the existence of parameters established in advance in an objective and transparent manner and, secondly, the comparability of SNCM's and CMN's ratios in the period from 1991 to 2001⁽¹⁰⁰⁾ and claims, in that respect, that the information given to the Commission was manifestly biased⁽¹⁰¹⁾.

8.2.2.2. Measures subsequent to the 2002 recapitalisation

(162) As regards the negative disposal price of EUR 158 million, STIM takes the view that that price is not a market price resulting from an open and non-discriminatory competitive tendering procedure because the recapitalisation took place under different conditions from those which must normally guide a private investor. STIM considers that the revalued net ledger assets would allow, in the worst of cases, a liquidation without costs for the State, or even yielding a gain on liquidation, that the sale price is derisory compared to the value of the undertaking (estimated at EUR 350 million by STIM) and that the aid is disproportionate in relation to the undertaking's needs.

(163) STIM also draws the Commission's attention to the exorbitant nature of the cancellation clause in respect of the transfer to the private sector.

(164) Finally, STIM disputes the justification for the negative sale price acclaiming that liquidation took place under socially difficult circumstances, which seems unrealistic.

(165) As regards the second recapitalisation of EUR 8,75 million, STIM considers that that capital contribution does not comply with the principle of the private investor in a market economy having regard to the inadequacy of the guarantees on return on investment. STIM challenges the argument regarding concurrence of private and public investment to deny that that contribution is State aid. Such concurrence, although it is settled, is only an indication and cannot be, in itself, a classification criterion⁽¹⁰²⁾. STIM states, finally, that that contribution is a guarantee given to purchasers by the French Government that SNCM has indeed been awarded the public service delegation to operate services to Corsica.

(166) As regards the EUR 38,5 million of aid to individuals, STIM takes the view that that amount is in fact intended to give SNCM the means to comply with certain essential aspects of the recovery plan submitted to the Commission which have not been implemented, in particular the reduction of staff.

8.2.2.3. Compatibility with the 2004 guidelines

(167) STIM takes the view that the aid received by SNCM is not limited to the minimum. The contribution of STIM and the purchasers to the restructuring plan is insufficient having regard to the conditions imposed in the 2004 guidelines and it is not demonstrated that SNCM's situation was so exceptional that it justified a lower contribution. Furthermore, STIM notes the disproportionate nature of the aid granted in 2006 in so far as it enabled SNCM to set up reserves to cover future losses. Finally, the fact that SNCM did not provide for disposal of the assets which were not essential to the survival of the undertaking is contrary to the requirements laid down by the 2004 guidelines.

- (168) STIM considers that the amounts were paid in breach of the principle of uniqueness established by the 2004 guidelines. The deterioration in the undertaking's financial situation and the social conflicts cannot be analysed as exceptional and unforeseeable circumstances for which the recipient company is not responsible.
- (169) Accordingly, STIM demands additional compensation of half of the aid contributed, namely EUR 98,25 million, through the disposal of an additional vessel and its direct and indirect SNCM holdings in CMN. In that respect, STIM states that those holdings are not strategic as provided in the guidelines on restructuring aid as they are not 'essential to the firm's survival' nor are they inalienable assets.
- (170) STIM also submits that the alleged synergies between SNCM and CMN do not exist inasmuch as SNCM has no real role in the management and development of CMN. STIM states, finally, that the shareholders' agreement linking the two undertakings has not existed since 15 March 2006, when CMN gave notice that it was no longer bound by it, as held by the *Cour d'Appel de Paris*.

8.2.3. *Comments of SNCM*

- (171) SNCM sent the Commission a copy of a file summarising its economic and competitive position, together with legal advice assessing the risk that, in connection with liquidation proceedings, the State intervention would be characterised by the courts as de facto management of the company for the period preceding privatisation.
- (172) Consulted by SNCM, the [...] firm arrived at the conclusion that, on the basis of the company's social documents supplemented by correspondence, speeches and minutes of the auditing bodies, the French State [...] ⁽¹⁰³⁾ ⁽¹⁰⁴⁾ ⁽¹⁰⁵⁾ The report also notes that [...] ⁽¹⁰⁶⁾ Finally, the report refers to [...].
- (173) On that basis, SNCM's expert concludes that it is very likely that the Tribunal de Commerce de Marseille would have characterised the French State as de facto manager.
- (174) Moreover, according to the findings in, inter alia, the reports of the Court of Auditors, the mismanagement attributable to the French State ⁽¹⁰⁷⁾, de facto manager of SNCM, contributed to SNCM's stated shortfall in assets. The loss caused by mismanagement amounted to [...].
- (175) In that context, according to SNCM's expert, there is no doubt that the French State would be ordered to bear all or a part of the shortfall in assets under an action 'en comblement de passif', having regard to the very strong involvement of the State in SNCM's management, its manifest acts of mismanagement and the size of its financial resources.

- (176) On the basis of the relevant case-law, SNCM's expert concludes that, if SNCM had been liquidated, the State would certainly have been ordered to pay all of SNCM's social security debts. That would have resulted in the State shareholder being made liable for an estimated share of between [...] and [...] % of the stated shortfall in assets (namely between EUR [...] and [...] million). Consequently, by deciding to privatise SNCM while strengthening in advance its capital in the sum of EUR 158 million, the French State acted like a well-informed investor.

9. OBSERVATIONS OF FRANCE ON THE COMMENTS OF THE INTERESTED PARTIES

9.1. **Observations of France on the comments of the interested parties concerning the decision to open the 2002 formal investigation procedure**

9.1.1. *The comments of Corsica Ferries*

- (177) The French authorities have indicated that some of the data submitted by CFF concerning SNCM's services were inaccurate.
- (178) The French State is of the opinion that, contrary to what is maintained by CFF, the restructuring plan was devised in such a way as to turn SNCM around as soon as possible and create the right conditions to ensure its medium- and long-term viability. The French authorities note that a significant part of the cost reduction programme has already been implemented ⁽¹⁰⁸⁾. Further, in 2001 SNCM earmarked EUR 21,3 million to finance restructuring measures, in particular the scheme to safeguard jobs.
- (179) In respect of the determination of the amount of the aid, the French authorities confirm that a 0,79 capital/debt ratio is quite typical for the balance sheets of most shipping companies, except in special situations ⁽¹⁰⁹⁾.

9.1.2. *Comments of Stef-TFE*

- (180) The French authorities conclude that the description which Stef-TFE gives of relations between SNCM and CMN in performing the public service contract does not reflect reality.
- (181) According to the French authorities, the decision of SNCM and CMN to enter into a joint venture in which they are jointly and not severally responsible has in no way 'been rendered obligatory by the overall character of the consultation', contrary to Stef-TFE's observations. The decision to set up a SNCM-CMN joint venture was the result of an analysis made by the two companies which showed that the continuation in that form of their original natural partnership gave them the best chances,

in particular in terms of competitiveness, to win the tender. CMN's entry into that venture therefore resulted from a well-considered decision on its part based on an evaluation of its own interests and not on an obligation arising out of the tender as such.

(182) The French authorities explain that, contrary to Stef-TFE's observations, the companies SNCM and CMN are neither independent nor in direct competition. Such a situation would be in conflict with the very principle of the single public service delegation contract to which they are co-signatories.

(183) The French authorities maintain that SNCM's share in CMN's capital cannot be construed as a purely financial asset, as Stef-TFE appears to allege. In conclusion, France's position is that SNCM's shareholdings in CMN are highly strategic in nature. In its opinion, the transfer of those holdings would not only make no sense commercially but would also be tantamount to a major strategic error.

9.1.3. Observations of France on the comments of the representatives of the local authorities

(184) Although France approves as a whole of the content of the letter of the president of the Region of *Provence-Alpes-Côte d'Azur*, it is nonetheless anxious to state that, contrary to what is asserted in point 2 of that letter⁽¹¹⁰⁾, the supply of services between mainland France and Corsica is not 'in excess of demand' and SNCM's fares policy complies with commitments which it made not to start a fares war and not to be a 'price leader'.

9.2. Observations of France on the comments of the interested parties concerning the 2006 decision

(185) In general, France notes that many of the observations of STIM and CFF are identical to those submitted to the Commission in 2003. In particular, they note that CFF's comments were submitted to the Court of First Instance in the action for annulment of the Commission decision of 9 July 2003 and were, for the most part, rejected both by the Commission and the Court.

(186) Concerning the public service delegation for the Marseille-Corsica routes, France challenges any argument that the procedure for the award of the public service delegation agreement was unlawful. Further, according to France, the existence of national procedures before the competent national courts as Community courts of ordinary jurisdiction implies that there is no Community interest for the Commission in examining questions relating to the procedure to award the public service delegation agreement.

9.2.1. The early implementation of the measures laid down in the first restructuring plan and its amendments

(187) The answer of the French authorities to the general remark concerning the early implementation of measures which may be classified as aid by France is that that implementation is justified by the specific features of the procedure, that is to say, the annulment in 2005 of the authorisation decision of the Commission of 9 July 2003, and not by an intention on the part of the French authorities to disregard their obligations under the EC Treaty. Indeed, France states that it has always kept the Commission informed of developments in the matter and with the different measures adopted since January 2005, in accordance with the duty to cooperate in good faith between the Member States and the Commission.

(188) Concerning those recent measures, the French authorities consider that since none of them constitute aid, Article 88(3)EC is not, ultimately, applicable to them and, accordingly, there is no obligation to suspend their application.

9.2.2. The 2002 recapitalisation

(189) First, the French authorities state that they did not cast doubt on the applicability of the *Altmark* judgment while noting, on the other hand, certain difficulties in applying the test laid down by that judgment, since the amount in question preceded it and could not therefore have taken into account those new criteria.

(190) France points out that the EUR 53,48 million in question is part of the EUR 69,3 million declared compatible by the Commission in 2003. The doubts expressed by the Commission in its initiation decision of 2006 do not therefore concern the compatibility of those measures, which are not called into question, as STIM seems to state in its observations, but concern the aid nature of that amount granted as compensation for public service costs.

(191) According to France, the observations of CFF and STIM do not call into question the applicability to the present case of the first and second *Altmark* conditions.

(192) In respect of the third criterion in *Altmark*, the French authorities deny the argument put forward by CFF and STIM that the payment of that sum necessarily results in overcompensation because the Commission authorised, by its decision of 30 October 2001, the payment of EUR 787 million as compensation for public service costs. In that respect, France states that the Commission, in its 2003 decision, stated that those obligations had been undercompensated and that the amount of EUR 53,48 million was justified as public service compensation.

- (193) Regarding the fourth *Altmark* condition, the French authorities submit that, despite the absence of a reference undertaking and thus the impossibility of establishing an overall comparison between SNCM and other undertakings, as noted also by CFF, they endeavoured to provide information serving to make the most exact comparison possible with similar undertakings, that is to say, primarily with CMN. France also challenges the argument raised by STIM and CFF that the structural costs of SNCM are greater than those of CMN. Even if that were to be the case, the French authorities consider that the productivity ratios of SNCM are very similar to those of CMN. In conclusion, SNCM was managed as well as CMN to which STIM at no point refers as a badly-run undertaking.
- (194) France states that the losses suffered between 1991 and 2001 were not attributable only to the public service delegation, as CFF appears to assert, but that the public service obligations prevented SNCM from adapting to the change in the competitive environment. The French authorities also state that those losses are not concentrated in the period 2000 to 2001 but gathered pace over that period on account of the increase in the round trips made by CFF.
- (195) Concerning the compatibility of the EUR 53,48 million paid as compensation for public service costs in accordance with Article 86(2) EC, the French authorities note that, first, in its 2003 decision, the Commission had already declared that amount as compatible with that article and, secondly, the CFI did not call it into question in its judgment in Case T-349/03.
- 9.2.3. *Measures subsequent to the 2002 recapitalisation*
- (196) As regards the sale process, France states that from its outset it provided for classic selection criteria based primarily on the price offered for the increase in value of SNCM's stock and, secondarily, on other criteria (industrial plan, social plan and so on), including the amount which the candidates were prepared to invest in the company for a recapitalisation. France firmly challenges the argument put forward by third parties that the process of putting up for sale was not transparent and notes that, in the present case, the State itself went beyond its legal and statutory obligations, substantial and restrictive as they were, provided for in the event of transfer of public shareholdings. France notes that the development following BCP's offer again to take up 100 % of SNCM's stock occurred in a very difficult financial and social context and that VT's joining BCP's offer did not change the commercial and financial terms of the transaction (except for capital ownership).
- (197) As regards the negative price of EUR 158 million, the French authorities note that, having regard to SNCM's financial situation on 30 September 2005, the undertaking was sold at a market price and that the sale was economically more advantageous than a liquidation of the undertaking. In that respect, the French authorities state that the application of the criterion of the private investor in the event of a transfer of undertaking similar to liquidation must not be regarded in the same way as the search for 'profitability of public action' but as the prevention of greater losses which the shareholder would have to suffer through a more costly liquidation.
- (198) In respect of the price paid, France challenges the argument that SNCM was transferred at a price which did not reflect its actual value⁽¹¹¹⁾.
- (199) The French authorities also refute CFF's argument that the market value of SNCM's fleet was underestimated, which CFF assessed at between EUR 406,5 million and EUR 426,5 million. The French authorities argue that the vessels taken into account in CFF's calculation do not correspond to those held in SNCM's name on 30 September 2005. The absence of discounts applied to the market value of the vessels does not take account of the background in which a potential compulsory liquidation of those assets takes place and, finally, the date chosen to calculate that market value, August 2006, is not the date of potential liquidation of SNCM to which reference must be made, that date being 30 September 2005. However, France notes that, if the calculation proposed by CFF was to be accepted, the negative price would be three times lower than the liquidation value of the assets required by the *Gröditzter* case-law, which would therefore be more favourable than the cases presented to the Commission by the French authorities.
- (200) In response to CFF's argument calling into question the application of the *Gröditzter* case-law by referring to the fact that the capital contribution of the State in SNCM was linked to the sale of 75 % of its holding, reducing in proportion the prospects of profit in return, the French authorities note that the negative sale price of EUR 158 million does correspond to the sale of the entirety of SNCM's capital, followed by a new investment by the State of 25 % giving a return of [...] % per year. Accordingly, France takes the view that the return on investment remains guaranteed by virtue of its shareholding of 25 % in the company in so far as that holding enjoys a guarantee of very high return.
- (201) France also challenges the argument put forward by CFF on the non-application to the present case of the ABX approach, taking as a basis in particular the analysis of the actual liquidation costs of SNCM and the risk that the State could be considered to be liable for the liabilities of the undertaking in an action 'en comblement de passif' as provided for by French insolvency procedures and confirmed by national case-law (judgment of the Court of Appeal of Rouen of 22 March 2005). Although the French authorities consider that their conduct as manager of SNCM cannot be described as being 'wrongful' in that action, they insist that there is a very high risk that an order would be made against the State by a national

- court for the shortfall in SNCM's assets owing to flexible criteria for characterisation of mismanagement as provided for in Article L-651-2 of the Commercial Code and pursuant to the case-law cited above which can be transposed to the present case.
- (202) In respect of the capitalisation of EUR 8,75 million, France notes that, contrary to the contentions of CFF and STIM, that capital contribution does not constitute State aid on account of the concurrence of that investment, the similarity of its subscription conditions and the higher-than-average return obtained by the State via CGMF.
- (203) In particular, the French authorities submit that the principle of equality of investors is not called into question by the existence of cancellation clauses since the latter were laid down in connection with the 100 % sale of SNCM and not with the EUR 35 million recapitalisation which followed it.
- (204) Further, France submits that its investment is much lower than that of the purchasers, since it is only the sum of EUR 8,75 million which must be compared to the investment made by the purchasers (EUR 26,25 million). The first recapitalisation of EUR 142,5 million should be examined only in the course of the comparison with the liquidation price.
- (205) Finally, France challenges STIM's argument that that contribution is a guarantee given to private purchasers that SNCM has indeed been awarded the public service delegation to operate services to Corsica. The French authorities submit that that increase in capital is prudent and irrespective of the undertaking's performance and that the award of the public service delegation to SNCM does not serve to improve the return expected on that investment.
- (206) As regards the EUR 38,5 million of social measures, France repeats the argument that those measures are aid to individuals and that their payment by the State cannot be considered to give an indirect advantage to the undertaking in so far as they are in addition to SNCM's statutory obligations and its obligations in agreements. Moreover, France recalls that those measures do not permit the departure of employees who would remain, in their absence, the responsibility of SNCM.
- (207) Contrary to CFF's argument, the French authorities state that the EUR 38,5 million does not correspond to implementation of reductions in staff provided for in the 2003 social plan because those reductions have, despite the delay, already been implemented. The new social plan is therefore in addition to the first social measures of 2003.
- 9.2.4. *Compatibility with the guidelines*
- (208) France considers that, in the light of the foregoing, the amount of aid to be assessed in the light of the guidelines is EUR 15,81 million.
- (209) Contrary to the contentions of CFF, the French authorities consider that, having regard to point 11 of the 2004 guidelines, the first recapitalisation, although enabling SNCM to build up its capital, did not take away its nature of an undertaking in difficulty in so far as that recapitalisation was intended to ensure the continuation of the company's activities.
- (210) France refutes CFF's contentions that it did not again have to inject money into the undertaking given that SNCM could have had recourse to bank credit. In that regard, the French authorities note that, on 24 August 2005, the banks refused to grant new cash lines to SNCM and that, accordingly, the only alternatives conceivable were privatisation or the liquidation of the undertaking.
- (211) France challenges the arguments put forward by CFF and STIM concerning the failure of the 2002 restructuring plan which, despite some delay, was implemented and made it possible to achieve the objectives in 2005. The deterioration in SNCM's economic and financial situation owing to factors external to the undertaking itself then made necessary the extension of the plan notified in 2002 and the introduction of new measures.
- (212) France takes the view that SNCM has good prospects for recovery and that the measures contemplated by the new shareholders, in particular the implementation of the social plan, the reinstatement of services and the renewal of certain vessels, will enable the undertaking to return to viability. In that regard, France observes that on account of the revenues deriving from the public service delegation (approximately [...] of SNCM's turnover) and in view of the extent of the fixed costs and the difficulties in redeploying the 6 vessels used on the Marseille-Corsica route, the public service delegation constitutes an essential element of the undertaking's strategy and its viability.
- (213) On the limitation of the aid to the minimum, France believes that it limited to the strict minimum the restructuring costs necessary to enable the restructuring to be carried out. To that effect, the French authorities note that, as the Commission recognised in its 2003 decision, the undertaking has itself contributed sufficiently to the restructuring plan from its own resources by virtue of the disposal of assets for the sum of EUR 30,2 million. In addition, having regard to other disposals made by SNCM for the sum of EUR 12,2 million, the total of the undertaking's own contribution comes to EUR 42,4 million. France considers that that amount is much greater than the amount of own contributions necessary to approve the restructuring aid, which finally amounts to EUR 15,81 million, since the other measures are not State aid.

9.2.5. *The conditions imposed by the Commission decision of 2003 and the possible new compensatory measures*

- (214) Contrary to the contentions of STIM and CFF, the French authorities state that they complied with all of the conditions imposed by the 2003 decision, to which they were bound until the end of 2006, in particular the maintenance of the fleet of 11 vessels and the application of lower fares than those of its competitors.
- (215) Indeed, France considers that, under the new final decision, the level of compensatory measures to be imposed on SNCM must be adapted in so far as the amount of restructuring aid was henceforth EUR 15,81 million rather than EUR 69,3 million.
- (216) In that respect, France challenges STIM's observations concerning the possibility that the Commission may require SNCM to sell its shareholding in CMN as a compensatory measure. France challenges STIM's argument that the description of strategic assets was called into question in the 2004 guidelines as opposed to those of 1999.
- (217) As regards measures referred to by CFF intended to reduce SNCM's market presence, the French authorities recall that, as the Commission noted, moreover, in its 2003 decision (recital 87), there is no excess capacity on the markets concerned (France — Corsica — the Maghreb) and that a reconfiguration of services to Corsica under and outwith the public service delegation would jeopardise the viability of the undertaking.
- (218) As for the argument raised by CFF that the implementation of the measures described above in favour of SNCM involves a serious risk of eliminating its main competitor on the mainland France-Corsica market, namely CFF, the French authorities submit that, having regard to the current structure of the market on which CFF is in the majority, the maintenance of a competitive structure depends on the authorisation of SNCM's restructuring plan and the presence of the latter on the market in question.
- (220) The classification of a national measure as State aid as provided for in Article 87(1) EC requires the following cumulative conditions to be fulfilled, namely: (1) the measure in question confers a selective economic advantage; (2) that advantage is financed via State resources; (3) that advantage distorts or threatens to distort competition and, finally, (4) that advantage has an effect on trade between Member States⁽¹¹²⁾.
- (221) The Commission notes that SNCM received State resources totalling EUR 274,54 million via CGMF wholly owned by the French Government.
- (222) Since SNCM operates in the maritime transport sector, open to competition within Europe, the potential economic advantage that it has received is likely to distort competition and to have an effect on trade between Member States.
- (223) The fact that the cabotage market to the Mediterranean islands was, until 1 January 1999, temporarily exempt from the application of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)⁽¹¹³⁾ does not exclude prima facie that subsidies granted for operating cabotage routes to the Mediterranean islands under a public service delegation could have an effect on trade between Member States and distort competition.
- (224) In any event, even if subsidies granted for operating cabotage routes could not have an effect on trade between Member States or entail distortions in competition before 1 January 1999, the situation changed after that date since, in accordance with Regulation (EEC) No 3577/92, cabotage activities were from then on open to all Community operators. In addition, it should be stated that SNCM does not carry on only cabotage transport but also operates on the international maritime market, which was liberalised by Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries⁽¹¹⁴⁾.

10. ASSESSMENT OF THE MEASURES

- (219) Article 87(1) of the EC Treaty provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.
- (225) Accordingly, the Commission considers in the present case that the last three criteria of Article 87(1) EC cited in paragraph 220 of this decision are fulfilled. The following sections examine in turn, in respect of each measure, the existence of a selective economic advantage and, where applicable, compatibility with the common market of measures classified as State aid.

10.1. The capital contribution of EUR 53,48 million for public service compensation

- (226) Although in its decision of 2003 the Commission recognised the public service compensation nature of a part of the EUR 76 million, namely EUR 53,48 million, for operating services to Corsica between 1991 and 2001, the Commission had assessed the capital contribution in its entirety, namely EUR 76 million, in terms of restructuring aid in so far as that amount had been notified by the French authorities for that purpose. In its judgment in Case T-349/03 annulling the Commission decision of 2003, the Community judicature called on the Commission to examine the sum of EUR 53,48 million in the light of the its judgment in the *Altmark* case.
- (227) Moreover, the French authorities requested the Commission to consider that, by virtue of its 'public service compensation' nature, a part of the 2002 restructuring aid does not constitute aid in the light of the *Altmark* case-law.
- (228) Since the French authorities relied on the application to the present case of the *Altmark* case-law and, in some circumstances, the derogation provided for in Article 86(2) EC, the Commission is required to make a ruling in that respect as those arguments have decisive importance in France's reasoning ⁽¹¹⁵⁾.

10.1.1. Introductory remarks

Applicability of the *Altmark* case-law to the present case

- (229) First of all, the Commission notes that, despite the fact that the ruling in *Altmark* is subsequent to the implementation of the abovementioned measure, the criteria laid down by the Community judicature in that case are applicable to the present case.
- (230) As recently pointed out by the Court of First Instance ⁽¹¹⁶⁾, the Court of Justice did not impose temporal limits on the scope of the statements made

in the judgment in *Altmark*. In the absence of such temporal limits, those statements following from Article 87(1) EC are therefore fully applicable to the factual and legal situation of the present case.

Determination of the amount of compensation received for public service

- (231) It should be noted, first of all, that SNCM suffered substantial deficits between 1991 and 2001 on all services to Corsica subject to the public service obligation, despite State subsidies authorised by the Commission decision of 2001 ⁽¹¹⁷⁾. The Commission found in paragraph 105 of that decision that the cumulative loss before tax for the period 1991-1999 for operating services to Corsica ⁽¹¹⁸⁾, as calculated in the report of the expert appointed by the Commission, and including the subsidies received, amounted to FRF 217 million, namely EUR 33,08 million.
- (232) So far as concerns 2000 and 2001 ⁽¹¹⁹⁾, the Commission has adopted the same approach as the abovementioned expert report and has recalculated, on the basis of the analytical profit-and-loss account supplied, the result before tax, removing provisions for restructuring already included in the restructuring costs as notified. Moreover, the Commission has been able to verify that, according to the company's annual accounts, there was no disposal of vessels during the two years in question.
- (233) The Commission takes the view that the loss in 2002 on the Marseilles-Corsica services cannot be accepted in view of the fact that, since 1 January 2002, the operating rates for services to Corsica from Marseilles and the amounts of financial compensation have been agreed between the public authorities and SNCM on a contractual basis, contrary to the practice followed for the 1991 and 1996 agreements.
- (234) Accordingly, in accordance with the approach and the grounds for the 2001 decision, the Commission has reached the following conclusions:

Table 3

Analytical profit-and-loss account for 1991-2001

Corsica network	2001		2000		1991-1999 ⁽¹⁾		Total 1991-2001	
	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR
Result before tax	- 302,575	- 46,127	- 40,256	- 6,137	- 216,98	- 33,078	- 559,811	- 85,343
Allocation to provision/depreciation Liamone ⁽²⁾	96,895	14,771	0,000	0,000	0,000	0,000	96,895	14,771
Allocation to provision/Social plan	112,110	17,091	0,000	0,000	0,000	0,000	112,110	17,091

Corsica network	2001		2000		1991-1999 ⁽¹⁾		Total 1991-2001	
	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR
Correction appreciation on vessels	0,000	0,000	0,000	0,000	182,100	27,761	182,100	27,761
Result before tax excluding appreciation and restructuring	- 93,571	- 14,265	- 40,256	- 6,137	- 216,980	- 33,078	- 350,807	- 53,480

⁽¹⁾ Data taken from Decision 2002/149/EC.

⁽²⁾ A provision of EUR 14,8 million was set up in 2001 for the high-speed vessel *Liamone*. It concerns reduction of the annual charge of the vessel to the level of a vessel adapted to new restrictions imposed on that route and financed under the same conditions. That provision was set up pursuant to accounting rules on the basis of which an undertaking may adjust its balance sheet by formally noting an exceptional depreciation provided that it states that one of its assets has an actual or market value lower than its accounting value.

- (235) In total, the cumulative loss recorded by SNCM on Marseille-Corsica services in addition to State subsidies authorised by the 2001 decision and adjusted by the capital gains on the vessels sold during that period and restructuring costs, amounts to EUR 53,48 million for the whole of the period 1991-2001.
- (236) In the light of the foregoing, the Commission takes the view that, of the EUR 76 million capital contribution notified in 2002 ⁽¹²⁰⁾, EUR 53,48 million may be evaluated as public service compensation.
- 10.1.2. *Existence of an economic advantage in the light of the Altmark case-law*
- (237) According to the Court of Justice, in so far as a State measure is to be regarded as compensation for the services provided by the recipient undertaking in order to discharge public service obligations, so that that undertaking does not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) EC.
- (238) However, in order for such compensation to escape classification as State aid, a certain number of cumulative conditions must be fulfilled (see footnote 67 of this decision).
- (239) As regards, in particular, the fourth criterion identified by the Court of Justice in *Altmark*, it must be stated that SNCM was not chosen following a public procurement procedure serving to select the candidate able to provide the services at the lowest cost for the authority.
- (240) In the absence of a public procurement procedure, the Commission considers that it is for the Member State to show that the level of compensation paid to SNCM does not exceed the costs incurred by an average well-run and adequately equipped undertaking, taking into account the relevant revenues and a reasonable profit for discharging the obligations, in accordance with the case-law of the Court.
- (241) In the present case, the French authorities themselves recognise in their records of 16 November 2006 that it is impossible in practice to find an undertaking which might serve as a reference point for that period of 1991-2001 because of the public service obligations of SNCM, which is the only undertaking able to take on those obligations. In those circumstances, the French authorities endeavoured to provide information serving to make the most exact comparison possible with similar undertakings, that is to say, primarily with CMN, stating, however, that those two undertakings did not have the same operating conditions as those imposed on SNCM by public service obligation agreements between 1991 and 2001.
- (242) In that regard, the Commission takes the view that, in the light of the arguments of the French authorities, the latter did not demonstrate in what respect the undertakings they judged to be similar constituted the reference point as required by Community case-law. In that context, the Commission notes that the information sent by France regarding undertakings does not make it possible to assess the degree of similarity relied on or to analyse the impact of the differences in operating conditions claimed in the comparison which should be made for the purposes of applying the fourth criterion above.
- (243) In those circumstances, the Commission considers that, on the basis of the information and data sent by the French authorities in the present proceedings, the latter still fail to prove that the fourth criterion in *Altmark* is fulfilled.

(244) Having regard to the foregoing arguments, the Commission takes the view that the measure in question gave SNCM an economic advantage. Given that the measure only benefited SNCM, that economic advantage was selective. Consequently, the compensation granted to SNCM under the 1991 and 1996 agreements for the sum of EUR 53,48 million constitutes State aid within the meaning of Article 87(1) EC.

10.1.3. *Compatibility with the common market of the measure in question pursuant to Article 86(2) EC*

(245) Since the French authorities have relied on the derogation provided for in Article 86(2) EC, the Commission will use the same approach and the same grounds as those of the 2001 decision in order to assess the measure in question.

(246) Under that article, the payment of State aid may escape the prohibition laid down in Article 87 of the EC Treaty provided that the sole purpose of the aid in question is to offset the extra costs incurred in performing the particular task assigned to an undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium.

(247) In the light of the case-law applicable to the 1991-2001 period⁽¹²¹⁾, the Commission must, as it did in its 2001 decision:

— verify whether the services whose management has been entrusted to SNCM can be qualified as a service of general economic interest, and

— examine whether the amount of the subsidies awarded to SNCM in the context of its public service obligations for maritime services to Corsica matches the excess costs borne by SNCM to satisfy the fundamental requirements of the public service contract.

Public service justification

(248) In the present case, in respect of the compensation paid over the period 1991–2001, as stated by the Commission in its 2001 decision, the public service obligations imposed on SNCM and CMN stem from two five-year agreements signed by the latter and the Corsica Transport Office (OTC). Those agreements, of which the legal basis is the 1976-2001 framework

agreement, specified the ways in which the public service was to be performed for the 1991-1996 and 1996-2001 periods. They also laid down the principles governing the payment of the lump-sum subsidy from the budget for territorial continuity in return for the obligations imposed.

(249) As for whether those obligations meet a real need for public service, the Commission stated in its 2001 decision that the framework agreement and the five-year agreements comply with the territorial continuity principle which aims to limit the drawbacks of insularity and ensure that Corsica is served in ways as close as possible to purely mainland connections. The Commission also notes that historically that objective, which is of legitimate public interest, has not been achieved through the interplay of market forces alone⁽¹²²⁾.

(250) The Commission therefore is of the opinion that the service system provided for by the framework agreement and the five-year agreements meets a real need for a public service.

The non-lump-sum character of the subsidy

(251) As the Commission stated in its 2001 decision, SNCM received over the 1991-2001 period under the legal framework described above an annual subsidy from the State, the amount of which is fixed for five years and is revised every year according to the changes in gross domestic product at market prices and the information and analytical accounts provided by SNCM.

(252) In paragraph 30 of its 2001 decision, the Commission notes the fact that 'under the terms of Article 4 of the 1976 agreement⁽¹²³⁾, the annual subsidy is awarded in the form of 12 equal monthly instalments. For the subsidy to be paid over, SNCM must submit its results for the previous financial year approved by the State financial officer. Any repayments owed by SNCM are deducted from the instalment or the instalments of the current financial year. The arrangements for adjusting instalments also provide for additional payments to be made by the State. Subsequent agreements also provide for penalties if the basic number of crossings that have not been made by SNCM in the course of the year exceeds 2 % of the basic number of crossings provided for in the agreement. The awarding authority may also notify SNCM that it is withholding the lump-sum payment for territorial continuity in the case of significant incidents causing the interruption of the public service.'

(253) In recital 82 of that decision, the Commission states that the second part of clause IV stipulates that 'should economic conditions and, in particular, operational costs and traffic levels that have served as the basis for calculating the subsidy deteriorate substantially, SNCM and the OTC will get together to study the measures to be implemented regarding the service, fares or raising of the amount of the award in order to re-establish the financial equilibrium of the company'.

(254) In the light of the foregoing, and as it concluded in its 2001 decision, the Commission is of the opinion that the compensation of EUR 53,48 million paid by the State is not a lump sum because of the mechanism serving to offset the financial imbalance which is connected to the disparity between the actual operational costs and the costs which served as the basis for calculating the subsidy.

Matching of the compensation to the public service costs

(255) As noted by the Commission in its decision of 2001⁽¹²⁴⁾, the financial compensation received at the time of the application of the five-year agreements of 1991 and 1996 did not enable SNCM to make good fully the losses related to its public service obligations. The Commission estimated that that undercompensation amounted to EUR 53,48 million.

(256) The Commission concludes that the sum of EUR 53,48 million paid by the State is equal to the undercompensation noted for the 1991-2001 period and is consequently appropriate in the light of the net costs caused by the public service task entrusted to SNCM.

10.1.4. Conclusion

(257) On the basis of the foregoing, the Commission takes the view that the measure in question constitutes State aid which is compatible with the common market in accordance with Article 86(2) EC. Since the measure was implemented on 14 November 2003, the Commission finds that that State aid was unlawful.

(258) In that respect, the amount of aid to be regarded as restructuring aid under the 2002 notification amounts to EUR 22,52 million⁽¹²⁵⁾. That amount must be added to the measures notified in 2006 in so far as the latter include restructuring aid (see section 10.5 of the present decision).

10.2. The disposal of SNCM at a negative sale price of EUR 158 million

(259) In the present case, the Commission must examine whether the capital contribution of the State of EUR

158 million prior to the sale of SNCM to private purchasers, that is to say ultimately the negative sale price of the undertaking for an equivalent amount, does not contain aid elements.

(260) An open, transparent and non-discriminatory public selection procedure at the end of which the State disposes of the undertaking after a prior recapitalisation (for an amount greater than the sale price) does not necessarily exclude the presence of aid, capable of benefiting both the privatised undertaking and the purchaser of that undertaking⁽¹²⁶⁾.

10.2.1. Legal framework

(261) In order to determine whether an undertaking has obtained an economic advantage from a capital contribution from the State, the Commission generally applies the criterion of the private investor in a market economy principle (the private investor principle). The private investor criterion comes from the principle of equal treatment between the public and private sectors which follows from Article 295 of the EC Treaty. According to that principle, the capital made available to the undertaking, directly or indirectly, in circumstances which correspond to normal market conditions, cannot be classified as State aid⁽¹²⁷⁾.

(262) To that end, the Commission may assess, inter alia, whether the supplier of the resources has acted like a private investor pursuing structural, global or sectoral policies and influenced by prospects of long-term profitability. The validity of that approach has been recognised by the Community judicature in several cases⁽¹²⁸⁾.

(263) According to settled case-law, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital constitutes State aid⁽¹²⁹⁾.

(264) The Community judicature have also laid down that a private investor pursuing a structural policy, whether general or sectoral, and guided by prospects of viability in the long term could not reasonably allow itself, after years of continuous losses, to make a contribution of capital which, in economic terms, proves to be not only costlier than selling the assets, but is moreover linked to the sale of the undertaking, which removes any hope of profit, even in the longer term⁽¹³⁰⁾.

(265) Specifically, in its *Gröditz* judgment, the Court held that, in order to establish whether the privatisation of an undertaking for a negative sale price involves elements of State aid, 'it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up'⁽¹³¹⁾.

10.2.2. Application to the present case

(266) In the light of the foregoing, in order to determine the aid nature of the measure in question, the Commission must 'assess whether the solution chosen by the State is, both in absolute terms and compared with any other solution including that of non-intervention, the least costly, which would lead, if that were the case, to the conclusion that the State has acted like a private investor' ⁽¹³²⁾.

10.2.2.1. Observance of the principle of the private shareholder in a market economy

(267) In that context, it must be noted that large groups of undertakings currently cannot, when they close sites or wind up subsidiaries, disregard the social consequences which such closures or liquidations involve.

(268) Accordingly, more often than not they carry out social plans which may include measures for the redeployment of staff, assistance in finding work, redundancy payments and even action at the local economic level, which go beyond the requirements of statutory provisions and collective agreements.

(269) In the present case, the Commission notes that SNCM is a company controlled by the State through CGMF (*Compagnie Maritime Générale et Financière*).

(270) The Commission takes the view that, in the event of SNCM's liquidation ⁽¹³³⁾, such measures would have been introduced which exceeded any statutory obligations with the aim of avoiding harming the brand image of the holding company to which it belongs and its ultimate shareholder ⁽¹³⁴⁾.

(271) The Commission notes that the spectre of the liquidation of the undertaking in 2004 gave rise to major incidents of social unrest. The violent social unrest of September 2004, for example, brought SNCM's fleet to a standstill for 16 days. The Commission adds that the French authorities provided figures to show that the industrial action of 2004, by tarnishing the brand image of the holding company with customers, was considerably detrimental to the number of passengers transported by SNCM and therefore to the undertaking's turnover. The Commission points out, moreover, that as a result of the adverse effect of the social climate in the summer of 2004 on SNCM's financial situation, the shareholder of the undertaking implemented a social plan in spring 2005 which was suspended in April 2005, in consultation with the unions. On the basis of the foregoing, the Commission takes the view that it has been established that, in the event of a liquidation of SNCM, the CGMF group's failure to take responsibility for the additional redundancy payments would certainly damage the

brand image of the holding company to which it belongs and its ultimate shareholder.

(272) Therefore the Commission is of the view that the costs associated with those measures must be included in the calculation of the costs of a liquidation. Those costs would then be charged to the liquidation value of SNCM in so far as that value were positive and/or paid directly by CGMF/the State as shareholder. The Commission considers that any other solution would overlook the social reality which large groups of undertakings face ⁽¹³⁵⁾.

(273) To quantify the cost to the shareholder of liquidation, the Commission accepts a minimum amount corresponding only to the additional redundancy payments.

(274) In that respect, the French authorities consider that, on the basis of the 2005 social plan, itself based on the 2002 social plan, the range should be from EUR [...] to [...] per employee, that is, a total amount of between EUR [...] million and [...] million. The French authorities state that the low limits of the abovementioned range take account of the fact that the cost of the reference social plan is increased because of the very large proportion of employees approaching retirement age who leave under particularly advantageous conditions. In addition, account is also taken of the fact that the background of liquidation of the undertaking and redundancy of all the staff is not comparable to that of an adjustment in staff numbers enabling continuation of activities as is the case with the reference social plan.

(275) The Commission expert carried out a comparative analysis of the figures put forward by the French authorities with social plans implemented in France recently. Hewlett Packard's social plan in 2003 cost EUR 214 000 per person and in 2005 between EUR 50 000 and EUR 400 000. In 2004, the social plan set up by Pechiney, after the merger with Alcan, cost EUR 128 000 per person. For the social plan of Giat Industries in 2004, the total cost per employee was in the region of EUR 162 000 as against EUR 71 000 for Gemplus in 2002 and EUR 69 000 for Danone (biscuits division) in 2001. In 2002, Yves Saint Laurent Haute Couture announced a social plan costing EUR 115 000 per employee. The Power 8 plan announced by Airbus France in February 2007 forecast a cost of EUR 68 000 per employee ⁽¹³⁶⁾. In 2008, Michelin's social plan amounted to EUR 157 400 per employee.

(276) As regards dockers, the Commission states that the French Court of Auditors, in its July 2006 public-domain subject report 'French ports faced with changes on maritime transport: the urgency of action' notes the total cost per person of the 2004 social plan, namely EUR 145 000 per departure to autonomous ports and EUR 209 000 per departure from the port of Marseille.

(277) The Commission notes that its decision of 17 July 2002 concerning the *Société Française de Production* illustrates the cost of generosity in the case of privatisation of an undertaking in difficulty. Accordingly, the cost to the State of generosity was EUR 43,1 million (that is, EUR 151 000 per employee under the plan providing for the departure of 285 employees) in addition to the cost of EUR 5,3 million in legal obligations and obligations in agreements (that is, in total a cost of EUR 169 000 per employee).

(278) In the light of that comparative analysis, the Commission considers the payment of EUR [...] to each employee by way of additional redundancy payments is consistent with the cost per employee laid off under social plans implemented by private shareholders in the same period.

(279) Finally, the Commission considers that a situation in which all of SNCM's staff are laid off in a liquidation of the undertaking is the most probable situation, in particular because the grant for the public service delegation for the 2007-2013 period had not yet been covered by a call for tenders and, thus, by a final decision. Furthermore, in the light of SNCM's worrying financial situation, it is unlikely that a plan for continued operation had been drawn up so that the undertaking would be put into receivership and redundancies avoided.

(280) In the light of the foregoing elements, the Commission finds a total amount of EUR [...] million which CGMF (the State) had to use for additional redundancy payments.

(281) At this stage in the analysis, the Commission must determine the value of the liquidation of SNCM apart from additional redundancy payments. It is in fact the difference between that liquidation value, to the extent that it is positive, and the additional redundancy payments which must be compared to the negative price resulting from the sale in order to verify whether the State acted as a private investor in a market economy. In order to do that, the Commission took as a basis the calculation of the revalued net assets. According to the revalued net asset method, an asset shortfall is determined when the economic value of the actual assets (generally higher than the net ledger assets) does not cover the economic value of the actual debts.

(282) In order to determine an asset shortfall in the present case the Commission, with the assistance of its

expert⁽¹³⁷⁾, verified as explained above that on 30 September 2005 the value of SNCM's assets was not sufficient to pay off preferential and non-preferential creditors (including employees as classic debts).

Choice of valuation methodology

(283) The Commission takes the view that the valuation of net assets is a method currently used to value companies in the maritime transport sector. It considers, in addition, that that method is particularly appropriate in SNCM's case since the reference shareholder's only alternative to the sale is to put the company into voluntary liquidation.

(284) As regards other valuation methods, in particular the present value method of unrestricted operating cash flows, the Commission considers that, having regard to the fact that that method presupposes that the company are continues to operate, which is not the case with SNCM, it is irrelevant to the present case.

The reference date

(285) The Commission chose the 30 September 2005 date as the reference date for the valuation of SNCM given that that was the date on which the choice between the acceptance of the takeover offer or the liquidation of the company was actually made, the selection of BCP having been decided on 27 September 2005.

The value of SNCM's assets

(286) The Commission observes in particular that SNCM's shareholder, in collaboration with Ernst & Young, carried out a quantification of the cost of liquidation of the undertaking (the CGMF report cited above) on 30 September 2005 to which supplementary expert opinions were given by Oddo Corporate Finance and the firm Paul Hastings. The Commission notes that the Oddo-Hastings report cited above valued SNCM's assets at EUR [...] million.

(287) As regards the valuation of the fleet held in its name⁽¹³⁸⁾, the gross market value of SNCM's vessels had been valued at EUR [...] million on 30 September 2005 by the specialist broker BRS, but the Oddo report valued SNCM's fleet at EUR [...] million after discount⁽¹³⁹⁾, brokerage commission⁽¹⁴⁰⁾ and legal uncertainty⁽¹⁴¹⁾.

Table 4

Scenarios for valuation of the assets of SNCM on 30 September 2005

(EUR million)

	Value of asset Oddo report	Value of asset Commission expert
Intangible asset	—	—
Property, Plant and Equipment		
— Fleet held in own name	[...]	[...]
— Buildings ⁽¹⁾	[...]	[...]
Investments ⁽²⁾	[...]	[...]
<i>Fixed assets</i>	[...]	[...]
Inventories	—	—
Advances and payments on account	—	—
Debtors clients	[...]	[...]
Other debtors ⁽³⁾	[...]	[...]
Net cash	[...]	—
Prepayments and accrued income	—	—
Other assets	[...]	[...]
Total Assets	[...]	[...]

⁽¹⁾ So far as concerns buildings (including SNCM's seat) the French authorities state that the liquidation value chosen is based on the valuation of a buildings expert of November 2003 updated by + [...] % to take account of the increase in prices.

⁽²⁾ Investments concern, essentially, SNCM's investments in Sudcargos, Aliso, CGTH, CMN and Ferrytour.

⁽³⁾ That item concerns, essentially, accounts receivable from the State, inter alia, compensation for public service obligations in September 2005 and reimbursement of employers' social charges by Assedic for the 2004 financial year.

Sources: Oddo-Hastings report, report of the Commission expert.

(288) From the table above it is clear to the Commission that the fleet of vessels constitutes the main element in the valuation of the undertaking. In that respect, the Commission expert considered, having carried out, where possible, a comparative analysis, that the discount applied to the gross market value of the vessels and the legal uncertainty were consistent. On that basis, it concluded that there were no arguments to reject the assessment of the value of the fleet drawn up by the French State.

(289) As regards the discount, the Commission is of the opinion that its level is consistent with the discounts observed in sales of vessels in the event of compulsory liquidation. According to the Commission expert, the Régie des Transports Maritimes, a national Belgian company operating the Ostend-Ramsgate route, for example, sold two car ferries in 1997 with discounts estimated at 35 % to 45 %. More recently, the company Festival Cruises disposed of three cruise vessels at an average discount of 20 %. The discounts observed in

similar cases are therefore in the region of the discounts applied by the French authorities in this case.

(290) Concerning the legal uncertainty, since no comparable transaction has taken place on the market, the Commission considers that the arguments justifying the application of legal uncertainty are consistent with the narrowness of the market for vessels of a certain type designed for a fairly specific use.

(291) The Commission notes, in addition, that its independent expert revised upwards the valuation of the investments, in particular that of the SNCM's holding in CMN (of EUR [...] million to EUR [...] million). In that respect, having regard to the offer to buy out that holding by *Stef-TFE* at EUR [...] million sent to the Commission in the present investigation, the Commission considers that the valuation of SNCM's holding in CMN of EUR [...] million is reasonable in the context of a company liquidation.

- (292) As regards the valuation of the other items of assets, the Commission expert did not raise any specific objection. It did not, however, accept the item 'net cash', since that item was in deficit. The Commission takes the view that in fact that item should be reclassified under SNCM's liabilities.
- (293) Having regard to the adjustments made, the Commission values SNCM's assets at EUR [...] million on 30 September 2005.
- The valuation of SNCM's liabilities
- (294) The Commission notes that the French authorities quantify the amount owed as preferential debts at EUR [...] million and at EUR [...] million the amount owed under non-preferential debts (apart from additional redundancy payments).
- (295) As regards, in particular, social liabilities, the French authorities value the cost of the social plan under collective agreement at EUR [...] million. The costs relating to the social plan were determined on an individual basis taking into account the type of contract (contract for an indefinite term and fixed-term contract), applicable staff regulations and collective agreements (seagoing staff, office staff and staff captain), seniority, rank and pay of each employee. That amount covers notice payments (EUR [...] million), payments for leave taken with notice (EUR [...] million), contractual redundancy payments (EUR [...] million) and the Delalande contribution (EUR [...] million) ⁽¹⁴²⁾.
- (296) The cost of the social plan not covered by the agreement is assessed by the French authorities at EUR [...] million. That social plan groups together all the accompanying measures related to SNCM's legal and statutory obligations in redundancy matters ⁽¹⁴³⁾ and the indirect costs related to the social plan under collective agreement ⁽¹⁴⁴⁾.
- (297) The cost of termination of the principal operating contracts concerns, essentially, the calling of the bank guarantee of EUR [...] million given to guarantee the proper performance by SNCM of its public service obligations, to which is added the penalty provided for by that agreement, equal to [...] % of the reference financial compensation of EUR [...] million for 2005, that is approximately EUR [...] million in the event of fault of the delegatee.
- (298) So far as concerns the net liabilities related to the sale of the leased vessels ⁽¹⁴⁵⁾, the French authorities state that, on the basis of certain assumptions ⁽¹⁴⁶⁾, the net sale proceeds are valued, by the specialist broker BRS, at EUR [...] million on 30 September 2005 after discount, brokerage commission and financial cost of portage. Since the savings on tax and bank debts amount to EUR [...] million, there remains a balance of bank debts relating to the leased vessels to be reimbursed of EUR [...] million.

Table 5

Scenarios for valuation of the liabilities of SNCM on 30 September 2005

(EUR million)

	Value of liabilities Odo report	Value of liabilities Commission expert
Preferential debts including:		
— Social and tax debts	[...]	[...]
— Financial debts guaranteed by assets ⁽¹⁾	[...]	[...]
Cost of social plan under a collective agreement	[...]	[...]
Cost of retired employees mutual benefit society ⁽²⁾	[...]	[...]
Cost of liquidation process	[...]	[...]
Interim operating losses ⁽³⁾	[...]	[...]
Paying off of preferential creditors	[...]	[...]
Unsecured debts ⁽⁴⁾	[...]	[...]
Cost of social plan not covered by a collective agreement	[...]	[...]
Cost of termination of principal operating contracts	[...]	[...]

(EUR million)

	Value of liabilities Odco report	Value of liabilities Commission expert
Additional cost related to disposal of leased vessels	[...]	[...]
Paying off of non-preferential creditors	[...]	[...]

(1) The vessels Napoléon Bonaparte and Paglia Orba guarantee the amount of naval loans which were used to finance them.

(2) That item falls under the practice according to which SNCM undertakes to be responsible for a part of the costs of the additional mutual benefit society in favour of its retired employees.

(3) Up to the closing of the liquidation. The interim losses take as an underlying basis the payment of salaries for one month only. They also include the cost of laying up vessels held in its name, not deducted from the value of the assets. That cost corresponds to the cost of immobilising vessels in dock awaiting their sale.

(4) Unsecured debts are broken down as follows: Provision for risk and charges (EUR [...] million), apportioned debts/participations (EUR [...] million), trading suppliers (EUR [...] million), general representation (EUR [...] million), group and associated debts (EUR [...] million), liabilities adjustment account (EUR [...] million).

Sources: Odco-Hastings report, report of the Commission expert.

(299) The Commission notes that social liabilities constitute the main element of SNCM's liabilities. As regards the preferential social liabilities, that is to say the cost of the social plan, the Commission expert verified the formulae for calculating all the components of the plan on the basis of surveys and did not find any anomalies or errors. Having regard to that verification, the Commission considers the amount of EUR [...] million put forward by the French authorities for the social plan under a collective agreement to be reasonable.

(300) In respect of the interim operating losses, the Commission considers that the estimate is cautious in the light of the legislation, in particular Articles L.622-10 of the Commerce Code and 119-2 of Decree No 85-1388 of 27 December 1985 pursuant to which SNCM may be obliged by the Commercial Court having jurisdiction to continue its operations for a term of two months, renewable at the request of the prosecuting authority on account of its public service obligations.

(301) So far as concerns the unsecured debts, the Commission expert did not raise any particular objection. However, it adjusted the amount of EUR [...] million from the amount of EUR [...] million resulting from a recalculation of the assets item 'net cash'. The Commission considers that to be in line with the changes made to the valuation of SNCM's assets.

(302) In respect of the cost of the social plan not covered by a collective agreement (apart from additional redundancy payments), the Commission expert considers that the assessment of the cost of the legal proceedings should be reduced to EUR [...] million instead of the EUR [...] million given by the French authorities. On that point, although the Commission is of the view that it is certain that trades union organisations asked for the fixed-term contracts to be reclassified as contracts for

an indefinite term⁽¹⁴⁷⁾, it considers, on the other hand, that the figure must relate only to employees with a fixed-term contract for whom that risk is almost definite (namely, [...] fixed-term contracts). Given a gross monthly salary of EUR [...] with an allowance of 9 months' salary for the first [...] fixed-term contracts and 6 months for the next [...] contracts, the amount comes to EUR [...] million.

(303) So far as concerns the net liabilities related to the disposal of the leased vessels, the Commission considers that the assumptions underpinning that calculation are justified in particular because of GIE's excessive regard for contractual formalities, which restricts any substitution of SNCM by third parties and makes tax relief subject to the operation of vessels under the French flag. In addition, it is also justified not to apply legal uncertainty to vessels operated under leasing agreements because those vessels were disposed of by the GIE's creditor banks. Against that background, the Commission takes the view that it is reasonable to take into account the financial costs of portage between 30 September 2005 and the date of actual disposal of the vessel.

(304) In the light of the foregoing, the Commission is of the opinion that on 30 September 2005 SNCM's preferential liabilities were EUR [...] million and SNCM's non-preferential liabilities EUR [...] million.

The finding of a shortfall in assets

(305) In the light of the foregoing, the Commission considers that on 30 September 2005 the value of SNCM's assets (namely, EUR [...] million) was insufficient to pay off preferential creditors (EUR [...] million) and non-preferential creditors (EUR [...] million).

Conclusion

(306) In the circumstances, in the absence of an action 'en comblement de passif' (see below), and having regard to recital 273 of this decision and the shortfall in assets, the cost of a liquidation of SNCM by CGMF is limited to the costs of additional redundancy payments, that is, EUR [...] million.

(307) It follows that the choice made by the French authorities to dispose of SNCM at the negative price of EUR 158 million compared to the minimum liquidation cost of EUR [...] million may be considered to be consistent with the choice which a private group of undertakings in a market economy would have made.

10.2.2.2. Consequences of a compulsory liquidation of SNCM

(308) The Commission also examined the argument of the French authorities that the State, as the majority shareholder, could be called upon 'en comblement de passif' in the event of the liquidation of the undertaking (see below). In that case, according to the French authorities, the calculation of the liquidation cost for the State shareholder must take into account national law, as accepted by the Commission in its ABX Logistics decision⁽¹⁴⁸⁾, and must be determined on a case-by-case basis, taking account of the special features of the sector⁽¹⁴⁹⁾ and the circumstances of the case.

(309) In the present case, the Commission notes that on 28 March 2006 the French authorities delivered to it documents attesting that SNCM's shareholder had carried out research into the least costly solution for it by examining in parallel and from the outset two possibilities, namely the liquidation of the undertaking and its sale at a negative price.

(310) On the basis of the expert's reports cited above sent to the Commission, the French authorities submit that the total actual costs which the French Republic would have to bear as shareholder, through CGMF, amount to EUR [...] and [...] million on 30 September 2005. That estimate takes account, in particular, of the risk that the French State would be called upon 'en comblement de passif' if the court had had to consider it to be de

facto managing SNCM. The French authorities consider that those risks must be taken into account in the calculation of the actual cost of a possible liquidation of SNCM.

(311) Accordingly the question arises as to the assessment of the actual costs as a whole which France would probably have to bear as shareholder in the event of a liquidation of SNCM by the court in order to determine if, in the light of the possibility of being ordered to bear those costs and the extent of such an order⁽¹⁵⁰⁾, a well-informed private investor would have preferred to sell its subsidiary directly at a negative price of EUR 158 million rather than run that risk.

(a) A possible order against the State 'en comblement de passif'

(312) In French law, the authorised liquidator of a company in compulsory liquidation has the power to initiate an action for damages against the former directors of the company, known as an 'action en comblement de passif' where there is cancellation of a safeguard plan or receivership or compulsory liquidation⁽¹⁵¹⁾.

(313) The reason for the bringing of an action 'en comblement de passif' against the former directors of the insolvent company is the need to build up the company's assets, which is one of the tasks entrusted to the authorised liquidator.

(314) In several letters to the Commission, the French authorities submitted that a situation in which the State is ordered by a national court to make good the liabilities of the undertaking which it manages is a highly plausible scenario and that it must be taken into account in the calculation of the actual cost of a possible liquidation of SNCM.

(315) In its records of 28 February 2008, SNCM provided an expert's report evaluating the consequences of an action 'en comblement de passif' against the French State. That report concluded that a commercial court hearing that case would very probably hold that the State was liable in that respect and would order it to pay SNCM's social debts in their entirety.

- (316) In the present case, the Commission is of the view that, in the light of the SNCM's stated asset shortfall (see above) and having regard to the possible civil liability arising on the part of the authorised liquidator in the event of failure to act under the law of 1985 and the creditors' entitlement to bring an action since 2005, it is very likely that an action 'en complément de passif' would be brought against the French State in the event of a liquidation of SNCM by the court ⁽¹⁵²⁾.
- (317) The relevant legislation provides that the social debts of the company in liquidation may be made chargeable to its former directors at law or in fact, subject to the cumulative fulfilment of four conditions.
- (i) *Acknowledgment of the State as director at law or in fact of the undertaking in compulsory liquidation* ⁽¹⁵³⁾
- (318) In the present case, the Commission notes that SNCM's expert provided a detailed analysis leading to the conclusion that it is very likely that the French State would be described as de facto manager of SNCM. Essentially, the aforesaid expert's report showed, in accordance with the relevant case-law ⁽¹⁵⁴⁾, that the State had carried out actual acts as manager and director which did not manifestly fall within the administrative supervision required by law, and had done so over a long period. In particular, according to SNCM's expert report, the State took decisions under its powers of supervision which it had itself set up, thereby misusing its powers of supervision to take decisions on behalf of the undertaking instead of the directors to whom the power to take those decisions falls. Moreover, it appears that SNCM's management bodies did not in fact have any independence from the State in the management of the undertaking. Finally, the State assumed the role of SNCM's management bodies by taking strategic decisions alone without informing those directors.
- (319) The Commission notes that the French authorities, in their records of 28 March 2008, did not have any reservations concerning the categorisation of the French State as de facto manager of SNCM. In their letter of 20 November 2006, the French authorities themselves state that the court would certainly categorise SNCM's State shareholder as de facto director of the undertaking. However, it is clear that such a declaration, made in proceedings concerning State aid, cannot in itself suffice to prove satisfactorily that a court considered the national authorities as de facto directors of the undertaking which received the measures in question and, above all, the degree of probability of such an eventuality.
- (320) In the circumstances of this case, there is no need for the Commission to take any further view on the assessment of the evidence relied on by the French authorities, having regard to the conclusion reached by the Commission in section 10.2.2.1 above.
- (ii) *The existence of one or more acts of mismanagement by the French State, de facto managing the undertaking in compulsory liquidation*
- (321) In the present case, the Commission notes that SNCM's expert report referred, on the basis of a non-exhaustive list of facts, to a series of factors to show that the State mismanaged SNCM when acting as its de facto manager.
- (322) In particular, it is stated that the French State made errors relating to investments [...] The State also committed numerous errors of management with regard to [...].
- (323) In that respect, [...] ⁽¹⁵⁵⁾ In their letter of 30 April 2007, the French authorities described the risk of an order for damages against the State as very high, having regard to the [...] criteria of categorisation of mismanagement as provided for in Article L.651-2 of the Commercial Code. However, it is clear that such a declaration, made in proceedings concerning State aid, cannot in itself suffice to prove satisfactorily that a court would have considered that the national authorities carried out the acts of mismanagement alleged and, above all, the degree of probability of such an eventuality.
- (iii) *The finding of a shortfall in assets*
- (324) In the present case, the Commission states that, in its letter of 16 November 2006, the French authorities provided a valuation of SNCM's shortfall in assets on the basis of the expert's reports of CGMF and Oddo-Hastings cited above. The Commission notes that SNCM's expert's report on the action 'en complément de passif' sent to the Commission in February 2008 takes as a basis those same reports to find that there is a asset shortfall in the event of the compulsory liquidation of the company. In particular, the Oddo-Hastings report points up an asset shortfall of EUR [...] million at 30 September 2005, calculated as the difference between the value of SNCM's assets (EUR [...] million) and the value of the undertaking's liabilities (preferential and non-preferential debts valued respectively at EUR [...] million and EUR [...] million).

- (325) The Commission notes that, under the French legislation cited above, there is a shortfall in assets where the authorised liquidator of the company does not have sufficient assets at its disposal to pay off the creditors, whether or not they are preferential. In respect, in particular, of the social debts of the undertaking, the social liabilities of the company consist, at a minimum, of classic salary payables, that is to say those which originate directly in employment contracts, collective agreements or the law and are automatically entered by the authorised liquidator in the liabilities of the undertaking ⁽¹⁵⁶⁾.
- (326) The Commission previously estimated the shortfall in assets of SNCM at EUR [...] million at 30 September 2005.
- (iv) *The existence of a causal link between the mismanagement and the state shortfall in assets*
- (327) According to the French authorities, under French law, the applicant for an action 'en complément de passif' does not have to determine the amount of the increase in liabilities caused by the director's mismanagement. The director of a natural person may be declared liable, on the basis of Article L.624-3 of the Commercial Code, even if his act of mismanagement is only one of the causes of the shortfall in assets and may be ordered to bear in whole or in part the social debts, even if his mismanagement is the cause of only a part of them ⁽¹⁵⁷⁾.
- (328) In this case, the Commission notes that SNCM's expert refers to the link between the mismanagement and the stated asset shortfall as obvious. On the basis of the estimates submitted by that expert, the financial loss resulting from the non-exhaustive list of the State's acts of mismanagement stated in recital 322 of this decision amounts to EUR [...] million ⁽¹⁵⁸⁾.
- (329) The French authorities [...] ⁽¹⁵⁹⁾.
- (330) Moreover, the Commission notes that the French authorities, in their records of 16 November 2006, 27 April 2007 and 28 March 2008 [...] ⁽¹⁶⁰⁾. The French authorities [...] ⁽¹⁶¹⁾ The French authorities have themselves acknowledged, in their letter of 16 November 2005, that 'it is clear that the State shareholder, which the court would certainly refer to as the de facto director of SNCM, limited liability company, would probably be ordered pursuant to Article L.615-2 to bear the shortfall in SNCM's assets in its entirety'.
- (331) In the circumstances of this case, there is no need for the Commission to take any further view on the assessment of the evidence relied on by the French authorities, having regard to the conclusion reached by the Commission in section 10.2.2.1 above.
- (b) **The estimate of the total cost of the compulsory liquidation of SNCM**
- Determination of the proportion of the shortfall in assets chargeable to the de facto director
- (332) In the light of the foregoing, as the file currently stands, the Commission does not have to determine the actual economic cost of the shareholder's liability.
- (333) In that respect, the Commission notes that, on the basis of Article L.624-3 of the Commercial Code, the director at law or in fact of the company in liquidation is ordered, in such circumstances, to pay all or part of the shortfall in assets established.
- (334) The Commission notes that the aforesaid article leaves the courts entirely at liberty to assess if there is any need to order the director to bear the social debts in whole or in part. In the light of the relevant case-law, it appears that the courts take into account the conduct of the director against whom proceedings are brought and adjust orders according to the facts proven.
- (335) As stated above, the French authorities consider that the French State would be called upon to bear a proportion estimated between [...] % and [...] % of the established shortfall in assets, that is, a range between EUR [...] million and EUR [...] million.
- (336) The Commission states that, in a situation similar to SNCM's relating to the company Les Mines de Salsignes, a sub-branch of BRGM (public company of an industrial and commercial nature) ⁽¹⁶²⁾, the commercial division of the Court of Cassation ordered BGRM and its subsidiaries, as de facto directors, to pay the entirety of the shortfall in assets jointly and severally with the other directors of the company Les Mines de Salsignes ⁽¹⁶³⁾. The portion of the social debts chargeable to the company Coframines and BGRM and therefore, ultimately, to the State, was 73,6 %. As set out in that decision, the Court of Cassation noted that the management board was a dependent of the two bodies under consideration.
- (337) However, the Commission takes the view that the French authorities have not shown, in the light of the rules on State aid, in what respect the aforesaid acts of mismanagement of the State prejudicial to the undertaking are acts which any other private shareholder in a market economy might have carried out. In that regard, it must be stated that only such acts, duly proven, may be taken into account in order to determine whether, having regard to the likelihood of being ordered to bear those costs and to the extent of those costs (that is, the present net value of the likelihood of any such future order), a well-informed private operator would prefer to pay directly a negative price of EUR 158 million rather than run that risk. The view cannot be taken that a private investor would be led to carry out wrongful acts owing to considerations of a general rather than entrepreneurial nature (for example, for social or regional development purposes).

(338) The Commission does not deny that, in certain exceptional cases, there is national legislation which enables third parties to bring proceedings against the shareholders of a liquidated company, in particular if those shareholders may be considered to be directors at law or in fact who have carried out acts of mismanagement prejudicial to the undertaking. However, although such a possibility exists under French law, the Commission considers that the French authorities have not sufficiently dispelled the Commission's doubts in the present case concerning the arguments relating to the likelihood that, in the event of SNCM's liquidation, the French State would be ordered to make good that company's liabilities. It is not, however, necessary to reach a conclusion on that point in this decision in the light of the conclusion reached by the Commission in section 10.2.2.1 above.

Possible payment of the additional redundancy payments in the event of SNCM's compulsory liquidation

(339) According to the French authorities, in addition to the asset shortfall, having regard to the relevant case-law⁽¹⁶⁴⁾, a court would certainly find it necessary to order the French State to pay the additional redundancy payments (between EUR [...] million and EUR [...] million). According to the French authorities, the actual costs which the French State as shareholder would have to pay as a whole fall within an inclusive range of between EUR [...] million and EUR [...] million.

(340) The French authorities state that, in recent judgments, French courts have ordered the director at law or in fact to pay, in addition to the asset shortfall, additional redundancy payments calculated on the basis of a social plan drawn up by the undertaking before it was put into liquidation.

(341) The French authorities state in particular that, in the *Aspocomp* case, the French company *Aspocomp SAS*, 99 % subsidiary of the Finnish company *Aspocomp Group Oyj*, signed a company-level agreement on 18 January 2002 describing the conditions for indemnification of a social plan relating to 210 employees of a total of 550. That agreement described, in particular, the amount of compensation and additional payments as well as assistance for voluntary redundancy. Following a change in group strategy, the parent company *Aspocomp Group Oyj* decided on 21 February 2002 to stop financing its subsidiary *Aspocomp SAS* and thus caused the voluntary liquidation of the latter. That decision *de facto* prevented the subsidiary from meeting the commitments under the company-level agreement and led it to lay off all of its other employees.

(342) In those circumstances, the judgment of the Court of Appeal of Rouen confirmed the judgment of the Evreux labour court and thus ordered the company *Aspocomp Group Oyj*, which had 99 % control of the management of its subsidiary, to pay: (i) the employees affected by the company-level agreement, the entire compensation and additional payments provided for in that agreement alone, as well as damages for redundancy

without actual and serious basis and (ii) the employees laid off under the voluntary liquidation of *Aspocomp* equivalent payments given that, by not meeting the commitments made, the parent company had acted unfairly and in a culpably thoughtless manner.

(343) In the present case, the Commission observes that, according to the supporting documents in the file, a negotiated social plan, based on the 2002 social plan and implemented in the spring of 2005, was suspended on 25 April 2005 by SNCM's shareholder without consultation with the undertaking's management. The Commission states, moreover, that the the social plan was drawn up prior to the decision of the State to sell SNCM.

(344) The Commission takes the view that, had SNCM been liquidated, the employees of the undertaking would certainly have relied on the provisions of that social plan before the courts.

(345) In order for such a step to be relevant in a case such as this one, the Commission should ascertain (i) whether a court would censure the Member State for having suspended the social plan in question without consulting the undertaking's management (ii) the amount which the Member State could have been ordered to pay in that eventuality and (iii) the degree of probability of that eventuality⁽¹⁶⁵⁾.

(346) The Commission notes that a judgment of the commercial division of the Court of Cassation, in which that court states that it would be prepared to grant an action in damages against a dominant company the wrongful conduct of which led to the downfall of the subsidiary, and as a result, collective redundancies⁽¹⁶⁶⁾, is to the same effect as the *Aspocomp* case-law.

(347) The Commission notes, however, that the line taken by the judgment of the Court of Appeal of Rouen has so far not been reflected in other judgments of the same kind. The Commission therefore considers that the French authorities have not sufficiently dispelled the Commission's doubts regarding the fact that SNCM's shareholder would be at a reasonably certain risk of its liability being put in issue and of having to make additional redundancy payments on the basis of that case-law. It is not, however, necessary to reach a conclusion on that point in this decision in the light of the conclusion reached by the Commission in section 10.2.2.1 above.

10.2.2.3. Conclusion

(348) The Commission takes the view, on the basis of the foregoing, that the choice to sell SNCM at a negative price of EUR 158 million is consistent with the choice which a private group of undertakings in a market economy would have made taking account of the social costs which a liquidation of the undertaking would entail.

- (349) The Commission based the above analysis only on the assumptions which it considered reasonable and sufficiently motivated. Those estimates lead to the view that the discrepancy between the scenario chosen by the French authorities and the alternative solution would be at least EUR [...] million, which should more than cover a possible error in the estimates arrived at after analysis.
- (350) Further, the Commission is of the opinion that the negative price of EUR 158 million is the result of a commercial negotiation between the State and the private purchasers following an open, transparent, non-discriminatory and unconditional public selection procedure. In that respect, the Commission considers that that price, which is the best possible price, constitutes a market price.
- (351) In spite of the restrictions referred to in paragraph 284 of this decision, the Commission states that the Commission expert verified the valuation scenarios of SNCM on the basis of the present value method of unrestricted operating cash flows stemming from a report of HSBC bank commissioned by the French authorities. The Commission's expert considers that HSBC's calculations were made correctly. On the basis of the results of those simulations, it may be concluded that the price paid for SNCM is consistent with the value of the undertaking estimated on the basis of the present value method of unrestricted operating cash flows at the time of the transaction.
- (352) It follows from section 10.2.2.1 above, without any need to reach a conclusion on the aspects set out in section 10.2.2.2 above, that that measure does not confer any economic advantage on either SNCM or its private purchasers. Therefore the State's capital contribution of EUR 158 million prior to the sale of the undertaking to private purchasers, that is to say, the negative sale price of EUR 158 million, does not constitute State aid within the meaning of Article 87(1) EC.

10.3. The capital contribution of CGMF of EUR 8,75 million

10.3.1. Legal framework

- (353) If intervention by the public authorities at issue takes place concurrently with significant intervention by private operators, under comparable conditions, the existence of an economic advantage may be automatically ruled out ⁽¹⁶⁷⁾.
- (354) The Commission's practice in previous decisions, confirmed by the Community judicature, automatically excludes the aid nature of a capital contribution by the State in such circumstances provided that three conditions are fulfilled:
- The private intervention must come from economic operators. That is not the case with an acquisition of a holding by employees in the capital of the undertaking concerned ⁽¹⁶⁸⁾,

- The private intervention must be significant. That is not the case, for example, where such private intervention relates only to 3,3 % of the total amount involved ⁽¹⁶⁹⁾,
- The private intervention must also be concurrent with the public intervention. The Court has thus confirmed the Commission's analysis that public contributions may constitute State aid when private investments in the same undertaking are made only after the allocation of the public contributions ⁽¹⁷⁰⁾. The Commission accepts, however, sometimes to take account of private intervention which took place shortly after public intervention, in particular when the private investor has already signed a letter of intent at the time of the public intervention ⁽¹⁷¹⁾.

10.3.2. Application to the present case

- (355) The Commission notes, first, that the shares in SNCM were transferred to the economic operators BCP and VT. Following the transfer transaction, the State had to contribute concurrently a sum of EUR 8,75 million to the undertaking in order to maintain the 25 % holding in SNCM in accordance with its commitment in particular vis-à-vis the employees.
- (356) Next, the contribution of the French State of EUR 8,75 million must be compared to the contribution of the private purchasers, that is EUR 26,25 million. That distribution follows, as stated previously, from the commitment of the French authorities to maintain a 25 % holding in the undertaking concerned. Since the private intervention relates to 75 % of the total amount, the Commission considers it to be significant. Moreover the Commission notes, solely in the interest of completeness, that the private partners have a sound financial structure, that the acquisition of SNCM fits perfectly into their entrepreneurial strategy and that the business plan of those purchasers provides for a return to profitability for the end of 2009.
- (357) As regards, finally, the concurrent nature of the two capital contribution transactions, the Commission's expert verified that that capital had been paid by all SNCM's shareholders, including CGMF.
- (358) It was verified that, on 31 May 2006, the management board of SNCM stated that the two transactions cited above had been carried out. In particular, the related and concurrent increase in capital of all shareholders for the sum of EUR 35 million took place on 31 May 2006. It took place in two concurrent stages: (i) a first increase in capital of [...] shares to which the purchasers subscribed in full, in cash and at nominal value (EUR [...]), and (ii) a second increase in capital of [...] shares (a quarter paid up) to which the purchasers [...] shares, that is, EUR 26,25 million) and the French State [...] shares, that is, EUR 8,75 million) subscribed in part, under the same conditions, namely subscription in cash for a nominal amount of EUR [...].

(359) The public and private capital contributions are therefore plainly concurrent.

(360) In the light of the foregoing, the Commission considers that the criteria laid down by the case-law to exclude automatically the aid nature of the measure in question are fulfilled. The Commission therefore considers that the French State's capital contribution of EUR 8,75 million does not confer any economic advantage on SNCM since that contribution was made in parallel to a contribution of private capital under comparable conditions in accordance with Community case-law.

(361) In any event, the Commission is of the opinion that the rate of return of the State's contribution, that is, [...] % per annum, constitutes adequate long-term profitability for capital invested by a private investor.

(362) In that regard, the Commission notes that the fixed yield of the State's capital investment in SNCM exempts the latter from any exposure in respect of performance of the business plan since that yield is completely dissociated from the performance (upwards or downwards) of the undertaking. Accordingly, the grant of the public service delegation will not enable the State to increase the yield expected from its holding.

(363) The Commission's expert concluded that in terms of risks the French State's capital contribution bore more similarity to a bond at a fixed rate than to an investment in shares. It follows that the rate of return of [...] % should be compared to the rate for bonds in the French private sector at the time of the transaction. According to the Commission's expert, that rate was established at 4,15 % at the end of May 2006.

(364) The Commission considers, finally, that the existence of the clause to cancel the sale of SNCM is not such as to call into question the principle of equal treatment of investors. That clause relates, in fact, to the entire sale of SNCM to private purchasers and not to the concurrent investment (EUR 35 million) by private investors (EUR 26,25 million) and the State (EUR 8,75 million) in the privatised SNCM.

(365) In the light of the foregoing, the Commission finds that the measure at issue does not constitute State aid within the meaning of Article 87(1) EC.

10.4. Measures involving aid to individuals (EUR 38,5 million)

10.4.1. Legal framework

(366) In order to determine whether a measure gives an undertaking an economic advantage, 'it is necessary [...] to

establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions' (172) or if the undertaking avoids 'having to bear costs which would normally have had to be met out of the undertaking's own financial resources, and thereby prevented market forces from having their normal effect' (173).

(367) The Court has consistently held that a normal charge is a charge which an undertaking must normally be able to bear as part of its day-to-day running or its normal activities (174). To be more precise, the Court stated that a reduction in social charges constitutes State aid when such a measure is 'intended partially to exempt undertakings in a particular sector from the pecuniary social charges arising from the normal application of the general social security system when such an exemption is not justified by the nature or general scheme of that system' (175). In that judgment, the Court clearly states that the existence of an economic advantage must be determined in relation to the social security system in general, thereby applying a logic similar to that used tax cases.

(368) On 20 September 2001, the Court reaffirmed that approach: 'an aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question, whereas a special charge is, on the contrary, an additional charge over and above those normal charges' (176).

(369) Accordingly, in order to identify what constitutes an advantage in accordance with the case-law on State aid, it is crucial to determine the rule of reference or the common system applicable within a given legal system on the basis of which the advantage in question is to be compared (177). In this respect, the Court has also held that the determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only in relation to 'normal' taxation, that is the tax rate in force in the reference geographical area (178).

(370) Furthermore, it is established case-law that 'for the application of Article 92 of the Treaty, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time. [...] The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour "certain undertakings or the production of certain goods" within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question' (179).

10.4.2. Application to the present case

- (371) It follows from the case-law and the Commission's past practice⁽¹⁸⁰⁾ that, in order to rule out the aid nature of the measure in question, the Commission must ascertain that the measure does not exempt SNCM from having to pay charges arising out of its day-to-day operations, that is, in the present case, charges arising out of the normal application of social legislation applicable to the sector in respect of employment contracts.
- (372) In that respect, the Commission confirms that, in compliance with the memorandum of understanding signed by the parties, the escrow account may be used solely for the purpose of financing compensation paid to individuals whose employment contracts with SNCM have been terminated prematurely. Therefore, it is neither the intention nor the effect of those measures to make it possible for employees to leave who, without those measures, would have been able to remain the responsibility of SNCM.
- (373) The Commission also notes that the grant of that compensation to workers laid off after the sale of SNCM was approved by the State in the exercise of its public authority and not by the company.
- (374) Furthermore, the Commission notes that those additional social measures go beyond the compensation provided for by social legislation and the applicable collective agreements. The costs arising out of the application of the latter therefore continue to be borne in their entirety by SNCM.
- (375) Finally, the Commission observes that those additional social measures will be implemented if, once SNCM has been sold, the purchasers decide to reduce staff numbers. In other words, that compensation does not relate to the planned staff reductions provided for under the 2002 restructuring plan.
- (376) Therefore, the Commission is of the opinion that the cost of the additional social compensation does not overlap either with the cost of the social plans borne by the State which were in existence prior to the transfer, or with the social costs estimated previously in the event of the compulsory liquidation of SNCM.
- (377) Accordingly, the additional social measures do not constitute charges arising out of the normal application of the social legislation applicable to cases where employment contracts have been terminated.
- (378) For the sake of completeness, the Commission notes that, even when the amount of EUR 38,5 million is added to the State's capital contribution of EUR 142,5 million, the adjusted negative selling price of EUR 196,5 million is still well below the cost of compulsory liquidation of SNCM (see point 3 of this decision).
- (379) In light of the foregoing and in accordance with its previous decisions⁽¹⁸¹⁾, the Commission considers the implementation by means of public funds of additional social measures in favour of persons laid off, without the measures in question relieving the employer of the normal charges it has to bear, to be a matter for the Member States within the scope of their social policy, and does not constitute direct aid within the meaning of Article 87(1) EC. The Commission considers that it does not constitute indirect aid either, as it only benefits staff after they have been laid off.

10.5. The balance of EUR 22,52 million notified as restructuring aid

(380) In light of the foregoing and in accordance with recital 258 of this decision, the amount of the subsidy to be assessed as State aid other than public service compensation is EUR 22,52 million⁽¹⁸²⁾ and represents part of the capital injection notified by the French authorities in 2002.

(381) The Commission finds that that amount confers on SNCM a selective economic advantage and, consequently, that the subsidy in question constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

10.5.1. Compatibility of the measure with the Community Guidelines on rescue aid and restructuring aid

(382) The measure in question was notified in 2002 by the French authorities in accordance with the 1999 Community Guidelines on rescue aid and restructuring aid⁽¹⁸³⁾.

(383) For the purposes of assessing restructuring aid for shipping companies⁽¹⁸⁴⁾, the Community guidelines on State aid for maritime transport refer back to the above-mentioned Guidelines. Under point 19 of those Guidelines, 'the only basis whereby aid for rescuing or restructuring firms in difficulty can be deemed compatible is Article 87(3)(c)'.

(384) As regards the compatibility of State aid for restructuring with Article 87(3)(c) EC, according to the case-law, the Commission's decision must state the reasons why it considers the aid to be justified having regard to the conditions laid down in the Guidelines, in particular, the existence of a restructuring plan, satisfactory demonstration of long-term viability and the proportionality of the aid in the light of the recipient's contribution to it.

Nature of firm in difficulty

(385) In order to be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the 1999 Guidelines⁽¹⁸⁵⁾.

- (386) In the present case, the Commission reiterates that this criterion was ascertained in its decision of 17 July 2002 on rescue aid for SNCM⁽¹⁸⁶⁾ and in its decision of 19 August 2002 initiating the formal investigation procedure against the recapitalisation plan on the basis of SNCM's annual accounts for 2001.
- (387) For the purpose of this decision, the Commission has verified that SNCM satisfied the condition in question on the basis of the company's annual accounts for 2002. Accordingly, the company's capital (excluding regulated provisions)⁽¹⁸⁷⁾ is still negative: EUR -26,5 million in 2002 as opposed to EUR -30,7 million in 2001. That level reflects the disappearance of more than half of the company's share capital, more than a quarter of which disappeared during the last 12 months following the notification, thus confirming the sufficient but non-obligatory condition described in point 5(a) of the Guidelines.
- (388) Besides that trend in the share capital, the Commission notes, inter alia, that
- between 2001 and 2002, pre-tax losses increased from EUR -5,1 million in 2001 to EUR -5,8 million in 2002, with net losses in 2002 reduced only through the sale of a number of ships,
 - SNCM's cash flow decreased to EUR 35,7 million at the end of 2002 from EUR 39,2 million at the end of 2001,
 - net financial debt, excluding leasing, increased from EUR 135,8 million in 2000 to EUR 144,8 million in 2002,
 - financial charges (interest and similar charges) increased from EUR 7 million in 2000 to EUR 9 503 million in 2002.
- (389) Moreover, the French authorities have confirmed to the Commission that the banks are now refusing to lend money to the company because of its indebtedness, even though SNCM has proposed to put up its newest vessels, free from mortgages or other burdens, as security.
- (390) Finally, the public service delegation contract does nothing to change that analysis. While the contract will certainly enable SNCM, in conjunction with the success of the restructuring plan, to attain positive operating results, the fact remains that its acute lack of capital, its growing indebtedness and the cost of operational measures under the restructuring plan are expected, after a certain period of time, to result in the insolvency of the company.
- (391) In light of the foregoing, the Commission takes the view that SNCM satisfies both the condition laid down in point 5(a) of the Guidelines and the condition laid down in point 6. The Commission therefore notes that, in 2002, SNCM was a firm in difficulty within the meaning of the Guidelines.
- Restoration of viability (points 31 to 34 of the Guidelines)
- (392) According to the 1999 Guidelines, aid is granted on condition that a restructuring plan, to be validated by the Commission, is implemented. As indicated in paragraph 79 of the decision in 2006 to extend the formal investigation procedure and in view of the fact that the Commission did not consider the measures implemented after the 2002 notification to constitute State aid, the Commission notes that the compatibility of the capital injection of EUR 22,52 million with the 1999 Guidelines must be examined on the basis of the 2002 restructuring plan. 'It is necessary to place oneself in the context of the period during which the financial support measures were taken in order to [...] refrain from any assessment based on a later situation'⁽¹⁸⁸⁾.
- (393) On the basis of the information provided by the French authorities, the Commission notes that, even though the 2002 restructuring plan envisaged a return to profitability by 2003 due to measures introduced gradually in 2002 and 2003 in particular, the fact remains that SNCM regained a 'adequate' level of equity capital only around 2005-2006. Accordingly, the Commission sets 31 December 2006 as the end of the restructuring period.
- (394) The return to profitability of services between Marseilles and Corsica is expected in the short term and services to the Maghreb are already profitable. Only services from Nice remain more uncertain but their relative importance is diminishing and the early depreciation of the Liamone in 2001 will make it possible to turn the company around to positive results on that route. Moreover, the Commission accepts the argument that a presence, even a reduced one, from Nice remains necessary for the company's position on the market as a whole. Redeployment to the Maghreb will help to reduce the company's dependence on its traditional routes and should also help it to restore viability in view of [...].
- (395) With regard to long-term viability, that is, beyond the term of the current public service delegation contract, the Commission takes the view that implementation of the plan should make it possible for the company to face competition effectively when contracts are renewed. Finally, it notes that, even if there is a partial loss (a car ferry), that contract should enable the company to maintain positive results. If the loss of that contract

should lead to a 40 % or higher reduction in company revenue in its traditional market, as envisaged in another scenario, the Commission believes that that would bring about a situation which few restructuring plans, with or without public support, could remedy, and that it is premature to envisage it at this stage.

- (396) As the market study makes 'realistic assumptions as to future operating conditions', the Commission considers the study to be a serious one and to be a sound basis for scenarios of company growth.
- (397) The Commission observes that in order to help the company restore its viability, the restructuring plan sets out to achieve greater viability mainly by implementing internal measures such as better control of its production costs and better productivity. Moreover, if SNCM's financial situation is improved by redeploying its activities on services to the Maghreb in view of the growth prospects of that market, the 2002 restructuring plan also contains measures aimed at withdrawing certain activities, in particular of its Italian subsidiary Corsica Marittima.
- (398) The Commission considers that the impact of the measures contained in the notified plan and the success of that plan are not dependent on market trends, except for the increase of services to the Maghreb which corresponds above all to a return to the position which SNCM had until the mid-1990s.
- (399) Moreover, the Commission notes that the restructuring plan takes account of the situation relating to and foreseeable changes in supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and SNCM's specific strengths and weaknesses.
- (400) Finally, the Commission believes that the restructuring plan proposes a transformation of SNCM so that it can cover all its costs, including depreciation costs and financial charges, once the restructuring has been completed.
- (401) In light of the foregoing, the Commission notes that, on the basis of the information available at the time at which the financial support measures were taken, the criterion relating to the viability of the company has been satisfied.

Avoidance of undue distortions of competition (points 35 to 39 of the Guidelines)

- (402) According to point 35 of the Guidelines, measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid should be regarded as 'contrary to the common interest' and therefore incompatible with the common market.

- (403) In the present case, such a condition should be implemented by limiting the presence which the company can enjoy on its traditional market, namely services to Corsica, which is also the market in which it faces competition from companies established in the Community, which is not the case for services to the Maghreb.
- (404) The Commission is of the opinion that there is no excess capacity on services by sea to Corsica in view of the highly seasonal character and the significant growth in traffic. The Commission also notes that the average occupancy rate on ships of SNCM's main competitor is lower than that of the public company. As there is no excess capacity on the market within the meaning of the Guidelines, there is no need to contribute to its improvement. The sale of ships — rather than their demolition — therefore constitutes a reduction in capacity admissible under the Guidelines.
- (405) The compulsory limitation or reduction of the company's presence on the relevant market or markets in which the company operates effectively represents a compensatory measure in favour of competitors. The measure should be in proportion to the distortive effects which the aid will cause or is likely to cause.
- (406) The restructuring plan significantly reduces the firm's presence on its market to the direct benefit of its competitors, due to the implementation of the following:
- the closure of the Corsica Marittima subsidiary (82 000 passengers in 2000) which was responsible for services between Italy and Corsica, and thus the withdrawal of the SNCM group from the market relating to services between Italy and Corsica,
 - the virtual withdrawal by SNCM of services between Toulon and Corsica, a market which in 2002 accounted for as many as 460 000 passengers,
 - the limitation of the total number of available seats and the number of round trips operated by SNCM each year from 2003, specifically on services between Nice and Corsica,
 - the sale of four ships.
- (407) Throughout the Gulf of Genoa and from Toulon, SNCM is reducing the services it offers by more than one million seats a year compared with 2001, that is by more than half, which is to the immediate benefit of its competitors, even though it is those services which have the strongest growth.
- (408) Despite the considerable scope of those measures, they were supplemented by an obligation on SNCM not to finance, during the restructuring period, any new investments other than the costs included in the restructuring plan for redeploying activities to the Maghreb.

(409) In the light of the foregoing, the Commission notes that the criterion relating to the avoidance of undue distortions of competition is satisfied.

Aid limited to the minimum (points 40 to 41 of the Guidelines)

(410) The amount of the aid must 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, without thereby jeopardising its chances of restoring viability.

(411) In its Decision of 19 August 2002, the Commission expressed misgivings about the method of calculation submitted by the French authorities in order to determine the amount of aid. Notwithstanding the additional explanations supplied by France, the Commission has made its own assessment.

(412) Indeed, with regard to the approach adopted by the French authorities, namely, an approach based on the capital/debt ratio, the Commission believes that:

— the panel of five companies used by the French authorities is not sufficiently representative of the maritime cabotage sector,

— the 79 % capital/debt ratio produced by this panel of companies is in fact in no way a reliable indicator of a company's health,

— the French authorities have not explained what exactly is covered by the amount of financial debts of those five companies and therefore cannot guarantee that that data is consistent with the amount of SNCM's indebtedness as stated in the restructuring plan,

— the French authorities have not shown that the 79 % capital/debt ratio emerging from that panel of companies is properly taken into account for the period 2002-2007 in the financial model included in the restructuring plan.

(413) The Commission is critical of the other approaches put forward by France to demonstrate that the capital provided was limited to a minimum, and doubts their relevance ⁽¹⁸⁹⁾.

(414) The Commission takes the view that the primary aim of the capital injection should not be to increase the company's equity (simple financial restructuring) but to help the company to move from its monopoly position under the 1976 agreement to a competitive position.

This is why the Commission is reluctant to base the level of aid on the method adopted by the French authorities, as it is difficult to specify the appropriate level of SNCM's capital. The Commission points out that by adding or removing certain companies from the panel chosen by the French authorities, the average capital/debt ratio may vary significantly.

(415) The Commission is of the view that the restructuring aid can cover the costs of the various restructuring plan activities required as a result of the changes in the company's legal and competitive environment (operational restructuring). With regard to the costs associated with the operational restructuring measures, the Commission bases its decision on the figure of EUR 46 million (see recital 55 of this decision) ⁽¹⁹⁰⁾.

(416) As the calculation should be an accurate estimate of SNCM's need for aid, the Commission reiterates that 'it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to [...] refrain from any assessment based on a later situation' ⁽¹⁹¹⁾.

(417) In the present case, the Commission notes, having regard to point 40 of the Guidelines, that significant sales of essentially naval assets amounting to EUR 26,25 million in net proceeds from associated debts ⁽¹⁹²⁾ occurred between 18 February 2002, the date on which the restructuring aid was notified by the French authorities, and 9 July 2003, the date on which the Commission issued its decision to approve the restructuring aid.

(418) Nevertheless, those sales are not enough to restore viability to SNCM, whose financial situation remains characterised by significant liabilities (EUR 19,75 million) at the end of that operation. As SNCM is unable to obtain a bank loan (even if it proposes its newest vessels, free of mortgages or other burdens, as a mortgage guarantee) the Commission therefore considers that the company is not able to find other internal resources to finance its restructuring.

(419) Having regard to the foregoing, the Commission therefore reaches the conclusion that the sum of EUR 19,75 million is justified as a means of restoring the company's viability in the short term.

(420) The Commission finds therefore that, of the EUR 22,52 million of restructuring aid originally notified, only EUR 19,75 million can be justified on the basis of SNCM's cash-flow requirements and of the sales of assets carried out by 9 July 2003, subject to inclusion of the proceeds from asset disposals (see below) imposed by the Commission in its 2003 decision in addition to the disposals included in the restructuring plan.

Compliance with the 'one time, last time' principle

(421) The Guidelines⁽¹⁹³⁾ provide that a company which in the past has already benefited from restructuring aid cannot normally receive such aid a second time during the ten years following the end of the restructuring period. Among the forms of aid already allocated to SNCM, there is no restructuring aid. This is in fact SNCM's first restructuring programme since its inception in 1976.

10.5.2. Continuation of compensatory measures

(422) As suggested by the Court in its 2005 judgment and set out in point 137 of the 2006 extension decision, the fact that the aid amount validated under the 1999 Guidelines was subject to a downward adjustment raises the question as to the continuation of compensatory measures imposed by the Commission in its 2003 decision.

(423) In its 2003 decision the Commission approved a capital injection of EUR 76 million under the 1999 Guidelines subject to the following conditions⁽¹⁹⁴⁾:

(i) to refrain, until 31 December 2006, from acquiring new ships and signing contracts for building, ordering or chartering new or refurbished ships;

(ii) to use, until 31 December 2006, only the 11 ships already in SNCM's possession;

(iii) to dispose of all its direct and indirect holdings in Amadeus France, Compagnie Corse Méditerranée, Société Civile Immobilière (SCI) Schuman, Société Méditerranéenne d'Investissements et de Participations, SOMECA;

(iv) to refrain, until 31 December 2006, from pursuing a fares policy in respect of published fares intended to offer lower fares than those of each of its competitors for equivalent destinations and services and identical dates;

(v) to limit, until 31 December 2006, the annual number of round trips on the various sea links to Corsica.

(424) The Commission expert has verified that all the conditions laid down in the 2003 Commission decision were implemented.

(425) It confirmed that the conditions relating to the acquisition of ships was respected (see condition (i)

above). It should be noted at this point that the Superfast, renamed the Jean Nicoli, was acquired by VT and leased to SNCM from February 2007, that is, after the end of the period stipulated in the 2003 decision⁽¹⁹⁵⁾.

(426) As regards the use of SNCM's existing fleet (condition (ii) above), the Commission expert confirmed that SNCM had maintained its fleet of 10 ships, that is to say, one unit less than the limit of 11 ships imposed by the 2003 decision, following the replacement of the Aliso by the Asco in 2004⁽¹⁹⁶⁾ and the disposal of the Asco on 24 May 2005.

(427) With regard to the replacement of the Aliso by the Asco, the Commission notes that the Asco and the Aliso are 'sister ships', that is twin vessels built using the same plans and by the same shipyard. They have exactly the same size, shape and capacity. The Commission finds that the swap of the two ships does not result in an increase in SNCM's capacity. The Commission also notes that the composition of SNCM's authorised fleet may only be modified for reasons beyond SNCM's control. In the present case, the Commission is of the opinion that the problems which SNCM encountered in disposing of the Asco were beyond the company's control. The Commission considers that if SNCM had found a buyer for the Aliso instead of the Asco, the sale of the Aliso would have had the same effect on the Company's capacity as the sale of the Asco and that the French authorities would have complied with the restructuring plan with regard to the sale of four vessels from SNCM's operational fleet.

(428) Furthermore, the expert stated on the basis of accounting records that all disposals of assets imposed by the 2003 decision (condition (iii) above) had been effected. The net proceeds of the disposals amount to EUR 5,02 million⁽¹⁹⁷⁾. The Commission points out that, in addition to the disposals contained in the 2002 restructuring plan or imposed by the 2003 decision, SNCM effected other disposals⁽¹⁹⁸⁾ which have been verified by the Commission expert and which generated net proceeds of EUR 12,6 million.

(429) With regard to the condition to refrain from price leadership⁽¹⁹⁹⁾, the Commission expert has verified that SNCM has an internal procedure to ensure that that condition is met. The expert also examined how SNCM applied that condition on its various services during the period from 16 March 2005 to 31 December 2006⁽²⁰⁰⁾. On the basis of that examination, the Commission expert concludes that, in [...] % of cases, the tickets issued by SNCM were in compliance with condition (iv). The Commission notes that, based on the information provided by the French authorities, SNCM still applies conditions (iv) and (v) today even though the 2003 decision only required it to do so until 31 December 2006.

(430) As for condition (v), the expert confirmed that SNCM had complied with the number of crossings during the 2005 and 2006 financial years. However, the company had exceeded the standard maximum number of seats available on crossings departing from Marseilles in 2005 and 2006 and, to a very slight extent, the maximum number of linear metres offered on crossings departing from Toulon in 2005 and 2006 and from Marseilles in 2006.

(431) With regard to the last point, the Commission notes, however, that exclusive cabin occupancy per family makes it difficult to estimate accurately the extent to which the standards were exceeded. That single factor should not therefore result in SNCM's being considered to have failed to meet the conditions imposed upon it by the 2003 decision.

(432) In the light of the foregoing, the Commission concludes that SNCM implemented the compensatory measures imposed by the 2003 decision.

10.5.3. Conclusion

(433) The Commission observes that SNCM has complied with almost all the compensatory measures in the 2003 decision. In view of the large reduction in the amount of aid approved under the 1999 Guidelines compared to the amount approved in 2003 (the amount in question having led the Commission to impose the abovementioned conditions), the Commission does not deem it necessary to impose additional conditions or requirements to avoid a distortion of competition which would be contrary to the common interest.

(434) In the light of the foregoing and taking into account the precise amount of the net proceeds of the disposals on the date on which the 2005 decision was adopted, the Commission considers the State aid granted in the form of a capital contribution of EUR 15,81 million ⁽²⁰¹⁾ to be compatible pursuant to Article 87(3)(c) EC.

11. CONCLUSION

(435) In conclusion, the Commission considers that the measures which are the subject of this decision do not constitute aid under Article 87(1) EC or is aid compatible with the common market.

(436) The Commission calls upon France to:

- inform the Commission as soon as possible, and not later than 15 working days after the date on which this decision is received, of the elements which it believes should be covered by the obligation of

professional secrecy provided for in Article 25 of Regulation (EC) No 659/1999,

- inform the recipient of the aid of this decision as soon as possible, without divulging, where appropriate, any elements which it considers to be covered by professional secrecy, of which communication to the recipient of the aid could be harmful to some interested parties, and indicate in the version transmitted, where appropriate, any other elements which it deems to be covered by professional secrecy and which it has divulged.

(437) The Commission reminds France that, under the guidelines, further restructuring aid cannot normally be considered, save in exceptional and unforeseeable circumstances for which the company is not responsible, during the 10 years following the end of the restructuring period, that is to say in this case 31 December 2006,

HAS ADOPTED THIS DECISION:

Article 1

The compensation of EUR 53,48 million for public service obligations paid by the French State to SNCM for the period 1991-2001 constitutes unlawful State aid for the purpose of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

The negative sale price of SNCM of EUR 158 million, the EUR 38,5 million in social measures aimed at employees and borne by CGMF, as well as the related and concurrent recapitalisation of SNCM by CGMF for the sum of EUR 8,75 million do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The EUR 15,81 million in restructuring aid operated by France to benefit SNCM constitutes illegal aid within the meaning of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 8 July 2008.

For the Commission

Antonio TAJANI

Vice-President

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- (1) OJ C 308, 11.12.2002, p. 29.
- (2) That restructuring plan followed the notification by the French authorities on 20 December 2001 of a cash advance granted by the Compagnie Générale Maritime et Financière to SNCM for the sum of EUR 22,5 million for rescue aid. By decision of 17 July 2002 (OJ C 148, 25.6.2003, p. 7), hereinafter 'the 2002 decision', the Commission authorised rescue aid in favour of SNCM under the preliminary examination procedure for aid as provided for in Article 88(3) EC. On 19 November 2002, the French authorities transmitted a copy of the cash advance agreements between SNCM and CGMF and proof of the refunds of the advance by CGMF to SNCM through two bank transfers of 13 May and 14 June 2002.
- (3) Registered under Reference TREN (2005) A/61846.
- (4) CGMF is a fully-owned French State financial holding which acts on its behalf for all operations concerning maritime transport, fitting out and leasing vessels in the Mediterranean.
- (5) OJ L 83, 27.3.1999, p. 1. Since the French authorities decided on 11 September 2002 to correct some factual errors in the decision of 19 August 2002, the Commission adopted a decision on 27 November 2002 amending the decision of 19 August 2002 (published in the OJ C 308, 11.12.2002, p. 29). Interested parties were invited to submit their observations on the planned aid from that date.
- (6) On 11 September 2002, the French authorities requested an additional period in which to make their observations on the decision of 19 August 2002. That period was granted by the Commission on 17 September 2002.
- (7) Registered under Reference SG (2002) A/10050.
- (8) Registered on 15 January 2003 under reference DG TREN A/10962.
- (9) Registered under reference SG(2003) A/1691.
- (10) Registered under Reference TREN (2005) A/21531.
- (11) Registered under reference SG(2003) A/1546.
- (12) OJ C 288, 9.10.1999, p. 2.
- (13) Registered under Reference TREN (2005) A/21701.
- (14) OJ L 61, 27.2.2004, p. 13. By decision of 8 September 2004 (the 2004 decision), the Commission made a minor amendment to the 2003 decision, allowing SNCM to make a swap, in some circumstances, between the two vessels Aliso and Asco through an amendment to Article 2 of the 2003 decision.
- (15) OJ L 19, 21.1.2005, p. 70.
- (16) Registered under Reference TREN (2005) A/27546.
- (17) Registered under Reference TREN (2005) A/30842.
- (18) Additional information was sent by post on 30 November 2005 (SG(2005) A/10782), 14 December 2005 (SG(2005)A/11122) and 30 December 2005 (TRENA/10016).
- (19) Registered under Reference TREN (2005) A/116904.
- (20) Registered under Reference TREN (2005) A/19105.
- (21) Case C-280/00 Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR 7747.
- (22) Veolia Transport is a wholly owned subsidiary of Veolia Environment. It operates under the Connex name passenger transport services on behalf of public bodies (suburban, interurban and regional public transport systems) and, for that purpose, manages road and railway networks and, to a lesser extent, transport services by sea.
- (23) OJ C 103, 29.4.2006, p. 28.

- (²⁴) OJ L 24, 29.1.2004, p. 1.
- (²⁵) OJ C 148, 24.6.2006, p. 42.
- (²⁶) Registered under Reference TREN (2005) A/25295.
- (²⁷) Registered under Reference TREN/A/24111.
- (²⁸) OJ C 303, 13.12.2006, p. 53.
- (²⁹) Registered under Reference TREN (2005) A/37907.
- (³⁰) By the group *Stef-TFE* on 28 December 2007 (A/20313) and by Corsica Ferries on 27 December 2006 (A/20056).
- (³¹) Letters of 4 January 2007 (D 2007 300067) sent to the *Stef-TFE* group and (D 2007 30000689) to the Corsica Ferries group.
- (³²) On 11 January, 16 January et 9 February 2007 registered under References TREN/A/21142, A/21669 and A/23798.
- (³³) On 13 February 2007 registered under References TREN/A/24473 and TREN/A/23981.
- (³⁴) Registered by the Commission as TREN A/30979. The French authorities requested and obtained two further additional periods of one month for submitting their comments by post of 15 March 2007 and 19 April 2007 registered under References TREN/A/27002 and A/29928.
- (³⁵) That information was communicated by CFF on 15.3.2007 (TREN/A/27058), 27.9.2007 (TREN/A/43510 of 1.10.2007), 30.11.2007 (TREN/A/49918 of 6.12.2007), 20.12.2007 (TREN/A/51600 of 26.12.2007), 14 March 2008 (TREN/A/87084), by Stim on 20.12.2007 (TREN/A/51391) and by SNCM on 28 February 2008 (TREN/A/85681). France also sent information on 21.12.2007 (TREN/A/51441), 7.1.2008 (TREN/A/86344) and 8.2.2008 (TREN/A/83661). Other documents were delivered by the French authorities at a work session of 29 February 2008
- (³⁶) SNCM holds a direct non-majority shareholding of 45 % in CMN an indirect non-majority shareholding of 24,1 % through the *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH). Effective control was given to the *Stef-TFE* group since 1992 through its 49 % holding in *Compagnie Méridionale de Participations* (CMP). SNCM and CMN were partners in the public service delegation over the period 2001-2006 and jointly won the new public service delegation contract for the period 2007-12/13.
- (³⁷) CGTH is a holding company wholly owned by SNCM.
- (³⁸) *Aliso Voyage* is SNCM's own distribution channel. Formed of 17 agencies throughout France, that company manages maritime ticket sales, 49,9 % of which are in SNCM ticket outlets.
- (³⁹) At the time of the adoption of the 2003 decision, SNCM held, equally with the transport group Delmas, a holding in the French freight transport shipping company Sud-Cargos, specialising in services to Morocco. That holding was subsequently sold at the end of 2005 for the sum of EUR [...] million, as is apparent from the 2005 investment plan submitted by the French authorities on 28 March 2006.
- (⁴⁰) SNCM wholly owns that company which carries out the victualling of SNCM's vessels.
- (⁴¹) The Ferrytour partnership is a tour operator that is 100 %-owned by SNCM. It organises trips by sea to Corsica, Sardinia and Tunisia but also flights to many destinations. In addition to its main line of business, it also organises mini-cruises and offers business travel services.
- (⁴²) Comptoirs du Sud, a subsidiary set up in 1996 which is 100 %-owned by SNCM, manages all the shops onboard its ships.
- (⁴³) See footnote 12.

- (⁴⁴) The *Napoléon Bonaparte* (capacity 2 150 passengers and 708 cars, power 43 MW, speed 23,8 knots), large luxury car ferry; the new *Danielle Casanova*, delivered in May 2002 (capacity 2 204 passengers and 700 cars, power 37,8 MW, speed 23,8 knots), also a large luxury car ferry; the *Île de Beauté* (capacity 1 554 passengers and 520 cars, power 37,8 MW, speed 21,5 knots), put into service in 1979 and rebuilt in 1989/1990; the *Méditerranée* (capacity 2 254 passengers and 800 cars, power 35,8 MW, speed 24 knots) and the *Corse* (capacity 2 150 passengers and 600 cars, power 27,56 MW, speed 23,5 knots).
- (⁴⁵) The *Paglia Orba*, (capacity 500 passengers, 2 000 linear metres for freight and 120 cars, power 19,7 MW, speed 19 knots); the *Monte d'Oro* (capacity 508 passengers, 1 615 metres for freight and 130 cars, power 14,8 MW, speed 19,5 knots); the *Monte Cinto* (capacity 111 passengers, 1 200 metres for freight, power 8,8 MW, speed 18 knots); since May 2003, the *Pascal Paoli* (capacity 594 passengers, 2 300 metres for freight and 130 cars, power 37,8 MW, speed 23 knots);
- (⁴⁶) The *Liamone* (capacity 1 116 passengers and 250 cars, power 65 MW, speed 42 knots) which also operates crossings from Toulon.
- (⁴⁷) All leased, except for *Danielle Casanova*, *Pascal Paoli*, *Liamone*.
- (⁴⁸) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).
- (⁴⁹) OJ S 2001/2010 – 007-005.
- (⁵⁰) Licensing authority for public service obligations since 1991 on the basis of French Law No 91-428 of 13 May 1991.
- (⁵¹) OJ 2006/S 100-107350.
- (⁵²) State aid N 781/01 authorised by decision of the Commission of 2 July 2002, OJ C 186, 6.8.2002, p. 3.
- (⁵³) State aid N 13/07 authorised by decision of the Commission of 24 April 2007, published on the Commission's Internet site: http://ec.europa.eu/community_law/state_aids/transport_2007.htm
- (*) Information covered by professional secrecy.
- (⁵⁴) The driver accompanies the vehicle combination on the crossing. In some cases, a driver loads the vehicle before departure and another driver unloads it upon arrival. This is entered as accompanied transport as against roll-on roll-off transport operations in which the trailer travels without tractor.
- (⁵⁵) OJ C 148, 25.6.2003, p. 7.
- (⁵⁶) That amount broke down as follows: EUR 20,4 million as restructuring plan in the strict sense, EUR 1,8 million for laying up costs of ships on sale, EUR 14,8 million for depreciation of *Liamone* and EUR 9 million for redeployment cost of activity to the Maghreb.
- (⁵⁷) That plan was adopted on 17 December 2001 by the SNCM management board.
- (⁵⁸) The restructuring plan provided for a reduction in the number of crossings from 4 138 (3 835 for SNCM and 303 for its subsidiary Corsica Marittima) to 3 410 in 2003 with the following route changes:
- changes to routes between Marseille and Corsica in accordance with the terms and conditions of the 2001-2006 public service contract,
 - near-withdrawal of routes between Toulon and Corsica,
 - reduction of services between Nice and Corsica,
 - closure of the Livorno-Bastia line with dedicated equipment, actually closed in 2003,
 - consolidation of services from Algeria and Tunisia by the vessels *Méditerranée*, *Ile de Beauté* and *Corse* and the withdrawal of the Genoa-Tunis service.
- (⁵⁹) Staff is reduced through natural wastage and early retirement on the basis of age criteria (early cessation of work), mobility leave and non-replacement of temporary contracts. However, for SNCM they entail an estimated cost of EUR 20,4 million.
- (⁶⁰) Such as traffic, projected growth of gross domestic product (1,5 %), the loan rate (5,5 %), the rate of return on financial products (4,5 %) and the short-term debt rate (5 %).

- (⁶¹) The French authorities described two alternative methods which they rejected as being too costly. The first valuation method consists of aggregating the costs of all restructuring measures. It leads to a EUR 90,9 million financing requirement based on the following:
- accumulated losses from 1991 to 2001, that is to say, EUR 41,7 million (EUR 29 million — figure validated by Decision 2002/149/EC of 30 October 2001 (OJ L 50, 21.2.2002, p. 66), EUR 6,1 million in respect of 2000 and EUR 6,6 million, before restructuring costs, in respect of 2001);
 - the reduction in resources made up of special amortisation between the same dates, that is, EUR 24 million (the item falls from EUR 86 to 62 million on the balance sheet over the period, which reflects the extension of the amortisation period from twelve to twenty years, the lesser use of that resource and the use of 'leasing' for the last units delivered);
 - appreciation of disposal generated during restructuring, namely EUR 21 million, deducted from the financing requirement;
 - cumulative effect of restructuring charges of EUR 46,2 million (see footnote 56).
- The second method consists of determining what the amount of capital required by the banks for the entire fleet would be, given that for financing of the purchase of a vessel the banks in general require capital corresponding to 20 to 25 % of the vessel's value. On the basis of the total sum of EUR 843 million representing the past cost of vessels acquired for the fleet, the French authorities calculated a capital requirement of between EUR 157 and 196 million. After deducting existing capital at the end of 2001, this method leads to a recapitalisation requirement of EUR 101 to 140 million.
- (⁶²) See below.
- (⁶³) In its restructuring plan, SNCM makes provision for laying up and selling four of its vessels in 2002: The Napoléon, the Liberté, the Monte Rotondo and the high-speed vessel Asco, the latter having in fact been subject of a swap with its sister vessel the Aliso. All those ships have now been sold. The stated net proceeds of disposal amount to EUR 25 165 000.
- In accordance with the 2003 decision, SNCM sold holdings in SCI Espace Schuman, Southern Trader, Someca, Amadeus and CCM for net proceeds of disposal of EUR 5,02 million.
- Since the 2003 decision, SNCM sold its holding in Sud Cargos, the vessel Asco and flats in SNCM's housing stock for the sum of EUR 12,2 million.
- (⁶⁴) The process of selection of private partners took place from 26 January 2005 to the end of September 2005. On 26 January 2005 and 17 February 2005, the French Government announced that it was going to begin seeking a private partner to take a holding in SNCM's capital, with a view to strengthening its financial structure and supporting it in the changes necessary for its growth.
- The Agence des Participations de l'Etat (APE) appointed an independent party to supervise the search process and instructed an advisory bank (HSBC) to contact the potential purchasers.
- In that regard, 62 industrial and financial investors were contacted for the purpose of specifying the financial conditions of a proposal intended to support the company's industrial plan and preserve jobs and the sound performance of the public service. [...] of them submitted expressions of interest, [...] confidentiality agreements were signed and [...] information notes were sent. [...] undertakings submitted offers in the first round on 5 April 2005 and three offers ([...], [...] and [...]) were received in the second round on 17 June 2005 as well as an expression of interest for a minority holding ([...]). Three offers were received in the third round on 28 July 2005. On 14 September 2005, each undertaking was invited to submit its firm and final proposal before 15 September 2005. On that date, since the company [...] had withdrawn, the State departments received two firm proposals of capital contributions and repurchase of the entire capital from the French groups Butler Capital Partners (BCP) and [...].
- On 27 September 2005, France published a press release stating that, on the basis of an in-depth examination of the two proposals, the proposal lodged by the BCP group was chosen because, while being the most acceptable from the financial point of view, it was in the best position to deal with the interests of the company, the public service and jobs. BCP's initial proposal put forward a negative price of EUR [...] million and was the lowest estimate of the negative price.
- That initial offer from the potential purchasers provided expressly for the possibility of adjusting their initial proposal following the carrying out of audits. The French authorities stated that the initial price was revised upwards following the audits presented on 16 December 2005 owing to objective elements influencing the regulatory and economic context in which SNCM operates which occurred after the submission of the proposal on 15 September 2005. The negative price was thus revised to EUR [...] million.
- The negotiations between the French authorities and the future purchasers made it possible to lower that figure to EUR 142,5 million, increased by the payment of a part of the expenses relating to the retired employees mutual benefits society (EUR 15,5 million).
- (⁶⁵) SNCM's internal process relating to the implementation of the recapitalisation and privatisation operations was formally begun on 12 April 2006 and completed on 31 May 2006. It must be stated that on 27 November 2007, the employee capital participation scheme had not been implemented.

- (⁶⁶) That mechanism is laid down in Article II.2 of the sale agreement of 16 May 2006 which provides that that account is intended 'to finance the proportion of the cost of possible voluntary departures or breach of employment contracts [...] which is in addition to sums of all kinds which must be paid by the employer under statutory provisions and provisions under agreements.' The task of the sequestration is 'to release funds as soon as the employees in question who have not been redeployed internally within the SNCM group actually leave the company and to release the balance of the amount seized at the end of its sequestration'. [...]
- (⁶⁷) The four criteria are as follows:
- (i) the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined;
 - (ii) The parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner to avoid their affording an economic advantage which could favour the beneficiary firm over competing firms;
 - (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
 - (iv) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.
- (⁶⁸) In that regard, the French authorities also note that the compensation was calculated on the specific basis of obligations (number of crossings, seats available, means of substitution, maximum fares, and so on) and therefore of the parameters in the five-year public service agreements signed in 1991 and 1996 between SNCM and the competent public authority and that those agreements also provided for an adjustment of the compensation on the basis of revenue received.
- (⁶⁹) In particular, the French authorities supplied, in their letter of 8 October 2002 (TREN/A/10050), evidence to show that the structure of SNCM's operating costs for the period 1991 to 2001 was comparable to that of similar sea passenger transport undertakings such as Brittany Ferries, Seafrance and CMN. As regards the latter, the French authorities assessed SNCM's efficiency by comparing activity of cargo and passenger vessels. Those two companies operate in a similar context, with almost equivalent vessels (3 cargo and passenger vessels for CMN and 4 cargo and passenger vessels for SNCM) and to equivalent destinations. The data gathered from 1991-2001 made it possible to verify that the productivity ratios (link between salary costs on one hand, and turnover, crossings and vessels on the other) for cargo and passenger vessel activity which are different in 1993, get appreciably closer over the period examined. Accordingly, that data shows that during that period, SNCM's productivity ratios became reconciled with those of an average undertaking in the sector.
- (⁷⁰) OJ L 50, 21.2.2002, p. 66. The French authorities note that, following the expert report referred to by the Commission concerning the accounting and management data submitted by the French authorities, the latter concluded in paragraph 68 of its decision of 30 October 2001 that 'the public service subsidies did not serve to offset the costs of SNCM's competitive activities. The separation of accounts concerning the supply of that service and the audits carried out by the regional and national audit bodies also guarantee that the annual accounts relating to the use of the territorial continuity subsidy give a true picture of the cost of the supply of the public service'.
- (⁷¹) In 2002 the French authorities had championed the strategic nature of SNCM's holding in Sud-Cargos. The development of goods traffic (container growth to the detriment of Roll-On Roll-Off), the repurchase of Delams, another shareholder of Sud-Cargos, by CMA CGM and the economic difficulties of Sud-Cargos are equally factors which explain that that holding was no longer considered as strategic and could be sold in 2005 by SNCM.
- (⁷²) Case C-334/99 *Federal Republic of Germany v Commission* [2003] ECR I-1139.
- (⁷³) Commission Decision of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (No C 53/03 (ex NN 62/03)), OJ L 383, 28.12.2006, p. 21.

- (74) Commission Decision of 8 July 1999 on State aid granted by Germany to Gröditzter Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH, OJ L 292, 13.11.1999.
- (75) That report was sent to the Commission in March 2006 and was drawn up by CGMF with the assistance of Ernst & Young, SNCM's legal auditor (the CGMF report).
- (76) The report drawn up on 29 March 2006 by Oddo Corporate Finance and the firm Paul Hastings (Oddo report) was sent to the Commission on 7 April 2006. It consists of a critical review, requested by the Agence des Participations de l'Etat (APE), the CGMF reports and an approach based on the liquidation costs deemed acceptable at the Community level.
- (77) Having regard to intangible assets (EUR [...] million) and capital assets (EUR [...] million), client debtors (EUR [...] million), other debtors (EUR [...] million) and a cash deficit of – EUR [...] million. France stated that a more realistic estimate, in the light of later financial items, brings that value to EUR [...] million.
- (78) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.
- (79) Judgment No 98-15129 of the Court of Cassation of 6 February 2001. That case concerns a public body, the BRGM (Bureau de Recherches Géologiques et Minières) ordered to pay the entirety of the shortfall in assets of its subsidiary, les Mines de Salsignes, on the ground that the de facto director, the BRGM, in spite of being aware of the deterioration in activities and the warning signs given, acted wrongfully in allowing activities to continue.
- (80) Case Aspocomp Group Oyj; Judgment of the Court of Appeal of Rouen of 22 March 2005.
- (81) By comparison, the rates of return of an OAT (Obligation Assimilable du Trésor, a bond issued by the State) on maturity after 30 years, 10 years, 5 years and 2 years respectively are 3,95 %, 3,82 %, 3,75 % and 3,72 % at 31 October 2006.
- (82) Commission Decision of 17 July 2002, Société Française de Production, C(2002) 2593 final — OJ C 71, 25.3.2003, p. 3.
- (83) According to an independent market study submitted by France in that regard, CFF currently has almost [...] % of the passenger market whereas SNCM went from 82 % market share in 2000 to [...] % in 2005 and saw very strong growth on the freight market in which SNCM is still the main carrier owing to its holding in CMN.
- (84) CFF points out that the public service delegation contract allocates a public grant to the company of EUR 64,3 million on average a year, making a total of EUR 321,5 million over five years. It argues that Article 5 of the public service delegation contract guarantees SNCM cashflow of EUR 72,8 million. Moreover, Corsica Ferries states that of the EUR 40,6 million losses recorded by SNCM in 2001, EUR 15 million relate to depreciation on the high-speed vessel *Liamone*.
- (85) The decision to initiate the procedure indicated that one of the measures laid down in the restructuring plan was 'the closure of the Bastia-Livorno line with dedicated equipment'.
- (86) CFF's criticism relates to the following points: no actual reduction in staff, no realisation of SNCM's shareholdings for the restructuring effort, no account taken of appreciation on vessels.
- (87) It argues that EUR 76 million corresponds to the FRF 500 million which the company would lose from its territorial continuity grant for the new period 2002 to 2006.
- (88) Compared to the ratios which it itself found in a sample group of 10 shipping companies. Those ratios vary from 23,69 % (for *Moby Lines*) through 49,7 % for CMN to 55,09 % (for *Grimaldi*).
- (89) CFF cites the shareholding of 50 % in the shipping company Sud-Cargos, the holding of 13 % in Amadeus, an undertaking specialised in air transport reservation systems, the holding in CMN and CGTH's property assets.

- (⁹⁰) *Key shareholder in CMN.*
- (⁹¹) For the record, the OTC is, together with the Corsican regional and local authorities, the awarding authority in respect of the public service delegation contract.
- (⁹²) As regards the public service delegation for Marseille-Corsica services, the majority of CFF's observations relate to the procedure for granting the new public service delegation for the period 2007-2012/2013 and the contentious proceedings initiated by CFF before the national courts, which were subsequently dismissed by the national courts.
- (⁹³) In that regard, CFF notes that, in the second six-month period of 2005, an emergency procedure was initiated before the Tribunal de commerce of Marseille and that voluntary liquidation could have been intended for autumn 2005 in respect of the losses estimated at EUR million in 2005.
- (⁹⁴) According to CFF, the Court of Cassation, in the case of Mines et produits chimiques de Salsignes, does not refer at all to the direct liability of the State shareholder in the event of liquidation of the undertaking of which it is the shareholder but rather the possibility of conducting an action for payment of social debts against a public company of an industrial and commercial nature and the fact that it is impossible for their managers to escape from their obligations by relying on action by the public authorities.
As regards the non-application to the present case of the case-law of the Court of Appeal of Rouen in the *Aspocomp* case, CFF submits that the subject-matter of that case-law, relating to an order that a parent company pay to the employees of a subsidiary social benefits for 'failure to comply with an agreement' ratified by the former, is very different from the facts of the SNCM file. There is therefore no definite risk that CGMF or the State will be ordered to pay the redundancy payments in the event of compulsory liquidation. However, CFF doubts the estimated figure for the other social costs on account of the fact that they seem to differ depending on the experts asked to provide them.
- (⁹⁵) In that regard, CFF considers that the actual value of the vessels as stated by SNCM at the time it made its bid under the public service delegation ought to have been taken into account in the valuation of SNCM's assets made in the Oddo and CGMF reports.
- (⁹⁶) According to CFF, France emphasises the essential nature of all of the services to Corsica, the maintenance of the fleet at the current level and the alleged strategic nature of SNCM's shareholding in the CMN group.
- (⁹⁷) On 1 January 2007, with the arrival of Superfast X.
- (⁹⁸) CFF proposes to restrict to 2005 levels capacity available on each of the competitive markets (Nice, Tunisia and Algeria), to refrain from opening any new routes and to reconfigure the Marseille-Corsica route to cargo and passenger vessels in order to reduce costs.
- (⁹⁹) SNCM acquired new vessels in breach of Article 2 of the Commission decision of 2003. In addition, SNCM did not sell its shareholding in CCM in breach of Article 3 of the Commission decision. Finally, SNCM has had an aggressive tariff policy since 2003 with prices lower than those applied by CFF in breach of Article 4 of that decision (tickets up to 30 % cheaper for identical or comparable services).
- (¹⁰⁰) Owing, on the one hand, to the lack of knowledge of the respective methods of accounting and analytical allocation of the two companies and, secondly, to the fact that CMN did not participate in such a study.
- (¹⁰¹) According to STIM, SNCM deliberately underestimated its financial results. According to the audit of an independent expert on behalf of the Office des Transports de Corse, the overall deficit of the Corsican network amounts to FF 125 million (approximately EUR 19 million) for the years 1996–2001, excluding the exceptional results of 2001.
- (¹⁰²) Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035.
- (¹⁰³) Among the facts relied on by that report, it appears that [...]
- (¹⁰⁴) In support of the report of the Court of Auditors, the report refers, for example, to [...]

- (¹⁰⁵) Among the facts relied on by that report, it appears that [...]
- (¹⁰⁶) The State, for example [...]
- (¹⁰⁷) The report severely criticises, inter alia, the following acts of mismanagement: [...]
- (¹⁰⁸) The number of vessels has been reduced and the programme for the disposal of assets is going ahead according to the industrial plan. Services have been reorganised and the action plan to reduce intermediate consumption is beginning to bear fruit. Finally, the employment component of the industrial plan is steadily being implemented.
- (¹⁰⁹) The 0,497 ratio announced by Corsica Ferries for CMN in 2001 is incorrect because it fails to take account of liquid assets on the balance sheet. With the appropriate correction, CMN's ratio is 0,557. According to the French authorities, that level is in any event still insufficient for CMN and the cash-flow problems which CMN came up against in 2002 illustrates that. In fact CMN had to borrow up to EUR 8 million from STEF-TFE to finance a cash deficit not covered by its banks.
- (¹¹⁰) In its letter of 9 January 2003, the regional council of *Provence-Alpes-Côte d'Azur* cited the market study which had been sent to the Commission in connection with the notification, of which it obviously had a copy, pointing out the following finding: 'Supply [of services between Corsica and mainland France] is in excess of demand. The passenger rate of vessels varies on average from 20 % in winter to 50 % in summer'.
- (¹¹¹) In particular, it refutes STIM's estimated value of the undertaking of nearly EUR 350 million which takes into account only the items of the balance sheet which improve the value from accounting capital (special depreciation, residual gains from vessels and so on) without taking account of liabilities which then reduce it. That method of calculation of a purely accounting nature does not reflect the economic reality of a shipping company such as SNCM having assets of value on the balance sheet but also a limited profitability and considerable off balance sheet liabilities.
- (¹¹²) See, for example, the judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.
- (¹¹³) OJ L 364, 12.12.1992, p. 7.
- (¹¹⁴) OJ L 378, 31.12.1986, p. 1.
- (¹¹⁵) The Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 31, and Joined Cases 204/97 and 270/97 *EPAC v Commission*, [2000] ECR II-2267, paragraph 35).
- (¹¹⁶) Case T-289/03 *BUPA and Others v Commission* [2005] ECR II-741.
- (¹¹⁷) See, in that regard, the Commission Decision of 30 October 2001 on the State aid awarded by France to SNCM, OJ L 50, 21.2.2002, p. 66.
- (¹¹⁸) Figure reduced by capital gains on disposals of vessels.
- (¹¹⁹) For 2000 and 2001, which were the last two years of application of the 1996 agreement, the expert report at the time, because of a lack of available data, could not calculate the result obtained in respect of the Corsica services through analytical accounting so far as concerns services to Corsica.
- (¹²⁰) In accordance with its practice in previous decisions, the Commission is unconcerned as to the means of compensation used by the Member State in so far as it can verify the absence of cross subsidy for competitive activities. See, inter alia, Commission decision of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA (OJ L 282, 19.10.2002, p. 29) and Commission decision of 23 July 2003 concerning the capital increase of EUR 297,5 million in favour of La Poste Belge/De Post (OJ C 241, 8.10.2003, p. 13).
- (¹²¹) In addition, it must be recalled that in 1997 the Commission established Community guidelines on State aid to maritime transport, specifying the conditions under which State aid awarded in exchange for fulfilling public service obligations will be considered compatible with the common market — OJ C 205, 5.7.1997, p. 5.
- (¹²²) Commission Decision 2002/149/EC (OJ L 50, 21.2.2002, p. 66).

- (¹²³) Conditions of the rules regarding the State financial contribution, set out in point IV of the five-year agreement between SNCM and OTC for 1996-2001.
- (¹²⁴) In particular, as stated in footnote 71 of this decision, the Commission determined that there was a separation of the accounts relating to the provision of those services in respect of the period under examination.
- (¹²⁵) That amount arises from the difference between the amount notified originally (EUR 76 million) and the amount paid in terms of public service obligations (EUR 53,48 million).
- (¹²⁶) Case C-334/99 *Commission v Germany* [2003] ECR I-1139, paragraph 142.
- (¹²⁷) Communication of the Commission to Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point (11)). While this communication deals with the manufacturing sector, the principle can undoubtedly be applied in the same way to all other sectors.
- (¹²⁸) See, in particular, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435.
- (¹²⁹) Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH et Lech-Stahlwerke GmbH v Commission of the European Communities* [1999] ECR II-17, paragraph 116.
- (¹³⁰) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.
- (¹³¹) Case C-334/99 *Commission v Germany* [2003] ECR I-1139, paragraph 142.
- (¹³²) Commission Decision 98/204/EC of 30 July 1997 conditionally approving aid granted by France to the GAN group, OJ L 78, 16.3.1998, p. 1.
- (¹³³) See, in that regard, Commission Decision 2006/947/EC of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (OJ L 383, 28.12.2006, p. 21).
- (¹³⁴) See, in that regard, *Italy v Commission* [1991] ECR I-1433.
- (¹³⁵) See, for example, Commission Decision 92/266/EEC of 27 November 1991 on the conversion activities of French public industrial groups outwith the steel and coal industries and excluding the Compagnie Générale Maritime, pursuant to Articles 92 to 94 of the EEC Treaty (OJ L 138, 21.5.1992, p. 24). See also the social plans referred to below.
- (¹³⁶) It should however be noted that half of the staff concerned were interim staff or onsite subcontractors. It may therefore be assumed that the cost per employee for the 5 000 positions involving permanent Airbus staff was much higher.
- (¹³⁷) Following a call for tenders, the Commission instructed an independent expert, Moore Stephens, Chartered Accountants, which issued its final report on 25 January 2008.
- (¹³⁸) These are the following vessels: Corse, Ile de Beauté, Méditerranée, Napoléon Bonaparte, Paglia Orba, Monte d'Oro, Monte Cino.
- (¹³⁹) That discount, which is EUR [...] million (that is on average [...] to [...] % of the gross market value), is, inter alia, justified by the specific nature of SNCM's vessels which are adapted to the services provided by the undertaking, by the state of the vessels and by the background of the placing on the market of the entire fleet (in particular the weakness of the seller's position). BRS's valuation is based in particular on the case of a sale of vessels fully in order and updated, well-maintained and in good working order under normal conditions of trade.
- (¹⁴⁰) Estimated at EUR [...] million.
- (¹⁴¹) Legal uncertainty is justified by the probability that the authorised liquidator is forced to dispose of the vessels very quickly and by a glut in the market because of its limited absorption capacity.
- (¹⁴²) At issue is an obligation introduced by Article L.321-13 of the Employment Code which provides for the payment by the employer of an indemnity upon the redundancy of an employee aged at least 50.

- (¹⁴³) Cost of revitalisation of the labour market area (EUR [...] million), costs of redeployment agreements (EUR [...] million), cost of the deployment support and assistance unit known as 'mobility' (EUR [...] million).
- (¹⁴⁴) Cost of laying off staff under SNCM contract on secondment to affiliated companies and staff of liquidated subsidiaries (EUR [...] million) and cost of legal proceedings relating to the breach of employment contracts and applications for reclassification of employment contracts (EUR [...] million).
- (¹⁴⁵) On 30 September 2005, SNCM operates three leased vessels. the NGV *Liamone* (from GIE Véronique Bail), the *Danielle Casanova* (GIE Joliette Bail) and the *Pascal Paoli* (GIE Castellane Bail).
- (¹⁴⁶) The assumptions underpinning that valuation are the following:
- SNCM brings an end to its lease-purchasing agreements on 30 September 2005, which means that the vessels are returned to their respective original owners (GIE) and no rent is paid,
 - The purchase options cannot be exercised,
 - The disposal of the vessels is made by GIE's bank creditors on 30 September 2005; the net proceeds of the sale of the vessels is allocated first to the reimbursement of bank and tax debts,
- (¹⁴⁷) Having regard to the heavy and repeated use by SNCM of fixed-term contracts.
- (¹⁴⁸) In its decision 2006/947/EC of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (OJ L 383, 28.12.2006, p. 21), the Commission stated: The Commission does not deny that, in certain exceptional cases, some national legislation provides for the possibility of third parties to bring proceedings against the shareholders of a liquidated company, in particular if these shareholders may be considered [...] and/or as being guilty of mismanagement. However, in the case in point, although French law does provide for this possibility and the Belgian authorities have provided some indications of such a risk, they have not sufficiently erased the doubts expressed regarding this case when the procedure was extended in April 2005. The Commission concludes that it is not legitimate in this case to include among the costs of this scenario the EUR 58 million which, according to the Belgian authorities, are linked to the risk of [...].
- (¹⁴⁹) Communication of the Commission concerning the aid which France has decided to grant to the Société Marseillaise de Crédit (OJ C 49, 19.2.1997, p. 2).
- (¹⁵⁰) i.e. the current net value of the risk of a future order, having regard to the fact that the persons accused of being responsible for the liabilities would defend themselves against such a claim.
- (¹⁵¹) Law No 85-98 of 25 January 1985 on receivership and the compulsory liquidation of undertakings codified in the Commercial Code in Articles L-621 et seq; Law No 2005-845 of 26 July 2005 concerning the safeguarding, receivership and liquidation of undertakings, codified in Articles 620-1 to 670-8 of the Commercial Code.
- (¹⁵²) The scenario of cancellation of a safeguard plan does not apply to the present case since the abovementioned law of 2005 entered into force subsequently whereas, on the basis of the evidence available to the Commission, nothing supports the conclusion that any receivership of SNCM would fail.
- (¹⁵³) Pursuant to the relevant laws, the public undertakings incorporated under private law fall within the scope of the above laws governing compulsory liquidation. Furthermore, the law make it possible for legal persons under public law to incur liability as director in an action 'en complément de passif'.
- (¹⁵⁴) French case-law requires the de facto director to have carried out 'actual acts as manager or director recurrently'.
- (¹⁵⁵) Response of the French authorities to certain observations submitted by SNCM (see recital 172 of this decision).
- (¹⁵⁶) It is interesting to note that, in addition to classic salary payables, there are judicial salary payables originating in decisions of labour courts. In the present case, the employee applies to the labour court for a ruling on the validity of his application and when that application is accepted, it is entered in the statement of debts of the company.
- (¹⁵⁷) Judgment of the Court of Cassation, 30 November 1993, No 91-20 554, Bull.civ. IV, No 440, p. 319.

- (¹⁵⁸) That assessment was made by Sorgem Evaluation, an investments adviser. The author of the assessment, Maurice Nussenbaum, is a financial expert at the Court of Appeal in Paris and is accredited by the Court of Cassation.
- (¹⁵⁹) Response of the French authorities to certain observations submitted by SNCM (see recital 174 of this decision).
- (¹⁶⁰) Response of the French authorities to certain observations submitted by SNCM (see recitals 175 and 176 of this decision).
- (¹⁶¹) Response of the French authorities to certain observations submitted by SNCM (see recitals 175 and 176 of this decision).
- (¹⁶²) Bureau de Recherches Géologiques et Minières (BRGM).
- (¹⁶³) See, for example, the judgment of the Court of Cassation of 6 February 2001 No 98-15129.
- (¹⁶⁴) See, *inter alia*, two judgments of the Court of Appeal of Rouen of 22 March 2005 — judgment No RG 04/02549 Aspocomp Group Oyj and judgment No RG 01/02667-04/02675.
- (¹⁶⁵) Having regard to the fact that the persons accused of having suspended that plan wrongfully would probably have defended themselves vigorously in order not to be rendered liable.
- (¹⁶⁶) Cass. com., 19 April 2005, Métaleurop.
- (¹⁶⁷) Application of Articles 92 and 93 of the EC Treaty to acquisition of holdings by public authorities, Bulletin EC 9/1984, point 3.2. iii.
- (¹⁶⁸) Case T-296/97 *Alitalia v Commission* [1997] ECR II-3871.
- (¹⁶⁹) See, for example, Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraph 70.
- (¹⁷⁰) See Case 301/87 *France v Commission* [1990] ECR I-307, paragraph 40.
- (¹⁷¹) See the communication concerning possible aid contained in a planned contribution of public capital in the capital of Klöckner Stahl, OJ C 390, 31.12.1994, p. 1.
- (¹⁷²) Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, paragraph 60.
- (¹⁷³) Case 301/87 *France v Commission* [1990] ECR I-307, paragraph 41.
- (¹⁷⁴) Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 82.
- (¹⁷⁵) Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 33.
- (¹⁷⁶) Case C-390/98 *HJ Banks* [2001] ECR I-6117, paragraph 33.
- (¹⁷⁷) Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, paragraph 79. See also the Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, point 16).
- (¹⁷⁸) Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 56.
- (¹⁷⁹) Case C-143/99 *Adria-Wien Pipeline GmbH* [2001] ECR I-8365, paragraph 41.

- (¹⁸⁰) See, for example, the Commission's decision of 10 October 2007 on the reform of supplementary pensions in the banking sector in Greece (OJ C 308, 19.12.2007, p. 9) and the Commission Decision of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ L 63, 7.3.2008, p. 16).
- (¹⁸¹) See Commission Decision of 17 July 2002 on *Société française de production* (OJ C 71, 25.3.2003, p. 3). The State financing of a plan to reduce staff numbers which enables a company to rid itself of some of its staff while not bearing the full costs of such a plan, is a selective advantage which may be prohibited under State aid rules. On the other hand, the implementation from public funds of additional social welfare measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social security policy of the Member States and does not constitute State aid within the meaning of Article 87(1) EC. [...] SFP will meet these costs in full. Therefore, the additional social welfare measures benefitting SFP's laid-off staff which will be implemented when the staff in question have left the company does not in any way relieve the company of its obligations and does not constitute State aid in favour of SFP.
- (¹⁸²) That amount arises from the difference between the amount actually notified (EUR 76 million) and the amount approved as public service compensation (EUR 53,48 million).
- (¹⁸³) OJ C 288, 9.10.1999, p. 2.
- (¹⁸⁴) OJ C 205, 5.7.1997, p. 5.
- (¹⁸⁵) See point 30 of the 2002 Guidelines.
- (¹⁸⁶) Decision cited above.
- (¹⁸⁷) Regulated provisions are costs entered in the accounts in accordance with French tax rules.
- (¹⁸⁸) Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 71.
- (¹⁸⁹) The first alternative method, based on the capital necessary to finance the existing fleet, seems inappropriate in that the French authorities have included in that calculation the value of fleet acquisition and not its sales value in 2002. The fact is, however, that if a new company were to start up with the same fleet as SNCM's such as it exists today it would have to find capital proportionate to the purchase value of all the ships together and not their construction value. Moreover, such an approach fails to take account of other major assets such as the computer booking system and the buildings in which the company has its headquarters. In the Commission's opinion, the second alternative method, based on SNCM's expenditure, seems more appropriate. However, the Commission would like to see a revision of the amount of EUR 41,7 million for previous losses, in particular to take account of the 2002 results and only losses connected with services to Corsica prior to 1999.
- (¹⁹⁰) It should be noted that the Commission's independent expert estimated the actual costs of the 2002 restructuring plan at EUR [...] million based on SNCM's accounts.
- (¹⁹¹) Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 71.
- (¹⁹²) See Table 2 of this Decision. This figure includes the assets disposed of at the time of the 2003 decision, namely the sale of the *Napoléon*, *Monte Rotondo* and *Liberté* vessels, as well as fixed asset disposals (Schuman and SCI Espace Schuman real estate).
- (¹⁹³) See point 48 of the Guidelines.
- (¹⁹⁴) See Annex I.
- (¹⁹⁵) It should be noted that, on 11 December 2007, an agreement to sell the *Jean Nicoli* was signed between VT and a third-party buyer with ownership being transferred in April 2008.
- (¹⁹⁶) The Commission was notified of this by letter dated 23 June 2004.
- (¹⁹⁷) This figure includes the sale of SCI Espace Schuman (EUR [...] million) on 24 June 2003 but does not include the negative net disposal proceeds from the sale of the *Aliso* (EUR [...] million) on 30 September 2004.
- (¹⁹⁸) The *Asco*, the company's holdings in *Sudcargos* and the company's real estate.

- ⁽¹⁹⁹⁾ The Commission finds that, when determining whether or not Article 4 of the 2003 decision has been complied with, account should be taken of the published prices, that is the prices on any advertising materials or communications published by SNCM. That condition does not apply to the prices proposed by SNCM's reservation system because those fares are subject to dynamic quotas (yield management) both at SNCM and its competitors. The way in which the systems are set up makes it impossible to take account of the special fares offered by SNCM's competitors and, therefore, to verify the non-existence of price leadership in the case of SNCM.
- ⁽²⁰⁰⁾ It appears that, on the basis of the information provided by the French authorities, SNCM at no time between 9 July 2003 and 16 March 2005 published prices lower than those published by its competitors in its corporate communications, advertising campaigns or public documents.
- ⁽²⁰¹⁾ This amount is the difference between SNCM's net cash needs (EUR 19,75 million) and the net proceeds of the assets disposed of following the 2003 decision (EUR [...] million from the sale of the Aliso and holdings in Southern Trader, Someca and Amadeus). It brings the State's total capital contribution to SNCM to EUR 69,29 million.
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ANNEX I

OPERATIVE PART OF THE 2003 DECISION*Article 1*

The restructuring aid which France plans to grant to the Société Nationale Maritime Corse-Méditerranée (SNCM) is compatible with the common market under the conditions laid down in Articles 2 to 5.

Article 2

From the date on which this Decision is notified and until 31 December 2006, SNCM shall refrain from acquiring new ships and signing contracts for building, ordering or chartering new or renovated ships.

From the date on which this Decision is notified and until 31 December 2006, SNCM can only operate the 11 ships which SNCM already possesses, namely: the *Napoléon Bonaparte*, *Danielle Casanova*, *Île de Beauté*, *Corse*, *Liamone*, *Aliso*, *Méditerranée*, *Pascal Paoli*, *Paglia Orba*, *Monte Cinto* and *Monte d'Oro*.

If for reasons beyond its control SNCM has to replace one of its ships before 31 December 2006, the Commission may authorise such a replacement on the basis of a duly reasoned notice served by France.

Article 3

The SNCM group shall dispose of all its direct and indirect holdings in the following companies:

- Amadeus France,
- Compagnie Corse Méditerranée,
- Société civile immobilière Schuman,
- Société Méditerranéenne d'Investissements et de Participations,
- Someca,

Instead of disposing of its holdings in Société Méditerranéenne d'Investissements et de Participations, SNCM may sell this company's sole asset, the Southern Trader, and close down this subsidiary.

The disposals may be made, at the choice of the French authorities, either through public auction or through a call for expressions of interest published in advance, providing for a minimum period of two months for any response.

France shall provide the Commission with proof of all these disposals. The low level of bids which SNCM might receive cannot be invoked as a reason for not going ahead with the disposals. If there are no bids and if France can show proof that all the necessary publicity has been made, the condition laid down in the first paragraph shall be deemed to have been complied with.

Article 4

In respect of all links to Corsica, SNCM shall, from the date on which this Decision is notified and until 31 December 2006, refrain from pursuing a fares policy in respect of published fares intended to offer lower fares than those of each of its competitors for equivalent destinations and services and identical dates.

The Commission reserves the right to initiate an investigation procedure whenever it finds that the conditions laid down in this Decision have not been complied with, and in particular the condition laid down in the first paragraph.

The condition laid down in the first paragraph is complied with if every day the lowest prices advertised by SNCM are higher than the lowest promotional prices advertised by each of its competitors for equivalent destinations and services.

The condition laid down in the first paragraph shall no longer apply if the prices of the said competitors exceed SNCM's fares that were in force in the reference year 1996, corrected for inflation.

Before 30 June each year, France shall inform the Commission of all the elements necessary to show that this condition has been duly complied with in the preceding calendar year in respect of all crossings to or from Corsica.

Article 5

In accordance with the commitments made by the French authorities in the restructuring plan, the annual number of round trips of ships on the various sea links to and from Corsica are until 31 December 2006 limited to the thresholds indicated in Table 3 of this Decision ⁽¹⁾, save for exceptional reasons for which SNCM is not responsible that would oblige it to transfer particular round trips to other ports, and save for any change made to the public service obligations incumbent on the company.

Article 6

France is authorised to recapitalise SNCM through a first payment of EUR 66 million from the date on which this Decision is notified.

Until the end of the restructuring period, that is until 31 December 2006, the Commission may decide, upon a request from the French authorities, to subsequently authorise a second payment to SNCM which will correspond to the difference between the EUR 10 million remaining and the proceeds from the disposals required in Article 3, in accordance with the conditions laid down in that Article.

Such a decision can be taken only if the action required in Article 3 has been carried out, the proceeds from the disposals does not exceed EUR 10 million and the conditions laid down in Articles 2, 4 and 5 have been complied with, without prejudice to the Commission's right to initiate, where appropriate, the formal investigation procedure for failure to comply with any of these conditions. Failing this, the second instalment of aid shall not be paid.

Article 7

Within six months of the date on which this Decision is notified, France shall inform the Commission of the measures taken to comply with it.

Article 8

This Decision is addressed to the French Republic.

⁽¹⁾ See Annex II to the present Decision.

ANNEX II

TABLE 3 OF THE 2003 DECISION

Trend in SNCM services

	Number of crossings		Places available		Linear metres available	
	2001	> 2003	2001	> 2003	2001	> 2003
Marseilles-Corsica	1 881	[...]	1 723 050	[...]	1 469 000	[...]
Toulon-Corsica	187	[...]	303 650	[...]	0	[...]
Gulf of Genoa	1 768	[...]	1 708 700	[...]	0	[...]
Sub-total Europe	3 836	3 067	3 735 400	2 357 500	1 469 000	[...]
Maghreb	302	372	444 000	635 000	0	0
Total	4 138	3 439	4 179 400	2 992 500	1 469 000	[...]