

COMMISSION

COMMISSION DECISION

of 8 September 2004

on the measure relating to the Bioscope theme park implemented by France for 'SMVP — Mise en valeur du patrimoine culturel'

(notified under document number C(2004) 2686)

(Only the French text is authentic)

(Text with EEA relevance)

(2005/401/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Whereas:

I. PROCEDURE

(1) By letter of 27 March 2001, registered as received on 28 March, a complaint was sent to the Commission regarding possible State aid for the Bioscope theme park (hereinafter Bioscope) in Alsace, France. The complaint also referred to the Écomusée d'Alsace, which was the subject of a separate Commission Decision dated 21 January 2003⁽²⁾ and is therefore not concerned by this Decision.

(2) The Commission asked France to provide information on the measure in question by letters dated 30 March 2001, 31 July 2001, 14 December 2001, 16 July 2002, 17 October 2002 and 3 December 2002. France provided this information by letters dated 24 July 2001, registered as received on 26 July, 28 November 2001, registered as received the same day, 2 June 2002, registered by the Commission the same day, 25 June 2002, registered as received the same day, 8 July 2002, registered as received on 9 July, 21 October 2002, registered as received on 22 October, and 7 February 2003, registered as received on 10 February.

(3) By letter of 29 October 2003, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of these measures.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁽³⁾. It called on interested parties to submit their comments on the measure in question.

(5) By letter of 26 January 2004, registered as received the same day, France sent its comments to the Commission.

(6) By letter of 19 February 2004, registered as received the same day, the German Federation of Theme Parks and Leisure Companies (*Verband Deutscher Freizeitparks und Freizeitunternehmen e.V.*, hereinafter VDFU) sent the Commission comments on the aid in question.

(7) By letter of 24 February 2004, registered as received on 25 February, the company 'SMVP — Valorisation et animation du Patrimoine culturel' (hereinafter SMVP) sent the Commission comments on the aid.

(8) By letters dated 26 and 27 February 2004, the Commission sent France copies of the comments made by the VDFU and SMVP.

(9) By letter of 26 March 2004, registered as received the same day, France sent the Commission its observations on the comments made by the VDFU and SMVP.

(10) By letter of 25 August 2004, registered as received on 31 August, France provided further information on the measure.

⁽¹⁾ OJ C 20, 24.1.2004, p. 6.

⁽²⁾ OJ C 97, 24.4.2003, p. 10.

⁽³⁾ See footnote 1.

II. DESCRIPTION

1. The Bioscope theme park project

- (11) The Bioscope theme park project was launched in 1994 by the region of Alsace. The aim was to construct a scientific, educational and fun theme park focusing on health, life and the environment.
- (12) The Alsatian regional authorities' idea was that the park should allow visitors to learn while enjoying themselves. It should distance itself from the traditional approach of more conventional scientific and technical museums such as the 'Palais de la découverte' or the 'Cité des sciences' in Paris, which were not considered attractive enough fully to meet their original objective. Visitors should see Bioscope above all as a place of relaxation and enjoyment which would, at the same time, also enable them to learn at their own pace.
- (13) In addition, the regional authorities point out that Bioscope also aims to increase the number of tourist attractions in Alsace, something which is not incompatible with the objective mentioned above.

2. Selection of the beneficiary

- (14) By order of 12 January 1998, the Regional Council of Alsace and the Departmental Councils of Haut-Rhin and Bas-Rhin set up the mixed consortium Symbio (Symbio) with a view to implementing the necessary procedures for the construction of Bioscope.
- (15) The regional authorities chose to operate Bioscope in accordance with the legal principle of public-service delegation⁽⁴⁾. The State finances the acquisition of land and some of the investment costs. It delegates the construction and operation of the park to a concessionaire for 30 years, with the concessionaire paying the State compensation in the form of a charge levied on its turnover. At the end of the concession, the property is returned to the State.
- (16) In order to select a concessionaire for Bioscope, Symbio published an invitation to tender for private operators in the *Official Journal of the European Communities*⁽⁵⁾ in September 1998.
- (17) After a lengthy selection procedure aimed at finding an operator with the necessary experience to construct and

operate the park satisfactorily, Symbio opted for Parc Astérix, which has since become a part of the Grévin et Compagnie group. This was confirmed on 13 March 2001 with the signing of a public-service delegation contract for 'the design, construction and management of the Bioscope theme park' between Symbio, on the one hand, and SMVP, a subsidiary of Parc Astérix, on the other.

- (18) An amendment to the contract was signed on 9 July 2002. The contract as amended is referred to below as the 'concession'.

3. The project resulting from the competitive tendering procedure — Participation by the State⁽⁶⁾

- (19) The concession envisages a small park corresponding to an initial investment of EUR 61,5 million and with an initial target of 400 000 visitors per year, eventually rising to 800 000.
- (20) The arrangements for participation by the State are laid down in the concession.
- (21) The following points in particular are set out:
- the State makes available to SMVP, in tranches and for 30 years, the necessary land, i.e. 50 hectares. This land remains the property of the State and will be returned free of charge at the end of the concession. The buildings, works and concessions acquired, fitted out, built and set up by SMVP during the concession, which are its property and are linked to the operation of the park, will be returned free of charge to the State at the end of the concession if they have been fully written off. Otherwise, the State will have to pay an allowance corresponding to the remaining accounting value for them to be returned,
 - SMVP designs the Bioscope theme park under State control before constructing it and operating it for 30 years,
 - the park built by SMVP represents an investment with an initial tranche of EUR 61,5 million. The State is the only investor in this first tranche, with a participation of EUR 30,5 million, through Symbio,

⁽⁴⁾ The public-service delegation procedure is subject to the rules set out in Article L.1411-1 *et seq.* of the General local and regional authorities code.

⁽⁵⁾ OJ S 168, 1.9.1998, 113001.

⁽⁶⁾ The 'State' hereinafter refers to the local and regional authorities of Alsace, Haut-Rhin and Bas-Rhin.

— the subsequent investments in the park's renovation are entirely the financial responsibility of SMVP. The plans must be approved by the State, which checks in particular whether they are consistent with the park's educational concept,

— SMVP pays an annual charge to the State representing 2,5 % of its annual gross turnover earned from all the activities carried out within the geographical bounds of the concession (except for the first two calendar years, even if not full operating years, for which the charge is 1 and 2 % respectively), less any other charges levied by the State on subcontracted activities.

III. REASONS FOR INITIATING THE PROCEDURE

(22) In the correspondence preceding the initiation of the formal investigation procedure, France pointed out that, in its view, the public authorities' intervention in this case was compensation for obligations linked to a task of general economic interest entrusted to the concessionaire responsible for operating Bioscope.

(23) When initiating the formal investigation procedure, the Commission expressed the following doubts regarding the French State's assistance for Bioscope and the justification given by France at the time.

(24) Firstly, the Commission felt that there were doubts as to whether France's reasoning that the beneficiary company had been entrusted with a task of general economic importance could be followed. It doubted whether France had clearly defined that task. Even if it had, the Commission doubted whether France had provided sufficient justification for the absence of overcompensation for the extra costs associated with that task.

(25) Secondly, the Commission felt that the State's support probably constituted aid, particularly as no evidence had been provided to show that the beneficiary company would receive from the State a payment corresponding to the market price for operating a theme park.

(26) Thirdly, the Commission assessed the compatibility of the potential aid in the light of the various provisions of the EC Treaty. It concluded that, given its aims, the potential aid could be considered only in the light of the provisions concerning regional aid or of Article 87(3)(d) of the EC Treaty concerning the promotion of culture. In the absence of any justification from France in this

respect, the Commission doubted whether the conditions necessary for potential aid to be authorised under either set of provisions had been met.

IV. COMMENTS FROM FRANCE ON THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

1. On the nature of State assistance for Bioscope as compensation for the obligation to provide a service of general economic interest

(27) In its comments on the initiation of the formal investigation procedure, France restates its position that State assistance for the Bioscope project does not constitute State aid within the meaning of Article 87(1) of the Treaty, but rather compensation for the costs associated with an obligation to provide a service of general economic interest.

(28) To back up this position, France begins by reminding the Commission of how the idea for Bioscope came about and then gives a practical description of the park project as drawn up by Symbio in conjunction with SMVP. This description emphasises the educational nature of the park and its attractions which are very different from the attractions found in traditional theme parks. France stresses that the concept of the park would, under no circumstances, alter in the future since any change in its educational vocation would be in breach of the agreement between the concessionaire and the State.

(29) France then points out what, in its view, the task of general economic interest entrusted to Bioscope comprises.

(30) France considers that the task was unambiguously spelt out in the concession linking SMVP to the State. It backs this up with extracts from the concession which emphasise generally the social and educational aims of Bioscope and with other extracts dealing more specifically with the prices to be charged for certain categories of visitor (children accompanied by their parents, school groups, elderly people). France also emphasises that Symbio will always have control over the activities of the concessionaire.

(31) France examines individually, the criteria laid down by the European Court of Justice in *Altmark* ⁽⁷⁾ for assessing public support in the form of compensation for costs associated with a task of general economic interest.

⁽⁷⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, [2003] ECR I-7747.

(32) While highlighting the fact that it cannot be held responsible for being unaware of these criteria when provision was made for State support since the judgment was delivered well after the signing of the concession, France points out that:

- the public service obligations are clearly defined since the operation as a whole is a service of general economic interest,
- the parameters on which the calculation of compensation is based were clearly defined beforehand since they were laid down before the concession was granted and since their very principle and nature were determined before the competitive tendering procedure was launched,
- the compensation does not exceed that which is necessary to cover the costs involved in performing a task of general economic interest, as a study carried out by independent experts, Rise Conseil, has shown that the return on SMVP's investment in the Bioscope project (between [5-10 %] (*) and [10-15 %]* depending on the calculation assumptions) would be comparable to or lower than the usual rates of return in the theme-park sector (between 11 and 15 % for a sample of profitable theme parks) (8).

2. On the existence of State aid

- (33) France takes the view that the public authorities' assistance for Bioscope does not constitute State aid within the meaning of Article 87(1) of the Treaty.
- (34) As a preliminary observation, France considers that Bioscope does not exercise an economic activity. Rather than a theme park, Bioscope should be considered as an alternative form of museum. Like a museum, school or hospital, Bioscope is the embodiment of the determination to serve the public in Alsace.
- (35) Furthermore, France considers that Bioscope's existence will not affect trade between Member States. It does not deny that the Bioscope project specifically aims to attract visitors from other countries, and especially its very close neighbour, Germany. It points out, however, that the theme park's catchment area does not extend

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(8) France claims that this finding simultaneously satisfies the last two of the four conditions established in the Altmark judgment.

over more than a few hundred kilometres. The only other leisure park in the area, Europa-Park in Rust, could not be considered to be in competition with Bioscope due to the difference in size between the two parks and their fundamentally different concepts.

- (36) France points out that, more generally, there can be no effect on competition since, in so far as Bioscope exercises a commercial activity, the relevant product market is confined to itself or, at the very least, to a quite small number of distant locations. It claims that very few tourist products could replace that offered by Bioscope. It emphasises the many differences between Bioscope, on the one hand, and the EuroDisney and Europa-Park leisure parks, on the other. It mentions the Spanish park Terra Mítica, whose concept is closer to Bioscope's, but points out that, in practice, visitors are highly unlikely to have to decide between two parks thousands of kilometres away from each other.
- (37) Lastly, France considers that the public assistance for Bioscope confers no advantage on SMVP or its parent company, Grévin et Compagnie. It bases its reasoning on the existence of a competitive tendering procedure which, it claims, ensured that a bid was accepted that reflected market conditions and on a detailed economic analysis by the independent experts Rise Conseil showing that the return on SMVP's investment in the Bioscope project would be comparable to or lower than the usual rates of return in the theme park sector.

3. On the compatibility of potential State aid with the Treaty

- (38) France points out that, if the public authorities' assistance for the Bioscope project were to be considered State aid within the meaning of Article 87(1) of the Treaty, this aid would, in any case, be compatible with the common market.
- (39) Firstly, France notes that the aid could be considered compatible with the Treaty by virtue of the derogation provided for in Article 87(3)(c).
- (40) It claims that the aid meets the conditions laid down in the Guidelines on national regional aid (9) (hereinafter the regional guidelines).

(9) OJ C 74, 10.3.1998, p. 9. Amended guidelines (OJ C 258, 9.9.2000, p. 5).

- (41) The Commission's unfavourable view, as expressed in the regional guidelines, of individual ad hoc aid not covered by a Commission-approved scheme would not be applicable to Bioscope, which was not covered by a sectoral policy. France also provides a list of the positive effects of the aid on the region of Alsace. It recalls that the decision to set up Bioscope in an assisted area was a deliberate one and was even criticised internally by those who would have preferred the project to be set up closer to the regional capital.
- (42) France also claims that the aid satisfies all other criteria laid down by the regional guidelines, and in particular aid intensity, which the Rise Conseil apparently shows to be considerably lower than the level admissible in the area in question.
- (43) Secondly, France points out that the aid could be considered compatible with the Treaty by virtue of the derogation provided for in Article 87(3)(d).
- (44) According to France, the terms 'culture' and 'heritage' mentioned in that Article should be broadly interpreted to include scientific culture and the promotion of health, an essential part of human heritage. In this respect, France mentions a whole range of activities proposed by Bioscope and allowing visitors to broaden their scientific knowledge as regards the environment and health and, more generally, to improve their well-being.
- investment, while a private operator would have required a larger share of the profits. The upshot is that SMVP receives a return in excess of the normal market return. The concession also allows SMVP to benefit from important synergies with its parent company's other parks.
- (48) The VDFU also contests France's view that the aid ranks as compensation for a task of general economic interest. It considers that none of the *Altmark* criteria are met in this case.
- (49) The VDFU claims that the definition of the task of general economic interest entrusted to Bioscope is in no way precise enough to meet the Court's requirements in this matter. It in no way questions the French public authorities' laudable aim of teaching through enjoyment, but it considers that this aim does not, in itself, define in a sufficiently precise manner the task of general economic interest entrusted to Bioscope. This would have required a detailed description of the means to be implemented in order to carry out this public service task and, in particular, a guarantee that no alteration conflicting with the aim of public service would subsequently be made to the park. The VDFU also points out that theme parks, even those financed entirely out of private funds, very often include attractions of an educational nature. The best example was Europa Park, which has, in particular, replicas of a Shakespearian theatre and the MIR space station and provides visitors with an introduction to environmental protection in the form of a 'four-dimensional' film produced in collaboration with the World Wide Fund for Nature (WWF).

V. COMMENTS FROM INTERESTED PARTIES

1. Comments made by the VDFU

- (45) As an introductory remark, the VDFU points out that the theme park sector is made up mainly of small and medium-sized enterprises which, as such, need special protection against distortions of competition. Enterprises of this type in Germany have had to undertake investment with no State aid and at considerable risk. Some of them have now been taken over by Grévin et Compagnie. State aid which distorts competition is particularly harmful in this sector inasmuch as it would lead to a drop-off in the peak numbers of visitors at non-subsidised parks, while these peak periods are precisely what parks need to become profitable.
- (46) The VDFU considers that the French State's assistance for SMVP constitutes aid within the meaning of Article 87(1) of the Treaty.
- (47) In its view, the concession arrangements do not allow Symbio to earn a normal rate of return on its part of the investment in Bioscope. Symbio is prepared to accept a low charge on the park's turnover in exchange for its
- (50) Owing to the imprecise nature of the definition of Bioscope's task of general economic interest, the VDFU feels that it is impossible to regard the concession as laying down in advance and in an objective and transparent manner the basis for calculating the compensation for the costs associated with this task. In its view, the charges paid by SMVP have not been clearly established and justified and are not based on objective criteria.
- (51) The VDFU also considers that the selection procedure for the Bioscope concession did not describe the practicalities of the task of general economic interest and the means to be implemented in order to perform that task in enough detail for the selection procedure to be implemented in such a way as to rule out any possibility of overcompensation. France should have justified the level of compensation payable to the concessionaire in respect of its task of general economic interest in a detailed way and by taking into account all the concessionaire's expenditure and profits, something which, according to the VDFU, it did not do properly.

- (52) The VDFU goes on to say that the French State's aid for Bioscope is incompatible with the provisions of the Treaty.
- (53) Firstly, the VDFU considers that the aid cannot be compatible with the regional guidelines. Given that the aid is not granted under a Commission-approved scheme, its positive effect on the region must be demonstrated. According to the VDFU, however, the area in which Bioscope will be located already possesses at least 10 theme parks on the German side of the border alone. Experience over the years in this field, particularly with the large number of failed theme parks such as the Hagondange/Lorraine park, shows that major public investment in this sector does not have any noticeable and beneficial structural effects on the region's economy.
- (54) According to the VDFU, it should be demonstrated that the park is likely to provide the region with a lasting boost and that the resulting development makes up for the impact that the project has on Bioscope's competitors. The VDFU cannot see how it would logically be possible to meet both of these conditions, at the very least if France's arguments are followed.
- (55) Lastly, the VDFU takes the view that, in order for the aid for Bioscope to be authorised under Article 87(3)(d) of the Treaty, it should be assessed whether the aid is proportional to the objective of promoting culture and heritage. Such a proportionality assessment could be carried out only under conditions of transparency and objectivity similar to those required for a proportionality assessment in respect of compensation for a task of general economic interest, something which the VDFU feels has not been carried out, as explained in point 45 *et seq.*
- (59) SMVP claims that the design, construction and operation of such a park could not be envisaged within a purely private framework, a finding reached in the Rise Conseil study.
- (60) Still according to SMVP, public participation in financing an activity of general interest unlikely to be funded by the private sector alone cannot be deemed incompatible with the Community rules on State aid.
- (61) SMVP therefore concludes that the State's participation does not exceed the levels of aid that would be incompatible with Community rules.

VI. FRANCE'S OBSERVATIONS ON THE COMMENTS FROM INTERESTED PARTIES

2. Comments made by SMVP

- (56) SMVP points out that it fully shares France's views, which are summarised in section IV.
- (57) SMVP's only aim is to perform the obligations set out in the concession. It would draw the Commission's attention to the very specific nature of Bioscope. Neither SMVP nor any other subsidiary of its parent company has had any experience in managing such an unconventional park.
- (58) According to SMVP, Bioscope is an exclusively public initiative whose concept has been defined by the public authorities alone and unquestionably satisfies a general interest.
- (62) France's observations relate solely to the comments made by the VDFU.
- (63) France rejects the VDFU's claim that Symbio would not earn a sufficient rate of return on its investment. In its view, Symbio would achieve a return comparable to a risk-free rate, this being for it the rate that must be applied to activities carried out by a public body that has to account for its use of public money. It also claims that the VDFU failed to take account of the fact that Bioscope will be returned to Symbio after the 30-year concession, goodwill included, thereby distorting its calculations.
- (64) France also disagrees with the VDFU that State aid to Bioscope would not meet the conditions laid down by the Court in *Altmark*. It restates the arguments set out in Section IV, emphasising in particular the fact that, in its view, Bioscope would not provide a mix of leisure and educational activities but would focus exclusively on the latter. It emphasises the fact that the concession rules out any modification of the park in this respect. Any undermining of the park's purely educational nature on the part of the concessionaire could be deemed 'a particularly serious breach of contract', authorising Symbio to take coercive measures that may even involve disqualifying the concessionaire.
- (65) France also points out that Bioscope is a unique project which, in its view, is not in competition with any German theme park. It believes that the activities described by the VDFU as examples of those parks' cultural activities are ancillary and subordinate in nature to their leisure activities. Moreover, in Germany, only Europa-Park is less than three hours' drive from Bioscope.

- (66) France also rejects the VDFU's assessment of the compatibility of State support with the regional guidelines. In its view, there is no contradiction in its arguments regarding the regional impact of the aid. If the State succeeds in its objective, the aid will have had a positive impact on the region and public money will not have been wasted. France recalls the numerous positive effects on the local economy that it ascribes to Bioscope. It questions the VDFU's argument that Bioscope could deprive German parks of the peak numbers of visitors they need to remain profitable. The only German park close enough to Bioscope that could see visitors lured away is Europa-Park. However, the number of visitors per year to Europa-Park (3,3 million according to France) is such that it is highly unlikely that its survival will depend on a hypothetical annual peak in visitor numbers.
- (67) Lastly, France would point out that, in its view, Bioscope's cultural objective corresponds fully to its public-service task.

VII. ASSESSMENT

1. Existence of aid

- (68) A measure constitutes State aid within the meaning of Article 87(1) of the Treaty when it confers, through State resources, a selective competitive advantage on one or certain undertakings such that trade between Member States is or may be affected. In this section, the Commission evaluates each of the four cumulative criteria making up this definition.

Selectivity

- (69) There is no doubt that the measure is selective as it favours a single undertaking, SMVP.

State resources

- (70) The State's assistance for Bioscope consists in the payment of funds by Symbio, a body grouping together a number of local authorities. Therefore, State resources are clearly being mobilised.

Effect on trade

- (71) France argues that Bioscope is a park so specific in nature that it is in no way substitutable for the attractions of

other theme parks, and in particular of the only one which, in France's view, lies in its visitor catchment area. The support given by the State to this project could not therefore affect the flow of visitors or trade between Member States.

- (72) The Commission recognises that Bioscope offers very different activities from traditional theme parks. A visit to a traditional theme park is therefore not an identical alternative to a visit to Bioscope, and this certainly means a very significant reduction in the number of visitors that Bioscope is likely to attract from other parks.

- (73) The Commission does not, however, consider this difference to be sufficient in itself to rule out altogether all forms of substitutability. When people have to decide how they wish to spend their free time, they do not necessarily choose between similar activities. They can decide to go to the swimming pool rather than the zoo, despite the fact that the type of entertainment to be enjoyed at the zoo is very different from that at the swimming pool. Likewise, parents frequently decide to go on a family visit to a museum whereas, were it up to them, the children would have preferred to go to a fair.

- (74) The Commission considers, therefore, that a visit to Bioscope could, to a limited extent, be an alternative to a visit to a German theme park.

- (75) Accordingly, the Commission believes that, in this particular case, the measure is indeed likely to distort trade between Member States and thus fulfils the relevant criterion.

Advantage

- (76) In order to determine whether the measure confers a competitive advantage on SMVP, the Commission must assess whether State intervention places the undertaking in a better situation than if market forces had been given free rein.

- (77) The fact that the State intervenes financially is not a sufficient condition to conclude that the recipient undertaking is placed at an advantage. State support can be given on the same terms as would have been accepted by a private investor in a market economy. It does not, therefore, constitute an advantage within the meaning of Article 87(1) of the EC Treaty.

- (78) In the present case, it is a particularly complicated task to analyse the nature of the State's intervention as the concession is legal in nature and lays down very dissimilar rights and obligations for each of the two parties.
- (79) To sum up very briefly, it can be considered from an economic viewpoint that both parties are investing in the Bioscope project, albeit with differing risks. Symbio, the public-sector player, assumes very little commercial risk whereas SMVP assumes the bulk of the risk. As is only natural, the investor who takes less of a risk receives less than the investor who takes more of a risk.
- (80) The analysis must, therefore, determine in particular whether the respective rates of return on investment are appropriate.
- (81) The Commission notes that the analysis was carried out by the independent company Rise Conseil and that its findings were sent to the Commission by France.
- (82) The analysis concludes that SMVP's rate of return on the Bioscope project is no higher than on similar investments in purely private projects and, moreover, is similar to that on risk-free investments. This would suggest that, to a certain degree, the respective investors' rates of return match the market rates of return.
- (83) This analysis is nevertheless based on the fact that the investment by the public authorities can be expected to take a very different form to SMVP's investment. For the principle of a market-economy private investor to be met, it would have to be possible for another private investor, not necessarily a pleasure-park operator, to be able to make an investment similar to that made by the State.
- (84) However, SMVP itself points out that it is highly likely, if not certain, that the project could have been launched without the participation of Symbio in this form. This tends to suggest that Symbio's participation could not have been replaced by that of a private investor, even on identical terms (absence of any risk linked to a lower rate of return). In the Commission's view, this does not necessarily contradict the findings of the Rise Conseil study as the State may possess special legal instruments allowing it to intervene under conditions not accessible to private operators.
- (85) In the light of the above, the Commission cannot therefore rule out the existence of an advantage for SMVP.
- (86) The Court judgment in *Altmark* sets out four cumulative conditions which, if met, result in the classification of a measure as compensation for charges related to a service of general economic interest and not therefore as a competitive advantage.
- (87) The first of these conditions is that 'the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined'.
- (88) When opening the formal examination procedure, the Commission had questioned whether this condition in particular was met in the present case.
- (89) Having analysed the information provided by France and interested parties, the Commission feels that this doubt remains.
- (90) The Commission considers first of all that the Bioscope's general educational objective, as set out for example in the preamble to the concession, is far too vague to be considered a clear definition of its public-service task. In particular, the definition is too wide-ranging to serve as a basis for any estimation of the costs of performing this task.
- (91) The Commission also considers that France's argument to the effect that the concession as a whole defines a public-service obligation is equally untenable. For, the concession contains many articles which would have been entirely identical if Bioscope had not had any pedagogical or educational vocation whatsoever and which cannot therefore be said to define a public-service task. It would, at the very least, be necessary to identify which of the concession's articles refer to this educational vocation. The Commission feels, however, that none of the articles are sufficiently specific in this regard, with the possible exception of the articles on special rates for certain categories of visitor, as discussed in point 92.

(92) Lastly, the Commission takes the view that the articles in the concession which concern the special rates for certain categories of visitor and to which France referred might indeed be a basis for defining a service of general economic interest. It is, however, clear that these articles relate to only a fraction of Bioscope's activity. If they were invoked with a view to defining a task of general economic interest, the scope of that task would not be sufficient to justify considering the whole project as a public-service project. Moreover, the very scope of the public-service task associated with these articles is unclear. Even unsubsidised parks tend to charge special rates for certain categories of visitor. It is a very common business practice.

(93) In the light of the above, the Commission considers that it cannot rule out the existence of an advantage for the beneficiary undertaking and that this advantage could only very partially be covered by the notion of compensation for charges related to a task of general economic interest.

Conclusion

(94) The Commission cannot therefore rule out the existence of State aid within the meaning of Article 87(1) of the EC Treaty for SMVP. Section VII(2), however, will demonstrate that, inasmuch as State aid exists in this case, it is compatible with the Treaty.

2. Compatibility of the aid

(95) The Commission notes that the aid is granted to an investment project located in a less-favoured area within the meaning of Article 87(3)(c) of the Treaty (the Alsace potassic basin). It is an ad hoc aid project as it is not covered by any aid scheme previously approved by the Commission.

(96) Such investment projects can sometimes be evaluated in the light of the multisectoral framework on regional aid for large investment projects. In this particular case, given that the date on which the aid was granted is the same as the date on which the amendment to the concession was signed, i.e. 9 July 2002, the multisectoral framework applicable is that published in 1998⁽¹⁰⁾ (the framework).

(97) Point 2.1 of the framework restricts its own scope to certain projects meeting either of two specific criteria.

(98) The first criterion is itself made up of three cumulative subcriteria:

— the total project cost must be at least EUR 50 million,

— the cumulative aid intensity must be at least 50 % of the regional aid ceiling for large companies in the area concerned,

— the aid per job created or safeguarded must amount to at least EUR 40 000.

(99) This section will demonstrate that the total cost of the project is EUR [60-65]* million and the aid intensity [7-8]* % while the aid ceiling for the area concerned is 10 %, and that the gross grant equivalent of the aid is EUR [5-10]* million, which, for the 105 jobs created, gives aid per job of EUR [45 000-95 000]*.

(100) The framework is therefore applicable.

(101) In order to determine whether the aid is compatible with the criteria of the framework, the Commission must firstly calculate the intensity of the aid. This intensity must then be compared with a maximum aid intensity calculated using the formula given in point 3.10 of the framework.

Aid intensity

(102) The intensity of aid in the form of a grant is the amount of the grant expressed as a percentage of eligible costs. When aid is other than in the form of a grant, the grant equivalent must first be calculated before being expressed in terms of the eligible costs.

(103) In this case, the aid granted by the State is complex in nature. There is not only a grant element, but other elements too, both positive and negative, deriving from the rights and obligations of each of the parties to the concession. All these elements need to be taken into account in calculating the grant equivalent of the aid.

(104) The following table summarises the elements of the concession in question and their positive and negative impact on the aid granted to SMVP.

Element of the concession	Impact on SMVP
State participation in the initial investment	Positive
Provision of land	Positive
Payment of a charge to the State	Negative
Return of the property to the State at the end of the concession	Negative

⁽¹⁰⁾ OJ C 107, 7.4.1998, p. 7.

- (105) In order to calculate the gross grant equivalent of the aid, each of these elements must be quantified and the algebraic sum worked out. The Commission has used the information at its disposal, particularly that contained in the Rise Conseil report, to quantify these elements.
- (106) The State's participation in the initial investment is easy to calculate: it totals EUR 30,5 million. The State will pay this amount in instalments over 10 years, which means that this amount must be discounted to its present value. In order to do this, the Commission has used the reference and discount rate that it recommended for use by France on the date on which the aid was granted. This rate is 5,06 % and is used in all the following calculations.
- (107) The discounted value of the State's participation in the initial investment is EUR 25,933 million.
- (108) It should also be noted that this grant is the State's only participation in the investments in Bioscope. All subsequent investments are the financial responsibility of SMVP.
- (109) The provision of land, i.e. the value of the rent not paid by SMVP, is estimated to be EUR 6,718 million. This calculation is based on the value of the proposed land in the Pulversheim area near Bioscope (EUR 10 to 12/m²) and on an annual rate of land rent of 8 %, as defined by the General Taxation Directorate in France.
- (110) The total charge payable by SMVP to Symbio is put at EUR 7,295 million. This figure is based on the estimated turnover given in Bioscope's business plan, which was sent to the Commission.
- (111) Quantifying the effect of returning the property to the State is more difficult. The effect is clearly unfavourable to SMVP. With a traditional grant, the beneficiary is and remains the owner of its investment and has full use of it. In particular, it can sell it on the market. In this particular case, Bioscope is returned to the State in its entirety, goodwill included, at the end of the 30-year concession⁽¹¹⁾. Compared with a traditional grant, SMVP thus forgoes the value of this property, which corresponds to the price at which it could have sold it on the market (discounted, of course, to the initial date).
- (112) The Commission thus considers that this selling price forgone by SMVP can be used to assess the value of the negative effect of returning the property to the State, as required by the concession.
- (113) Two distinct methods have been used to calculate this selling price: the gross operating surplus multiple method and the free cash flow method.
- (114) The first method consists of valuing the undertaking as a multiple of its normative gross operating surplus. The multiple depends on the sector and is estimated on the basis of published financial data on recent transactions.
- (115) The Rise Conseil analysis of the values of multiples observed in recent transactions in this sector for which sufficient financial data have been published shows multiples varying between 6,3⁽¹²⁾ and 13,25⁽¹³⁾, with an average of 8,71.
- (116) Applying this average multiple to Bioscope values it at EUR [15-20]* million⁽¹⁴⁾.
- (117) The second method consists in determining a normative cash flow for the undertaking for the period following the start of the concession and in assuming that the undertaking has the same value as a hypothetical company producing such a cash flow in perpetuity.
- (118) In order to calculate this, an assumption as to the cash-flow perpetuity rate has to be made.
- (119) The Rise Conseil study of financial analyses of recent transactions gives assumptions for perpetuity levels of between 1⁽¹⁵⁾ and 3,5 %⁽¹⁶⁾, with an average of 2,2 %.
- (120) Moreover, perpetuity levels are generally estimated to be of a similar order of magnitude as the economic growth rate. Given that France's economic growth in recent years has been between 1 and 3 %, the Commission takes the view that a value of 2,2 % can be applied for the perpetuity rate.

⁽¹¹⁾ In fact, Bioscope, strictly speaking, remains the property of the State throughout the period of the concession, but the effect of this ownership is felt in economic terms only at the end of the concession, when the concessionaire must give up use of the property without compensation.

⁽¹²⁾ Sale of Parques Reunidos (Source: Rise Conseil's report quoting the Advent internet site).

⁽¹³⁾ Sale of Tussauds (Source: Rise Conseil's report quoting *Les Echos* of 9 December 2003 and the *Daily Telegraph* of 23 February 2003).

⁽¹⁴⁾ This calculation is based on the gross operating surplus envisaged in Bioscope's business plan, from which the hypothetical rent the company should pay for use of the land is subtracted to take into account the fact that any buyer would have to rent the land, unless it in turn benefited from some kind of aid.

⁽¹⁵⁾ Analysis of the merger between Ebizcuss.com and International Computer carried out by Gruppo Banca Sella.

⁽¹⁶⁾ Analysis of the stockmarket flotation of Avenir France carried out by CIC Securities.

- (121) Applying this method on the aforementioned assumptions gives a value of EUR [15-20]* million for the undertaking ⁽¹⁷⁾. This figure is similar to the first, an indication of the coherence of these two economic approaches.
- (122) In order not to favour one economic approach over the other, the Commission has taken the arithmetic mean of these two results, i.e. EUR [15-20]* million, as the value of the park.
- (123) The gross grant equivalent of the aid is thus: $25,933 + 6,718 - 7,295 - [15-20]* = \text{EUR } [5-10]*$ million.
- (124) In order to calculate the aid intensity, this figure should be expressed as a percentage of the eligible investments.
- (125) Investment in the Bioscope project will be in two main parts: the initial investment needed for the park to open, and the subsequent investment needed to maintain its attraction.
- (126) Both types of investment are mentioned in the concession. The concession sets the value of the initial investment at EUR 61,5 million, shared between Symbio and SVMP. The discounted value of this investment is EUR 49,985 million. The concession does not, however, set a figure for the subsequent investment but states simply that it should be such as to maintain the park's attraction. The subsequent investment must be approved by Symbio and is entirely the financial responsibility of SVMP.
- (127) In quantifying the subsequent investment, the Commission has based itself on SMVP,s business plan, which has been approved by Symbio.
- (128) The total discounted value of the subsequent investment is EUR [25-35]* million. In the Commission,s view, this is a cautious estimate as the average value of such investment in the last 10 years of the concession, when Bioscope will be operating as planned, is only 14 % of the park's turnover, compared with the average in this sector in France of between 16 and 25 % of turnover ⁽¹⁸⁾. A less cautious, i.e. higher, estimate for this investment would give a lower aid intensity. The Commission can therefore make do with a cautious estimate for its purposes.
- (129) Of the EUR [25-35]* million in subsequent investment, the Commission has based itself only on the part corresponding to investment in new attractions and thus in the extension of Bioscope's activities to calculate the eligible costs; this figure is EUR [15-20]* million and excludes the EUR [10-15]* million set aside for investment in maintenance and replacement. Only the first type of investment mentioned corresponds to initial investment within the meaning of the regional guidelines (point 4.4).
- (130) The basis for calculating eligible costs is thus EUR 49,585 million for the initial investment, plus EUR [15-20]* million for subsequent investment, i.e. EUR [65-70]* million.
- (131) The Commission has then subtracted from these costs the part corresponding to the launch of the attractions, which, in its view, is not eligible for aid under point 4.5 of the regional guidelines. In the detailed description of the first-tranche expenditure provided by France, these activities account for 5 % of total costs. The Commission has extrapolated this figure to the subsequent tranches. Eligible costs within the meaning of the regional guidelines thus amount to 95 % of EUR [65-70]* million, i.e. EUR [60-65]* million.
- (132) The aid intensity in terms of gross grant equivalent is thus $7,279 / [60-65]* = [10-12]* \%$.
- (133) The corresponding intensity in terms of net grant equivalent, calculated using the straight-line depreciation assumptions in the business plan and the reference and discount rate recommended by the Commission for France, is [7-8]* % ⁽¹⁹⁾.
- Maximum allowable aid intensity*
- (134) The formula given at point 3.10 of the framework expresses the maximum allowable aid intensity as the product of four factors.
- (135) The first term, R, is the authorised maximum aid intensity for large companies in the assisted area concerned. In this case, R = 0,10.
- (136) The second term, T, is the competition factor.

⁽¹⁷⁾ Here too, the calculation takes into account the fact that a prospective buyer would have to pay rent for the land.

⁽¹⁸⁾ Source: Rise Conseil study.

⁽¹⁹⁾ This calculation is based on the assumption that, if the undertaking could indeed sell its property at the end of the concession, the full selling price would be counted as part of its profits and thus subject to corporation tax, reducing accordingly the profit on the sale for SMVP. If this effect were not taken into account, the net grant equivalent would be even lower.

- (137) Point 3.3 of the framework states that 'in determining whether structural overcapacity exists in the sector or subsector concerned, the Commission will consider, at the Community level, the difference between the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector'. Structural overcapacity is deemed to exist when, over the previous five years, the capacity utilisation rate of the relevant sector or subsector is more than two percentage points below the average capacity utilisation rate for manufacturing industry as a whole. When the difference exceeds 5 %, the structural overcapacity is considered serious.
- (138) As the Commission has indicated in previous decisions ⁽²⁰⁾, manufacturing industry cannot be compared to a service sector such as theme parks or one of its subsectors. The quantitative criterion set out in recital 137 cannot therefore be applied.
- (139) In the absence of sufficient data on capacity utilisation, point 3.4 of the framework states that the Commission will consider whether the investment takes place in a declining market. For this purpose, the Commission will compare the evolution of apparent consumption of the product(s) in question with the growth rate of manufacturing industry as a whole.
- (140) In the period 1997 to 2002, the average growth rate of EEA manufacturing industry as a whole was 4,8 % ⁽²¹⁾.
- (141) In the case of theme parks, it is difficult to obtain figures on consumption growth for the Community as a whole.
- (142) As regards France, where Bioscope is located, the sector has particularly high growth figures.
- (143) According to a report from the French Senate ⁽²²⁾, theme-park activity in France has increased ninefold in 10 years, corresponding to an average growth rate of 25 %. The report also states that growth in the sector is expected to slacken but should still be between 4 and 8 %.
- (144) In the Commission's view, these figures for France can be used in this case, particularly as the situation in the Member States near to Alsace, which are the only ones falling within Bioscope's visitor catchment area, is similar to that in France in this respect ⁽²³⁾.
- (145) In the light of this, the Commission considers that the investment is not taking place in a declining market.
- (146) Moreover, Grévin et Compagnie's share of the relevant product market is way below 40 %. The abovementioned Senate report indicates, by way of example, that the total number of visitors recorded by the group in 2002 was five million, compared with 13,1 million for Disneyland Paris alone.
- (147) Applying the table of equivalence given in the framework, the Commission thus concludes that $T = 1$.
- (148) The third term, I, is the capital/labour factor. It is a function of the ratio of the project's eligible costs to the number of jobs created by it. In this case, the eligible costs are EUR [60-65]* million and the number of full-time-equivalent direct jobs created is 105. The ratio between these two values is around EUR [600 000-650 000]* per job created. Applying the table of equivalence given in the framework, the Commission concludes that $I = 0,8$.
- (149) The fourth term, M, is the regional impact factor. This factor is always equal to or above 1.
- (150) In the light of the foregoing considerations, the maximum allowable aid intensity is not less than $0,10 \times 1 \times 0,8 = 8 \%$.

⁽²⁰⁾ See Commission Decision of 7 August 2001 in Case N 229/01 — Italy — Aid to Pompei Tech World SpA for the project of a leisure park (OJ C 330, 24.11.2001, p. 2).

⁽²¹⁾ See Commission Decision of 20 April 2004 in Case N 611/2003 — Germany (Saxony-Anhalt) — Aid for investment projects in favour of e-glass AG.

⁽²²⁾ Draft Finance Law 2004 — Volume III — Annexe 20: Tourism. Section VI 'Les parcs de loisirs en France'. Available on the Senate's website : <http://senat.fr/rap/l03-073-320/l03-073-32029.html>.

⁽²³⁾ According to the abovementioned Senate report, France is just behind Belgium and Germany as regards the economic weight of the leisure-park sector.

Conclusion

- (151) Given that the aid intensity is [7-8]* % and that the maximum allowable aid intensity is not less than 8 %, the aid is compatible with the rules of the framework.
- (152) Accordingly, the Commission concludes that the aid is compatible with the criteria of the regional guidelines and hence with the common market under Article 87(3)(c) of the Treaty.
- (153) The Commission would, however, point out that this positive assessment is based on the state of play with regard to the park project and the concession, as described to the Commission. If the nature of the park project were to change or if the State's involvement were to be significantly altered, the Commission should be informed of such a change so that it could review the situation in the light of Community rules governing State aid.
- (154) The Commission does not prejudge the question as to whether the procedure for granting the concession to construct and operate Bioscope to SVMP complies with the rules and principles of Community law. It reserves the right to take the proper steps in this respect, should that be necessary,

HAS ADOPTED THIS DECISION:

Article 1

The measure which France has implemented for 'SMVP — Mise en valeur du patrimoine culturel' and the conditions of which are laid down in the public-service delegation contract granting the concession for 'the design, construction and operation of the Bioscope theme park' between, on the one hand, Symbio and, on the other, 'SMVP — Mise en valeur du patrimoine culturel', as modified by the amendment dated 9 July 2002, while constituting State aid, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 8 September 2004.

For the Commission

Mario MONTI

Member of the Commission