

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 24 October 2011

on State Aid SA 32600 (2011/C) — France — Restructuring aid to SeaFrance SA granted by the SNCF*(notified under document C(2011) 7808)***(Only the French version is authentic)****(Text with EEA relevance)**

(2012/397/EU)

THE EUROPEAN COMMISSION,

information, which was provided by the French authorities on 4 May 2011.

Having regard to the Treaty on the Functioning of the European Union (hereinafter: 'TFEU'), and in particular the first subparagraph of Article 108(2) thereof,

- (3) On 6 April 2011, a competitor of SeaFrance, P&O Ferries (hereinafter: 'P&O'), filed a complaint with the Commission against the restructuring aid.

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

- (4) By letter dated 22 June 2011, the Commission notified the French Republic of its decision to initiate the procedure (hereinafter: 'the decision to initiate the procedure') provided for under Article 108(2) TFEU.

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

- (5) The Commission invited interested parties to submit their comments on the aid in question ⁽³⁾. A detailed description of the comments received by it is given in Section V.

Whereas:

I. PROCEDURE

1.1. General procedural context

- (1) By decision of 18 August 2010 ⁽²⁾ the Commission approved rescue aid (hereinafter: 'rescue aid') in favour of SeaFrance SA (hereinafter: 'SeaFrance'), which France has since implemented. This aid consisted of a loan for a maximum amount of EUR [40-70] million granted by the SNCF to SeaFrance.

- (6) The French authorities presented comments on 14 July 2011 in response to the decision to initiate the procedure, on 22 July 2011 following the complaint by P&O, and on 19 August 2011 in response to the comments by interested third parties on the decision to initiate the procedure.

- (2) On 18 February 2011, the French authorities notified restructuring aid (hereinafter 'restructuring aid') in favour of SeaFrance amounting to EUR 223 million, accompanied by a restructuring plan. By letter dated 29 March 2011, the Commission requested additional

- (7) On 12 September 2011, the French authorities communicated a modified restructuring plan.

- (8) On 3 October 2011, the French authorities again modified the restructuring plan (hereinafter: 'the modified restructuring plan').

⁽¹⁾ OJ C 208, 14.7.2011, p. 8.

⁽²⁾ OJ C 102, 2.4.2011, p. 2.

⁽³⁾ See footnote 1.

- (9) The Commission and the French authorities met [...]. A large number of telephone calls⁽⁴⁾ and e-mail exchanges also occurred throughout the procedure. On 18 October 2011, the French authorities sent a letter to the Commission, summarising the arguments presented during the previous exchanges.

1.2. National procedural context

- (10) In the context of the procedure for judicial reorganisation of SeaFrance, initiated on 30 June 2010, the Paris Commercial Court is to give a final decision on 25 October 2011 on whether SeaFrance is to go into liquidation or continue its activity⁽⁵⁾.
- (11) Furthermore, since the opening of the judicial reorganisation procedure, third parties have been permitted to submit bids to the official receiver that will enable the company to remain in business through its total or partial sale. According to the information available to the Commission, three takeover bids have been presented: one jointly by the French group Louis Dreyfus Armateurs and the Danish company DFDS A/S (hereinafter: 'DFDS') (referred to jointly hereinafter as 'DFDS-LDA'), one by the trade union Confédération française démocratique du travail (hereinafter: 'the CFDT') and one by the SNC Being Bang Immaterial (hereinafter: 'Being Bang').
- (12) DFDS-LDA submitted a partial bid to take over the assets and staff of SeaFrance for three symbolic euro⁽⁶⁾. It forwarded a copy of the bid to the Commission, for information. Under this bid, DFDS-LDA would retain only 460 employees (i.e. 200 fewer than proposed in the modified restructuring plan) and would retain the freight vessel Nord Pas-de-Calais (in addition to the multi-purpose car ferries Berlioz and Rodin), but not the car ferry Molière (whereas the modified restructuring plan proposes the sale of the freight vessel Nord Pas-de-Calais and does not consider relinquishing the car ferry Molière, but on the contrary early exercise of the purchase option on it).
- (13) According to the press, the CFDT lodged a takeover bid for the company with the Paris Commercial Court on 24 August 2011. The CFDT would like to retain all the present 1 100 employees. To this end, it is considering purchasing the SeaFrance vessels for a symbolic euro and not taking over the company's liabilities. The CFDT plans to obtain a secured loan amounting to at least EUR 50 million from banks and also to apply to regional and local authorities for an additional loan of EUR 80 million to be able to contend with any new crisis.

- (14) Still according to the press, Being Bang also submitted a bid to take over SeaFrance, the terms of which are not known to the Commission. Being Bang communicated a bid to take over SeaFrance to the Commission for information. This document reached the Commission outside the time limit in which interested parties could present their comments, i.e. within 15 days of the date of publication of the decision to initiate the procedure. In accordance with case-law, the Commission did not therefore forward it to the French authorities and will not take it into account for the purposes of the present decision⁽⁷⁾.
- (15) None of the bids referred to in recitals (11) to (14) has been forwarded by France to the Commission. Therefore they will not be the subject of the present decision.

1.3. Subject of the present decision

- (16) The present decision concerns only the capital increase notified by France in respect of SeaFrance, two loans, of EUR 99,8 million and EUR [40-70] million respectively, planned in favour of SeaFrance, and the rescue aid approved by the Commission on 18 August 2010.
- (17) The present decision does not cover either the extension of the cash management agreement granted by the SNCF to SeaFrance (SA.31331 - 2011/NN) or the financing granted to SeaFrance by the SNCF with a view to the exercise of the option on the vessel SeaFrance Berlioz (SA.31252 - 2010/NN). The Commission had also initiated the procedure provided for under Article 108(2) TFEU in respect of these two measures on 22 June 2011.
- (18) In view of the urgency associated with the judicial reorganisation procedure – the Paris Commercial Court being due to give its decision on 25 October 2011 –, the present decision concerns only the restructuring aid, which according to the modified restructuring plan, consists of recapitalisation and two loans, and the rescue aid authorised for a limited period. The investigation procedure therefore remains open with regard to the cash management agreement (SA.31331 - 2011/NN) and the Berlioz financing (SA.31252 - 2010/NN).

II. DESCRIPTION OF THE BENEFICIARY

- (19) SeaFrance is a public limited liability company governed by French law, fully owned by SNCF Participations SA, also a public limited liability company governed by French law, which manages the participating interests of the SNCF group, which in turn is fully owned by the public industrial and commercial entity 'Société nationale des chemins de fer français' (hereinafter: 'SNCF').

⁽⁴⁾ [...].

⁽⁵⁾ Article L. 622-1, first paragraph, of the Commercial Code.

⁽⁶⁾ One euro for the tangible assets (the business, ships, slots, etc.), one euro for the intangible assets (the IT systems) and one euro for the stocks.

⁽⁷⁾ Judgment of 9 September 2009, *Diputación Foral de Álava and Gobierno Vasco v Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, ECR II-3029, points 259 to 272.

- (20) SeaFrance provides maritime transport services (freight and passengers). It operates only on the Calais-Dover route. Its market shares on this route are as follows:

	2007	2010
Passengers (*)	3 720	2 920
Freight (**)	770 550	550 884

(*) In thousand passengers
(**) In thousand units

- (21) At the time of notification of the original restructuring plan in February 2011, the SeaFrance fleet consisted of the following vessels:

- three multi-purpose car ferries ('Ro-pax', roll-on-roll-off passenger ships) carrying passengers and freight: the Rodin, the Molière and the Berlioz;
- one vessel dedicated exclusively to freight transport: the Nord Pas-de-Calais; and
- two vessels not in operation awaiting sale, the Cézanne and the Renoir (these vessels were sold in July 2011).

- (22) In December 2009, SeaFrance had a permanent workforce of 1 550 employees.

- (23) SeaFrance transports freight (transport of lorries) and passengers (foot passengers until the end of 2008, cars, caravans, motorbikes and coaches) and also offers other services, such as on-board sales⁽⁸⁾ and foreign exchange services.

III. DESCRIPTION OF THE AID

- (24) Under the restructuring plan, as originally notified in February 2011 (hereinafter: 'the original restructuring plan'), the restructuring aid was to consist of a SeaFrance capital increase of EUR 223 million, to be underwritten by its sole shareholder, SNCF Participations SA.

- (25) The original restructuring plan was essentially based on:

- a reduction in capacity from 6 to 4 vessels;
- a reorganisation of the crossings schedule leading to a decrease of 29,4 % in the number of crossings per year compared to the original crossings schedule;

⁽⁸⁾ Catering services, take-away sales, mainly of alcoholic beverages, tobacco and perfumes.

- the equivalent of 725 full-time redundancies, i.e. almost half the December 2009 workforce, in order to return to a staff costs/turnover ratio of 26 % in 2013.

- (26) The plan also provided for an improvement in productivity of on-board sales depending on passenger numbers, a change in the catering range, a redefinition of the 'Croisière Bleu marine' package, a review of the car-deck space management, the abandonment of transporting individual foot passengers (effective since the end of 2008) and the axing of tours operating to single destinations. Furthermore, reductions in external charges completed the restructuring: the creation of a purchasing department to rationalise the purchasing procedures and improvement of internal control (launch of a computer-assisted maintenance management project, centralised stock control on land and on board, invitations to tender systematically open to European shipyards for the award of contracts for withdrawal from service of the vessels, reduction in advertising expenditure).

- (27) Under the restructuring plan communicated on 12 September 2011, the SeaFrance capital increase underwritten by the SNCF was to amount to only EUR 166,3 million.

- (28) This capital increase was to be supplemented by two loans of EUR 99,8 million and EUR [40-70] million respectively, the former intended to finance the restructuring proper of SeaFrance and the latter to replace the existing loan concerning the vessel Molière in order to exercise the purchase option for this vessel early (at the beginning of the year [...] instead of the end of the year [...]). Taking up this option early was to enable SeaFrance to acquire, from the end of [...], full ownership of a vessel with an estimated value of EUR [...] million.

- (29) These two loans were to be granted at 6,05 % interest for a period of 12 years with constant capital repayments.

- (30) The French authorities justified this rate of 6,05 %:

- (1) by the application of the Communication from the Commission on the revision of the method for setting the reference and discount rates⁽⁹⁾ (hereinafter: 'the Reference Rates Communication'), taking account of high collateral for a rating of CCC, i.e. a margin of 400 basis points; and

- (2) by the application by the SNCF, at its request, of a method presented as 'traditional'⁽¹⁰⁾, resulting in a rate of between [6,00-6,15] % and [6,00-6,15] %⁽¹¹⁾, based on:

⁽⁹⁾ OJ C 14, 19.1.2008, p. 6.

⁽¹⁰⁾ The application of this method is presented in Annex 5 to the French authorities' comments dated 12 September 2011 modifying the original restructuring plan.

⁽¹¹⁾ EURIBOR 12 months + margin + management costs = 2,18 % + [0-5] % + (between [0,00 -0,20] % and [0,10 - 0,20] %).

- the reference rate EURIBOR 12 months (which on 1 August 2011 stood at 2,18 %);
 - a rating of SeaFrance by the SNCF at BB-, based on financial projections covering the period 2011-2019 consisting of 6 ratios, i.e. the leverage ⁽¹²⁾, gearing ⁽¹³⁾, equity ⁽¹⁴⁾, interest coverage ⁽¹⁵⁾, liquidity ⁽¹⁶⁾ and profitability ⁽¹⁷⁾ ratios, evaluated at between [0-5/20] and [15-20/20]; and
 - the calculation of a margin (in this case [0-5] %) resulting from the combination of the BB- rating and a loss given default rate of between [30-40] % and [40-50] %.
- (31) In addition to the measures already announced in the original restructuring plan and the two above-mentioned loans, other measures were proposed in the restructuring plan communicated on 12 September 2011, i.e.:
- the sale of another vessel, the freight vessel Nord Pas-de-Calais, in addition to the two vessels Cézanne and Renoir sold in July 2011 in accordance with the original restructuring plan;
 - a total reduction in the workforce of 922 employees (instead of 1 550 employees in December 2009, i.e. a – 60 % reduction) bringing the total wage bill/turnover ratio to [20-25] % in 2013 and [20-25] % in 2019;
 - a decrease in the number of crossings per year of 5 830 crossings (i.e. an additional cut of 2 352 crossings compared to the original restructuring plan), which boils down to a 37,6 % reduction compared to the crossings schedule of 2007;
 - economies amounting to EUR [1-5] million (closing of two SeaFrance agencies located in Calais and Paris, closing of the call centres in Belgium and Germany, reduction in marketing expenditure, transfer of all services by the end of 2013 to Calais, abolishing the quality certification of the freight vessel Nord Pas-de-Calais and introduction of automated embarkation checks).
- (32) The restructuring period defined in the modified restructuring plan is spread over 5 years, i.e. from 2011 to 2015, whereas that provided for in the original restructuring plan lasted until 2019.
- (33) Under the modified restructuring plan, the conditions agreed for the two loans granted by the SNCF are now as follows:
- the loans are granted at a rate established at 8,55 % ⁽¹⁸⁾; France justifies this rate by referring to the Reference Rates Communication, taking account of normal collateral for a CCC rating. Consequently the margin is established at 650 basis points;
 - the loans are granted for a 12-year term; the loan of EUR 99,7 million may be drawn down in four instalments ⁽¹⁹⁾ and that of EUR [40-70] million in one instalment; and
 - each drawing must be repaid in constant annual instalments until repayment in full at the end of 2023.
- The other measures proposed in the restructuring plan communicated on 12 September 2011 (see recital 31) have been included in the modified restructuring plan.
- (34) The estimated financing needs for the implementation of the modified restructuring plan are as follows:
- repayment of the credit line granted by the SNCF to SeaFrance (EUR [40-70] million);
 - repayment of the cash management agreement concluded between the SNCF and SeaFrance (EUR [40-70] million);
 - the future operating cash flows until 2017, net of the job-protection plan, existing investments and borrowings (EUR [...] million);
 - the cost cover for the job-protection plan (EUR [...] million);
 - the payments related to borrowings, including the Rodin, Berlioz and Molière loans (EUR [...] million);
 - the payments related to investments, i.e. primarily the scrubbers (EUR [...] million);
 - the intra-annual working capital requirements (WCR) or requirements related to operating contingencies (EUR [...] million).

⁽¹²⁾ Corresponds to the gross financial debt/EBITDA ratio. The concept of EBITDA (earnings before interest, tax, depreciation and amortisation) is comparable to the concept of gross operating surplus.

⁽¹³⁾ Gross financial debt/equity ratio.

⁽¹⁴⁾ Equity/total assets ratio.

⁽¹⁵⁾ EBITDA/net financial expenses ratio.

⁽¹⁶⁾ Net cash x360/turnover ratio.

⁽¹⁷⁾ EBITDA/turnover ratio.

⁽¹⁸⁾ The collateral for the loan of EUR 99,7 million consists of a first mortgage on the Rodin (according to the French authorities, market value of EUR [...] million, free of any pledge) and a second mortgage on the Berlioz (according to the French authorities, market value of EUR [...] million, [...] and, for the loan of EUR [40-70] million, of a mortgage on the vessel Molière (according to the French authorities, market value estimated at EUR [...] million).

⁽¹⁹⁾ [...]

- (35) The estimated financing needs for the implementation of the modified restructuring plan amount to a total of EUR [...] million (net of proceeds from sales):

(in EUR million)

	2011	2012	2013	2014	2015	2016	2017	Total
Repayment of short-term credit facilities	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Future operating cash flows (from December 2011)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Residual job-protection plan	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Payments related to borrowings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Payments related to investments	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Intra-annual WCR	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total financing needs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

IV. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (36) The Commission concluded that the notified measure constituted aid within the meaning of Article 107(1) TFEU and launched a detailed investigation in the light of its doubts regarding the prospects for return to long-term viability of the company under the restructuring plan and the level of the company's own contribution. The Commission also wondered about the adequacy of the measures proposed with a view to limiting the distortions of competition caused by the aid.

V. COMMENTS BY INTERESTED PARTIES

5.1. Comments by interested parties opposed to the restructuring aid

5.1.1. Complaint and comments of P&O

- (37) On 29 July 2011, P&O communicated comments on the decision to initiate the procedure, which supplement its complaint.

- (38) The arguments put forward in the complaint and P&O's comments are as follows:

5.1.1.1. Concerning the difficulties of SeaFrance

- (39) According to P&O, SeaFrance's share of the market concerned ⁽²⁰⁾ fell from 21 % in 2006 to 17 % in 2010 and the company's load factor fell from 63 % in 2008 to 56 % and 58 % in 2009 and 2010 respectively, i.e. to a non-viable level.
- (40) P&O points out that, for many years, SeaFrance's losses have been well in excess of its profits (net losses of EUR 120 million over the period), which means that SeaFrance would be unable to offer a return on investment to its shareholders/investors for a very long time.

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Profits/losses of SeaFrance (*)	- 16,8	- 1,7	- 2,8	2,6	- 3,5	3,4	14,8	- 2,4	- 3,0	- 19,0	7,9	7,27	- 13,6	- 57,7	- 36,0

(*) In EUR million.

Source: P&O's comments.

⁽²⁰⁾ According to P&O, the market concerned is that of short sea crossings (i.e. between Dover and France) for passengers and freight (Short French Sea tourist and freight market).

(41) In view of the fact that most of SeaFrance's car ferries are ro-pax (multi-purpose vessels able to carry both passengers and freight) and that the 'passenger' business is very seasonal, it would be crucial for SeaFrance not to alienate the freight customers who must be assured that the service will be provided reliably and continuously throughout the year.

(42) However, according to P&O, as regards the freight business, the value of the goodwill, reputation and market share of SeaFrance had declined significantly, notably on account of the frequent interruptions in service (strikes, etc.), the market's awareness of SeaFrance's difficulties and the lay-up of the freight vessel Nord Pas-de-Calais (to keep a vessel laid up would be very expensive, according to P&O, which also points out that the laying-up of the vessels Cézanne and Renoir in the port of Dunkerque would cost at least EUR 1,09 million, and possibly EUR 2,4 million).

5.1.1.2. Concerning the compatibility of the aid

(43) P&O provides statistics to show that the market concerned is subject to long-term structural overcapacity. However, according to point 8 of the Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²¹⁾ (hereinafter: 'the Guidelines'), 'it would not be justified to keep a firm artificially alive in a sector with long-term structural overcapacity or when it can only survive as a result of repeated State interventions'.

5.1.1.3. Concerning the causes of SeaFrance's difficulties

(44) The causes of SeaFrance's difficulties are the following:

- over-staffing, salaries too high, vessels ill-adapted to the market;
- the management is not sufficiently independent of the State and social power to truly be able to manage the company according to the market;
- inability to adapt to three new market components: the rising price of fuel, a market tending towards recession and the competitive pressure from Eurotunnel.

(45) Finally, it is revealing, according to P&O, that SeaFrance, which was up for sale for a period of over three years, did not find a buyer.

5.1.1.4. Concerning the difficulty of restoring long-term viability

(46) To explain the difficulty in restoring the long-term viability of SeaFrance, P&O essentially takes up the

arguments already set out concerning the market shares of SeaFrance, its load factors and its status of firm in difficulty.

5.1.1.5. Concerning the ill-adapted nature of the internal restructuring measures

(47) The only substantial measure proposed by SeaFrance in the original restructuring plan consisted in reducing the workforce, but the salaries would remain too high (salary costs/turnover ratio of 26 % compared to 15 % at P&O). Even in the case of an additional 200 redundancies, the ratio would be in the vicinity of 22 %.

(48) The laying-up of the vessels Manet, Cézanne and Renoir would in no way have improved the results (losses) of 2008, 2009 and 2010 and the planned laying-up of the freight vessel Nord Pas-de-Calais would not significantly improve SeaFrance's situation, especially on account of the cost of keeping a vessel laid up (EUR 1.8 million per year).

(49) The reduction in the number of crossings alleged by SeaFrance is misleading as it would amount to only 10 % and would result from the change in fleet (the vessels Cézanne and Renoir replaced by the larger vessel Molière). The laying-up of the freight vessel Nord Pas-de-Calais would reduce capacity by only an additional 7 %.

(50) The proposals to improve on-board sales, the restaurants, the subcontracting and the control of advertising expenditure are only part of normal business management, like that of all the competitors of SeaFrance.

(51) None of the measures proposed would respond to the three new market components (recession, price of fuel, competition from Eurotunnel) and the exchange rate fluctuations.

5.1.1.6. Concerning the market forecasts used by SeaFrance

(52) P&O points out that SeaFrance's restructuring plan forecasts a spectacular increase in its load factors (from 58 % to 80 %) on the basis of a rapid rise in demand and/or a significant increase in its market share.

(53) However, the SeaFrance forecasts in no way correspond to those of P&O nor to the trend in SeaFrance's market share, which fell from 21 % in 2006 to 17 % in 2010. The quality of the offer to freight customers would be liable to suffer from the laying-up of the freight vessel Nord Pas-de-Calais and some of the customers could turn to Eurotunnel in periods of affluence, when SeaFrance would suffer from under-capacity.

⁽²¹⁾ OJ C 244, 1.10.2004, p. 2.

(54) The fact that the aid measures will have effect only from 2016 but will permit the long-term viability of the company to be assured only from 2019, would not comply with point 35 of the Guidelines, according to which the duration of the restructuring plan must be 'as short as possible' and 'must restore the long-term viability of the firm within a reasonable timescale'. The laying-up of the freight vessel Nord Pas-de-Calais and additional job reductions would not significantly improve SeaFrance's situation: it would save EUR 6 million in salary costs and EUR 7 million in vessel-related costs (i.e. EUR 13 million in total). P&O nevertheless considers that SeaFrance would lose 50 000 freight units, i.e. EUR 5-6 million in freight revenue, and that the laying-up of the freight vessel Nord Pas-de-Calais would cost EUR 1,8 million per year in the absence of a buyer.

5.1.1.7. Concerning the compensatory measures

(55) The compensatory measures must be added to the measures aiming to restore viability and must therefore be separate from them. However, according to the French authorities and the decision to initiate the procedure, all the allegedly compensatory measures are necessary to restore the company's viability. There is therefore no compensatory measure, according to P&O.

5.1.1.8. Concerning the company's own contribution

(56) According to P&O, the withdrawal of the vessel Manet in 2008 and that of the vessels Cézanne and Renoir cannot count as a contribution since these withdrawals took place well before the notification of the restructuring and the value of the vessels is minimal compared to the total amount of the State aid, i.e. EUR 400 million, according to P&O. The French authorities apparently did not propose that the sale of the freight vessel Nord Pas-de-Calais should count as own contribution and its value, estimated at EUR 12 million, would be negligible compared to the total amount of State aid.

(57) P&O suggests the sale and lease-back of the SeaFrance vessels as own contribution.

5.1.1.9. Concerning the conditions of granting the aid

(58) P&O suggests that the restructuring of SeaFrance should be subject to the following conditions, in addition to changes remedying the inadequacies and problems described:

- the sale and lease-back of the multi-purpose vessels fully owned by SeaFrance;
- the transparency of costs relating to the main assets of SeaFrance (notably the leasing of vessels);
- during the restructuring period:
- the commitment not to sell at a loss;

- the commitment not to extend the fleet (beyond the three existing multi-purpose vessels);
- the commitment to limit the capacity and frequency of crossings of the multi-purpose ferries;
- the commitment of France/SNCF not to grant any more aid;
- the commitment of France/SNCF to draw up a report showing verifiably that SeaFrance is complying with the restructuring plan.

(59) In conclusion, P&O asked the Commission not to approve the restructuring aid.

5.1.2. Comments by Eurotunnel

(60) On 29 July 2011, the Eurotunnel SA group (hereinafter: 'Eurotunnel') forwarded its comments to the Commission on the decision to initiate the procedure.

(61) Eurotunnel is sceptical about the feasibility of the increase in the load factors forecasted by SeaFrance. In fact, Eurotunnel considers that the Channel has been suffering from overcapacity for many years. The capacity of the Channel Tunnel is only 57 % used and the ferries have invested in vessels with very large capacity, thereby increasing the already existing overcapacity of supply. Moreover, Eurotunnel is of the opinion that the reduction in the SeaFrance fleet from 6 to 4 vessels still does not allow the cross-Channel market to return to equilibrium. For that matter, from January to February 2011, SeaFrance operated with only two vessels without any reduction in its overall traffic. The load factors of 80 % for the period 2011-2019 are therefore unrealistic. According to the Eurotunnel estimates, SeaFrance would need to increase its traffic by 25 %. On the basis of press articles: '[...] to recover this traffic we have had to cut our prices' ⁽²²⁾, Eurotunnel therefore accuses SeaFrance of having conducted a price war for a long time.

(62) Finally, Eurotunnel considers that it is not relevant to compare the load factors of ro-pax and the railway shuttles using the Channel Tunnel, as the latter are not passenger/freight and they allow real-time adjustment to traffic demand.

(63) With regard to taking into account the fuel surcharge, Eurotunnel asserts that SeaFrance only invoices part of this surcharge to its customers, i.e. EUR 8,11 per crossing, compared to EUR 11,62 for P&O and EUR 14,73 for DFDS. The lost earnings for SeaFrance would amount to EUR 1,2 million since the beginning of 2011.

⁽²²⁾ Nord Littoral of 9 April 2010 (p. 10).

(64) With regard to the nearly 50 % redundancies, this loss of staff should be seen in relative terms, according to Eurotunnel, as some of the employees have the possibility of being reintegrated into the SNCF group, which will only have a minimal impact on the net balance of employment in the region.

(65) Finally, Eurotunnel concludes that the restructuring plan is not only inadequate, but also fails to meet the specifications of prudent investments.

5.1.3. *Comments by DFDS*

(66) DFDS communicated its comments to the Commission by letter dated 29 July 2011.

(67) DFDS remains sceptical about the ability of SeaFrance to recover long-term economic viability on account of the inadequacy of the restructuring measures in relation to its present financial situation. DFDS is concerned about the effects of these new aid measures on competition in the market concerned.

(68) DFDS sent the Commission comments on the SeaFrance restructuring plan by e-mail dated 23 September 2011.

(69) This document reached the Commission outside the time limit within which interested parties could submit their comments, i.e. within 15 days of the date of publication of the decision to initiate the procedure. Furthermore, it provides no new information. In accordance with case-law, the Commission has therefore not forwarded this document to the French authorities and will not take it into account for the purposes of the present decision ⁽²³⁾.

5.1.4. *Comments by CLdN*

(70) On 29 July 2011, the CLdN group (hereinafter: 'CLdN') communicated its comments to the Commission.

(71) CLdN is a Luxembourg-based transport company which is involved in particular in the transport of freight by freight vessel (roll-on/roll-off or 'ro-ro') or by ro-pax, in the Channel and the North Sea between Belgium and the Netherlands, on the one hand, and the United Kingdom, Ireland, Sweden and Denmark, on the other.

(72) CLdN regards itself as a competitor to SeaFrance which would suffer considerably from the adverse consequences of the measures implemented by the SNCF in favour of its subsidiary SeaFrance on account of the geographical proximity of the routes operated by CLdN, i.e. Ipswich-Rotterdam and Purfleet-Zeebrugge.

(73) CLdN considers in fact that the measures implemented are very likely to have anti-competitive consequences on freight not only on the Calais-Dover route, but also on the neighbouring routes between the United Kingdom and Belgium. It considers that the negative effects of

these measures are not sufficiently offset by the compensatory measures and the own contribution proposed in the restructuring plan. On the contrary, these measures would merely maintain a firm in difficulty, incapable of reducing its basic costs, on the market and would enable it to increase its capacities on a market with overcapacity.

(74) According to CLdN, the measures in question will reduce the viability of the existing competitors by maintaining on the market transport capacity which should normally have disappeared. It would be unrealistic to rely on SeaFrance being able to achieve a load factor of 80 %, unless the aid is used to carry out aggressive price cuts and to take market shares from competitors. However, this strategy would be economically unsustainable in the medium or long term for SeaFrance and would be harmful for its direct competitors, i.e. P&O and Eurotunnel, which operate on the same Calais-Dover route, but also, in time, for CLdN.

(75) Finally, CLdN emphasises the inadequacy of the workforce cuts provided for in the restructuring plan (which would be far from enabling SeaFrance to approach the staff costs/turnover ratio of its competitors) and the fact that the redundancy costs will be low compared to traditional restructuring, as a large number of SeaFrance employees will be taken on by the SNCF.

(76) CLdN consequently wishes the European Commission to take a negative decision.

5.2. **Comments from interested parties in favour of the restructuring aid**

5.2.1. *Comments by the SNCF*

(77) On 29 July 2011, the SNCF communicated comments to the Commission, which correspond to the comments made by the French authorities (see section VI).

5.2.2. *Comments by an economic operator wishing to remain anonymous*

(78) On 30 July 2011, an economic operator wishing to remain anonymous communicated its comments to the Commission.

(79) Firstly, it recalls the main characteristics of the cross-Channel market, concluding from this that the keener competition between the shipping companies and Eurotunnel, the inflation in fuel prices and the volatility of the sterling exchange rate have caused difficulties for SeaFrance, but also pose a threat to the long-term viability of P&O and DFDS.

(80) The operator in question considers that the difficulties of SeaFrance are chiefly structural (employment coefficient too high and organisation too inflexible), but that recapitalisation combined with the restructuring of SeaFrance and a fleet maintained at 4 vessels can guarantee the long-term viability of the company.

⁽²³⁾ Judgment of 9 September 2009, *Diputación Foral de Álava and Gobierno Vasco v Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, ECR II-3029, points 259 to 272.

(81) It considers that the disappearance of SeaFrance would in fact result in a duopoly between Eurotunnel and P&O. However, many road hauliers work with at least 2 shipping companies to guarantee timetable flexibility and the profitability of their lorries.

(82) According to the operator in question, if SeaFrance were to disappear, the capacity of the other two shipping companies would be insufficient to cope with the traffic in the Channel. According to the operator wishing to remain anonymous, Eurotunnel has almost achieved maximum capacity and therefore could absorb only a small proportion of the SeaFrance traffic. 'The overcapacity in the Channel today is [...] very relative and should not constitute a serious problem' since as soon as a problem arises at one shipping company or in the ports, this leads to congestion in the ports of Calais, Dover and Dunkerque.

(83) Moreover, a single freighter in the Channel operated by P&O would not guarantee the necessary transport capacity and would distort the market in favour of P&O, which would in this way hold a monopoly for the transport of hazardous goods.

(84) According to the operator in question, P&O is at the origin of the price undercutting; this operator believes in the viability of SeaFrance on account of the quality of management of the company (quality of cooperation with its agents), its modern fleet capable of functioning for at least 10 years and the high motivation of its staff.

5.2.3. Comments by road haulage companies

(85) By letters dated 26, 27 and 28 July 2011, five road haulage companies and representative associations (LKW Walter Internationale Transportorganisation AG, Youngs Transportation & Logistics Ltd, Laser Transport International Limited, Carna Transport Ltd and Road Haulage association international group) communicated their comments to the Commission.

(86) These five companies and associations express their concerns in the event of the disappearance of SeaFrance. In their opinion, the disappearance of SeaFrance would result, on the one hand, in an oligopoly on the cross-Channel transport market leading to a decline in the quality of services and an increase in prices and, on the other hand, a risk regarding the capacity of the operators remaining on the market to be able to cope with the volume of freight, especially in cases where one of them is unable to provide services.

(87) If SeaFrance were to dispose of its freight vessel, the Nord Pas-de Calais, they are also worried about the emergence of a *de facto* P&O monopoly for the

transport of hazardous goods which cannot be undertaken through the Tunnel or by a multi-purpose ferry.

5.2.4. Comments of tour operators and travel agencies

(88) A large number of travel agencies and tour operators expressed their concern regarding the possible disappearance of SeaFrance (see list in the table in this recital):

Date of the comments	Name of the interested parties
26.07.2011	4 separate position papers: 1) R&T Tours; 2) Sports Tours Ltd; 3) TM Ski&Travel Ltd; 4) International Sport & Leisure
27.07.2011	5 separate position papers: 1) Broadway Tours; 2) Gemini Travel; 3) DE Vere Travel Group; 4) Adaptable Travel; 5) Gower Tours Ltd
28.07.2011	2 separate position papers: Angling Lines Ltd; Acorn Ventures Ltd
29.07.2011	Bartletts Battlefield Journeys Ltd

(89) In their opinion, the disappearance of SeaFrance would lead, on the one hand, to the emergence of an oligopoly on the cross-Channel transport market, with the consequence of a decline in the quality of the services and a rise in prices and, on the other hand, a risk regarding the capacity of the operators remaining on the market to cope with the passenger volume, especially in cases where one of them is unable to provide services.

5.2.5. Comments from the Côte d'Opale Chamber of Commerce and Industry

(90) By letter dated 29 July 2011, the Côte d'Opale Chamber of Commerce and Industry (hereinafter: 'CCI') communicated its comments to the Commission. The CCI specifies that it is a public institution responsible for contributing to economic development, attractiveness and support of businesses in the Nord Pas-de-Calais region. The CCI is also the concessionaire of the Port of Calais and, in this capacity, runs the port.

(91) Firstly, the CCI recalls the key role played by SeaFrance in the development of the Port of Calais. At the end of 2008, the SeaFrance workforce comprised 1 600 employees, most of whom lived in the Nord Pas-de-Calais region. It also contributes to the revenue received by the Port of Calais in respect of services to ships and goods services. In 2008, SeaFrance was also the largest purchaser of non-port goods and services, representing EUR 130 million per year in supplies, services, consumables, repairs and maintenance, about 36 % of which were in the Nord Pas-de-Calais region. The CCI adds that the Port of Calais plays a leading role in the economic development of Pas-de-Calais.

(92) According to the CCI, the disappearance of SeaFrance would have a significant impact on the development of the Port of Calais on account of the loss of jobs and of direct and indirect revenue generated by the company. The Nord Pas-de-Calais region has also approved the implementation of the 'Port 2015' project which provides for the extension of the port, the construction of a new sea dock and the improvement of the existing structures. This project is based on operational forecasts which risk being seriously affected in the event of the disappearance of SeaFrance.

(93) Furthermore, the CCI is worried about the emergence of a Eurotunnel-P&O duopoly which would have a negative impact on prices and services, if SeaFrance were to disappear.

(94) The CCI concludes from this that keeping SeaFrance in operation is necessary in the present competitive context, particularly as the traffic forecasts are upwards, especially for freight transport.

5.2.6. Comments by the CFDT trade union

(95) By letter dated 29 July 2011, the Syndicat Maritime Nord (hereinafter: 'the SMN'), which belongs to the CFDT, communicated its comments to the Commission.

(96) The SMN firstly stresses that since its creation in 1996, SeaFrance has never been recapitalised by its sole shareholder, the SNCF. SeaFrance has therefore had to pay for the renewal of its fleet from its equity, which has had a considerable impact on the cash position of the company.

(97) The SMN also points out the disparities existing between British and French social legislation (longer working hours in the United Kingdom not entirely offset by smaller crews in France). On account of the staff costs/turnover ratio, the SMN emphasises the fact that SeaFrance is not inclined to practise a low price policy

and compensates for this by the quality of the services offered. It also points out that in view of the market shares of SeaFrance, which are well below those of the market leaders, both in freight and in passenger transport, SeaFrance has little impact on prices.

(98) The SMN considers that the adverse impacts of the fall in sterling continue to decrease as expenses, and especially technical expenses, are as often as possible denominated in sterling.

(99) The SMN considers that SeaFrance has already made significant cuts in the number of crossings and the transport capacities since 2009 (– 30 % in frequency and – 25 % in volume) and with the 4 vessels currently operating, SeaFrance has reached the minimum size allowing it a sufficient rotation frequency to remain credible.

(100) Finally, the SMN points out that the employees of SeaFrance would not understand the Commission not taking account of the consequences of the successive restructuring implemented, in terms of both working conditions and employment at SeaFrance, but also in the Calais employment area, which is one of the most stricken in France.

VI. COMMENTS BY FRANCE

6.1. Comments concerning the reasons for SeaFrance's difficulties in general

(101) Regarding the difficulties of SeaFrance, the French authorities point out that the information communicated by P&O is largely incorrect and that, contrary to the results of SeaFrance as presented by P&O — which contain errors for the years 2002, 2004, 2005 and 2006 (see recital 40), the cumulated losses of SeaFrance between 1996 and 2010 amount to EUR – 151,4 million and not EUR – 169 million. The French authorities communicated the following table, rectifying the errors appearing in the table drawn up by P&O in its complaint:

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Profits/losses of SeaFrance (*)	– 16,8	– 1,7	– 2,8	2,6	– 3,5	3,4	26,2	– 2,4	4,9	– 9,3	7,9	15,4	– 20,9	– 57,7	– 36,2

(*) In EUR million

(102) The French authorities dispute the reasons for the difficulties of SeaFrance put forward by P&O, i.e. that the value of the goodwill, reputation and market share of SeaFrance concerning freight has declined significantly on account, in particular, of the frequent interruptions in service and market awareness of SeaFrance's difficulties (see recital 42). They counter this with the observations of SeaFrance customers which underline the quality of the services provided by the company and the progress achieved in recent years to improve the quality of the services supplied (see recitals 85 to 89).

(103) In response to the argument of the competitors of SeaFrance that the company workforce is too large, the French authorities point out that SeaFrance undertook a significant reduction in the workforce, as a result of which nearly 725 jobs were cut, this drastic measure being designed to enable a staff costs/turnover ratio of 26 % to be restored in 2013. This ratio would remain slightly higher than those obtained by Eurotunnel and Irish Ferries. However, the activities of SeaFrance will be quite significantly different in their implementation from those of the Channel Tunnel operator, whose

ratio stood at 22,5 % in 2010, and it is inconceivable, under the French flag, for SeaFrance to manage to achieve such a low ratio as Irish Ferries, whose vessels are apparently under the Cypriot flag. The French authorities consider that, in view of the considerable effort made by SeaFrance as regards redundancies, the staff costs/turnover ratio of 26 % is sufficient and allows SeaFrance to remain competitive. They specify that the level of salaries paid by SeaFrance results from French social legislation, which offers greater protection than that of the States where its competitors are established, and especially that of the United Kingdom, in particular with regard to the minimum wage.

- (104) The SeaFrance fleet, as defined in the restructuring plan, is not ill-adjusted. Quite the contrary, it was specifically constructed for the Calais/Dover route, with the exception of the vessel *Molière*, which had to have conversion work carried out on it to be adapted to maritime transport in the North Sea. As regards P&O's argument that the management of SeaFrance is not sufficiently independent of the State and of worker power to manage the company efficiently, the French authorities consider that this is an assertion which is not based on any evidence.

6.2. Comments concerning the competitive position on the Dover/Calais market

- (105) The French authorities contest the allegations of P&O, Eurotunnel and CLdN concerning structural overcapacity of the market. In their view, the overcapacity observed is largely attributable to the economic climate (in particular, the economic crisis has led to a reduction in freight traffic and rise in the sterling exchange rate). On the basis of the growth forecasts drawn up before the crisis, certain operators increased their capacities but the hoped-for growth failed to materialise on account of the economic recession. The French authorities cite market analyses carried out by the Dover Harbour Board in 2005 ⁽²⁴⁾ and 2008 ⁽²⁵⁾ indicating long-term growth in freight volumes.
- (106) France considers that the concerns expressed by certain SeaFrance customers relating to the emergence of a P&O monopoly for the transport of hazardous goods on the Calais/Dover route (see recitals 83 and 87) are unfounded. In fact, since there are no national or international regulations prohibiting the transport of hazardous goods on car ferries, SeaFrance could consider carrying out such transport during crossings with low passenger numbers, for example on certain night crossings.

6.3. Comments concerning the compatibility of the restructuring aid

- (107) As regards the compatibility of the measures notified under the restructuring plan, the French authorities

provided the following replies to the doubts expressed by the Commission concerning the return to long-term viability expected from the restructuring plan, on the prevention of any excessive distortion of competition and on SeaFrance's own contribution to the restructuring plan.

6.3.1. On the return to long-term viability and the restructuring plan

- (108) The French authorities justify the fact that the load factors forecasted for the coming years are higher than those observed in the past on the basis of the introduction from 2006 of a new information system allowing optimisation and rationalisation of the loading of these vessels. In their opinion, this system in particular has allowed low profitability crossings to be identified and withdrawn from the SeaFrance schedule. Furthermore, the French authorities emphasise the fact that between 2000 and 2007, the period taken into account by the Commission, SeaFrance's operating activities were organised in the form of shuttles, irrespective of the intensity of demand.
- (109) The French authorities also justify the lower load factors of SeaFrance's competitors by the operating method chosen by the competitors. In their opinion, P&O had a large number of vessels and a 'shuttle' type service exerting a downwards influence on the load factor. As regards DFDS, the specialised nature of its vessels would preclude the optimisation of its loads according to their individual profitability. Moreover, on account of the length of its crossings, DFDS would be forced to offer a shuttle service over long periods. Finally, the high capacity of its vessels would automatically lower the average load factors of DFDS through crossings with low demand.
- (110) Furthermore, the French authorities reacted to the Commission's doubts and to the comments of third parties concerning taking into account the risks (fuel costs, depreciation of sterling), which is necessary to evaluate the credibility of the restructuring plan. They emphasise firstly that the financial hedging policy in the form of foreign exchange contracts will be resumed by SeaFrance as soon as the judicial reorganisation is over. They then explain that the company applies a 'bunker adjustment factor' (hereinafter: 'BAF') which covers about 40 % of the additional cost associated with the increase in the price of fuel above EUR 285 per tonne and that after 2015, the BAF will be supplemented by a new surcharge taking account of the obligation to consume fuel with 0,1 % sulphur content.

- (111) As regards the depreciation of sterling, the French authorities specify firstly that the policy of hedging part of the monthly balances in sterling by forward sales based on the budgetary rate, interrupted on account of the judicial reorganisation procedure, will be applied once more as soon as this procedure is over. [...]

⁽²⁴⁾ http://www.doverport.co.uk/_assets/client/images/collateral/30%20year%20master%20plan%20zoning%20report.pdf

⁽²⁵⁾ http://www.doverport.co.uk/_assets/client/images/collateral/dover_consultation_web.pdf

(112) Concerning the other measures mentioned in recital 96 of the decision to initiate the procedure, the French authorities specify that their effects were not taken into account in the business plan as they are difficult to quantify. However, these measures would be likely to generate savings.

(113) Finally, the French authorities point out that the staff costs/turnover ratio should change from [20-25]% in 2012 to [20-25]% in 2019. It would approach the ratios of SeaFrance's competitors.

6.3.2. *Concerning the prevention of any excessive distortion of competition*

(114) As regards the prevention of any excessive distortion of competition, the French authorities wish to confirm that the sale of the two vessels, the *Renoir* and the *Cézanne*, did indeed occur on 7 July 2011 at the price of USD [0-10] million (EUR [0-10] million).

6.3.3. *Concerning SeaFrance's own contribution to the restructuring plan*

(115) According to the French authorities, a first part of SeaFrance's own contribution to the restructuring plan consists of the proceeds from the sale of the vessels *Renoir* and *Cézanne*, as well as the expected income from the sale of the vessel *Nord Pas de Calais*.

(116) The French authorities consider in addition that the two loans described in recitals 28 to 33 are exempt from State aid and that the loan of EUR 99,8 million must be considered as an own contribution. According to the French authorities, to evaluate the existence of aid, the Commission must take only the Reference Rates Communication as a basis. They point out that the Commission applied this Communication in its decision to initiate the procedure concerning the loan granted to ČSA – Czech Airlines by the publicly owned company Osinek⁽²⁶⁾ and in its decision concerning the loans granted by the Hungarian Development Bank in favour of Hungarian fertiliser producer Péti Nitrogénművek⁽²⁷⁾. They consider that, for the reasons described in recitals 28 to 33, the two loans do not constitute aid.

VII. ASSESSMENT OF THE AID

7.1. Existence of aid

(117) According to Article 107(1) TFEU, '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, in so far as it affects trade between Member States, be incompatible with the internal market'.

(118) The classification of a measure as State aid presupposes that the following cumulative conditions are satisfied, i.e.: 1) the measure in question confers an advantage, 2) this advantage is granted through State resources, 3) this advantage is selective and 4) the measure in question distorts or threatens to distort competition and is liable to affect trade between Member States⁽²⁸⁾.

(119) The present decision covers three aid measures: the recapitalisation and the two loans described in recitals 28 to 33.

7.1.1. *Recapitalisation of SeaFrance*

(120) The French authorities themselves consider in their notification that the capital increase in favour of SeaFrance constitutes State aid. By their notification, the French authorities admit that the recapitalisation measure is imputable to the State and that it confers a selective advantage on SeaFrance alone.

(121) As regards the existence of an advantage, the Commission considers that, for the reasons to be explained in section 7.2.1, SeaFrance constitutes a firm in difficulty. In view of the very difficult situation of SeaFrance and the fact that it has been placed under the judicial reorganisation procedure, the company would be unable to cope with the implementation of its restructuring plan and its cash requirements. In such circumstances, a private operator would not have contributed capital. In addition, the French authorities did not even try to demonstrate that the expected return corresponds to that which a private investor would have required. The measure therefore constitutes a selective advantage since only SeaFrance benefits from it. It is granted through public resources, since the SNCF is a public undertaking. It is imputable to the State.

(122) As regards the effect on competition and on trade within the Union, it should first be pointed out that, according to established case-law, as soon as an undertaking operates in a sector where producers from various Member States are effectively competing, any aid that this undertaking may receive from the public authorities is liable to affect trade between Member States and damage competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share⁽²⁹⁾.

⁽²⁶⁾ Decision of 24 February 2010 in case NN 1/10 (ex CP 371/09) — Czech Republic ČSA — Czech Airlines — possible State aid implications of a loan provided by Osinek.

⁽²⁷⁾ Decision of 27 October 2010 on State aid C 14/09 (ex NN 17/09) granted by Hungary to Péti Nitrogénművek Zrt (OJ L 118, 6.5.2011, p. 9).

⁽²⁸⁾ See, for example, Court of Justice judgment of 10 January 2006 in case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, point 129.

⁽²⁹⁾ See in particular Court of Justice judgment of 21 March 1991 in case C-305/89 *Italy v Commission* ECR I-1603.

- (123) In this respect, the fact that an economic sector has been liberalised at Union level constitutes evidence that the aid may have a real or potential effect on competition and on trade between Member States ⁽³⁰⁾.
- (124) In this context, it is important to point out that 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 ⁽³¹⁾ fully liberalised maritime transport between Member States as of 1 January 1993.
- (125) In the present case, as previously established, there is modal competition with the other maritime operators in a liberalised sector and also intermodal competition, especially with railway transport ⁽³²⁾.
- (126) The Commission concludes from this that the recapitalisation is likely to strengthen the position of the company in relation to its competitors in trade between the Member States of the Union. The measure therefore affects trade between Member States and is liable to cause distortions of competition.
- (127) In the light of the above, the Commission considers that the measure in question constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.2. The loans described in recitals 28 to 33

- (128) France considers that the two loans described in recitals 28 to 33 are granted under market conditions and therefore respect the principle of the private market economy investor (see recital 116).
- (129) The Commission does not agree with this analysis. In fact, in the present case, the SNCF has already granted aid to SeaFrance, notably rescue aid, and is planning to grant new aid, i.e. the recapitalisation. The loans pursue the same purpose as the other aid measures, i.e. the rescue and restructuring of SeaFrance. They will be granted at a time when SeaFrance is a firm in difficulty and at the same time as the restructuring aid. This is self-evident as regards the loan of EUR 99,7 million, which is intended – just like the recapitalisation – to enable SeaFrance to meet its current capital requirements. However, it is also true of the loan of EUR [40-70] million, which serves to refinance and exercise the purchase option under the leasing contract for the vessel Molière earlier than provided for. In fact, the financing of means of production, here the vessel, is closely linked to the day-to-day activities of SeaFrance. Through the refinancing and early purchase under the leasing contract, SeaFrance aims to reduce its operating costs, which comes under the restructuring of the company. Consequently, the loan of EUR [40-70]

million also comes under the logic of restructuring SeaFrance.

- (130) In its *BP Chemicals* judgment, the Court of First Instance clarified that in such a situation, it is appropriate to analyse the loans, from the point of view of State aid, not in isolation, but together with the other measures ⁽³³⁾.
- (131) According to the judgment of the Court of First Instance, it is true that the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as ‘aid’ does not, in principle, mean that a further capital injection cannot be classed as an operation which satisfies the private market economy investor test. However, the Court considers that, in a case which concerned three capital injections made by the same investor over a period of two years, the first two of which brought no return, it was for the Commission to determine whether the third injection could reasonably be dissociated from the first two and classed, for the purposes of the private investor test, as an independent investment.
- (132) The Court considers that the considerations relevant to determining whether the subsequent measure could reasonably be dissociated from the first two and classed, for the purposes of the private investor test, as an independent investment, include in particular the timing of the capital injections in question, their purpose and the subsidiary’s situation at the time when each decision to make an injection was made.
- (133) France does not dispute the fact that the recapitalisation constitutes aid, as it has no prospect of obtaining a return corresponding to that which a private investor would have demanded. This also emerges from the table in recital 35, which indicates the financing need for the period 2011-2017. In fact the company would be unable to distribute dividends during this period. In view of the considerable costs entailed in the payment of the interest and principal on the loans described in recitals 28 to 33 and the low profit margin provided for in the restructuring plan, this situation would be very likely to continue beyond 2017 until the repayment of the loans in full in 2023. However, a private investor in a traditional industry such as maritime transport would not accept the entire absence of return on an investment amounting to EUR 166,3 million for a 12-year period. Since the two loans have the same purpose as the recapitalisation, i.e. the financing of the restructuring costs, and since the economic situation of the company is unchanged (it is in difficulty) and the loans are granted at the same time as the recapitalisation, these loans cannot reasonably be dissociated from the rescue aid and the recapitalisation.

⁽³⁰⁾ Court of Justice judgment of 13 February 2003 in case C-409/00 *Spain v Commission* [2003] ECR I-1487.

⁽³¹⁾ OJ L 378, 31.12.1986, p. 1.

⁽³²⁾ Especially with the railway transport of passengers and freight provided by Eurotunnel.

⁽³³⁾ Judgment of the Court of First Instance of 15 September 1998 in case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, points 170 and 171.

- (134) Taken as a whole, the return on the rescue aid and on the recapitalisation and the two loans is below the return that a private market economy investor would require. In fact, as explained, the SNCF cannot expect any return on the recapitalisation before 2023. Even if, considered individually, the return on the two loans corresponded to market conditions – which is not the case –, this would not be sufficient for the measures as a whole to be regarded as satisfying the private market economy investor principle. The following developments are therefore set out for the sake of completeness.
- (135) The French authorities cite the Reference Rates Communication to justify the absence of aid as regards the two loans. They consider that, in view of the company rating (CCC) and the collateral offered (normal), the rate must amount to 8,55 %, i.e. EURIBOR 12 months plus 650 basis points. The French authorities consider that this is a conservative application of the Reference Rates Communication.
- (136) Even if the two loans were to be assessed in isolation – which is not the case –, the French authorities would not have demonstrated that they were granted at a market rate.
- (137) In this respect, the Commission first wishes to emphasise that, as pointed out in the first paragraph of the Reference Rates Communication: 'The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. They are also used to check compliance with the de minimis rule and block exemption regulations.'⁽³⁴⁾ The Reference Rates Communication cannot therefore be binding on the Commission as regards its application of the principle of the private market economy operator, especially in cases where real market data are available which are manifestly different from those resulting from the methodology set out in this Communication.
- (138) In this case, since the provider of the aid is also supplying the loan, in order to ensure that the proposed remuneration does in fact correspond to market remuneration, the Commission must take operators external to the SNCF as a basis. The Commission asked the French authorities on several occasions to produce an example of an offer from an independent financial institution. This offer was never produced.
- (139) Furthermore, the Commission also carried out a market survey. According to the Commission's estimates, with normal collateral, the rate on the loans, to be in line with market conditions, should be around 14 % (5-year swap rate of 2,825 %⁽³⁵⁾ + average CDS⁽³⁶⁾ below B- (i.e. CCC) of 11,18 % + premium of 0,2 %). This corresponds to the data observed in April, May and June 2011. In addition, despite the Commission's repeated requests⁽³⁷⁾, the French authorities have never produced a rating or a rate proposal from a private bank.
- (140) In addition, on several occasions⁽³⁸⁾, the Commission asked the French authorities to consider external financing or to produce a rating or a rate proposal from a commercial bank. These suggestions were not formally followed up.
- (141) Finally, the arguments put forward by the French authorities under recital 116 that the Commission applied the Reference Rates Communication in two recent procedures could not be accepted. In fact, as regards these two procedures, one of which is still in progress, the issues were different. As regards Péti Nitrogénművek, all the measures under examination constituted State aid. As for Osinek, the Commission has not yet taken a final decision and at the time when the loan was granted, no aid measure had been notified.
- (142) The Commission concludes that the loans used to finance the own contribution and the early exercise of the purchase option for the vessel Molière also confer an advantage on SeaFrance. For the reasons set out in recitals 121 to 126, the other three conditions for the existence of aid (selective advantage granted through public resources, effect on competition and effect on intra-Community trade) are also satisfied. These loans therefore constitute State aid.

7.1.3. The rescue aid

- (143) For the reasons set out in recitals 30 to 47 of the Commission decision of 18 August 2010, the loan granted by the SNCF to SeaFrance as rescue aid constitutes aid within the meaning of Article 107(1) TFEU.

7.2. Compatibility of the three aid measures

- (144) In view of the purpose of the three restructuring aid measures in question and the claims made by the French authorities in the context of their notifications, the Commission considers that the compatibility of the three aid measures with the internal market must be analysed on the basis of Article 107(3)(c) TFEU and in the light of the Guidelines.

7.2.1. Eligibility: firm in difficulty

- (145) To be able to qualify for restructuring aid, a firm must be regarded as a firm in difficulty within the meaning of Section 2.1 of the Guidelines.

⁽³⁵⁾ At 1 July 2011, Bloomberg EUSA5.

⁽³⁶⁾ All sectors together.

⁽³⁷⁾ [...]

⁽³⁸⁾ See recital 9 above.

⁽³⁴⁾ OJ C 14, 19.1.2008, p. 6.

(146) In this respect, the Commission considers that SeaFrance is a firm in difficulty within the meaning of point 10(a) of the Guidelines, since more than half of its registered capital has disappeared, falling from EUR 81,7 million in 2007 to EUR 57,7 million in 2008 and to EUR – 0,69 million in 2009 (i.e. a reduction of more than 100 %, by EUR 82,4 million between 2007 and 2009), and more than one quarter of that capital has been lost over the preceding 12 months, since it fell from EUR 57,7 million in 2008 to EUR – 0,69 million in 2009.

(147) In addition, SeaFrance can also be considered as being in difficulty within the meaning of point 10(c) of the Guidelines on the grounds that it fulfils the criteria for being the subject of collective insolvency proceedings. In fact, as indicated in recital 10, SeaFrance was placed under a judicial reorganisation procedure on 30 June 2010 by the Paris Commercial Court.

(148) Furthermore, the conditions set out under point 13 of the Guidelines are also satisfied as, although belonging to the SNCF group, SeaFrance's difficulties relate specifically to itself and are not the result of an arbitrary allocation of costs within the group.

7.2.2. Own contribution

(149) In the decision to initiate the formal investigation procedure, the Commission considered that SeaFrance's own contribution to the restructuring effort was uncertain and insufficient according to the provisions of the Guidelines.

(150) In the modified restructuring plan, the French authorities propose an own contribution from SeaFrance of EUR [80-130] million, consisting in the following measures:

- a loan of EUR 99,7 million at 8,55 % to finance the restructuring of SeaFrance;
- the planned sale of the freight vessel Nord-Pas-de-Calais (market value estimated at EUR [0-10] million by two independent experts); and
- the sale of the vessels Renoir and Cézanne in July 2011 for an amount of USD [0-10] million, or approximately EUR [0-10] million.

(151) Pursuant to point 43 of the Guidelines, 'The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary 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. Such assessment

will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.' ⁽³⁹⁾.

(152) Point 7 of the Guidelines also specifies that 'it is appropriate to reaffirm with greater clarity the principle that [the substantial contribution from the beneficiary to the restructuring] must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition. [...]' ⁽⁴⁰⁾.

(153) The Union case-law also emphasised that the own contribution must indicate that the markets believe in the feasibility of the return to viability ⁽⁴¹⁾.

(154) The French authorities informed the Commission that the sale of the two vessels, i.e. the Renoir and the Cézanne, took place on 7 July 2011, for an amount of EUR 3,1 million.

(155) The planned sale of the freight vessel Nord-Pas-de-Calais should bring SeaFrance's contribution resulting from the sale of the vessels to EUR [10-20] million. At the time of notification of the original restructuring plan, the French authorities had committed to SeaFrance disposing of the vessels Renoir and Cézanne. These two sales took place in July 2011. It is established decision-making practice of the Commission that future sales of assets can be accepted as own contribution on condition that the Member State has produced a realistic estimate of their market value ⁽⁴²⁾. In this case, the French authorities produced two valuations for the freight vessel Nord-Pas-de-Calais carried out by two independent experts, both establishing the market value of the vessel at about EUR [0-10] million. The Commission points out that one of the two experts had estimated the market value of the vessels Renoir and Cézanne at USD [0-10 000 000] in April 2011. The two vessels were sold for a value of USD [0-10 000 000] in July 2011. Consequently, the Commission considers firstly that the estimate of the market value can be considered realistic and secondly that the planned sale of the freight vessel Nord-Pas-de-Calais is acceptable as own contribution.

⁽³⁹⁾ Underlining added.

⁽⁴⁰⁾ Underlining added.

⁽⁴¹⁾ General Court judgment of 7 December 2010 in case T-11/07 *Frucona Košica v Commission*, not yet published in the ECR, points 244 and 245.

⁽⁴²⁾ Decision N 488/09 Restructuring aid to POLFA 'Tarchominskie Zakłady Farmaceutyczne' SA, recital 47.

- (156) As a preliminary point, the French authorities specified that the loan for EUR [40-70] million intended to finance the exercise of the purchase option on the vessel Molière does not constitute an additional own contribution. In fact, it replaces an off-balance sheet contribution already existing under the leasing contract relating to the vessel Molière. It was not therefore taken into account in the calculation of the total own contribution. Nevertheless, in so far as this financing replaces existing financing, the Commission must ensure that it too meets the criteria of compatibility of the own contribution, especially that of the absence of aid.
- (157) In so far as the loans are granted by the SNCF in accordance with point 43 of the Guidelines, the Commission must ensure that this financing is free of aid and it 'is a sign that the markets believe in the feasibility of the return to viability'. Such is not the case for the following three reasons, each of which would suffice to support this conclusion.
- (158) Firstly, as indicated by the Commission in section 7.1.2, recitals 129 to 142 above, the conditions to which the loans were subject do not correspond to market conditions.
- (159) According to the Commission's estimates, with normal collateral, the rate on the loans, to be in line with market conditions, should be around 14 % (5-year swap rate of 2,825 %⁽⁴³⁾ + average CDS⁽⁴⁴⁾ below B- (i.e. CCC) of 11,18 % + premium 0,2 %). This corresponds to the data observed in April, May and June 2011. In addition, despite the Commission's repeated requests⁽⁴⁵⁾, the French authorities never produced a rating or rate proposal from a private bank.
- (160) Secondly, as shown in section 7.1.2., recitals 129 to 142, the loans in question themselves constitute State aid. They could not therefore be taken into consideration as an own contribution which must be free of aid, in accordance with the title preceding point 43 of the Guidelines.
- (161) Thirdly, and in any case, according to points 7 and 43 of the Guidelines, the real contribution serves in particular to show that the markets believe in the feasibility of the return to viability⁽⁴⁶⁾. However, in the present case, the authority granting the aid and the parent company are combined in a single legal person, i.e. the SNCF, and the measures concerned are simultaneous. Under these circumstances, this purpose cannot be complied with in the absence of a real contribution obtained from an investor or creditor external to the SNCF. In fact, the conduct of the authority granting the aid in no way shows that the markets believe in the return to viability.
- (162) As indicated in recital 141, the Commission considers that the reference made by France in its comments to the decisions relating respectively to the aid granted by the publicly owned company Osinek in favour of ČSA – Czech Airlines and the loans granted by the Hungarian Development Bank in favour of Hungarian fertiliser producer Péti Nitrogénművek (see recital 116) is not relevant as, in the first of these cases, the Commission has not yet taken a final decision and, in the second, this is not a case of restructuring.
- (163) In addition, as indicated previously and independently of the question of a possible aid element in the loans, the own contribution must indicate that the markets believe in the feasibility of the return to viability.
- (164) In this case, the financing by the SNCF could not demonstrate this. In fact, the SNCF is both the grantor of aid and the provider of the own contribution. The French authorities did not provide any information showing that a prudent independent investor would be prepared to enter into a firm commitment to provide an own contribution and a loan to exercise the option under the same conditions as those proposed by the SNCF.
- (165) SeaFrance's own contribution meeting the requirements of point 43 of the Guidelines, i.e. free of aid and expressing the belief of the markets in the feasibility of a return to viability, consequently amounts to only EUR [10-20] million, i.e. to less than [< 10] % of the restructuring costs. The 50 % threshold provided for in point 44 of the Guidelines is therefore not reached. The Commission therefore considers that SeaFrance's own contribution to the restructuring effort remains very inadequate in terms of the provisions of the Guidelines.
- (166) The Commission also observes that France has not invoked the exceptional circumstances clause provided for in point 44 of the Guidelines or provided any evidence of the existence of an exceptional situation of this kind.
- (167) The Commission therefore concludes that the requirement of a 'real contribution, free of aid', provided for by the Guidelines, is not satisfied.

7.2.3. Return to long-term viability

- (168) In so far as SeaFrance's own contribution to the restructuring effort remains very inadequate in the light of the provisions of the Guidelines, the Commission considers that there is no need to assess the condition of return to long-term viability.

⁽⁴³⁾ At 1 July 2011, Bloomberg EUSA5.

⁽⁴⁴⁾ Average CDS all sectors together.

⁽⁴⁵⁾ [...]

⁽⁴⁶⁾ General Court judgment of 7 December 2010 in case T-11/07 *Frucona Košica v Commission*, not yet published in the ECR, point 245.

7.2.4. *Prevention of any excessive distortion of competition (compensatory measures)*

- (169) In the decision to initiate the procedure, the Commission indicated that the compensatory measures proposed by the French authorities were inadequate. In their comments in response to the decision to initiate the procedure, the French authorities accepted ⁽⁴⁷⁾ the near non-existence of compensatory measures ⁽⁴⁸⁾. They indicated that this problem would be resolved under a modified restructuring plan.
- (170) Supplementary compensatory measures were indeed proposed under the restructuring plan communicated on 12 September 2011, and especially the forthcoming sale of the freight vessel Nord Pas-de-Calais. The French authorities also mention the already completed sale of the vessels Renoir and Cézanne, the reduction in the number of crossings (reduction by 5 830 crossings, i.e. – 37,6 % compared to the 2007 crossings schedule) and the reduction in market shares of SeaFrance ([10-15]% of the car transport market for 2012-2019, compared to [15-20]% in 2008).
- (171) In so far as SeaFrance's own contribution to the restructuring effort remains very inadequate in the light of the provisions of the Guidelines, the Commission considers that there is no need to analyse the compensatory measures proposed.

7.2.5. *Consequence of the incompatibility of the restructuring aid and the rescue aid*

- (172) Following the notification of the restructuring plan by France on 18 February 2011, in accordance with point 26 of the Guidelines, the 6-month period within which the loan must be reimbursed was extended until the Commission reaches its decision on the restructuring plan. Since the Commission considers that the measures notified as restructuring aid do not satisfy the compatibility conditions provided for by the Guidelines, the consequences of this incompatibility must be drawn. The loan cannot therefore be extended any longer beyond the date of this decision and must therefore be reimbursed without delay.
- (173) The amount to be recovered consists of the principal of the rescue loan, plus contractual interest due and not yet paid on the date of notification of the present decision, plus, from the date of the notification of the present decision, interest calculated in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁴⁹⁾.

⁽⁴⁷⁾ See section 2.2 (bottom of page 19 and page 20) of the comments of the French authorities.

⁽⁴⁸⁾ Under the 2004 Guidelines on restructuring aid, compensatory measures must be taken to minimise the adverse effects on trading and may comprise divestment of assets or reductions in capacity or market presence.

⁽⁴⁹⁾ OJ L 140, 30.4.2004, p. 1.

VIII. CONCLUSION

- (174) The capital increase of EUR 166,3 million, the loan of EUR 99,7 million and the loan of EUR [40-70] million that the SNCF plans to grant to SeaFrance constitute aid within the meaning of Article 107(1) TFEU. This aid is incompatible with the internal market and therefore cannot be implemented.
- (175) The loan granted by France, through the SNCF, as rescue aid in favour of SeaFrance, authorised by Commission decision of 18 August 2010, must be reimbursed immediately, together with the contractual interest due and not yet paid on the date of notification of the present decision.

HAS ADOPTED THIS DECISION:

Article 1

The capital increase of EUR 166,3 million, the loan of EUR 99,7 million and the loan of EUR [40-70] million that the French Republic is planning to implement, through the SNCF, as restructuring aid in favour of SeaFrance constitute State aid within the meaning of Article 107(1) TFEU and are incompatible with the internal market.

For this reason, these aid schemes may not be implemented.

Article 2

The loan granted by France, through the SNCF, as rescue aid in favour of SeaFrance, referred to in the Commission decision of 18 August 2010, constitutes aid which is incompatible with the internal market.

Article 3

1. France, through the SNCF, shall recover the aid referred to in Article 2 from the beneficiary, including the contractual interest due and not yet paid on the date of notification of the present decision.

2. The amounts to be recovered shall bear interest from the date of notification of the present decision until they are in fact recovered.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 4

1. The recovery of the aid referred to in Article 2 shall be immediate and effective.

2. France shall ensure that the present decision is implemented within four months following the date of its notification.

Article 5

1. During the two months following the notification of the present decision, France shall communicate the following information to the Commission:

- (a) the principal amount of the aid to be recovered from the beneficiary, which comprises the amount of the loan and the interest on the loan due and not yet paid;
- (b) the amount of the interest to be recovered from the beneficiary, which must be calculated according to the principles set out in Article 3(3);
- (c) a detailed description of the measures already taken and planned to comply with the present decision; and
- (d) the documents showing that the beneficiary has been ordered to reimburse the aid.

2. France shall keep the Commission informed of the progress in the national measures taken to implement the present decision until full recovery of the aid referred to in Article 2. It shall forward immediately, at the Commission's request, any information on the measures already taken and planned to comply with the present decision. It shall also provide detailed information on the amounts of aid and the interest already recovered from the beneficiary.

Article 6

This decision is addressed to the French Republic.

Done at Brussels, 24 October 2011.

For the Commission

Joaquín ALMUNIA

Vice-President