II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 April 2007

relating to the aid measure implemented by Belgium in support of Inter Ferry Boats (C 46/05 (ex NN 9/04 and ex N 55/05))

(notified under document C(2007) 1180)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2009/608/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

After having invited the interested parties to present their observations in accordance with the aforementioned Articles,

Whereas:

1. PROCEDURE

1.1. Cases NN 9/04 and N 55/05

(1) By letter of 12 August 2003, registered as received by the European Commission on 20 August 2003 (TREN/A(03)27718), the Belgian authorities notified, under Article 88(3) of the Treaty, the rescue and restructuring measures introduced by Société Nationale des Chemins de Fer Belges (SNCB) for its subsidiary Inter Ferry Boats (IFB) in the form of a framework agreement concluded on 7 April 2003.

(2) On 13 October 2003 (D (03)17546), the Commission asked the Belgian authorities to provide further information. A bilateral meeting on this subject was held with the Belgian authorities on 12 December 2003. At this meeting, the IFB restructuring plan was submitted to the Commission.

(3) The Belgian authorities replied to the Commission's letter by letter of 7 January 2004, registered as received by the Commission on 13 January 2004 (TREN/A (04)10708). This letter stated that the measures notified had been introduced. Consequently, the case was registered as NN 9/04. A second meeting was held on 30 April 2004. The Belgian authorities sent the additional documents requested by the Commission at this meeting by letter of 15 June 2004, registered as received by the Commission on 21 June 2004 (TREN/A(04)23691).

(4) By letter of 26 January 2005 (D(05)100339), the Commission asked the Belgian authorities to provide further information. This was sent by letter of 25 March 2005, registered as received by the Commission on 30 March 2005 (TREN/A(05)7712).

(5) By letter of 28 January 2005 (SG(2005)A1133), the Belgian authorities informed the Commission of SNCB's intention to further increase IFB's capital, this not being provided for in the agreements notified on 12 August 2003. The Commission recorded this case as notification N 55/05.

(6) By letter of 29 March 2005 (D(05)106199), the Commission asked the Belgian authorities to provide further information. This was sent by letter of 28 April 2005, registered as received by the Commission on 3 May 2005 (SG(2005)A(05)4155).

(7) By letter of 31 May 2005 (D(05)111096), the Commission asked the Belgian authorities to provide further information. This was sent by letter of 30 June 2005, registered as received by the Commission on 1 July 2005 (TREN/A(05)16598).

(8) A meeting between the Commission and the Belgian authorities was held on 16 September 2005. At the meeting, the Commission asked the Belgian authorities to provide it with further information. This was sent by email on 21 October 2005, registered as received by the Commission on 24 October 2005 (TREN/A(05)27067).

1.2. **Case C 46/05**

(9) By letter of 7 December 2005, the Commission informed Belgium of its decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the measures in question.

(10) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [1]. The Commission called on interested parties to present their comments on the measure in question. The Commission has not received comments from interested third parties on this subject.

(11) Belgium replied to the letter informing it that the procedure had been initiated by letter of 14 February 2006, registered as received by the Commission on 15 February 2006 as TREN/A/13934. It withdrew its notification of 28 January 2005 in the same letter.

(12) The meetings between the Commission and the Belgian authorities took place on 1 June 2006 and 25 July 2006. The Belgian authorities provided additional information to the Commission by letter of 29 June 2006, registered as received by the Commission the same day as TREN/A/25806, by letter of 20 September 2006, registered the same day as TREN/A/32665, and by emails sent on 16 and 21 November 2006, registered as TREN/A/37638 and TREN/A/37981.

(13) By letter of 30 November 2006, received by the Commission on 5 December 2006 and registered as TREN/A/39219, the Belgian authorities forwarded a letter from Mr Karel Vinck which concerned the current file. The Belgian authorities sent this letter in support of their argument that SNCB's decisions in this matter were not attributable to Belgium, but solely to SNCB.

(14) By letter of 5 February 2007 (D (07)302095), the Commission asked the Belgian authorities to provide further information. Belgium sent this information by letter of 6 February 2007, registered as received by the Commission on 7 February 2007 (A(07)24246), by letter of 8 February 2007, registered as received by the Commission on 9 February 2007 (A(07)23613), by letter of 13 February 2007, registered as received by the Commission on 15 February 2007 (A(07)24201), and by letter of 15 February 2007, registered as received by the Commission on 16 February 2007 (A(07)24362).

(15) By letter of 15 March 2007 (D (07)306248), and at a meeting held on 16 March 2007, the Commission asked the Belgian authorities to provide further information. Belgium sent this information by letter of 30 March 2007, registered as received by the Commission the same day (A (07)28411).

2. **DETAILED DESCRIPTION OF THE RESCUE AND RESTRUCTURING MEASURES**

2.1. **The parties to the framework agreement on the rescue and restructuring of IFB**

2.1.1. *IFB*

2.1.1.1. Description of the company

(16) IFB is a limited liability company incorporated under Belgian law. SNCB holds 89,03 % of the share capital. The other shareholders are CNC Transports, a 93,8 % subsidiary of SNCF (7,41 %), ICF (2,08 %), and EWS (English Welsh and Scottish Railway — 1,22 %).

(17) IFB was set up on 1 April 1998 by the merger of the following three companies: Ferry Boats SA, Interferry SA and the 'rail' division of Edmond Depaire Ltd. As shown by Belgium by means of an extract from the register of companies, this merger was a takeover, during the course of which Ferry Boats SA took over Interferry SA; the rail division of Edmond Depaire was subsequently incorporated in the merged entity. IFB has therefore taken over the legal personality of Ferry Boats, which was set up in 1923.

[1] OJ C 159, 8.7.2006, p. 2.

(18) IFB mainly pursues two types of activity, logistics for rail transport and combined transport (IFB Logistics) and the operation of continental combined transport terminals (IFB Terminals). The firm's activities have been described in detail in points 16 to 29 of the letter initiating the formal investigation.

(19) To these activities must be added the holdings and subsidiaries which IFB has or had in Belgium and abroad in companies operating maritime and continental terminals and in transport companies. These holdings and subsidiaries have been described in detail in points 30 *et seq*. of the letter initiating the formal investigation. Belgium has informed the Commission that certain factual information contained in that letter was either not entirely correct or that the situation had since changed. The factual changes which have occurred since the letter initiating the investigation was sent are described in the subsequent points. For all other matters, see the decision initiating the investigation procedure (points 30 to 49).

(20) IFB's holdings in the terminals in Belgium. IFB withdrew from the terminal in Zeebrugge. Point 39 of the letter initiating the investigation procedure states that it has sold its shares in the investment group OCHZ. In reality, IFB has sold its shares to Hesse-Noord Natie, with which it jointly operates the terminal.

(21) Point 41 of the letter initiating the investigation procedure states that IFB owns a 16,76 % share of the company Dry Port Mouscron-Lille. Belgium has informed the Commission that, following an increase in the company's additional capital on 29 June 2006, in which IFB did not participate, and the entry of a private investor, DELCATRANS, in the company's capital, its holding has been reduced to 11,07 %

(22) IFB's holdings in the terminals in France. IFB sold its 30 % shareholding in the company Nord France Terminal International OU (hereinafter NFTI-ou) to CMA-CGM in autumn 2006. Following this transaction, IFB has a shareholding of only 2 % in CNC Transports, since renamed Naviland Cargo.

2.1.1.2. Markets concerned and IFB's market shares

(23) The Commission established in the decision initiating the procedure (points 50 to 54) that, for IFB Logistics' activities, it was necessary to distinguish between two different product markets: the shipping activities and the logistics activities. These markets have been defined as national markets and IFB Logistics' market share has been calculated as between 2 % and 5 %.

(24) As regards the terminals market, the decision initiating the procedure (points 55 to 59) distinguishes between the continental terminals and the maritime terminals. In the meantime IFB has disposed of all its shareholdings in the maritime terminals. Neither the interested parties nor Belgium have contested the definition contained in the decision initiating the procedure.

(25) The rail freight market is an ancillary market of these two markets. Since 2003, it has been open for the transportation of international freight to and from Belgium, as provided for in Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [2]. This opening-up of international freight was supplemented by the opening-up of the national freight market on 1 January 2007, as provided for in Directive 91/440/EEC and implemented in Belgium by Royal Decree of 13 December 2005.

2.1.2. *SNCB*

(26) SNCB was set up by the Belgian Act of 23 July 1926 establishing the Société Nationale des Chemins de Fer Belges [3]. Since 14 October 1992 [4], it has been an autonomous public undertaking and a public limited company [5].

(27) Belgium reformed SNCB's structure on 1 January 2005. It was divided into three distinct companies, namely:

— SNCB Holding, a holding company which owns 100 % of the shareholding in the other two companies, these being:

— Infrabel, the railway infrastructure operator, and

— the new SNCB, the railway company in charge of transport services.

The Belgian State owns 100 % of the share capital in SNCB Holding.

(28) The management bodies of SNCB are the Management Board, the Executive Committee and the Chief Executive. The Management Board is composed of 10 members, including the Chief Executive. The directors are appointed by the King, by decree debated in the Council of Ministers.

[2] OJ L 237, 24.8.1991, p. 25.
[3] Moniteur Belge of 24 July 1926.
[4] Date of entry into force of the Royal Decree of 30 September 1992 approving the first contract for administration of Société Nationale de Chemins de Fer Belges and specifying the measures relevant to that company, Moniteur Belge of 14 October 1992.
[5] As defined in the Act of 21 March 1991 reforming certain public economic undertakings, Moniteur Belge of 27 March 1991.

(29) The Belgian Government is represented on the Management Board by a Government Commissioner. The Government Commissioner can call upon the Belgian authorities in order to revoke a decision of the Management Board relating to any matter not connected to the fulfilment of public service assignments if that decision 'is prejudicial to […] the implementation of public service duties' (Article 23, paragraph 2, of the Act).

2.2. **The financial difficulties encountered by IFB in 2001 and 2002**

(30) It is necessary first of all to analyse the reasons which caused these financial difficulties, and then to describe the reactions of the IFB's and SNCB's directors.

2.2.1. *The financial difficulties*

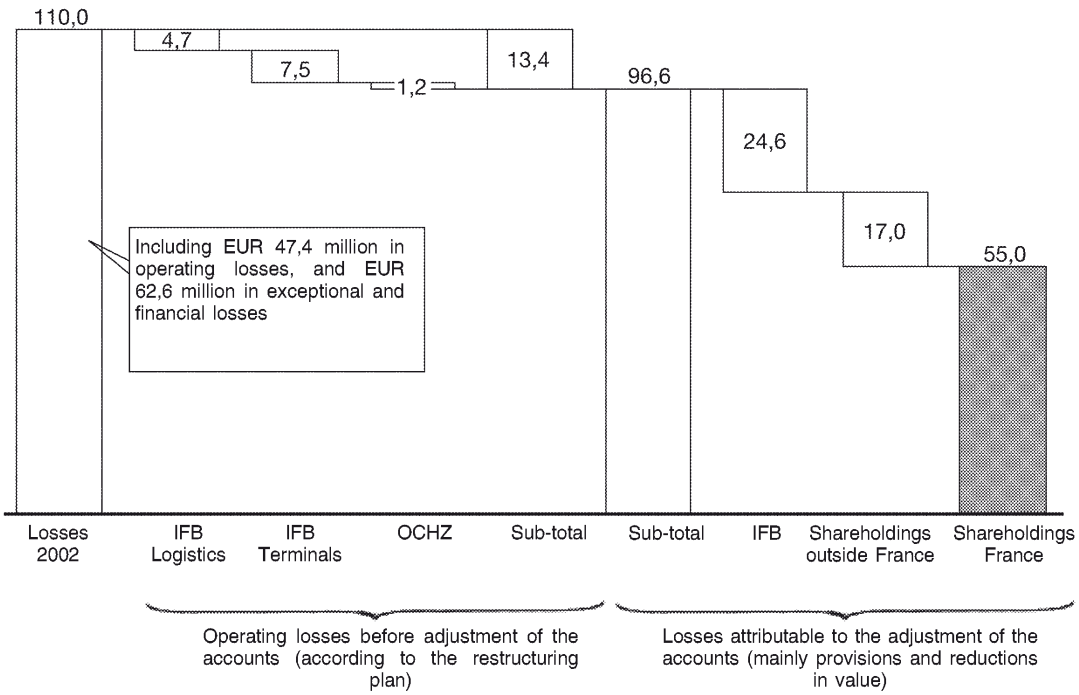
(31) The principal reason for IFB's difficulties reside in the financial difficulties encountered by its holdings in France, all situated in the port of Dunkerque, in 2001 and 2002. The financial difficulties also concerned the activities of 'IFB Logistics' and 'IFB Terminals', which suffered losses in 2002.

(32) As indicated in diagram 1, the total amount of IFB's losses in the 2002 financial year was EUR 110 million. EUR 12,2 million concerned operating losses before adjustment of the accounts at the level of IFB Logistics (EUR 4,7 million) and IFB Terminals (EUR 7,5 million). To this is added an operating loss of EUR 1,2 million at the level of the holding in OCHZ. These losses, totalling EUR 13,4 million, constitute 12 % of the total losses. The balance of the losses in 2002, EUR 96,6 million, stemmed from reductions in value and provisions within the context of the necessary adjustment of the accounts following the problems which the company had encountered in France and Belgium. 75 % of these reductions in value and provisions stemmed from IFB's holdings. Of this proportion, 76 % concerned the holdings in France.

Diagram 1

Breakdown of losses in 2002

(EUR million)



Source: Restructuring plan IFB, 24/03/2003; IFB Controlling.

2.2.2. *The response from IFB and SNCB management*

(33) Since the end of 2000, IFB has no longer paid the invoices sent to it by SNCB for the provision of its train services. In 2001 and especially in 2002, IFB continued this practice, which SNCB tolerated. Thus, at the end of January 2003 IFB found itself with unpaid SNCB invoices with a total value of EUR 63 million. The non-payment of these invoices explains why IFB was able to survive despite serious financial difficulties.

(34) On 21 May 2002, IFB's Management Board found that, following the losses sustained since the end of 2000, capital funds had fallen to less than half of the share capital. As provided for in Article 633 of the Belgian Companies Code, IFB convened an extraordinary general meeting of IFB shareholders.

(35) During the course of this meeting, SNCB, as the majority shareholder stated its commitment to support IFB for the operational expenses by the means of a cash advance of EUR 2,5 million. This commitment by SNCB was approved by SNCB's Management Board. On the basis of this commitment, the shareholders decided provisionally to continue with IFB's operations and requested that IFB's Management Board draw up a complete restructuring plan, including the subsidiaries and the management of the terminals.

(36) The SNCB's Management Board, at its meeting on 19 July 2002, summarised the situation of its subsidiary IFB. IFB's Chief Executive described the group's situation; the Management Board then took the following decision: 'The Board agrees to a contribution of EUR 2,5 million which is required to ensure cash flow requirements and to guarantee the continuity of IFB until the end of October 2002 (this amount constitutes an advance on a likely increase in capital).'

(37) During the second half of 2002, following approval by the Management Board, the cash advance of EUR 2 500 000 was transferred by SNCB to IFB, according to the following timetable:

— 6.8.2002: transfer of EUR 1 000 000,

— 17.9.2002: transfer of EUR 1 000 000,

— 30.9.2002: transfer of EUR 500 000.

(38) This advance bore interest at a rate of 3,1 %; it was fully repaid in July 2003. Repayment was in two stages:

— on 15 July 2003, IFB repaid EUR 1 500 000 of this sum, plus interest of EUR 40 422,04;

— on 23 July 2003, the balance of EUR 1 000 000, plus interest of EUR 26 883,35, was repaid by IFB to SNCB.

(39) On 19 September 2002, IFB's Chief Executive instructed two auditors to compile a special report in order to evaluate the financial state of the company. In light of the conclusions of this report, submitted to IFB on 4 December 2002 and subsequently to SNCB, on 20 December 2002 SNCB's Management Board gave its consent in principle to underwrite an increase in IFB's capital. On 24 December 2002, the Extraordinary General Meeting of Shareholders ('EGM') of IFB likewise accepted this proposal.

(40) IFB's senior management, with the aid of consultants McKinsey, drew up a restructuring plan for IFB. This plan, which is described in detail in points 73 to 86 of this decision, was approved by IFB's Management Board on 23 March 2003.

(41) The management of the two companies (IFB and SNCB) subsequently finalised the details for the rescue and restructuring of IFB in a 'framework agreement on the restructuring of IFB', which was signed by the two companies on 7 April 2003. At a second EGM, IFB shareholders agreed to continuing IFB's activities on the basis of this framework agreement.

2.3. **The rescue and restructuring measures in the 'framework agreement on the restructuring of IFB' of 7 April 2003**

(42) Article 2 of the framework agreement stipulates that implementation of the measures agreed between the parties will be in two phases, namely a rescue period and a period of restructuring.

2.3.1. *Terms and conditions governing the rescue measures*

(43) Article 3 of the framework agreement provides for the following rescue measures:

— the granting of a recoverable advance of EUR 5 million,

— the granting of a credit facility up to a maximum of EUR 15 million, and

— the granting of a provisional extension for the payment of IFB's debts of EUR 63 million in relation to SNCB.

(44) The duration of these measures was limited to 12 months; however, they were tacitly extended by mutual agreement by the parties until the date of the increase in capital.

(45) The interest rate on the recoverable advance and the sums deducted against the credit facility is equivalent to the reference interest rate applied by the Commission for State aid. The interest is capitalised, and payment is made at the same time as the payment of the debts due.

(46) The debts of EUR 63 million are subject to conventional late payment interest of 5,4 %. The interest is capitalised and paid at the same time as the payment of the principal debt.

(47) The interest owed to SNCB by IFB for the debts and the credit facility was EUR 2,2 million in 2002, EUR 3,9 million in 2003, EUR 4,7 million in 2004, and EUR 5,2 million in 2005, and will be EUR 4,4 million in 2006.

(48) Article 7 of the agreement provides that IFB relinquishes the time-barring of its debts to SNCB.

(49) This set of measures was implemented as of the signing of the framework agreement, on 7 April 2003. However, IFB did not make use of the recoverable advance.

2.3.2. *Terms and conditions governing the restructuring measures*

(50) Article 4 of the framework agreement, 'Terms governing the package of measures "restructuring measures"', is worded as follows:

'The Parties confirm their intention to implement the following measures insofar as they conform to a restructuring plan approved by their two Boards of Directors, by the Belgian State and if necessary by the EC, and subject to the approval of IFB's shareholders:

— The conversion into capital of a recoverable advance of EUR 5 million,

— The conversion into capital of the credit facility for a maximum amount deducted of EUR 15 million […],

— The conversion into capital of debts of […] EUR 63 million,

— Potentially and on the condition that the two parties are in agreement on the matter, an additional increase in capital […]'.

(51) The implementation of this increase in capital is subject to a condition precedent, provided for in Article 5 of the framework agreement, namely Commission approval in the light of State aid rules. Article 5 is worded as follows:

'The commitments entered into by SNCB […] are subject to the following condition precedent. The parties will ask the Belgian State to notify the EC of this framework agreement as swiftly as possible. The parties will also ask The Belgian State, in the event that the EC has good reason to consider within the context of this communication that the [framework agreement] includes the granting of State aid (as referred to in Article 87 of the EC Treaty, to notify the [framework agreement] under Article 88(3) of the EC Treaty. In order to enable the EC to adopt a position, [the framework agreement] will at all events not be implemented within a period of 15 working days from the date of notification to the EC. If [the framework agreement] is considered by the EC to be global State aid, it will not be implemented until the EC has explicitly or implicitly approved the aid concerned and, where appropriate, subject to the limits and according to the conditions set out in the approval provision.

Should the EC consider [the framework agreement] partially or totally to constitute State aid, and in the event that and insofar as this aid is declared incompatible with the common market, the parties would then discuss in good faith the feasibility of any additional measures requested in respect of IFB, but with no obligation to implement these additional or adjusted measures if the circumstances in which the aid must be given are considered to be absolutely unjustified.'

(52) Belgian civil law provides that, once the condition precedent is fulfilled, the agreement is valid retroactively.

(53) In their reply to the initiating letter, the Belgian authorities informed the Commission that the capital increase will be made exactly as agreed between the parties in the framework agreement, if the Commission approves it. It will be EUR 95,3 million, made up as follows:

(EUR)

Conversion into capital of the credit facility	15 million
Conversion into capital of IFB's debts to SNCB	63 million
Conversion into capital of the interest accumulated for the credit facility and debts in the years 2002 to 2006 (only partly for 2006)	17,3 million
Total	95,3 million

(54) The Belgian authorities informed the Commission that the increase will not concern the total amount of interest accumulated in 2006, in order to ensure that IFB's debt to equity ratio corresponds to the average level of its competitors, and is not greater. It also no longer includes the recoverable advance, since IFB has not made use of this facility.

(55) In their reply to the letter initiating the procedure, the Belgian authorities also informed the Commission that they were withdrawing the notification of 28 January 2005, in which they had informed the Commission of SNCB's and IFB's intention, in addition to what was provided for in Article 4 of the framework agreement, to proceed with an increase in additional capital of EUR 5 million by a contribution in kind of a 47 % shareholding in the company TRW [6] by SNCB.

(56) The restructuring plan provided for in Article 4 was communicated to the Commission at a meeting with the Belgian authorities on 12 December 2003. Its implementation commenced from 2003, and it was completed at the beginning of 2005.

(57) The restructuring plan comprised two parts, which correspond to two different strategies concerning on the one hand the group's French subsidiaries and on the other hand the Belgian activities of IFB. The strategy selected for France is the complete divestiture of its shareholdings, whereas the strategy selected for Belgium is the restructuring of the company with a view to continuing its operations.

2.3.2.1. The divestiture of the subsidiaries operating the terminals in France

(58) As explained in this decision and, in more detail, in points 30 onwards in the letter initiating the procedure, IFB pursued a strategy of divestiture of its French subsidiaries. This policy was achieved by selling the shareholding in NFTI-ou in November 2006.

(59) The total cost of divestiture of the IFB subsidiaries in France amounted to EUR 39,1 million. The following table reproduces the allocation of these costs in relation to the five subsidiaries. The net borrowing requirements and the figures concerning the various companies are explained in further detail in the following points.

[6] IFB already has a shareholding of 0,9 % in this company, which operates the terminals in Antwerp, Zeebrugge, Oostende, Charleroi, Liège, Brussels, Etge, Genk and Muizen, and offers rail freight services to 11 Member States.

Divestiture of french shareholdings: Summary of costs incurred

(in M EUR)

	ACIMAR	NFTI-ou	IFB FRANCE	DPD	TOTAL INVESTMENTS
Capital depreciation on debts	3,9		0,8	2,8	7,5
Capital depreciation on investments		16,7	0,1	5,1	22,0
Capital increase		1,7			1,7
Total cost	3,9	18,5	0,9	7,9	31,1
Interest due on 30.6.2006					+ 7,7
Current account fluctuation 9.2002 – 12.2002					+ 0,5
Capital appreciation on SSTD sale					– 0,2
Total cost of divestiture of French investments					39,1

(a) ***Net borrowing requirement***

(60) The table has been based on the accounting Statements of 27 September 2002. They distinguish between the following amounts:

— A sum of EUR 31,1 million corresponding to the capital losses on debts, capital losses on shareholdings together with the increase in capital of NFTI-ou of EUR 1,7 million;

— A sum of EUR 7,7 million in outstanding interest corresponding to the amount of interest accumulated between the end of 2002 and 30 June 2006 on behalf of the recoverable advance and the extension for payment which served to finance the divestiture;

— A sum of EUR – 0,2 million corresponding to the capital appreciation on the sale of SSTD;

— A sum of EUR 0,5 million corresponding to the difference between the accounting statements of 27 September 2002 and the amount of the actual capital depreciation accounted for on 31 December 2002.

(61) This last sum of EUR 0,5 million corresponds to the flow of funds between IFB's French shareholdings and IFB between 27 September 2002 and the end of 2002 and must be included in the table in order to be able to reconcile the actual capital depreciation accounted for at the end of 2002 with the total requirement calculated on the basis of the situation on 27 September 2002. As regards the IFB's borrowing requirement, there is no reason to take account of this amount; IFB's borrowing requirement relative to the divestiture of its French shareholdings is therefore EUR 38,6 million.

(62) The borrowing requirement for the divestiture of IFB's shareholdings in France has been financed by SNCB. IFB utilised EUR 30,9 million of its financial headroom obtained by the granting of the provisional credit facility of EUR 15 million and by the provisional non-recovery of the existing debts of the order of EUR 63 million to finance the divestiture. EUR 7,7 million of finance correspond to interest due for this sum by virtue of the framework agreement of 7 April 2003, which provides that the interest is not paid until the time of the payment of the principle debt (or converted into capital at the same time as the principal debt).

(b) ***Acimar***

(63) The company Acimar achieves its total turnover from a transport contract with the company Arcelor. This contract expired on 31 December 2005; at the time of the IFB audit in the second half of 2002, the contract was generating annual losses […] (*). Since attempts to renegotiate this contract with Arcelor have failed, SNCB has decided to file for Acimar's bankruptcy, and to seek legal redress. IFB has non-recoverable debts in respect of Acimar of EUR 3,9 million, which constitute the cost of divestiture.

(c) ***NFTI-ou***

(64) As regards NFTI-ou, which was a company controlled jointly by IFB and Port Autonome de Dunkerque (*Port of Dunkerque Authority*), and operated the terminals in the port of Dunkerque, SNCB opted for divestiture by selling its shareholding.

(*) Confidential data.

(65) IFB's shareholding in NFTI-ou required IFB, under the terms of a letter of intent, to finance a share of the losses corresponding to its shareholding in the company. Furthermore, IFB guaranteed security for a bank loan to the company with […], which had a value of EUR 2,9 million.

(66) In order to divest its shareholding in the company, IFB negotiated with Port Autonome de Dunkerque the lifting of the commitments resulting from the letter of intent. In return, IFB contributed to an increase in the capital of NFTI-ou, this having become necessary to allow the company to continue operating, amounting to EUR 1,7 million, and conceded part of its share capital to Port Autonome de Dunkerque for the nominal cost of EUR 1. Following this operation, IFB held only 30 % of the share capital.

(67) IFB and Port Autonome de Dunkerque subsequently sought and found a buyer, CMA-CGM, for the IFB shares […]. Taking the selling price into consideration, the total cost of divestiture for IFB was EUR 18,5 million, comprising EUR 1,7 million for the increase in capital and EUR 16,7 million for the depreciation in capital realised by the shareholding.

(d) ***IFB France***

(68) IFB France, which subsequently became AGEP, was sold to NFTI-ou […] which represented a depreciation in capital of EUR 0,1 million. Since IFB divested itself of NFTI-ou at the same time, the transfer to NFTI-ou resulted in the divestiture by sale of IFB France. Before the sale, IFB was obliged to abandon its debts on IFB France totalling EUR 0,8 million. The total cost of divestiture of IFB France was therefore EUR 0,9 million.

(e) ***Dry Port Dunkerque***

(69) IFB's shareholding in Dry Port Dunkerque was characterised by the same features as its shareholding in NFTI-ou: a letter of intent obliged IFB to make good the company's operating losses.

(70) IFB divested this shareholding by liquidation and by selling some of its assets, namely its 8,6 % shareholding in NFTI-ou held by Dry Port Dunkerque. Here, contrary to the situation in NFTI-ou, IFB's partners could not insist that the company should continue in business.

(71) IFB could not realise its debts on Dry Port Dunkerque (EUR 2,8 million), and had to accept the capital depreciation of its shareholding (EUR 5,1 million). The total cost of the liquidation was therefore EUR 7,9 million.

(f) ***SSTD***

(72) The company SSTD is a profitable company. Following the loss of its main client and in view of the strategic decision to exit the French market, IFB decided to sell it at the beginning of 2005, which generated a small profit.

2.3.2.2. The restructuring plan for the continuation of activities in Belgium

(73) IFB drafted a plan with consultants McKinsey for the restructuring of IFB's activities in Belgium. This restructuring plan was in two parts:

— Restructuring of 'IFB Logistics',

— Restructuring of 'IFB Terminals'.

The essential idea behind this plan is to limit the activities of IFB to its core business, that is to say the logistics activities and the operation of the terminals in Belgium, and to divest and sell the activities which are not essential to the economic viability of the core business. It is necessary to outline the financial results of the restructuring, together with the various measures taken to accomplish these results (general measures, measures relating to the logistics activity, measures relating to the terminal activity, investments).

(a) ***Financial results of the restructuring***

(74) After adjustments for depreciation, reductions in value and provisions for risk and charges (operational cash flow), the restructuring plan anticipated the following financial results which were largely confirmed by the results obtained:

(EUR million)

	2004	2005	2006 (1st half)	Total during the restructuring period
Projected operational cash flow	3,9	4,3	2,35	10,550
Resulting operational cash flow	4,875	3,079	2,475	10,429

(75) The projections for the IFB financial results were based essentially on the following elements, of which IFB was aware at the time the restructuring plan was adopted:

— **Centralisation of 'Railbarge' traffic on one terminal, and a perceptible increase in volumes.** The centralisation of 'Railbarge' traffic allows optimisation of the operational model, and an increase in revenue, as handling undertaken there up till then by third parties could be integrated into the group. Furthermore, IFB gained an important new client, CSAV, which envisaged placing orders for a volume of 50 000 TEU from 2004;

— **Significant reduction in both personnel and maintenance costs.** These measures are outlined in more detail in points 78 to 83 of this decision;

— **A new agreement concerning the operation of the rail terminal at Cirkeldyck**, which allowed the provision of important synergies with the adjacent terminal MSC Home Terminal;

— **An increase in volume at the terminal in Muizen**, following a new contract entered into with Unilog;

— **Very positive general projections for the intermodal transport market**, which has undergone spectacular growth since the start of the year 2000.

(b) ***Measures taken toward restructuring***

General Measures

(76) The conclusion of a new collective labour agreement at company level and changes to the working regulations enabled a higher rate of activity to be achieved (the number of working days per annum was increased by 13 with effect from 1 January 2004) at a lower cost (pay for weekend work and team work was reduced with effect from 1 October 2003).

(77) The administrative and commercial services were centralised in Berchem, which enabled the site in Ghent to be closed and the capacity of the one in Zeebrugge to be reduced.

(78) These measures contributed to limiting the personnel required in order to reduce IFB's general overheads by around EUR 2,55 million per annum [7] in total. IFB reduced its personnel from 210 FTE [8] in September 2002 to 175 FTE at the beginning of 2006, which represents a reduction of 17 %. These reductions can be presented in detail as follows:

— For the directly operated terminals (except subsidiaries), personnel was reduced from 110 FTE in September 2002 to 96 FTE at the beginning of 2006, a reduction of 13 %,

— As regards the logistics activities of IFB, personnel was reduced from 60 FTE in September 2002 to 49 FTE at the beginning of 2006, a reduction of 19 %,

— Personnel assigned to 'sales and marketing' and other central support functions (finance, human resources, etc.) was reduced from 40 FTE in September 2002 to 31 FTE at the beginning of 2006, a reduction of 23 %.

Restructuring of the logistics activities

(79) The restructuring plan provided for the following 10 measures, which were intended to allow an improvement of EUR 5,7 million.

Measures	Benefit
1. Effect of the reduction in the wages bill	[...]
2. Consultancy and outsourcing	[...]
3. Reductions in value and exceptional depreciation	[...]
4. Handover of the non-profitable branches in the North European Network	[...]
5. Loss of volume of conventional traffic	[...]
6. Recovery of wagons maintenance provisions	[...]
7. Increase in intermodal	[...]
8. Revision of Railbarge contract (price increase and product re-engineering)	[...]
9. Increase in commissions for representation (agent)	[...]
10. Reduction in general overheads	[...]

(80) While carrying out the restructuring plan, which was completed at the end of 2004, two additional measures were taken:

— For the terminal at Cirkeldijck, the price of handling was increased,

[7] The increase in the number of working days per annum led to a cost reduction of around EUR 0,6 million per annum; the centralisation of the administrative and commercial services in Berchem led to a cost reduction of around EUR 0,2 million per annum, and the reduction of up to 35 FTE led to a cost reduction of EUR 1,75 million per annum.

[8] Full-time equivalents.

— In general, traffic was analysed and, as a consequence, re-directed in consultation with the clients.

Restructuring of the 'IFB terminal' activities

(81) The restructuring of the 'IFB Terminal' activities, which was completed in 2005, required seven measures, which are described in further detail in points 103 to 107 in the decision initiating the procedure.

(82) In addition to the measures initially anticipated, IFB Logistics completed an in-depth analysis of its rail products, which revealed the existence of several unprofitable products, which IFB has since ceased to offer.

(83) For other products, this analysis demonstrated the need for improvements in the technical plan. These improvements were made, notably in the intermodal container transport sector.

Investments provided for in the restructuring plan

(84) The restructuring of Mainhub together with the restructuring of Zomerweg involved the need for new investments […], essentially for investments in renewals […] as well as miscellaneous investments, […].

2.4. **Description of the reasons which led to the initiation of the procedure on 7 December 2005**

(85) In its notification, Belgium considered that the measures in question did not constitute State aid, as they were not attributable to Belgium, and, in any case, SNCB had behaved like a private investor in a market economy.

(86) The Commission had doubts as to whether the granting of a payment extension for the existing debts of EUR 63 million and their conversion, together with the conversion of the interest of EUR 11 million pertaining to them, into share capital constitutes State aid. Its doubts concerned whether SNCB's conduct could be attributed to its owner, The Belgian State, and whether SNCB has behaved as a private investor in a market economy would have done.

(87) The Commission also has doubts as to whether the granting of a recoverable advance of EUR 5 million and the granting of a credit facility of EUR 15 million, the conversion of the credit facility of EUR 15 million and the interest of EUR 2,5 million pertaining to it into share capital, and the contribution in kind of EUR 5 million of new share capital, consisting of SNCB's shareholding in TRW, constitute State aid.

(88) Inasmuch as this aid constitutes cash aid, the Commission doubts that it can be declared to be compatible with the common market as rescue aid, as it has been granted for a period of more than 12 months.

(89) The Commission had some doubts as to whether the aid package could be declared to be compatible with the common market as restructuring aid.

(90) Its doubts concerned the respective applicability at the time of the 1999 ([9]) Community guidelines for State aid for the rescue and restructuring of businesses in difficulty (hereinafter the 1999 guidelines) and the 2004 ([10]) Community guidelines concerning State aid for the rescue and restructuring of businesses in difficulty (hereinafter the 2004 guidelines), whether the measures taken were sufficient to mitigate, as far as possible, the unfavourable consequences of the aid on competitors, whether the aid was limited to a strict minimum and whether IFB's own contribution to the restructuring aid was sufficient.

(91) Belgium sent its comments by letter of 14 February 2006, which was supplemented by letters of 29 June 2006, 20 September 2006, 16 November 2006 and 21 November 2006.

(92) In its reply, Belgium repeated its position that the measures in question do not constitute aid, as they are not attributable to the Belgian State, and because SNCB as a private investor would have done in a market economy.

(93) Belgium then considered that if the measures in question constituted State aid, they should be analysed on the basis of the 1999 guidelines for rescue and restructuring aid, and not on the basis the 2004 guidelines. Furthermore, Belgium considered that the measures are compatible with the common market as rescue and restructuring aid.

([9]) OJ C 288, 9.10.1999, p. 2.
([10]) OJ C 244, 1.10.2004, p. 2.

3. BELGIUM'S COMMENTS

(94) Belgium's position can be summarised as follows.

3.1. Belgium's observations on the procedure

(95) In their reply, the Belgian authorities informed the Commission that they had reservations regarding the length of the examination. They believe they have legitimate expectations as to the legality of provisionally maintaining the rescue measures until the Commission takes a final decision on the restructuring plan.

(96) The communications of 12 August 2003 (registered by the Commission as NN 9/04) and 28 January 2005 (registered by the Commission as N 55/05) are, according to the Belgian authorities, intended to provide the Commission with all information needed to check whether or not SNCB's measures in support of IFB constitute State aid within the meaning of Article 87(1) of the Treaty. According to the Belgian authorities, it is only if the measures concerned were deemed to be State aid that the Commission would have been (and would be) required to consider the communications as notifications under Article 88(3) of the Treaty.

(97) The Belgian authorities consider, more particularly, that the communication of 12 August 2003 did not concede that the rescue and restructuring measures in support of IFB constituted State aid or therefore that the rescue measures could be regarded as non-notified State aid. The Belgian authorities consider that the measures were not subject to the obligation of prior notification and to the requirement not to be put into effect within the meaning of Article 88(3) of the Treaty.

(98) The Belgian authorities made a similar statement regarding the communication of 28 January 2005 in which Belgium informed the Commission about an additional capital increase of EUR 5 million.

3.2. Absence of 'State aid' within the meaning of Article 87(1) of the Treaty

3.2.1. *Absence of State resources*

(99) Belgium considers that neither the rescue measures nor the restructuring measures granted to IFB were financed from State resources. SNCB is said to have financed these measures exclusively from its own resources, without mobilising State resources in any way.

(100) According to Belgium, the fact that SNCB is a public undertaking within the meaning of Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [11] is not sufficient to establish that the measures in question, which had been financed by SNCB, were financed from State resources. Belgium considers that it is necessary to distinguish between, on the one hand, SNCB's own resources, which arise from revenues generated by its activities and, on the other hand, the funds allocated by the State for SNCB's public service responsibilities. Since the funds allocated by the State were not sufficient to finance the expenses incurred in connection with such responsibilities in their entirety, Belgium concludes that there is no possibility that State resources were used by SNCB to finance measures to support IFB.

(101) Belgium considers that SNCB's capital is not at the disposal of the Belgian authorities, but is used for SNCB's business purposes. As a consequence, Belgium considers that it is not 'at the disposal of the public authorities', as required by the *Stardust Marine* [12] ruling.

(102) Finally, Belgium considers that any reduction in SNCB's own funds owing to the measures granted to IFB would not have entailed any 'loss' for the State [13], since the resources would in no way have otherwise had to be transferred to the State budget.

3.2.2. *Absence of liability on the part of the Belgian State*

(103) As regards the granting of a cash advance of EUR 2,5 million in the second half of 2002, the Belgian authorities consider that SNCB's decision to grant this advance is not attributable to the Belgian State.

(104) Belgium puts forward the following arguments to demonstrate its non-liability:

— The SNCB's strategic decision to restructure IFB, rather than allowing it to go bankrupt, was taken independently by SNCB's executive committee. In particular, IFB's future was not the subject of the studies commissioned at the end of 2001 by the Belgian Government for the company ABX, nor of the decisions concerning ABX which the Belgian Council of Ministers adopted in 2002,

[11] OJ L 195, 29.7.1980, p. 35.
[12] Court judgment of 16 May 2002, *France* v *Commission* (Case C-482/99 [2002] ECR I-4397), '*Stardust Marine*' judgment.
[13] Judgment of the Court of First Instance of 27 January 1998 in Case T-67/94, Ladbroke Racing [1998] I-1, paragraph 109, confirmed by the Court of Justice judgment of 16 May 2000 in Case C-83/98 P, Ladbroke Racing [2000] I-3271, paragraph 48.

— The decision to grant an advance to IFB had been taken by SNCB's executive committee. Belgium admits that the executive committee decided to submit this measure to the SNCB's Management Board, but considers that the granting of this cash advance did not require approval by SNCB's Management Board since, by virtue of the delegation of authority of the Management Board to the executive committee, the latter was empowered to bind SNCB for amounts up to EUR 2,5 million,

— This advance did not form part of a restructuring plan or other plan or measure which had been submitted to the Belgian State or in respect of which any consultation had taken place with the Belgian State,

— Other factors such as the relatively small size of the advance and its provisional nature equally confirm the conclusion that the granting of this advance can not be attributed to the Belgian State.

(105) As regards the non-payment of SNCB's invoices by IFB, the Belgian authorities consider that SNCB's Management Board were not informed of the fact the IFB was no longer settling SNCB's invoices until December 2002, i.e. when it had decided in principle to increase IFB's capital.

(106) The Belgian authorities consider furthermore that the action or lack of action by the Management Board, by the executive committee and by the Chief Executive are not attributable to the Belgian State, either before or after the conclusion of the framework agreement. They argue that there is no involvement of the Belgian State whatsoever (in the sense of the '*Stardust Marine*' case-law) in SNCB's decision-making process concerning the taking of measures in respect of IFB.

(107) According to the Belgian authorities, the measures taken by SNCB in respect of IFB are measures concerning an SNCB subsidiary which does not itself undertake public tasks and which is no longer associated with the performance of public tasks by SNCB. IFB's activities are therefore solely commercial activities, outside of any public tasks. Thus, still according to the Belgian authorities, they are not subject to State control as the Belgian authorities are required to respect SNCB's independence as regards matters which are not public tasks.

(108) As regards the role of the Government Commissioner, the Belgian authorities say that the IFB file was never submitted to them and that, therefore, they were not competent to intervene, given that the Government Commissioner did not express comments at any stage on the measures taken in respect of IFB and that he also did not intend to take any action whatsoever. Furthermore, they maintain that they did not intervene in any way in SNCB's decision-making process concerning IFB, or during the period preceding the conclusion of the framework agreement, or during the subsequent period.

(109) As regards the three items identified by the Commission in the letter initiating the procedure (points 143 to 150), namely the submission of the restructuring plan for approval by the Belgian State, the press articles demonstrating a strong influence by the Belgian Government on SNCB during the year 2003, and the scope, contents and the terms of the framework agreement, the Belgian authorities consider that these factors are not sufficient to establish responsibility in the sense of the *Stardust Marine* case-law.

(110) regards the approval of the restructuring plan by the Belgian State, the Belgian authorities consider that this provision of the framework agreement did not in any way aim to grant the Belgian authorities such competence as to be able to judge the contents of the restructuring plan, but was inspired by the fact that SNCB wanted the restructuring plan, like the framework agreement, to be communicated to the Commission.

(111) As regards the press articles, the Belgian Government considers that these do not contain any indication of intervention by the Belgian Government in this case, for the following reasons:

— In the article which appeared in La Libre Belgique on 19 May 2003, SNCB's press department explains that the Commission had not yet been asked to give the green light for the IFB case, since 'the federal authority still has to speak'. According to the Belgian Government, these comments refer exclusively to the 'communication' of the measures in support of IFB by the Belgian State to the Commission,

— In the article which appeared in La Libre Belgique on 18 December 2002 (in the version published on the website www.cheminots.be), Mr Karel Vinck is quoted as follows: 'A sufficient financial headroom is required for the management of the company'. According to the Belgian authorities, this statement exclusively concerns the fulfilment of SNCB's public tasks, and expresses the idea that the Belgian authorities are competent to agree objectives to be achieved for the fulfilment of the public tasks with SNCB by means of the legal instrument of the management contract, but that the achievement of these objectives is the responsibility and falls within the competence of SNCB's Management Board.

(112) Finally, the Belgian authorities sent the Commission a written statement by Mr Karel Vinck, Chief Executive of SNCB at the time of the events, confirming the absence of any involvement of the Belgian authorities in the granting, by SNCB to IFB, of the rescue and restructuring measures which are the subject of this dossier. Such a letter, signed by Mr Vinck on 17 November 2006, was received by the Commission on 5 December 2006.

(113) As regards the scope, contents and terms of the framework agreement, the Belgian authorities repeat their position that, even if the restructuring measures are important for the future of IFB, the Belgian authorities do not have the power of approval, authority to control the basis issue, or the right to be consulted in this case.

3.2.3. *Principle of a private investor in a market economy*

(114) Belgium considers that, following the reasoning developed by the Commission in the *ABX Logistics* [14] decision, the Commission should analyse separately, on the one hand, the funds which SNCB awarded to IFB to finance the divestiture of its French subsidiaries and, on the other hand, the funds which SNCB granted to IFB to finance the pursuit of its activities in Belgium.

3.2.3.1. Divestiture of French shareholdings

(115) In the *ABX Logistics* decision, the Commission is said to have confirmed that, since ABX France was not in a position to support the costs of disinvestment itself, SNCB would be acting as would a 'private investor in a market economy' in taking charge of these costs.

(116) Belgium considers the same conclusion applies as regards the cost of divestiture, for IFB, of its French shareholdings. It is attempting to show that, for each one of these companies, IFB opted for the least expensive method.

(117) As regards Acimar, Belgium has provided the following table:

Acimar — judicial administration followed by liquidation

Financial situation in 2002

(in EUR million)

	2001	2002
Turnover		
EBT		
Total balance (31.12)		
Net worth (31.12)		

Cost of alternatives

(in EUR million)

	Performance of contract	Judicial administration
Cash drain 1.1.2003-31.12.2005		
Capital depreciation debts 31.12.2002		
Total	– 14,7	– 3,9

Comments

— The attempts of the business during the year 2002 to obtain a revision of the contractual conditions failed; the duration of the contract was until 31.12.2005.

— The performance of the contract implied an important annual cash drain.

— In these circumstances, a request for judicial settlement was the least expensive solution.

— During the settlement period, the operating losses were financed by the client.

— Acimar ceased trading on 1.9.2003.

[14] Decision of 7 December 2005, Case C(2005) 4447 (OJ L 383, 28.12.2006, p. 21).

(118) As regards NFTI-ou, Belgium has provided the following table:

NFTI-ou — Handover

Financial situation in 2002

(in EUR million)

	2001 (*)	2002
Turnover		
EBT		
Total balance (31.12)		
Net worth (31.12)		

(*) From 1.5.2001 to 31.12.2001.

Cost of alternatives

(in EUR million)

	Continued	Partial sale
Increase in capital + repayment to ING credit		
Settlement plan		
Actual cash drain (CH annual of EUR – 3,7 million) (100 % letter of intent)		
Capital depreciation of shareholding		
Capital depreciation of debts 31.12.2002		
Sale price (EUR 1) – 30 % shareholding		
Total	– 36,2	– 18,5

Comments

— On the basis of a 'letter of intent', IFB was obliged to make contributions to the current account.

— IFB guaranteed security for a bank loan to NFTIou for which repayment has been requested by ING.

— In these circumstances, IFB negotiated with the other shareholder, the Independent Port of Dunkerque (PAD):

  — An increase in the capital of NFTIou part of which was underwritten by IFB,

  — The release of IFB from its commitments issued in the letter of intent, and PAD's commitment to seek a buyer for the balance of IFB's shareholding in NFTIou, by means of the transfer of a nominal sum to PAD for a part of IFB's shareholding in NFTIou to be reduced to 30 % (including the shareholding in DPD).

— The sale of the remaining 30 % shareholding is currently in progress.

(119) Belgium informed the Commission that filing for bankruptcy for NFTI-ou had never been envisaged, given that the continuation of business by NFTI-ou offered the prospect of profitability. According to Belgium, the sale of IFB's shareholding of 30 % to CMA-CGM on 2 November 2006 […] and the full recovery of the sums awarded in the form of advances to the current account demonstrate the viability of this company.

(120) As regards IFB France, which subsequently became AGEP, Belgium has provided the following table:

IFB France (AGEP) — Cession a NFTI-ou

Financial situation in 2002

(in EUR million)

	2001	2002
Turnover		
EBT		
Total balance (31.12)		
Net worth (31.12)		

Cost of alternatives

(in EUR million)

	Liquidation	Transfer NFTI-ou
Relinquishing of debts		
Capital depreciation on shareholding		
Capital appreciation on completion of asset transfer		
Asset deficiency (14 FTE)		
Total	– 1,7	– 0,8

Comments

— Faced with the risk of forced liquidation or of voluntary liquidation, IFB negotiated with PAD the transfer of title of IFB France to NFTI-ou by the means of the abandonment of debt by IFB.

— The liquidation of the company would have led to greatly increased costs (capital depreciation on shareholdings, risk of coverage of liabilities as representing founder and/or sole director).

(121) As regards Dry Port Dunkerque, Belgium has provided the following table:

Dry Port Dunkerque (DPD) — Liquidation with partial sale

Financial situation in 2002

(in EUR million)

	2001	2002
Turnover		
EBT		
Total balance (31.12)		
Net worth (31.12)		

Cost of alternatives

(in EUR million)

	Continued	Liquidation with partial sale of assets
Actual cash drain (Actual CH of EUR – 0,5 million) (100 % lettrer of intent)		
Capital depreciation of debts		
Capital depreciation of shareholding		
Total	– 10,4	– 7,9

Comments

— A letter of intent obliges IFB to make contributions to the current account in order to cover the operational losses of DPD.

— After the divestiture in NFTI-ou, a buyer for the shareholding in DPD was sought but could not be found.

— IFB negotiated the volontary liquidation of DPD, by means of a nominal sum for the shareholding of 8,6 % in NFTI-ou.

(122) As regards SSTD, Belgium provided the following table:

SSTD: Cession

Context:

— IFB owns a shareholding of 50 %.

— SSTD had profitable activities which continued until the beginning of 2005.

— At the end of 2004, SSTD lost its main client (representing 40 % of its turnover).

— This loss led to the decision to sell the shareholding in SSTD.

— The sale of the shareholding was intervened at the beginning of 2005 and was completed with a negligible capital appreciation (positive but negligible impact on the borrowing requirements).

(123) The Belgian authorities concluded that IFB chose the least costly solution as regards the French subsidiaries.

3.2.3.2. Restructuring and continuation of IFB's activities in Belgium

(124) As regards the financing of the restructuring and the continuation of IFB's activities in Belgium, Belgium considered that SNCB also behaved as an informed private creditor/investor in a market economy would have done, as the financial result of the alternative — the cessation of activities in Belgium — would have been, for SNCB, much less attractive and much more costly.

(125) Belgium presented the following calculations to illustrate the alleged cost of the liquidation of IFB's activities in Belgium and the alleged cost of remaining in business, subject to the capital increase.

(a) ***Net cost to SNCB if IFB had gone bankrupt in 2003***

(126) Belgium determined IFB's net current value from IFB's balance sheet of 31 December 2002. According to the Belgian authorities, the value of IFB's fixed assets which could theoretically have been realised if IFB had filed for bankruptcy in January 2003 included tangible fixed assets and financial fixed assets (shareholdings).

(127) For the tangible fixed assets, Belgium retained an amount of EUR 6,9 million. To justify this calculation, Belgium refers to the study *'Bankruptcy auctions: costs, debt recovery, and firm survival'* ([15]), which concludes that the rate of recovery of the bundle of debts in a bankruptcy scenario is on average 33 %. When calculating the assets recovered, Belgium applied this rate to the tangible fixed assets which appeared in IFB's balance sheet totalling EUR 20,9 million (excluding the fixed assets under construction of EUR 1,9 million, for which a zero rate of recovery was used).

(128) For the financial fixed assets (shareholdings), Belgium assumed a value of EUR 1,9 million, which corresponds to their complete accounting value on the IFB balance sheet on 31 December 2002.

([15]) Karin S. Thorburn, Tuck School of Business Administration of Dartmouth College, published in *Journal of Financial Economics* (#58, 2000), and based on an analysis of 263 businesses in Sweden.

(129) For the current assets, Belgium proposed the following value estimates:

— IFB's commercial debts: these concern a total of EUR 25,6 million of which EUR 18 million are considered to have been collected, which corresponds to a rate of recovery of 70 % for the short term debts. This rate is based on the average determined in the study 'Liquidation of Ormet Corporation' ([16]),

— Other IFB debt: this involves a total of EUR 7 million of which EUR 4,5 million are considered to have been to be collected. The amount of EUR 7 million can be broken down into EUR 2,5 million of debts for the subsidiaries DPD and OCHZ, and EUR 4,5 million in VAT. A rate of recovery of 100 % is assumed for the VAT debt, and a rate of recovery of 0 % for the two subsidiaries,

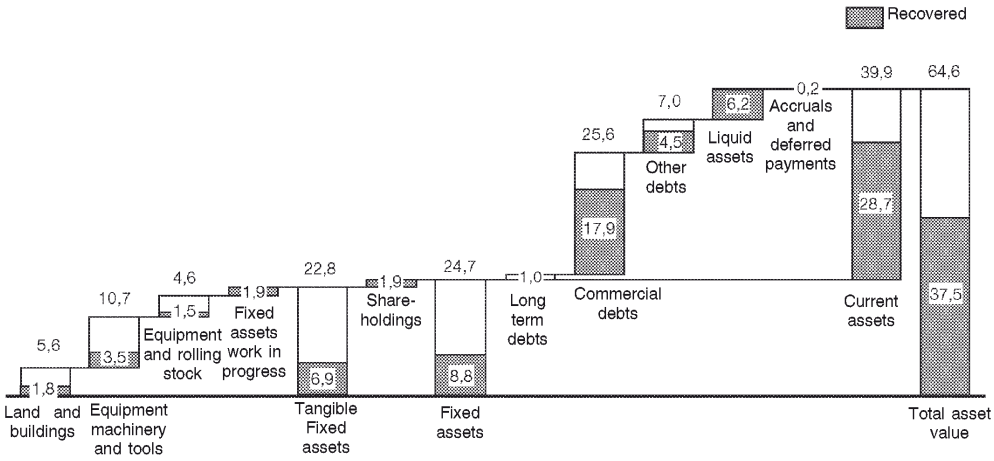
— Liquid assets and accruals and deferred payments: this involves a total of EUR 6,4 million which is considered to have been recovered in its entirety.

(130) The application of this set of rates of recovery gives rise to a total recovery of EUR 37,5 million on the assumption of the bankruptcy/liquidation of IFB, as indicated in diagram 2.

Diagram 2

Recovery of assets

(EUR million)



	Land and buildings	Equipment machinery and tools	Equipment and rolling stock	Fixed assets work in progress	Tangible Fixed assets	Share-holdings	Long term debts	Commercial debts	Other debts	Liquid assets	Accruals and deferred payments	Current assets	Total asset value
Rate of recovery utilised (Percentage)	33	33	33	0		100	0	70	64	100	100		
Reference Index (*) (Percentage)	33	33	33	—		100	—	55 — 85	See comments	—	—		
Comments	Zeebruges-Berchem	Terminal equipment	Essentially coaches	—		Revalued in 2002	Prêt à DPD		Debts of DPD and OCHZ (2,5) + VAT (4,5)	—	—		

(*) Based on the guaranteed rates of recovery for certain types of guarantees and on the article by K .S. Thorburn

Source: Jurisprudence Etats-Unis; K. S. Thorburn (2000), 'Bankruptcy auctions costs, debt recovery, and firm survival', *Journal of Financial Economics*

([16]) (Ormet Corporation filed its balance sheet on 30 January 2004 and submitted a reorganisation plan to the competent courts in September 2004). The Belgian authorities commented that the rate is noticeably higher than the rate of 33 % used by Professor Thorburn in her study referred to above.

(131) Furthermore, the Belgian authorities deducted the amount of the recovery which could be expected for IFB's liabilities. These liabilities rose to a total of EUR 76,9 million, not counting the debts of EUR 63 million in respect of SNCB for unpaid invoices from the period 2000–02. They are detailed below:

(a) Social liability: an estimated total of EUR 2,9 million for the IFB workforce, after subtraction of SNCB personnel seconded to IFB;

(b) Taxes, salaries and social security: a total of EUR 1,4 million due but not paid (taken from the balance sheet of 1 January 2003;

(c) Provisions and deferred taxes: a sum of EUR 34,7 million has been retained, from a total of EUR 40,8 million recorded from liabilities on the balance sheet of 31 December 2002. This variance is explained by the following items which would not have been a liability in the event of the liquidation of IFB:

— maintenance of terminals: EUR 3,3 million,

— maintenance of logistics operation: EUR 0,9 million,

— provisions for personnel restructuring: EUR 1,9 million,

(d) IFB's financial debt totalling EUR 15 million. The financial debt of EUR 15 million, contracted with credit institutions […], was guaranteed by IFB's commercial receivables. For this reason, and with regard to the preservation of SNCB's credit in the banking market, it is clear that this debt would also have been repaid to the credit institutions before the eventual repayment of SNCB's receivables;

(e) The commercial debt to bodies other than SNCB, totalling EUR 22,9 million.

On the basis of the above calculations, the IFB's net asset value for SNCB, excluding debts to SNCB, would have been EUR – 39,4 million, i.e. the value of the assets recovered (EUR 37,5 million) from which the total sum of the commitments to be honoured due to liabilities (EUR 76,9 million) is subtracted, excluding debts to SNCB.

(132) The Belgian authorities consider that, in the event of liquidation, in order to avoid significant damage to its commercial reputation, SNCB would have absorbed the cost of IFB's negative net asset value. In this respect, they emphasise that most of IFB's creditors are also clients, suppliers, creditors, debtors or partners of SNCB.

(133) Moreover, the cessation of the IFB's activities, again according to the Belgian Government, would have give rise to a major social liability for SNCB, which can be estimated at 530 FTE (full time equivalents) ([17]). These 530 FTE are made up as follows:

— On the one hand, some 50 of SNCB's personnel seconded to IFB who would have had to return SNCB in the event of bankruptcy,

([17]) The estimate of the social liability does not take into account the repercussions which IFB's bankruptcy would have had on OCHZ IGE for IFB's social liability. The bankruptcy of a member of an IGE automatically leads to the dissolution of the IGE in question.

— On the other hand, around 480 FTE of SNCB whose employment depended on IFB remaining in business. This estimate is obtained from the following calculation. IFB's share of the total turnover of SNCB's Freight division is 8,1 %. This ratio, when applied to the total number of SNCB personnel employed directly or indirectly by the Freight division on 31.12.2002, indicates that around 609 FTE depend upon IFB being in business. Of these 609 FTE, it has been assumed that 129, or 21 %, would be able to retain a job despite IFB's bankruptcy, as a result of SNCB's specific initiatives to regain a share of the traffic previously generated by IFB. This ratio of 21 % corresponds to the number of Sabena jobs which could be saved by launching SN Brussels Airlines in the aftermath of Sabena's bankruptcy.

(134) The Belgian Government considers that, since SNCB was at the time finalising its business plan 'MOVE 2007', which foresaw the shedding of 10 000 jobs, almost a quarter of its personnel, between 2003 and 2007, the opportunity to reassign personnel rendered redundant as a result of the cessation of IFB's activities was practically zero as regards both seconded personnel returning to SNCB or personnel linked to the Freight activity remaining with SNCB.

(135) Consequently, the Belgian Government proposed to add the cost of the surplus staff thus generated for SNCB to the direct cost of the negative net value of IFB, at least during the five-year period from 2003 to 2007. With a total average salary of EUR 46 200 per FTE per annum […], the total cost of this social liability would therefore be EUR 122,4 million.

(136) In order to justify this calculation, Belgium first of all explained that the SNCB personnel made redundant due to the cessation of IFB's activities could not be laid off, given that these personnel have the status of 'statutory employee' ([18]).

(137) Following the meeting of 1 June 2006, the Belgian authorities sent the Commission a less pessimistic scenario for the calculation of the net value and social liability which would have been borne by SNCB in the event of the liquidation of IFB. This scenario proposes the following two changes:

— SNCB would not have paid the total bundle of debts, but only those of creditors which were […], suppliers […] or partners […] of SNCB; on this assumption, the sum of IFB's liability which would have been paid by SNCB would have been EUR 13 million […],

— The IFB buyer would have largely continued to use SNCB's services; on this assumption 79 % of the 609 FTE employed by SNCB and assigned as indirect support for IFB would have been able to keep their job; on this assumption, the additional social cost to be borne by SNCB would have been limited to EUR 41,1 million (this last sum corresponds to the salary costs of the 50 FTE seconded by SNCB to IFB along with 21 % of the 609 FTE referred to above).

([18]) SNCB's staff regulations do not provide the option of dismissing its statutory personnel, except during the probationary period or within the context of a disciplinary procedure.

(138) The total cost which would have been borne by SNCB in the event of the liquidation of IFB in these two scenarios, as estimated by the Belgian authorities, is represented in the following table:

	Net cost — sums retained in the response	Difference in the 'optimistic' hypotheses	Net cost — adjusted sums
Total asset value	64,6		64,6
Non-recovered assets	– 27,1		– 27,1
Social costs	– 2,9		– 2,9
Taxes, salaries and social security	– 1,4		– 1,4
Provisions and deferred taxes	– 34,7		– 34,7
Priority loans and other financial debt	– 15		– 15
Non-SNCB commercial debt	*– 22,9*	*9,9*	*– 13*
Recovery value	– 39,4		– 29,5
Social liability to the SNCB	*– 122,4*	*81,3*	*– 41,1*
Net cost for SNCB of filing for bankruptcy by IFB	– 161,8		– 70,6

(b) ***Valuation of IFB in a business-as-usual scenario***

(139) Belgium proposed to calculate IFB's value in a 'business-as-usual' scenario according to the 'discounted cash flows' or 'DCF' method. The parameters used for this analysis are as follows.

(140) The 10-year DCF analysis is based on IFB's balance sheet of 31 December 2002, and on the restructuring plan drawn up in February–March 2003, including projections to the end of 2005. For the year 2006, when the restructuring of IFB brought about the stabilisation of the business, the trading profit had been set at 3,2 % of turnover. From 2006, the working assumption is an annual growth of 3 % of turnover which, at a constant margin, leads to a pre-tax rate of profit growth of 3 %. The resulting discounted cash flows are compounded to a weighted average cost of capital (WACC) of 8 %. The value of the terminals has been calculated on the assumption of a continuing annual growth of 3 %.

(141) These calculations lead to valuation of the business at around EUR 29,1 million (excluding shareholdings and provisions), as shown in diagram 4.

Diagram 4

Value of ifb based on discounted cash flows — Assumptions and results

(EUR million)

Assumptions

- The cash flows are calculated based on the profits before tax included in the restructuring plan of 2003, for which the provisions run until end 2005
- The results have been amended as follows:
  - In 2006, net margin of 3,2 % (*) assumed (which corresponds to a profit before tax of EUR 1 800 000)
  - From 2006 on, pre-tax profit growth rate of 3 % (*) assumed
  - No taxes
  - Payment of interest EUR 527 000 assumed constant in 2003 and added to result
  - Amortisation assumed constant based The figures from 2002: added to result
  - Capital expenditure assumed to be constant based on amortisation; reduced to counter-balance amortisations
  - Development of floating capital based on a growth rate of 3 % from 2004 on
- The cashflows are calculated over 10 years And discounted at average cost and balanced with capital of 8 %

Cash flow analysis	2003	2004	2005	2006	2012
— Profit before tax	(5 100)	200	1 000	1 800	2 149
— Taxes	—	—	—	—	—
— Interest payments	527	527	527	527	527
— Profits before Interest and taxes	(4 573)	727	1 527	2 327	2 676
— Plus amortisations	6 286	6 286	6 286	6 286	6 286
— Gross operating surplus (**)	**1 713**	**7 013**	**7 813**	**8 613**	**8 962**
— Investements and					
— Capital expenditure	(6 286)	(6 286)	(6 286)	(6 286)	(6 286)
— Floating capital	996	(281)	(290)	(299)	(357)
— Discounted cash	**(3 577)**	**446**	**1 237**	**2 028**	**2 320**
— NPV (***) of discounted cash flows	**6 962**				
— Final present value	**22 135**				
— Value of the business	**29 096**				

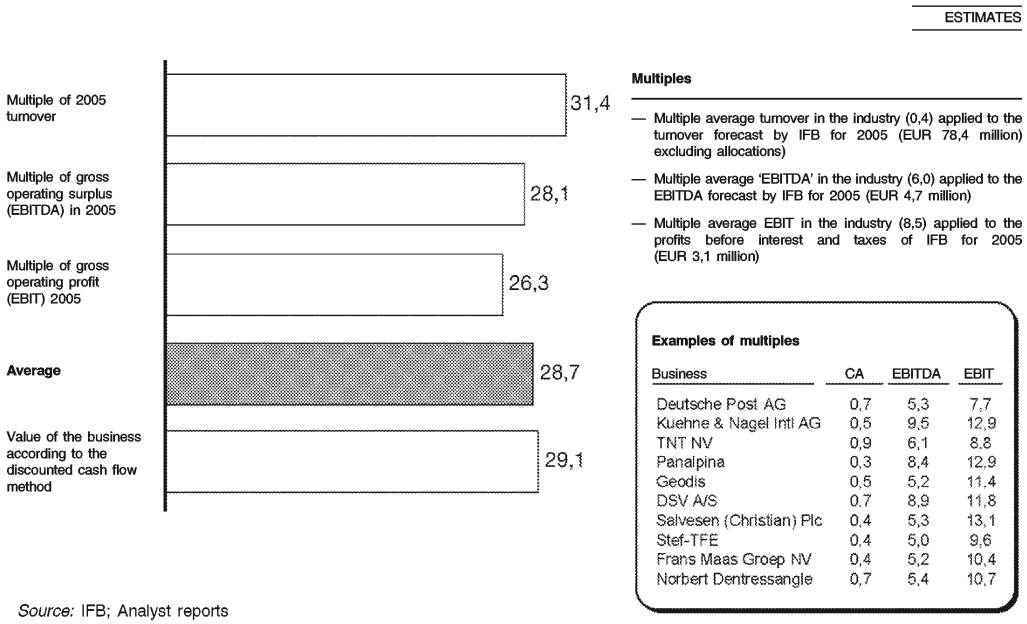
(*) Industry practices
(**) EBITDA
(***) Net present value

(142) According to the Belgian Government, an analysis based on multiples (dependent on the results obtained in 2005) confirms the valuation obtained on the basis of the DCF method. The 'multiples' valuation (with more cautious multiples than the sector averages) indicates a value for the business of around EUR 28,7 million, as shown in diagram 5.

Diagram 5

Value of the ifb business

(EUR million)



Source: IFB; Analyst reports

(143) The Belgian Government considers that the actual results obtained by IFB in the years 2003, 2004 and 2005 also confirm that the DCF valuation, and the assumptions upon which it is based, were realistic.

(144) The Belgian Government considers that IFB's shareholdings, namely the EUR 1,9 million entered as assets in IFB's balance sheet of 31 December 2002, should be added to IFB's value as calculated excluding provisions and shareholdings.

(145) IFB's total value, including the shareholdings, was therefore EUR 31 million on 31 December 2002.

(146) Still according to the Belgian Government, the value of provisions, estimated at EUR 34,2 million ([19]), along with the financial debt amounting to EUR 15 million, should be deducted from this value of the business.

(147) This results in a net value of EUR – 18,2 million for the SNCB shareholding in IFB in the business-as-usual scenario. This calculation is illustrated in diagram 6.

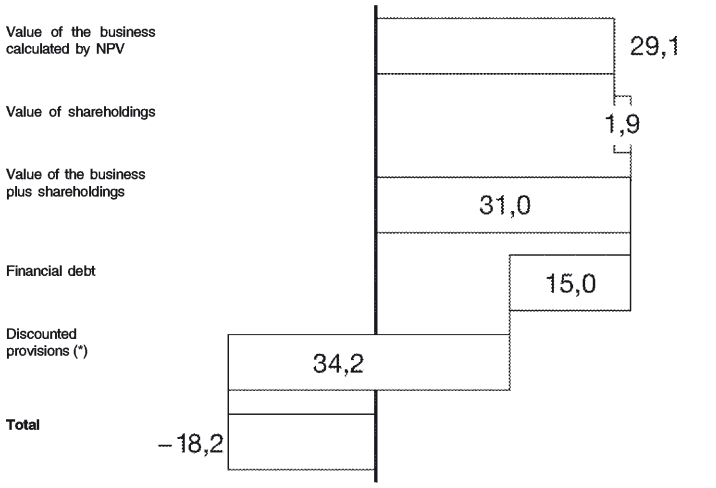
(148) As in the preceding estimate of the cost borne by SNCB in the event of the liquidation of IFB, the above calculations do not take account of the debts of EUR 63 million resulting from the unpaid invoices during the period between 2000 and 2002.

([19]) This value arises from the discounting of cash-flows linked to provisions of EUR 40,8 million forecast in the balance sheet of 31.12.2002.

Diagram 6

Evaluation of the investment option, January 2003

(EUR million)



(*) NPV of the package of provisions contained in the 2002 final balance sheet paid from 2003 to 2006

Source: IFB

(c) ***Comparison of the two scenarios and conclusion***

(149) Based on the Belgian Government's analysis, the two scenarios would give the following results:

— The net cost to SNCB of the bankruptcy and liquidation of IFB would be a net loss of EUR 161,8 million (reduced to EUR 70,6 million in the revised estimate),

— The decision to invest EUR 15 million to allow IFB to remain in business would lead to a considerable reduction in the loss of value for SNCB, which would therefore be no more than EUR 18,2 million, a gain of EUR 143,6 million compared with the scenario of bankruptcy and liquidation (EUR 52,4 million compared with the revised estimate).

(150) Consequently, the Belgian Government considers that SNCB, in agreeing the measures in question, had behaved as a private investor in a market economy would have done.

3.2.4. *Absence of distortion of competition*

(151) Finally, Belgium considers, as regards the part of the measures serving to finance the divestment of the French subsidiaries, that an amount of aid which is strictly limited to the actual costs incurred following the cessation of business cannot be considered to distort competition. That part of the financing would therefore not be covered by the scope of Article 87(1) for this reason.

3.3. **Compatibility of the rescue measures with the guidelines**

3.3.1. *IFB is not a newly created business*

(152) Belgium considers that since IFB was founded in 1923 and has, by means of a merger by takeover, acquired a company, along with a branch of activity in 1998 (see description in part 2 of this decision), there can be no doubt that IFB has had legal personality for more than 80 years and cannot therefore be considered a 'newly created business'.

3.3.2. *The rescue measures are compatible with the 1999 guidelines*

(153) According to the Belgian Government, the fact that the duration of the rescue measures is more than 12 months would not have the effect of ruling out the possibility of their being compatible with the common market on the basis of the 1999 guidelines. Belgium considers that SNCB maintained the rescue measures with the sole aim of covering the period necessary for the Commission to take the final decision in this case.

(154) Since point 24 of the 1999 guidelines provides that authorisation of the rescue measures remains valid until the Commission rules on the restructuring plan, the Belgian authorities request the Commission not to invoke the duration of its own approval procedure for the rescue measures in order to contest the duration of the continuation of these measures, and to approve the rescue measures, on the basis of point 24 of the 1999 guidelines.

(155) The Belgian authorities consider that the suspension of the capital increase pending examination by the Commission necessarily means the continuation, as a provisional and precautionary measure, of the payment period which IFB is allowed within the framework of the rescue measures, as the sole alternative would have been voluntary liquidation. Finally, according to the Belgian authorities, during the course of its examination, the Commission had never have expressed any reservation regarding the provisional continuation of the rescue measures.

3.3.3. *The restructuring measures are compatible with the 1999 guidelines*

3.3.3.1. Applicability of the 1999 guidelines

(156) Belgium considers that SNCB's commitment to underwrite the increase in capital of IFB should be analysed within the context of the 1999 guidelines and not those of 2004.

(157) In order to justify this point of view, Belgium maintains that the two conditions established by the Commission in point 240 of the decision initiating the procedure for the applicability of the 1999 guidelines are met. As a reminder, in point 240 of the decision initiating the procedure, the Commission concluded, as regards the interpretation of points 102 to 104 of the 2004 guidelines for this case, that 'if SNCB decides not to award the new asset to IFB, and if the evidence is forthcoming that SNCB was engaged in converting its receivables into capital before the publication of the 2004 guidelines, the Commission would have to examine in its final decision the aid granted to IFB by the SNCB on the basis of the 1999 guidelines'.

(158) As regards the first condition, Belgium observes that, in its reply to the letter initiating the procedure, it had retracted the increase in capital notified on 28 January 2005, and that consequently, the first condition was fulfilled.

(159) As regards the second condition, Belgium considers that there can be no doubt that the increase in capital of IFB currently proposed would be put into effect as agreed by the parties, under the condition precedent of the Commission's agreement, in the framework agreement of 7 April 2003.

(160) In order to underline this point, the Belgian authorities draw the Commission's attention to:

— Point 4 of the preamble to the framework agreement of 7 April 2003, which confirms that the Management Board of SNCB has already approved the underwriting of an increase in capital of IFB,

— Article 4 of the same contract, which confirms the reciprocal intention of both parties to proceed with an increase in capital of IFB.

(161) As regards the second point, the Belgian authorities draw attention to the fact that, under Belgian law (the law applicable to the framework agreement), a contract arises from the sole consensus of the contracting parties, and that in this case, Article 4 of the framework agreement expressly confirms without any ambiguity the consensus of SNCB and IFB to proceed with an increase in capital of IFB by converting SNCB's receivables from IFB into capital retroactively to 7 April 2003.

(162) The Belgian authorities point out that, under Belgian law, obligations which are subject to a condition precedent remain fully binding, and the implementation of the condition precedent has a retroactive effect on the contract which takes effect from the date of signature.

3.3.3.2. Measures to limit the adverse effects on competition as much as possible

(163) The Belgian authorities emphasise that the IFB's market shares are well below 10 % of the markets involved in this case. Consequently, they consider that the anti-competitive effects resulting from the State aid involved cannot be considered to be significant. They point out notably that, by virtue of point 36 of the 1999 guidelines, 'if the firm's [beneficiary of the aid's] share of the relevant market is negligible, it should be considered that there is no undue distortion of competition' ([20]), and that, for the application of Article 81(1) EC, the Commission considers the anti-competitive effects of agreements concluded by businesses having market shares smaller than 10 % to be insignificant ([21]).

(164) As regards the activities of IFB Logistics and IFB Terminal more particularly, the Belgian authorities make the following comments.

(165) The mitigating measures on the freight transhipment market. The Belgian Government observes that IFB's share of the terminals market in the Antwerp region is less than 7 %, and that during the period 2002-2005 the terminals market in this region experienced a rate of growth of 10,7 % per annum on average, whereas the volumes transported by IFB increased by only 4,1 % per annum on average.

(166) The Belgian Government added that, by implementing the restructuring plan, IFB had considerably reduced its transhipment capacity, as described in part 2 of the initiating letter (points 25 to 29). With regard to the circumstance that, with the exception of the DPD terminal, all of the assets sold are still in operation today, the Belgian authorities consider that the takeovers are to be considered as real and substantial compensatory measures. According to the Belgian Government, the set of takeovers would represent a reduction in IFB's capacity from 1,5 million TEU in 2002 to 1,1 million TEU at the end of 2005, i.e. a reduction of 27 %.

([20]) See 1999 guidelines, point 36.

([21]) See notably the guidelines concerning the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, point 24 in particular.

(167) The Belgian authorities added that the implementation of the restructuring plan by IFB has not been accompanied by pricing measures which had the aim or effect of increasing IFB's market share. They observe that IFB increased its prices by an average of 4,2 % ([22]), whereas the industrial annual rate of inflation was 1,9 %.

(168) *The mitigating measures on the logistics market*. The initiating letter considers (paragraphs 258-260) that the measures 'proposed' did not concern the logistics market, and that IFB had been able to increase its volume in this market. The Belgian authorities put forward five arguments to show that sufficient mitigating measures have been taken in the logistics market.

(169) First, IFB had taken measures which have led to a reduction in its capacity in the logistics market. The total number of wagons of which IFB is the owner or which are subject to a long-term lease fell from 744 units in 2002 ([23]) to 377 units at the beginning of 2006 ([24]). This is a reduction of 49 %.

(170) The reduction in IFB's logistics capacity also resulted from the fact that IFB's shareholding in the company CNC (now Naviland Cargo) weakened, from 10 % in 2002 to 2 % currently.

(171) Second, the Belgian authorities consider that IFB's share of the logistics market is well below 5 %, if the geographical extent of this market is limited to Belgian territory. It is appropriate then, by virtue of point 36 of the guidelines, to ask whether the anti-competitive effects resulting from State aid in this case can be considered to be perceptible. According to the Belgian authorities, IFB cannot be considered to be capable of exercising a perceptible influence on the competitive element of the logistics market. For the same reason, it was difficult, according to the Belgian Government, to consider the distortions of competition resulting from the aid from which IFB benefited as perceptible, and so only very limited measures appear necessary in order to limit unfavourable consequences for IFB's competitors.

(172) Third, the Belgian authorities propose to put into perspective the development of IFB's logistics activity in order to respond radically to the Commission's assertion that IFB had been 'able to increase its volume in this market in a significant way' during the period in question. According to the Belgian authorities, the following facts had to be taken into account:

— For the combined (intermodal) transport sector, the volumes transported by IFB experienced annual growth in the order of 9,9 % during the period 2002–05, which is less than the average annual growth of 12 % observed in the ARA region for the same period,

— In the conventional transport sector, IFB is a totally marginal player, even assuming that the market is restricted to Belgium. IFB's share, both in volume and value, is less than 1 %.

(173) In addition, the origin of IFB's turnover in growth in its logistics activity, according to the Belgian Government, is to be found to some extent in the growth of the 'bulk' sub-sector (bulk transport). In 2003, IFB's turnover on bulk was only EUR 3,3 million. In 2004, IFB obtained two bulk transport contracts of significant volume. Firstly, a contract for the transport of coal […] which generated a turnover […] in 2004 and […] in 2005. Secondly, a contract for the bulk transport of aggregates which yielded an increase in turnover […] in 2004 and […] in 2005. IFB achieved a profit margin on these two contracts, which adequately confirms the absence of anti-competitive practices on the part of IFB.

([22]) The average price increase was obtained by weighting the terminals according to their turnover.
([23]) IFB was the owner of 368 wagons and had finalised the long-term lease of 376 other wagons.
([24]) At the beginning of 2006 IFB was the owner of 204 wagons and had finalised the long-term lease of 173 other wagons.

(174) Fourth, the Belgian Government considers that IFB's opening-up of its terminals to competitors in the logistics market is also to be considered as an important mitigating measure.

(175) Fifth, the Belgian Government considers that the limited distortions of competition which could be considered to result from the restructuring aid to IFB are further reduced by the following factors:

— The liberalisation of rail freight transport in Belgium. The Belgian authorities, in compliance with the applicable European rules, opened this market to competition (from March 2003 for international transport, followed by total liberalisation on 1 January 2007) ([25]). This opening-up did not fail to have an effect, as shown by the activities of the companies DLC and, more recently, Fret SNCF. In its decision N 386/04, Fret SNCF, the Commission considered such liberalisation to be a compensatory measure for competitors,

— Several other competitors of SNCB/IFB (among which are Rail4Chem, Railion Nederland, TrainSport, DFG, EWS, Connex and ACTS) have already received or in all probability will receive their operating licences shortly,

— The SNCB (B-Cargo) already currently provides traction services to IFB's competitors, whether suppliers of combined (intermodal) transport such as companies as HUPAC, CNC (Naviland Cargo), Conliner, Danzas/DHL Express Cargo and ICF, or suppliers of 'forwarding' services such as Transfesa, K+N, Nauta, NTR, Panalpina, Rail&Sea, Railog, Chemfreight, Rhenania, TMF, Gondrand, RME Chem, RME fret and East Rail Expedition,

— As the Commission noted in its decision in case N 386/04, Fret SNCF, the conditions between rail and road are not identical, to the detriment of rail.

(176) According to the Belgian Government, the liberalisation measures have led to substantial capacity increases in the logistics market, as shown by the activities of IFB's competitors during the period 2003-2005. According to the Belgian Government, competition concentrated on the intermodal sector, where five of IFB's competitors launched a total of 12 new links in this period.

3.3.3.3. Limitation of the increase in capital to the minimum

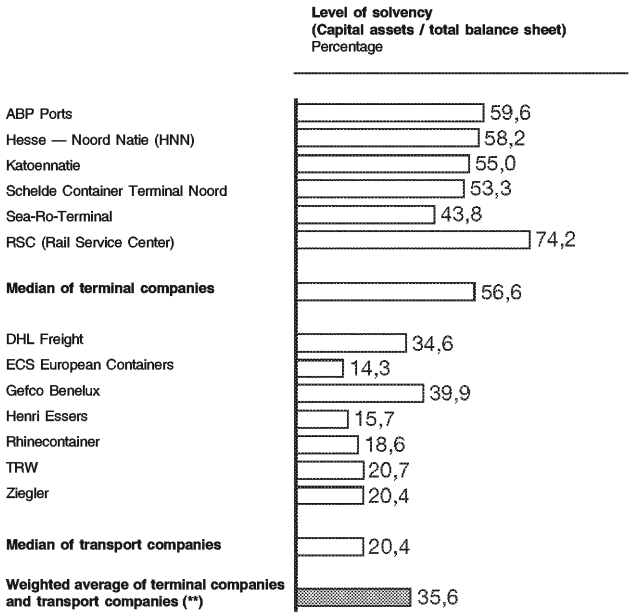
(177) According to the Belgian Government, SNCB and IFB carried out an in-depth analysis of IFB's capital requirements on the basis of the results as at 31 December 2005 and the forecasts for the year 2006. The aim was to allow IFB to pursue its activities in the freight transhipment and logistics markets with a level of solvency comparable to its competitors in these markets.

(178) In relation to the information communicated before the decision initiating the procedure (see points 265 to 269), SNCB and IFB have compiled additional information about the average level of solvency of, on the one hand, IFB's competitors operating terminals and, on the other hand, of transport companies in competition with IFB. The levels of solvency (which must be understood as the relationship between capital base and total balance sheet) of the companies in question are set out in Diagram 16.

([25]) This complete opening-up of the markets, which is provided for in Directive 91/440/EC, was implemented by Royal Decree of 13 December 2005.

Diagram 16

Level of solvency — sample of comparable companies, 2004 (*)



(*) The 2003 figures were used for ABP, HNN and Sea Ro as their 2004 annual accounts had not yet been published.

(**) Weighted as a function of the utilisation of IFB assets (42 % terminals, 58 % assets).

Source: Belfirst; Amadeus; IFB

(179) Diagram 16 shows that the median level of solvency of the terminal operators is 56,6 %, whereas the median level of solvency of the transport companies is 20,4 %. Since IFB is active in both sectors, IFB's level of solvency, as a function of the 'benchmarks' referred to, should be less than 35,6 %. This last percentage has been calculated by weighting IFB's operational fixed assets in the following way:

— 42 % of IFB's operational fixed assets (measured by their net accounting value, that is to say after amortisations and depreciation) are allocated to the terminals activities,

— 58 % of IFB's operational fixed assets are allocated to the transport (logistics) activity.

(180) The Belgian authorities made the observation that IFB's target level of solvency is also in line with the actual level of solvency of companies such as Gosselin (38,9 %) and Hupac (34,9 %), which, like IFB, combine the operation of terminals with logistics activities.

(181) Based on IFB's target level of solvency IFB of 35,6 % and a total debt of EUR 128,1 million (estimate as at 30 June 2006), the increase in capital of IFB, according to the Belgian authorities' calculations, should therefore imply a conversion of debt into capital of at least EUR 95,3 million.

3.3.3.4. IFB's own contribution

(182) According to the Belgian authorities, SNCB's total contribution to the restructuring of IFB is EUR 95,3 million, i.e. the forecast amount of additional capital. The sums committed to the French part of the group should be subtracted from this amount, i.e. EUR 39,1 million. The balance, i.e. EUR 56,2 million, therefore represents SNCB's contribution to the restructuring of the group's non-French activities.

(183) Later, the Belgian authorities specify that the borrowing requirements for IFB's non-French activities for the restructuring period (from 1 January 2003 to 30 June 2006), were EUR 106,3 million. Of these requirements, EUR 56,2 million will be covered by SNCB and EUR 50,1 million by means of IFB's own resources. IFB's contribution to the total cost of restructuring its activities in Belgium will be 47,1 %.

(184) The following table shows the financing details:

Finance requirements and sources

(Assuming the conversion of receivables of EUR 63 million constitutes a 'cost' of restructuring.)

(EUR 1 000)

	Restructured division	French divestitures	Total
Period: 1.1.2003-30.6.2006			
A. **FINANCE REQUIREMENTS**			
A.1. Restructuring costs			
A.1.1. Gross operating loss ('cash drain') excluding the effect of productivity gains	– 27 916		– 27 916
(equivalent to the gross operating loss in 2002; pro rata for 6 months in 2006			
A.1.2. Exceptional charges	– 32		– 32
A.2. Capital requirements during restructuring			
A.2.1. Variation in working capital (additional)	– 7 865	– 8 000	– 16 685
A.2.2. Investments in renewal in non-financial fixed assets	– 6 611		– 6 611
A.2.3. Investments in financial fixed assets (shareholdings)	– 782	– 1 700	– 2 482
A.3. Repayment of debts and interest			
A.3.1. In favour of creditors (financiers) other than the SNCB			
A.3.1.1. Interest payments	– 2 351		– 2 351
A.3.1.2. Repayment of financial debts	– 16 559		– 16 559
A.3.2. In favour of the SNCB			
A.3.2.1. Repayment of debt prior to 2003	– 33 200	– 29 800	– 66 000
A.3.2.2. Payment of interest accumulated from 31.6.2005 on debt prior to 2003	– 6 800	– 5 200	– 11 000
A.3.2.3. Payment of interest accumulated from 31.6.2005 on credit facility	– 2 200	– 300	– 2 500
A.3.2.4. Payment of interest from second half of 2005 and first half of 2006	– 3 100	– 2 100	– 6 200
A.4. Taxes (accrual from 1999 tax year)	– 77		– 77
Total of requirements A.1 + A.2+ A.3 + A.4	***– 106 313***	***– 47 100***	***– 153 413***

(EUR 1 000)

		Restructured division	French divestitures	Total
B	**FINANCE SOURCES**			
B.1.	Financed by the SNCB			
B.1.1.	Credit facility (to be subsequently converted into capital)	13 300	1 700	15 000
B.1.2.	Additional capital (over and above the conversion of the credit facility	42 920	37 380	90 300
	Total SNCB contribution (subtotal B.1)	***56 220***	***39 080***	***95 300***
B.2.	Financed by IFB' s own resources			
B.2.1.	Productivity gains:			
B.2.1.1.	Partial or total disappearance of gross operating loss in column A.1.1	26 167		26 167
B.2.1.2.	Gross operating surplus in 2004, 2005 and 2006	10 429		10 429
B.2.2.	Financial receipts	1 368		1 368
B.2.3.	Variation in requirement and working capital (reduction)	2 687		2 687
B.2.4.	Sale of non-financial fixed assets (essentially the OCHZ terminal in 2004)	4 771		4 771
B.2.5.	Sale of financial fixed assets (shareholdings)	1 267	8 020	9 287
B.2.6.	Financial debts entered into with credit institutions	3 300		3 300
B.2.7.	Exceptional receipts	1 105		1 105
	Total IFB contribution (subtotal B.2)	***50 093***	***8 020***	***58 113***
	Total of sources (B.1 + B.2)	***106 313***	***47 100***	***153 413***
	Financed by the SNCB as a % of the total	52,9 %		
	Financed by IFB as a % of the total	47,1 %		
		OWN CONTRIBUTION	PRIVATE INVESTOR	

(185) Belgium provides the following details on this table.

(186) The financing requirements cover the following categories:

— Direct costs of restructuring (section A.1): these costs comprise principally the cumulative gross operating loss ('cash drain'), without taking account of the productivity gains. If the productivity gains which IFB achieved during the implementation of its restructuring plan are not taken into account, the gross operating loss in 2003, 2004 and 2005 would be the same as in 2002, that is to say an annual sum of EUR 8 million to be financed, as shown in the table below. The financing requirement for 2006 has been limited to half of this sum, on the assumption of an increase in capital on 30 June 2006. Totalled over the entire period of restructuring, the gross operating loss which IFB would have incurred in the absence of productivity gains is EUR 27,9 million,

(EUR million)

	2002	2003	2004	2005 Forecast	2006 Budget (up to 30.6)	Period 2003 to 30.6.2006 cumulative
Operating profit	(47 357)	(2 960)	5 740	3 007	1 213	
+ Amortisations and reductions in value of fixed assets	6 286	5 139	2 585	1 605	802	
+ Reductions in value of current assets	6 433	(258)	(1 851)	(554)	0	
+ Provisions	26 662	(4 670)	(1 599)	(980)	460	
Gross operating profit	(7 976)	(2 749)	4 875	3 079	2 475	7 680
Gross operating loss ('cash drain') excluding the effect of gains in productivity		(7 976)	(7 976)	(7 976)	(3 988)	(27 916)

— Capital requirements during restructuring (variations in working capital requirements and investments during restructuring, section A.2): these costs consist of necessary investments during the restructuring period. An increase in working capital was necessary in order to finance the works in progress, to absorb the difference between receivables and commercial debts and to maintain sufficient liquidity. Investments in renewals of tangible fixed assets were necessary for the continuation of IFB's activities during the implementation of the restructuring plan. They were not aimed at expanding IFB's capacity but were rather investments in renewal of assets which had come to the end of their life cycle and were entirely amortised, together with various investments such as vehicles, computers, minor building renovations etc. The investment of EUR 0,6 million in financial fixed assets in 2004 was linked to the restructuring of the subsidiary IFB Maritime Germany: IFB Maritime Germany was taken over by Haeger & Schmidt International and the shareholding in RKE owned by Haeger & Schmidt International was transferred to IFB,

— Repayment of debts and interest (section A.3): apart from interest and repayment of financial debts to credit institutions, this category accounts for interest and repayment of debts to SNCB. The debt of EUR 33,2 million is the portion of the debt of EUR 63 million which does not relate to the French subsidiaries. The interest of EUR 1,4 million payables in 2006 is the interest which does not form part of the increase in capital (in order to minimise the increase in capital). The other interest (for a total of EUR 9,7 million) forms part of the increase in capital. All this interest is interest on the debts linked to IFB's non-French activities,

— Taxes (section A.4): the taxes paid in 2004 are an accrual from the 1999 tax year.

(187) According to Belgium, these finance requirements were partly covered by IFB and partly by SNCB. As regards IFB's contribution (section B.2), Belgium provided the following additional information:

— During the restructuring period, IFB achieved important gains in productivity (see section B.2.1). These achievements improved the gross operating profit, as a result of which the loss in 2002 disappeared partially in 2003 and entirely in 2004, 2005 and 2006. Furthermore, a surplus was made in 2004 and 2005, which should also be the case in 2006. These achievements confirm the forecasts made on the basis of the data possessed by the company IFB during the development of the restructuring plan (see points 74 and 75 of this decision),

— Various financial revenues (section B.2.2): these account for EUR 1,4 million. These financial revenues arise from interest which IFB was able to accumulate on its bank accounts. These revenues were foreseeable at the time of the restructuring plan, as they correspond to the 'Euribor' interest for the sums which IFB could reasonably expect to see in its accounts in view of the forecasts in its restructuring plan,

— Extraordinary revenues (section B.2.8): these account for EUR 1,1 million. These extraordinary revenues arise from capital appreciation which IFB was able to achieve from the sale of 263 EAOS wagons […]. In 2003, during the preparation of the restructuring plan, this capital appreciation was foreseeable, as the market for EAOS wagons was experiencing important growth due to the increased demand for this type of wagon in Eastern Europe,

— In 2004 and 2005, IFB freed up around EUR 2,7 million by lowering its working capital requirement (section B.2.3),

— IFB financed the restructuring costs partly by the sale of assets (sections B.2.4 and B.2.5). Besides the sale of various assets of relatively limited importance, this part of the contribution principally consisted of divestiture in 2004 of assets utilised at the OCHZ terminal. The co-ownership rights (50 %) of these assets utilised by OCHZ were ceded […] (see line B.2.4 in 2004) and IFB recovered an additional sum of EUR 0,9 million in working capital from OCHZ (see line B.2.5 for 2004),

— in 2003, IFB obtained a bank loan for a sum of EUR 2 million from ING Bank (see line B.2.6). In 2006, IFB financed the purchase of 'reach stackers' by means of an external loan of EUR 1,3 million,

(188) Belgium considers that it has contributed to the restructuring plan from its own resources, as required by the 1999 guidelines.

4. ASSESSMENT

4.1. Evaluation of the aid character of the rescue and restructuring measures

(189) According to Article 87(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.

4.1.1. *Aid granted by the State or through State resources*

(190) The first question to be considered is whether SNCB's financial support for IFB was 'granted by a State or through State resources'. According to the case-law of the Court of Justice of the European Communities in *Stardust Marine* ([26]), this criterion is fulfilled if, on the one hand, it concerns State resources, and if, on the other hand, their granting is attributable to the State, that is to say Belgium.

4.1.1.1. State resources

(191) The Commission notes that SNCB is a public undertaking within the meaning of Article 2 of Directive 80/723/EEC: the Belgian State owns 100 % of the share capital of SNCB, and the Management Board, along with the Chief Executive, are appointed by the King, by decree debated in the Council of Ministers. Thus, the criteria in Article 2(2)(a) and (c) of that Directive are fulfilled.

(192) In this context, '… it should be recalled that it has already been established in the case-law of the Court that Article 87(1) EC covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources' ([27]).

(193) Consequently, the Commission estimated in its letter initiating the procedure (points 136 to 138) that the sums put at IFB's disposal must be categorised as State resources.

([26]) Court judgment of 16 May 2002, *France* v *Commission*, as cited in footnote 13, paragraph 37.

([27]) Court judgment of 16 May 2002, *France* v *Commission*, as cited in footnote 13, paragraph 37.

(194) Belgium contests the fact that all the resources at SNCB's disposal constitute State resources. The Commission responds to the three arguments by Belgium as follows:

(195) The proposed distinction between SNCB's resources allocated to public service assignments and the resources allocated to commercial activities is not relevant in the light of the *Stardust Marine* ruling. In effect, this ruling concerns the resources of a public bank, which demonstrates well that the resources of a public undertaking allocated to commercial activities can constitute State resources.

(196) The argument that SNCB's capital is not at the disposal of Belgium, but allocated to the social aims of SNCB cannot be accepted either. The fact that Belgium owns 100 % of SNCB's capital, that this remains under continuous public control and that the State could at any moment decide to privatise SNCB, demonstrates that the capital of this company is at the disposal of the Belgian State. Furthermore, the Commission notes that the Belgian State appoints the administrators of the Management Board, together with the Chief Executive, which bestows upon it a certain control over the business.

(197) The argument that the measures granted to IFB by SNCB do not lead to any loss of the Belgian State's capital is factually incorrect: as Belgium is the owner of SNCB, any bad investment which diminishes the SNCB's value also diminishes the Belgian State's capital.

(198) The Commission therefore concludes that the measures examined were financed by State resources.

4.1.1.2. Imputability

(199) As regards the imputability of the State measures concerned, the *Stardust Marine* ruling states that '… the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. …' ([28]).

(200) It is therefore clear from the case-law of the Court of Justice that the criterion of imputability to the State must be examined by the Commission on a case-by-case basis. The Court of Justice admits that as a general rule, '… it will be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.' According to the same case-law, '… it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken' ([29]).

(201) The Court of Justice then clarifies which criteria may be utilised to demonstrate imputability:

'The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court has already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities (see, in particular, *Van der Kooy*, paragraph 37) or the fact that, apart from factors of an organic nature which linked the public undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued by a Comitato Interministeriale per la Programmazione Economica (CIPE) (Case C-303/88 *Italy v Commission*, cited above, paragraphs 11 and 12; Case C-305/89 *Italy v Commission*, cited above, paragraphs 13 and 14).

Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains' ([30]).

(202) In the letter initiating the procedure (points 140 to 150), as regards the imputability of the measure the Commission distinguished between the period prior to the conclusion of the framework agreement on 7 April 2003 and the period subsequent to this contract. In view of Belgium's observations, it would appear more appropriate to distinguish between three different periods:

([28]) Court judgment of 16 May 2002, *France* v *Commission*, as cited in footnote 13, paragraphs 52 and 55.

([29]) Court judgment of 16 May 2002, *France* v *Commission*, as cited in footnote 13, paragraphs 53 and 54.

([30]) Court judgment of 16 May 2002, *France* v *Commission*, as cited in footnote 13, paragraphs 55 to 57.

— the period prior to 19 July 2002 (date of the decision by SNCB's Management Board to approve the granting of a cash advance and to accept that an increase in capital for IFB was 'probable'),

— the period between 19 July 2002 and 20 December 2002 (date of the decision by SNCB's Management Board to approve the principle of an increase in IFB's capital and authorising the executive committee to negotiate the framework contract of 7 April 2003),

— the period subsequent to 20 December 2002.

Period prior to the Management Board's decision of 19 July 2002

(203) As regards the period prior to this decision of the Management Board, the question is whether the tolerance demonstrated by SNCB's management (Management Board) in not requiring payment from IFB for transport services from 2000 onward, is attributable to the Belgian State. In its letter initiating the procedure (points 141 to 142), the Commission expressed doubts as to whether the decision to accept the systematic non-payment of invoices during the period from the end of 2000 to the beginning of 2003 had been taken without the intervention of the Belgian authorities.

(204) According to the Belgian Government's response, SNCB's Management Board was not informed of this practice until 19 July 2002; the Government Commissioner was informed at the same time. The Commission has not received any observations from third parties.

(205) In records of the proceedings in the Chamber of Deputies and the Senate of 6 March 2002, 24 January 2002 and 28 February 2002, the Commission found comments about IFB, within the context of the members' and senators' wider debate on the opening up of the rail market and the ABX case. Consequently, it asked the Belgian Government to send it the studies by Boston Consulting Group and Team Consult which were referred to during these discussions, along with the Belgian Government's decision of 22 February 2002, which was also discussed.

(206) Analysis of these documents has not revealed any indication of influence by the Belgian Government on SNCB's decisions concerning the future of IFB.

(207) Therefore, the question is whether the tolerance of the management of a public undertaking, as described in point 203 of this decision, may be imputed to the Belgian State, when there is no evidence of any specific intervention on the part of the administration as the situation emerged.

(208) According to the 1993 Act establishing SNCB as a joint stock company under public law, SNCB's management, that is to say the Chief Executive and the members of the executive committee, manage the business autonomously, without the intervention of the public authorities. Therefore, in the absence of concrete evidence of State intervention in the management of the IFB case, the Commission must conclude that the decision by SNCB's management to tolerate the non-payment of IFB's invoices during the period from the end of 2000 to July 2002 is not imputable to the Belgian State.

Period between the Management Board's decision of 19 July 2002 and the Management Board's decision of 20 December 2002

(209) Since 19 July 2002, SNCB's Management Board, among whom the Government Commissioner who represents Belgium's interests on SNCB's Management Board, has known that IFB had not been paying its invoices since the end of 2000, and approved the granting of an advance of EUR 2,5 million to IFB during the second half of 2002.

(210) In this respect, the Commission must verify if the criteria established by the *Stardust Marine* case-law allows this decision by SNCB's Management Board to be imputed to Belgium. In other words, it is a question of verifying in this particular case if the presence of the Government Commissioner on the Management Board, despite his lack of any concrete intervention in the measure in question, allows the decision to be imputed to the Belgian State in any case. According to the facts at the Commission's disposal neither the examination of the dossier, nor the third party observations resulted in evidence suggesting that the Belgian Government sought to influence the decision by the Management Board of 19 July 2002. The SNCB, being an autonomous public undertaking, which has the status of a public limited company in law, enjoys management independence in relation to Belgium. As regards the presence of the Government Commissioner on SNCB's Management Board, the Commission notes that the commissioner's role was limited (see also the Audit Office report on this subject [31]):): The Government Commissioner could only intervene with regard to the decision of 19 July 2002 if it was likely to prejudice the implementation of SNCB's public service duties. In view of the amount of the aid (EUR 2,5 million) and the nature of the aid (cash advance, with interest), it has to be concluded that the decision was not such as to prejudice the implementation of SNCB's public service duties.

[31] Court of Audits: The correct use of public funds by SNCB; audit carried out in implementation of the Resolution by the *Chambre des représentants* of 11 May 2000; Brussels, May 2001.

(211) The Commission concludes that, in view of these factors, the granting of an advance of EUR 2,5 million to IFB by SNCB to maintain commercial activity without any link to public service is not imputable to the Belgian State.

(212) The Commission concludes that this case does not contain any evidence in terms of the involvement of the public administration, the nature of the activities concerned or their status which would allow the Management Board's decision of 19 July 2002 to grant an advance of EUR 2,5 million to IFB to be imputed to the Belgian State.

Period subsequent to the Management Board's decision of 20 December 2002

(213) On 20 December 2002, the Management Board decided to finalise a framework agreement with IFB, which had to include rescue measures as well as restructuring measures and increase IFB's capital.

(214) Analysis of the case by the Commission in its letter initiating the procedure (points 143 to 150) revealed three specific indications of the imputability to the Belgian State of these rescue and restructuring measures in support of IFB. These indications were:

— The submission of the restructuring plan to the Belgian State for approval,

— The press articles demonstrating strong influence of the Belgian Government on SNCB during the year 2003,

— The scope, contents and conditions of the framework agreement of 7 April 2003.

(215) In their reply to the letter initiating the procedure, the Belgian authorities contested that these three indications were sufficient to establish the imputability of the measures to the State within the meaning of the *Stardust Marine* case-law. Below the Commission repeats the contents of the indications, and explains why the Belgian Government's arguments could not be accepted.

(a) *Approval by public authorities (point 56 of the Stardust Marine ruling)*

(216) In its rulings on *Van der Kooy* ([32]), *Italy/Commission* ([33]) and *Commission/France* ([34]), the Court of Justice decided as to the imputability of aid from the fact that the granting of aid had been submitted for the approval of the public authorities. In the *Van der Kooy* ruling, this factor alone sufficed to establish imputability; in the *Italy/Commission and Commission/France*, approval was combined with other elements which showed the influence of central government ([35]). The *Space Park Development GmbH* decision, which was the first decision by the Commission applying the *Stardust Marine* ruling, equally inferred the imputability of aid from the fact that the loan in question must been approved by the Bremen authorities ([36]). Consequently, the submission of a measure to the Member State for approval constitutes an indication of imputability.

(217) In the case in question, Article 2 of the framework agreement obliges the Boards of Directors of SNCB and the IFB to submit their restructuring plan to the Belgian State for approval ([37]). This therefore constitutes initial evidence of imputability to the Belgian State of SNCB's decision to restructure IFB.

(218) The Belgian Government emphasises that, in contrast to the provisions of the framework agreement, SNCB and IFB did not finally submit the restructuring plan for the approval of the Belgian Government, as that would have violated SNCB's commercial independence.

([32]) Court judgment of 2 February 1988, *Kwekerij Gebroeders van der Kooy BV e.a.* v *Commission* (Cases C-67/85, C-68/85 and 70/85 [1988] 219).

([33]) Court judgments of 21 March 1991, *Italy* v *Commission* (Cases C-303/88, [1991] I-1433, and C-305/89 [1991] I-1603).

([34]) Court judgment of 30 January 1985, *Commission* v *France* (Case 290/83 [1985] 439).

([35]) Namely the appointment of the directors by the State for the *Commission* v *Italy* judgments; the financing by a public establishment, the grant arrangements which correspond to those of ordinary State aid, the presentation by the government of the aid as forming part of a set of State measures for the *Commission* v *France* judgment.

([36]) Commission Decision of 17 September 2003 relating to State aid awarded by Germany in support of Space Park Development GmbH, OJ L 61 of 27.2.2004, p. 66, recital 30.

([37]) As a reminder, Article 4 reads as follows: The Parties confirm their intention to implement the following measures insofar as they conform to a restructuring plan approved by their two Boards of Directors, by Belgium and if necessary by the EC, and subject to approval by the shareholders of IFB.

(219) As already explained in the letter initiating the procedure (points 146 and 147), this de facto situation does not render this indication of imputability inoperative: the two parties to the contract, SNCB and IFB, would likely not have included such a clause in the contract, if there was no influence by the Belgian Government to that effect.

(220) The fact that the Belgian Government claims that it was not formally consulted about the restructuring does not suffice to exclude any informal influence of the Belgian Government during the preparation of the framework agreement of 7 April 2003, nor to exclude approval. As the Court of Justice stated in its *Stardust Marine* ruling, '… it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities'. Therefore, the simple fact that the contract concluded between the parties provides for approval by the Belgian State, is a strong indication of the implication of the Belgian Government.

(221) In its reply to the letter initiating the procedure, the Belgian Government explains that the clause contained in Article 2 of the framework agreement does not concern the restructuring plan itself, but the communication by means of which Belgium was going to notify the Commission of the framework agreement.

(222) The Commission considers that this argument is unconvincing: if the parties to the framework agreement had had mere notification by Belgium to the Commission in mind, they would have expressly written so in Article 2 of the agreement. The interpretation proposed by the Belgian Government is contrary to the letter of the agreement.

(223) Consequently, the Commission concludes that Article 2 of the agreement implies the approval of measures by the Belgian authorities and constitutes an indication of imputability of the measures in question to the Belgian State.

(b) *Press articles*

(224) The additional evidence of intervention by the Belgian Government in this case is also to be found in press articles ([38]). Thus, an article which appeared in *La Libre Belgique* of 19 May 2003 ([39]) quotes SNCB's press department, which explains that Belgium had still not notified the Commission of the rescue measures on 19 May 2003, whereas the framework agreement had been signed on 7 April 2003, by the fact that 'the federal authority is [was] to have its say'. In an article which appeared in March 2003 on the website www.cheminots.be, Karel Vinck, at the time the Chief Executive of SNCB, was quoted on the subject of the ABX and IFB cases as follows: 'He demands sufficient financial headroom for the management of the company.' That allows the interpretation that SNCB's management considered that the State was intervening too much in these cases.

(225) Belgium refutes this implication. As regards the article in *La Libre Belgique*, it emphasises, as in Article 2 of the framework agreement, that the federal authority only had something to say about the Belgian Government's communication to the Commission, by means of which the framework agreement was notified. The text of the press article and SNCB's press release is clear. If SNCB's press department had wanted to say that the Belgian Government only had to approve a text for communication to the Commission, it would have indicated that the problem to be resolved was purely a problem of form, and not one of substance.

(226) As regards the points made by Karel Vinck, the Belgian authorities consider that these were limited to the management of the public service assignments. This does not appear very credible, as he was interviewed on the subject of the ABX and IFB files, which, as the Belgian Government itself recognised, concern SNCB's commercial activities, and not the public service assignments.

(c) *Scope, contents, conditions of the framework agreement*

(227) In a more general manner, the Commission recalls the aforementioned point 56 of the *Stardust Marine* ruling which states that 'any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains' must be taken into account to establish the imputability of a measure to the Member State, with the result that the scope, the content, and the conditions of the framework agreement constitute additional indications of imputability.

(228) Belgium refutes this third suggestion, repeating that SNCB would be completely autonomous in taking all these decisions, with the exception of the management of the public services.

([38]) Press articles may constitute evidence of imputability, see *ABX Logistics* decisions, OJ C 9, 14.1.2004, p. 12; *Sniace SA*, OJ L 108, 30.4.2003, p. 35.

([39]) 'Inter Ferry Boats split into two divisions', uploaded on 19 May 2003 on www.lalibre.be

(229) The Commission considers that the 1993 Act which regulates SNCB's status as a joint stock company under public law certainly gives SNCB independence for its commercial activities. However, the Commission recalls that the Government Commissioner is present at every meeting of the Executive Committee, and can refer a matter to the Belgian authorities in order to revoke a decision made by the Management Board relating to a matter which is not concerned with the fulfilment of public service assignments if that decision is prejudicial to […] the implementation of public service duties.

(230) As already explained, the Commission considers that the decision to grant a cash advance of EUR 2,5 million could not be subject to appeal by the Government Commissioner as, due to its amount and its nature, it could not be prejudicial to the implementation of public service duties.

(231) The assessment must be different for the decision to invest nearly EUR 100 million in a company on the verge of bankruptcy. That decision should lead the Government Commissioner to intervene, or at least to inform the Belgian authorities so that they could intervene formally or informally, as he did for example in 2000 for the investments in the Italian branch of ABX.

(232) Consequently, the Commission considers that, taken together with the presence and the powers of the Government Commissioner, the scope, the contents and the conditions of the framework agreement also constitute evidence of imputability.

(d) *Conclusion*

(233) Consequently, the Commission concludes that the measures in question are imputable to the Belgian State as regards the period subsequent to the decision by SNCB's Management Board of 20 December 2002.

(234) It is therefore necessary to analyse whether the measures taken by SNCB concerning IFB from 20 December onwards conferred an advantage upon the beneficiary, or if, on the contrary, SNCB behaved like an informed investor in a market economy.

4.1.2. *Advantage to the aid recipient applying the principle of an informed investor in a market economy*

(235) It is necessary to analyse whether the decision by SNCB's Management Board of 20 December 2002 to increase IFB's capital by the conversion of credits due, and to award the rescue measures, which led to SNCB's signature, on 7 April 2003, of the framework agreement with IFB, created an economic advantage for IFB, or if this decision was the result of an assessment by a private investor in a market economy.

(236) Since SNCB's decision not to request any further payment of its invoices to IFB from the end of 2000 until December 2002 and SNCB's decision to award an advance of EUR 2,5 million are not imputable to Belgium, there is no longer any need to analyse these decisions in detail.

(237) For information, the rescue measures consist of:

— The granting of a payment extension for debts of EUR 63 million,

— The granting of a credit facility of EUR 15 million,

— The granting of a recoverable advance of EUR 5 million.

(238) The restructuring measures consisted of the divestiture of the subsidiaries in France and the restructuring and continuation of activities in Belgium. The financing of these measures was initially ensured by the rescue measures, the restructuring plan providing that this finance would be secured by the conversion of the subsequent debts into capital stock:

— The conversion of debts of EUR 63 million for which a payment extension had been granted into capital stock,

— The conversion of the credit facility of EUR 15 million into capital stock,

— The conversion of the capitalised interest on the payment extension and on the credit facility into capital stock.

(239) In order to establish whether SNCB behaved as a private investor in a market economy would have done, it is necessary to assess whether, in similar circumstances, a private investor of a size comparable to SNCB, finding itself in a situation comparable to that of SNCB, would have acted in the same way [40].

[40] Judgment of 21 March 1991, *Italy* v *Commission*, C-305/89, paragraphs 19 and 20.

(240) The Court of Justice stated that, while the conduct of a private investor is not necessarily that of an ordinary investor placing capital funds with a view to their profitability in the shorter or longer term, it must, at least, be that of a private holding, or a group of private businesses pursuing a structural, global or sector policy, and guided by the prospects of profitability in the longer term ([41]). The Court stated that the Commission is obliged to 'conduct a complete analysis of all the factors pertinent to the contested action and in its context' in order to know whether the State acted as an informed investor in a market economy would have done ([42]).

(241) In its reply to the letter initiating the procedure, Belgium considers that SNCB's decision to request IFB to divest the group's French subsidiaries, and also SNCB's decision to request IFB to restructure and continue with its activities in Belgium correspond to decisions which a private investor in a market economy would have taken.

(242) The Commission however considers that the pertinent question is not to know whether IFB, in divesting its subsidiaries in France and restructuring and continuing its activities in Belgium, acted in the same way as an investor in a market economy, but to know whether SNCB's decision to finance these two measures is a decision that a private investor would have taken.

(243) In 2002/2003, SNCB therefore had to decide whether it was cheaper overall to finance the restructuring of IFB (which involved the divestiture of the subsidiaries in France and the continuation of activities in Belgium) or to file for IFB's bankruptcy. The Commission's consistent practice is to consider that a private investor would have continued a subsidiary's activities, if a comparison between the costs of liquidation of the subsidiary and the costs of restructuring the subsidiary showed that the costs of liquidation exceeded the costs of restructuring ([43]).

(244) It is appropriate to establish first of all the cost to SNCB of each one of these two scenarios, i.e. the restructuring and the liquidation of IFB.

4.1.2.1. Cost of restructuring IFB

(245) In the first scenario, SNCB commits EUR 95,3 million to the financing of the restructuring of IFB by waiving the recovery of receivables which are converted into capital. On completion of the restructuring, it owns 100 % of a business the value of which is estimated to be EUR 31 million, but having EUR 34,2 million in provisions, and EUR 15 million of financial debts (excluding debts to SNCB), and therefore having a net enterprise value of EUR − 18 million. The Commission considers these estimates, based on recognised methods, to be realistic.

(246) The Commission notes therefore that, if IFB had been sold, SNCB would only have been able to obtain a negative sale price.

4.1.2.2. Hypothetical cost of the liquidation of IFB

(247) In the second scenario, SNCB also waives the recovery of its EUR 95 million of receivables. Belgium estimates furthermore that, based on information available at the time of the finalisation the framework agreement of 7 April 2003, the liquidation of IFB's Belgian activities would have obliged SNCB to bear an additional cost of between EUR 70,6 and EUR 161,8 million. This amount would correspond to the sums which could normally have been recovered by the liquidation of assets (EUR 37,5 million), from which the costs brought about by the liquidation of IFB's liabilities (EUR 67 to EUR 76,9 million) and the cost of SNCB personnel made redundant (EUR 41,1 to EUR 122,4 million) following the cessation of IFB's activities are deducted.

(248) The Commission does not agree with this analysis. First of all, it contests that SNCB would have had to meet the total cost of IFB's liabilities. Furthermore, it contests the amount of the additional cost calculated by Belgium.

SNCB's responsibility for IFB's liabilities

(249) Contrary to what Belgium claims, the fact that IFB has negative net assets (value of the recovery of assets, minus the value of the current liabilities) does not mean that, in the event of bankruptcy, SNCB would have had to bear the corresponding excess liabilities. The Commission points out that, in principle, a company like IFB responds to its obligations with its own capital assets. The shareholders' responsibility for the company's obligations does not normally go beyond the latter's capital stock and therefore does not affect the individual capital of the various shareholders. It is only in exceptional cases and under very strict conditions that certain national legislation allows the possibility for third parties to have recourse to the shareholders ([44]).

([41]) Judgment of 21 March 1991, *Italy* v *Commission*, C-305/89, paragraphs 19 and 20.

([42]) Judgment of 6 March 2003, *WestLB Girozentrale* v *Commission* (Cases T-228/99 and T-233/99 [2003] II-435). Paragraph 2251.

([43]) See Commission decision of 7 December 2005, Case C 53/03, Belgium, Restructuring of the company *ABX Logistics*, paragraph 196 *et seq*.

([44]) See decision to extend the procedure C 53/03, Belgium, *ABX Logistics*, paragraph 61.

(250) In the hypothetical case of IFB's bankruptcy, SNCB would therefore have lost its capital stock, but it would not have had to repay the other IFB creditors. *A priori*, the cost of IFB's bankruptcy to SNCB, acting as a shareholder, would therefore have been zero, and not the EUR 29,5 to EUR 39,4 million as maintained by the Belgian authorities.

(251) In its decision-making process, the Commission recognises, however, that a business placed in SNCB's situation would have been obliged to support some costs in capacities other than that of shareholder ([45]). In this case, costs are notably as follows:

— As a creditor, SNCB will lose its receivables from IFB, at least in proportion to its share in IFB's liabilities not covered by the assets; the Commission can accept that, taking SNCB's role in IFB's liquidation into account, this risk could be assessed as being up to the total amount of receivables held by SCNB in IFB, i.e. EUR 95 million,

— The Commission would be able to accept that, in order to save its reputation, it would have been advisable for SNCB, as the parent company, to take back some of the unpaid debts to IFB's suppliers who are also suppliers to SNCB.

(252) It is necessary therefore to estimate the maximum amount which SNCB would have been led to bear in this capacity. In this respect, Belgium itself estimates that the additional costs borne by SNCB in this capacity ought not to exceed EUR 13 million. In reality, the actual additional costs could have been less, as IFB's creditors would have first of all recovered part of their receivables from IFB's liquidation, and would only have been recompensed by SNCB for the amount of the balance. This amount of EUR 13 million can therefore be considered to be a maximum limit.

The amount of additional social cost for SNCB

(253) The Commission considers that in principle a private investor in a market economy, who has to decide between financing of the restructuring of its subsidiary and its bankruptcy, might be minded to take into account the cost of a reduction in its personnel, if that reduction in personnel were a direct and inevitable consequence of the bankruptcy of its subsidiary.

(254) Belgium concludes that IFB's bankruptcy would have left SNCB with an overstaffing situation of 530 employees, 50 of whom were seconded to IFB, and 480 of whom were employees within SNCB in areas dependent upon the IFB's activities. The reduction of SNCB's personnel by 530 employees would have led to costs of EUR 122,4 million, which is EUR 230 000 per employee. The details of this calculation are explained in part 3 of this decision.

(255) The Commission considers that it is not realistic to consider that SNCB would only have been able to recover 21 % of the traffic previously generated by IFB. First of all, as Belgium recognised in its reply to the decision initiating the procedure, the markets in which IFB is active are booming (11 % growth for freight transhipment, 12 % growth for combined transport). Consequently, it would appear probable that IFB's competitors would have purchased IFB's assets in order to continue its activities.

(256) Under this assumption, the purchaser of IFB would have needed rail freight transport services. In view of SNCB's very strong position in the international transport market for goods leaving Belgium, and its monopoly (until 1 January 2007) of the national goods transport market within Belgium, the Commission considers that the buyer of IFB would have chosen SNCB as its rail carrier, at least for a significant part of its requirements. Consequently, even under the assumption of IFB's bankruptcy, SNCB would have been able to recover a very large proportion of the rail traffic generated by IFB.

(257) Furthermore, the Commission observes that the rail transport markets are in growth. Consequently, it would appear reasonable to assume that SNCB would have grown at the same rate as the market, which would have allowed it to reintegrate the 50 employees released from IFB as needs arose.

(258) In conclusion, the Commission considers that Belgium has not convincingly demonstrated that SNCB would have had an overstaffing situation of 480 employees under the assumption of IFB's bankruptcy, and that it would not have been able to reintegrate the 50 employees seconded to IFB.

(259) On the basis of information communicated by Belgium, the Commission considers that, in the second scenario, SNCB (as in the first scenario) would also waive the recovery of its debts up to a maximum of EUR 95,3 million and beyond this, bear a maximum cost of EUR 13 million.

4.1.2.3. Conclusion

(260) With SNCB waiving its receivables from IFB up to EUR 95,3 million in both scenarios, Belgium has not

([45]) See Commission decision of 7 December 2005, Case C 53/03, Belgium, Restructuring of the company *ABX Logistics*, paragraph 204 *et seq*.

demonstrated that, by opting for the first scenario (financing of the restructuring), resulting in SNCB owning a business with a negative value estimated at EUR − 18 million, SNCB has made an informed economic choice as opposed to the second scenario of liquidation, in which the only proven additional costs within the context of this procedure are estimated to be a maximum of EUR 13 million.

(261) The Commission concludes that Belgium has not demonstrated that SNCB acted like a private investor in a market economy by taking the decision, imputable to the Belgian State, to finance the restructuring and the continuation of IFB's activities in Belgium and the divestiture of IFB's activities in France.

4.1.3. *Distortion of competition and effect on transactions between Member States*

(262) The Commission must analyse the market situation concerned and the market sectors of the beneficiaries of this market, together with the impact which the financial support would have on competition ([46]).

(263) In this case, the financial support was awarded to a business active in markets open to competition, which is in a situation of competition with other operators in several Member States, as demonstrated in section 2 of this decision. The financial support therefore distorts or threatens to distort competition and threatens to affect or does affect transactions between Member States.

(264) In its letter replying to the initiating of the procedure, the Belgian Government contests the claim that the two criteria in Article 87(1) are fulfilled, as the Commission has not presented any proof establishing such distortions of competition.

(265) The Commission draws the Belgian authorities' attention to the fact that Article 87(1) makes reference to a threat of distortion. Consequently, the Commission does not have to supply proof of a distortion of competition, but must explain in a convincing manner the risk of such distortions, which it has done in the letter initiating the procedure (points 212 and 213) and in this decision.

4.1.4. *Conclusion: existence of State aid*

(266) In conclusion, the Commission considers that the financing of the restructuring of IFB (in Belgium) by SNCB and the cessation of its activities in France, in the form of conversion into capital of debts of EUR 95,3 million, constitutes State aid.

([46]) Court judgment of 13 March 1985, *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, (Joint cases 296/82 and 318/82, Rec. 1985, p. 809), paragraph 24.

4.2. **Compatibility of the aid**

(267) Article 87(3)(c) EC provides that 'the following may be considered to be compatible with the common market: aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.'

(268) The aid awarded by Belgium through SNCB could be compatible with the common market by virtue of Article 87(3)(c) as interpreted by the Commission in its 1999 and 2004 guidelines.

4.2.1. *Compatibility as rescue aid*

(269) Only measures consisting of cash aid may be compatible as rescue aid. In this case, the cash aids are the granting of a payment extension, the credit facility and the recoverable advance.

(270) Firstly, the question arises as to which version of the guidelines is applicable. The last version of these guidelines came into force on 10 October 2004. Point 7 thereof, 'date of application and duration', states:

'102. The Commission will apply these guidelines with effect from 10 October until 9 October 2009.

103. Notifications registered by the Commission prior to 10 October 2004 will be examined in the light of the criteria in force at the time of the notification.

104. The Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty on the basis of these guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union*. In all other cases it will conduct the examination on the basis of the guidelines which apply at the time the aid is granted.'

(271) The cash aid was granted on 7 April 2003 by the conclusion of a framework agreement between IFB and SNCB. This grant took place without prior notification to the European Commission and therefore in violation of Article 88(3) of the Treaty. The assessment of its compatibility as rescue aid will therefore be based on the 1999 guidelines.

(272) Point 23 of the 1999 guidelines defines the following five conditions for rescue aid to be compatible with the common market:

'Rescue aid must:

(a) consist of liquidity support in the form of loan guarantees or loans. In both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rates adopted by the Commission;

(b) be linked to loans that are to be reimbursed over a period of not more than twelve months after disbursement of the last instalment to the firm; reimbursement of the loan linked to the rescue aid may possibly be covered by the restructuring aid subsequently approved by the Commission;

(c) be warranted on the grounds of serious social difficulties and have no unduly adverse "spillover" effects on other Member States;

(d) be accompanied on notification by an undertaking on the part of the Member State concerned to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated;

(e) be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised (for example, covering wage and salary costs or routine supplies)'.

(273) The repayment period provided for in the framework agreement is 12 months. However, the Belgian Government informed the Commission that the period was tacitly extended between the parties until the time of the capital increase.

(274) In view of this factor, the Commission considered in its decision initiating the procedure (points 232 and 233) that the criterion of point 23(b) was not fulfilled, and the cash aid could not be authorised as rescue aid.

(275) Belgium contests this legal assessment with three arguments. It considers firstly that SNCB maintained the rescue measures with the sole intention of allowing the Commission to conclude its scrutiny of case NN 9/04. It takes advantage of point 24 of the guidelines, which provides that the authorisation of rescue measures remains valid until the Commission rules on the restructuring plan. Consequently, the Belgian authorities asked the Commission not to refer to the duration of its own procedure for approval of the rescue measures to contest the duration of the maintenance of these measures, and to approve the rescue measures on the basis of point 24 of the 1999 guidelines, until the Commission rules upon the restructuring plan.

(276) The Commission does not consider this argument to be relevant. Point 24 of the 1999 guidelines states that 'the rescue aid will initially be authorised for not more than six months or, where the Member State concerned has submitted a restructuring plan within that period, until the Commission reaches its decision on the plan. In duly substantiated exceptional circumstances and at the request of the Member State concerned, the Commission may extend the initial six-month period'.

(277) The Commission notes that Belgium implemented this restructuring aid on 7 April 2003. The period of six months for the submission of a restructuring plan therefore expired on 6 October 2003. Having communicated the restructuring plan to the Commission at the meeting on 12 December 2003, the Belgian authorities did not comply with the period provided for in point 24 of the guidelines.

(278) The Belgian authorities' second argument that they had supplied the Commission with all the necessary information for a decision on the rescue measures in their communication of 12 August 2003 is also not relevant. The fact that the Commission requested additional information on several subsequent occasions shows that the information supplied by Belgium was not complete.

(279) As regards the Belgian authorities' argument that the Commission had never expressed reservations regarding the provisional continuation of the rescue measures, it suffices to recall that the Commission, in its letters of 13 October 2003 and 26 January 2005, included the following warning: the Commission draws 'the attention of the Belgian authorities to the suspensive clause on implementation Article 88, paragraph 3, of the EC Treaty, laid down in Article 3 of Council

Regulation (EC) No 659/99, which prohibits the implementation of any new aid before the Commission has taken, or is deemed to have taken, a decision authorising it. Furthermore, I would like to remind the Belgian authorities that the recovery of all aid implemented in contravention of this clause, would have to be charged to its beneficiary under the terms of Article 14 of said regulation'.

(280) The Commission therefore concludes that the cash aids awarded by SNCB to IFB exceeded the period of 12 months laid down in point 23(b) of the 1999 guidelines, and that the Belgian authorities did not submit the restructuring plan to the Commission within a period of six months, as laid down in point 24 of the 1999 guidelines. The aid awarded by SNCB may not therefore be authorised as rescue aid. It could nevertheless be compatible with the common market as restructuring aid.

4.2.2. *Compatibility of restructuring aid*

(281) The question arises again as to which version of the guidelines is applicable. In its decision initiating the procedure (point 240), the Commission considers that if SNCB decides not to award any new benefit to IFB, and if proof is provided that SNCB was committed to converting debts into capital before the publication of the 2004 guidelines, in its final decision the Commission must assess the aid awarded to IFB by SNCB on the basis of the 1999 guidelines.

(282) The Belgian authorities, in their reply to the letter initiating the procedure, had informed the Commission that SNCB was relinquishing to IFB the contribution in kind of its shareholding in the company TRW, and retracting its notification of 28 February 2005. Due to this, the Commission notes that SNCB decided not to award any further benefit to IFB, but to limit itself to converting debts into capital.

(283) It is necessary to determine whether SNCB committed to converting debts into capital before the publication of the 2004 guidelines. The Belgian authorities, in their reply to the letter initiating the procedure, demonstrated that, under Belgian law, SNCB's commitment to converting debts into capital was firm as from 7 April 2003, the time of the conclusion of the framework agreement, and the fact that this commitment was subject to a condition precedent, that is to say notification to the Commission and approval by the Commission, did not have the consequence of removing the firm and definite nature of this commitment. As demonstrated by the Belgian authorities, if this condition precedent is fulfilled, it has a retroactive effect. SNCB's commitment to convert its debts into capital is therefore firm as from 7 April 2003.

(284) The two conditions being fulfilled, the Commission concludes that it is appropriate to apply the 1999 guidelines to this case. This conclusion is moreover in keeping with the analysis presented in the decision initiating the procedure (point 240), in which the Commission concludes:

'[…] if SNCB decides not to award the new benefit to IFB, and if proof is provided that SNCB was committed to converting debts into capital before the publication of the 2004 guidelines, in its final decision the Commission must assess the aid awarded to IFB by SNCB on the basis of the 1999 guidelines' ([47]).

(285) In order to be able to benefit from restructuring aid, a firm must firstly be eligible for the application of the guidelines. To be eligible a firm must be a firm in difficulty. On this subject, the 1999 guidelines state (points 4 and 5):

'(4) […] the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.

(5) In particular, a firm is, in any event and irrespective of its size, regarded as being in difficulty for the purpose of these guidelines:

(a) in the case of a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'.

([47]) Decision to initiate the formal examination procedure — State Aid C 46/05, paragraph 240.

(286) As has already demonstrated in the decision initiating the procedure (point 225), IFB's 2002 annual accounts show a subscribed capital of EUR 48 million and recurrent losses before tax of EUR 50 million. Consequently, the share capital had disappeared when SNCB decided in April 2003 to award the aid. More than half of the subscribed capital having disappeared at this time, more than a quarter which in the previous 12 months, IFB is a firm in difficulty in the sense of points 4 and 5 of the guidelines.

(287) Furthermore, the firm does not have to be a newly created firm. On this subject, the 1999 guidelines state (point 7).

'(7) For the purposes of these Guidelines, a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets.'

(288) As described in section 2 of this decision, IFB was created on 1 April 1998 by the merger of the company FerryBoats SA with the company InterFerry SA, and the addition of the 'rail' division of the company Edmond Depaire SA to the merged entity. In the letter initiating the procedure (points 218 to 223), the Commission expressed doubts as to whether the new IFB business continued with the legal identity of one of the three companies, or if it had been newly created in 1998.

(289) In their reply to the letter initiating the procedure, the Belgian authorities established that IFB continued with the legal identity of FerryBoats SA, which had been registered in 1923. The Commission therefore concludes that IFB is not a newly created firm within the meaning of point 7 of the 1999 guidelines.

(290) Point 3.2.2 of the 1999 guidelines sets out the conditions for the authorisation of restructuring aid. The conditions are as follows:

— The restructuring plan must make it possible to restore the long-term viability of the firm within a reasonable period,

— Measures must be taken to mitigate, as far as possible, any adverse effects of the aid on competitors,

— The aid must be limited to the strict minimum needed to enable restructuring to be carried out, and the firm must make a contribution to its restructuring,

— The Commission must be able to satisfy itself, on the basis of regular detailed reports, that the restructuring plan is being implemented properly,

— The restructuring aid should be granted once only.

4.2.2.1. Restructuring plan restoring the economic viability of the firm

(291) As regards the restructuring plan restoring the economic viability of the firm, the 1999 guidelines state:

'(31) The grant of the aid is conditional on implementation of the restructuring plan which must be endorsed by the Commission in the case of all individual aid measures.

(32) The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss making even after restructuring.

(33) The restructuring plan should describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It should take account, inter alia, of the present State of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It should enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.

(34) The plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the marketplace on its own merits'.

(292) The Commission concluded in its decision initiating the procedure (points 242 to 247) that Belgium had provided a restructuring plan which fulfilled the criteria set out in the guidelines, and therefore did not express any doubts as to this criterion. Following the initiation of the procedure, the Commission did not receive any comments from interested parties contesting this conclusion.

(293) The Commission observes that the firm IFB had been able to demonstrate its economic viability both in its restructuring plan, presented in 2003, and in its results achieved since then. Consequently, the Commission concludes, as in its decision initiating the procedure (point 271), that the criterion 'restructuring plan restoring the economic viability of the firm' is fulfilled.

(294) Nevertheless, as indicated in point 290 of this decision, the restructuring plan establishing the economic viability of the firm is not a sufficient condition; it is also necessary to establish that aid does not lead to undue distortions of competition.

4.2.2.2. Prevention of undue distortions in competition

(295) As regards the prevention of undue distortions of competition, the 1999 guidelines state (points 35 to 39):

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

(36) This condition usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period. Where the size of the relevant market(s) is negligible at Community and at EEA level or the firm's share of the relevant market(s) is negligible it should be considered that there is no undue distortion of competition. This condition should accordingly be regarded as not normally applying to small or medium-sized enterprises, except where otherwise provided by rules on State aid in a particular sector.

(37) The compulsory limitation or reduction of the company's presence on the relevant market(s) represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets. The Commission will determine the extent of the limitation or reduction on the basis of the market survey attached to the structuring plan and, where the procedure has been initiated, on the basis of information supplied by interested parties. The reduction in the firm's presence is to be put into effect through the restructuring plan and any conditions attached thereto.

(38) A relaxation of the need for compensatory measures may be contemplated if such a reduction or limitation is likely to cause a manifest deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a tight oligopolistic situation.

(39) Compensatory measures can take different forms according to whether or not the firm is operating in a market where there is excess capacity. […]'

(296) Prior to the decision initiating the procedure, the Belgian authorities had explained that, in order to mitigate, as far as possible, any adverse effects of the aid on competitors, IFB had taken two measures:

— Withdrawal from its transhipment activities in France,

— The closure of the terminal in Bressoux in Belgium and the sale of shareholdings in the terminals in Brussels and Zeebrugge in Belgium.

(297) In its decision initiating the procedure (points 252 to 265), the Commission expressed doubts as to whether these measures were sufficient to mitigate, as far as possible, any unfavourable consequences of the aid on competitors. These doubts concern the two sectors in which IFB is continuing its activities, that is to say the Belgian freight transhipment market and the Belgian logistics market.

(a) ***The Belgian freight transhipment market***

(298) The two measures referred to in the letter initiating the procedure (point 260) concern the Belgian freight transhipment market. In the letter initiating the procedure (points 262 to 264), the Commission expressed doubts as to whether these measures were sufficient, notably in view of the fact that it was envisaged that SNCB's shareholding in the company TRW, which retains significant shareholdings in the Brussels and Zeebrugge terminals, would be transferred to IFB, and that IFB owns minority shareholdings in a number of important Belgian terminals.

(299) The Belgian Government, in its reply to the letter initiating the procedure, presents several arguments to refute the Commission's doubts. Firstly, it underlines that IFB experienced less significant growth than the market (4,1 % growth for IFB, 10,7 % growth for the terminals in the port of Antwerp, 12 % growth for the terminals in the ARA region). The Commission considers that this additional information allows the conclusion that IFB's weight in the market has been reduced following the implementation of the restructuring plan.

(300) Secondly, Belgium showed that IFB had reduced its capacity in the fright transhipment market from 1,5 million TEU in 2002 to 1,1 million TEU at the end of 2005. The Commission considers that this reduction in capacity constitutes an important mitigating measure.

(301) Finally, Belgium informed the Commission that the handover of TRW to IFB will not take place. The Commission considers that this last change is important since it means that the closure of Bressoux and the sale of shareholdings to Brussels and Zeebrugge result in a genuine reduction in IFB's presence in the Belgian freight transhipment market.

(302) In view of these arguments, and the fact that IFB's market share is reduced, the Commission considers that Belgium has produced proof that sufficient measures to mitigate any unfavourable consequences of the aid for competitors have been taken in the freight transhipment sector.

(b) ***The Belgian logistics market***

(303) In its letter initiating the procedure (points 257 to 259), the Commission noted that the proposed measures did not concern the logistics market. The Commission therefore considered that the absence of measures proposed for the logistics market, together with the fact that the market is in a state of flux and that IFB had been able to increase its volume significantly, created some doubts as to whether Belgium had limited, as far as possible, the unfavourable consequences of IFB's logistics activities on competition.

(304) The Belgian Government, in its reply to the letter initiating the procedure, presented five arguments aimed to demonstrate that, contrary to what was being claimed by the Commission in its decision initiating the procedure, IFB had taken sufficient measures to limit distortions of competition (for the details, see the description in section 3 of this decision, points 177 to 187). These arguments can be summarised as follows:

— Reduction of 49 % in the wagon capacity utilised by IFB,

— IFB's market share less than 5 %,

— Slower growth than market (9,9 % for IFB, against an average of 12 % for the market),

— Growth mainly due to freight transport, a sub-sector of the market in which IFB had only a very small presence before 2002,

— The liberalisation of the rail freight market from 2007 will once again increase competitive pressure.

(305) The Commission notes that the five arguments presented by the Belgian Government are convincing. Regarding the first argument, it considers that the Belgian Government has demonstrated that IFB has reduced its logistical capacity by reducing the number of wagons utilised by 49 %, which makes it possible to limit the distortions of competition brought about by the measures in question. Regarding the second argument, the Commission agrees that the Belgian Government that IFB's market shares of the logistics market have been reduced within the meaning of point 36 of the 1999 guidelines. Regarding the third argument, the Commission considers that the explanations given by Belgium to describe in more detail IFB's increase in turnover demonstrate that IFB Logistics has grown less quickly than its competitors, and that the most significant growth concerns a sub-sector where IFB is only marginally present. Regarding the fourth argument, the Commission considers that, even if the decision to open its terminals to competitors was probably also due to economic considerations, it nevertheless has the consequence of consolidating the opening-up of the markets in which IFB is active, and can thus limit the negative effects of aid. Regarding the fifth argument, the Commission recognises that IFB's situation is in some ways similar to the situation of SNCF freight, insofar as IFB, like SNCF freight, is active in the sub-sectors 'rail freight transport' and 'combined transport', which have been completely liberalised since 1 January 2007 ([48]).

(306) The Commission concludes that Belgium has shown proof that sufficient measures have been taken to mitigate, as far as possible, the unfavourable consequences of aid on competitors in the logistics sectors.

([48]) This complete opening-up of the markets, which is provided for in Directive 91/440/EC, was implemented by Royal Decree of 13 December 2005.

(c) ***Conclusion***

(307) The Commission concludes that the Belgian authorities have shown proof that they have taken sufficient measures to mitigate, as far as possible, the unfavourable consequences of aid for competitors in the two markets in question.

4.2.2.3. Aid limited to a minimum

(308) As regards the limitation of aid to a minimum, the 1999 Guidelines state (points 40 and 41):

'(40) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. To limit the distortive effect, the amount of the aid or the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The Commission will accordingly examine the level of the firm's liabilities after restructuring, including the situation after any postponement or reduction of its debts, particularly in the context of its continuation in business following collective insolvency proceedings brought against it under national law. Neither should any of the aid go to finance new investment that is not essential for restoring the firm's viability.

(41) In any event, it must be demonstrated to the Commission that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as this is essential for restoring viability without unduly distorting competition'.

(309) It is therefore necessary to verify firstly whether the aid is limited to the minimum, and then whether IFB has made an adequate contribution itself.

(a) **Limitation of aid to a minimum**

(310) In order to demonstrate that the aid is limited to the strict minimum, the Belgian Government explains that the increase in capital is limited to restoring IFB's capital stock, which has become negative further to losses recorded in 2001 and 2002, to a level which allows it to recover its economic viability. As explained in section 2 of this decision, IFB's solvency rate, that is to say the debt-to-equity ratio, will be 35,6 % after the increase in capital.

(311) In its decision initiating the procedure (point 268), the Commission noted that the increase in capital was EUR 20 million less than had been recommended by the consultants McKinsey in the restructuring plan; furthermore, the Commission noted (point 268) that the solvency rate envisaged by IFB was less than that of the terminal companies and also, though to a lesser extent, than that of companies with mixed activities.

(312) However, it noted that the rate was greater than the average of the rates recorded in the transport companies. In view of that, it concluded that it did not have at its disposal sufficient factors to consider definitively that the aid was limited to the strict minimum.

(313) The Commission considers that, to establish that the aid was limited to a minimum, it is necessary to check firstly whether the solvency rate of IFB, which will retain its activities in Belgium, does not exceed the average of its competitors, and then if IFB divested its shareholdings in France at the lowest possible cost.

(i) *Solvency rate not exceeding the average of competitors*

(314) Belgium provided additional information in its reply to the letter initiating the procedure. Firstly, it calculated the solvency rate of the six terminal companies which are most comparable to IFB and the solvency rate of the six logistics companies which are most comparable to IFB. Then, it calculated an average, weighting the average rates of the terminal companies and the logistics companies in relation to the relative strength of these two activities within IFB. This produced an average solvency rate of 35,6 %, which corresponds to IFB's solvency rate after the foreseen increase in capital.

(315) Furthermore, Belgium demonstrated that the two most direct competitors to IFB, namely the companies Gosselin and Hupac, have very similar solvency rates (38,9 % and 34,9 % respectively).

(316) In view of the additional information provided by Belgium, and the fact that the increase in capital has been reduced, in relation to the initial recommendation of EUR 120 million contained in the McKinsey plan of December 2003, to EUR 95,3 million, the Commission considers that the increase in capital is limited to what is strictly necessary.

(ii) *Divestiture of shareholdings in France at lowest cost*

(317) As regards the divestiture of IFB's French subsidiaries, the Commission has further verified that, during its withdrawal, IFB always chose the lowest cost option, in order to limit withdrawal costs, and therefore aid, to a minimum.

(a) ***Acimar***

(318) The legal divestiture of Acimar by judicial settlement cost of EUR 3,9 million (see section 2 of this decision). The Commission notes that Belgium demonstrated that the alternative, that is to say the continuation of its activities, would have necessitated the financing of the annual cash-drain by IFB until the end of 2005, which would have represented a loss of EUR 10,8 million in total, without any certainty of being able recover the debts of EUR 3,9 million which would have had to be abandoned in the judicial settlement.

(319) The Commission consequently concludes that IFB chose the lowest cost option for Acimar.

(b) ***NFTI-ou***

(320) As regards NFTI-ou, which was a company controlled jointly by IFB and Port Autonome de Dunkerque, operating the terminals in the port of Dunkerque, IFB explored two possibilities: the pursuit of activities, or divestiture by selling its shareholding. Divestiture would have led to costs of EUR 18,5 million (see detailed description in section 2 of this decision).

(321) As regards the alternative, that is to say the continuation of activities, Belgium demonstrated in its reply that this would have generated losses of EUR 36,2 million (see detailed description in section 3 of this decision).

(322) In view of the cost of these two options, the Commission considers that IFB chose the least expensive option.

(c) ***IFB France***

(323) The handover of IFB France, which subsequently became AGEP, to NFTI-ou cost EUR 0,9 million (see detailed description in section 2 of this decision). The question arises as to whether allowing IFB France to file for bankruptcy would not have been less costly for IFB.

(324) As in the assumption of its sale, IFB would have had to abandon its receivables to IFB France for a value of EUR 0,8 million. Belgium however claims that filing for bankruptcy would have generated additional costs: IFB would not have been able to achieve the sale price of EUR 0,1 million, which would have generated capital losses on its shareholding, and IFB would have had to pay a total of EUR 0,8 million to 14 employees, who would have lost their employment following the bankruptcy, by virtue of French social law.

(325) The Commission considers that Belgium has not presented evidence of this risk of coverage of liabilities. Therefore, the Commission must reject this argument. [49] The Commission concludes that the handover of IFB France cost at least the same as its continuation would have done.

(326) The Commission therefore concludes that IFB selected one of the two least expensive options.

(d) ***Dry Port Dunkerque***

(327) For the Dry Port of Dunkerque, it had been decided to liquidate this company, by the preliminary sale of a part of the assets, namely the shareholding of 8,6 % in NFTI-ou. That cost EUR 7,9 million (see detailed description in section 2 of this decision).

(328) In the alternative scenario, i.e. the continuation of activities, IFB would have had to finance the annual cash drain generated by the company's losses, which would have presented an additional charge of EUR 2,6 million.

(329) Consequently, liquidation was the least costly option.

(e) ***SSTD***

(330) In view of the strategic decision to leave the French market, the decision to sell SSTD for EUR 0,2 million (see detailed description below in section 2) was the most attractive option for IFB.

[49] See Court judgment of 14 September 1994, *Spain* v *Commission*, 'Hytasa' judgment (Cases C-278/92, C-279/92 and C 208/92 [1999] I-4103), point 22, and Commission decision of 22 July 1998 in the SDBO affair.

(f) ***Conclusion***

(331) The Commission concludes that IFB divested its shareholdings in France at the lowest possible cost, and that as a consequence the finance allocated by SNCB to finance this divestiture, which was necessary for the viability of the remainder of IFB, was limited to the minimum possible.

(b) **Beneficiaries' own contribution**

(332) Point 40 of the 1999 guidelines states that:

'Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions.'

(333) In the letter initiating the procedure (point 270), the Commission noted that, according to the restructuring plan, IFB did not appear to make a significant contribution of its own to its restructuring, and therefore the Commission had doubts as to whether IFB contributed sufficiently to its restructuring.

(334) Belgium, in its reply to the letter initiating the procedure, explained in detail what it considered IFB's own contributions to be (see description in section 3 of this decision, points 194 to 201).

(335) The Commission assesses Belgium's explanations as follows:

(i) *Costs of restructuring*

(336) The Commission starts by determining the total cost of restructuring, net of productivity gains and reduction in working capital requirement.

Net costs of restructuring	
Net operating loss	2,749
Exceptional charges	0,032
Increase in working capital requirement	12,998
Investments and replacement of non-financial assets	6,611
Investments in financial assets	1,882
Interest payments to businesses other than SNCB	2,351
Repayment of financial debt	16,599
Partial repayment of debt and interest to SNCB	81,7
Tax debts	0,077
Total	125,56

(337) In this respect, the Commission considers that it is justified, in accordance with its decision-making process [50], in retaining the costs in the table above, rather than the costs presented by Belgium (see the table in point 184), in particular for the following reasons:

— The operating loss (the 'cash drain'). Belgium had included EUR 27,916 million as 'gross operating loss' in the restructuring costs. The Commission considers that, in line with its decision-making practice [51], only the net operating loss should be included in the restructuring costs. These costs may be obtained by deducting the productivity gains during the restructuring period (EUR 25,167 million) from the gross operating loss during the restructuring period (EUR 27,916 million). Consequently, the net operating loss is EUR 2,749 million,

— Variations in working capital requirement. In the sections 'costs' and 'own contribution', Belgium mentions variations in the working capital requirement [52]. In accordance with the Commission's decision-making practice [53], only the net increase in working capital requirement should be taken into account for the restructuring costs, which is EUR 12,998 million [54],

— Inter-group transfers. In the costs of restructuring, Belgium includes, under the heading 'investments in financial assets', inter-group transfers linked to the centralisation of the Belgian shareholdings in the group. These transfers were as follows: shares in RKE (a Belgian firm, described in detail in section 2, point 47, of the letter initiating the procedure), held by Haeger & Schmidt International (a 100 % subsidiary of IFB in Germany, described in detail in section 2, point 47, of the letter initiating the procedure) were transferred to IFB, which now

[50] See Commission decision of 5 December 2005, *ABX Logistics*, Case C 53/03, paragraph 247.

[51] See Commission decision of 5 December 2005, *ABX Logistics*, Case C 53/03, paragraph 247.

[52] The upward variations are explained by the need to finance the work in progress and to absorb the difference between receivables and commercial debts and to maintain sufficient liquidity at the beginning of the restructuring period. The downward variations occurred in the middle and at the end of the restructuring period: thus, in 2004 and 2005, IFB freed up around EUR 2,7 million by lowering its working capital requirement. This was made possible by the recovery of EUR 0,9 million in working capital from OCHZ at the time of the sale of the 50 % shareholding in that company, along with a reduction in the payment period granted to customers as from 2004 in relation to 2003, in combination with an unchanged supplier payment policy.

[53] See Commission decision of 5 December 2005, *ABX Logistics*, Case C 53/03, paragraph 247.

[54] This result is obtained as follows: EUR 7,685 million (increase in Belgium) + 8 000 (increase in France) EUR – 2,687 million (reduction), see table in section 3, paragraph 184.

holds them directly, and no longer indirectly via Haeger & Schmidt International. The price of this transaction was EUR 1,6 million and was settled by a cash payment of EUR 0,6 million and by a reduction in IFB's receivables (current account) from Haeger & Schmidt International of EUR 1 million.

The Commission considers that this transaction, which constitutes a transfer within the IFB group, may not be taken into consideration as a restructuring cost, as it is financially neutral at group level. At a cost of EUR 0,6 million to IFB, this corresponds to an increase in profits of EUR 0,6 million for Haeger & Schmidt International, which appears in the consolidated accounts for the group as a profit increase.

(ii) *Financing by SNCB and own shareholding in IFB*

(338) SNCB financed the restructuring to the tune of EUR 95,3 million. As demonstrated in points 199 to 237, this financing is imputable to Belgium. It will involve a conversion into capital of the credit facility and receivables for which a payment extension was awarded, together with the interest pertaining to it.

(339) Contrary to point 43 of the 2004 guidelines, the 1999 guidelines do not prevent the firm's own contribution consisting of future profits. The Commission considers that, within the context of the 1999 guidelines, future profits can constitute an own contribution, if the future profits were foreseeable at the time when the restructuring plan was prepared.

(340) IFB will contribute to its own restructuring initially by means of the profits forecast for the years 2004, 2005 and 2006, which should amount to a total of EUR 10,5 million. As already explained, the forecast of these profits was based on the factual elements known to IFB at the time of the development of the restructuring plan, such as the conclusion of major new contracts, a reduction in salary costs following a reduction in the workforce, and synergies forecast in the restructuring plan. Consequently, the Commission concludes that these future profits were foreseeable at the time when the restructuring plan was prepared.

(341) Later, IFB will contribute from its financial receipts, which result from accumulated interest on IFB's bank accounts, and which amount to EUR 1,4 million in total. As described in point 187, these future receipts were foreseeable at the time when the restructuring plan was prepared.

(342) By the sale of 'non financial' assets to private firms, IFB will contribute EUR 4 771 million. Besides the sale of various assets of relatively limited size, totalling EUR 0,271 million, this part of the contribution principally comprised the divestiture in 2004 of assets utilised at the OCHZ terminal. The co-ownership rights (50 %) to these assets utilised by OCHZ were ceded for a price of EUR 4,5 million.

(343) IFB will release EUR 9,287 million by the sale of 'financial' assets, i.e. the sale of minority shareholdings in private firms. These revenues were generated by the divestiture of

— Autocare Europe and IFB France in 2003,

— GIE OCHZ, Brussels Port Invest SA and Brussels Terminal Intermodal SA in 2004, and

— CNC Ferry Boats Intermodal in 2005.

As described in point 187, these future receipts were foreseeable at the time when the restructuring plan was prepared.

(344) The Commission considers that Belgium has demonstrated that, by means of the sales to private firms described above, IFB has reduced its activities to its core business.

(345) IFB was able to release EUR 3,3 million in 2003 and 2006 by entering into credit arrangements with private credit institutions. This credit has been described in detail in points 75 to 79 of the decision initiating the procedure. They have been obtained under market conditions, and without the offer of security on the part of SNCB or the Belgian State to the banking establishments.

(346) Finally, IFB is contributing EUR 1,105 million, arising from exceptional receipts. These exceptional receipts correspond to capital increases achieved on the sale of non-financial assets (mainly of EAOS wagons and rolling stock at the terminals).

(347) The Commission concludes that IFB's own involvement in the restructuring costs amounts to EUR 24,927 million. The following table summarise all IFB's contributions:

Profits 2004 to 2006	10,429
Financial receipts	1,368
Sale of non-financial assets	4,771
Sale of financial assets	9,287
Credit entered into with private banks	3,300
Exceptional receipts	1,105
Total	30,26

Conclusion on own contribution

(348) To summarise, out of the total costs for the restructuring of IFB, which amount to EUR 125,56 million, EUR 95,3 million, or 76 %, were paid by SNCB. This financing is imputable to the Belgian State. EUR 30,26 million, or 24 %, of these costs were borne by IFB itself.

(349) In this case, the Commission recalls that the 1999 guidelines do not impose a minimum level of own contribution, but only a significant contribution. Nevertheless, inasmuch as the 2004 guidelines, which are not applicable in this case, insist upon an own contribution greater than 50 %, the Commission believes that it is useful to recall the particular difficulties of restructuring (upon which 250 jobs in Belgium directly depend); the scale of the reductions in capacity (reduction of 49 % of the rail wagons; handover of several terminals); and the importance of combined transport, the market in which IFB is principally active, to the European Union's transport policy.

(350) The Commission concludes that, under these circumstances, and in view of the size of the IFB business and its disastrous financial situation prior to its restructuring, a shareholding of 24 % constitutes a significant shareholding.

4.2.2.4. Annual report and 'one time, last time'

(351) The 1999 guidelines state in points 45 and 48:

'(45) The Commission must be put in a position to make certain that the restructuring plan is being implemented properly, through detailed regular reports communicated by the Member State concerned.

[…]

(48) In order to prevent firms from being unfairly assisted, restructuring aid should be granted once only. When planned restructuring aid is notified to the Commission, the Member State must specify whether the firm concerned has in the past already received restructuring aid, including aid granted before entry into force of these Guidelines and any unnotified aid. If so, and where less than 10 years has elapsed since the restructuring period came to an end or implementation of the plan has been halted, the Commission will normally allow further restructuring aid only in exceptional and unforeseeable circumstances for which the company is not responsible. An unforeseeable circumstance is one which could in no way be anticipated when the restructuring plan was drawn up.'

(352) As already noted in the decision initiating the procedure (point 271), the Belgian Government agreed to provide the Commission with an annual report to allow the Commission to evaluate whether the restructuring plan was implemented in accordance with the commitments made by the Belgian authorities.

(353) As also noted in the decision initiating the procedure (point 271), the criterion 'one time, last time' has been respected.

5. CONCLUSIONS

(354) The Commission finds that Belgium unlawfully implemented some of the measures in question in violation of Article 88(3) EC. However, the assessment of the measures has shown that, in part, they do not constitute aid, and as far as the rest are concerned, they are compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The financing of the restructuring of the activities of Inter Ferry Boats SA in Belgium and the financing of the divestiture of Inter Ferry Boats SA in France for the amount of EUR 95,3 million by Société Nationale des Chemins de Fer Belges, imputable to Belgium and implemented by the latter, constitute State aid for restructuring, which is compatible with the common market.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24 April 2007.

For the Commission

Jacques BARROT

Vice-President