

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 November 2013

concerning the State aid SA.16237 (C58/02) (ex N118/02) implemented by France in favour of SNCM

(notified under document C(2013) 7066)

(Only the French text is authentic)

(Text with EEA relevance)

(2014/882/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having called on interested parties to submit their comments pursuant to those articles ⁽²⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 18 February 2002, France notified the Commission of planned restructuring aid for Société Nationale Maritime Corse-Méditerranée (hereinafter: 'SNCM'), which notification was supplemented on 3 July 2002 ⁽³⁾. The restructuring plan followed the notification by the French authorities on 20 December 2001 of a cash advance of EUR 22,5 million granted by Compagnie Générale Maritime et Financière (hereinafter: 'CGMF') ⁽⁴⁾ to SNCM as rescue aid. By decision of 17 July 2002 ⁽⁵⁾ (hereinafter: 'the 2002 decision'), the Commission authorised rescue aid in favour of SNCM under the preliminary examination procedure for aid laid down in Article 88(3) of the EC Treaty. The notified restructuring aid consisted in the recapitalisation of SNCM through CGMF to the tune of EUR 76 million.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU is used throughout this Decision.

⁽²⁾ OJ C 303, 13.12.2006, p. 53.

⁽³⁾ Registered under reference TREN A/61846.

⁽⁴⁾ CGMF is a financial holding company wholly owned by the French State which acts on the latter's behalf for all operations concerning maritime transport, fitting out and leasing vessels in the Mediterranean.

⁽⁵⁾ OJ C 148, 25.6.2003, p. 7.

- (2) By letter of 19 August 2002, the Commission notified the French authorities of the decision to initiate the formal investigation procedure ⁽⁶⁾ pursuant to Article 88(2) of the EC Treaty and Article 6 of Council Regulation (EC) No 659/1999 ⁽⁷⁾.
- (3) On 8 October 2002 ⁽⁸⁾, the French authorities communicated to the Commission their comments on the decision of 19 August 2002 ⁽⁹⁾.
- (4) At the request of the French authorities, meetings were organised with the Commission on 24 October 2002, 3 December 2002 and 25 February 2003.
- (5) In the context of initiating the procedure, the Commission received observations from two undertakings, namely Corsica Ferries France (hereinafter: 'CFF') on 8 January 2003 ⁽¹⁰⁾ and STIM d'Orbigny group STEF-TFE (hereinafter: 'STIM') on 7 January 2003, and from various French regional and local authorities on 18 December 2002 and 9 and 10 January 2003. It sent those observations to France for comment by letters of 13 and 16 January and 5 and 21 February 2003.
- (6) The French authorities submitted their comments on the observations by CFF and STIM on 13 February ⁽¹¹⁾ and 27 May 2003 ⁽¹²⁾.
- (7) On 16 January 2003, the Commission sent a request for additional information, to which the French authorities replied on 21 February 2003.
- (8) By letter of 10 February 2003 ⁽¹³⁾, the French authorities expanded their arguments seeking to demonstrate that the planned aid complied in every respect with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁴⁾ (hereinafter: 'the 1999 guidelines').
- (9) At the Commission's request, on 25 February 2003 ⁽¹⁵⁾ the French authorities forwarded a copy of the shareholders' agreement binding SNCM and STIM.
- (10) By Decision 2004/166/EC ⁽¹⁶⁾ (hereinafter: 'the 2003 decision'), the Commission approved, under certain conditions, the granting of restructuring aid to SNCM payable in two instalments, one of EUR 66 million and the other for a maximum amount of EUR 10 million, to be determined on the basis of the net proceeds resulting from asset sales made after the adoption of the 2003 decision. The payment of the first instalment was authorised by the 2003 decision.
- (11) On 13 October 2003, CFF brought an action for annulment of the 2003 decision before the General Court of the European Communities (hereinafter: 'the General Court') (Case T-349/03).

⁽⁶⁾ OJ C 308, 11.12.2002, p. 29.

⁽⁷⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1). Since the French authorities requested on 11 September 2002 that some factual errors in the decision of 19 August 2002 be corrected, on 27 November 2002 the Commission adopted a decision amending the decision of 19 August 2002 (published in OJ C 308, 11.12.2002, p. 29). Interested parties were invited to submit their observations on the planned aid from that date.

⁽⁸⁾ On 11 September 2002, the French authorities requested an additional period in which to make their observations on the decision of 19 August 2002. That period was granted by the Commission on 17 September 2002.

⁽⁹⁾ Registered under reference SG(2002) A/10050.

⁽¹⁰⁾ Registered on 15 January 2003 under reference DG TREN A/10962.

⁽¹¹⁾ Registered under reference SG(2003) A/1691.

⁽¹²⁾ Registered under reference TREN A/21531.

⁽¹³⁾ Registered under reference SG(2003) A/1546.

⁽¹⁴⁾ OJ C 288, 9.10.1999, p. 2.

⁽¹⁵⁾ Registered under reference TREN A/21701.

⁽¹⁶⁾ Commission Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ L 61, 27.2.2004, p. 13).

- (12) By Decision 2005/36/EC⁽¹⁷⁾ (hereinafter: 'the 2004 decision'), the Commission decided that the amendments requested by France on 23 June 2004, namely swapping the vessel *Aliso* with the vessel *Asco* in the list of vessels which SNCM was authorised to use following the 2003 decision and the sale of the *Aliso* instead of the *Asco*, were not such as to call into question the compatibility with the internal market of the restructuring aid authorised by the 2003 decision.
- (13) By decision of 16 March 2005 (hereinafter: 'the 2005 decision')⁽¹⁸⁾, the Commission approved the payment of the second instalment of restructuring aid, in the amount of EUR 3,3 million, which brought the total amount of authorised restructuring aid to EUR 69,3 million.
- (14) On 15 June 2005, in Case T-349/03⁽¹⁹⁾, the General Court annulled the 2003 decision on the ground that the minimal character of the aid had been incorrectly assessed.
- (15) On 25 October 2005⁽²⁰⁾, the French authorities sent the Commission information relating to the financial situation of the company since the notification of the planned restructuring aid on 18 February 2002.
- (16) On 17 November 2005⁽²¹⁾, the French authorities provided information on the updating of the 2002 restructuring plan and the reconstitution of SNCM's own capital⁽²²⁾.
- (17) On 15 March 2006, a briefing note on the market, the business plan (revenue part) and the projected income statement were submitted to the Commission by the French authorities⁽²³⁾. Other documents were delivered to the Commission on 28 March 2006 and 7 April 2006⁽²⁴⁾. In the letter dated 7 April 2006, the French authorities also called on the Commission to classify part of the 2002 restructuring aid, in particular the amount of EUR 53,48 million, not as a measure taken under a restructuring plan but as non-aid in accordance with the *Altmark*⁽²⁵⁾ case-law or as an autonomous measure independent of the restructuring plan pursuant to Article 86(2) of the EC Treaty, on account of its being 'public service compensation'.
- (18) On 21 April 2006, a planned merger, under which the undertakings Veolia Transport (hereinafter: 'VT')⁽²⁶⁾ and Butler Capital Partners (hereinafter: 'BCP') acquired joint control of SNCM⁽²⁷⁾, was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004⁽²⁸⁾. By decision dated 29 May 2006⁽²⁹⁾, the Commission decided not to oppose the notified operation and to declare it compatible with the internal market.
- (19) On 21 June 2006⁽³⁰⁾, the French authorities sent the Commission the Order of 26 May 2006 of the Ministry of Economic Affairs, Finance and Industry approving financial transactions decided by *Société nationale des chemins de fer français* (hereinafter: 'SNCF') and Decree No 2006-606 of 26 May 2006 transferring SNCM to the private sector.
- (20) Information concerning the public service delegation and aid having a social character relating to the operation of services to Corsica was sent to the Commission on 7 June 2006⁽³¹⁾.

⁽¹⁷⁾ Commission Decision 2005/36/EC of 8 September 2004 amending Decision 2004/166/EC on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ L 19, 21.1.2005, p. 70).

⁽¹⁸⁾ OJ C 16, 21.1.2006, p. 20.

⁽¹⁹⁾ See the judgment of the General Court of 15 June 2005 in Case T-349/03 *Corsica Ferries France SAS v Commission* [2005] ECR II-2197.

⁽²⁰⁾ Registered under reference TREN A/27546.

⁽²¹⁾ Registered under reference TREN A/30842.

⁽²²⁾ Additional information was sent by post on 30 November 2005 (SG(2005) A/10782), 14 December 2005 (SG(2005) A/11122) and 30 December 2005 (TREN A/10016).

⁽²³⁾ Registered under reference TREN A/16904.

⁽²⁴⁾ Registered under reference TREN A/19105.

⁽²⁵⁾ Case C-280/00 *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR 7747.

⁽²⁶⁾ Veolia Transport was a wholly owned subsidiary of Veolia Environnement. It operated under the name of *Connex des services de transport de voyageurs pour le compte de collectivités publiques* (suburban, interurban and regional public transport systems) and, for that purpose, managed road and railway networks and, to a lesser extent, transport services by sea.

⁽²⁷⁾ OJ C 103, 29.4.2006, p. 28.

⁽²⁸⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

⁽²⁹⁾ OJ C 148, 24.6.2006, p. 42.

⁽³⁰⁾ Registered under reference TREN A/25295.

⁽³¹⁾ Registered under reference TREN A/24111.

- (21) By letter dated 13 September 2006, the Commission notified the French authorities of its decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty and in Article 6 of Regulation (EC) No 659/1999 concerning the new measures implemented in favour of SNCM and the restructuring plan notified in 2002 ⁽³²⁾ (hereinafter: 'the 2006 decision').
- (22) On 16 November 2006, France sent the Commission its comments on the 2006 decision ⁽³³⁾.
- (23) On application by a number of interested parties to extend the time-limit for submitting comments by 1 month ⁽³⁴⁾, the Commission decided to grant that additional period to all interested parties ⁽³⁵⁾.
- (24) The Commission received comments from CFF ⁽³⁶⁾ and STIM ⁽³⁷⁾ which were forwarded to the French authorities by letter dated 20 February 2007. A third party also sent comments which were also forwarded to the French authorities, and withdrawn by that party on 28 May 2008.
- (25) The French authorities sent their observations on the comments by the interested third parties on 30 April 2007 ⁽³⁸⁾.
- (26) On 20 December 2007, CFF lodged a complaint against SNCM with the Commission which supplemented the information sent on 15 June 2007 and 30 November 2007. That complaint concerns Article 3 of the new public service delegation agreement signed in June 2007 between the Corsican regional authorities and the *Compagnie Méridionale de Navigation-SNCM* joint venture for 2007 to 2013. According to CFF, the application of that clause would mobilise new financial resources for SNCM in the region of EUR 10 million for 2007. Furthermore, it stated that the compensation paid to SNCM in respect of public service obligations is State aid which is, moreover, unlawful since it has not been notified to the Commission.
- (27) The Commission informed the interested parties of its decision to extend the period for them to submit comments to 14 March 2008.
- (28) On 26 March 2008, the Commission forwarded the comments by the interested third parties to France, which communicated its observations on 28 March, 10 April and 28 April 2008.
- (29) By decision dated 8 July 2008, the Commission took the view that the new measures in 2006 did not constitute State aid within the meaning of Article 87(1) of the EC Treaty and that the measures notified in 2002 were aid compatible with the internal market.
- (30) This decision was partially annulled on 11 September 2012 by the General Court ⁽³⁹⁾, which found that the Commission's conclusions on the measures implemented in 2006 were vitiated by manifest errors of assessment. The General Court held that the Commission's analysis of the 2002 restructuring aid should be reviewed because the decision was based on the fact that the 2006 measures were free of aid.
- (31) The only aid in respect of which the finding of compatibility was not annulled is the EUR 53,48 million as compensation for SNCM's public service obligations for the period 1991-2001. Consequently, this point will not be addressed in this decision.

⁽³²⁾ See footnote 2.

⁽³³⁾ Registered under reference TREN A/37907.

⁽³⁴⁾ By the STEF-TFE group on 28 December 2007 (A/20313) and by Corsica Ferries on 27 December 2006 (A/20056).

⁽³⁵⁾ Letters of 4 January 2007 (D 2007 300067) sent to the STEF-TFE group and (D 2007 30000689) to the Corsica Ferries group.

⁽³⁶⁾ On 11 January, 16 January and 9 February 2007, registered under references TREN/A/21142, A/21669 and A/23798 respectively.

⁽³⁷⁾ On 13 February 2007, registered under references TREN/A/24473 and TREN/A/23981.

⁽³⁸⁾ Registered by the Commission as TREN/A/30979. The French authorities requested and obtained two further additional periods of 1 month for submitting their comments by letters dated 15 March 2007 and 19 April 2007, registered under references TREN/A/27002 and A/29928.

⁽³⁹⁾ See the judgment of the General Court of 11 September 2012 in Case T-565/08 *Corsica Ferries France SAS v European Commission*, not yet reported (hereinafter: 'the judgment of 11 September 2012').

- (32) The Commission must therefore adopt a new final decision. There is no need to examine facts subsequent to the date of adoption of the annulled decision. Following the annulment, the Commission is required, first, to evaluate whether certain of the measures in question are consistent with the behaviour of a private investor in a market economy and, second, as far as the measures examined constitute State aid, whether the compatibility conditions laid down by the guidelines are met. For each of these two re-examinations, in accordance with the case-law of the General Court ⁽⁴⁰⁾, the Commission may take account only of the information that was available to it on the date of adoption of the annulled decision, i.e. 8 July 2008 ⁽⁴¹⁾.
- (33) On 13 November 2012 a meeting took place between the Commission, the French authorities and representatives of SNCM.
- (34) By letters dated 6 December 2012 and 5 February 2013, the French authorities made two separate requests for a decision to re-open the procedure, on the following grounds: by spelling out the criteria for the prudent investor in a market economy test, the General Court had handed down an innovative judgment that necessitated the re-opening of the adversarial procedure. By letters dated 15 January and 13 February 2013, the Commission rejected these requests, emphasising that the procedure could be re-opened at the precise point where the illegality had occurred and pointing out that the 2006 opening decision was not unlawful in any way. However, it also informed the French authorities that they were at liberty to submit any supplementary information for discussion or analysis or any document that they felt appropriate.
- (35) The French authorities sent the Commission an information note on 16 May 2013.
- (36) By letter dated 19 June 2013, SNCM also requested a decision to re-open the formal investigation procedure on grounds similar to those put forward by the French authorities. The Commission rejected this request by letter dated 10 July 2013. However, the Commission also informed SNCM that it was at liberty to submit any supplementary information for discussion or analysis or any document that it felt appropriate.
- (37) On 27 August 2013, SNCM sent an information note and a new report on the sale of SNCM.

II. DESCRIPTION

2.1. THE RECIPIENT OF THE MEASURES COVERED BY THIS DECISION

- (38) The recipient of the measures covered by this decision is SNCM, which has several subsidiaries in the maritime sector and operates the maritime transport of passengers, cars and lorries on routes between mainland France and Corsica, Italy (Sardinia) and the Maghreb (Algeria and Tunisia).
- (39) SNCM is a limited liability company which came into being in 1969 with the merger of *Compagnie Générale Transatlantique* and *Compagnie de Navigation Mixte*, both established in 1850. At that time called *Compagnie Générale Transméditerranéenne*, it was renamed Société Nationale Maritime Corse-Méditerranée in 1976, after SNCF had acquired a stake in its capital. The company was chosen by the French Government to implement the principle of territorial continuity with Corsica, bringing maritime transport fares into line with SNCF rail transport fares on the basis of an agreement concluded on 31 March 1976 for a term of 25 years. The French Government had already entrusted *Compagnie Générale Transatlantique* with the operation of services to Corsica through an earlier agreement of 23 December 1948.
- (40) At the time of the notification of the recapitalisation in 2002, 20 % of SNCM was held by SNCF and 80 % by CGMF. As a result of the sale of the equity capital in SNCM on 30 May 2006 (see recital 18 of this decision), BCP and VT hold 38 % and 28 % respectively of SNCM's capital, while CGMF retains 25 % (9 % of the capital is reserved to employees).

⁽⁴⁰⁾ See the judgment of the General Court in Case T-301/01 *Alitalia v Commission* [2008] ECR III 753, in particular paragraphs 137 and 146.

⁽⁴¹⁾ See also the judgment of the Court of Justice of 5 June 2012 in Case C-124/10 P *Commission v EDF*, not yet reported, paragraphs 83-85 and 104-105, in relation to the information to be taken into account to determine whether a State has behaved like a prudent private investor in a market economy.

- (41) In 2008, the main subsidiaries of SNCM were *Compagnie Méridionale de Navigation* ('CMN')⁽⁴²⁾, *Compagnie Générale de Tourisme et d'Hôtellerie* ('CGTH')⁽⁴³⁾, *Aliso Voyage*⁽⁴⁴⁾, *Sud-Cargos*⁽⁴⁵⁾, *Société Aubagnaise de Restauration et d'Approvisionnement* ('SARA')⁽⁴⁶⁾, *Ferytour*⁽⁴⁷⁾ and *Les Comptoirs du Sud*⁽⁴⁸⁾.
- (42) Following the disposal of the high-speed vessels *Aliso* in September 2004 and *Asco*⁽⁴⁹⁾ in May 2005, the SNCM fleet comprises 10 vessels (5 car ferries⁽⁵⁰⁾, 4 mixed vessels (freight and passenger)⁽⁵¹⁾ and a high-speed vessel operating principally from Nice⁽⁵²⁾), 7 of which it holds in its own name⁽⁵³⁾.
- (43) For the sake of completeness, it should be noted that regular shipping services between the ports of mainland France and Corsica have since 1948 been operated as a public service. SNCM and CMN were the concession-holders between 1976 and 2001 under a framework agreement initially concluded for 25 years. In accordance with the Community rules in force⁽⁵⁴⁾ and following the European invitation to tender⁽⁵⁵⁾ organised by the Corsican regional authorities⁽⁵⁶⁾, SNCM and CMN jointly secured the public service delegation to operate services between Marseille and Corsica in exchange for financial compensation from 2002 to 2006.
- (44) Since the public service delegation was to expire at the end of 2006, the public shipping service referred to above, which was the object of a new Europe-wide invitation to tender⁽⁵⁷⁾, was awarded to the SNCM-CMN joint venture from 1 May 2007 to 31 December 2013 for a subsidy of approximately EUR 100 million per annum.
- (45) Similarly, obligations relating to the frequency of services are imposed on all operators providing services to the island from Toulon or Nice. On those routes, Corsican residents and other categories of passengers were entitled from 2002 to 2013 to social aid established pursuant to Commission decisions of 2 July 2002⁽⁵⁸⁾ and 24 April 2007⁽⁵⁹⁾.

2.2. COMPETITIVE ENVIRONMENT

- (46) SNCM operates mainly in two separate markets, passenger traffic and freight traffic. It operates services to Corsica and the Maghreb from France and, to a lesser extent, services to Italy and Spain.

⁽⁴²⁾ SNCM holds a direct non-majority shareholding of 45 % in CMN and an indirect non-majority shareholding of 24,1 % through *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH). The STEF-TFE group has had effective control since 1992 through its 49 % shareholding in *Compagnie Méridionale de Participations* (CMP). SNCM and CMN were partners in the public service delegation during the period 2001-2006 and jointly won the new public-service delegation contract for the period 2007-2012/13.

⁽⁴³⁾ CGTH is a holding company wholly owned by SNCM.

⁽⁴⁴⁾ *Aliso Voyage* is SNCM's own distribution channel. Comprising 17 agencies throughout France, the company manages maritime ticket sales, 49,9 % of which are in SNCM ticket outlets.

⁽⁴⁵⁾ At the time of the adoption of the 2003 decision, SNCM held, equally with the transport group Delmas, a shareholding in the French maritime freight shipping company *Sud-Cargos*, which specialises in services to Morocco. That shareholding was subsequently sold at the end of 2005 for EUR 3,3 million, as is apparent from the 2005 investment plan submitted by the French authorities on 28 March 2006.

⁽⁴⁶⁾ SNCM owns 100 % of that company, which carries out the victualling of SNCM's vessels.

⁽⁴⁷⁾ The *Ferytour* partnership is a tour operator that is wholly owned by SNCM. It operates trips by sea to Corsica, Sardinia and Tunisia but also flights to many destinations. In addition to its main line of business, it also organises mini-cruises and offers business travel services.

⁽⁴⁸⁾ *Comptoirs du Sud*, a subsidiary set up in 1996 which is wholly owned by SNCM, manages all the shops on board its ships.

⁽⁴⁹⁾ See footnote 16.

⁽⁵⁰⁾ The *Napoléon Bonaparte* (capacity 2 150 passengers and 708 cars, power 43 MW, speed 23,8 knots), a large luxury car ferry; the new *Danielle Casanova*, delivered in May 2002 (capacity 2 204 passengers and 700 cars, power 37,8 MW, speed 23,8 knots), also a large luxury car ferry; the *Île de Beauté* (capacity 1 554 passengers and 520 cars, power 37,8 MW, speed 21,5 knots), put into service in 1979 and refitted in 1989/1990; the *Méditerranée* (capacity 2 254 passengers and 800 cars, power 35,8 MW, speed 24 knots) and the *Corse* (capacity 2 150 passengers and 600 cars, power 27,56 MW, speed 23,5 knots).

⁽⁵¹⁾ The *Paglia Orba* (capacity 500 passengers, 2 000 linear metres for freight and 120 cars, power 19,7 MW, speed 19 knots); the *Monte d'Oro* (capacity 508 passengers, 1 615 metres for freight and 130 cars, power 14,8 MW, speed 19,5 knots); the *Monte Cinto* (capacity 111 passengers, 1 200 metres for freight, power 8,8 MW, speed 18 knots); since May 2003, the *Pascal Paoli* (capacity 594 passengers, 2 300 metres for freight and 130 cars, power 37,8 MW, speed 23 knots).

⁽⁵²⁾ The high-speed vessel *Liamone* (capacity 1 116 passengers and 250 cars, power 65 MW, speed 42 knots), which also operates crossings from Toulon.

⁽⁵³⁾ All are leased, except for the *Danielle Casanova*, the *Pascal Paoli* and the *Liamone*.

⁽⁵⁴⁾ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7.).

⁽⁵⁵⁾ OJ S 2001/10 – 007-005.

⁽⁵⁶⁾ Licensing authority for public service obligations since 1991 on the basis of French Law No 91-428 of 13 May 1991.

⁽⁵⁷⁾ OJ 2006/S 100-107350.

⁽⁵⁸⁾ State aid N 781/2001 authorised by Commission Decision of 2 July 2002 (OJ C 186, 6.8.2002, p. 3).

⁽⁵⁹⁾ State aid N 13/2007 authorised by Commission Decision of 24 April 2007, published on the Commission's website: http://ec.europa.eu/community_law/state_aids/transport_2007.htm

2.2.1. **Services to Corsica**

2.2.1.1. *Passenger transport*

- (47) The operation of passenger transport services to Corsica is a highly seasonal market. It is distinguished by seasonal peaks of passenger numbers which may be up to 10 times those of the slackest periods, which requires operators to provide a fleet which can absorb those peaks. Half of the turnover is generated in July and August. Furthermore, there is an imbalance in respect of the direction of the route, even in peak periods: in July, for example, departures from the mainland are full whereas the return is almost empty. As a result, the average annual passenger load factors of the vessels are relatively low.

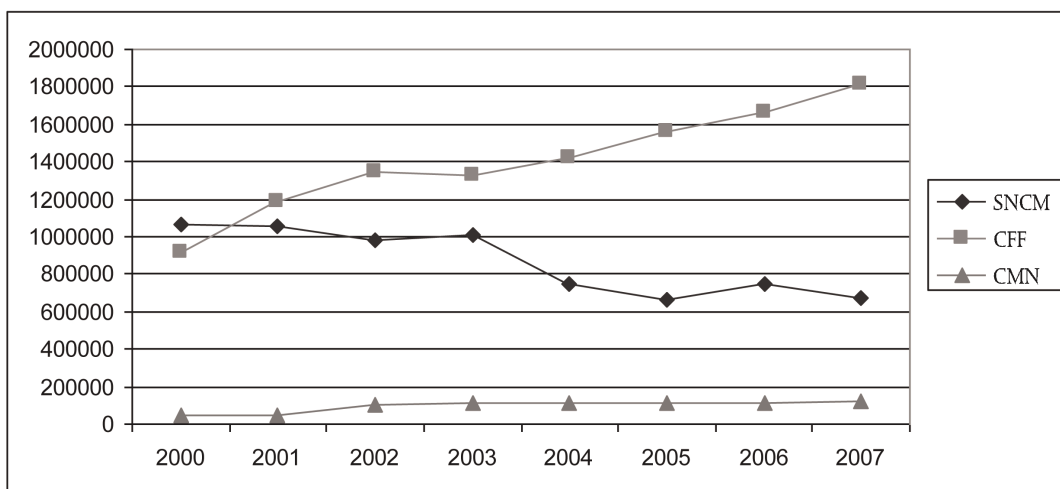
- (48) SNCM is the incumbent operator linking Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under a public service delegation; the other third of its activities comprises routes with other departure points or destinations (Nice-Corsica, Toulon-Corsica, international routes to Sardinia and the Maghreb).

- (49) SNCM has always had a monopoly on its principal activity. Since 1996, however, it has faced competition which has grown very quickly. Today the dominant player in shipping services between the mainland and Corsica is CFF and its market share continues to grow. Although it has been present in that market only since 1996, CFF has seen its passenger traffic increase by 44 % a year between 2000 and 2005, and that growth continues. Thus, in 2008, nearly [...] (*) % of passengers by sea between the mainland and Corsica took a CFF ferry, whereas only [...] (*) % used an SNCM service, and CMN carried the remaining passengers, i.e. [...] (*) %.

- (50) The position attained by CFF in the relevant market since 2000 is also reflected in the number of passengers carried per season between Corsica and mainland France. The graph below shows that CFF's market share went from 45 % in 2000 to 70 % in 2007 and SNCM's share went from 53 % to 26 % during the same period, with a difference of more than a million passengers transported.

Graph

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



Source: Observatoire régional des transports de la Corse.

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

(*) Confidential information.

- (52) Since 2006, SNCM's capacity and its market shares for services to Corsica have decreased, with a reduction of 8 % in available seats (– 20 % for services from Nice and – 3 % for services from Marseille).
- (53) However, the continued reduction in market shares demonstrates that the renewal of confidence on the part of passengers, which had been greatly damaged by the strikes and disruptions caused by the industrial disputes of 2004 and 2005, in particular at the time of the privatisation of the undertaking, is very slow.
- (54) Passenger transport by sea between the mainland and Corsica has grown on average by 4 % a year since 1993; that growth should continue, with an increase of [...] (*) % also forecast for 2008 (relevant at the time for the examination of the facts), then moderate growth over the coming years. None the less, new players do not appear to be seeking to enter that market. At the time of the call for tenders put out by the Office des Transports de Corse to award the public service delegation to operate services by sea to a number of Corsican ports from 2007 to 2013, no candidates other than CFF and SNCM-CMN came forward, even though part tendering on a given route was possible.
- (55) CFF, SNCM's main competitor, greatly increased its passenger capacity from 500 000 to 4,5 million between 1999 and 2007 (including a 30 % increase between 2006 and 2007), which enabled it to increase its traffic (from 1,3 million in 2005 to 1,6 million in 2007) and its market share. For structural reasons, that policy none the less results in a lower passenger load factor for CFF than for SNCM, with a difference in the region of 10 percentage points in 2007. For SNCM, the average passenger load factor in 2007 was 48 %, which is normal having regard to the fact that the market is very seasonal (see above).

2.2.1.2. Transport of freight

- (56) As regards freight traffic to Corsica, in 2005 SNCM held around 45 % of the Marseille-Toulon market to Corsica.
- (57) SNCM and CMN have a de facto near-monopoly for (unaccompanied) general goods traffic. Under the public service delegation contract, the two firms operate frequent services from Marseille to all Corsican ports.
- (58) For accompanied trailers loaded onto ferries, accounting for 24 % overall of general goods traffic measured in linear metres, there is competition among all the passenger transport operators. SNCM and CMN also have the main share of the market in this accompanied traffic. The other operators, in particular CFF, have a 10 % share, i.e. 2 % of the overall market.
- (59) For accompanied automotive vehicles⁽⁶⁰⁾ loaded onto ferries (approximately 24 % of general goods traffic in 2003), SNCM and CMN also hold the majority of the relevant market. However, since 2002 CFF has been developing its services and holds approximately 15 % of the market.

2.2.2. Services to the Maghreb

- (60) Tunisia and Algeria are an important market of approximately 5 million passengers, with air transport predominating. In that context, transport by sea represents about 15 % of traffic. While Algeria represents a significant maritime market of approximately 560 000 passengers, Tunisia is a smaller market in the region of 250 000 passengers.
- (61) The French maritime transport market to the Maghreb saw steady growth of around 13 % between 2001 and 2005. Having regard to the prospects for growth in tourism in that region, maritime transport was expected (relevant at the time for the examination of the facts) to see an annual growth rate of around 4 % by 2010.
- (62) In Algeria, SNCM is the second-largest operator in the market after *Entreprise Nationale de Transport Maritime de Voyageurs* (ENTMV), an Algerian public undertaking. SNCM's market share increased from 24 % in 2001 to 35 % in 2005.

⁽⁶⁰⁾ The driver accompanies the vehicle combination on the crossing. In some cases, a driver loads the vehicle before departure and another driver unloads it upon arrival. This is entered as accompanied transport as against roll-on roll-off transport operations in which the trailer travels without tractor.

- (63) SNCM is the second-largest operator in the market to Tunisia after *Compagnie tunisienne de navigation* (CTN). Although SNCM has lost market share to CTN since 2001, going from 44 % to 39 % in 2004, an improvement was, however, recorded in 2005 (40 %).

2.3. DESCRIPTION OF THE MEASURES COVERED BY THIS DECISION

2.3.1. The 2002 recapitalisation of SNCM

- (64) Following the Commission decision of 17 July 2002 to authorise rescue aid to SNCM ⁽⁶¹⁾, on 18 February 2002 the French authorities notified the Commission of planned restructuring aid to SNCM. That measure consisted in the recapitalisation of SNCM, through its parent company CGMF, to the tune of EUR 76 million, of which EUR 46 million was accounted for by restructuring costs ⁽⁶²⁾. The objective of the capital increase was to increase SNCM's own capital from EUR 30 million to EUR 106 million.
- (65) In accordance with the 1999 guidelines, the French authorities submitted to the Commission a restructuring plan ⁽⁶³⁾ for SNCM concerning five points:
- (i) a reduction in the number of crossings and the redeployment of its vessels between the different routes (a reduction in services to Corsica and an increase in services to the Maghreb). The restructuring plan provided for a reduction in the number of crossings from 4 138 (3 835 for SNCM and 303 for its subsidiary *Corsica Marittima*) to 3 410 in 2003 with the following route changes:
 - changes to routes between Marseille and Corsica in accordance with the terms and conditions of the 2001-2006 public service contract,
 - near-withdrawal of routes between Toulon and Corsica,
 - reduction of services between Nice and Corsica,
 - closure of the Livorno-Bastia line with dedicated equipment, actually closed in 2003,
 - consolidation of services from Algeria and Tunisia by the vessels *Méditerranée*, *Ile de Beauté* and *Corse* and the withdrawal of the Genoa-Tunis service;
 - (ii) a reduction in its fleet by four vessels, which was to provide EUR 21 million of liquid assets;
 - (iii) the transfer of certain property assets;
 - (iv) a reduction in staff ⁽⁶⁴⁾ of approximately 12 % which, combined with a sensible wage policy, was to make it possible to reduce crew costs from EUR 61,8 million in 2001 to EUR 54,8 million on average from 2003 to 2006 and shore costs from EUR 50,3 million in 2001 to EUR 45,8 million over the same period;
 - (v) the closure of two of its subsidiaries, *Compagnie Maritime Toulonnaise* and *Corsica Marittima*, whose residual activities would be taken over by SNCM.
- (66) Following the observations made by the Commission in its decision of 19 August 2002, the French authorities, in their letter of 31 January 2003, set out the improvements made to the restructuring plan on the following points:
- commitments and clarifications concerning wage policy,

⁽⁶¹⁾ See footnote 5.

⁽⁶²⁾ That amount broke down as follows: EUR 20,4 million for the restructuring plan itself, EUR 1,8 million for laying-up costs of ships to be sold, EUR 14,8 million for depreciation of the *Liamone* and EUR 9 million for the cost of redeploying activity to the Maghreb.

⁽⁶³⁾ The plan was adopted on 17 December 2001 by the SNCM management board.

⁽⁶⁴⁾ Staff numbers are reduced through natural wastage and early retirement on the basis of age criteria (early cessation of work), mobility leave and non-replacement of temporary contracts. However, for SNCM the reductions entail an estimated cost of EUR 20,4 million.

— a plan for reducing costs in intermediate purchases,

— a commitment that SNCM would not initiate a price war with its competitors operating services to Corsica.

- (67) On the last point, the French authorities state that 'SNCM makes that commitment without reservations, because it takes the view that a price war of its own making would not be consistent either with its strategic positioning, its interest (because it would lead to a reduction in revenue), its usual practices or its expertise'.
- (68) In their restructuring plan, the French authorities submitted to the Commission a detailed financial model for 2002 to 2007 on the basis of median hypotheses relating to a series of variables ⁽⁶⁵⁾. The financial projections show, inter alia, a return to operating profit from 2003.

Table 1
Financial model for 2002-2007

EUR million	2000 Actual	2001 Actual	2002 Plan	2002 Actual	2003 Plan	2004 Plan	2005 Plan	2006 Plan	2007 Plan
Turnover	204,9	204,1	178	205,8	190,4	192,9	195,2	197,1	193,9
Operating subsidies	85,4	86,7	74,5	77,7	69,9	68,8	68,4	67	68,5
Operating result	- 14,7	- 5,1	1,2	- 5,8	6,8	10,6	10,7	8,1	9
Net result	- 6,2	- 40,4	23	4,2	12	14	1	3	3
Capital	67,5	29,7	119	33,8	124	134	145	160	169
Net financial debt (excl. leasing)	135,8	134,5	67,7	144,8	55,2	38,2	57,1	115,7	228,1
Financial ratios									
Operating result/turnover+subsidies	- 5 %	- 2 %	0 %	- 2 %	3 %	4 %	4 %	3 %	3 %
Capital/balance-sheet debt	50 %	22 %	176 %	23 %	225 %	351 %	254 %	138 %	74 %

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

- (69) According to the French authorities, the EUR 76 million capital contribution and the return to operating profitability, expected from 2003, should make it possible to raise the company's capital from its level of about EUR 30 million at the end of 2001 to EUR 120 million in the short term (2003) and then to EUR 160-170 million at the end of the period covered by the plan (2006-2007). That was to lead to a reduction in debt from EUR 145 million in 2002 to levels of EUR 40 million to EUR 55 million from 2003 to 2005. In the last years of the plan, an increase in debt was forecast by the company because of the replacement of one or two vessels (full ownership).

⁽⁶⁵⁾ Such as traffic, projected growth of gross domestic product (1,5 %), the borrowing rate (5,5 %), the rate of return on financial products (4,5 %) and the short-term debt rate (5 %).

- (70) The French authorities also provided a sensitivity analysis of expected results in relation to working hypotheses in respect of traffic on different routes. On that basis, the different simulations show that SNCM should have returned to profitability under the scenarios in question.
- (71) Initially, the French authorities described two alternative methods which they rejected as being too costly.
- (i) The first valuation method consisted in adding together the costs of all the restructuring measures. It led to a EUR 90,9 million financing requirement, based on the following:
- accumulated losses from 1991 to 2001, i.e. EUR 41,7 million (EUR 29 million — figure validated by Decision 2002/149/EC of 30 October 2001 (OJ L 50 of 21 February 2002, p. 66), EUR 6,1 million in respect of 2000 and EUR 6,6 million, before restructuring costs, in respect of 2001),
 - the reduction in resources made up of excess tax depreciation between the same dates, i.e. EUR 24 million (the item falls from EUR 86 million to EUR 62 million on the balance sheet over the period, which reflects the extension of the depreciation period from 12 to 20 years, the lesser use of that resource and the use of leasing for the latest units delivered),
 - capital gain on disposal generated during restructuring, i.e. EUR 21 million, deducted from the financing requirement, and
 - cumulative effect of restructuring charges of EUR 46,2 million (see footnote 58).
- (ii) The second method consisted in determining the amount of capital the banks would require for the entire fleet, given that for financing the purchase of a vessel banks in general require capital corresponding to 20 % to 25 % of the vessel's value. On the basis of a historical acquisition cost of EUR 843 million for the fleet, the French authorities calculated a capital requirement of between EUR 157 million and EUR 196 million. After deducting existing capital at the end of 2001, this method led to a recapitalisation requirement of EUR 101 million to EUR 140 million.
- (72) The method finally chosen by the French authorities to determine the amount of the recapitalisation involves calculating the financing requirement on the basis of the average capital/debt ratio of five European shipping companies recorded in 2000. In spite of the differences in the balance sheets of those undertakings, the average calculated by the French authorities was 79 %. The French authorities submit that the financial projections for 2002 to 2007 give an average capital/debt ratio of 77 %, with capital to reach EUR 169 million in 2007. Such a level of own capital was to be obtained by means of a EUR 76 million recapitalisation and the success of the measures provided for in the restructuring plan.

2.3.2. Measures subsequent to the 2002 recapitalisation

2.3.2.1. Preliminary remark

- (73) The recapitalisation and the restructuring plan of 2002 did not produce the expected results and, from 2004, the economic and financial situation of SNCM greatly deteriorated. Both internal factors (industrial disputes, insufficient and belated achievement of productivity objectives, loss of market share) and external factors (reduced appeal of Corsica as a destination, acquisition of market share by CFF, management errors by the State⁽⁶⁶⁾), as well as the increased cost of fuel, contributed to this deterioration.
- (74) Accordingly, SNCM's operating results were EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. The net result was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005.
- (75) The deterioration in SNCM's economic and financial situation led the French authorities to sell assets over and above what was laid down in the 2002 restructuring plan and required by the 2003 decision and to initiate a procedure to seek private partners.

⁽⁶⁶⁾ See below.

Table 2
List of assets sold by SNCM since 2002

	Net proceeds	Date
Sales proposed in the 2002 notification (EUR thousand)	25 165	
the <i>Aliso</i> (instead of the <i>Asco</i> , in accordance with the Commission decision of 8.9.2004)	(315)	30.9.2004
the <i>Napoléon</i>	6 396	6.5.2002
the <i>Monte Rotondo</i>	591	31.7.2002
the <i>Liberté</i>	10 088	27.1.2003
All Schuman property	8 405	20.1.2003
Additional sales required by the Commission in its decision of 9.7.2003 (EUR thousand)	5 022	
SCI Espace Schuman	765,7	24.6.2003
Southern Trader	2 153	22.7.2003
Someca	1 423,9	30.4.2004
Amadeus	680	12.10.2004
CCM	— ⁽¹⁾	—
Additional sales occurring after the decision of July 2003 (EUR thousand)	12 600	
the <i>Asco</i>	7 100	24.5.2005
Sud-Cargos	4 300	15.9.2005
Sales of flats from SNCM's housing stock (formerly occupied by SNCM staff)	1 200	9.2003 to 2006
TOTAL (EUR thousand)	42 385	

⁽¹⁾ SNCM did not find a buyer for its shareholding in CCM.

2.3.2.2. Measures subsequent to the 2002 recapitalisation

- (76) The process of selecting private partners took place from 26 January 2005 to the end of September 2005.
- (77) On 26 January and 17 February 2005, the French Government announced that it was going to begin searching for a private partner to take a stake in SNCM's capital, with a view to strengthening the latter's financial structure and supporting it in the changes necessary for its growth.
- (78) *Agence des Participations de l'État* ('APE') appointed an independent party to supervise the search process and instructed an advisory bank (HSBC) to contact potential buyers.

- (79) In that context, 72 industrial and financial investors were contacted for the purpose of specifying the financial conditions of a proposal to support the company's industrial plan and preserve jobs and the efficient performance of the public service. Twenty-three of them submitted expressions of interest, 15 confidentiality agreements were signed and 15 information notes were sent. Six undertakings submitted offers in the first round on 5 April 2005 and three offers (Connex — now Veolia Transdev (VT), Caravelle and BCP) were received in the second round on 17 June 2005 as well as an expression of interest for a minority stake (Comanav). Three offers were received in the third round on 28 July 2005.
- (80) On 14 September 2005, each undertaking was invited to submit its firm and final proposal before 15 September 2005. On that date, since Connex had withdrawn, the State received two firm proposals of capital contributions and the purchase of the entire capital from the BCP and Caravelle groups.
- (81) On 27 September 2005, France published a press release stating that, on the basis of an in-depth examination of the two proposals, the one submitted by the BCP group was chosen because, while being the most acceptable from a financial point of view, it was the best able to defend the interests of the company, the public service and jobs. BCP's initial offer was for a negative price of EUR 113 million and was the lowest estimate of the negative price.
- (82) That initial offer from the potential buyers provided expressly for the possibility of adjusting their initial proposal once audits had been carried out. The French authorities stated that the initial negative price was revised upwards following the audits presented on 16 December 2005 owing to objective elements influencing the regulatory and economic context in which SNCM operates which occurred after the proposal was submitted on 15 September 2005. The negative price was thus revised to EUR 200 million.
- (83) The negotiations between the French authorities and the future buyers, i.e. BCP in association with the Connex group, now Veolia Transdev, a subsidiary of Veolia, made it possible to lower that figure to EUR 142,5 million, increased by the payment of a part of the expenditure relating to the mutual societies of SNCM's retired employees (EUR 15,5 million).
- (84) Following this open, transparent and non-discriminatory selection procedure, an agreement was finally reached on 13 October 2005 between the State, BCP and VT in a very difficult company and financial context. VT is SNCM's industrial operator (28 % stake) whereas BCP is the main shareholder with a stake of 38 %. The State committed itself, in particular towards the employees, to retaining a 25 % ⁽⁶⁷⁾ stake in the company. BCP and VT drew up a business plan for SNCM which was notified to the European Commission on 7 April 2006.
- (a) The content of the memorandum of understanding
- (85) The memorandum of understanding, under which 75 % of SNCM's capital is sold to private buyers, was signed on 16 May 2006 by the parties (BCP, VT and CGMF).
- (86) Section II of the memorandum of understanding provides that CGMF undertakes to approve, subscribe to and fully pay up an increase in SNCM's capital for a total of EUR 142,5 million.
- (87) In addition to the increase in capital, CGMF undertakes to make EUR 38,5 million available to SNCM, in the form of a current account advance. That advance, which will be paid by SNCM to a trustee (the bank CIC), is intended to finance the 'ex gratia' part of the cost, which is in addition to amounts payable under legislation and agreements in the event of a plan to reduce staff numbers implemented by the buyers. The payment of compensation over and above payments received in accordance with legislation and agreements is done on an individual and named basis corresponding to staff who have left the undertaking and whose employment contract was terminated.

⁽⁶⁷⁾ SNCM's internal process relating to the implementation of the recapitalisation and privatisation operations began formally on 12 April 2006 and was completed on 31 May 2006. It must be stressed that on 27 November 2007, the employee share ownership scheme had not been implemented.

- (88) That mechanism is laid down in Article II.2 of the sale agreement of 16 May 2006, which provides that that account is intended 'to finance the proportion of the cost of possible voluntary departures or termination of employment contracts ... which is in addition to sums of all kinds which must be paid by the employer under legislation and agreements.' The task of the trustee is 'to release funds as soon as the employees in question who have not been redeployed internally within the SNCM group actually leave the company and to release the balance of the amount on deposit at the end of the trusteeship'. The operation of this account is the subject of a trusteeship agreement annexed to the memorandum of understanding. In order to enable the escrow account to be activated, SNCM must provide the Chairman of CGMF with a list of the names of staff whose employment contract has been terminated and for whom activation of the escrow account is requested together with a monthly statement of the net expenditure, which is the detailed breakdown of all the compensation and expenses paid to the staff in question. At the same time, SNCM informs the trustee of the 'additional actual monthly cost' per employee, which is the amount over and above the sums of all kinds which must be paid by the employer under legislation and agreements. The total amount of additional *ex gratia* measures by the State may not, under any circumstances, exceed EUR 38,5 million and in the event that these additional social measures do not reach this threshold in the 3 years following the sale, the balance will be repaid to the State.
- (89) Section III of the memorandum of understanding provides that CGMF, following these transactions, is to sell to the private buyers its shares representing 75 % of the shares comprising the share capital of the undertaking and the escrow account intended to finance the part of the social plan over and above any obligations under agreements or legislation.
- (90) Section III of the memorandum of understanding also provides for an additional capital increase of EUR 8,75 million by BCP/VT, made available to SNCM on the basis of its cash requirements. Paragraph III.2.7 of the memorandum of understanding provides that the value of CGMF's shares is to be equal, at all times, to their original nominal value increased by [...] (*) % of their paid-up nominal value, multiplied by $D/365$, where D is the number of days since the date of sale, subject to deduction of any amounts paid (dividends, for example). These arrangements do not apply in the event of receivership or liquidation of the company by the court.
- (91) The memorandum of understanding (Section III.5) includes a cancellation clause granting the right to sell SNCM, which may be exercised concurrently by the buyers should one of the following events occur because these scenarios would call into question the credibility of their business plan and the company's return to viability:
- the failure to award the public service delegation for services by sea to Corsica for the period commencing 1 January 2007 or its award on substantially worse terms,
 - any negative decision by the European Commission or a judgment by the General Court or by the Court of Justice, such as a rejection of the transaction or the imposition of conditions having a substantial impact on the value of the company, within a deadline of 6 years from the date of acquisition by the partners of rights in respect of the company.
- (92) Section VII of the memorandum of understanding provides that CGMF is to pay a part of SNCM's social security liabilities in terms of the costs of the mutual societies of its retired workers for an amount estimated at EUR 15,5 million from the date of the transfer of ownership of the undertaking.
- (93) The detailed rules of governance of the undertaking are set out in Section IV of the memorandum of understanding. There will be a change in the way that SNCM is managed; it will be converted into a limited liability company with a board of directors and a supervisory board. The supervisory board will be made up of 10, then 14 members. It will be chaired provisionally by a representative of the State. If the public service delegation is entrusted to SNCM, the Chairman of the supervisory board will be replaced by a representative of BCP. The board of directors has the task of carrying out the operational management of SNCM.
- (94) On 26 May 2006, the French Government confirmed the sale of SNCM as well as the measures referred to above.
- (b) The measures
- (95) In the light of the foregoing, the memorandum of understanding contains three types of state measures justifying an examination under the Union's State aid rules:

- the sale of 75 % of SNCM at a negative price of EUR 158 million (capital contribution of EUR 142,5 million and payment of the costs of the mutual societies for an amount of EUR 15,5 million),
- the current account advance by CGMF for the amount of EUR 38,5 million for staff laid off by SNCM,
- the capital increase of EUR 8,75 million to which CGMF subscribed jointly and concurrently with the capital contribution of EUR 26,25 million by VT and BCP,
- the sale cancellation clause ⁽⁶⁸⁾.

2.4. SUBJECT MATTER OF THIS DECISION

- (96) This final decision relates to the measures implemented by France in favour of SNCM since 18 February 2002, namely:
- the balance of the capital contribution by CGMF to SNCM for the amount of EUR 76 million in 2002, i.e. EUR 15,81 million,
 - the negative price of EUR 158 million obtained by CGMF on the sale of SNCM,
 - the current account advance by CGMF for the amount of EUR 38,5 million for staff laid off by SNCM,
 - the capital increase of EUR 8,75 million subscribed by CGMF;
- (97) This decision does not concern the compensation for SNCM's public service obligations for the period 1991-2001, which was confirmed as being compatible with the internal market by the judgment of the General Court of 11 September 2012 ⁽⁶⁹⁾.
- (98) Nor does this decision concern the examination of the financial compensation paid or to be paid to SNCM for public service obligations for the period 2007-2013, which is the subject of a separate procedure ⁽⁷⁰⁾.
- (99) Furthermore, it should be noted that the judgment of 11 November 2012 has been the subject of two appeals before the Court of Justice, lodged by SNCM and France respectively in Joined Cases C-533/12 P and C-536/12 P. This decision has been taken to comply with the judgment under appeal because the judgment annulled the decision of 8 July 2008. Under these conditions, if the examination of the appeals were to result in the partial or full annulment of the judgment of 11 November 2012 and reinstate certain parts of the decision of 8 July 2008, this decision would become null and void because of the appeal judgments, inasmuch as this decision concerns reinstated measures.

2.5. GROUNDS LEADING TO THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE IN 2002 AND ITS EXTENSION IN 2006

2.5.1. Initiation of the 2002 formal investigation procedure

- (100) The Commission, in its decision to initiate the procedure of 19 August 2002, while acknowledging that SNCM was an undertaking in difficulty, expressed doubts as to the compatibility of the notified measure with the criteria laid down in point 3.2.2 of the 1999 guidelines in force at the time.
- (101) The Commission expressed certain doubts regarding the restructuring plan, having regard to the absence of an analysis of the causes of the undertaking's losses. In particular, the Commission raised questions concerning the links between the losses and the public service obligations, the impact of SNCM's policy of buying vessels on its income statements and the measures planned to increase the undertaking's productivity.

⁽⁶⁸⁾ That clause, which itself is of substantial value, will be analysed as part of the examination of the capital increase.

⁽⁶⁹⁾ Case T 565/08 *Corsica Ferries France SAS v European Commission*, not yet reported.

⁽⁷⁰⁾ Decision C(2013) 1926 final, 2 May 2013.

- (102) Moreover, the Commission noted certain lacunae in the restructuring plan, in particular the absence of specific measures to reduce the amount of intermediate consumption and the absence of a reference to SNCM's future pricing policy.
- (103) The Commission also raised questions regarding the relevance of the calculation method adopted by the French authorities to determine the amount of the recapitalisation and regarding some of the assumptions underlying the financial simulations.

2.5.2. Extension of the 2006 formal investigation procedure

- (104) By its decision of 13 September 2006, the Commission decided to extend the 2002 formal investigation procedure to the measures planned in connection with the sale of SNCM to the private sector.
- (105) In the event that this amount were categorised as State aid compatible with Article 86(2) of the EC Treaty, the Commission took the view that it had to be assessed in the light of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter: 'the 2004 guidelines') ⁽⁷¹⁾. In so far as the amount of restructuring aid is noticeably lower than that notified in 2002 and approved in 2003, the Commission expressed doubts as to whether it was appropriate to maintain all of the compensatory measures imposed on SNCM by the 2003 decision.
- (106) The Commission also expressed doubts about whether the conditions imposed by the 2003 decision had been complied with, namely the principle of price leadership and the frequency of services to Corsica.
- (107) As regards the negative price at which SNCM was sold, the Commission had doubts about whether the recapitalisation by the State prior to the sale of SNCM complied with the principle of the private investor in a market economy. In particular, the Commission expressed doubts as to the validity of the calculation of the liquidation costs which the State as shareholder would be required to pay in the event of SNCM being liquidated.
- (108) The Commission questioned whether the financial measures could be justified under the 2004 guidelines.
- (109) It also cast doubts on the second recapitalisation of EUR 8,75 million in relation to observance of the principles of concomitance of the private and public investment and the similarity of the subscription conditions within the meaning of the case-law.
- (110) Finally, the Commission expressed doubts as to whether the additional social measures of EUR 38,5 million in aid to individuals could constitute an indirect advantage for the undertaking. It also highlighted the risk of conflict with the supplementary redundancy payments as part of the risks borne by a prudent investor.

III. OBSERVATIONS BY THE FRENCH AUTHORITIES ON THE OPENING DECISION

3.1. ON THE 2002 RECAPITALISATION

- (111) The restructuring plan notified in 2002 consisted of a capital contribution of EUR 76 million, of which EUR 53,48 million was public service compensation. Allowing for the sale of shares carried out by SNCM ⁽⁷²⁾, the amount of aid actually paid becomes EUR 69 292 400. The French authorities take the view that, if the amount of EUR 53,48 million is compatible aid, then the amount of aid to be regarded as restructuring aid under the notification in 2002 is EUR 15,81 million.

3.2. ON THE MEASURES SUBSEQUENT TO THE 2002 RECAPITALISATION

- (112) France recalls, first, that the seriousness of the industrial action of 2004 to 2005 and the deterioration in the economic and financial situation of SNCM led the State as shareholder to launch a procedure for selecting private investors in January 2005 and to implement urgent measures (in particular the sale of the *Asco* and the shareholding in *Sud Cargos* ⁽⁷³⁾).

⁽⁷¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁷²⁾ See Table 2.

⁽⁷³⁾ In 2002 the French authorities had championed the strategic nature of SNCM's stake in *Sud-Cargos*. The development of goods traffic (container growth to the detriment of roll-on roll-off), the purchase of *Delmas*, another shareholder in *Sud-Cargos*, by *CMA CGM* and the economic difficulties of *Sud-Cargos* are equally factors which explain that the stake was no longer considered strategic and could be sold by SNCM in 2005.

3.2.1. On the negative sale price of SNCM

- (113) Under the relevant Community case-law at the time, the French authorities call upon the Commission to take the view that the negative sale price of SNCM of EUR 158 million does not contain any measure which may be classified as aid within the meaning of Article 87(1) of the EC Treaty because the French State acted like a private investor in a market economy.
- (114) First of all, France observes that the final price of EUR 158 million, which is lower than the negative price that the buyers initially asked for after their audit of SNCM, is the result of a negotiation of transfer of control conducted under an open, transparent and non-discriminatory competitive tendering procedure and, for that reason, does in fact constitute a market price.
- (115) France takes the view that, because the search for a private partner for SNCM was conducted under an open, transparent and non-discriminatory competitive tendering procedure at the end of which the best bid was chosen, the sale price is a market price.
- (116) According to the French authorities, the sale at the negative price of EUR 158 million took place under the most favourable conditions for the State in accordance with Community case-law at the time and the Commission's decision-making practice and therefore contains no aid element. France takes the view that that negative price is lower than the liquidation cost which the State would have had to bear in the event of the liquidation of the undertaking.
- (117) That is, in France's view, the only conclusion which can be reached irrespective of whether the approach followed is that stemming from the case-law of the Court of Justice of the European Communities (hereinafter: 'the *Gröditzter* case-law' ⁽⁷⁴⁾) or that based on the analysis of the actual costs of liquidating SNCM (the *ABX* decision ⁽⁷⁵⁾).
- (118) As regards the first method, based on the *Gröditzter* case-law, France argues that that judgment confirmed the Commission's assessment in its decision of 8 July 1999, to the effect that 'the cost of liquidation comprises only the liquidation value of the assets' ⁽⁷⁶⁾.
- (119) In that respect, the reports by CGMF ⁽⁷⁷⁾ and Oddo-Hastings ⁽⁷⁸⁾ estimate the liquidation value of the assets at a minimum of EUR 190,3 million on 30 September 2005 ⁽⁷⁹⁾.
- (120) Accordingly, given that the State as the owner and shareholder of a company is liable for its debts only up to the liquidation value of its assets (*Hytasa* case-law ⁽⁸⁰⁾), France asserts that the liquidation value of the company's assets estimated to be at least EUR 190,3 million is considerably higher than the negative sale price of EUR 158 million.
- (121) On the second method, France points out that it follows from the Commission decision on the State aid implemented by Belgium for ABX Logistics, in which the Commission examined a negative sale price having, as in this case, the character of a market price by comparing it to the costs which the State as shareholder would actually bear in the event of a voluntary liquidation or compulsory liquidation as assessed by an independent third party. According to France, the Commission recognises in particular in that decision the validity of a certain number of costs which can result from an action by creditors to make good a shortfall in assets (*action en comblement de passif*) or from the liquidation for other divisions of the group liquidating its subsidiary.

⁽⁷⁴⁾ Case C-334/99 *Federal Republic of Germany v Commission* [2003] ECR I-1139.

⁽⁷⁵⁾ Commission Decision of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (No C 53/2003 (ex NN 62/2003)) (OJ L 383, 28.12.2006, p. 21).

⁽⁷⁶⁾ Commission Decision of 8 July 1999 on State aid granted by Germany to Gröditzter Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH (OJ L 292, 13.11.1999, p. 27).

⁽⁷⁷⁾ The report was sent to the Commission in March 2006 and was prepared by CGMF with the assistance of Ernst & Young, SNCM's statutory auditor (hereinafter: 'the CGMF report').

⁽⁷⁸⁾ The report drawn up on 29 March 2006 by Oddo Corporate Finance and the law firm Paul Hastings ('Oddo-Hastings report') was sent to the Commission on 7 April 2006. It consists of a critical review, requested by the *Agence des Participations de l'État* (APE), of the CGMF reports and an approach based on the liquidation costs deemed acceptable at Community level.

⁽⁷⁹⁾ Having regard to tangible fixed assets (EUR 161,9 million) and investments (EUR 32,7 million), accounts receivable (EUR 0,8 million), other debtors (EUR 9,4 million) and a cash deficit of EUR 14,5 million. France stated that a more realistic estimate, in the light of subsequent financial information, brings that value to EUR 330 million.

⁽⁸⁰⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

- (122) On the basis of the CGMF and Oddo-Hastings reports cited above, the French authorities submit that the actual costs which the French Republic would have to bear as shareholder amount to between EUR 312,1 million and EUR 361 million on 30 September 2005, broken down as follows:
- EUR [70-80] (*) million under the social plan under collective agreement, which covers all the costs associated with the termination of the employment contract and for which the undertaking is contractually liable,
 - EUR [30-40] (*) million under the social plan not under collective agreement, which covers all the costs associated with the flanking measures to SNCM's statutory and regulatory redundancy obligations and the indirect costs of the social plan under collective agreement,
 - Between EUR [200-210] (*) million and EUR [250-260] (*) million as payment of supplementary redundancy payments for which the State would be held liable by the court, in addition to the compensation paid under the social plan under collective agreement and the social plan not under collective agreement, following the *Aspocomp Group Oyj* judgment of 22 March 2005 of the Rouen Court of Appeal.
- (123) That method takes account, in particular, of the risk that the French State would be required to make good a shortfall in assets if the court were to consider it to be the de facto manager of SNCM. The French authorities believe that the risk of an action to make good a shortfall in assets cannot be discounted, particularly in the light of a precedent set by the French Court of Cassation⁽⁸¹⁾. Accordingly, in several letters to the Commission, the French authorities submitted that a situation in which a national court orders the State to make good a shortfall in the assets of the undertaking which it manages is a scenario which is more than plausible and that it had to be taken into account in calculating the actual cost of a possible liquidation of SNCM.
- (124) On 30 September 2005, the residual value of SNCM's assets (EUR 190,3 million) was, after payment of preferential debts, EUR 36,5 million. Other cost elements taken into account under the action to make good a shortfall in assets against the State include, inter alia, the costs of termination of the principal operating contracts, the costs related to the cancellation of the lease purchasing conditions of vessels and the payment of unsecured debts, which would result in a shortfall in assets of EUR 134,4 million. The French authorities consider that the State would have been ordered to pay between 85 % and 100 % of that amount.
- (125) Furthermore, the French authorities take the view that, because of SNCM's dependence on the State, and in the light of another French case⁽⁸²⁾, the liquidation of the undertaking might have led the court to order the payment of damages to employees. According to that case-law, the French authorities believe that it would be very likely that a court would set the amount of additional compensation on the basis of the compensation which would be paid under a social plan submitted prior to the liquidation.
- (126) Under that approach, the analysis of actual costs which the State as shareholder would have had to pay shows that the cost to the State of the sale of SNCM at a negative price of EUR 158 million is lower than the actual cost which it would have had to bear in the event of the compulsory liquidation of the undertaking.
- (127) In conclusion, the French authorities consider that this amount cannot be classified as State aid.

3.2.2. On the joint capital contribution by the shareholders

- (128) France takes the view that, through that shareholding, it acted like a prudent investor because, first, it intervened concurrently as a minority shareholder alongside BCP and VT and, second, that shareholding enjoys a fixed capital return of [...] (*) % per year, which protects the State from the risks associated with the implementation of the business plan. France argues that that rate of return is very satisfactory for a private investor⁽⁸³⁾. It points out, however, that no payment would be due in the event that SNCM is put into receivership or compulsory liquidation or that the buyers exercise the cancellation clause.

⁽⁸¹⁾ Judgment No 98-15129 of the Court of Cassation of 6 February 2001. That case concerns a public body, the BRGM (*Bureau de Recherches Géologiques et Minières*) ordered to pay the entirety of the shortfall in assets of its subsidiary, les Mines de Salsignes, on the ground that the de facto manager, the BRGM, in spite of being aware of the deterioration in activities and the warning signs given, acted wrongfully in allowing activities to continue.

⁽⁸²⁾ Case *Aspocomp Group Oyj*; judgment of 22 March 2005 of the Rouen Court of Appeal.

⁽⁸³⁾ By way of comparison, the rates of return on French government bonds (*Obligation Assimilable du Trésor* — OAT) with maturities of 30 years, 10 years, 5 years and 2 years were 3,95 %, 3,82 %, 3,75 % and 3,72 % respectively on 31 October 2006.

3.2.3. On the additional social measures (aid to individuals)

- (129) France takes the view, relying on the Commission's practice in previous decisions, in particular the *SFP (Société française de production)* case⁽⁸⁴⁾, that this financing constitutes aid to individuals which does not benefit the undertaking. Accordingly, the implementation from public funds of additional social measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social policy of the Member States and is not State aid.

3.2.4. On the lifting of the restrictions imposed by the annulled decision of 2003

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

3.3. CONCLUSION

- (131) If the Commission were, however, to classify all or part of the new measures as State aid, France would draw the Commission's attention to the fact that the new measures, by ensuring that SNCM becomes viable again, allow competition to be maintained in the relevant markets, in particular the market for services to Corsica. According to France, that aspect is one of the principles of the guidelines in the rescue of an undertaking in difficulty as noted, in the present case, by the Commission (recital 283 of its annulled decision) and by the General Court in its judgment of 15 June 2005 in Case T-349/03 (paragraph 117). In particular, the latter pointed out that the Commission could consider, in the exercise of its wide discretion, that the presence of an undertaking was necessary in order to prevent the emergence of a strengthened oligopolistic structure in the relevant markets.
- (132) As regards the determination of any compensatory measures to be imposed on SNCM, France suggests that the Commission take into account the structure of the market. Accordingly, a reduction in SNCM's capacity would be such as to strengthen the position of CFF in the market for services to Corsica, which would be dominant from then on⁽⁸⁵⁾.
- (133) According to the French authorities, the restructuring plan, as updated, complies with the compatibility criteria set out by the Commission in its 1999 and 2004 guidelines. The French authorities maintain that all of the measures laid down in the context of SNCM's privatisation should also serve to restore SNCM's long-term viability from the end of 2009 and are restricted to the minimum necessary for that return to viability.

IV. COMMENTS BY INTERESTED PARTIES

4.1. ON THE DECISION TO INITIATE THE 2002 FORMAL INVESTIGATION PROCEDURE

4.1.1. Comments by Corsica Ferries (CFF)

- (134) Disputing, first, that SNCM is an undertaking in difficulty within the meaning of the guidelines⁽⁸⁶⁾, CFF raises the question whether SNCM can become profitable on the non-subsidised routes. Moreover, CFF notes that, contrary to what is stated in the restructuring plan⁽⁸⁷⁾, services are still operated to Livorno.
- (135) On the subject of cost reduction, CFF regrets that it does not have access to particular parts of the restructuring plan at which its representatives have levelled criticism⁽⁸⁸⁾.

⁽⁸⁴⁾ Commission Decision of 17 July 2002, *Société Française de Production*, C(2002) 2593 final (OJ C 71, 25.3.2003, p. 3).

⁽⁸⁵⁾ According to an independent market study submitted by France in that regard, CFF [...] currently has almost 60 % of the passenger market whereas SNCM went from 82 % market share in 2000 to 33 % in 2005 and saw very strong growth in the freight market, where SNCM is still the main carrier owing to its shareholding in CMN.

⁽⁸⁶⁾ CFF points out that the public service delegation contract allocates a public grant to the company of some EUR 64,3 million on average a year, making a total of EUR 321,5 million over 5 years. It argues that Article 5 of the public service delegation contract guarantees SNCM cash flow of EUR 72,8 million. Moreover, Corsica Ferries stresses that of the EUR 40,6 million losses recorded by SNCM in 2001, EUR 15 million relate to depreciation on the high-speed vessel the *Liamone*.

⁽⁸⁷⁾ The decision to initiate the procedure indicated that one of the measures laid down in the restructuring plan was 'the closure of the Bastia-Livorno line with dedicated equipment'.

⁽⁸⁸⁾ CFF's criticism relates to the following points: no actual reduction in staff, no sale of SNCM's shareholdings for the restructuring effort, no account taken of gains on vessels.

- (136) CFF is of the view that the calculation by the French authorities resulting in the amount of EUR 76 million is purely notional⁽⁸⁹⁾ while the own capital-to-debt ratio of 79 % decided upon by the French authorities seems exaggerated⁽⁹⁰⁾. With regard to SNCM's shareholdings, CFF notes that some of the subsidiaries are of no relevance to the shipping company's activities⁽⁹¹⁾.
- (137) CFF concludes that the planned aid circumvents the Cabotage Regulation and renders the invitation to tender for Marseille to Corsica services meaningless. CFF emphasises that the planned aid should not result in facilitating a more aggressive commercial offer on the part of SNCM. It suggests that restructuring aid should not be granted until 2007 and only if SNCM loses the next tender in 2006, which would be the only scenario that would genuinely put the public shipping company in difficulty.

4.1.2. Comments by STIM

- (138) STIM, the main shareholder in CMN, argues that SNCM's shares in CMN should be analysed as purely financial assets. According to STIM, CMN and SNCM are independent and in competition with each other on routes other than those from Marseille, even though both are co-contractors under the public service delegation contract.
- (139) The letter states that STIM would undertake 'to buy back all or part, and preferably all, of SNCM's shares in CMN', whose value it estimates at between EUR 15 million and EUR 17 million, if the Commission were to take the view, under the conditions it might impose in its final decision, that 'such a sale is necessary to ensure that the restructuring plan is properly balanced'.

4.1.3. Comments by the representatives of the regional and local authorities

- (140) The mayor of the city of Marseille, the president of the general council of Bouches-du-Rhône and the president of the regional council of Provence-Alpes-Côte d'Azur highlighted the economic importance of SNCM's role in the regional economy.
- (141) The president of the regional council of Provence-Alpes-Côte d'Azur added that the conditions for SNCM's restructuring plan to guarantee the undertaking's viability appear to be satisfied.
- (142) The president of the executive council of the Assembly of Corsica submitted the deliberations of that assembly of 18 December 2002 during which it issued 'a favourable opinion' regarding SNCM's planned recapitalisation.

4.1.4. Comments by the Corsica Transport Office

- (143) The Corsica Transport Office notes that the disappearance of SNCM 'would immediately lead to a major reduction in services' as it is currently the only company capable of meeting the requirements of the contract with regard to passenger transport. It notes, in addition, the importance of SNCM to the Corsican economy.

4.2. ON THE 2006 DECISION TO EXTEND THE PROCEDURE

4.2.1. Comments by Corsica Ferries France (CFF)

- (144) CFF notes the scale of the amounts in question, their disproportionate nature in relation to SNCM's turnover and the fact that they were paid to SNCM before the Commission took a position on aid classification pursuant to Article 87(1) of the EC Treaty.
- (145) CFF draws the Commission's attention to the fact that the French State's support for SNCM is of strategic importance to the development of CFF. These unauthorised measures enable SNCM to have a very aggressive tariff policy on the routes on which CFF has been present for 10 years and on which, for the first time since it was set up, it is losing market share.

⁽⁸⁹⁾ It argues that EUR 76 million corresponds to the FRF 500 million which the company would lose from its territorial continuity grant for the new period 2002 to 2006.

⁽⁹⁰⁾ Compared with the ratios which it itself found in a sample group of 10 shipping companies. Those ratios vary from 23,69 % (for Moby Lines), through 49,7 % for CMN, to 55,09 % (for Grimaldi).

⁽⁹¹⁾ CFF cites the 50 % stake in the shipping company Sud-Cargos, the 13 % stake in Amadeus, an undertaking specialised in air transport reservation systems, the stake in CMN and CGTH's property assets.

- (146) In respect of the process of competitive tendering for the sale of the company, CFF takes the view that it was not fully transparent in so far as the undertaking selected, namely BCP, no longer has operational control of SNCM, having handed over to the VT group. Furthermore, since the financial conditions had changed to become much more favourable to the buyers, CFF raises the question of the principle of the equal treatment of investors which ought to have prevailed throughout the transaction.
- (147) As regards the negative sale price of EUR 158 million, CFF is uncertain whether the criterion of the prudent investor in a market economy applies to the present case. First, CFF wonders whether the view can be taken that the transaction at issue was carried out by the State at the same time as a significant and concurrent action by private operators involved in comparable circumstances, while the State recapitalised the company before the joint recapitalisation by the shareholders and the new restructuring plan. Second, CFF considers that, in the face of SNCM's serious financial circumstances, a prudent investor would have acted sooner in order to prevent his investment depreciating ⁽⁹²⁾.
- (148) CFF takes the view that the reference to the *ABX Logistics* case is irrelevant. Besides the fact that the circumstances of that case cannot be applied to the present case, CFF notes a significant contribution by the aid beneficiary in that case, which clearly did not happen with SNCM. Furthermore, according to CFF, the Commission decision of 2006 did not take account of the costs relating to the risk of legal proceedings in a liquidation of the undertaking concerned. In that respect, CFF submits that the national case-law relied on by France to justify the costs relating to SNCM's liquidation does not apply to the present case. According to CFF, the Court of Cassation in the *Mines et produits chimiques de Salsignes* case does not refer at all to the direct liability of the State as shareholder in the event of the liquidation of an undertaking in which it is the shareholder, but rather the possibility of bringing an action for payment of payroll and social security debts against an industrial and commercial public company and the impossibility for the managers to escape their obligations by relying on action by the public authorities.
- (149) As regards the inapplicability to the present case of the *Aspocomp* case-law established by the Rouen Court of Appeal, CFF submits that the subject-matter of that case, relating to an order that a parent company pay to the employees of a subsidiary social benefits for 'failure to comply with an agreement' ratified by the former, is very different from the facts of the SNCM case. There is therefore no definite risk that CGMF or the State will be ordered to make redundancy payments in the event of compulsory liquidation. Moreover, CFF doubts the estimated figure for the other social costs because they seem to differ, depending on the experts asked to determine them.
- (150) CFF takes the view that the application of the Community case-law in *Gröditzter* and *Hytasa* to the present case necessarily leads to the conclusion that the State did not act like a private investor in so far as, in accordance with the above case-law, the capital contribution by the State was linked to the sale of 75 % of its stake in SNCM, reducing in proportion the prospects of profit in return.
- (151) Finally, CFF considers that the comparison between the liquidation costs and the recapitalisation costs should take into account the value of the assets, which is transferred to the buyer in both cases. CFF submits that the value of the assets sold to the buyers varies between EUR 640 million and EUR 755 million ⁽⁹³⁾, compared with the market value of the fleet used by SNCM, which CFF valued at between EUR 644 million and EUR 664 million in August 2006.
- (152) As regards the classification of the measures subsequent to the 2002 recapitalisation as restructuring aid, CFF is of the opinion that, although SNCM fulfils the conditions of an undertaking in difficulty under the 2004 guidelines in the period preceding the first recapitalisation of EUR 142,5 million, that classification becomes very questionable for the period preceding the second capital increase of EUR 8,75 million because the undertaking's capital had been reconstituted.

⁽⁹²⁾ In that regard, CFF notes that, in the second half of 2005, an emergency procedure was initiated before the Marseille Commercial Court and that voluntary liquidation could have been envisaged as early as autumn 2005 in respect of the losses estimated at EUR 30 million in 2005.

⁽⁹³⁾ In that regard, CFF takes the view that the actual value of the vessels as stated by SNCM at the time it made its bid under the public service delegation ought to have been taken into account in the valuation of SNCM's assets made in the Oddo-Hastings and CGMF reports.

- (153) As regards the viability of the undertaking, CFF emphasises that the sale of SNCM is only partial and is not irrevocable, in the light of the cancellation clauses negotiated with the buyers. Those factors are important elements of uncertainty as regards the will and the ability of the buyers to turn SNCM around and therefore secure the prospects of the undertaking's long-term viability. Furthermore, CFF states that, contrary to the requirements of the 2004 guidelines, the French authorities did not contemplate discontinuation of the activities which remained structurally loss-making even after the restructuring⁽⁹⁴⁾. In addition, CFF expresses its scepticism regarding the plan for reducing costs, despite SNCM's fleet becoming larger⁽⁹⁵⁾ and the planned reduction in staff, in particular in the light of the failure of the 2002 social plan.
- (154) CFF doubts whether the new aid is limited to the minimum on account, first, of a lack of clarity as to what the social costs cover and, second, the content of the minutes of SNCM's meeting of 28 April 2006, according to which a part of that aid would be used to cover the operating losses of the company in 2006 and 2007. CFF also considers that the buyers of SNCM do not contribute substantially to the restructuring of the undertaking.
- (155) In order to prevent undue distortions of competition, CFF considers it necessary to renew and specify the compensatory measures imposed on SNCM in 2003 and to add new measures relating to the reduction of SNCM's presence in the market⁽⁹⁶⁾. CFF considers, moreover, that a part of the measures imposed on SNCM by the 2003 decision were not complied with. SNCM acquired new vessels in breach of Article 2 of the Commission's 2003 decision. In addition, SNCM did not sell its shareholding in CCM, in breach of Article 3 of the Commission decision. Finally, SNCM has had an aggressive tariff policy since 2003, with prices lower than those applied by CFF in breach of Article 4 of the decision (tickets up to 30 % cheaper for identical or comparable services).
- (156) Regarding the nature of the second recapitalisation of EUR 8,75 million, CFF takes the view that, in addition to the concurrence of public and private investment, the private action must be significant and carried out under comparable conditions in order that the State action is validated. In the present case, those two conditions are not satisfied. First, the buyers' shareholding, which is closely linked to the first capital increase of EUR 142,5 million, is not significant. Second, the buyers' action was not carried out under conditions comparable with those of the state action, in particular by virtue of the cancellation clauses and the expected profitability of CGMF's minority shareholding.
- (157) As regards the social measures of EUR 38,5 million, CFF disputes the classification of that amount as aid to individuals. Although it true that this amount directly benefits SNCM's employees, CFF submits that the measure could give rise to indirect positive effects for SNCM, in particular in terms of the calming of industrial relations.

4.2.2. Comments by STIM

4.2.2.1. On the measures subsequent to the 2002 recapitalisation

- (158) As regards the negative sale price of EUR 158 million, STIM takes the view that this price is not a market price resulting from an open and non-discriminatory competitive tendering procedure because the recapitalisation took place under different conditions from those which must normally guide a private investor. STIM considers that the revalued net book assets would allow, in the worst-case scenario, a liquidation without costs for the State, or even yield a gain on liquidation, that the sale price is derisory compared with the value of the undertaking (estimated at EUR 350 million by STIM) and that the aid is disproportionate to the undertaking's needs.
- (159) STIM also draws the Commission's attention to the exorbitant nature of the cancellation clause in respect of the sale to the private sector.
- (160) Finally, STIM disputes the justification for the negative sale price based on the assumption that liquidation would take place under socially difficult circumstances, which seems unrealistic.

⁽⁹⁴⁾ According to CFF, France emphasises the essential nature of all of the services from Nice, the maintenance of the fleet at the current level and the alleged strategic nature of SNCM's shareholding in the CMN group.

⁽⁹⁵⁾ On 1 January 2007, with the arrival of the *Superfast X*.

⁽⁹⁶⁾ CFF proposes to restrict capacity available on each of the competitive markets (Nice, Tunisia and Algeria) to 2005 levels, to refrain from opening any new routes and to reconfigure the Marseille-Corsica route to cargo and passenger vessels in order to reduce costs.

- (161) As regards the second recapitalisation of EUR 8,75 million, STIM considers that that capital contribution does not comply with the principle of the private investor in a market economy, having regard to the inadequacy of the guarantees on return on investment. STIM challenges the argument based on the concomitance of private and public investment in order to deny that the contribution is State aid. Such concomitance, if established, is only a pointer and cannot be, by itself, a classification criterion⁽⁹⁷⁾. STIM states, finally, that that contribution is a guarantee given to the buyers by the French Government that SNCM has indeed been awarded the public service delegation to operate services to Corsica.
- (162) As regards the EUR 38,5 million of aid to individuals, STIM takes the view that this amount is in fact intended to provide SNCM with the resources to comply with certain essential aspects of the recovery plan submitted to the Commission which have not been implemented, in particular the reduction in staff.

4.2.2.2. *On compatibility with the 2004 guidelines*

- (163) STIM takes the view that the aid received by SNCM is not limited to the minimum. The contribution by SNCM and the buyers to the restructuring plan is insufficient, given the conditions imposed in the 2004 guidelines, and it is not demonstrated that SNCM's situation was so exceptional that it justified a lower own contribution. Furthermore, STIM notes the disproportionate nature of the aid granted in 2006 in so far as it enabled SNCM to set up reserves to cover future losses. Finally, the fact that SNCM did not plan to dispose of the assets which were not essential to the survival of the undertaking is contrary to the requirements laid down by the 2004 guidelines.
- (164) STIM considers that the amounts were paid in breach of the 'one time, last time' principle established by the 2004 guidelines. The deterioration in the undertaking's financial situation and the industrial disputes cannot be analysed as exceptional and unforeseeable circumstances for which the recipient company is not responsible.
- (165) Consequently, STIM demands additional compensation of half of the aid provided, i.e. EUR 98,25 million, through the sale of an additional vessel and of SNCM's direct and indirect shareholdings in CMN. In that respect, STIM states that those shareholdings are not strategic within the meaning of the 2004 guidelines on restructuring aid as they are not 'essential to the firm's survival', nor are they inalienable assets.
- (166) STIM also submits that the claimed synergies between SNCM and CMN do not exist because SNCM has no real role in the management and development of CMN. STIM stresses, finally, that the shareholders' agreement linking the two undertakings has not existed since 15 March 2006, when CMN gave notice that it was no longer bound by it, as held by the Paris Court of Appeal.

4.2.3. **Comments by SNCM**

- (167) SNCM sent the Commission a file summarising its economic and competitive position, together with legal advice assessing the risk that, in the event of liquidation proceedings, the state intervention would be characterised by the courts as de facto management of the company for the period preceding privatisation.
- (168) The law firm Baker & McKenzie, consulted by SNCM, came to the conclusion that, on the basis of the company's statutes, supplemented by correspondence, speeches and minutes of the boards, the State [...] (*) decisions⁽⁹⁸⁾ [...] (*) bodies⁽⁹⁹⁾, [...] (*) company boards⁽¹⁰⁰⁾. The report also notes that [...] (*) SNCM⁽¹⁰¹⁾. Finally, the same report refers to the fact that [...] (*) SNCM.
- (169) On that basis, SNCM's expert concludes that it is very likely that the Marseille Commercial Court would have characterised the French State as de facto manager.
- (170) Moreover, according to the findings in, inter alia, the reports by the Court of Auditors, the mismanagement attributable to the French State, the de facto manager of SNCM, contributed to SNCM's established shortfall in assets. The report severely criticises, inter alia, the following acts of mismanagement: the choice [...] (*) commercial. The loss caused by mismanagement amounted to [...] (*) (*).

⁽⁹⁷⁾ Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035.

⁽⁹⁸⁾ Among the facts relied on by that report, it appears that SNCM's management board [...] (*) its power of prior authorisation.

⁽⁹⁹⁾ On the basis of a report by the Court of Auditors, the report refers, for example, to the fact that the State decided [...] (*) could discuss it.

⁽¹⁰⁰⁾ Among the facts relied on by that report, it appears that the State [...] (*) industrial project.

⁽¹⁰¹⁾ The State, for example, [...] (*) the directors of SNCM.

- (171) In that context, according to SNCM's expert, there is no doubt that, under an action to make good a shortfall in assets, the State would be ordered to bear all or part of the shortfall, given the very heavy involvement of the State in the management of SNCM, its manifest acts of mismanagement and the scale of its financial resources.
- (172) On the basis of the relevant case-law, SNCM's expert concludes that, if SNCM had been liquidated, the State would certainly have been ordered to pay all of SNCM's payroll and social security debts. That would have resulted in the State as shareholder being made liable for an estimated share of between 85 % and 100 % of the established shortfall in assets (i.e. between EUR 316,6 million and EUR 385,7 million). Consequently, by deciding to privatise SNCM while strengthening in advance its capital in the amount of EUR 158 million, the State acted like a prudent investor.

V. OBSERVATIONS BY FRANCE ON THE COMMENTS BY THE INTERESTED PARTIES

5.1. OBSERVATIONS BY FRANCE ON THE COMMENTS BY THE INTERESTED PARTIES CONCERNING THE DECISION TO INITIATE THE 2002 FORMAL INVESTIGATION PROCEDURE

5.1.1. On the comments by CFF

- (173) The French authorities have indicated that some of the data submitted by CFF concerning SNCM's services were inaccurate.
- (174) Contrary to what is maintained by CFF, the State is of the opinion that the restructuring plan was devised in such a way as to turn SNCM around as soon as possible and to create the right conditions to ensure its viability in the medium and long term. The French authorities note that a significant part of the cost reduction programme has already been implemented. The number of vessels has been reduced and the programme for the disposal of assets is going ahead in accordance with the industrial plan. Services have been reorganised and the action plan to reduce intermediate consumption is beginning to bear fruit. Finally, the employment component of the industrial plan is gradually being implemented. Furthermore, in 2001 SNCM earmarked EUR 21,3 million to finance restructuring measures, in particular the plan to safeguard jobs.
- (175) With regard to determining the amount of aid, the French authorities confirm that an own capital/debt ratio of 0,79 is quite typical for the balance sheets of most shipping companies, except in special situations. According to the French authorities, the 0,497 ratio announced by CFF for CMN in 2001 is incorrect because it fails to take account of liquid assets on the balance sheet. With the appropriate correction, CMN's ratio is 0,557. According to the French authorities, that level is in any event still insufficient for CMN, as illustrated by the cash-flow problems it encountered in 2002. In fact CMN had to borrow up to EUR 8 million from STIM to finance a cash deficit not covered by its banks.

5.1.2. On the comments by STIM

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

5.1.3. On the comments by the representatives of the regional and local authorities

- (177) Although France agrees with the overall content of the letter from the president of the Provence-Alpes-Côte d'Azur region, it would none the less note that, contrary to what is asserted in point 2 of that letter ⁽¹⁰²⁾, supply on the route between mainland France and Corsica is not 'in excess of demand' and SNCM's fare policy complies with the commitments which it made not to start a price war and not to be a price leader.

5.2. ON THE COMMENTS BY THE INTERESTED PARTIES CONCERNING THE 2006 DECISION

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

⁽¹⁰²⁾ In its letter of 9 January 2003, the regional council of Provence-Alpes-Côte d'Azur cited the market study which had been sent to the Commission in connection with the notification, of which it obviously had a copy, highlighting the following finding: 'Supply [on the route between Corsica and mainland France] is in excess of demand. The passenger load factor of vessels varies on average from 20 % in winter to 50 % in summer.'

5.2.1. On the early implementation of the measures laid down in the first restructuring plan and its amendments

- (179) In response to the general remark concerning the early implementation by France of measures which may be classified as aid, the French authorities state that the implementation is justified by the specific features of the procedure, i.e. the annulment in 2005 of the Commission decision of 9 July 2003 authorising the aid, and not by an intention on the part of the French authorities to disregard their obligations under the EC Treaty. Indeed, France states that it has always kept the Commission informed of developments in the matter and of the different measures adopted since January 2005, in accordance with the principle of sincere cooperation between the Member States and the Commission.
- (180) Concerning those recent measures, the French authorities consider that, since none of them constitutes aid, Article 88(3) EC is not, ultimately, applicable to them and, accordingly, there is no obligation to suspend their implementation.

5.2.2. On the measures subsequent to the 2002 recapitalisation

- (181) As regards the sale process, France states that from the outset it provided for standard selection criteria based primarily on the price offered for the value of SNCM's shares and, secondarily, on other criteria (industrial plan, company plan and so on), including the amount which the candidates were prepared to invest in the company by way of a recapitalisation. France strongly contests the argument put forward by third parties that the process of offering for sale was not transparent and notes that, in the present case, the State went beyond its statutory and regulatory obligations, substantial and restrictive as they were, provided for in the event of the sale of public shareholdings. France notes that the development following BCP's offer to buy 100 % of SNCM's shares occurred in a very difficult financial and company context and that VT's joining BCP's offer did not change the commercial and financial terms of the transaction (except for capital ownership).
- (182) As regards the negative price of EUR 158 million, the French authorities note that, having regard to SNCM's financial situation on 30 September 2005, the undertaking was sold at market price and that sale was economically more advantageous than liquidation of the undertaking. In that respect, the French authorities state that application of the private investor criterion in the event of sale of an undertaking close to liquidation must be regarded not as a search for 'profitability of public action' but as the prevention of higher losses which the shareholder would have to suffer through a more costly liquidation.
- (183) In respect of the price paid, France contests the argument that SNCM was sold at a price which did not reflect its actual value. In particular, it refutes STIM's estimated value of the undertaking of nearly EUR 350 million, which takes into account only the balance-sheet items which increase the value using book equity (excess tax depreciation, residual gains on vessels, etc.) without taking account of liabilities which reduce it. That method of calculation of a purely accounting nature does not reflect the economic reality of a shipping company, such as SNCM, with assets of value on the balance sheet but also limited profitability and considerable off-balance-sheet liabilities.
- (184) The French authorities also refute CFF's argument that they underestimated the market value of SNCM's fleet, which CFF assessed at between EUR 406,5 million and EUR 426,5 million. The French authorities argue that the vessels taken into account in CFF's calculation do not correspond to those held in SNCM's name on 30 September 2005. The absence of discounts applied to the market value of the vessels does not take account of the background against which a potential compulsory liquidation of those assets would have taken place and, finally, the date chosen to calculate that market value, August 2006, is not the date of the potential liquidation of SNCM to which reference must be made, that date being 30 September 2005. Moreover, France notes that, if the calculation proposed by CFF were to be accepted, the negative price would be three times lower than the liquidation value of the assets required by the *Gröditz* case-law, which would therefore be more favourable than the scenarios presented to the Commission by the French authorities.
- (185) In response to CFF's argument calling into question the application of the *Gröditz* case-law by referring to the fact that the State's capital contribution to SNCM was linked to the sale of 75 % of its shareholding, reducing in proportion the prospects of profit in return, the French authorities note that the negative sale price of EUR 158 million does correspond to the sale of the entirety of SNCM's capital, followed by a new investment by the State of 25 %, giving a return of [...] (*) % per year. Accordingly, France takes the view that the return on investment remains guaranteed by virtue of its 25 % shareholding in the company because that stake enjoys a guarantee of a very high return.

- (186) France also contests the argument put forward by CFF on the non-applicability to the present case of the ABX approach, taking as a basis in particular the analysis of the actual liquidation costs of SNCM and the risk that the State could be held liable for the liabilities of the undertaking in an action to make good a shortfall in assets as provided for by French insolvency procedures and confirmed by national case-law (judgment of 22 March 2005 by the Rouen Court of Appeal). Although the French authorities consider that their conduct as manager of SNCM could not be described as 'mismanagement' in such an action, they insist that there is a very high risk that a national court would make an order against the State for the shortfall in SNCM's assets owing to flexible criteria for the existence of mismanagement within the meaning of Article L-651-2 of the Commercial Code and pursuant to the case-law cited above, which can be applied to the present case.
- (187) In respect of the recapitalisation of EUR 8,75 million, France notes that, contrary to the contentions of CFF and STIM, the capital contribution does not constitute State aid on account of the concurrence of that investment, the similarity of its subscription conditions and the higher-than-average return obtained by the State via CGMF.
- (188) In particular, the French authorities submit that the principle of equal treatment of investors is not called into question by the existence of the cancellation clauses since the latter were laid down in connection with the 100 % sale of SNCM and not with the EUR 35 million recapitalisation which followed it.
- (189) Furthermore, France submits that its investment is much lower than that of the buyers, since it is only the amount of EUR 8,75 million which must be compared with the investment made by the buyers (EUR 26,25 million). The first recapitalisation of EUR 142,5 million should be examined only as part of the comparison with the liquidation price.
- (190) Finally, France contests STIM's argument that that contribution is a guarantee given to the private buyers that SNCM has indeed been awarded the public service delegation to operate services to Corsica. The French authorities submit that the capital increase is prudent and independent of the undertaking's performance and that the award of the public service delegation to SNCM does not serve to improve the return expected on that investment.
- (191) As regards the EUR 38,5 million of social measures, France repeats the argument that those measures are aid to individuals and that their payment by the State cannot be regarded as providing an indirect advantage to the undertaking since they are in addition to SNCM's statutory and contractual obligations. Moreover, France points out that those measures do not permit the departure of staff who, without the measures, would remain the responsibility of SNCM.
- (192) Contrary to CFF's argument, the French authorities point out that the EUR 38,5 million does not correspond to the implementation of the staff reductions provided for in the 2003 social plan because those reductions have, despite the delay, already been implemented. The new social plan is therefore in addition to the first social measures of 2003.

5.2.3. On compatibility with the guidelines

- (193) France considers that, in the light of the foregoing, the amount of aid to be assessed is EUR 15,81 million.
- (194) Contrary to the contentions of CFF, the French authorities consider that, having regard to point 11 of the 2004 guidelines, the first recapitalisation, while enabling SNCM to reconstitute its capital, did not remove its status as an undertaking in difficulty in so far as that recapitalisation was intended to ensure the continuation of the company's activities.
- (195) France refutes CFF's contentions that it should not have had to re-inject money into the undertaking, given that SNCM could have had recourse to bank credit. In that regard, the French authorities note that, on 24 August 2005, the banks had refused to grant new cash lines to SNCM and that the only conceivable alternatives were therefore privatisation or liquidation of the undertaking.
- (196) France contests the arguments put forward by CFF and STIM concerning the failure of the 2002 restructuring plan which, despite some delay, was implemented and made it possible to achieve the objectives in 2005. The deterioration in SNCM's economic and financial situation owing to factors external to the undertaking itself then made it necessary to extend the plan notified in 2002 and to introduce new measures.

- (197) France takes the view that SNCM has good prospects for recovery and that the measures contemplated by the new shareholders, in particular the implementation of the social plan, the reinstatement of routes and the renewal of certain vessels, will enable the undertaking to return to viability. In that regard, France observes that, on account of the revenues deriving from the public service delegation (approximately [50-70] (*) % of SNCM's turnover) and in view of the level of fixed costs and the difficulties in redeploying the 6 vessels used on the Marseille-Corsica route, the public service delegation constitutes an essential element of the undertaking's strategy and its viability.
- (198) On the limitation of the aid to the minimum, France believes that it limited to the strict minimum the restructuring costs necessary to enable the restructuring to be carried out. To that effect, the French authorities note that, as the Commission recognised in its 2003 decision, the undertaking itself has contributed sufficiently to the restructuring plan from its own resources by virtue of the sale of assets for the amount of EUR 30,2 million. In addition, having regard to other sales made by SNCM for the amount of EUR 12,2 million, the total of the undertaking's own contribution comes to EUR 42,38 million. France considers that that amount is much higher than the amount of own contributions necessary to approve the restructuring aid, which finally amounts to EUR 15,81 million, since the other measures are not State aid.

5.2.4. On the conditions imposed by the Commission decision of 2003 and the possible new compensatory measures

- (199) Contrary to the contentions of STIM and CFF, the French authorities state that they complied with all of the conditions imposed by the 2003 decision, to which they were bound until the end of 2006, in particular the maintenance of the fleet of 11 vessels and the application of fares lower than those of competitors.
- (200) Indeed, France considers that, under the new final decision, the level of compensatory measures to be imposed on SNCM must be adapted because the amount of restructuring aid was henceforth EUR 15,81 million rather than EUR 69,3 million.
- (201) In that respect, France contests STIM's observations concerning the possibility that the Commission may require SNCM to sell its shareholding in CMN as a compensatory measure. France contests STIM's argument that the definition of strategic assets was called into question in the 2004 guidelines in relation to the 1999 guidelines.
- (202) As regards the measures referred to by CFF, intended to reduce SNCM's market presence, the French authorities recall that, as the Commission noted, moreover, in its 2003 decision (recital 87), there is no excess capacity in the markets concerned (France — Corsica & the Maghreb) and that a reconfiguration of services to Corsica under and outside the public service delegation would jeopardise the viability of the undertaking.
- (203) As for the argument raised by CFF that the implementation of the measures described above in favour of SNCM involves a serious risk of eliminating its main competitor in the mainland France-Corsica market, namely CFF, the French authorities submit that, having regard to the current structure of the market in which CFF is market leader, the maintenance of a competitive structure depends on the authorisation of SNCM's restructuring plan and the presence of the latter in the relevant market.

VI. ASSESSMENT OF THE MEASURES

6.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TFEU

- (204) Article 107(1) of the TFEU provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (205) The classification of a national measure as State aid within the meaning of Article 107(1) TFEU requires the following cumulative conditions to be fulfilled, namely: (1) the measure in question confers a selective economic advantage; (2) that advantage is financed via state resources; (3) that advantage distorts or threatens to distort competition and, finally, (4) that advantage has an effect on trade between Member States⁽¹⁰³⁾.

⁽¹⁰³⁾ See, for example, the judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.

- (206) The Commission notes that SNCM received state resources totalling EUR 274,54 million ⁽¹⁰⁴⁾ via CGMF, which is wholly owned by the State.
- (207) Since SNCM operates in the maritime transport sector, which is open to competition within Europe, the potential economic advantage that it has received is likely to distort competition and affect trade between Member States.
- (208) The fact that the cabotage market to the Mediterranean islands was, until 1 January 1999, temporarily exempt from the application of Regulation (EEC) No 3577/92 does not exclude prima facie that the subsidies granted for operating cabotage routes to the Mediterranean islands under a public service delegation could affect trade between Member States and distort competition.
- (209) In any event, even if subsidies granted for operating cabotage routes could not affect trade between Member States or distort competition before 1 January 1999, the situation changed after that date since, in accordance with Regulation (EC) No 3577/92, cabotage activities were from then on open to all operators in the European Union. In addition, it should be stressed that SNCM does not carry on only cabotage transport but also operates in the international maritime market, which was liberalised by Council Regulation (EEC) No 4055/86 ⁽¹⁰⁵⁾.
- (210) Accordingly, the Commission considers that in the present case the last three criteria of Article 107(1) TFEU cited in recital 205 of this decision are fulfilled. It must therefore examine in turn, in respect of each measure, the existence of a selective economic advantage, in accordance with the judgment of the General Court of 11 September 2012.

6.1.1. Relevant period for the purposes of the assessment

- (211) In accordance with the case-law of the General Court ⁽¹⁰⁶⁾, the Commission must, after the annulment of one of its decisions, base its new assessment only on the information that was available to it on the date of adoption of the annulled decision, in this case 8 July 2008.
- (212) Any events subsequent to 8 July 2008 must not, therefore, be taken into account. Changes that may have taken place in the market or in the situation of the aid beneficiary must be excluded from the analysis. Nor will the Commission consider the period of implementation of the restructuring plan from July 2008 onward ⁽¹⁰⁷⁾.
- (213) Similarly, the Commission is not under an obligation to start the investigation of the case afresh or even to supplement it by resorting to new technical expertise ⁽¹⁰⁸⁾. The annulment of an act concluding an administrative procedure which comprises several stages does not necessarily entail the annulment of the entire procedure. Where, as in this case, in spite of the fact that investigation measures have been taken allowing an exhaustive analysis to be made of the compatibility of the aid, the analysis carried out by the Commission is incomplete, thus making the decision unlawful, the procedure for replacing that decision can be resumed at that point by means of a fresh analysis of the investigation measures taken previously ⁽¹⁰⁹⁾.
- (214) Moreover, since the Commission is required to base its new analysis solely on information which was available to it in July 2008, information in respect of which both the French authorities and SNCM had already defined their position, it is unnecessary to consult them afresh ⁽¹¹⁰⁾. Finally, with the publication of the decision to open the procedure in the Official Journal, the third parties concerned were ensured the right to submit their comments ⁽¹¹¹⁾ and there is no provision in Regulation (EC) No 659/1999 requiring that that opportunity be made available to them again where the original restructuring plan has been amended during the investigation procedure ⁽¹¹²⁾.

⁽¹⁰⁴⁾ This amount corresponds to the additional capital contribution of EUR 15,81 million notified in 2002 and the amount of the public service delegation, i.e. EUR 53,48 million, and the three new measures implemented by the French authorities in 2006, namely the sale of 100 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the current account advance of EUR 38,5 million in favour of SNCM's employees.

⁽¹⁰⁵⁾ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

⁽¹⁰⁶⁾ *Alitalia v Commission*, see footnote 40 above.

⁽¹⁰⁷⁾ *Alitalia v Commission*, cited above, paragraph 137.

⁽¹⁰⁸⁾ *Alitalia v Commission*, cited above, paragraphs 144 and 159.

⁽¹⁰⁹⁾ *Alitalia v Commission*, cited above, paragraphs 99-101 and 142.

⁽¹¹⁰⁾ *Alitalia v Commission*, cited above, paragraph 174.

⁽¹¹¹⁾ See footnote 29.

⁽¹¹²⁾ See footnote 110.

- (215) This decision is therefore based, in the main, solely on the information available on 8 July 2008. However, in the alternative, the Commission will demonstrate that it would not change its conclusions if account were taken of the note by the French authorities dated 16 May 2013 in relation to the facts referred to before 8 July 2008 and of the information submitted by SNCM on 27 August 2013.

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

- (216) In the present case, the Commission must examine whether the EUR 158 million capital contribution by the State prior to the sale of SNCM to private purchasers, that is, ultimately, the 'negative sale price' of the undertaking of exactly the same amount, does not contain elements of State aid.
- (217) An open, transparent and non-discriminatory public selection procedure at the end of which the State disposes of the undertaking after a prior recapitalisation (for an amount greater than the sale price) does not necessarily exclude the presence of aid, liable to benefit both the privatised undertaking and the purchaser of that undertaking⁽¹¹³⁾.
- (218) In order to determine whether an undertaking has obtained an economic advantage from a capital contribution by the State, the Commission generally applies the principle of a 'private investor operating in a market economy' (the private investor principle), provided that the beneficiary is not liable for the reimbursement of other forms of State aid and that the contribution is subject to analysis with reference to the said principle. The private investor principle is an expression of the principle of equal treatment of public and private sectors, pursuant to Article 345 TFEU. According to that principle, capital made available to an undertaking by the State, directly or indirectly, in circumstances which reflect normal market conditions, cannot be classified as State aid⁽¹¹⁴⁾.
- (219) To that end, the Commission may assess, inter alia, whether the provider of the resources has acted like a private investor pursuing structural policy — whether general or sectoral — and guided by the longer-term prospects of positive returns on the capital invested. The validity of this approach has been acknowledged by the European Union Courts in a number of cases⁽¹¹⁵⁾.
- (220) According to settled case-law, when injections of capital are made by a public investor without any prospect of profitability, even in the long term, the provision of such capital constitutes State aid⁽¹¹⁶⁾.
- (221) The European Union Courts have also held that a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the long term could not reasonably allow itself, after years of continuous losses, to make a capital contribution which, in economic terms, proves not only costlier than selling the assets, but is, moreover, linked to the sale of the undertaking, which effectively removes any hope of profit, even in the longer term⁽¹¹⁷⁾.
- (222) Specifically, in its *Gröditz* judgment, the Court of Justice held that, in order to establish whether the privatisation of an undertaking for a negative sale price involves elements of State aid: 'it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up'⁽¹¹⁸⁾.
- (223) In the light of the foregoing, in order to determine whether the measure in question constitutes aid, the Commission must 'assess whether the solution chosen by the State is, both in absolute terms and compared with any other solution, including that of non-intervention, the least costly, which would lead, if that were the case, to the conclusion that the State has acted like a private investor'⁽¹¹⁹⁾.

⁽¹¹³⁾ Case C-334/99 *Commission v Germany* [2003] ECR I-1139, paragraph 142.

⁽¹¹⁴⁾ Commission Communication to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point 11). While this Communication deals with the manufacturing sector, the principle can be applied in the same way to all other sectors.

⁽¹¹⁵⁾ See, in particular, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435.

⁽¹¹⁶⁾ Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission of the European Communities* [1999] ECR II-17, paragraph 116.

⁽¹¹⁷⁾ See footnote 80.

⁽¹¹⁸⁾ See footnote 113.

⁽¹¹⁹⁾ Commission Decision 98/204/EC of 30 July 1997 conditionally approving aid granted by France to the GAN group (OJ L 78, 16.3.1998, p. 1).

- (224) In other words, the Commission must verify that the decision to make such a major capital contribution is indeed less costly than a liquidation.

6.1.2.1. *On assessing the costs of liquidation*

(a) *On taking account of the impact of the additional redundancy payments*

- (225) When quantifying the cost to the shareholder of liquidation, the French authorities hold the view that, in this day and age, large groups of undertakings cannot disregard the social consequences of their decisions to close sites or wind up subsidiaries. Accordingly, they usually implement social plans which may include measures to retrain staff, help them find new jobs, redundancy payments, and possibly even local development measures, which go beyond the requirements of statutory provisions and collective agreements.
- (226) In that respect, the French authorities consider that, on the basis of the 2005 social plan, itself based on the 2002 plan, the range should be from EUR [90 000-100 000] (*) to [120 000-130 000] per employee, i.e. a total amount of between EUR [200-210] (*) million and [250-260] (*) million. The French authorities point out that the lower limits of the abovementioned range take account of the fact that the costs of the reference social plan have been inflated due to the very large proportion of employees approaching retirement age, who leave under particularly advantageous conditions. Account is also taken of the context (liquidation of the undertaking and wholesale redundancies), which is in no way comparable to a cut in staff numbers allowing the company to stay in business, which is the premise for the reference social plan.
- (227) Ultimately, the French authorities consider that, even when using the analysis grid established by the General Court in its judgment of 15 September 2012, the transfer of control of SNCM for the negative sale price of EUR 158 million did not include elements of State aid. They maintain that the Commission has all the information necessary to respond to the Court's criticisms.
- (228) The Commission does not share this analysis.
- (229) According to the General Court judgment ⁽¹²⁰⁾, the making of additional redundancy payments may, in principle, constitute a legitimate and appropriate practice, depending on the circumstances of the case, the aim being to foster a calm social dialogue and preserve the brand image of a company or group of companies. In accordance with the principle of equal treatment of private and public sectors, the option of making additional redundancy payments is also open to the Member States in the event that a public undertaking goes into liquidation, even though their obligations cannot, in principle, exceed the strict minimum under statutory and contractual obligations. However, the Court states that '... the burden of those additional costs, because of legitimate concerns, cannot follow an exclusively social, even political, objective, as it would otherwise go beyond the framework of the private investor test ... In the absence of any economic rationale, even in the long term, the assumption of the burden of costs which exceeds the strict statutory obligations and obligations under agreements must therefore be considered to be State aid within the meaning of Article 87(1) EC' ⁽¹²¹⁾.
- (230) Regarding the argument put forward by the French authorities on protecting the State's brand image, the Court considers that '... the protection of the brand image of a Member State as a global investor in the market economy cannot constitute, other than under specific circumstances and without a particularly cogent reason, sufficient justification to demonstrate the long-term economic rationale of the assumption of additional costs such as additional redundancy payments' ⁽¹²²⁾. There are no such specific circumstances in this case.
- (231) The Commission notes that, following the launch of the procedure, the French authorities failed to define the economic activities of the French State, particularly at geographical and sectoral level. An assessment needs to be carried out of the long-term economic rationale of the measures in question, even though the French authorities eventually stated in their correspondence of 16 May 2013 that the State's actions should be compared to those of a diversified holding company, seeking to maximise its profits and protect its brand image as a global business, particularly as regards the management of its staff.
- (232) Regarding the brand image of CGMF, the Commission notes that it had no assets other than SNCM in the maritime transport sector. This argument cannot therefore apply to it.

⁽¹²⁰⁾ *Corsica Ferries France SAS v Commission*, cited in footnote 39, paragraphs 81 to 83.

⁽¹²¹⁾ Paragraph 84 of the abovementioned judgment.

⁽¹²²⁾ Paragraph 85 of the abovementioned judgment.

- (233) Regarding the brand image of the State as shareholder, the French authorities asserted that there was a high risk of social unrest in State-controlled undertakings, liable to affect not only those undertakings located in close proximity to SNCM's operations, but all sectors, and in particular the transport sector. The Commission holds the view that the French authorities failed to demonstrate that there was a bona fide risk of contagion to all public undertakings and that they also failed to demonstrate that the payment of the additional compensation helped prevent further strike action. Finally, the Commission considers that the State's assertion that the payment of the additional compensation was made on purely social grounds is not sufficient to rule out the presence of State aid.
- (234) Furthermore, the Commission considers that the French authorities have not adduced sufficient objective and verifiable data capable of showing that the making of additional redundancy payments, in similar circumstances, is an established practice among private entrepreneurs. The Commission notes that the mere reference to a limited number of social plans is not enough to demonstrate the existence of a sufficiently established practice in cases comparable to the one at hand, that the redundancy schemes referred to by the French authorities relate to restructuring rather than liquidation plans, and that a large number of these concern sectors which, on the face of it, have nothing in common with transport infrastructure (e.g. the cosmetics industry (Yves Saint-Laurent Haute couture), the agri-food industry (Danone) and the electronics industry (Hewlett Packard)). Furthermore, the table prepared by the French authorities in the note of 16 May 2013, which sets out a list of social plans, details six plans launched after the privatisation of SNCM and which cannot, therefore, serve as grounds for taking into account the additional redundancy payments.
- (235) SNCM produced a new list of five social plans in the note of 27 August 2013. The Commission considers that this list does not prove that the making of additional redundancy payments, in similar circumstances, is an established practice among private entrepreneurs. The Commission notes that, of the five plans in question, two concern SNCM, one of which is the subject of the present decision. These two plans cannot therefore be used to make objective comparisons for two reasons: first, SNCM's former practices in this area do not constitute a sufficient basis to justify the established nature of the practice and, second, the 2002 social plan relates to a period when SNCM was still under public control, while the comparison criterion set by the General Court was private undertakings operating in the same field. As such, the Commission notes that the Port of Marseille social plan cannot be taken into account because in 2004 the port was in public, not private hands. Moreover, as regards the last two social plans referred to, i.e. Air Lib and Eurostar, the Commission observes that these are restructuring, not liquidation plans. Lastly, the Commission observes that the average additional compensation of these two plans is more than 50 % below the average additional compensation paid by SNCM.
- (236) Finally, the Commission notes that the French authorities have not established that the French State's actions were motivated by a reasonable probability of obtaining an indirect material profit, even in the long term, by avoiding increased social unrest within the undertaking, given that the latter would have folded in the event of liquidation. There is insufficient evidence to support the hypothesis that larger payouts were made to employees of other public undertakings. This standpoint is lent even more credence by the fact that, even from the point of view of a global investor as hypothesised by the French authorities, the granting of very high severance payments to employees of a company is likely to complicate any future restructuring of other companies belonging to the same investor. Furthermore, the French authorities have not quantified the significant nature of the potential social costs which they cite as justification for the granting of additional redundancy payments.
- (237) The French authorities have also argued that a liquidation procedure would have been longer and potentially riskier for the State as shareholder than the sale of SNCM at a negative price. The Commission notes that the French authorities have failed to provide proof of this risk and have not explained why the length of the liquidation procedure would have been taken into account by a private shareholder. The *Frucona Kosice* ⁽¹²³⁾ case referred to by the French authorities has no bearing on the present case because it concerns the private creditor test. The length of a liquidation procedure is relevant for analysing whether the State, as creditor of Frucona Kosice, maximised recovery of its debts by accepting immediate partial repayment or if it would have been better to wait for the outcome of the liquidation of the undertaking. The circumstances of the present case are different since the State is a shareholder in SNCM, not a private creditor. Given that, in the event of liquidation of SNCM, the assets would clearly not be sufficient to cover the liabilities, the State would be unable to recover its contribution. Consequently, the length of the liquidation procedure has no bearing on this case.
- (238) The French authorities have therefore failed to justify the shouldering of the cost of these additional payments by the State acting as a private investor in the context of a liquidation.

⁽¹²³⁾ Case C-73/11 P, *Frucona Kosice v European Commission*.

(239) At this stage in the analysis, the Commission must determine the value of the liquidation of SNCM excluding the additional redundancy payments.

(b) On the liquidation value of SNCM

(240) According to the revalued net asset method, an asset shortfall is determined when the economic value of the actual assets (generally higher than the net book value) does not cover the economic value of the actual debts.

(241) In order to determine an asset shortfall in the present case, the Commission, with the assistance of its expert ⁽¹²⁴⁾, verified as explained above that on 30 September 2005 the value of SNCM's assets was insufficient to pay off preferential and non-preferential creditors.

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

(243) As regards other valuation methods, in particular that of 'present value of operating free cash flows', the Commission considers that, since this method appraises the company as a going concern, which would not be the case if SNCM were to go into liquidation, it is inapplicable in the present case.

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

(i) On the value of SNCM's assets

(245) The Commission observes in particular that SNCM's shareholder, in collaboration with Ernst & Young, calculated the cost of liquidating the undertaking (see the abovementioned CGMF report) on 30 September 2005, and supplementary expert opinions were provided by Oddo Corporate Finance and the Paul Hastings law firm. The Commission notes that the Oddo-Hastings report referred to above valued SNCM's assets at EUR 190,3 million.

(246) As regards the valuation of the fleet held in its name ⁽¹²⁵⁾, the gross market value of SNCM's vessels had been assessed at EUR 224 million on 30 September 2005 by the specialist broker BRS, while the Oddo report valued the fleet at EUR 150,7 million after discount ⁽¹²⁶⁾, brokerage commission ⁽¹²⁷⁾ and legal uncertainty ⁽¹²⁸⁾.

Table 3

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

	Value of asset Oddo report EUR million	Value of asset Commission expert EUR million
Intangible asset	—	—
Tangible assets		
Fleet held in own name	150,7	151,7

⁽¹²⁴⁾ Following a call for tenders, the Commission contracted an independent expert, Moore Stephens, Chartered Accountants, which issued its final report on 25 January 2008.

⁽¹²⁵⁾ The fleet comprises the following 7 vessels: *Corse*, *Ile de Beauté*, *Méditerranée*, *Napoléon Bonaparte*, *Paglia Orba*, *Monte d'Oro*, *Monte Cino*.

⁽¹²⁶⁾ The said discount of EUR 52,2 million (i.e. an average of 25 to 30 % of the gross market value), is due, inter alia, to the specific nature of SNCM's vessels (which are tailored to the services provided by the undertaking), to the condition of the vessels and to the circumstances of the sale of the entire fleet (in particular the weakness of the seller's position). BRS's valuation is largely based on the hypothesis of a sale, under normal trade conditions, of vessels which are fully up-to-date, well-maintained and in good working order.

⁽¹²⁷⁾ Estimated at EUR 4,6 million.

⁽¹²⁸⁾ The legal uncertainty is due to the likelihood of the authorised liquidator being forced to dispose of the vessels very quickly and to a glut in the market because of limited absorption capacity.

	Value of asset Oddo report EUR million	Value of asset Commission expert EUR million
Buildings ⁽¹⁾	11,2	11,2
Investments ⁽²⁾	32,7	38,3
Fixed assets	194,6	201,2
Inventories	—	—
Advances and payments on account	—	—
Accounts receivable	0,8	0,8
Other receivables ⁽³⁾	9,4	9,4
Net cash	- 14,5	—
Prepayments and accrued income	—	—
Other assets	- 4,3	10,20
Total assets	190,3	211,4

Sources: Oddo-Hastings report, Commission expert's report.

⁽¹⁾ With regard to buildings (including SNCM's registered office), the French authorities point out that the liquidation value given is based on the valuation of a buildings expert carried out in November 2003 and subsequently raised by 20 % to take account of inflation.

⁽²⁾ The investments concern mainly SNCM's equity securities in Sudcargos, Aliso, CGTH, CMN and Ferrytour.

⁽³⁾ This item concerns mainly state receivables, including compensation for public service obligations in September 2005 and the reimbursement by Assedic of employers' social charges for the 2004 financial year.

- (247) From the table above, it is clear to the Commission that the fleet of vessels constitutes the main element in the valuation of the undertaking. In that respect, the Commission expert, after carrying out a comparative analysis wherever possible, concluded that the discount applied to the gross market value of the vessels and the precautions for legal uncertainty were logical. On that basis, it concluded that there was no justification for rejecting the value of the fleet as estimated by the French Government.
- (248) As regards the discount, the Commission is of the opinion that its level is consistent with the discounts observed in sales of vessels in the event of compulsory liquidation. The Commission expert referred, by way of example, to the *Régie des Transports Maritimes* (a state-owned Belgian company operating the Ostend-Ramsgate route) which sold two car ferries in 1997 with discounts estimated at 35 % to 45 %. More recently, Festival Cruises disposed of three cruise vessels at an average discount of 20 %. The discounts observed in similar cases are therefore of the same order of magnitude as the discounts applied by the French authorities in this case.
- (249) As for the legal uncertainty, since no comparable transaction has taken place in the market, the Commission considers that the arguments justifying the application of legal uncertainty are warranted given the limited market for vessels of a certain type designed for a fairly specific use.
- (250) The Commission also notes that its independent expert revised upwards the valuation of the investments, in particular that of SNCM's holding in CMN (from EUR 21,8 million to EUR 28 million). In that respect, in view of Stef-TFE's offer to buy out the holding for EUR 35,2 million, as revealed to the Commission during the present investigation, the Commission considers that the valuation of SNCM's holding in CMN at EUR 28 million is reasonable in the context of a company liquidation.
- (251) The Commission expert did not raise any specific objections to the valuation of the other assets. It did not, however, accept the item 'net cash', because it was in deficit. The Commission considers therefore that this item should be reclassified under SNCM's liabilities.

- (252) Taking account of the various adjustments, the Commission values SNCM's assets at EUR 211,4 million on 30 September 2005.
- (ii) On the valuation of SNCM's liabilities
- (253) The Commission notes that the French authorities quantify the amount owed as preferential debts at EUR 153,8 million and the amount owed as non-preferential debts at EUR 170,9 million (excluding additional redundancy payments).
- (254) With particular regard to social liabilities, the French authorities assessed the cost of the social plan under collective agreement at EUR [70-80] (*) million. The costs relating to the said plan were determined on an individual basis taking into account the type of contract (permanent or fixed-term), the statutes and the collective agreements applicable (crew, office staff and ships' officers), seniority, rank and salary. This amount covered notice payments (EUR [20-30] (*) million), payments for leave taken with notice (EUR [0-10] (*) million), contractual redundancy payments (EUR [30-40] (*) million) and the Delalande contribution (EUR [0-10] million) ⁽¹²⁹⁾.
- (255) The cost of the social plan not under collective agreement is estimated by the French authorities at EUR [30-40] (*) million. This plan groups together all the flanking measures to with SNCM's statutory and regulatory redundancy obligations ⁽¹³⁰⁾ and the indirect costs of the social plan under collective agreement ⁽¹³¹⁾.
- (256) The cost of termination of the principal operating contracts concerns, essentially, the calling of the bank guarantee of EUR 7,4 million given to guarantee the proper performance by SNCM of its public service obligations, plus the penalty provided for by that agreement, equal to 2 % of the EUR 63 million baseline financial compensation for 2005, i.e. approximately EUR 1,2 million in the event of default by the delegatee.
- (257) Regarding the net liabilities related to the sale of the leased vessels ⁽¹³²⁾, the French authorities underline that, on the basis of certain assumptions ⁽¹³³⁾, the net sale proceeds were valued, by the specialist broker BRS, at EUR 144,8 million on 30 September 2005 after discount, brokerage commission and financial cost of portage. Since the savings on tax and bank debts amount to EUR 193,5 million, the outstanding balance of bank debts relating to the leased vessels amounts to EUR 48,7 million.

Table 4

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

	Value of liabilities Oddo report EUR million	Value of liabilities Commission expert EUR million
Senior debt including:		
Social and tax debts	[20-30]*	[20-30]*
Financial debts guaranteed by assets ⁽¹⁾	15,9	15,9
Cost of social plan under collective agreement	[70-80]*	[70-80]*
Cost of retired employees' mutual societies ⁽²⁾	10,2	10,2

⁽¹²⁹⁾ At issue is an obligation introduced by Article L.321-13 of the Employment Code, which obliges employers to provide severance pay to employees over 50 who are made redundant.

⁽¹³⁰⁾ Cost of job creation measures (EUR [0-10] (*) million), cost of redeployment agreements (EUR[10-20] (*) million), cost of the deployment support and assistance unit known as 'mobility' (EUR[0-10] (*) million).

⁽¹³¹⁾ Cost of laying off staff under SNCM contract on secondment to affiliated companies and staff of liquidated subsidiaries (EUR [0-5] (*) million) and cost of legal proceedings relating to the breach of employment contracts and applications for reclassification of employment contracts (EUR [0-10] (*) million).

⁽¹³²⁾ On 30 September 2005, SNCM operated three leased vessels: the NGV *Liamone* (held by the EIG Véronique Bail), the *Danielle Casanova* (EIG Joliette Bail) and the *Pascal Paoli* (EIG Castellane Bail).

⁽¹³³⁾ The assumptions underpinning that valuation are the following: SNCM brings an end to its lease-purchasing agreements on 30 September 2005, which means that the vessels are returned to their respective original owners (EIGs) and no rent is paid; the purchase options cannot be exercised; the disposal of the vessels is made by the EIGs' bank creditors on 30 September 2005; the net proceeds of the sale of the vessels is allocated first to the reimbursement of bank and tax debts.

	Value of liabilities Oddo report EUR million	Value of liabilities Commission expert EUR million
Cost of liquidation procedure	4,7	4,7
Interim operating losses ⁽³⁾	26,5	26,5
Payments to senior creditors	153,8	153,8
Unsecured debts ⁽⁴⁾	69,7	84,2
Cost of social plan not under collective agreement	[30-40]*	[30-40]*
Cost of termination of principal operating contracts	[10-20]*	[10-20]*
Additional cost related to disposal of leased vessels	48,7	48,7
Payments to unsecured creditors	170,9	181,1

Sources: Oddo-Hastings report, Commission expert's report.

- (1) The *Napoléon Bonaparte* and *Paglia Orba* vessels serve as guarantee for the amount of the shipping loans which were used to finance them.
- (2) This item stems from the practice whereby SNCM undertakes to assume liability for part of the costs of the complementary mutual benefits scheme for its retired employees.
- (3) Up to the completion of the liquidation. The interim losses take as underlying basis the payment of salaries for a single month. They also include the cost of decommissioning vessels held in its name, not deducted from the value of the assets. That cost corresponds to the cost of immobilising vessels in dock pending their sale.
- (4) The unsecured debts are broken down as follows: provisions for risk and charges (EUR 3,3 million), apportioned debts/shareholdings (EUR 0,1 million), trade suppliers (EUR 28,6 million), general representation (EUR 23 million), group and associated debts (EUR 7,8 million), liabilities adjustment account (EUR 6,9 million).

- (258) The Commission notes that social liabilities account for the major part of SNCM's liabilities. As regards the preferential social liabilities, i.e. the cost of the social plan, the Commission expert verified the formulae for calculating all the components of the plan on the basis of surveys and did not find any anomalies or errors. In the light of that verification, the Commission considers reasonable the sum of EUR [70-80] (*) million proposed by the French authorities for the social plan under collective agreement.
- (259) Regarding the interim operating losses, the Commission views the estimate as prudent in the light of the legislation, in particular Article L.622-10 of the French Commercial Code (Code du commerce) and Article 119-2 of Decree No 85-1388 of 27 December 1985 pursuant to which SNCM may be obliged by the relevant commercial court to continue its operations for a term of 2 months, renewable at the request of the prosecuting authority on account of its public service obligations.
- (260) The Commission expert did not raise any particular objections in respect of the unsecured debts. However, it increased the initial amount of EUR 14,5 million under 'net cash' to EUR 69,7 million. The Commission considers that the corrected figure is commensurate with the changes made to the valuation of SNCM's assets.
- (261) As for the cost of the social plan not covered by collective agreement (and excluding additional redundancy payments), the Commission expert considers that the estimated cost of the legal proceedings should be reduced to EUR [0-5] (*) million instead of the EUR [0-10] (*) million quoted by the French authorities. On that point, although the Commission is convinced that trade union organisations would call for the fixed-term contracts to be reclassified as permanent contracts ⁽¹³⁴⁾, it still believes that the figure should be based only on employees with a fixed-term contract, whose situation is evidently precarious (there are 150 such contracts). Based on a gross monthly salary of EUR [2 000-2 500] (*) with an allowance of 9 months' salary for the first [100-120] (*) fixed-term contracts and 6 months for the next [50-70] (*) contracts, the total amount is EUR [0-10] (*) million.

⁽¹³⁴⁾ In view of the heavy and repeated use by SNCM of fixed-term contracts.

- (262) Regarding the net liabilities related to the disposal of the leased vessels, the Commission considers that the assumptions underpinning that calculation are justified mainly because of the EIGs' excessive regard for contractual formalities, which restricts any substitution of SNCM by third parties and makes tax relief subject to the operation of vessels under the French flag. Furthermore, there are no grounds for applying legal uncertainty to vessels operated under leasing agreements because those vessels were disposed of by the EIGs' creditor banks. Against this background, the Commission takes the view that it is reasonable to take into account the financial costs of portage between 30 September 2005 and the date of actual disposal of the vessel.
- (263) In the light of the foregoing, the Commission considers that on 30 September 2005 SNCM's preferential liabilities were EUR 153,8 million and its non-preferential liabilities EUR 181,1 million.
- (iii) On the finding of a shortfall in assets
- (264) In the light of the foregoing, the Commission considers that on 30 September 2005 the value of SNCM's assets (i.e. EUR 211,4 million) was insufficient to pay off preferential creditors (EUR 153,8 million) and non-preferential creditors (EUR 181,1 million), i.e. a total of EUR 334,9 million. Consequently, the asset shortfall amounts to some EUR 123,5 million.
- (c) On taking account of action to make good the asset shortfall
- (265) The Commission also examined the French authorities' argument that the State, as majority shareholder, could be called upon to make good the asset shortfall in the event of liquidation of the undertaking (see below). One of the interested parties (CFF) contested the application of the national case-law referred to by the French authorities in this particular case. CFF holds the view that, regarding the case-law of the Rouen Court of Appeal in the *Aspocom Group Oyj* case, the court ordered the Finnish parent company to pay compensation to the employees of its liquidated French subsidiary because this compensation had been provided for by a social plan on the basis of a company-level agreement approved by the parent company. In the end, it was not paid out.
- (266) The French authorities consider that the total actual costs which the State would have had to bear as shareholder, through CGMF, amounted to between EUR 312,1 and EUR 361 million on 30 September 2005. This estimate takes account, in particular, of the risk of the State being called upon to make up the asset shortfall if the court were to consider it to be de facto manager of SNCM, and of the risk of the State being ordered to make additional redundancy payments to staff laid off. The French authorities consider that those risks must be taken into account when calculating the actual cost of the possible liquidation of SNCM.
- (267) What is at issue here is the estimated total costs which France, as shareholder, would probably have had to bear in the event of compulsory liquidation of SNCM in order to determine whether, in view of the risk of being ordered to bear these costs and given the amounts involved, a well-informed private investor would have preferred to sell its subsidiary directly at a negative price of EUR 158 million rather than run the said risk.
- (268) Under French law, the authorised liquidator of a company in compulsory liquidation has the power to launch an action for damages against the former managers of the company, known as an 'action en complément de passif' (action to make good an asset shortfall) in the event of cancellation of a recovery plan or receivership or compulsory liquidation⁽¹³⁵⁾.
- (269) The reason for the bringing of an action 'en complément de passif' against the former directors of the insolvent company is the need to build up the company's assets, which is one of the tasks entrusted to the authorised liquidator.
- (270) In several letters to the Commission, the French authorities maintained that a situation in which the State is ordered by a national court to make good the liabilities of the undertaking which it manages is a highly plausible scenario and that it must be taken into account when calculating the actual cost of a possible liquidation of SNCM.

⁽¹³⁵⁾ Law No 85-98 of 25 January 1985 on receivership and the compulsory liquidation of undertakings codified in the Commercial Code in Articles L-621 et seq.; Law No 2005-845 of 26 July 2005 concerning the safeguarding, receivership and liquidation of undertakings, codified in Articles 620-1 to 670-8 of the Commercial Code.

- (271) In its correspondence of 28 February 2008, SNCM provided the Baker & McKenzie Report evaluating the consequences of an action 'en comblement de passif' against the French State. That report concludes that a commercial court hearing the case would very probably hold that the State was liable and would order it to pay SNCM's social debts in their entirety.
- (272) The relevant legislation provides that the social debts of the company in liquidation may be made chargeable to its former de jure or de facto managers, subject to the cumulative fulfilment of four conditions.
- (i) Acknowledgement of the State as de jure or de facto manager of the undertaking in compulsory liquidation
- (273) The Baker & McKenzie report submitted by SNCM provided the Commission with an analysis leading to the conclusion that [...] (*). In essence, the aforementioned expert report aims to show, in accordance with relevant case-law⁽¹³⁶⁾, that the State had repeatedly committed [...] (*). In particular, according to the report, the State took [...] (*) decisions. Moreover, it would appear that the management organs [...] (*) the undertaking. Finally, the State [...] (*).
- (274) The Commission notes that the French authorities, in their correspondence of 28 March 2008, did not express any reservations [...] (*). In their letter of 20 November 2006, the French authorities themselves state that the court [...] (*) the undertaking.
- (275) However, the Commission takes the view that the statement made by the French authorities on 20 November 2006 in connection with a State aid procedure cannot in itself suffice to establish to the requisite legal standard that a court would have considered the national authorities to be de facto managers of the undertaking benefiting from the measures in question, or, especially, the degree of probability of such an eventuality.
- (276) In particular, as regards the decisions at issue, it is far from established that the final decision taken by the State deviates notably from the practice followed in the management by the State of its holdings. Even the Baker & McKenzie report highlights the existence of a recurring controversy surrounding the desirable level of intervention by the State in the management of its shareholdings and mentions the extensive role, in general, of [...] (*).
- (277) The examples of domestic case-law put forward by the State and by SNCM are not directly applicable to the circumstances at hand. The main cases cited concern local authorities, and the BRGM judgment of 6 February 2001 relates to a public industrial and commercial establishment.
- (278) In any event, it is far from established that the State acting as public authority would be considered to be de facto manager.
- (ii) The existence of one or more acts of mismanagement by the French State as de facto manager of the undertaking in compulsory liquidation
- (279) In the present case, the Commission notes that SNCM's expert report referred, on the basis of a non-exhaustive list of factual elements, to a series of factors to show that the State, [...] (*), committed acts of mismanagement.
- (280) In particular, it is reported that the French State made errors relating to investments linked [...] (*) SNCM. The State also allegedly committed numerous acts of mismanagement with regard to capacity [...] (*) SNCM.
- (281) In their letter of 30 April 2007, the French authorities portrayed the risk of an order for damages against the State as very high, having regard to the criteria for categorising mismanagement as provided for in Article L. 651-2 of the Commercial Code.
- (282) Again, the Commission considers that this statement of 30 April 2007, made in connection with a State aid procedure, cannot in itself suffice to establish to the requisite legal standard that a court would have considered that the national authorities committed the alleged errors, or, especially, the degree of probability of such an eventuality. This is all the more so since the French authorities deny the very existence of acts of mismanagement, which are, however, *a sine qua non* for the bringing of an action 'en comblement de passif'.

⁽¹³⁶⁾ French case-law requires the de facto manager to have taken regular positive action of a managerial nature.

(283) More fundamentally, SNCM, like the French authorities, relies to a large extent on very old management decisions. Thus the Baker & McKenzie report focuses on [...] (*) carried out up until 2000. It does not hesitate to refer to Court of Auditors reports for the financial years 1993-99. It was around the mid-1990s that the main acts of mismanagement allegedly took place. SNCM's creditors were informed of these management practices when they extended credit. There was, therefore, at least implicit acceptance of the risk associated with this type of management. There is nothing to indicate that the State's liability for making good the asset shortfall can reasonably be incurred in such a situation.

(284) Furthermore, these alleged acts of mismanagement can be explained by political choices made by the public authorities and there is nothing to indicate either that these political choices can be classed as mismanagement within the meaning of the case-law on making good a shortfall in assets.

(285) Finally, the Baker & McKenzie report lacks credibility, particularly when it maintains that SNCM's situation was attributable to external communication errors committed by the State with regard to that situation. All that emerges from this report is that the State mentioned a situation which was already public knowledge. The State's conduct therefore has nothing in common with an act of mismanagement.

(iii) The finding of a shortfall in assets

(286) In this case, the Commission remarks that the Oddo-Hastings report points up an asset shortfall of EUR 134,4 million at 30 September 2005, calculated as the difference between the value of SNCM's assets (EUR 190,3 million) and the value of the undertaking's liabilities (preferential and non-preferential debts valued respectively at EUR 153,8 million and EUR 170,9 million).

(287) The Commission previously estimated the shortfall in SNCM's assets at EUR 123,5 million at 30 September 2005 (see recital 264).

(iv) The existence of a causal link between the mismanagement and the established shortfall in assets

(288) According to the French authorities, the manager of a legal person may be declared liable, on the basis of Article L.624-3 of the Commercial Code, even if his act of mismanagement is only one of the causes of the shortfall in assets, and may be ordered to bear in whole or in part the social debts, even if his mismanagement is the cause of only a part of them⁽¹³⁷⁾. According to the French authorities, the French State would be called upon to bear a proportion estimated at between 85 % and 100 % of the established shortfall in assets, i.e. between EUR 114,3 million and EUR 134,4 million.

(289) There is no sound basis for this analysis. In so far as the alleged acts of mismanagement are based on decisions taken in the mid-1990s which immediately generated additional costs for SNCM, it is very difficult to attribute the problem to an asset shortfall in 2005, particularly since a lot of things happened between the two dates.

(290) Furthermore, if there seems to be no automatic link between the amount of compensation granted to make good the asset shortfall and the amount of the increase in liabilities caused by the manager's mismanagement (if this were to be established), this also means that the courts may decide to set the amount to be paid by the manager at a much lower level than the established asset shortfall⁽¹³⁸⁾.

(291) Contrary to what the French authorities (and SNCM) seem to believe, there is nothing to indicate that the decisions at issue here would be considered by the courts looking into the matter to be serious enough to warrant placing the burden of a major part of the asset shortfall on the shoulders of the public authorities. According to the allegations under investigation, the decisions were taken for protectionist purposes in a political context (what is more, 10 years earlier for the most part) or were more recent decisions taken to spare employees from having to make productivity gains or as part of efforts to improve industrial relations.

⁽¹³⁷⁾ Judgment of the Court of Cassation, 30 November 1993, No 91-20.554, Bull.civ. IV, n^o440, p. 319.

⁽¹³⁸⁾ See pages 46 to 48 of the Baker & McKenzie report.

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

- (292) According to the French authorities, in addition to the asset shortfall, and in the light of the relevant case-law⁽¹³⁹⁾, a court would definitely be compelled to order the French State to make the additional redundancy payments (between EUR [200-210] (*) million and EUR [250-260] (*) million). The French authorities consider the actual costs to be paid by the French State as shareholder as falling somewhere in the region of EUR 212,1 million to EUR 361 million.
- (293) The French authorities point out that, in recent judgments, the French courts have ordered the de facto or de jure manager to defray, as well as the asset shortfall, additional redundancy payments calculated on the basis of a social plan drawn up by the undertaking before it was put into liquidation.
- (294) The French authorities state in particular that, in the *Aspocomp* case, the French company Aspocomp SAS, a 99 % subsidiary of the Finnish company Aspocomp Group Oyj, signed a company-level agreement on 18 January 2002 describing the conditions for indemnification of a social plan relating to 210 employees out of a total of 550. That agreement described, in particular, the amount of compensation and additional payments as well as assistance in the case of voluntary redundancy. Following a change in group strategy, the parent company Aspocomp Group Oyj decided on 21 February 2002 to stop financing its subsidiary Aspocomp SAS, thereby forcing the latter into voluntary liquidation. That decision prevented the subsidiary from fulfilling its obligations under the company-level agreement and forced it to lay off all of its remaining employees.
- (295) In these circumstances, the judgment of the Rouen Court of Appeal confirmed the judgment of the Evreux labour court and ordered Aspocomp Group Oyj, which had 99 % control of its subsidiary, to pay (i) the employees affected by the company-level agreement the entire compensation and additional payments provided for in that agreement, as well as damages for dismissal without due and just cause and (ii) the employees laid off under the voluntary liquidation of Aspocomp equivalent payments given that, by not honouring the commitments made, the parent company had acted unfairly and with a culpable lack of concern.
- (296) Although France also referred, in support of its theory, to a judgment of the commercial division of the Court of Cassation⁽¹⁴⁰⁾ handed down on 19 April 2005, the Commission does not see any decisive element in that judgment with any bearing on the present dispute. The only relevant observation made by the Court of Cassation is that an appeal court did not set out adequate grounds in law to settle confusion over ownership between a parent company and its subsidiary. At all events, the Commission notes that the facts in *Aspocomp* are not comparable to those in the case under examination. In the present case, CGMF did not fail to honour its commitments to make additional redundancy payments.
- (297) It is to be noted that both SNCM and the French authorities seem to attribute importance to the fact that a social plan [...] (*). It is extremely doubtful that [...] (*) can be considered mismanagement such as to incur the liability of the State towards the employees [...] (*). Even in the unlikely event that [...] (*) the State was liable towards the employees and had entitled them to compensation payable by the State⁽¹⁴¹⁾, the granting of such an entitlement would itself constitute an advantage accorded to SNCM, and hence State aid, for reasons similar to those set out below concerning aid to individuals totalling EUR 38,5 million, as this measure was capable of improving somewhat industrial relations in the undertaking.

(vi) Conclusion on taking account of action to make good the asset shortfall

- (298) It has not been established to the requisite legal standard that the French authorities would, with a sufficient degree of probability, have been ordered by a national court to pay damages to make good the asset shortfall, and still less that the monies to be paid would have exceeded the negative price at which SNCM was 'sold'.

⁽¹³⁹⁾ See, inter alia, two judgments of the Rouen Court of Appeal of 22 March 2005 – judgment No RG 04/02549 *Aspocomp Group Oyj* and judgment No RG 01/02667 -04/02675.

⁽¹⁴⁰⁾ Cass. com., 19 April 2005, *Métaleurop*.

⁽¹⁴¹⁾ Or that it had undertaken, in this instance, to provide compensation in the event of future job losses.

- (299) Account should also be taken of the fact that the State's actions, assuming that it was indeed guilty of mismanagement, were intended to protect national industries and services, including SNCM and its employees, notably by avoiding imposing a situation on them which could have provoked social unrest. In reality, even if public bodies, including the State, can be considered in certain circumstances to be de facto managers of an undertaking, there is nothing to indicate that the measure to make good the shortfall can be used to gain insight into the State's policy decisions, particularly in such circumstances. This is a far cry from the circumstances of the *Aspocomp* case, which was in no way concerned with such matters.
- (300) The Commission considers in any event that the French authorities cannot now avail themselves of political choices made in the past to justify public intervention intended to remedy the effects of those earlier choices. On the contrary, both cases of intervention, i.e. the interference of the past and the more recent public intervention, should be regarded as cumulative distortions of competition. Accepting the State's liability for making good the asset shortfall would be tantamount to allowing the State to admit to mismanagement of the undertaking so as to be able to make a financial contribution without its being classed as state aid, thereby engendering a fresh distortion of competition. The State would effectively be 'using' its own mismanagement as justification for granting an additional financial contribution in contradiction with the general principle of 'nemo auditur propriam turpitudinem allegans' ⁽¹⁴²⁾.
- (301) It would also be totally contrived to portray the State simultaneously as saint and sinner, i.e. as a 'bad manager' (assuming this were proven to be the case) stepping in to bail out the undertaking which it has mismanaged. Management errors do not constitute normal behaviour on the part of the prudent private investor in a market economy. Accordingly, bail-out mechanisms to set right such errors are not normal behaviour either.
- (302) Accepting the theory advanced by the French authorities and by SNCM would pave the way for the State to award guarantees to undertakings by knowingly 'making management errors'. This is hardly acceptable in terms of aid discipline.
- (303) In this case, the conduct that would incur the liability of the State according to the theory expounded by SNCM and the French authorities would in fact only apply to the State's actions as a public authority, not as a shareholder. Given that a prudent private investor would not have taken decisions based on these political and public considerations, the risk of having to make good an asset shortfall resulting from such decisions does not come into play for a 'prudent private investor in a market economy' test ⁽¹⁴³⁾.
- (304) The French authorities point out that in its *ABX* decision of 7 December 2005 the Commission was willing to take account of the fact that 'in certain exceptional cases, some national legislation provides for the possibility of third parties to bring proceedings against the shareholders of a liquidated company, in particular if these shareholders may be considered [deleted in the text] and/or as being guilty of mismanagement.' ⁽¹⁴⁴⁾.
- (305) However, the Commission underlines that the concept of aid must be assessed objectively and notes that the decision to open proceedings in the same case stipulated that 'even in the unlikely event that all of these conditions required by national law to hold them accountable ... were fulfilled, this would still not rule out the presence of state aid in the measures for the benefit of the subsidiary.' ⁽¹⁴⁵⁾.
- (306) In the present case, the Commission considers that the French authorities have not adequately dispelled its doubts surrounding the assertion that SNCM's shareholder was at risk, with a sufficient degree of certainty, of being held to account.
- (307) In these circumstances, and having refused to take into account the additional redundancy payments (see recitals 225 et seq.), the Commission concludes that liquidating SNCM would have cost the State nothing. The Commission considers that the State, as shareholder, cannot be obliged to bear the costs of the liquidation because shareholders' exposure is linked to their capital contribution to the undertaking.

⁽¹⁴²⁾ Decision 98/204/EC, point 3.3.

⁽¹⁴³⁾ See, for example, the judgment of the Court of Justice in Case C-334/99 *Germany v Commission* ('Gröditzter') [2003] ECR I-1139, paragraphs 133-141 and the judgment of the General Court in Joined Cases T-268/08 and T-281/08 *Land Burgenland et al v Commission*, not yet reported, paragraphs 152-159.

⁽¹⁴⁴⁾ Recital 208 of the decision.

⁽¹⁴⁵⁾ OJ C 142, 11.6.2005, p. 2, paragraph 63.

6.1.2.2. Conclusion

- (308) The Commission considers that a private investor would have favoured the less costly solution, i.e. the liquidation of SNCM. It concludes, therefore, that the negative price of EUR 158 million constitutes State aid.

6.1.3. EUR 8,75 million capital contribution by CGMF

- (309) In their observations following the decision to open the procedure, the French authorities note that the recapitalisation by the State to the tune of EUR 8,75 million occurred concurrently with capital injections by private investors and that the State took a minority stake while the majority of the funds were provided by the market. Furthermore, they consider that the rate of return on the State's contribution, i.e. [...] (*) % per annum, constitutes adequate long-term profitability for capital invested by a private investor. In their note of 16 May 2013, they also state that the risks connected with the cancellation clause are offset by the repurchase option available to the private shareholders.
- (310) The State's contribution must now be compared with that of the private investors, i.e. EUR 26,25 million. The State's contribution amounts to EUR 158 million (see section 6.1.2) plus an additional EUR 38,5 million in individual aid and EUR 15,81 million paid under the 2002 plan (see sections 6.1.4 and 6.1.5).
- (311) All of the 2006 measures are set out in the memorandum of understanding in which each of the parties (CGMF, BCP and VT) agreed to the EUR 158 million capital contribution, the EUR 38,5 million current account advance and the EUR 8,75 million capital increase. These three measures constitute a single operation aimed at privatising SNCM. As the General Court itself observes in paragraph 125 of the judgment of 11 September 2012, 'That capital contribution [of EUR 8,75 million] takes place in the context of a global sale agreement, resulting from a single set of negotiations, in which the purchasers' capital constitutes the counterpart to significant commitments, in various forms, made by the French State'. The three measures in question are therefore to be considered a package and this capital injection into SNCM by the State must be compared with the contribution by private investors for the purposes of assessing the significance of the intervention.
- (312) In the light of the foregoing, the Commission concludes that the private shareholder contribution, i.e. 10,6 % of the total, cannot be considered significant.
- (313) As already established in recital 311, the three measures in question constitute a single privatisation operation. The Commission therefore considers that the public and private capital contributions are to be deemed concurrent.
- (314) Regarding the criterion of contributions made under comparable conditions, the Commission notes, firstly, that the interested parties CCF and STIM have called into question the significant nature of the private intervention, and in particular the existence of comparable conditions between the public investment and the private investors, given the presence of a cancellation clause.
- (315) The Commission considers that the circumstances of this capital increase alone demonstrate that the risks run by the private and public investors are not identical. The existence of the cancellation clause and the conditions attached thereto suffice to show that the respective outcome for the private investors and the public investor in terms of risk is not the same should the conditions set out in the clause be fulfilled. In accordance with the memorandum of understanding, private investors have the option of withdrawing and recovering their investment in the event of a negative decision by the Commission, the General Court or the Court of Justice, or of non-renewal of the public service delegation. This latter part of the cancellation clause is all the more penalising for the State as it concerns SNCM's core activity. SNCM is the incumbent operator linking Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under the public service delegation. Private investors are therefore protected by the cancellation clause against the commercial risk in respect of the majority of SNCM's activities. This risk is actually borne by the State alone.
- (316) Invoking the aforementioned cancellation clause would generate an obligation to reimburse all of the capital contributions of the buyers by SNCM for the benefit of these private investors. This would leave CGMF once more holding 100 % of SNCM's capital, at a time when the risk of liquidation and hence of the loss of a significant portion of the public investment will have increased substantially.

- (317) As for the promise to purchase by the private shareholders, this cannot be invoked by CGMF in the event of the receivership or liquidation of SNCM. This confirms that, in the event of difficulties, this option cannot be invoked, and the risks are borne essentially by CGMF and hence the State. The Commission considers, therefore, that this promise to purchase cannot be regarded as the counterpart to the cancellation clause.
- (318) Furthermore, the Commission cannot accept the French authorities' argument that the memorandum of understanding contained a series of guarantees intended to protect the State's investment. The obligations imposed on the buyers do not constitute additional risks or constraints placed on the buyers that would leave them in a situation comparable to that of CGMF. They are solely intended to ensure that, during the period in which the cancellation clause may be invoked by the private buyers, the latter do not make any legal modification to SNCM and carry out only those actions which are necessary in order to implement the business plan and the social pact.
- (319) Furthermore, as underlined by the General Court in its judgment of 11 September 2012, an analysis of the expected return is not in itself enough to enable the conclusion to be drawn that the investment was made by the State on market conditions, given the fact that the risks are not shared equitably between the public and the private shareholders.
- (320) Even if the condition of 'investments made on equal terms' ('*pari passu*') is not fulfilled, the measure can still be compliant with the principle of the private investor in a market economy. In such cases, it has to be shown that the State acted in the same way as a prudent private investor in a similar situation, for example by carrying out *ex ante* analyses of the profitability of the investment. However the French authorities have not provided proof of any such *ex ante* analysis. They only considered in their observations *ex post* that the fixed rate of return of [...] (*) % would be adequate for a private investor, by comparing it with the rates of return on an OAT (*Obligation Assimilable du Trésor*) issued by the State, and on which the return at the time was between 3,72 % and 3,95 %. They did not, however, provide any analyses to show that the rate of 10 % would have been acceptable for a private investor, given the risks borne by the State, e.g. the risks relating to the termination clause and those linked to the situation of the undertaking.
- (321) Above all, the rate of [...] (*) % applies only to the capital contribution of EUR 8,75 million, but any analysis should have taken into account the total state contribution accepted in the memorandum. Given that there is no return associated with the negative sale price of EUR 158 million or with the current account advance of EUR 38,5 million, the rate of return on the State's entire investment in SNCM at the time of privatisation in 2006 would have been significantly lower than the rate of return on an OAT. Given the risks involved, this rate would not have been accepted by a private investor in a market economy.
- (322) In the light of the foregoing, the Commission considers that the criteria laid down by case-law to exclude outright the aid nature of the measure in question are not fulfilled. The Commission considers, therefore, that the State's capital contribution of EUR 8,75 million confers an economic advantage on SNCM inasmuch as that contribution was made in parallel with a contribution of private capital under conditions which are not comparable within the meaning of Union case law. Consequently, the measure in question constitutes State aid within the meaning of Article 107(1) TFEU.

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

- (323) The French authorities consider that this funding constitutes aid to individuals which does not benefit the undertaking and therefore is not State aid. The interested parties CCF and STIM contested the categorisation of this measure as aid to individuals because they consider that the measure could generate indirect positive effects for SNCM.
- (324) The Commission considers that the fact that the direct beneficiaries of the aid to individuals are employees is not sufficient to demonstrate the absence of aid for the benefit of their employer. The General Court held that: 'the fact that the direct beneficiaries of the aid to individuals are employees is not sufficient to demonstrate that no aid had been provided to their employer.'⁽¹⁴⁶⁾

⁽¹⁴⁶⁾ Paragraph 137 of the judgment of 11 September 2012.

- (325) As also indicated by the General Court in paragraph 138 of the judgment of 11 September 2012, 'In order to examine whether that aid to individuals constitutes aid within the meaning of Article 87(1) EC, it is therefore necessary to determine whether SNCM obtains an indirect economic advantage which enables it to avoid having to bear costs which would normally have had to be met out of its own financial resources and therefore prevents market forces from having their normal effect.'
- (326) Furthermore, the Commission notes that, according to the memorandum of understanding, this measure is a commitment by the State towards the private partners to finance 'the proportion of the cost of possible voluntary departures or breach of employment contracts (whatever their nature) which is in addition to sums of all kinds which must be paid by the employer ...' As the General Court states in paragraph 145 of the judgment of 11 September 2012, the inclusion of this aid to individuals in the sale agreement tends to show that it creates an advantage. The parties had recourse to it because they could derive a certain advantage from it.
- (327) This aid is therefore liable to confer an economic advantage on SNCM by releasing it from the obligation to bear all the costs connected with the potential future departure of certain employees. If an undertaking is relieved of these costs by the State, it effectively receives an advantage. The Commission stresses that these supplementary social measures are intended to facilitate the implementation of the redundancy plans necessary to attain the objectives of the undertaking, and that they are not a statutory requirement. In this case, the frequency of industrial action within SNCM shows that the implementation of a social plan in the undertaking as much as guarantees the outbreak of strikes and other industrial action. There is absolutely no doubt that these additional social measures constitute an advantage for SNCM.
- (328) The Commission considers, therefore, that this measure constitutes aid within the meaning of Article 107(1) TFEU.

6.1.5. The balance of EUR 15,81 million awarded as restructuring aid in 2002

- (329) The 2006 measures increase substantially the EUR 69,29 million in restructuring aid examined under the 2002 plan and can be regarded as a modification to the restructuring plan and its cost. When privatisation was envisaged, the restructuring plan was still under way. However, the intended aim of restoring viability had not been achieved by SNCM. The General Court highlighted that '[i]n that regard, it must be noted that the 2006 Decision is explicit on the fact that, as there are elements of aid for restructuring in the 2006 Plan, those elements ought to be analysed in conjunction with the aid for restructuring in the 2002 Plan ...' ⁽¹⁴⁷⁾. The General Court underlines that this analysis was carried out 'on a sound basis'. The sum of EUR 69,29 million comprises the EUR 66 million granted in 2002 as the first instalment of the restructuring plan and the EUR 3,29 million in aid granted in 2005 as the second instalment.
- (330) Of this amount of aid granted under the 2002 restructuring plan, EUR 53,4 million concerns in reality the public service delegation. Since the General Court judgment of 11 September 2012 confirmed the legality of this aid, the Commission must examine jointly the compatibility of the restructuring aid proper, i.e. the EUR 15,81 million granted during the 2002 restructuring operation, and the compatibility of all of the 2006 measures in the light of the 2004 guidelines.

6.2. EXAMINATION OF THE COMPATIBILITY OF THE RESTRUCTURING AID PAID IN 2002 AND 2006

6.2.1. Guidelines to consider

- (331) The Commission notes that the 2002 restructuring plan was examined under the 1999 guidelines. It also notes that the new 2006 measures integrating the 2002 plan post-date the entry into force of the new 2004 guidelines and were implemented before the Commission had authorised them.
- (332) In accordance with the transitional rules provided for by the 2004 guidelines ⁽¹⁴⁸⁾, it is these guidelines which apply to the aid, inasmuch as it is illegal aid part of which was awarded after they entered into force.
- (333) Consequently, since the 2006 measures constitute aid, they are to be regarded as an integral part of the restructuring operations launched in 2002 and should be analysed alongside these. The compatibility of all of this aid will, therefore, be analysed under the 2004 guidelines.

⁽¹⁴⁷⁾ Paragraph 150 of the judgment of 11 September 2012.

⁽¹⁴⁸⁾ Paragraphs 102 to 104 of the 2004 guidelines.

6.2.2. 'A firm in difficulty'

- (334) In order to be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the guidelines.
- (335) In the present case, the Commission points out that fulfilment of this condition was ascertained in its decision of 17 July 2002 on rescue aid for SNCM⁽¹⁴⁹⁾ and in its decision of 19 August 2002 initiating the formal investigation procedure in respect of the recapitalisation plan on the basis of SNCM's annual accounts for 2001.
- (336) For the purposes of this decision, the Commission verified that SNCM satisfied the said condition by examining the company's annual accounts for 2002. The company's capital (excluding regulated provisions)⁽¹⁵⁰⁾ was still negative: EUR – 26,5 million in 2002 compared with EUR – 30,7 million in 2001. That level reflects the disappearance of more than half of the company's registered capital, more than a quarter of which disappeared during the 12 months following the notification, thus satisfying the condition set out in point 10(a) of the Guidelines.
- (337) As well as that trend in the share capital, the Commission notes, inter alia, that:
- between 2001 and 2002, pre-tax losses increased from EUR – 5,1 million in 2001 to EUR – 5,8 million in 2002, with net losses in 2002 reduced only through the sale of a number of vessels,
 - SNCM's cash flow dropped from EUR 39,2 million at the end of 2001 to EUR 35,7 million at the end of 2002,
 - net financial debt, excluding leasing, increased from EUR 135,8 million in 2000 to EUR 144,8 million in 2002,
 - financial charges (interest and similar charges) increased from EUR 7 million in 2000 to EUR 9,503 million in 2002.
- (338) Moreover, the French authorities confirmed to the Commission that the banks were now refusing to lend money to the company because of its indebtedness, even though SNCM had offered to put up its newest vessels, free from mortgages and other encumbrances, as security.
- (339) The public service delegation agreement did nothing to change that analysis. While the agreement, in conjunction with the success of the restructuring plan, undoubtedly enabled SNCM to achieve positive operating results, the fact remains that its acute lack of capital, its growing indebtedness and the cost of operational measures under the restructuring plan can be expected — within a certain time-frame — to cause the company to fold.
- (340) Since the restructuring period spanned the years 2002-2006, it must be verified whether SNCM fulfilled the said condition during that period and in particular at the time when the decision was taken to inject fresh public funds.
- (341) The 2003 decision observed that SNCM fulfilled this criterion during the 2001 and 2002 financial years⁽¹⁵¹⁾.
- (342) It must now be verified whether SNCM continued to meet the condition in the 2003-05 financial years, i.e. the last complete accounting years prior to the implementation of the new measures in 2006 relating to the privatisation of SNCM.

⁽¹⁴⁹⁾ See footnote 5.

⁽¹⁵⁰⁾ Regulated provisions are costs entered in the accounts in accordance with French tax rules.

⁽¹⁵¹⁾ Paragraphs 209 to 297.

- (343) As already indicated in recitals 73 et seq., SNCM's situation deteriorated significantly in 2004 and 2005. The company's profits before tax stood at EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. Net profit was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005. Shareholders' equity in 2005 (EUR – 1,7 million) dropped by 25,5 million compared with 2004. This drop saw more than half of the firm's share capital wiped out, with more than a quarter of that capital lost over the preceding 12 months, thereby meeting the criteria set out in point 10(a) of the 2004 guidelines.
- (344) In the light of the foregoing, the Commission considers that SNCM can be considered a firm in difficulty within the meaning of the 2004 guidelines.

6.2.2.1. *Own contribution*

- (345) Pursuant to point 43 of the guidelines, 'The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.'
- (346) Point 44 of the guidelines stipulates that 'The Commission will normally consider the following contributions to the restructuring to be appropriate: at least 25 % in the case of small enterprises, at least 40 %, for medium-sized enterprises and at least 50 % for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a lower contribution.'
- (347) Point 7 of the guidelines also specifies that 'it is appropriate to reaffirm with greater clarity the principle that [the substantial contribution from the beneficiary to the restructuring] must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition ...'
- (348) The case-law also emphasises that the own contribution must indicate that the markets believe in the feasibility of a return to viability⁽¹⁵²⁾. The Commission stresses that this requirement is particularly relevant in respect of SNCM because of the latter's situation since 2002. The Commission points out that the initial restructuring measures of 2002 did not achieve the desired results. Some of them were either not complied with or not attained (see recital 351). Since SNCM was not able to fully implement these initial restructuring measures, from 2004 its economic and financial situation continued to deteriorate (see recitals 73 to 75).
- (349) The restructuring costs amounted to EUR 46 million in 2002. As for the 2006 measures, the Commission considers that the amount of the restructuring costs corresponded to the amount of the aid⁽¹⁵³⁾, i.e. EUR 202,5 million, plus the EUR 26,25 million capital contribution from the private partners, giving a grand total of EUR 274,8 million. The own contribution is made up of 42,385 million in net asset sales and the EUR 26,25 million capital increase by the private partners, giving a total own contribution of EUR 68,635 million. Consequently, taking into account the new measures of 2006, the own contribution accounted for 25 % while the guidelines stipulate that it must be at least 50 %. The Commission notes that the French authorities did not invoke exceptional circumstances and cases of particular hardship, in which case the Commission is at liberty to accept a lower contribution. In any event, the Commission considers that there were no exceptional circumstances in this particular case which would warrant a decrease in the level of own contribution required by the 2004 guidelines.
- (350) The Commission considers, therefore, that SNCM's own contribution to the restructuring effort is still insufficient with regard to the provisions of the guidelines.

⁽¹⁵²⁾ See the judgment of the General Court of 7 December 2010 in Case T-11/07 *Frucona Košica v Commission*, not yet reported, paragraphs 244 and 245.

⁽¹⁵³⁾ The 2006 measures dealt with the privatisation of SNCM.

6.2.2.2. *Return to long-term viability*

(351) In its decision to open the procedure, the Commission expressed doubts about the long-term viability of SNCM, in particular in the light of the following:

- SNCM did not plan to discontinue all of its loss-making activities,
- the success of the restructuring plan was closely linked to the award of the public service delegation between Marseille and Corsica from 1 January 2007 to 31 December 2012,
- the forecast reductions in crew numbers set out in the 2002 plan were not adhered to and the 10 % increase in productivity was not achieved,
- the reduction of 400 full-time equivalent jobs and the productivity measures provided for in the 2006 plan were inadequate owing to the slippages from the 2002 plan.

(352) The French authorities replied that the change in shareholders and the implementation of the three measures set out in the privatisation plan would enable SNCM to develop its activity on a sound basis and that the loss-making nature of certain parts of its business were therefore not irremediable.

(353) The Commission notes that the measures provided for in the 2002 restructuring plan could not be brought to fruition and that this led to a marked deterioration in the company's results in 2004 and 2005. In 2006, the EUR 20 million increase in turnover and the EUR 9 million increase in public service compensation were not enough to restore operating profit because the increase in fuel prices and operating costs was far higher than expected. The Commission expert noted that the implementation of the business plan of the buyers was seriously impeded by a number of incidents⁽¹⁵⁴⁾ and concluded that the cumulated losses were likely to be far bigger than initially envisaged for 2007.

(354) Consequently, the Commission considers that the responses of the French authorities have not dispelled all its doubts. Linking the restoration of viability to the award of the public service delegation from 2007 to 2013 and to the implementation of the three measures set out in the privatisation plan, which had not been confirmed as legal and compatible with the internal market, seems risky. The credibility of a long-term plan to restore the viability of an undertaking presupposes, at the very least, that the underlying assumptions are realistic. In this case, however, the success of the plan depends almost exclusively on the occurrence of two hypothetical events over which SNCM has no control. Furthermore, given SNCM's financial situation at the time, the Commission has doubts concerning its ability to finance the necessary refurbishment of some of its ferries. This refurbishment is, however, presented by the French authorities as a factor in enabling them to achieve their objectives of restored viability.

(355) The Commission considers, therefore, that the condition of restoring long-term viability required by the guidelines is not fulfilled.

6.2.2.3. *Avoidance of undue distortion of competition (compensatory measures)*

(356) The annulled decision of 2008 mentioned four compensatory measures:

- the closure of the Corsica Marittima subsidiary (82 000 passengers in 2000) which was responsible for services between Italy and Corsica, and thus the withdrawal of the SNCM group from the market covering that route,
- the virtual withdrawal by SNCM of services between Toulon and Corsica — a market which accounted for as many as 460 000 passengers in 2002,

⁽¹⁵⁴⁾ See Stephens report, study on the restructuring of the SNCM shipping company, p. 85, paragraph 3: implementation of the public service delegation in July 2007 instead of January; numerous disputes with CFF.

- the limitation of the total number of available seats and the number of round trips operated by SNCM each year from 2003, specifically on services between Nice and Corsica,
- the sale of four vessels.
- (357) The Commission would like to point out that these measures had been proposed by the French authorities in connection with the EUR 15,81 million in aid, i.e. the restructuring aid granted in 2002.
- (358) Following the annulment of the 2008 decision by the judgment of 11 September 2012, the aid total now amounts to over EUR 210 million. The Commission considers that its doubts have not been allayed for the following reasons:
- (359) Concerning the sale of the four vessels as part of the restructuring measures in 2002, the Commission notes that these sales were partially offset by the delivery of the *Danielle Casanova* in June 2002, and the *Paglia Orba* and *Pascal Paoli* mixed freight and passenger vessels in 2003.
- (360) Concerning the closure of Corsica Marittima, point 40 of the guidelines states, inter alia, that 'Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures'. Consequently, the closure of Corsica Marittima, which had been making a loss since its inception in 1990, cannot be treated as a compensatory measure, but rather as a measure to help restore long-term viability.
- (361) The same reasoning applies in respect of the route between Corsica and Nice. The Commission notes that SNCM has a minority market share, with Corsica Ferries holding 70 % of the market⁽¹⁵⁵⁾. According to the Stephens report, there is high demand for the service departing Nice, particularly during the summer period. There is also demand for this service outside the summer season. However, the route was making net losses between 2004 and 2007. Consequently, this measure cannot be regarded as a compensatory measure, but rather as a measure to help restore long-term viability.
- (362) The Commission also notes that passenger traffic has increased considerably between Corsica and the port of Toulon, shooting up from less than 200 000 passengers per annum in 1999 to almost 1 million in 2007⁽¹⁵⁶⁾. Consequently, SNCM's virtual withdrawal from this route could be regarded as a compensatory measure. The Commission notes, however, that the Toulon-Corsica route is the least significant for SNCM in terms of passenger numbers.
- (363) None the less, even if this measure were to be classified as a compensatory measure, the Commission considers that it would be far from sufficient. Point 40 of the guidelines states that '[t]he measures must be in proportion to the distortive effects of the aid ...'. As already set out in recitals 341 and 342, the Commission notes that these measures had been proposed by the French authorities in connection with the amount of EUR 15,81 million in aid, an amount corresponding to the restructuring aid granted in 2002. With the total amount of aid now standing at some EUR 218 million, the Commission is of the opinion that the measures proposed are insufficient compared with the distortion of competition caused by the granting of this aid.
- (364) Consequently, the Commission concludes that its doubts concerning the classification of these measures, either as compensatory measures or as measures required to restore viability, have not been allayed. In any event, the measures proposed are still far from sufficient.
- (365) The French authorities have highlighted the risk of a monopoly for CFF if SNCM were to disappear. The Commission considers that the French authorities have not demonstrated sufficiently the existence and significance of this risk. The transport of passengers and freight between mainland France and Corsica is an open and competitive market for all operators present in the Mediterranean. This market is also characterised by the absence of entry barriers. In any event, the position of Corsica Ferries is not such as to justify competition being distorted by the contested measures.

⁽¹⁵⁵⁾ See Stephens report, study on the restructuring of the SNCM shipping company, p. 96.

⁽¹⁵⁶⁾ See French Competition Authority (Autorité de la Concurrence), Opinion No 12-A-05 of 17 February 2012, paragraphs 124 and 125.

- (366) In the light of the foregoing, the Commission concludes that the measures proposed do not fulfil the criteria set out in points 38 to 42 of the guidelines.

VII. CONCLUSION

7.1. INCOMPATIBILITY AND RECOVERY OF THE CAPITAL CONTRIBUTION NOTIFIED BY THE FRENCH AUTHORITIES IN 2002 AND OF THE THREE NEW MEASURES IMPLEMENTED BY THE FRENCH AUTHORITIES IN 2006

- (367) The capital contribution of EUR 15,81 million notified by the French authorities in 2002 and the three new measures implemented by the French authorities in 2006, i.e. the sale of 75 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the cash advance of EUR 38,5 million in favour of SNCM's employees, constitute aid within the meaning of Article 107(1) TFEU. This aid is incompatible with the internal market.
- (368) The Commission points out that, in accordance with Article 14(1) of Regulation (EC) No 659/1999, all unlawful aid that is incompatible with the internal market must be recovered from the beneficiary.
- (369) For the purposes of such recovery, the French authorities must also add to the aid amount the recovery interest payable from the date on which the aid concerned was made available to the company until it has been effectively recovered⁽¹⁵⁷⁾, in accordance with Chapter V of Commission Regulation (EC) No 794/2004⁽¹⁵⁸⁾.

7.2. INCOMPATIBILITY AND RECOVERY OF THE RESCUE AID

- (370) If the measures notified as restructuring aid do not satisfy the compatibility conditions provided for by the guidelines, the consequences of this incompatibility should be drawn in respect of the rescue aid awarded by the French authorities to SNCM forming the subject matter of the Commission Decision of 17 July 2002, and recovery instigated.
- (371) On 19 November 2002, the French authorities transmitted to the Commission a copy of the cash advance agreements between SNCM and CGMF and proof of repayment of CGMF's advance to SNCM through two bank transfers of 13 May and 14 June 2002,

HAS ADOPTED THIS DECISION:

Article 1

The capital contribution of EUR 15,81 million and the three new measures implemented by the French authorities in 2006, i.e. the sale of 75 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the cash advance of EUR 38,5 million in favour of SNCM's employees, implemented by France for the benefit of SNCM in breach of Article 108(3) TFEU, constitute State aid which is unlawful and incompatible with the internal market.

Article 2

1. France shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary until that of their recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008⁽¹⁵⁹⁾ amending Regulation (EC) No 794/2004.

⁽¹⁵⁷⁾ See Article 14(2) of Regulation (EC) No 659/99.

⁽¹⁵⁸⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁵⁹⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. France shall ensure that this Decision is implemented within 4 months following the date of its notification.

Article 4

1. Within 2 months of notification of this Decision, France shall communicate the following information to the Commission:
 - (a) the total amount (principal and interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) the documents proving that the beneficiary has been ordered to repay the aid.
2. France shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 20 November 2013.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary	Total amount of aid received under the scheme (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency.