

COMMISSION

COMMISSION DECISION

of 22 November 2006

on State aid implemented by France for the Laboratoire national de métrologie et d'essais (C24/2005)

(notified under document number C(2006) 5477)

(Only the French version is authentic)

(Text with EEA relevance)

(2007/217/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

- (1) Following a complaint from a competitor, the Commission was informed that France had implemented State aid for the Laboratoire national de métrologie et d'essais (hereinafter referred to as 'LNE') ⁽²⁾.
- (2) By letters dated 3 September 2003, 11 February 2004 and 7 June 2004, the Commission requested the French authorities to submit information about the State's financial assistance for the LNE. The French authorities provided the Commission with information by letters dated 7 November 2003, 5 April 2004 and 6 August 2004.
- (3) By letter dated 5 July 2005, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of certain measures by letters dated 4 November 2005 and 19 April 2006. France provided the information requested in the decision to initiate the procedure.

- (4) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measure.

- (5) The Commission received comments from interested parties. It forwarded them to France, which was given the opportunity to react; its comments were received by letter dated 1 March 2006.

- (6) The Commission sent additional questions on 6 June 2006. The French authorities' replies were sent on 2 August 2006 and were registered as received by the Commission on the same day.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Recipient

Status and activities

- (7) The LNE was set up in 1901 as part of the Conservatoire National des Arts et Métiers. It ranked as a public institution under the supervision of the Ministry of National

⁽¹⁾ OJ C 263, 22.10.2005, p. 22.

⁽²⁾ LNE is the acronym for the Laboratoire national de métrologie et d'essais, established by Decree of 25 January 2005, following the incorporation of the Bureau national de métrologie into the Laboratoire national d'essais.

⁽³⁾ See footnote 1.

Education. In 1978 it acquired EPIC status (public enterprise of an industrial and commercial nature) pursuant to Law No 78-23 of 10 January 1978 on consumer protection and information (products and services), under which, the LNE was made responsible for performing all analysis, research, consultation, expertise, testing and supervisory services and providing technical assistance to protect and inform consumers or to improve product quality. The LNE was also authorised, as and when requested by the Ministries, to study on their behalf the test methods for drawing up regulations and standards and to issue quality certificates. Its tasks also included liaising on the public authorities' behalf with the international bodies responsible for these areas. In 2005 the LNE was given the additional task of heading up the national scientific metrology service (a role previously played by the public interest group Bureau national de métrologie — 'BNM' and it became the Laboratoire national de métrologie et d'essais.

- (8) Besides its public service task, the LNE offers companies a wide range of services covering every stage in the life of their products. Its four core activities are measurement, testing, certification and training. It has the resources to conduct standard or tailor-made testing programmes in many fields ⁽⁴⁾. Its clients are industrial companies, distribution companies, local and regional authorities, consumer organisations, legal experts and courts of law, insurance companies and government departments ⁽⁵⁾.
- (9) The LNE uses its premises and equipment both to perform the tasks assigned to it by the State and to provide services to third parties.
- (10) The LNE plays an active part in European and international organisations such as the CEN (European Committee for Standardisation), EUROLAB (European Federation of National Associations of Measurement, Testing and Analytical Laboratories), the EOTC (European Organisation for Conformity Assessment) and the ILAC (*International Laboratory Accreditation Committee*).
- (11) It has 700 staff divided into 30 multidisciplinary teams and 55 000 m² of laboratory space, including 10 000 m² in Paris and 45 000 m² in Trappes.
- (12) The LNE has offices in Asia (LNE-Asia in Hong Kong ⁽⁶⁾) and in the United States (North America G-MED subsidiary in Washington). These activities are, however, small-scale.

- (13) In 2005 its revenue was EUR 65 million and its profits EUR 0,7 million.

Performance contracts

- (14) Since 1997 the mandate given to the LNE by the State has been enshrined in performance contracts concluded between the French authorities and the LNE for a period of four years. The first performance contract was in force between 1997 and 2001, the second between 2001 and 2004. The third contract is for the period 2005 to 2008.
- (15) These contracts include tasks as a national metrology laboratory and as a research body, the provisions of technical assistance to the public authorities and support services to businesses in the field of testing and conformity attestation.

The LNE's resources

- (16) According to Decree No 78-280 of 10 March 1978 on the LNE, the resources accruing to the enterprise include grants from the central government, regional or local authorities, public institutions and public or private bodies of all kinds ⁽⁷⁾. On this basis, the LNE has to date been awarded operating grants ⁽⁸⁾ and investment grants:

<i>(EUR million)</i>		
	Operating grants	Investment grants
2005	14,7	6,9
2004	13,8	6,1
2003	13,0	5,5
2002	13,6	4,6
2001	12,6	4,6
2000	11,2	4,6
1999	10,8	4,4
1998	10,9	4,1
1997	10,9	4,2
1996	10,4	4,2
1995	10,7	4,1
1994	11,0	4,0
1993	10,6	3,8

⁽⁴⁾ For example, metrology and instrumentation, materials, consumer products, health and medical apparatus, industrial equipment and components, logistics and packaging, energy and the environment.

⁽⁵⁾ Source: www.lne.fr

⁽⁶⁾ In 2001 the LNE set up LNE-Asia, a joint venture between the LNE and the CMA Testing and Certification Laboratories.

⁽⁷⁾ This decree was amended by Decrees Nos 2005-49 of 25 January 2005 and 2005-436 of 9 May 2005, in particular as regards the financial and accounting arrangements and the supervision of the LNE. The LNE's resources, however, remain exactly the same.

⁽⁸⁾ The sum of the amounts corresponding to the Metrology Contract and of the operating grants on the profit and loss account.

- (17) According to the French authorities, the operating grants and the investment grants were awarded by the Ministry of Industry and the BNM in return for the LNE's public service tasks. Essentially, they are designed to cover the costs incurred in performing these tasks. The legal basis of these grants is the Finance Law voted on each year by the French Parliament.
- (18) Some of the investment grants are linked to the construction of two new laboratory complexes 'Trappes 3' and 'Trappes 4' (phases 1 and 2), named after their location. These grants were awarded by the Industry and the Environment Ministries, the BNM, the Conseil Régional d'Ile-de-France and the Conseil Général des Yvelines.
- (19) The LNE also obtains resources from its commercial activities. The turnover from the market sector always accounted for over 50 % of the LNE's total resources over the period examined, reaching 63 % in 2005.

2.2. The relevant markets

- (20) The LNE operates in the testing, metrology, certification, measurement, training and R & D markets. It provides the above services mainly in the following sectors: consumer products, medical/health, packaging, construction products, and industrial products.
- (21) These markets are open to competition in the European Community. In particular, the LNE competes with other organisations on the market for the certification required by Community Directives and with thousands of conformity assessment bodies, mainly because of its authorisation to award national standards established by other Member States' authorities (for example, the German GS mark).

2.3. Grounds for initiating the procedure

- (22) At the end of its preliminary examination, the Commission found that it was not possible at that stage to ascertain accurately whether some of the tasks assigned to the LNE were services of general interest or not and also whether these activities were commercial or not.
- (23) The Commission accordingly expressed doubts about the grounds for the amount of the operating and investment grants awarded to the LNE to compensate for the costs of its activities or investment projects of a non-economic nature or deriving from the fulfilment of a remit conferred by the State. In the absence of separate

accounts for activities of a different nature, which, moreover, could not be precisely demarcated, the LNE could have used part of the public grants to carry out its competitive activities. This would be tantamount to cross-subsidising commercial activities and would constitute State aid within the meaning of Article 87 of the EC Treaty.

- (24) According to the Commission, the advantage gained from cross-subsidising commercial activities would favour the LNE in its activities on markets open to EU-wide competition. Intra-Community trade would therefore be affected.
- (25) The aid would have to be considered unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁹⁾.
- (26) The exceptions to incompatibility provided for in Article 87(2) and (3) of the EC Treaty would not be applicable in this case.
- (27) Article 86(2) of the EC Treaty applies only to services of general economic interest operated on behalf of the State. After preliminary analysis of the cases, the Commission decided, however, that it was not clear from the information it possessed at that stage that the tasks entrusted to the LNE by the State under a performance contract were of an unconditionally economic nature. Nor did it seem that the services performed by the LNE on a competitive basis were the subject of a separate task of general economic interest. The Commission therefore took the view that, at that stage, Article 86(2) of the Treaty could not be involved in support of the compatibility of the measures in question.

3. COMMENTS FROM INTERESTED PARTIES

- (28) Three interested parties submitted comments under the procedure:
- the company Emitech, by letter dated 14 November 2005,
 - the laboratory Intertek Testing Services (France), by letter dated 21 November 2005,
 - the laboratories Pourquery Analyses Industrielles, by letter dated 21 November 2005.

⁽⁹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

- (29) These comments, many of which are similar, are summarised and grouped together by topic under recitals 30 to 32.
- (30) Firstly, it is claimed that the public service task entrusted to the LNE was not clearly defined and that it was therefore impossible for its competitors to draw the line between possible public service obligations and commercial activities. They also had no way of objectively and transparently checking whether the LNE used the grants that it received from the State solely for its public service obligations. Grants were paid by the regional authorities, e.g. for the extension of the Trappes site, where commercial activities were carried out. Nor did the LNE perform certain tasks, such as representing the public authorities in international bodies (Intertek, refers, for example, to taking part in AFNOR and CEN committees without any compensation from the public authorities). The aid in question was also granted to the LNE without prior notification — it was therefore illegal and as such invalid.
- (31) Secondly, on account of its public enterprise status, the LNE enjoyed a number of selective advantages, such as self-insurance and, more generally, non-payment of insurance, a special labour legislation scheme, in particular for retirement and unemployment insurance, the right to use documents with the French Republic's header and logos, the use of an official image or an official laboratory image, *de facto* entitlement to the research tax credit, and free archiving. The LNE was also favoured by the customs administration, which used the LNE's services or required firms to use those services, to the exclusion of any other laboratories.
- (32) Thirdly, the Government grants distorted competition, especially at international level. The LNE also had many branches abroad.
- and public undertakings⁽¹⁰⁾ are met. This relieves the LNE of the need to keep separate accounts.
- (35) The French authorities stress, however, that the LNE has had an analytical accounting system since 1990. The system was revised in 2005 to comply with the 2005 to 2008 performance contract between the State and the LNE. It allows a complete separation of the accounts for commercial and non-commercial activities and shows, in particular, the profitability of the commercial services performed by the LNE, regardless of the annual grant made to it and assigned to public service tasks.
- (36) The full-cost accounting method is used: the LNE is structured around analysis centres that directly or indirectly contribute to its various tasks and activities. The amount of expenditure and revenue is allocated as precisely as possible:
- there are 80 operational sections or main analysis centres, with a staff of some 500 people,
 - there are some 40 auxiliary centres comprising the functional sections and cost centres, with a staff of some 200 people.
- (37) LNE staff enter their working hours via input software. Depending on the nature of the activity, the hours are direct (operational sections) or indirect (operational and functional sections), given that the overheads are made up of the costs of the auxiliary centres (functional sections and cost centres).
- (38) The costs of the auxiliary centres are then divided between the main centres according to several cost units or allocation keys (staff, payroll, number of IT posts, surface area of premises, quality of their temperature and heat regulation systems).
- (39) The full costs of the main analysis centres are then charged to the activities on the basis of two cost factors:
- the hours of direct labour charged by each staff member,
 - the rate of utilisation of equipment.

4. COMMENTS FROM FRANCE

- (33) By letters dated 4 November 2005 and 19 April 2006, France sent the Commission its comments on the decision to initiate a formal investigation procedure in respect of the aid granted to the LNE and it provided additional information about the LNE's accounts.

Separation of accounts

- (34) Firstly, France emphasises the fact that the criteria mentioned in Article 4(2)(a) and (b) of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States

⁽¹⁰⁾ OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2005/81/EC (OJ L 312, 29.11.2005, p. 47).

- (40) This second factor is designed to allocate in an appropriate manner depreciation and infrastructure costs to the LNE's activities (infrastructure costs are made up of the indirect costs of the maintenance, workshop and property management units).
- (41) In a main analysis centre (average operational section of six people), a rate of utilisation is calculated for each sector by weighting the rate of utilisation by the value of the equipment. The depreciation and infrastructure costs, directly linked to the equipment, can then be charged, pro rata to these rates, to each of the commercial and public sectors.
- (42) The analysis centre's indirect costs and other overheads are allocated to the commercial or public activities pro rata to the direct hours charged by the section's staff members.
- (43) In 2005 the effective rates of utilisation of equipment in the commercial sector and the public sector allowed an individual breakdown of infrastructure and depreciation costs for each piece of equipment pro rata to its utilisation. The sum of these individual breakdowns gives the total figures for 2005.
- (44) For the years 1993 to 2004, such an individual breakdown was not feasible. An overall indicator for the rate of utilisation was therefore used. It was reached by weighting individual rates of utilisation of each piece of equipment by the value of the equipment. The value of this indicator for 2005 is 44 % for the commercial sector and 56 % for the public sector. These rates of utilisation were calculated, on a team-by-team basis, for the laboratory's main items of equipment with a purchase value of EUR 7 500 or more, i.e. almost 1 200 items of equipment, representing in value 70 % of all the LNE's apparatus and equipment.
- (45) However, for its cost allocation calculations and thus for estimating the results of the public and commercial sectors, France uses a more cautious allocation ratio of 50:50, rather than a 56:44 ratio. This corresponds to a safety margin of about 10 % (in fact, 6 points out of 56).
- (46) Buildings are not included in the above sampling but the utilisation ratios in analytical accounts result in a 2/3-1/3 allocation in favour of the public sector.
- (47) The LNE's accounts for the period 1993 to 2004 have therefore been re-done as requested by the Commission

in order to allocate fixed production overheads to either the commercial or the public sector, whereas they had been entered in the accounts as 'mixed' costs. The method used is based on a principle developed in the IAS 2 international accounting standard, whereby fixed production overheads must be allocated to production costs on the basis of the normal capacity of the production facilities.

Service of general economic interest

- (48) Secondly, France recalls the activities linked to the public service tasks that were entrusted to the LNE and points out that the LNE is an EPIC subject to compliance with the principle of specification, which applies to any public establishment specifically created to operate a public service. Basing itself on European Court of Justice case-law⁽¹¹⁾, it goes on to say that the LNE's public service tasks are of general economic interest as the LNE uses resources that it would not commit if it considered only its commercial interest. The tasks identified in the 2005/2008 performance contract are therefore of a clear and specific economic nature. Lastly, the case-law⁽¹²⁾ states, on the one hand, that undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority which defines precisely the content of the public service obligations and, on the other hand, that the Commission can call into question the definition of services of general economic interest only in a case of manifest error. France maintains that, by definition, EPICs satisfy the above criteria.

Absence of State aid and cross-subsidation

- (49) Thirdly, according to France, the compensation granted to the LNE for its public service obligations does not constitute unlawful State aid. The four cumulative conditions of the Altmark judgment⁽¹³⁾ are, in fact, met. Analysis also reveals that the provisions of the Community framework for State aid in the form of public service compensation⁽¹⁴⁾ (the framework) are met. In addition, any penalty imposed on France would contravene Commission Decision No 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest⁽¹⁵⁾. Article 2(1)(a) of the Decision lays down the compatibility of such compensation under certain conditions that the LNE meets.

⁽¹¹⁾ Including the judgment of the Court of 11 April 1989 in Case 66/86, *Ahmed Saeed Flugreisen et al.* [1989] ECR 803.

⁽¹²⁾ Judgment of the Court of 15 June 2005 in Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECR II-2031, at paragraphs 186 *et seq.* and 216.

⁽¹³⁾ Judgment of 24 July 2003, in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

⁽¹⁴⁾ OJ C 297, 29.11.2005, p. 4.

⁽¹⁵⁾ OJ L 312, 29.11.2005, p. 67.

- (50) The grants for the Trappes sites, awarded by the regional authorities and the State, funded the resources needed to perform the public service tasks entrusted to the LNE.
- (51) Using an analysis of the relevant markets, France wishes to prove that, at the date of referral, there had been no irregular cross-subsidies, i.e. enabling the LNE to charge predatory prices in the relevant commercial sectors.
- (52) Lastly, France considers that the LNE does not have a significant market share as it is estimated at 4,2 % nationally and at 1 % Europe-wide.

Other factors

- (53) Fourthly, France points out that the trade discount granted to small and medium-sized enterprises (SMEs) in the Ile-de-France is consistent with a scheme authorised by the Commission in 1989⁽¹⁶⁾, for which any laboratory was eligible, including the complainants. The subsidies granted by the Conseil Régional d'Ile de France amount to EUR 61 000 since 1995. The real recipients of these subsidies were the SMEs in question. Furthermore, France has found no trace of an alleged subsidy from the Agency for the Environment and Energy Management (ADEME) to the LNE.
- (54) Fifthly, France notes that, to perform their tests, the French customs and indirect taxation authorities (DGDDI) use their own laboratories or those of the Directorate-General for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF) if they possess the ad hoc technical expertise (for example, a large number of tests on toys are carried out by a customs laboratory). If not, the DGDDI uses external laboratories, such as the LNE. The laboratory is chosen on the basis of its expertise in applying the regulations in question. The DGDDI can therefore turn to, for example, the National Research and Safety Institute (INRS) in the cases of protective masks or to the Scientific and Technical Centre for Buildings (CSTB) for construction products.

5. ASSESSMENT OF THE MEASURES

- (55) The subject matter of this procedure is the annual operating and investment grants awarded to the LNE by the public authorities between 1993 and 2005.

⁽¹⁶⁾ File NN 6/89, regional centres of innovation and technology transfer. Letter to the French authorities, (SEC(1989)814 of 23.5.1989).

5.1. Classification as State aid

The LNE's public service tasks are economic activities

- (56) The competition rules do not apply to non-economic activities. The first matter to be assessed is, therefore, whether the LNE's activities in the public sector⁽¹⁷⁾ are economic in nature or not.
- (57) Any activity consisting in supplying goods or services on a given market is an economic activity⁽¹⁸⁾. According to Mr Advocate-General Jacobs, in his conclusions in Case C-222/04, the emphasis when interpreting whether an activity is economic in nature should be placed on whether that activity could, at least in principle, be carried on by a private undertaking in order to make profits.
- (58) In this context, the Commission considers that the study, research, consultation, expertise, testing and control work and all the technical assistance measures designed to protect and inform consumers or improve product quality carried out by the LNE as part of its general interest task, correspond to a supply of services on the relevant markets and that these services could, in principle, be supplied by an undertaking in order to make profits. The tasks entrusted by the State to the LNE are therefore economic in nature⁽¹⁹⁾.

Criteria required to classify a state measure as State aid

- (59) Under Article 87(1), a measure constitutes State aid if the four following conditions are all met. First, it must be a state measure or involve state resources. Second, the measure must confer an advantage on its recipient. Third, it must distort or threaten to distort competition by favouring certain undertakings. Fourth, it must affect trade between Member States.

State resources

- (60) State budget allocations are clearly state resources.
- (61) The public interest group 'Bureau national de métrologie' was under state control⁽²⁰⁾, before being incorporated into the LNE in 2005. The LNE's resources linked to contracts with BNM are therefore state resources.

⁽¹⁷⁾ Clearly, activities in the market sector are economic activities within the meaning of the case-law.

⁽¹⁸⁾ Judgment of the Court of 10 January 2006 in Case C-222/04 *Cassa di Risparmio di Firenze et al.* [2006] ECR I-289.

⁽¹⁹⁾ Subject to what is stated in paragraph 5.4 of this decision.

⁽²⁰⁾ The BNM was a public interest group made up of the French State, represented by the Ministry for Industry and the Ministry for Research and New Technologies, and of public entities, viz. the Commissariat à l'énergie atomique, the Conservatoire national des arts et métiers, the LNE and the Observatoire de Paris. The public interest group was funded by its members.

(62) Aid granted by regional and local bodies of the Member States, whatever their status and description, must be scrutinized to determine whether it complies with Article 87 of the Treaty ⁽²¹⁾. The grants paid by the Conseil Régional d'Ile de France and by the Conseil Général des Yvelines are state resources.

(63) Therefore, all the measures in question are financed through state resources.

Advantage conferred on the recipient

(64) Measures which, in various forms, mitigate the burdens which are normally included in the budget of an undertaking and which are thereby similar to subsidies constitute advantages for the purposes of Article 87(1) ⁽²²⁾.

(65) Operating and investment grants mitigate the charges that are normally included in the LNE's budget. These grants therefore confer an advantage on the LNE.

Distorting or threatening to distort competition by favouring certain undertakings

(66) Article 87(1) prohibits aid that favours certain undertakings or the production of certain goods, i.e. selective aid.

(67) As the sole beneficiary of the measures that are the subject of this procedure is the LNE, the selectivity condition is clearly met.

(68) It should also be recalled that, in principle, aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities distort the conditions of competition ⁽²³⁾.

(69) Consequently the measures in question, which favour the LNE, could distort competition.

Effects on trade

(70) The Commission notes that the relevant markets are the subject of intra-Community trade. In 2005 the LNE had a turnover within the European Union of EUR 4 million (excluding France) and of EUR 2,35 million outside the European Union. In 2000, according to France, the LNE generated 13 % of its turnover outside France, i.e. 9 % in the European Union and 4 % outside.

(71) Moreover, for the effect-on-trade condition to be met, the Commission is not required to establish the real impact of this aid on trade between the Member States and an effective distortion of competition but must simply examine whether this aid could affect trade and distort competition.

(72) In this context, it is sufficient to note that the markets on which the LNE operates have a cross-border dimension and that the LNE competes with undertakings located in other Member States and with French undertakings active on these markets at international level. It was argued here that any granting of aid to an undertaking that operates on the Community market would be likely to distort competition and affect trade between Member States ⁽²⁴⁾.

(73) Consequently, France's claims that trade would not be affected because of LNE's small market shares cannot be accepted, especially since the amounts granted are far from negligible.

(74) The measures in question hamper the commercial activities of Community operators ⁽²⁵⁾ wishing to expand their activities in France. Without public support, the LNE's operations would be on a smaller scale, enabling the LNE's competitors to increase their turnover.

(75) As the measures in question put the LNE in a stronger position than other operators competing in intra-Community trade, it can be concluded that they affect trade between Member States and are likely to distort competition between these operators.

Compensation for a public service obligation — the Altmark judgment

(76) In July 2003 the Court ruled in *Altmark* ⁽²⁶⁾ that, where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) of the Treaty. To do so, the four conditions referred to in the judgment must all be satisfied.

⁽²¹⁾ See the judgment of the Court of 14 October 1987 in Case 248/84 *Federal Republic of Germany v Commission* [1987] ECR. I 4013, at paragraph 17.

⁽²²⁾ See the judgment of 19 September 2000 in Case C-156/98 *Germany v Commission* [2003] ECR I-6857 paragraph 30, and the case-law cited.

⁽²³⁾ See the judgment of 16 September 2004 in Case T-274/01 *Valmont* ECR II-3145, at paragraph 44, and the case-law cited.

⁽²⁴⁾ See, for example the judgments of the Court of 17 September 1980 in Case 730/79 *Philip Morris/Commission* [1986] ECR 2671, at paragraphs 11 and 12 and of 30 April 1998 in Case T-214/95 *Vlaams Gewest/Commission* [1998] ECR II-717, at paragraphs 48 to 50.

⁽²⁵⁾ The LNE's competitors are both domestic companies and international groups (Bureau Veritas, Intertek, etc.).

⁽²⁶⁾ See the judgment of 24 July 2003 in Case 280/00 in *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, at paragraph 87.

(77) France maintains that the compensation paid to the LNE for its public service obligations is not unlawful State aid because the four conditions referred to by the Court are satisfied.

(78) The Commission does not share this opinion.

(79) According to the fourth condition listed in the Altmark judgment, where the undertaking which is to discharge public service obligations in a specific case is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(80) In its arguments to demonstrate compliance with the condition spelt out in the preceding paragraph, France limits itself to saying that the analysis of the costs which a typical undertaking would incur must take into account the range of public service tasks entrusted to the LNE, which concern both regulatory applications and basic research in various sectors (metrology, health, environment, industry, consumer goods, construction and packaging products).

(81) France has not provided any analysis of the costs of 'a typical undertaking, well run'. In addition, no explanation is given as to why it might not be possible to compare LNE to a typical undertaking of this type.

(82) The Commission is unable to conjure up out of nothing the comparison required by Community case-law.

(83) The Commission therefore considers that the fourth criterion listed in the Altmark judgment has not been met.

(84) France's abstract reference to points 13 to 17 of the framework in no way alter this view.

Conclusion

(85) In the light of all the foregoing considerations, the Commission considers that the budget allocations and the grants paid by the regional authorities in question

constitute aid within the meaning of Article 87(1) of the Treaty.

5.2. Unlawfulness of the aid

(86) The Commission considers it irrelevant for the purposes of this procedure that the 1978 Decree constituted a financing scheme. This Decree is very general in nature and the decisions on the amount of the grants awarded by the State and the BNM to the LNE were taken annually, on grounds and terms that could vary widely from one year to the next. Annual operating and investment grants awarded to the LNE therefore constitute new individual aid measures.

(87) These aid measures were implemented without prior notification to the Commission. They are therefore illegal.

5.3. Compatibility of the aid with the common market

5.3.1. The exceptions in Article 87

(88) The exemptions laid down in Article 87(2) of the Treaty concerning aid having a social character, granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany are clearly irrelevant to this case.

(89) As for exemptions in Article 87(3) of the Treaty, the Commission notes that the aim of the aid in question is not to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, that it is not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the French economy. Nor is it intended to promote culture and heritage conservation. As for the exemption in Article 87(3)(c), the Commission considers that the doubts expressed when the procedure was initiated have not been dispelled: the aid in question does not facilitate the development of certain economic areas or of certain economic activities.

(90) It should be noted in this connection that neither the French authorities nor the interested parties made use of the exemptions in Article 87(2) and (3) during the administrative procedure. In particular, France considered that the provisions of Article 87 would not be applicable as the measures examined would not distort competition or affect trade between the Member States.

5.3.2. Article 86(2)

(91) Under Article 86(2), undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

(92) According to point 26 of the framework, the Commission will apply the provisions of the framework to non-notified aid if it was granted after 29 November 2005 and the provisions in force at the time the aid was granted, in all other cases.

(93) This procedure concerns aid granted before 29 November 2005.

(94) The Commission Communication on services of general interest in Europe⁽²⁷⁾, which was in force when the aid was granted, should therefore be applied. Accordingly, where the rules apply, compatibility with those rules is based on three principles:

— neutrality with regard to the public or private ownership of companies,

— Member States' freedom to define services of general interest, subject to control for manifest error,

— proportionality requiring that restrictions of competition and limitations of the freedoms of the single market do not exceed what is necessary to guarantee effective fulfilment of the task.

Neutrality

(95) There is no difficulty with compliance with the principle of neutrality in this case.

Task of general economic interest

(96) As regards the definition of the LNE's public service task as a task of general economic interest, it is up to the Commission to assess the economic nature of the activity in question and to check that the Member State has not committed a manifest error of assessment by classifying it as a task of general interest.

(97) It has already been established that the LNE's activities in the public sector are economic activities.

(98) As for the general interest classification, apart from the sectors in which this question is already covered by Community rules, the Member States enjoy wide discretionary powers, subject to a manifest error of assessment detected by the Commission.

(99) In this case, the Commission considers that the definition of the LNE's public service tasks, as it derives from the 1978 text and the additions made in 2005, is sufficiently clear⁽²⁸⁾ and that there is therefore no manifest error of assessment on the part of the French authorities. Moreover, undertakings entrusted with operating a service of general economic interest must have been entrusted with it through an act of public authority. In this case, Law No 78-23 of 10 January 1978 and the 2005 Decrees are official acts of the public authorities. In addition, from 1997, the performance contracts co-signed by the State set out the LNE's tasks clearly and in detail.

(100) The comments from interested parties, which essentially indicate that it would be impossible for the LNE's competitors to draw the line between its public service obligations and its commercial activities, do not invalidate this conclusion. They refer, in practice, to the requirement for separate accounts to be kept for activities that come under the heading of services of general economic interest and for commercial-type activities, in order to avoid any cross-subsidisation incompatible with the EC Treaty. These latter points are discussed below.

Proportionality

(101) Proportionality under Article 86(2) implies that the means used to fulfil the general interest task do not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions imposed on the rules of the EC Treaty exceed what is necessary to guarantee effective fulfilment of the task. The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to bear the specific burden and the net extra costs of the particular task assigned to them.

(102) The Commission considers that the aid in question comes under the LNE's general interest task.

⁽²⁷⁾ OJ C 17, 19.1.2001, p. 4.

⁽²⁸⁾ The tasks in question are described in detail in Section 2.

(103) In this context, if the annual compensation paid by the public authorities does not exceed the net extra costs incurred by the LNE in the performance of the service of general economic interest, the principle of proportionality is satisfied. This can be verified if, when income and expenditure in the public and commercial sectors have been correctly entered in the analytical accounts, the result of the public sector including all grants in the financial year is negative or zero or generates a reasonable profit, particularly taking into account the activities and the sector in which LNE operates.

Validation of the LNE's analytical accounting methodology

(104) The Commission has examined the methodology used for the LNE's analytical accounts, in order to check whether it was indeed possible to identify all the income and expenditure relating to the service of general economic interest for the period 1993 to 2005 ⁽²⁹⁾.

(105) In 2005 the LNE's analytical accounts were based on full costs, which entails identifying exactly all the activities, by means of a large number of operational sections (80) and functional sections (some 40).

(106) Revenue from the LNE's commercial sector is made up of the turnover from services performed and from other products, including, for example, charging for the provision of staff, charging for carriage to the customer and withdrawals from contingency reserves.

(107) Revenue from the public sector includes the 'studies' turnover, the Metrology contract (ex-BNM), miscellaneous revenue (for example, from international technical cooperation), operating grants and the share of investment grants transferred to the profit and loss account.

(108) The share of investment grants transferred to the profit and loss account includes the investment grants paid by the regional authorities. Consequently, the grants in question, which helped finance the resources needed to perform the public service tasks entrusted to the LNE, are included in the analysis of the amount of compensation granted to the LNE to cover the costs of the general economic interest service tasks. The 2/3-1/3

⁽²⁹⁾ For the purposes of this procedure, it is not necessary to establish whether the LNE has set up separate accounts and has identified public funds made available in accordance with Commission Directive 80/723/EEC. A possible infringement of this Directive would not affect the compatibility of the aid in question with the common market.

breakdown between public and private sectors for the depreciation of buildings is in line with the use made of the 'Trappes 3' and 'Trappes 4' buildings.

(109) Expenditure is similarly divided between the commercial and the public sectors. It is basically split between direct labour, purchases/outsourcing/direct costs, direct task expenses, indirect expenses, overheads, infrastructure and depreciation costs.

(110) As regards the depreciation and infrastructure costs of materials used in both the commercial and the public sector, these are calculated in the analytical accounts using widely accepted methods and on the basis of the rate of utilisation of these materials.

(111) The Commission considers that the sampling carried out, which represents 70 % in value of the LNE's materials and equipment and serves as the basis for calculating the 44/56 allocation ratio, is satisfactory. In addition, the application of this overall allocation ratio to the most costly equipment can be extended to the less expensive equipment, which complements the heavy equipment.

(112) The 44/56 ratio is also acceptable for the whole of the period examined as the commercial sector activities were then on an upward trend ⁽³⁰⁾. It is therefore reasonable to assume that the rate of utilisation recorded for public sector equipment in 2005 represents a minimum for the period 1993 to 2004.

(113) Furthermore, the Commission considers that the upshot of the 10 % safety margin used by the French authorities in their recalculations for the period 1993 to 2004 is that the expenditure charged to the public sector is not overestimated and does not therefore warrant possibly excessive grants. The French authorities' approach is therefore cautious.

(114) The Commission accordingly concludes that the LNE's analytical accounts correspond to normally accepted standards and have no particular specificities and also that the recalculations done to present the accounts by sector ⁽³¹⁾ during the period 1993 to 2004 are acceptable ⁽³²⁾.

⁽³⁰⁾ The commercial sector represents the following percentages of the LNE's turnover:
2005 — 71 %, 2004 — 70 %, 2003 — 69 %, 2002 — 66 %, 2001 — 66 %, 2000 — 66 %, 1999 — 64 %, 1998 — 65 %, 1997 — 61 %, 1996 — 60 %, 1995 — 58 %, 1994 — 60 % and 1993 — 62 %.

⁽³¹⁾ The revenue and expenditure of the 'mixed' sector mentioned when the procedure was initiated were allocated between the public and commercial sectors according to the methodology set out in the preceding paragraphs.

⁽³²⁾ The possibility for the Commission, in the absence of analytical accounts, to rely on an analytical reconstruction of the costs carried out ex post by backward projection was endorsed by the Court (see the judgment of 7 June 2006 in Case T-613/97, Report 2006, p. II-01531, *Union française de l'express (UFEX)*, in particular paragraph 137).

No overcompensation

- (115) The annual results of the public sector which include public grants and as established by the LNE's analytical accounts, are as follows:

(EUR '000)

	Result public sector	Result/turnover public sector (*)
2005	(1 414)	(8,4 %)
2004	(851)	(5,1 %)
2003	(321)	(2,2 %)
2002	204	1,3 %
2001	(186)	(1,3 %)
2000	(856)	(6,2 %)
1999	65	0,5 %
1998	(459)	(3,5 %)
1997	271	2,0 %
1996	(223)	(1,7 %)
1995	56	0,4 %
1994	178	1,3 %
1993	(41)	(0,3 %)

(*) The turnover of the public sector does not include the share of investment grants paid into the profit and loss account.

- (116) Since 1993, the results of the public sector, i.e. activities covered by services of general economic interest, have more often than not shown a loss despite the granting of the aid in question. When a surplus is recorded, it is 2 % or less than the turnover generated in the public sector. The weighted result for the period 1993 to 2005 is a loss of 1,9 %.

- (117) These results, generally negative, are clearly lower than what a reasonable profit would be for a comparable private undertaking.

- (118) Furthermore, the Commission has examined in detail the results and the turnover of the LNE and of the three interested parties, which have comparable activities to those of the LNE, for the period 1998 to 2005⁽³³⁾. This shows that the net result/turnover ratios were lower for the LNE (-3,2 % for the LNE's activities in

⁽³³⁾ For the Laboratoires Pourquery, the available data does not go beyond 2004.

the public sector, 0,6 % for all of its activities) than for the interested parties, whose ratios ranged between 0 % and 4 %. This confirms that the profits made by the LNE in the public sector can be considered reasonable profits.

- (119) The Commission therefore concludes that the LNE has not benefited from any overcompensation for the costs of the services of general economic interest since 1993. The public service compensations paid to the LNE during the period 1993 to 2005 constitute State aid that is compatible with Article 86(2) of the Treaty.

- (120) It follows that it is not necessary to check the existence of any cross-subsidisation for the LNE⁽³⁴⁾ for its activities in the commercial sector.

5.4. Non-commercial nature of certain of the LNE's activities in the public sector

- (121) It should be noted that, while some — although not many — of the LNE's activities in the public sector should be considered non-commercial⁽³⁵⁾ and akin to public service tasks, checks should also be made to verify that the compensation paid by the public authorities remains equal to or less than the net costs incurred for the performance of these tasks⁽³⁶⁾.

- (122) This analysis has already been carried out, for example, in paragraphs 115 to 120 and shows that there is no reason to object to the compensation in question. It implies that the financing of these activities does not constitute State aid.

5.5. Comments from third parties

- (123) In the comments submitted under this procedure, some competitors have mentioned other aid allegedly received by the LNE. These measures have not been the subject of this procedure. In the light of the French authorities' replies, the Commission none the less considers that it sufficiently well informed to take a position on them.

⁽³⁴⁾ After analysing the loan conditions granted by the banks to the LNE, even if the guarantee that is the corollary of its status as a public industrial and commercial enterprise conferred an advantage on the LNE for public sector activities, this advantage would be very small in value, close to the *de minimis* amount, and would not call into question the proportionality tests carried out in paragraphs 101 to 103 in respect of public service compensation.

⁽³⁵⁾ This could be the case, for example, of basic research in metrology.

⁽³⁶⁾ See in this connection Commission Decision 2001/46/EC of 26.7.2000 on the State aid measure implemented by Germany for the SICAN group and its project partners, and in particular paragraphs 87 to 92 (OJ L 18, 19.1.2001, p. 18).

- (124) The total amount of the grants awarded to the LNE by the Conseil Régional d'Ile-de-France to finance the commercial discount granted by the LNE to SMEs in that region was EUR 61 000 in 2003. Since these grants can be regarded as aid to the LNE (and not to the client SMEs) and since they are not part of an existing aid scheme (see paragraph 54), they satisfy the conditions set out in Article 2 of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ⁽³⁷⁾. The Commission cannot therefore oppose them.
- (125) The Commission also notes that ADEME has not granted any aid to the LNE.
- (126) Neither the LNE's alleged use of the official logos of the French Republic nor its degree of participation in the work of international bodies seems to be relevant in this case. The LNE's logo is different from the official logo, which can be used only by the public authorities. As for the LNE representing the public authorities in certain European and international organisations (working parties of the International Organisation for Legal Metrology (OIML) and the Committee on European Cooperation in Legal Metrology (WELMEC)), any advantage that the LNE may gain from this in terms of image could not rank as State aid.
- (127) The alleged advantages as regards self-insurance, a special labour legislation scheme for employees or free archiving do not exist in practice. The LNE's insurance policies, which cost over EUR 300 000 in 2004, are similar to those taken out by private undertakings. The LNE's employees do not have special status, like that of the civil service, but instead come under private law both for unemployment insurance and for retirement. Lastly, the LNE is not entitled to free archiving — on the contrary, the direct cost of this was some EUR 80 000 in 2005.
- (128) The LNE's *de facto* entitlement to the research tax credit does not constitute State aid within the meaning of Article 87(1), especially since this *de facto* entitlement does not involve any state resources. It results from the LNE having been the subject of an ad hoc evaluation of its researchers in the context of its public obligations in the research field. Furthermore, the research tax credit is taken into account in the LNE's income and expenditure.
- (129) As for the customs authorities' alleged support for the LNE, this is not backed up by any precise information. It

transpires that the DGDDI uses its own laboratories, those of the DGCCRF or external laboratories, including the LNE, the Institut national de recherche et de sécurité or the Centre scientifique et technique du bâtiment (CSTB) for construction products.

6. CONCLUSIONS

- (130) Subject to Section 5.4, public service compensation in the form of budget allocations from the State and the BNM and grants from the regional authorities that were awarded to the LNE between 1993 and 2005 constitute State aid.
- (131) The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty.
- (132) However, this aid is compatible with Article 86(2) of the Treaty.
- (133) This decision does not concern the state guarantee for which the LNE's activities in the commercial sector could qualify because of its EPIC status. This aspect, which has led to a proposal for appropriate measures under Article 88(1) of the Treaty ⁽³⁸⁾, will be the subject of further decisions,

HAS ADOPTED THIS DECISION:

Article 1

The public service compensation which France implemented unlawfully for the Laboratoire national de métrologie et d'essais between 1993 and 2005 is compatible with the common market.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 22 November 2006.

For the Commission

Neelie KROES

Member of the Commission

⁽³⁷⁾ OJ L 10, 13.1.2001, p. 30.

⁽³⁸⁾ Aid E 24/2004 and letter of 5 July 2005.