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II

*(Information)*

# INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

# COMMISSION

## Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty

## Cases where the Commission raises no objections

**(Text with EEA relevance)**

(2008/C 184/01)

| | |
|---|---|
| Date of adoption of the decision | 10.6.2008 |
| Reference number of the aid | N 61/08 |
| Member State | Spain |
| Region | — |
| Title (and/or name of the beneficiary) | Régimen de ayudas a la investigación y desarrollo de las TIC |
| Legal basis | Orden por la que se regulan las bases, el régime de ayudas y la gestión de la acción estratégica de telecomunicaciones y sociedad de la información |
| Type of measure | Aid scheme |
| Objective | Research and development |
| Form of aid | Direct grant, Soft loan |
| Budget | Annual budget: EUR 356 million<br>Overall budget: EUR 1 600 million |
| Intensity | 80 % |
| Duration | Until 31.12.2011 |
| Economic sectors | All sectors |
| Name and address of the granting authority | — |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

| Date of adoption of the decision | 1.7.2008 |
|---|---|
| Reference number of the aid | N 101/08 |
| Member State | Italy |
| Region | — |
| Title (and/or name of the beneficiary) | R&D aid in the aeronautic sector |
| Legal basis | Legge n. 808 del 1985; progetto di decreto del ministro dello Sviluppo economico |
| Type of measure | Aid scheme |
| Objective | Research and development |
| Form of aid | Soft loan, Reimbursable grant |
| Budget | Overall budget: EUR 720 million |
| Intensity | 80 % |
| Duration | Until 31.12.2013 |
| Economic sectors | Manufacturing industry |
| Name and address of the granting authority | Ministero dello Sviluppo economico<br>Direzione generale Politica industriale<br>Via Molise, 2<br>I-00187 Roma |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

## Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty

## Cases where the Commission raises no objections

**(Text with EEA relevance)**

(2008/C 184/02)

| | |
|---|---|
| Date of adoption of the decision | 30.4.2008 |
| Reference number of the aid | N 251/07 |
| Member State | Germany |
| Region | National wide scheme |
| Title | Förderung der Einführung eines interoperablen Fahrgeldmanagements |
| Legal basis | Jeweiliges jährliches Haushaltsgesetz; Einzelplan 12 (Bundesministerium für Verkehr, Bau und Stadtentwicklung, Länderfinanzausgleich), Bundeshaushaltsordnung, Verwaltungsverfahrensgesetz, Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung |
| Type of measure | Aid scheme |
| Objective | Research and Development |
| Form of aid | Grant |
| Budget | EUR 9 750 000 |
| Intensity | 50 % (industrial research); 25 % (experimental development); 10 % bonus for medium-sized enterprises; 20 % bonus for small-sized enterprises; 15 % bonus for projects involving collaboration between undertakings and research organisations; global intensity limited to 80 % in all cases |
| Duration | 2008-2009 |
| Economic sectors | Mainly transport sector |
| Name and address of the granting authority | Bundesministerium für Verkehr, Bau und Stadtentwicklung |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

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| | |
|---|---|
| Date of adoption of the decision | 1.7.2008 |
| Reference number of the aid | N 304/07 |
| Member State | Italy |
| Region | — |
| Title (and/or name of the beneficiary) | Aiuti al capitale di rischio delle PMI |

| | |
|---|---|
| Legal basis | 1) Bozza di decreto del ministro concernente le modalità e le procedure per la concessione ed erogazione di aiuti per il capitale di rischio<br>2) Articolo 1, comma 847, della legge 27 dicembre 2006, n. 296 |
| Type of measure | Aid scheme |
| Objective | Risk capital, Small and medium-sized enterprises |
| Form of aid | Provision of risk capital |
| Budget | Annual budget: EUR 400 million<br>Overall budget: EUR 2 000 million |
| Intensity | 100 % |
| Duration | 1.9.2007-31.12.2013 |
| Economic sectors | — |
| Name and address of the granting authority | Ministero dello Sviluppo economico |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

| | |
|---|---|
| Date of adoption of the decision | 5.6.2008 |
| Reference number of the aid | N 670/07 |
| Member State | Czech Republic |
| Region | — |
| Title (and/or name of the beneficiary) | OP ZP, Prioritní osa 1, oblast podpory 1,1 – snížení znečistění vod, podoblast 1,1,2 – snížení znečistění z průmyslových zdrojů |
| Legal basis | Programový dokument OP ZP |
| Type of measure | Aid scheme |
| Objective | Environmental protection |
| Form of aid | Direct grant |
| Budget | Annual budget: CZK 188 million<br>Overall budget: CZK 1 130 million |
| Intensity | 50 % |
| Duration | 1.10.2007-31.12.2013 |
| Economic sectors | Manufacturing industry |

| | |
|---|---|
| Name and address of the granting authority | Ministerstvo životního prostředí<br>Vršovická 65<br>CZ-100 10 Praha 10 |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

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| | |
|---|---|
| Date of adoption of the decision | 22.4.2008 |
| Reference number of the aid | N 726b/07 |
| Member State | Netherlands |
| Region | — |
| Title (and/or name of the beneficiary) | Omnibus Decentraal — Module 9: Risicokapitaal voor het MKB |
| Legal basis | Provinciewet; Gemeentewet; Algemene wet bestuursrecht |
| Type of measure | Aid scheme |
| Objective | Risk capital |
| Form of aid | Provision of risk capital |
| Budget | Annual budget: EUR 468 million<br>Overall budget: EUR 3 745 million |
| Intensity | — |
| Duration | Until 31.12.2015 |
| Economic sectors | All sectors |
| Name and address of the granting authority | Nederlandse provincies en gemeenten — contact: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties<br>Bezuidenhoutseweg 67<br>2500 EB Den Haag<br>Nederland |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

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| | |
|---|---|
| Date of adoption of the decision | 13.5.2008 |
| Reference number of the aid | N 22/08 |
| Member State | Sweden |
| Region | — |

| Title (and/or name of the beneficiary) | Reduktion av $CO_2$-skatten för bränslen som används i anläggningar som omfattas av EU ETS |
|---|---|
| Legal basis | Lagen om skatt på energi (aviserat i regeringens proposition 2007/08:1, avsnitt 5.6.3) |
| Type of measure | Aid scheme |
| Objective | Environmental protection |
| Form of aid | — |
| Budget | Overall budget: EUR 170 million |
| Intensity | Approximately 70 % |
| Duration | 1.7.2008-31.12.2017 |
| Economic sectors | Manufacture of food products and beverages, manufacture of textiles, manufacture of wood and of products of wood and cork (except furniture), manufacture of articles of straw, manufacture of pulp, paper and paper products, manufacture of chemicals and chemical products, manufacture of rubber and plastic products, manufacture of motor vehicles and supply of electricity, gas and water |
| Name and address of the granting authority | Skatteverket |
| Other information | — |

The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://ec.europa.eu/community_law/state_aids/

IV

*(Notices)*

# NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

# COMMISSION

**Euro exchange rates** ([1])

**21 July 2008**

(2008/C 184/03)

**1 euro** =

| | Currency | Exchange rate | | Currency | Exchange rate |
|---|---|---|---|---|---|
| USD | US dollar | 1,5858 | TRY | Turkish lira | 1,8907 |
| JPY | Japanese yen | 169,65 | AUD | Australian dollar | 1,6260 |
| DKK | Danish krone | 7,4614 | CAD | Canadian dollar | 1,5921 |
| GBP | Pound sterling | 0,79460 | HKD | Hong Kong dollar | 12,3665 |
| SEK | Swedish krona | 9,4539 | NZD | New Zealand dollar | 2,0830 |
| CHF | Swiss franc | 1,6220 | SGD | Singapore dollar | 2,1441 |
| ISK | Iceland króna | 124,27 | KRW | South Korean won | 1 603,64 |
| NOK | Norwegian krone | 8,0585 | ZAR | South African rand | 12,0414 |
| BGN | Bulgarian lev | 1,9558 | CNY | Chinese yuan renminbi | 10,8310 |
| CZK | Czech koruna | 22,968 | HRK | Croatian kuna | 7,2178 |
| EEK | Estonian kroon | 15,6466 | IDR | Indonesian rupiah | 14 513,24 |
| HUF | Hungarian forint | 229,36 | MYR | Malaysian ringgit | 5,1348 |
| LTL | Lithuanian litas | 3,4528 | PHP | Philippine peso | 70,140 |
| LVL | Latvian lats | 0,7032 | RUB | Russian rouble | 36,8495 |
| PLN | Polish zloty | 3,2212 | THB | Thai baht | 52,863 |
| RON | Romanian leu | 3,5480 | BRL | Brazilian real | 2,5122 |
| SKK | Slovak koruna | 30,330 | MXN | Mexican peso | 16,1220 |

([1]) *Source:* reference exchange rate published by the ECB.

**Opinion of the Advisory Committee on Mergers given at its meeting of 28 February 2008 regarding a draft decision relating to Case COMP/M.4731 — Google/DoubleClick**

**Rapporteur: Belgium**

(2008/C 184/04)

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation.
2. The Advisory Committee agrees with the Commission that the notified operation is deemed to have a Community dimension following the referral pursuant to Article 4(5) of the EC Merger Regulation.
3. The Advisory Committee agrees with the Commission that the markets to be considered are:
   - the market for provision of online advertising space that could be possibly further subdivided into markets for search advertising and for non-search advertising,
   - the market for intermediation in online advertising that could be possibly further subdivided into markets for search advertising intermediation and for non-search advertising intermediation,
   - the market for provision of online display ad serving technology that could be possibly further subdivided between provision of such services to advertisers and to publishers.
4. The Advisory Committee agrees with the Commission that:
   - the market for provision of online advertising space, both for search and non-search, is to be considered alongside national or linguistic borders within the EEA,
   - the market for intermediation in online advertising, both for search and non-search, is at least EEA-wide in scope,
   - the market for provision of online display ad serving technology, that could be further subdivided between provision of such services to advertisers and to publishers, is at least EEA-wide in scope.
5. The Advisory Committee agrees with the Commission's assessment that the notified operation would not significantly impede effective competition with regards to the elimination of actual competition between the parties to the transaction.
6. The Advisory Committee agrees with the Commission's assessment that the notified operation would not significantly impede effective competition with regards to the elimination of the parties as a potential competitor to each other.
7. The Advisory Committee agrees with the Commission's assessment that the notified operation would not significantly impede effective competition as regards its non-horizontal effects.
8. The Advisory Committee agrees with the Commission that the notified concentration should be declared compatible with the Common Market and with the functioning of the EEA Agreement in accordance with Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.

## Final report of the Hearing Officer in Case COMP/M.4731 — Google/DoubleClick

*(Pursuant to Articles 15 and 16 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings — OJ L 162, 19.6.2001, p. 21)*

(2008/C 184/05)

On 21 September 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 ([1]) ('Merger Regulation') by which the undertaking Google Inc. ('Google', USA) would acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking DoubleClick Inc. ('DoubleClick', USA) by way of purchase of shares.

Upon examination of the notification, the Commission concluded that the notified operation raised serious doubts as to the compatibility of the notified acquisition with the common market and with the functioning of the EEA Agreement with regard to the market for online advertising. The Commission also found that the commitments proposed by the notifying party on 19 October 2007 were not sufficient to clearly rule out the serious doubts identified by the Commission during the phase I investigation. Accordingly, the Commission decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation on 13 November 2007.

Access to key documents was provided to the notifying party on 16, 19 and 20 November 2007, in accordance with paragraph 45 of DG Competition's Best Practices on the conduct of EC merger control proceedings.

On the basis of the additional evidence gathered during the phase II investigation, the Commission concluded that the proposed transaction would not significantly impede effective competition in the common market or a substantial part thereof and is therefore compatible with the common market and the EEA Agreement. Accordingly, no Statement of Objections was sent to the notifying party.

No queries or submissions have been made to me by the parties or any third party. The case does not call for any particular comments as regards the right to be heard.

Brussels, 3 March 2008.

Karen WILLIAMS

([1]) OJ L 24, 29.1.2004, p. 1.

# Summary of Commission Decision

## of 11 March 2008

## declaring a concentration compatible with the common market and the functioning of the EEA Agreement

## (Case COMP/M.4731 — Google/DoubleClick)

**(Only the English text is authentic)**

**(Text with EEA relevance)**

(2008/C 184/06)

*On 11 March 2008, the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* ([1]) *(the EC Merger Regulation), and in particular Article 8(1) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address:*

*http://ec.europa.eu/comm/competiton/index_en.html*

### I. INTRODUCTION

1. On 21 September 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Regulation (EC) No 139/2004 ('the Merger Regulation') by which the undertaking Google Inc. ('Google', USA) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking DoubleClick Inc. ('DoubleClick', USA) by way of purchase of shares.

### II. THE PARTIES

2. Google operates an Internet search engine and provides online advertising space on its own websites as well as on partner websites (affiliated to the Google 'AdSense' network). More recently, especially via the acquisition of YouTube, Google started to provide content. Google derives almost all of its revenues from online advertising.

3. DoubleClick mainly sells ad serving, management and reporting technology worldwide to website publishers, advertisers and advertising agencies. It is also launching an intermediation (ad exchange) platform.

### III. ARTICLE 4(5) REFERRAL

4. The proposed transaction lacks Community dimension within the meaning of Article 1(2) and (3) of the Merger Regulation. However, following a referral request under Article 4(5) of the EC Merger Regulation, the concentration is deemed to have a Community dimension.

### IV. THE RELEVANT PRODUCT MARKETS

5. Google is active mainly in the provision of online advertising space. The widest possible relevant product market considered in the Decision is the overall market for online advertising. The Commission has assessed whether this market may have to be subdivided further on the basis of the various forms of online advertising (text v non-text (display) ads and/or search ads v non search ads) or on the basis of different sales channels (direct sales v intermediated sales through ad networks and ad exchanges). However, the exact definition of the relevant product market has been left open in the Decision as the transaction would not give rise to competition concerns under any possible product market definition.

6. DoubleClick is active in display ad serving. The market investigation has shown that display ad serving technology constitutes a separate market from ad serving technology for text ads. Within the market for display ad serving technology a further subdivision has to be made between the provision of such services to advertisers and the provision of such services to publishers.

### V. THE RELEVANT GEOGRAPHIC MARKETS

7. The Decision defines the overall online advertising market as geographically divided alongside national or linguistic borders within the EEA. As regards intermediation, the Decision concludes that this hypothetical market is at least EEA wide in scope.

8. Finally, the Decision defines the markets for the provision of display ad serving technology for advertisers and publishers to be at least EEA wide in scope.

([1]) OJ L 24, 29.1.2004, p. 1.

## VI. COMPETITIVE ASSESSMENT

### 6.1. Position of the parties in the relevant markets

9. Google is currently active in the online advertising market (i) as a publisher, with its own search engine web page Google.com (and its national web pages such as google.fr, google.it etc.), and (ii) as an intermediary with its ad network (AdSense). Through these direct and indirect channels, Google is the leading provider of online advertising, and in particular of search ad space in the EEA with market shares of between [25-35 %] and [60-70] % depending on the exact market definition.

10. Google's main competitors in search advertising are Yahoo! and Microsoft with market shares of up to [10-20] % at the worldwide level and at least [0-10] % in the EEA for Yahoo! and approximately [0-10] % for Microsoft both at the worldwide and the EEA-wide levels. In non search intermediation in the EEA, *inter alia* TradeDoubler, Zanox (belonging to Axel Springer), AdLink, Interactive Media (belonging to Deutsche Telekom), Advertising.com and Lightningcast (both AOL/TimeWarner) and Tomorrow Focus are active (about [10-20] % market share in the case of TradeDoubler, [0-10] % in the case of Zanox and about [0-10] % for each of the other players).

11. DoubleClick is a provider of ad serving technology. On the advertiser side, DoubleClick is the leading player in the EEA ad serving market together with aQuantive/Atlas (recently acquired by Microsoft). They each have about [30-40] % market share in the EEA. On the publisher side, the market investigation points to DoubleClick leading with around [40-50] % market share in the EEA, followed by 24/7 Real Media/OpenAdStream (recently acquired by the advertising agency WPP) with less than [20-30] % and AdTech/AOL (less than [10-20] %).

12. Despite these relatively high market shares, DoubleClick's market power is limited because DoubleClick faces significant competition from rival suppliers of ad serving tools, to which customers could switch in case of a price increase. While the market investigation provided mixed answers regarding the theoretical level of switching costs, there is evidence that a large number of publishers and advertisers have actually switched from DoubleClick to other service providers (and *vice versa*) in the past years. The fact that the ad serving market is currently competitive is also evidenced through a significant price decline of DoubleClick's products for advertisers and publishers, during a period of increasing demand.

13. DoubleClick is also launching a new ad exchange. This ad exchange commenced beta testing in June 2007. The number of transactions it has conducted so far is negligible and, in any case, it has not yet achieved full commercialization.

### 6.2. Horizontal effects

14. Currently Double Click is not present in the market for the provision of online space and Google is not providing ad serving tools on a stand alone basis. Therefore, there is no actual competition between both companies.

15. The Decision also concludes that the proposed transaction does not give rise to competition concerns with a view to the possible elimination of potential competition between Google and DoubleClick. DoubleClick's ad exchange has not yet developed any significant market position, but it cannot be ruled out that DoubleClick, if it stayed independent, could develop into an important player in the intermediation market. However, it is likely that there would remain a sufficient number of other competitors which would maintain sufficient competitive pressure after the merger so that competition would not be significantly impeded. In particular, as compared to other players active in this market, DoubleClick does not appear to have any significant advantages in competing with Google in the ad intermediation market.

16. As regards potential competition from Google in the ad serving market, the Decision examines the fact that Google is currently developing a new ad serving product for both advertiser- and publisher-side display ad serving, but dismisses any concerns relating to the possible elimination of potential competition because there is no indication that Google's new products would have been better placed to compete with DoubleClick's respective products than the numerous players already present in the market.

### 6.3. Non-horizontal effects

#### 6.3.1. *Foreclosure based on DoubleClick's market position in ad serving*

17. The Commission investigated a number of exclusionary strategies based on DoubleClick's market position in ad serving that the merged entity might engage in. These strategies include: (a) increasing the price of DoubleClick tools when used by publishers or advertisers with competing ad networks or selectively increasing the price of DoubleClick tools to customers less likely to switch to other ad serving tools suppliers; (b) degrading DoubleClick tools' quality when used with competing ad networks; (c) bundling DoubleClick tools with Google's intermediation services (either through pure or mixed bundling); (d) 'tweaking' the ad arbitration mechanism to serve ads in favour of AdSense; and (e) input foreclosure (i.e. refusal to sell or raising rivals' costs) regarding the sale of ad serving tools to competing ad networks.

18. The Decision dismisses all of these concerns. Firstly, the market investigation revealed that the merged entity would not be able to successfully foreclose its rivals in the ad serving market because DoubleClick faces a number of competitive constraints and is unlikely to be able to exercise any significant market power.

19. Secondly, the merged entity's incentives to engage in the described strategies also appear to be limited. Price variations (even significant) for ad serving tools are unlikely to trigger significant switching between ad networks because the costs of ad serving represents only a small proportion of online advertising costs/revenues for advertisers and publishers. This is likely to reduce any incentive to offer DoubleClick's display ad serving technology to publishers at a lower price (or even for free) when used in combination with AdSense (i.e. mixed bundling). Pure bundling (i.e. bundling DoubleClick's display ad serving technology with intermediation through AdSense) is likely to be unprofitable in view of the switching this might entail. The 'tweaking' strategy would constitute a breach of the merged entity's contractual obligations *vis-à-vis* its customers, which, if carried out on any meaningful scale, would probably be detected.

20. Finally, even if all or any of these strategies were to be successfully implemented, the transaction would still be unlikely to have a negative effect on competition since the merged entity would continue to compete with a number of financially strong, vertically integrated rivals (including Microsoft, Yahoo!, AOL and WPP) which offer the same product combination.

6.3.2. *Foreclosure based on Google's market position in search advertising and ad intermediation services*

21. In view of Google's strong position in the provision of search ads, Google might also try to leverage this position into the market for display ad serving by requiring users of its search ad (intermediation) services to use DoubleClick's products for serving all or part of their inventory. The Decision dismisses also these concerns.

22. Already the ability to foreclose rivals by engaging in such a strategy seems to be limited because there is a very limited pool of common customers which use both search ads or search ad intermediation services and display ad serving technology. Apart from that, on the advertiser side, there may be practical difficulties because the two relevant parts of the bundle are not sold or priced simultaneously.

23. Moreover, the market investigation has shown that the merged entity would not have an incentive to adopt such a strategy because that strategy would most likely not be profitable.

24. However, even if all or any of these strategies were to be successfully implemented, the transaction would still be unlikely to have a negative effect on competition since the merged entity would continue to compete with a number of financially strong, vertically integrated rivals (including Microsoft, Yahoo!, AOL and WPP) which would be unlikely to be foreclosed.

6.3.3. *Foreclosure based on combination of Google and DoubleClick's assets*

25. Finally, the mere combination of DoubleClick's assets with Google's assets, and in particular the databases that both companies have and could develop on customer online behaviour could allow the merged entity to achieve a position that could not be replicated by its competitors. As a result of this combination, Google's competitors would be progressively marginalised which would ultimately allow Google to raise the prices for its intermediation services.

26. However, the market investigation has revealed these concerns to be unfounded. DoubleClick's contracts with advertisers and publishers currently allow DoubleClick to use the data created through its ad serving technology only to the benefit of the respective customer. There is no indication that the merged entity would be able to impose contractual changes on its customers which would allow the cross use of their data in the future. In addition, the combination of data about searches with data about users' web surfing behaviour is already available to a number of Google's competitors today (e.g. Microsoft and Yahoo).

## VII. **CONCLUSION**

27. The Decision therefore concludes that the proposed concentration will not give rise to competition concerns as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it. Consequently, the Commission declared the transaction compatible with the Common Market and the EEA Agreement, in accordance with Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.

**Communication from the Commission**

# Community guidelines on State aid for railway undertakings

(2008/C 184/07)

## 1. INTRODUCTION

### 1.1. General context: the railway sector

1. The railways have unique advantages: they are a safe and clean mode of transport. Rail transport therefore has great potential for contributing to the development of sustainable transport in Europe.

2. The White Paper 'European transport policy for 2010: time to decide' [1] and its mid-term review [2] underline to what extent a dynamic railway industry is necessary for establishing an efficient, clean and safe goods and passenger transport system that will contribute to the creation of a single European market enjoying lasting prosperity. The road congestion plaguing the towns and certain areas of the European Community, the need to face up to the challenges of climate change, and the increase in fuel prices show how necessary it is to stimulate the development of rail transport. In this respect it should be pointed out that the common transport policy also has to pursue the environmental objectives set by the Treaty [3].

3. However, rail transport in Europe has an image problem, having declined steadily from the 1960s to the end of the 20th century. Both goods and passenger traffic volumes have fallen in relative terms compared with the other transport modes. Rail freight has even shown a decline in absolute terms: loads transported by rail were higher in 1970 than in 2000. The traditional railway undertakings were unable to offer the reliability and good timekeeping their customers expected of them, which led to a shift of traffic from rail to the other modes of transport, chiefly road [4]. Although passenger transport by rail might have continued to grow in absolute terms, this increase seems very limited compared with that of road and air transport [5].

4. This trend seems to have reversed recently [6], but there is still a long way to go for rail transport to become sound and competitive. Particularly in the rail freight transport sector there continue to be major difficulties which call for public-sector action [7].

5. The relative decline in Europe's railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.

6. First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the Member States forced the national railway undertakings into

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[1] COM(2001) 370 of 12 September 2001, p. 18.

[2] Communication from the Commission 'Keep Europe moving — Sustainable mobility for our continent — Mid-term review of the Transport White Paper' (COM(2006) 314, 22 June 2006, p. 21).

[3] Article 2 of the Treaty stipulates as one of the main objectives of the Community that of promoting 'sustainable and non-inflationary growth' respecting the environment. These provisions are supplemented by specific objectives set out in Article 174, which provides that Community environment policy shall contribute in particular to preserving, protecting and improving the quality of the environment. Article 6 of the Treaty provides that 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

[4] From 1995 to 2005 rail freight (expressed in tonne-km) increased by 0,9 % per year on average, as against + 3,3 % average annual growth for road during the same period (source: Eurostat).

[5] From 1995 to 2004 passenger rail transport (expressed in passenger-km) increased by 0,9 % per year on average, as against + 1,8 % average annual growth for private vehicles during the same period (source: Eurostat).

[6] Since 2002, particularly in those countries which have opened up their markets to competition. In 2006 there was a 3,7 % growth on the year in rail freight performance and 3 % in the performance of passenger transport. This improvement is likely to continue in 2007.

[7] Communication from the Commission 'Towards a rail network giving priority to freight' (SEC(2007) 1322, SEC(2007) 1324 and SEC(2007) 1325, 18 October 2007).

making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.

7. Secondly, the development of rail transport in Europe was hamstrung by the lack of standardisation and interoperability on the networks, while road hauliers and air carriers had been able to develop a whole range of international services. The Community has inherited a mosaic of national rail networks characterised by different track gauges and incompatible signalling and safety systems, which do not allow the railway undertakings to benefit from the economies of scale which would result from designing infrastructure and rolling stock for a large single market rather than for 25 [1] national markets.

8. The Community is conducting a three-pronged policy to revitalise the rail industry by:

(a) gradually introducing conditions fostering competition on the rail transport services markets;

(b) encouraging standardisation and technical harmonisation on the European rail networks, aiming at full interoperability at the European level;

(c) granting financial support at Community level (in the TEN-T programme and the Structural Funds framework).

9. The Community has thus gradually opened up the rail transport markets to competition. An initial liberalisation package was adopted in 2001 including Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways [2], Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings [3], Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [4]. That package was followed by a second package in 2004 the main instruments of which were Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency [5], Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [6], Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system [7] and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways [8]. A third package was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 [9], Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [10], Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure [11] and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community [12]. As a result, the rail freight market was opened to competition on 15 March 2003 on the trans-European rail freight network, then on 1 January 2006 for international freight

(1) Malta and Cyprus do not have rail transport networks.
(2) OJ L 75, 15.3.2001, p. 1.
(3) OJ L 75, 15.3.2001, p. 26.
(4) OJ L 75, 15.3.2001, p. 29. Directive as last amended by Directive 2007/58/EC (OJ L 315, 3.12.2007, p. 44).
(5) OJ L 164, 30.4.2004, p. 1.
(6) OJ L 164, 30.4.2004, p. 44.
(7) OJ L 164, 30.4.2004, p. 114.
(8) OJ L 164, 30.4.2004, p. 164.
(9) OJ L 315, 3.12.2007, p. 1.
(10) OJ L 315, 3.12.2007, p. 14.
(11) OJ L 315, 3.12.2007, p. 44.
(12) OJ L 315, 3.12.2007, p. 51.

and finally from 1 January 2007 for rail cabotage. The third railway package sets 1 January 2010 as the date for opening up international passenger transport to competition. Some of the Member States, such as the United Kingdom, Germany, the Netherlands and Italy, have already (partially) opened up their domestic passenger transport markets.

10. The relevant provisions of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (1), put in place a new institutional and organisational framework for the players in the railway industry, involving:

    (a) separating railway undertakings (2) from infrastructure managers (3) as regards accounts and organisation;

    (b) management independence of railway undertakings;

    (c) management of railway undertakings according to the principles which apply to commercial companies;

    (d) financial equilibrium of railway undertakings according to a sound business plan;

    (e) compatibility of Member States' financial measures with the State aid rules (4).

11. Alongside this liberalisation process, the Commission has undertaken, on a second level, to promote the interoperability of European rail networks. This approach has been accompanied by Community initiatives to improve the safety standard of rail transport (5).

12. The third level of public intervention in favour of the railway industry lies in the area of financial support. The Commission considers this support to be justified in certain circumstances in view of the substantial adaptation costs necessary in that industry.

13. The Commission notes, furthermore, that there has always been considerable injection of public funds in the rail transport sector. Since 2004 the States of the European Union when it comprised 25 Member States (EU-25) have overall contributed funds totalling some EUR 17 billion to the construction and maintenance of railway infrastructure (6). The Member States pay railway undertakings EUR 15 billion annually in compensation for the provision of unprofitable passenger transport services (6).

14. The granting of State aid to the railway industry can be authorised only where it contributes to the completion of an integrated European market, open to competition and interoperable and to Community objectives of sustainable mobility. The Commission will accordingly make sure that public-sector financial support does not cause distortions of competition contrary to the common interest. Here the Commission will in certain cases be able to ask Member States for commitments on the Community objectives in return for the granting of aid.

### 1.2. **Objective and scope of these guidelines**

15. The objective of these guidelines is to provide guidance on the compatibility with the Treaty of State aid to railway undertakings as it is defined in Directive 91/440/EEC and in the context described above. In addition, Chapter 3 also applies to urban, suburban and regional passenger transport undertakings. The guidelines are based in particular on the principles established by the Community legislator in the three successive railway packages. Their aim is to improve the transparency of public

(1) OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2007/58/EC.

(2) Article 3 of Directive 91/440/EEC defines a railway undertaking as 'any public or private undertaking licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which provide traction only'.

(3) Article 3 of Directive 91/440/EEC defines an infrastructure manager as 'any body or undertaking responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. The functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings'.

(4) Article 9(3) of Directive 91/440/EEC states: 'Aid accorded by Member States to cancel the debts referred to in this Article shall be granted in accordance with Articles 73, 87 and 88 of the Treaty'.

(5) In particular, Directive 2004/49/EC.

(6) *Source:* European Commission, on the basis of the data communicated annually by the Member States. The figures may be even higher in that not all financial support has been notified, in particular co-financing through the Structural and Cohesion Funds.

financing and legal certainty with regard to the Treaty rules in the context of the opening-up of the markets. These guidelines do not concern public financing intended for infrastructure managers.

16. Article 87(1) of the Treaty provides that in principle any aid granted by a Member State which threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Nevertheless, such State aid may in certain situations be justified in the light of the common interest of the Community. Some of these situations are mentioned in Article 87(3) of the Treaty, and apply to the transport sector as they do to other sectors of the economy.

17. Also, Article 73 of the Treaty provides that aids are compatible with the common market 'if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'. This Article constitutes a *lex specialis* in the general scheme of the Treaty. On the basis of this Article the Community legislator has adopted two instruments specific to the transport sector: Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway ([1]) and Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ([2]). Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings ([3]) likewise provides that certain compensation may be granted by Member States to railway undertakings.

18. Article 3 of Regulation (EEC) No 1107/70 provides that Member States are neither to take coordination measures nor to impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 73 of the Treaty except in the cases or circumstances provided for by the Regulation in question, without prejudice, however, to Regulations (EEC) No 1191/69 and (EEC) No 1192/69. According to the judgment of the Court of Justice of the European Communities in *Altmark* ([4]), it follows that State aid which cannot be authorised on the basis of Regulations (EEC) No 1107/70, (EEC) No 1191/69 or (EEC) No 1192/69 cannot be declared compatible on the basis of Article 73 of the Treaty ([5]). In addition, it should be recalled that public service compensation which does not respect provisions stemming from Article 73 of the Treaty cannot be declared compatible with the common market on the basis of Article 86(2) or any other provision of the Treaty ([6]).

19. Regulation (EC) No 1370/2007 ('the PSO Regulation'), which will enter into force on 3 December 2009 and which repeals Regulations (EEC) No 1191/69 and (EEC) No 1107/70, will put in place a new legal framework. The aspects relating to public service compensation are therefore not covered by these guidelines.

20. After the entry into force of Regulation (EC) No 1370/2007, Article 73 of the Treaty will be directly applicable as a legal basis for establishing the compatibility of aid not covered by the PSO Regulation, and in particular aid for the coordination of freight transport. A general interpretation therefore needs to be developed for considering the compatibility of aid for coordination purposes with Article 73 of the Treaty. The aim of these guidelines is in particular to establish criteria for this examination and intensity thresholds. In view of the wording of Article 73, the Commission must nevertheless make it possible for Member States to show, where appropriate, the need for and proportionality of any measures which exceed the thresholds established.

21. These guidelines concern the application of Articles 73 and 87 of the Treaty and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. They deal with the following aspects: public financing of railway undertakings by means of infrastructure funding (Chapter 2), aid for the purchase and renewal of rolling stock (Chapter 3),

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([1]) OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).
([2]) OJ L 130, 15.6.1970, p. 1.
([3]) OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).
([4]) Judgment of the Court of Justice of 24 July 2003, Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH ('Altmark')* [2003] ECR I-7747.
([5]) Judgement in Altmark, paragraph 107.
([6]) See, in that regard, recital 17 of Commission Decision 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 (OJ L 312, 29.11.2005, p. 67, point 17).

debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4), aid for restructuring railway undertakings (Chapter 5), aid for the needs of transport coordination (Chapter 6), and State guarantees for railway undertakings (Chapter 7). However, these guidelines do not deal with the rules for the application of the PSO Regulation, for which the Commission has not yet developed any decision-making practice ([1]).

## 2. PUBLIC FINANCING OF RAILWAY UNDERTAKINGS BY MEANS OF RAILWAY INFRASTRUCTURE FUNDING

22. Railway infrastructure is of major importance for the development of the railway sector in Europe. Whether for interoperability, safety or the development of high-speed rail, considerable investments will have to be made in this infrastructure ([2]).

23. These guidelines apply only to railway undertakings. Their aim is therefore not to define, in the light of State aid rules, the legal framework which applies to the public financing of infrastructure. This Chapter only examines the effects of public financing of infrastructure on railway undertakings.

24. Moreover, public financing of infrastructure development can grant an advantage to railway undertakings indirectly and thereby constitute aid. According to the case-law of the Court of Justice, it should be evaluated whether the infrastructure measure has the economic effect of lightening the burden of charges normally encumbering railway undertakings' budgets ([3]). For that to be the case, a selective advantage would have to be granted to the undertakings concerned, that advantage originating in the financing of the infrastructure in question ([4]).

25. Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation (Directive 2001/14/EC), the Commission normally considers that public financing of the infrastructure does not constitute State aid to railway undertakings ([5]).

26. The Commission also points out that, where public financing of railway infrastructure constitutes aid to one or more railway undertakings, it may be authorised, for example on the basis of Article 73 of the Treaty, if the infrastructure in question meets the needs of transport coordination. In this regard, Chapter 6 of these guidelines is a pertinent reference point for assessing compatibility.

## 3. AID FOR THE PURCHASE AND RENEWAL OF ROLLING STOCK

### 3.1. Objective

27. The fleet of locomotives and carriages used for passenger transport is ageing and in some cases worn out, especially in the new Member States. In 2005, 70 % of the locomotives (diesel and electric) and 65 % of the wagons of the EU-25 were more than 20 years old ([6]). Taking only the Member States

([1]) Nor do they concern the application of Regulation (EEC) No 1192/69.
([2]) Communication from the Commission 'Keep Europe moving — Sustainable mobility for our continent — Mid-term review of the Transport White Paper'.
([3]) Judgment of the Court of Justice of 13 June 2002, Case C-382/99, *Netherlands* v *Commission* [2002] ECR I-5163.
([4]) Judgment of the Court of Justice of 19 September 2000, Case C-156/98, *Germany* v *Commission* [2000] ECR I-6857.
([5]) Commission Decision of 7 June 2006, N 478/04, Ireland — State guarantee for capital borrowings by Córas Iompair Éireann (CIÉ) for infrastructure investment (OJ C 209, 31.8.2006, p. 8); Decision of 8 March 2006, N 284/05, Ireland — Regional Broadband Programme (OJ C 207, 30.8.2006, p. 3), point 34; and the following Decisions: Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), point 64; Decision of 20 April 2005, N 355/04 PPP, Belgium — Public-Private-Partnership for tunnelling the Krijgsbaan at Deurne; the development of industrial estates and the operation of Antwerp Airport (OJ C 176, 16.7.2005, p. 11), point 34; Decision of 11 December 2001, N 550/01, Belgium — Public-Private Partnership for loading and unloading facilities (OJ C 24, 26.1.2002, p. 2), point 24; Decision of 20 December 2001, N 649/01, United Kingdom — Freight Facilities Grant (OJ C 45, 19.2.2002, p. 2), point 45; Decision of 17 July 2002, N 356/02, United Kingdom — Network Rail (OJ C 232, 28.9.2002, p. 2), point 70; N 511/95, Jaguar Cars Ltd. See also, the Commission Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5), point 12; White Paper: Fair Payment for Infrastructure use (COM(1998) 466 final), point 43; Communication from the Commission to the European Parliament and the Council: 'Reinforcing Quality Service in Sea Ports: A Key for European Transport' (COM(2001) 35 final, p. 11).
([6]) *Source:* UIC Rolling stock fleet in EU-25 + Norway (2005).

which joined the European Union in 2004, 82 % of locomotives and 62 % of wagons were more than 20 years old in 2005 ([1]). According to the information at its disposal, the Commission estimates that the annual rate of renewal of the fleet is around 1 %.

28. This trend of course reflects the difficulties of the railway industry in general, which reduce the incentives for railway undertakings and their capacity to invest in an effort to modernise and/or renew their rolling stock. Such investment is indispensable to keeping rail transport competitive with other modes of transport which cause more pollution or entail higher external costs. It is also necessary to limit the impact of rail transport on the environment, particularly by reducing the noise pollution it causes, and to improve its safety. Finally, improving interoperability between the national networks means it is necessary to adapt the existing rolling stock in order to be able to maintain a coherent system.

29. In the light of the above it seems that under certain circumstances aid for the purchase and renewal of rolling stock can contribute to several types of objectives of common interest and therefore be considered compatible with the common market.

30. This Chapter seeks to define the conditions in which the Commission is to carry out such a compatibility assessment.

### 3.2. **Compatibility**

31. The compatibility assessment has to be made according to the common-interest objective to which the aid is contributing.

32. The Commission considers that in principle the need to modernise rolling stock can be sufficiently taken into account either in implementing the general State aid rules or by applying Article 73 of the Treaty where such aid is intended for transport coordination (see Chapter 6).

33. In assessing the compatibility of aid for rolling stock the Commission therefore generally applies the criteria defined for each of the following aid categories in these guidelines or in any other relevant document:

(a) aid for coordination of transport ([2]);

(b) aid for restructuring railway undertakings ([3]);

(c) aid for small and medium-sized enterprises ([4]);

(d) aid for environmental protection ([5]);

(e) aid to offset costs relating to public service obligations and in the framework of public service contracts ([6]);

(f) regional aid ([7]).

34. In the case of regional aid for initial investment, the Guidelines on national regional aid, 'the regional aid guidelines', provide that 'in the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment' (point 50, footnote 48). The Commission considers that a derogation should be made from this rule with regard to rail passenger transport. This is due to the specific characteristics of this mode of transport, and in particular to the

([1]) *Source:* CER (2005).
([2]) See Chapter 6.
([3]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), and Chapter 5.
([4]) Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33). Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).
([5]) Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1).
([6]) Regulation (EEC) No 1191/69 cited above; PSO Regulation of the European Parliament and of the Council, cited above, in which attention should be drawn in particular to Article 3(1): 'Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract'.
([7]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13), point 8.

fact that it is possible that the rolling stock in this sector may be permanently assigned to specific lines or services. Subject to certain conditions, defined below, the costs of acquisition of rolling stock in the rail passenger transport sector (or for other modes such as light rail, underground or tram) are deemed to be admissible expenditure within the meaning of the guidelines in question [1]. However, the costs of acquisition of rolling stock for exclusive use in freight transport are not admissible.

35. In view of the situation described in points 28 and 29, this derogation applies to any kind of investment in rolling stock, whether initial or for replacement purposes, so long as it is assigned to lines regularly serving a region eligible for aid under Article 87(3)(a) of the Treaty, an outermost region or a region of low population density within the meaning of points 80 and 81 of the regional aid guidelines [2]. In the other regions, the derogation applies only to aid for initial investment. For aid for investment for replacement purposes, the derogation applies only when all the rolling stock that the aid is used to modernise is more than 15 years old.

36. In order to avoid distortions of competition which would be contrary to the common interest, the Commission does, however, consider that such a derogation has to be made subject to four conditions, which have to be met cumulatively:

(a) the rolling stock concerned must be exclusively assigned to urban, suburban or regional passenger transport services in a specific region or for a specific line serving several different regions; For the purposes of these guidelines 'urban and suburban transport services' is to be understood as transport services serving an urban centre or conurbation as well as those services between that centre or conurbation and its suburbs. 'Regional transport services' is to be understood as transport services intended to meet the transport needs of one or more regions. Transport services serving several different regions, in one or more Member States, may therefore be covered by the scope of this point if it can be shown that there is an impact on the regional development of the regions served, in particular by the regular nature of the service. In this case, the Commission verifies that the aid does not compromise the effective opening of the international passenger transport market and cabotage following the entry into force of the third railway package;

(b) the rolling stock must remain exclusively assigned to the specific region or the specific line passing through several different regions for which it has received aid for at least ten years;

(c) the replacement rolling stock must meet the latest interoperability, safety and environmental standards [3] applicable to the network concerned;

(d) the Member State must prove that the project contributes to a coherent regional development strategy.

37. The Commission will take care to avoid undue distortions of competition, notably by taking account of the additional revenue that the replaced rolling stock on the line in question could procure for the enterprise aided, for example, through sales to a third party or use on other markets. To this end, the granting of the aid may be made subject to the obligation on the recipient undertaking to sell under normal market conditions all or part of the rolling stock it is no longer using, so as to allow its further use by other operators; in this case the proceeds from the sale of the old rolling stock will be deducted from the eligible costs.

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(1) The Commission notes that, depending on the specific circumstances of the case in point, this reasoning may be applied mutatis mutandis to vehicles used for the public transport of passengers by road, where such vehicles meet the latest Community standards applicable to new vehicles. Where that is the case, in the interests of equal treatment the Commission will, in such situations, apply the approach described here for railway rolling stock. The Commission encourages the Member State to support the least polluting technologies when awarding this type of aid and will study the extent to which specific financial aid leading to higher aid intensities for such technologies is appropriate.

(2) The least populated regions represent or belong to regions at NUTS-II level with a population density of no more than 8 inhabitants per $km^2$ and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

(3) Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards is possible within the Guidelines on State aid for environmental protection.

38. More generally, the Commission will ensure that no improper use is made of the aid. The other conditions provided for in the regional aid guidelines, notably as regards the intensity ceilings and the regional aid maps and the rules on the cumulation of aid, apply. The Commission notes that the specific lines concerned may in certain cases pass through regions where there are different intensity ceilings in accordance with the regional aid maps. In this case the Commission will apply the highest rate of intensity of the regions regularly served by the line concerned in proportion to the regularity of such service ([1]).

39. With regard to investment projects with eligible expenditure in excess of EUR 50 million, the Commission considers it appropriate, due to the specificities of the rail passenger transport sector, to derogate from points 60 to 70 of the regional aid guidelines. However, points 64 and 67 of those guidelines remain applicable when the investment project concerns rolling stock assigned to a specific line serving several regions.

40. If the recipient undertaking is entrusted with providing services of general economic interest that necessitate buying and/or renewing rolling stock and it already receives compensation for this, that compensation should be taken into account in the amount of regional aid that may be awarded to this undertaking, in order to avoid overcompensation.

## 4. **DEBT CANCELLATION**

### 4.1. **Objective**

41. As mentioned in Section 1.1, railway undertakings have in the past experienced a state of imbalance between their revenues and their costs, especially their investment costs. This has led to major indebtedness, the financial servicing of which represents a very heavy burden on railway undertakings and limits their capacity to make the necessary investments in both infrastructure and renewal of rolling stock.

42. Directive 91/440/EEC explicitly took this situation into account. It is stated in the seventh recital thereto that Member States 'should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure' and envisages that a 'financial rearrangement' might be necessary for this purpose. Article 9 of the Directive provides: 'In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation'. Article 9(3) envisages the granting of State aid 'to cancel the debts referred to in this Article', and provides that such aid must be granted in accordance with Articles 73, 87 and 88 of the Treaty.

43. At the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the Member States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:

(a) transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;

(b) the creation of separate entities for the financing of infrastructure projects (for example, high-speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;

(c) financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.

([1]) Where the line or specific service systematically (that is to say, on every journey) serves the region to which the highest rate applies, this rate is applied to all admissible expenditure. Where the region to which the highest rate applies is only occasionally served, this rate is applied only to the part of the admissible expenditure allocated to serving that region.

44. These three types of action have helped to improve the financial situation of railway undertakings in the short term. Their indebtedness has been reduced compared with total liabilities, as has the share of interest repayments in the operating costs. In general the debt reduction has allowed railway undertakings to improve their financial situation through a reduction in their capital and interest repayments. Such reductions have also helped to lower the rates of interest, which has a substantial impact on the financial servicing of the debt.

45. However, the Commission notes that the level of indebtedness of many railway undertakings continues to give cause for concern. Several of these undertakings have a level of indebtedness higher than is acceptable for a commercial company, are still not capable of self-financing, and/or cannot finance their investment needs from the revenue from present and future transport operations. Also, in the Member States which joined the Community after 1 May 2004 the level of indebtedness of the companies in the sector is considerably higher than in the rest of the Community.

46. This fact is reflected in the Community legislator's choice not to amend the provisions of Directive 91/440/EEC when Directives 2001/12/EC and 2004/51/EC were adopted. These provisions therefore fall within the general framework formed by the successive railway packages.

47. This Chapter seeks to define how, in the light of this requirement of secondary legislation, the Commission intends to apply the Treaty rules on State aid to the mechanisms for reducing the indebtedness of railway undertakings.

### 4.2. **Presence of State aid**

48. The Commission notes first of all that the principle of incompatibility laid down in Article 87(1) of the Treaty applies only to aid 'which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only 'insofar as it affects trade between Member States'. Under established case-law, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, these undertakings must be regarded as affected by that aid ([1]).

49. Any measure attributable to the State which leads to the complete or partial cancellation of debts specifically in favour of one or more railway undertakings and through State resources therefore falls within the scope of Article 87(1) of the Treaty, if the railway undertaking in question is active in markets open to competition and if this debt cancellation strengthens its position in at least one of those markets.

50. The Commission notes that Directive 2001/12/EC opened up the international rail freight services market to competition over the whole trans-European rail freight network from 15 March 2003. It therefore considers that, generally, the market was opened up to competition at the latest on 15 March 2003.

### 4.3. **Compatibility**

51. When the cancellation of a railway undertaking's debt constitutes State aid covered by Article 87(1) of the Treaty it must be notified to the Commission in accordance with Article 88 of the Treaty.

52. Aid of this kind must generally be examined on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 2004 ('the 2004 guidelines on State aid for restructuring'), subject to Chapter 5 of these Guidelines.

53. In specific cases where the debts cancelled exclusively concern transport coordination, compensation of public service obligations or the setting of accounting standards, the compatibility of this aid will be examined on the basis of Article 73 of the Treaty, the regulations adopted for the implementation thereof and the rules for the normalisation of the accounts ([2]).

([1]) Judgment of the Court of Justice of 17 September 1980, Case 730/79, *Phillip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 11.
([2]) Regulation (EEC) No 1192/69.

54. In the light of Article 9 of Directive 91/440/EEC, the Commission also considers that, under certain circumstances, it should be possible to authorise this aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.

55. The Commission takes the view that this type of aid may be compatible in so far as it seeks to ease the transition to an open rail market, as provided for by Article 9 of Directive 91/440/EEC ([1]). Thus it considers that such aid may be regarded as compatible with Article 87(3)(c) of the Treaty ([2]), provided that the following conditions are met.

56. Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. In cases where the Member States joined the Community after 15 March 2001, the relevant date is that of accession to the Community. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at Community level had yet to be taken.

57. Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. Debts incurred for the purpose of investment not directly linked to transport and/or rail infrastructure are not eligible.

58. Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition on the market would not allow them to rectify their financial situation within a foreseeable future. Assessment of this criterion has to take into account any productivity improvements which the undertaking can reasonably be expected to achieve.

59. Fourthly, the aid must not go beyond what is necessary for the purpose. In this regard, account must also be taken of future developments in competition. It should not, at any rate, place the undertaking in a situation more favourable than that of an average well-managed undertaking with the same activity profile.

60. Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market, for example by deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators ([3]).

61. Where these conditions are met, the debt cancellation measures are contributing to the objective set in Article 9 of Directive 91/440/EEC, without unduly distorting competition and trade between Member States. They can thus be considered compatible with the common market.

## 5. **AID FOR RESTRUCTURING RAILWAY UNDERTAKINGS — RESTRUCTURING A 'FREIGHT' DIVISION**

### 5.1. **Objective**

62. Save where specifically provided otherwise, the Commission assesses the compatibility of State aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 guidelines on State aid for restructuring. Those guidelines do not provide for any derogation for railway undertakings.

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([1]) The Commission applies, by analogy, certain conditions laid down by the Commission communication relating to the methodology for analysing State aid linked to stranded costs of 26 July 2001, SEC(2001) 1238.
([2]) Without prejudice to the application of Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70.
([3]) Without prejudice to the application of Directive 2001/14/EC.

63. Generally speaking, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid. The 2004 guidelines on State aid for restructuring apply only to 'firms in difficulty'. They also state, at point 13, that a firm 'belonging to or being taken over by a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'. It should be avoided, *a fortiori*, that artificial subdivision allows a loss-making activity within a given company to receive public funds.

64. However, the Commission considers that the European rail freight sector currently finds itself in a very specific situation making it necessary, in the common interest, to envisage that aid granted to a railway undertaking allowing it to overcome difficulties in the freight operations of that undertaking might, under certain circumstances, be considered compatible with the common market.

65. In today's railway industry, the competitive situation of freight transport operations is quite different from that which applies to passenger transport. The national freight markets are open to competition whereas the rail passenger transport markets are not going to be opened up before 1 January 2010.

66. This situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers. The financial equilibrium of passenger transport, on the other hand, may also depend on the public authorities taking action by way of public service compensation.

67. However, several European railway undertakings have not legally separated their passenger and freight transport activities, or have only just done so. Moreover, current Community legislation does not provide for the obligation to make this legal separation.

68. Furthermore, one of the central priorities of European transport policy has, for many years, been to breathe new life into the railway freight industry. The reasons for this are set out in Chapter 1 of these guidelines.

69. This specific characteristic of rail freight activities necessitates an adapted approach, as has been recognised in the Commission's decision-making practice ([1]) on the basis of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty of 1999 ([2]).

70. This Chapter is intended to show, in the light of the Commission's decision-making practice and taking account of the amendments made by the 2004 guidelines on State aid for restructuring to the corresponding 1999 guidelines, the way in which the Commission intends to implement this approach in future.

71. In view of the risks highlighted above, this approach is justified and will be maintained only for the freight divisions of railway undertakings, and for a transitional period, namely for restructurings notified before 1 January 2010, the date on which the rail passenger transport market will be opened up to competition.

72. Furthermore, the Commission wishes to take account of the fact that, in a growing number of Member States, railway undertakings have adapted their organisation to specific developments in rail freight and passenger transport activities by taking steps to legally separate their freight transport activities. The Commission will therefore require, as part of the restructuring efforts and before awarding any aid, the legal separation of the freight division in question by transforming it into a commercial company under common commercial law. The Commission is of the view that this separation will, with other appropriate measures, help considerably to achieve two goals, namely to exclude all cross-subsidisation between the restructured division and the rest of the undertaking and to ensure that all financial relations between these two activities are carried out in a sustainable manner and on a commercial basis.

([1]) See Commission Decision of 2 March 2005, N 386/04, Aid for restructuring SNCF Freight — France (OJ C 172, 12.7.2005, p. 3).
([2]) OJ C 288, 9.10.1999, p. 2.

73. In order to avoid any doubt, the 2004 guidelines on State aid for restructuring will continue to apply in their entirety when examining the aid dealt with in this Chapter, except with regard to the express derogations set out below.

### 5.2. **Eligibility**

74. The eligibility criteria must be adapted to include the situation in which a freight division of a railway undertaking constitutes a coherent and permanent economic unit, which will be legally separated from the rest of the undertaking through the restructuring process before aid is granted, and faces difficulties such that, if it had been separated from the railway undertaking, it would be a 'firm in difficulty' within the meaning of the 2004 restructuring guidelines.

75. This means, in particular, that that division of the undertaking would be facing serious difficulties of its own, which are not the result of an arbitrary allocation of costs within the railway undertaking.

76. In order for the division to be restructured to constitute a coherent and permanent economic unit it must comprise all the freight transport activities of the railway undertaking, whether industrial, commercial, accounting or financial. It must be possible to attribute to it a level of losses, as well as a level of own funds or capital, which sufficiently reflects the economic reality of the situation which the division faces in order to evaluate in a coherent manner the criteria fixed in point 10 of the 2004 guidelines on State aid for restructuring ([1]).

77. When assessing whether a division is in difficulty as described above, the Commission will also take into account the ability of the rest of the railway undertaking to ensure the recovery of the division to be restructured.

78. The Commission is of the view that, although the situation described is not directly covered by the 2004 guidelines on State aid for restructuring, point 12 of which excludes newly created firms from the scope of the guidelines, restructuring aid may be granted in this context to enable the firm created by this legal separation to operate in viable market conditions. This is intended to apply only in situations where the firm to be created as a result of legal separation includes the entire freight division, as described by the separate accounting established in accordance with Article 9 of Directive 91/440/EEC, and includes all the division's assets, liabilities, capital, off-balance sheet commitments and workforce.

79. The Commission considers that, for the same reasons, when a railway undertaking has recently legally separated its freight division, where this division fulfilled the above criteria, the firm in question must not be considered a newly created firm within the meaning of point 12 of the 2004 guidelines on State aid for restructuring, and is therefore not excluded from the scope of these guidelines.

### 5.3. **Return to long-term viability**

80. The Commission will make sure not only that the criteria for a return to long-term viability as set out in the 2004 guidelines on State aid for restructuring are fulfilled ([2]), but also that restructuring will ensure the freight activity is transformed from a protected activity enjoying exclusive rights into one which is competitive on the open market. This restructuring should therefore concern all aspects of

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([1]) Point 10 of the guidelines on State aid for restructuring states: 'In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these guidelines in the following circumstances:
- in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or
- in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or
- whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings'.

([2]) See in particular points 34 to 37 of the guidelines on State aid for restructuring.

the freight activity, whether industrial, commercial, or financial. The restructuring plan required by the restructuring guidelines [1] must make it possible to ensure a standard of quality, reliability and service which meets customers' requirements.

### 5.4. **Prevention of any excessive distortion of competition**

81. In analysing the prevention of any excessive distortion of competition, as provided for by the guidelines on State aid for restructuring, the Commission will also base itself on:

(a) the difference between the economic models for rail and the other modes of transport;

(b) the Community objective of shifting the balance between modes of transport;

(c) the competitive situation on the market at the time of restructuring (degree of integration, growth potential, presence of competitors, likely trends).

### 5.5. **Aid limited to a minimum**

82. The provisions of the 2004 guidelines on State aid for restructuring apply when verifying this criterion. To this end the firm's own contribution will include that of the freight division which will be legally separated from the railway undertaking. However, in the Commission's view, the very specific situation of the European rail freight industry, which is described above, may constitute an exceptional circumstance within the meaning of paragraph 44 of those guidelines. It may therefore accept lower own contributions than those provided for in the 2004 guidelines on State aid for restructuring provided that the freight division's own contribution is as high as possible without jeopardising the viability of the operation.

### 5.6. **'One time, last time' principle**

83. The 'one time, last time' principle applies to the legally separated firm, by taking account of the restructuring aid notified as initial restructuring aid received by the undertaking. However, restructuring aid authorised under the conditions set out in this Chapter does not affect application of the 'one time, last time' principle with regard to the rest of the railway undertaking.

84. To avoid any doubt, if the railway undertaking as a whole has already received restructuring aid, the 'one time, last time' principle means that aid as provided for in this Chapter may not be granted to restructure the freight division of the undertaking.

## 6. **AID FOR COORDINATION OF TRANSPORT**

### 6.1. **Objective**

85. As already stated, Article 73 of the Treaty was implemented by Regulations (EEC) No 1191/69 and (EEC) No 1107/70, which will be repealed by the PSO Regulation. The PSO Regulation will, however, apply only to land passenger transport. It will not cover rail freight transport, for which aid for coordination of transport will continue to be subject only to Article 73 of the Treaty.

86. In addition to this, Article 9 of the PSO Regulation concerning aid for coordination of transport and aid for research and development applies explicitly without prejudice to Article 73 of the Treaty, so it will be possible to use Article 73 directly for justifying the compatibility of aid for coordination of rail passenger transport.

87. The objective of this Chapter is therefore to establish criteria which will allow the Commission to assess the compatibility, on the basis of Article 73 of the Treaty, of aid for the coordination of transport, both generally (Section 6.2) and as regards certain specific forms of aid (Section 6.3). The Commission notes that, although the general implementing principles of Article 73 of the Treaty are relevant when assessing State aid under the PSO Regulation, these guidelines do not cover the detailed rules for the implementation of the Regulation in question.

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[1] See in particular Section 3.2 of the restructuring guidelines.

### 6.2. **General considerations**

88. Article 73 of the Treaty provides for compatibility of aid which meets the needs of coordination of transport. The Court of Justice has ruled that this Article 'acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community' ([1]).

89. The concept of 'coordination of transport' used in Article 73 of the Treaty has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest.

90. The progress made with liberalising the land transport sector has in some respects considerably reduced the need for coordination. In an efficient liberalised sector, coordination can in principle result from the action of market forces. As indicated above, however, the fact remains that investment in infrastructure development continues to be carried out by the public authorities. Moreover, even after the liberalisation of the sector, there may still be various market failures. These in particular are the failures which justify the intervention of the public authorities in this field.

91. Firstly, the transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits to the possibility of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result there may be disparities between the different modes of transport, which ought to be corrected by public authority support for those modes of transport which give rise to the lowest external costs.

92. Secondly, the transport sector may experience 'coordination' difficulties in the economic sense of the term, for example in the adoption of a common interoperability standard for rail, or in the connections between different transport networks.

93. Thirdly, the railway undertakings may not be able to reap the full rewards of their research, development and innovation efforts (positive externalities), which also amounts to a failure of the market.

94. The presence of a specific provision in the Treaty making it possible to authorise aid which meets the needs of transport coordination shows how important these risks of market failures are and the negative impact they have on the development of the Community.

95. In principle, aid which meets the needs of transport coordination has to be considered compatible with the Treaty.

96. Nevertheless, for a given aid measure to be considered to 'meet the needs' of transport coordination, it has to be necessary and proportionate to the intended objective. Furthermore, the distortion of competition which is inherent in aid must not jeopardise the general interests of the Community. By way of illustration, aid likely to shift traffic flows from short sea shipping to rail would fail to meet these criteria.

97. Finally, in view of the rapid development of the transport sector, and hence the need for coordinating it, any aid notified to the Commission for the purpose of obtaining a decision, on the basis of Article 73 of the Treaty, that the aid is compatible with the Treaty has to be limited ([2]) to a maximum of 5 years, in order to allow the Commission to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal ([3]).

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([2]) Ibidem.

([3]) This period is increased to 10 years for measures which fall within the scope of Article 15(1)(e) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51); Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100). See in particular Commission Decision of 2 April 2008, NN 46/B/06, Slovakia — Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

98. As regards the railway industry more specifically, aid for the needs of transport coordination can take several forms:

(a) aid for infrastructure use, that is to say, aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;

(b) aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;

(c) aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector, hereinafter referred to as 'interoperability aid';

(d) aid for research and development in response to the needs of transport coordination.

99. In the following Sections the Commission will specify the conditions which, from the point of view of its decision-making practice, make it possible to ensure, for these different types of aid for coordination of transport, that the aid concerned meets the conditions of compatibility mentioned in Article 73 of the Treaty. In view of the specific nature of research and development aid, the criteria applicable to this type of measure are dealt with separately.

### 6.3. **Criteria for aid for rail infrastructure use, reducing external costs and interoperability**

100. The assessment of the compatibility of aid for infrastructure use, reducing external costs and interoperability with respect to Article 73 of the Treaty is in keeping with the Commission's decision-making practice pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70. In the light of this practice the conditions which follow appear sufficient for determining whether the aid is compatible.

#### 6.3.1. *Eligible costs*

101. The eligible costs are determined on the basis of the following.

102. As regards **aid for rail infrastructure use**, the eligible costs are the additional costs for infrastructure use paid by rail transport but not by a more polluting competing transport mode.

103. As regards **aid for reducing external costs**, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.

104. In that regard, it should be recalled that Article 10 of Directive 2001/14/EC explicitly allows Member States to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail. If there is not yet any Community legislation which harmonises methods for calculating infrastructure access charges within or across land transport modes, the Commission will take account of the development of the rules governing the allocation of infrastructure costs and external costs when applying these guidelines ([1]).

([1]) In this connection the third paragraph of Article 11 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ L 187, 20.7.1999, p. 42), as amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344), provides that 'No later than 10 June 2008, the Commission shall present, after examining all options including environment, noise, congestion and health-related costs, a generally applicable, transparent and comprehensible model for the assessment of all external costs to serve as the basis for future calculations of infrastructure charges. This model shall be accompanied by an impact analysis of the internalisation of external costs for all modes of transport and a strategy for a stepwise implementation of the model for all modes of transport'. During the preparation of a communication on the internalisation of external costs to comply with this objective, on 16 January 2008 the Commission published a handbook on the studies carried out so far on external costs in the transport sector (http://ec.europa.eu/transport/costs/handbook/index_en.htm). This handbook, which was compiled jointly by several transport research institutes, can be used, amongst other factors, to determine eligible costs. Furthermore, the Commission has published a White Paper COM(1998) 466, Fair payment for infrastructure use — A phased approach to a common transport infrastructure charging framework in the European Union (Bulletin of the EU — Supplement No 3/98).

105. Both for aid for rail infrastructure use and for aid for reducing external costs, the Member State has to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport [1]. The methodology used and calculations performed must be made publicly available [2].

106. As regards **interoperability aid**, the eligible costs cover, to the extent to which they contribute to the objective of coordinating transport, all investments relating to the installation of safety systems and interoperability [3], or noise reduction both in rail infrastructure and in rolling stock. In particular they cover investment associated with the deployment of ERTMS (European Rail Traffic Management System) and any like measure which can help to remove the technical barriers in the European rail services market [4].

6.3.2. *Necessity and proportionality of the aid*

107. The Commission considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below the following values:

(a) for aid for rail infrastructure use, 30 % of the total cost of rail transport, up to 100 % of the eligible costs [5];

(b) for aid for reducing external costs, 30 % [6] of the total cost of rail transport, up to 50 % of the eligible costs [7];

(c) for interoperability aid, 50 % of the eligible costs.

108. For aid above these thresholds, Member States must demonstrate the need and proportionality of the measures in question [8].

109. For both aid for rail infrastructure use and aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit chosen corresponds to the highest cost differential among the various options. Where the intensity thresholds referred to in point 108 are adhered to, it may be presumed that the 'no overcompensation' criterion is met.

(1) Member States can find indications of the different methods for evaluating extra costs in Annex 2 to Commission Green Paper Towards fair and efficient pricing in transport — Policy options for internalising the external costs of transport in the European Union (Bulletin of the EU — Supplement No 2/96; COM(1995) 691 final) and in the study which the Commission published on 16 January 2008 (See Article 11 of Directive 1999/62/EC).
(2) Article 10 of Directive 2001/14/EC.
(3) See, in particular, Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ L 235, 17.9.1996, p. 6). Directive as last amended by Directive 2007/32/EC (OJ L 141, 25.6.2007, p. 63) and Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system (OJ L 110, 20.4.2001, p. 1). Directive as last amended by Directive 2007/32/EC.
(4) Calculation of the eligible costs will take account of any changes made to charges for infrastructure use based on rolling stock performance (especially sound performance).
(5) See, by way of illustration, Commission Decision of 22 December 2006, N 574/05, prolongation of existing aid scheme N 335/03, Italy — Friuli Venezia Giulia — Aid for the setting up of rolling-motorway services (OJ C 133, 15.6.2007, p. 6); Commission Decision of 12 October 2006, N 427/06, United Kingdom — Rail Environmental Benefit Procurement Scheme (REPS) (OJ C 283, 21.11.2006, p. 10).
(6) Annex I to Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (OJ L 328, 24.11.2006, p. 1) provides that Community financial assistance for modal shift actions is limited to a maximum of 35 % of the total expenditure necessary to achieve the objectives of the action and incurred as a result of the action. In these guidelines, as regards State aid for transport coordination the criterion is 30 % of the total cost of rail transport.
(7) See, by way of illustration, Commission Decision of 22 December 2006, N 552/06, Denmark — Prolongation of environmental aid scheme for the transport of goods by rail (OJ C 133, 15.6.2007, p. 5) and Commission Decision of 12 October 2006, N 427/06, United Kingdom — Rail Environmental Benefit Procurement Scheme (REPS), op. cit.
(8) This could be the case with interoperability measures on the trans-European transport network as last defined by Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network (OJ L 167, 30.4.2004, p. 1).

110. At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road ([1]).

111. Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

6.3.3. *Conclusion*

112. Aid for rail infrastructure use, for reducing external costs or for interoperability that is necessary and proportionate and so does not distort competition contrary to the common interest must be considered compatible under Article 73 of the Treaty.

### 6.4. **Compatibility of aid for research and development**

113. In the area of land transport, Article 3(1)(c) of Regulation (EEC) No 1107/70, adopted on the basis of Article 73 of the Treaty, provides for the possibility of granting aid to research and development. The Commission has recently developed a body of practice in the application of this provision ([2]).

114. Article 9(2)(b) of the PSO Regulation adopts the text of Article 3(1)(c) of Regulation (EEC) No 1107/70. Under that provision, aid which has the purpose of promoting research into or development of rail passenger transport systems and technologies which are more economic for the community in general, which is restricted to the research and development stage and which does not cover the commercial exploitation of such transport systems and technologies, has to be regarded as meeting the needs of transport coordination.

115. Article 9(2)(b) of the PSO Regulation applies without prejudice to Article 87 of the Treaty. Thus, aid for research, development and innovation in the field of passenger transport, if not covered by Article 9 of the PSO Regulation, and aid which only concerns freight, may be considered compatible on the basis of Article 87(3)(c) of the Treaty.

116. In this regard the Commission has defined, in the Community framework for State aid for research and development and innovation ([3]) (hereinafter the 'Community framework'), the conditions under which it will declare aid of that type compatible with the common market on the basis of Article 87(3)(c) of the Treaty. That framework applies 'to aid to support research and development and innovation in all sectors governed by the Treaty. It also applies to those sectors which are subject to specific Community rules on State aid, unless such rules provide otherwise' ([4]). The framework therefore applies to aid for research, development and innovation in the railway transport sector which does not fall within the scope of Article 3(1)(c) of Regulation (EEC) No 1107/70 or Article 9 of the PSO Regulation (following the entry into force of that Regulation).

117. It is not excluded that the compatibility of aid for research and development may be analysed directly on the basis of Article 73 of the Treaty, if it is aimed at meeting the needs of transport coordination. In this case the abovementioned conditions should be checked, in particular the fact that the aid must

([1]) With regard to measures falling under Article 15(1)(e) of Directive 2003/96/EC, an impact on the price of transport may be taken for granted, unless there is proof to the contrary. See in particular the Commission Decision of 2 April 2008, NN 46/B/06, Slovakia — Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

([2]) Commission Decision of 30 May 2007, N 780/06, The Netherlands — *Onderzoek en ontwikkeling composiet scheepsconstructie en multi-purpose laadruim*; het 'CompoCaNord'-project (OJ C 227, 27.9.2007, p. 5); Commission Decision of 19 July 2006, N 556/05, The Netherlands — Environmental protection and innovation in public transport in the province of Gelderland (OJ C 207, 30.8.2006); Commission Decision of 20 July 2005, N 63/05, Czech Republic — Programme for energy economics and use of alternative fuels in the transport sector (OJ C 83, 6.4.2006).

([3]) OJ C 323, 30.12.2006, p. 1.

([4]) Ibidem, point 2.1.

be necessary and proportionate to the intended objective, and must not jeopardise the general interests of the Community. The Commission considers that the general principles set out in the Community framework are relevant in analysing these various criteria.

## 7. STATE GUARANTEES FOR RAILWAY UNDERTAKINGS

118. The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees [1] sets out the legal requirements applicable to State guarantees, including in the rail transport field.

119. This notice states, in point 2.1.3, that the Commission 'regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'.

120. The Commission's consistent practice has been to consider unlimited guarantees in a sector open to competition to be incompatible with the Treaty. In accordance with the proportionality principle they cannot in particular be justified by tasks of general interest. With an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service [2].

121. When the State guarantees are granted to undertakings with a presence on both competitive and non-competitive markets, the Commission's practice is to require the complete removal of the unlimited guarantee granted to the undertaking as a whole [3].

122. Several railway undertakings are enjoying unlimited guarantees. These guarantees are generally a legacy of special cases of historic monopolies set up for railway undertakings before the Treaty entered into force or before the rail transport services market was opened up to competition.

123. According to the information available to the Commission, these guarantees do, to a large extent, constitute existing aid. The Member States concerned are invited to inform the Commission of the conditions for implementing the schemes for existing aid as well as of the measures envisaged for removing them, in accordance with the procedure defined in Section 8.3.

## 8. FINAL PROVISIONS

### 8.1. Rules on the cumulation of aid

124. The aid ceilings stipulated in these guidelines are applicable irrespective of whether the aid in question is financed wholly or in part from State resources or from Community resources. Aid authorised under these guidelines may not be combined with other forms of State aid within the meaning of Article 87(1) of the Treaty or with other forms of Community financing if such combination produces a level of aid higher than that laid down in these guidelines.

125. In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

### 8.2. Date of application

126. The Commission will apply these guidelines from the date of their publication in the *Official Journal of the European Union*.

The Commission will apply these guidelines to all aid, whether or not notified, in respect of which it is called upon to take a decision after the date of their publication.

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[1] OJ C 71, 11.3.2000, p. 14.

[2] Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9); Commission Decision of 24 April 2007, E-12/05, Poland — Unlimited guarantee for the Polish post office (Poczta Polska) (OJ C 284, 27.11.2007, p. 2); Commission Decision of 27 March 2002, E-10/00, Germany — State guarantees for public credit institutions in Germany (OJ C 150, 22.6.2002, p. 7).

[3] Ibidem.

### 8.3. **Appropriate measures**

127. In accordance with Article 88(1) of the Treaty, the Commission proposes that the Member States amend their existing aid schemes relating to State aid covered by these guidelines so as to comply with them at the latest two years after their publication in the *Official Journal of the European Union*, subject to the specific provisions in the Chapter on State guarantees. The Member States are invited to confirm that they accept these proposals for appropriate measures in writing at the latest one year after the date of publication in the *Official Journal of the European Union*.

128. Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) 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 [1] and, if necessary, initiate the proceedings referred to in that provision.

### 8.4. **Period of validity and reporting**

129. The Commission reserves the right to amend these guidelines. It will present a report on their application before any amendment and at the latest five years after the date of their publication.

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

V

*(Announcements)*

# ADMINISTRATIVE PROCEDURES

# COMMISSION

## CALL FOR PROPOSALS — EACEA/21/08

**Implementation of Erasmus Mundus External Cooperation Window Asia Region in the academic year 2008/2009**

**The Community Action programme for the promotion of cooperation between higher education institutions and the exchange of students, researchers and academic staff from EU Member States and Third-Countries**

(2008/C 184/08)

### 1. Objectives and description

The Erasmus Mundus External Cooperation Window aims at mutual enrichment and better understanding between the European Union and Third-Countries. It is designed to foster institutional co-operation in the field of higher education between the European Union and Third-countries through a mobility scheme addressing student and academic exchanges for the purpose of studying, teaching, training and research.

The following activities and costs will be covered by the programme.

The setting of institutional-based **partnerships** of European and Third-Country higher education institutions to cover both types of activities:

— the **organisation of individual mobility** of higher education students, researchers and academic staff,

— the **implementation of individual mobility**. The types of mobility and education to be funded under this call are:

  — *students*: undergraduate, master, doctorate and post-doctorate mobility opportunities,

  — *academic staff*: exchanging for the purposes of teaching, practical training and research.

### 2. Eligible applicant and beneficiaries

Applicants must be European Universities or Higher Education Institutions representing a partnership up to 20 partners' institutions.

The partnership composition has to be constituted of European Higher Education Institutions, in possession of an Erasmus Charter before the date of publication of the present call and Third-Country Higher Education Institutions recognised and accredited by the national authorities.

3. **Eligible country**

The eligible countries for the activities covered by the call are:

— the 27 member States of the European Union,

— the European Candidate countries Croatia and Turkey and EEA countries (Iceland, Liechtenstein and Norway),

— the following Asian countries: Afghanistan, Bhutan, Nepal, Pakistan, Bangladesh, Cambodia, Sri Lanka, India, Indonesia, Malaysia, Philippines, Thailand, China, North Korea, Myanmar/Burma and Maldives.

4. **Budget available**

The overall indicative amount made available for the Asia region under this call for proposals is **EUR 11 085 700**.

| Geographical window | Number of partnerships expected to be funded | Estimated maximum grant per partnership |
|---|---|---|
| Asia region | 2 | EUR 5 542 850 |

5. **Deadlines**

Applications must be sent no later than **31 October 2008**.

6. **Further information**

The full text of the call for proposals and the application forms are available on the following website:

http://eacea.ec.europa.eu/extcoop/call/index.htm

Applications must comply with the requirements set out in the full text and be submitted using the form provided.

# PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMPETITION POLICY

# COMMISSION

## STATE AID — ITALY

## State Aid C 26/08 (ex NN 31/08) — Loan of EUR 300 million to Alitalia

## Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

**(Text with EEA relevance)**

(2008/C 184/09)

By letter of 11 June 2008, reproduced in the authentic language on the pages following this summary, the Commission notified Italy of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned measure.

Interested parties may submit their comments within one month of the date of publication of this summary and the text of the letter, to the following address:

European Commission
Directorate-General for Energy and Transport
Directorate A — Unit 2
B-1049 Brussels
Fax (32-2) 296 41 04

These comments will be communicated to Italy. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

TEXT OF SUMMARY

### FACTS AND PROCEDURE

1. At a meeting on 23 April 2008, the Italian authorities informed the Commission that the Italian Council of Ministers had approved the granting of a loan in the sum of EUR 300 million to Alitalia on 22 April 2008, through Decree-Law No 80 of 23 April 2008 [1].

2. By letter of 24 April 2008, the Commission asked the Italian authorities to confirm the existence of this loan and to provide any relevant information that would help to assess the measure in respect of Articles 87 and 88.

3. By letter of 30 May 2008, the Italian authorities replied to the Commission's letter of 24 April 2008 after having been granted an extension by the Commission, in which they notified the latter of the adoption on 27 May 2008 of Italian Decree-Law No 93 [2], under which Alitalia was permitted to incorporate the amount of the aforementioned loan into its own capital to cover its losses. The intention behind this was to allow the company to maintain the value of its capital in order to avoid the losses resulting in share capital and reserves falling below the legal limit, thereby preventing a *procedura concorsuale*, or insolvency proceedings, from being instigated and ensuring that the possibility of privatisation remained an open and credible one.

4. The Commission received several complaints at the same time regarding the granting of the EUR 300 million loan by the Italian Government to Alitalia.

[1] *Decreto-legge 23 aprile 2008, n. 80, Misure urgenti per assicurare il pubblico servizio di trasporto aereo* (Official Gazette of the Italian Republic No 97 of 24 April 2008).

[2] *Decreto-legge 27 maggio 2008, n. 93, Disposizioni urgenti per salvaguardare il potere di acquisto delle famiglie* (Official Gazette of the Italian Republic No 127 of 28 May 2008).

**ASSESSMENT**

5. On the subject of whether the measure in question can be regarded as aid, the Commission has doubts as to whether Italy, in granting Alitalia the said aid measure, acted as a prudent shareholder pursuing a structural, global or sectoral policy, guided by the likely profitability of invested capital from a longer term point of view than an ordinary investor.

6. The Commission therefore takes the view, on the basis of the information at its disposal, that the measure in question, irrespective of how the relevant funds are used, provides Alitalia with an economic advantage it would not have had under normal market conditions. This assessment is based on the company's financial situation and on the conditions and circumstances under which the measure was granted.

7. The Commission also has doubts as to whether the measure is compatible with the common market. On the basis of the information at its disposal at this stage, it takes the view that this aid measure should not be declared compatible with the common market in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([3]). Indeed, it points out that Alitalia has already benefitted from rescue and restructuring aid.

TEXT OF LETTER

'Con la presente, ho l'onore di informarLa che la Commissione, dopo aver esaminato le informazioni fornite dalle autorità italiane relative alla misura in oggetto, ha deciso di avviare la procedura di cui all'articolo 88, paragrafo 2, del trattato.

1. **PROCEDURA**

(1) Nel corso di una riunione svoltasi il 23 aprile 2008, le autorità italiane hanno informato la Commissione che il Consiglio dei ministri italiano aveva approvato il 22 aprile 2008 la concessione di un prestito di 300 Mio EUR alla compagnia aerea Alitalia con decreto-legge 23 aprile 2008, n. 80 ([4]).

(2) Non avendo ricevuto alcuna notifica da parte delle autorità italiane prima della decisione di concessione del suddetto prestito, la Commissione ha chiesto a tali autorità, con lettera del 24 aprile 2008, di confermare l'esistenza di detto prestito, di fornire in proposito qualsiasi informazione utile per esaminare tale misura alla luce degli articoli 87 e 88 del trattato, nonché di sospendere la concessione del suddetto prestito e di informare la Commissione in merito alle misure adottate per conformarsi a questo obbligo in virtù dell'articolo 88, paragrafo 2, del trattato.

(3) In questa lettera la Commissione ha inoltre ricordato alle autorità italiane l'obbligo loro incombente di procedere alla notifica di qualunque progetto volto ad istituire o a modificare aiuti e di non dare esecuzione alla misura progettata prima che la procedura di esame della Commissione abbia condotto ad una decisione finale.

(4) Infine la Commissione ha precisato in questa lettera che, in mancanza di risposta da parte delle autorità italiane entro il termine di 10 giorni lavorativi, sarebbe stata eventualmente tenuta ad avviare la procedura formale di esame prevista all'articolo 88, paragrafo 2, del trattato sulla base delle informazioni disponibili e ad ingiungere la sospensione della misura in applicazione dell'articolo 11, paragrafo 1, del regolamento (CE) n. 659/1999 del Consiglio, del 22 marzo 1999, relativo alle modalità di applicazione dell'articolo 93 del trattato CE ([5]).

(5) Con lettera del 7 maggio 2008 le autorità italiane hanno chiesto la proroga del termine loro prescritto per rispondere alla lettera della Commissione del 24 aprile 2008, richiesta che la Commissione ha accolto con lettera dell'8 maggio 2008 rinviando tale termine al 30 maggio 2008.

(6) Con lettera del 30 maggio 2008 le autorità italiane hanno risposto alla lettera della Commissione del 24 aprile 2008. In questa lettera le autorità italiane hanno segnatamente informato la Commissione dell'adozione, in data 27 maggio 2008, del decreto-legge n. 93 ([6]) che concede all'Alitalia la facoltà di imputare l'importo del suddetto prestito in conto capitale.

(7) Parallelamente sono pervenuti alla Commissione diversi reclami, uno dei quali dalla compagnia Ryanair, nei quali si denuncia la concessione del prestito di 300 Mio EUR alla compagnia Alitalia da parte del governo italiano.

2. **DESCRIZIONE DELLA MISURA**

(8) Nel corso della riunione del 23 aprile 2008 le autorità italiane hanno presentato alla Commissione il suddetto decreto legge n. 80, con il quale lo Stato italiano, che detiene il 49,9 % del capitale della compagnia Alitalia, le concede un prestito di 300 Mio EUR.

([3]) OJ C 244, 1.10.2004, p. 2.
([4]) Decreto-legge n. 80. Misure urgenti per assicurare il pubblico servizio di trasporto aereo (GU n. 97 del 24.4.2008).
([5]) GU L 183 del 27.3.1999, pag. 1.
([6]) Decreto-legge n. 93. Disposizioni urgenti per salvaguardare il potere di acquisto delle famiglie (GU n. 127 del 28.5.2008).

(9) I considerando di questo decreto-legge recitano:

"Vista la situazione finanziaria, manifestata nelle informazioni rese al mercato, dell'Alitalia […] e considerato il ruolo di quest'ultima quale vettore che maggiormente assicura il servizio pubblico di trasporto aereo nei collegamenti tra il territorio nazionale e i paesi non appartenenti all'Unione europea, nonché nei collegamenti di adduzione sulle citate rotte del traffico passeggeri e merci dai e ai bacini di utenza regionali.

Ritenuta la straordinaria necessità ed urgenza di assicurare, per ragioni di ordine pubblico e di continuità territoriale, detto servizio pubblico di trasporto aereo mediante la concessione da parte dello Stato ad Alitalia […] di un prestito di breve termine, a condizioni di mercato, della durata strettamente necessaria per non comprometterne la continuità operativa nelle more dell'insediamento del nuovo governo, ponendolo in condizione di assumere, nella pienezza dei poteri, le iniziative ritenute necessarie per rendere possibile il risanamento e il completamento del processo di privatizzazione della società.".

(10) L'articolo 1 di questo decreto-legge autorizza a concedere ad Alitalia un prestito di 300 Mio EUR per consentirle di fare fronte a pressanti fabbisogni di liquidità e stabilisce che tale prestito debba essere rimborsato nel minore termine tra il trentesimo giorno successivo a quello della cessione del capitale sociale di Alitalia e il 31 dicembre 2008. Il predetto articolo prevede inoltre che il prestito in questione sia gravato da un tasso d'interesse equivalente ai tassi di riferimento adottati dalla Commissione e, segnatamente, fino al 30 giugno 2008, al tasso indicato nella comunicazione della Commissione sui tassi di interesse per il recupero degli aiuti di Stato e di riferimento/attualizzazione in vigore per i 25 Stati membri con decorrenza 1° gennaio 2008 ([7]) e, a partire dal 1° luglio 2008, al tasso indicato nella comunicazione della Commissione relativa alla revisione del metodo di fissazione dei tassi di riferimento e di attualizzazione ([8]).

(11) Con lettera del 30 maggio 2008 le autorità italiane hanno informato la Commissione che con decreto-legge n. 93 il governo italiano ha concesso ad Alitalia la facoltà di imputare l'importo del prestito in conto capitale per coprire le proprie perdite (cfr. articolo 4, paragrafo 3, del suddetto decreto-legge). Questa facoltà è finalizzata a preservare il valore del capitale della compagnia per evitare che le perdite determinino una riduzione del capitale sociale e delle riserve al di sotto del limite legale, scongiurando così l'attivazione della procedura concorsuale, nonché a far sì che le prospettive di privatizzazione restino aperte e credibili.

(12) Le modalità di rimborso del prestito indicate nel decreto-legge n. 80 permangono valide nel contesto del decreto-legge n. 93, ad eccezione del tasso di interesse applicato al prestito che è maggiorato dell'1 % (cfr. articolo 4, paragrafi 1 e 2, del decreto-legge n. 93) e del fatto che, nell'ipotesi di una liquidazione della compagnia, l'importo in oggetto sarà rimborsato solo dopo che saranno stati soddisfatti tutti gli altri creditori, unitamente e proporzionalmente al capitale sociale (cfr. articolo 4, paragrafo 4, del decreto-legge n. 93).

([7]) GU C 319 del 29.12.2007, pag. 6.

([8]) GU C 14 del 19.1.2008, pag. 6.

## 3. VALUTAZIONE PRELIMINARE DELLA MISURA ALLA LUCE DELL'ARTICOLO 87, PARAGRAFO 1, DEL TRATTATO

### 3.1. Esistenza di un aiuto di Stato

(13) Secondo l'articolo 87, paragrafo 1, del trattato, sono "incompatibili con il mercato comune, nella misura in cui incidano sugli scambi tra Stati membri, gli aiuti concessi dagli Stati, ovvero mediante risorse statali, sotto qualsiasi forma che, favorendo talune imprese o talune produzioni, falsino o minaccino di falsare la concorrenza".

(14) Per definire una misura nazionale come aiuto di Stato si presuppone che siano soddisfatte le seguenti condizioni cumulative, ossia che: 1) la misura in questione conferisca un vantaggio mediante risorse statali; 2) il vantaggio sia selettivo e 3) la misura in causa falsi o minacci di falsare la concorrenza e possa incidere sugli scambi tra Stati membri ([9]).

(15) Esponiamo nel seguito le ragioni che inducono la Commissione a ritenere a questo stadio che la misura in oggetto soddisfi tali condizioni cumulative.

#### 3.1.1. *In merito all'esistenza di un vantaggio conferito mediante risorse statali*

(16) Da una parte occorre rilevare che la misura in oggetto (nel seguito "la misura") è un prestito, il cui importo può essere imputato sui fondi propri di Alitalia ([10]), che è stato direttamente concesso a quest'ultima dallo Stato italiano e comporta pertanto il trasferimento di risorse statali. Inoltre, la misura è imputabile allo Stato italiano, giacché la decisione di concessione del suddetto prestito è stata adottata dal Consiglio dei ministri italiano il 22 aprile 2008 e completata dal decreto-legge n. 93, del 27 maggio 2008.

(17) Per quanto riguarda, d'altra parte, l'esistenza di un vantaggio economico, la Commissione ritiene, a questo stadio e sulla base delle informazioni di cui dispone, che la misura, qualunque sia l'uso dei fondi corrispondenti, conferisca ad Alitalia un vantaggio economico di cui essa non avrebbe beneficiato in condizioni normali di mercato ([11]).

([9]) Cfr. ad esempio, la sentenza della Corte del 10 gennaio 2006, ministero dell'Economia e delle finanze/Cassa di Risparmio di Firenze (C-222/04, Racc. pag. I-289, punto 129).

([10]) La misura si basa sui decreti-legge n. 80 e n. 93 summenzionati.

([11]) Cfr. ad esempio, la sentenza della Corte dell'11 luglio 1996, SFEI, C-39/94, Racc. pag. 3547, punto 60.

(18) Sotto questo profilo occorre in primo luogo osservare che la situazione finanziaria di Alitalia era gravemente compromessa al momento della concessione del prestito in oggetto [12] e dell'adozione del decreto-legge n. 93.

(19) Alitalia ha infatti registrato perdite consolidate pari a 626 Mio EUR nell'esercizio 2006 e a 495 Mio EUR nell'esercizio 2007 [13].

(20) Inoltre, sulla base delle informazioni finanziarie pubblicate dall'impresa, Alitalia ha registrato una perdita, prima delle imposte, di 214,8 Mio EUR nel primo trimestre del 2008, il che equivale ad un peggioramento del 41 % rispetto allo stesso periodo del 2007. D'altra parte, il debito netto di Alitalia ha raggiunto 1,36 Mrd EUR al 30 aprile 2008, facendo registrare un aumento del 13 % rispetto al dicembre 2007. Parallelamente la tesoreria dell'impresa, compresi i crediti finanziari a breve termine, è scesa al 30 aprile 2008 a 174 Mio EUR, in calo del 53 % rispetto a fine dicembre 2007 [14].

(21) Tale circostanza emerge inoltre chiaramente dal decreto-legge n. 80, nel quale è indicato segnatamente che la concessione del prestito in oggetto deve rendere possibile il risanamento della compagnia e consentirle di far fronte al suo fabbisogno di liquidità immediato (cfr. considerando 9 e 10 supra).

(22) Le autorità italiane argomentano inoltre nella loro risposta alla Commissione del 30 maggio 2008 che l'adozione del decreto-legge n. 93 è motivata dall'aggravamento della situazione finanziaria della compagnia ed è destinata a consentirle di salvaguardare il proprio valore e di assicurarne la continuità operativa. Esse indicano, in questo contesto, che le misure adottate mirano ad evitare che le perdite determinino una riduzione del capitale sociale e delle riserve al di sotto del limite legale, scongiurando così l'attivazione della procedura concorsuale e la messa in liquidazione della compagnia.

(23) Il 3 giugno 2008 le autorità italiane hanno adottato il decreto-legge n. 97 [15] che fa riferimento alla situazione finanziaria di Alitalia descritta in precedenza.

[12] Occorre ricordare che, secondo una giurisprudenza costante, sia l'esistenza che la consistenza di un aiuto devono essere valutate tenendo conto della situazione al momento della sua concessione (cfr., ad esempio, la sentenza del Tribunale di primo grado del 19 ottobre 2005, Freistaat Thüringen/Commissione, T-318/00, Racc. pag. II-4179, punto 125).

[13] Dati trasmessi dalle autorità italiane nella loro lettera alla Commissione del 30 maggio 2008.

[14] Cfr. i risultati finanziari disponibili sul sito Internet di Alitalia (http://corporate.alitalia.com/en/investors/financial/index.aspx).
Cfr. inoltre, per quanto riguarda la situazione finanziaria di Alitalia dal 2001, la decisione della Commissione, del 20 luglio 2004, N 279/04 — Misure urgenti a favore della ristrutturazione e del rilancio di Alitalia (GU C 125 del 24.5.2005) e la decisione della Commissione, del 7 giugno 2005, C 2/05 — Alitalia — Piano di ristrutturazione industriale (GU L 69 dell'8.3.2006, pag. 1).

[15] Decreto-legge n. 97. Disposizioni urgenti in materia di monitoraggio e trasparenza dei meccanismi di allocazione della spesa pubblica, nonché in materia fiscale e di proroga di termini (GU n. 128 del 3.6.2008).

(24) L'insieme di questi elementi consente di ritenere che la situazione finanziaria di Alitalia fosse gravemente compromessa sia al momento della concessione del prestito di 300 Mio EUR con decreto-legge n. 80, sia al momento dell'adozione del decreto-legge n. 93.

(25) In secondo luogo, per quanto riguarda le condizioni di concessione della misura, la Commissione constata che, in base al decreto-legge n. 80, il tasso di interesse applicabile è quello indicato nella comunicazione della Commissione sui tassi di interesse per il recupero degli aiuti di Stato e di riferimento/attualizzazione in vigore per i 25 Stati membri con decorrenza 1º gennaio 2008 e, a partire dal 1º luglio 2008, al tasso indicato nella comunicazione della Commissione europea relativa alla revisione del metodo di fissazione dei tassi di riferimento e di attualizzazione [16]. Tale tasso è stato maggiorato dell'1 % dal decreto-legge n. 93 [17].

(26) Ebbene occorre osservare che, per quanto riguarda la comunicazione della Commissione sui tassi di interesse per il recupero degli aiuti di Stato e di riferimento/attualizzazione in vigore per i 25 Stati membri con decorrenza 1º gennaio 2008 [18], i tassi che vi figurano sono stati fissati in modo da riflettere il livello medio dei tassi di interesse in vigore nei diversi Stati membri per i prestiti a medio e lungo termine (da cinque a dieci anni) accompagnati da garanzie normali. La Commissione dubita che tali tassi, per quanto maggiorati dell'1 %, possano essere considerati appropriati nel caso di un'impresa la cui situazione finanziaria è gravemente compromessa. D'altro canto, questa comunicazione si basa sulla comunicazione della Commissione relativa al metodo di fissazione dei tassi di riferimento e di attualizzazione del 1997 [19], ai termini della quale "il tasso di riferimento così determinato è un tasso minimo che può essere aumentato in situazioni di rischio particolare (per esempio imprese in difficoltà, mancanza delle garanzie normalmente richieste dalle banche, ecc.). In tali casi il premio potrà raggiungere i 400 punti base ed essere anche superiore, nell'ipotesi in cui nessuna banca privata avrebbe accettato di concedere il prestito". A questo stadio la Commissione nutre dei dubbi sul fatto che una maggiorazione di 100 punti base del tasso di riferimento, quale prevista dal decreto-legge n. 93, sia sufficiente per tenere conto della situazione particolarmente compromessa nella quale Alitalia versava al momento della concessione della misura.

(27) Per quanto riguarda la comunicazione della Commissione europea relativa alla revisione del metodo di fissazione dei tassi di riferimento e di attualizzazione [20], è sufficiente constatare che, anche qualora fosse applicabile visto che il prestito è stato concesso prima della sua entrata in vigore e la qualifica di una misura come aiuto si valuta al momento della sua concessione, le autorità italiane non hanno precisato in che modo intendevano applicarla.

[16] Cfr. supra, considerando 10.

[17] Cfr. supra, considerando 12.

[18] Cfr. nota n. 4.

[19] GU C 273 del 9.9.1997, pag. 3.

[20] Cfr. nota n. 5.

(28) A questo stadio appare pertanto poco probabile che un investitore privato che si fosse trovato in una situazione comparabile a quella dello Stato italiano nel caso in oggetto, ammesso che avesse acconsentito a concedere il prestito ad Alitalia, avrebbe accettato di praticare il tasso di interesse applicabile ad un'impresa in condizioni finanziarie normali, per quanto maggiorato di 100 punti base. La Commissione dubita d'altronde che, data la situazione finanziaria gravemente compromessa di Alitalia, un tale investitore privato avrebbe accettato di concederle qualsiasi prestito e, a maggior ragione, un prestito il cui importo venga imputato in conto capitale e che pertanto, nell'ipotesi di una liquidazione della compagnia, sarebbe rimborsato solo dopo che sono stati soddisfatti tutti gli altri creditori, unitamente e proporzionalmente al capitale sociale (cfr. articolo 4, paragrafo 4, del decreto-legge n. 93).

(29) Ciò appare tanto più plausibile se si considera che la decisione del governo italiano di concedere il prestito in oggetto è intervenuta il 22 aprile 2008, a seguito del ritiro il giorno stesso di un'offerta di acquisto di Alitalia ([21]) e che l'adozione del decreto-legge n. 93 è stata motivata dall'aggravamento della situazione finanziaria della compagnia.

(30) La quasi contemporaneità del ritiro dell'offerta di acquisto summenzionata e della concessione del predetto prestito da parte del governo italiano avvalora la tesi che un azionista di dimensioni comparabili non avrebbe accettato di concedere tale prestito, né a maggior ragione un prestito imputabile in conto capitale di Alitalia, date la gravità della sua situazione e l'assenza di prospettive di acquisto della compagnia al momento della concessione del prestito.

(31) Sotto questo profilo la Commissione ritiene opportuno sottolineare che, per quanto le consta e sulla base delle informazioni trasmesse dalle autorità italiane, non esisteva alcuna prospettiva certa ed immediata di acquisto di Alitalia da parte di un altro investitore al momento della concessione della misura. A questo stadio la lettera del cav. B. Ermolli ad Alitalia, citata dalle autorità italiane nella loro lettera del 30 maggio 2008 a dimostrazione dell'interesse di imprenditori ed investitori italiani per l'elaborazione di un progetto di rilancio della compagnia, non può essere considerata come una prospettiva di questo tipo ([22]).

(32) Alla luce degli elementi che precedono la Commissione nutre dei dubbi in merito al fatto che lo Stato italiano, concedendo ad Alitalia il prestito in oggetto per un importo di 300 Mio EUR, si sia comportato come un azionista avveduto che persegue una politica strutturale, globale o settoriale, guidato da prospettive di redditività dei capitali investiti che sono a più lungo termine rispetto a quelle di un investitore comune ([23]).

3.1.2. *In merito al carattere selettivo della misura*

(33) La concessione di questo prestito conferisce alla compagnia Alitalia un vantaggio economico di cui essa è l'unica beneficiaria. La misura presenta pertanto un carattere selettivo.

3.1.3. *In merito alle condizioni di incidenza della misura sugli scambi tra Stati membri e di distorsione della concorrenza*

(34) La Commissione ritiene che la misura incida sugli scambi tra Stati membri poiché riguarda un'impresa la cui attività di trasporto, per sua natura, influisce direttamente sugli scambi e concerne numerosi Stati membri. Inoltre essa falsa o minaccia di falsare la concorrenza all'interno del mercato comune, poiché riguarda una sola impresa che si trova in situazione di concorrenza con le altre compagnie aeree comunitarie nella sua rete europea, in particolare dall'entrata in vigore della terza fase di liberalizzazione del trasporto aereo il 1° gennaio 1993 ([24]).

(35) Alla luce di quanto precede la Commissione ritiene, sulla base delle informazioni di cui dispone in questa fase, che la misura pari ad un importo di 300 Mio EUR concessa dallo Stato italiano ad Alitalia costituisca un aiuto di Stato ai sensi dell'articolo 87, paragrafo 1, del trattato.

### 3.2. **Qualifica della misura come aiuto illegittimo**

(36) Conformemente all'articolo 88, paragrafo 3, del trattato, lo Stato membro è tenuto a notificare qualsiasi progetto volto ad istituire o modificare aiuti. Lo Stato membro interessato non può dare esecuzione alle misure progettate prima che tale procedura abbia condotto a una decisione finale.

(37) La decisione del governo italiano di concedere il prestito di 300 Mio EUR è intervenuta il 22 aprile 2008 con decreto-legge n. 80. I fondi sono stati pertanto messi a disposizione di Alitalia in tale data, come confermato d'altra parte dalle autorità italiane nella loro riunione con la Commissione del 23 aprile 2008. Quanto al decreto-legge n. 93, che prevede la facoltà di imputare l'importo del prestito in conto capitale della compagnia, è stato adottato il 27 maggio 2008.

([21]) Un'offerta pubblica di scambio di azioni era stata presentata ad Alitalia il 14 marzo 2008 ed approvata il 16 marzo dal suo consiglio di amministrazione.

([22]) Nel comunicato stampa di Alitalia del 13 maggio 2008 si legge: "Il Consiglio di amministrazione ha apprezzato con favore la comunicazione pervenuta da parte del Cav. Bruno Ermolli e resta in attesa di una circostanziata manifestazione di intenti che si mostri coerente con le citate indicazioni di contesto per convenire l'avvio della richiesta due diligence" (http://corporate.alitalia.com/en/press/press/index.aspx).

([23]) Cfr. ad esempio la sentenza del Tribunale di primo grado, del 15 settembre 1998, Breda Fucine Meridionali/Commissione, T-126/96 e T-127/96, Racc., pag. II-3437, punto 79.

([24]) Regolamento (CEE) n. 2407/92 del Consiglio, del 23 luglio 1992, sul rilascio delle licenze ai vettori aerei, (CEE) n. 2408/92 del Consiglio, del 23 luglio 1992, sull'accesso dei vettori aerei della Comunità alle rotte intracomunitarie e (CEE) n. 2409/92 del Consiglio, del 23 luglio 1992, sulle tariffe aeree per il trasporto di passeggeri e di merci — GU L 240 del 24.8.1992, pag. 1.

(38) Ebbene, la Commissione constata che l'Italia non ha notificato le misure in oggetto né al momento dell'adozione del decreto-legge n. 80 né a quello dell'adozione del decreto-legge n. 93. La Commissione ritiene pertanto in questa fase che l'Italia abbia agito in modo illegittimo concedendo l'aiuto in questione in violazione dell'articolo 88, paragrafo 3, del trattato.

### 3.3. **Compatibilità della misura con il mercato comune**

(39) Giacché la Commissione ritiene in questa fase che la misura costituisca un aiuto di Stato ai sensi dell'articolo 87, paragrafo 1, del trattato, occorre innanzitutto esaminarne l'eventuale compatibilità alla luce delle deroghe di cui ai paragrafi 2 e 3 di tale articolo. È opportuno ricordare in proposito che il beneficiario della misura appartiene al settore del trasporto aereo.

(40) Per quanto riguarda le deroghe previste all'articolo 87, paragrafo 2, del trattato relative agli aiuti a carattere sociale concessi ai singoli consumatori, agli aiuti destinati a ovviare ai danni arrecati dalle calamità naturali oppure da altri eventi eccezionali nonché agli aiuti concessi all'economia di determinate regioni della Repubblica federale di Germania, la Commissione constata, sulla base delle informazioni di cui dispone in questa fase, che sono prive di qualunque pertinenza nel presente contesto.

(41) Quanto alla deroga di cui all'articolo 87, paragrafo 3, lettera b), del trattato, è sufficiente constatare che la misura non costituisce un progetto importante di comune interesse europeo e non mira a porre rimedio a un grave turbamento dell'economia italiana. L'aiuto, inoltre, non è destinato a promuovere la cultura e la conservazione del patrimonio ai sensi della deroga dell'articolo 87, paragrafo 3, lettera d), del trattato.

(42) Per quanto riguarda la deroga di cui all'articolo 87, paragrafo 3, lettera c), del trattato, che autorizza gli aiuti destinati ad agevolare lo sviluppo di talune attività sempreché non alterino le condizioni degli scambi in misura contraria all'interesse comune, la Commissione ritiene che nulla consenta di considerare che l'aiuto in questione sia compatibile con il mercato comune. In effetti non sembra essere applicabile nel caso in oggetto alcuna delle deroghe previste sotto questo profilo dagli orientamenti della Commissione relativi all'applicazione degli articoli 92 e 93 del trattato CE e dell'articolo 61 dell'accordo SEE agli aiuti di Stato nel settore dell'aviazione ([25]), completati dalla comunicazione della Commissione relativa agli orientamenti comunitari concernenti il finanziamento degli aeroporti e gli aiuti pubblici di avviamento concessi alle compagnie aeree operanti su aeroporti regionali ([26]).

(43) D'altra parte, per quanto la Commissione abbia autorizzato, in maniera eccezionale, taluni aiuti al funzionamento nel trasporto aereo sulla base degli orientamenti in materia di aiuti di Stato a finalità regionale del 1998, modificati nel 2000 ([27]), per linee aeree operate a partire dal territorio delle regioni ultraperiferiche e per compensare i sovraccosti derivanti dagli svantaggi permanenti di tali regioni, identificati all'articolo 299, paragrafo 2, del trattato, anche questa eccezione sembra in questa fase priva di pertinenza nel presente contesto.

(44) Quanto all'argomento delle autorità italiane relativo alla necessità di garantire, per ragioni di ordine pubblico e continuità territoriale, il servizio pubblico assicurato da Alitalia, la Commissione constata in questa fase che questa affermazione di per sé non è di natura tale da consentirle di considerare che la misura sia compatibile con il mercato comune.

(45) Infine la Commissione ritiene, sulla base delle informazioni di cui dispone in questa fase, che la misura non possa essere dichiarata compatibile con il mercato comune in applicazione degli orientamenti comunitari sugli aiuti di Stato per il salvataggio e la ristrutturazione di imprese in difficoltà ([28]). Per quanto Alitalia possa essere qualificata come impresa in difficoltà ai sensi di questi orientamenti, le condizioni cumulative che consentono di considerare che il prestito in oggetto sia un aiuto al salvataggio non sono in linea di massima soddisfatte nel caso in oggetto. La Commissione rileva infatti che lo Stato non si è impegnato a fornire entro un termine di sei mesi a decorrere dall'attuazione della misura un piano di ristrutturazione o un piano di liquidazione o la prova del rimborso integrale del predetto prestito ([29]).

(46) Inoltre, e in ogni caso, non si potrebbe considerare rispettato nel caso di Alitalia il principio dell'aiuto una tantum ([30]), valido sia per gli aiuti al salvataggio che per gli aiuti alla ristrutturazione. Occorre infatti ricordare che Alitalia ha già beneficiato di un aiuto alla ristrutturazione approvato dalla Commissione con decisione del 18 luglio 2001 ([31]), nonché di un aiuto al salvataggio sotto forma di garanzia dello Stato per un prestito ponte di 400 Mio EUR approvato dalla Commissione con decisione del 20 luglio 2004 ([32]).

(47) La Commissione tiene infine ad aggiungere che le eccezioni alla regola dell'aiuto una tantum collegate in particolare all'esistenza di circostanze eccezionali, imprevedibili e non imputabili all'impresa interessata non le sembrano applicabili nelle circostanze in oggetto ([33]).

### 3.4. **Conclusione**

(48) Tenuto conto dell'insieme delle considerazioni che precedono, la Commissione ritiene in questa fase che la misura costituisca un aiuto di Stato ai sensi dell'articolo 87, paragrafo 1, del trattato e nutre dubbi quanto alla sua compatibilità con il mercato comune.

([25]) GU C 350 del 10.12.1994, pag. 5.
([26]) GU C 312 del 9.12.2005, pag. 1.
([27]) GU C 258 del 9.9.2000, pag. 5.
([28]) GU C 244 dell'1.10.2004, pag. 2.
([29]) Cfr. sezione 3.1.1, paragrafo 25, lettera c), degli orientamenti predetti.
([30]) Cfr. sezione 3.1.1, paragrafo 25, lettera e), e sezione 3.3 degli orientamenti predetti.
([31]) Decisione 2001/723/CE della Commissione, del 18 luglio 2001, relativa alla ricapitalizzazione della società Alitalia (GU L 271 del 12.10.2001, pag. 28).
([32]) Decisione della Commissione del 20 luglio 2004 citata nella nota n. 11.
([33]) Cfr. sezione 3.3, paragrafo 73, degli orientamenti predetti.

(49) La Commissione tiene in questo contesto a richiamare l'attenzione dell'Italia sull'effetto sospensivo dell'articolo 88, paragrafo 3, del trattato, sugli articoli 11 e 12 del regolamento (CE) n. 659/1999 citato in precedenza, nonché sull'articolo 14 di detto regolamento che prevede che qualsiasi aiuto illegittimo e incompatibile con il mercato comune potrà essere oggetto di recupero presso il suo beneficiario.

4. **DECISIONE**

(50) Conformemente all'articolo 6 del regolamento (CE) n. 659/1999 del Consiglio, del 22 marzo 1999, recante modalità di applicazione dell'articolo 93 del trattato CE, la Commissione invita l'Italia, nel quadro della procedura prevista all'articolo 88, paragrafo 2, del trattato, a presentare le proprie osservazioni e a fornire qualunque informazione utile per la valutazione della misura concessa ad Alitalia entro il termine di un mese a decorrere dalla data di ricezione della presente. L'Italia fornirà in particolare qualsiasi informazione utile quanto all'uso da parte di Alitalia della facoltà offertale di imputare il prestito in conto capitale, in modo da consentire alla Commissione di analizzare la natura esatta della misura.

(51) La Commissione comunica all'Italia che informerà gli interessati attraverso la pubblicazione della presente lettera e di una sintesi della stessa nella *Gazzetta ufficiale dell'Unione europea*. Informerà inoltre gli interessati nei paesi EFTA firmatari dell'accordo SEE attraverso la pubblicazione di un avviso nel supplemento SEE della Gazzetta ufficiale e informerà infine l'Autorità di vigilanza EFTA inviandole copia della presente. Tutti gli interessati anzidetti saranno invitati a presentare osservazioni entro un mese dalla data di detta pubblicazione.'

## Prior notification of a concentration

## (Case COMP/M.5141 — KLM/Martinair)

**(Text with EEA relevance)**

(2008/C 184/10)

1. On 17 July 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 [1] by which the undertaking KLM Royal Dutch Airlines NV ('KLM', the Netherlands) controlled by Air France-KLM Holding SA ('Air France-KLM', France) acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the whole of the undertaking Martinair Holland NV ('Martinair', the Netherlands) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for KLM: international network airline active worldwide in the air transport of both freight and passengers,

— for Martinair: airline offering both charter and scheduled services, serving only intercontinental destinations and transporting both freight and passengers.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax ((32-2) 296 43 01 or 296 72 44) or by post, under reference number COMP/M.5141 — KLM/Martinair, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
J-70
B-1049 Bruxelles/Brussel

[1] OJ L 24, 29.1.2004, p. 1.

# OTHER ACTS

# COMMISSION

**Publication of an application pursuant to Article 6(2) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs**

(2008/C 184/11)

This publication confers the right to object to the application pursuant to Article 7 of Council Regulation (EC) No 510/2006 ([1]). Statements of objection must reach the Commission within six months from the date of this publication.

SUMMARY

**COUNCIL REGULATION (EC) No 510/2006**

**'OVOS MOLES DE AVEIRO'**

**EC No: PT-PGI-005-0518-03.01.2006**

**PDO ( ) PGI ( X )**

This summary sets out the main elements of the product specification for information purposes.

1. **Responsible department in the Member State:**

Name: Gabinete de Planeamento e Políticas

Address: Rua Padre António Vieira, n.º 1-8°
P-11099-073 Lisboa

Tel. (351) 213 81 93 00

Fax (351) 213 87 66 35

E-mail: gpp@gpp.pt

2. **Group:**

Name: Associação dos produtores de ovos moles de Aveiro

Address: Mercado Municipal Santiago
R. Ovar n.º 106 — 1º AA,AB
P-3800 Aveiro

Tel. (351) 234 42 88 29

Fax (351) 234 42 30 76

E-mail: apoma@sapo.pt

Composition: Producers/processors ( X ) Other ( )

3. **Type of product:**

Class 2.4 — Pastry, biscuits, cakes and other fine bakers' wares and confectionery products

([1]) OJ L 93, 31.3.2006, p. 12.

4. **Specification:**

(Summary of requirements under Article 4(2) of Regulation (EC) No 510/2006)

4.1. *Name:* 'Ovos Moles de Aveiro'

4.2. *Description: Ovos Moles de Aveiro* is a product obtained by the addition of raw egg yolk to sugar syrup. They may be put up as they are, wrapped in communion wafer or put up in wooden or China containers. Its colour is uniform, ranging from yellow to orange, shiny all over and very intense, its complex aroma is of egg yolk developing towards a characteristic odour contributed to by aromas as varied as caramel, cinnamon and nuts, as a result of the chemical reactions during cooking between the sugar and the components of the egg yolk. It is sweet, with the flavour of egg yolk and sugar softened by the cooking process and its consistency is creamy and somewhat thick. The texture is uniform, with no yolk or sugar grains (although they are permissible several days after manufacture, inasmuch as they are the result of crystallisation of the product). The communion wafer occasionally used in the commercial presentation is of even colour ranging from white to cream, opaque, matt and odourless or with a slight odour of flour. The flavour is *sui generis*, its consistency plastic and crumbly and its texture dry, smooth and uniform.

4.3. *Geographical area:* In view of the specific requirements concerning the egg yolks, in particular as regards colour and degree of freshness, the geographical production area for the eggs is limited to the districts bordering on the Ria de Aveiro and neighbouring lagoon areas and the districts in the Médio Vouga. From an administrative point of view, the area covers the districts of Águeda, Albergaria-a-Velha, Aveiro, Estarreja, Ílhavo, Mira, Murtosa, Oliveira de Frades, Ovar, S. Pedro do Sul, Sever do Vouga, Tondela, Vagos and Vouzela.

In view of the edapho-climatic conditions and characteristics required for preparation of the communion wafers and the 'ovos moles', in particular as regards humidity and atmospheric temperature and the requisite specific know-how, the geographical area for the preparation and packaging is limited to the districts bordering on the Ria de Aveiro and neighbouring lagoon areas. From an administrative point of view, the area covers the districts of Águeda, Albergaria-a-Velha, Aveiro, Estarreja, Ílhavo, Mira, Murtosa, Ovar, Sever do Vouga and Vagos.

4.4. *Proof of origin:* The characteristics of the product itself, in particular as regards its physical and sensory characteristics, the special quality of the raw materials of local origin, the know-how of the producers who have been making it for centuries according to a tradition passed down from generation to generation, the different ways of marketing the product, in either wooden or china containers painted with motifs inspired by the Aveiro region or wrapped in sealing wafer (or communion wafer), moulded in lagoon-life motifs (fish, swimming crabs, mussels, shells, whelks, wooden barrels, buoys, cockles, casks and baby clams) or nuts (walnuts and chestnuts), all attest to interaction with the region of origin. Furthermore, a monitoring system supervising the entire line of production, including egg producers, wafer makers and the manufacturers of 'ovos moles', ensures that only those producers which comply with the requirements and the rules set out above may use the PGI for their final product. The certification mark affixed on each package or indicated in the sales documents of producers/resellers is numbered, making the product traceable right back to the egg producers. Proof of origin can be checked at any stage throughout the entire production chain.

4.5. *Method of production:* According to authentic and unvarying local custom, the eggs are carefully cracked open and the yolk separated either by filtering through the fingers or by using an appropriate egg separator. At the same time, the sugar syrup is separately prepared; it must be heated to a point midway between thickening and forming threads. The yolks are added to the syrup once it has cooled down. The mixture is cooked at a temperature of 110 °C and the know-how associated with this stage is crucial. Next, the mixture is allowed to cool and rest for 24 hours either in ovens or appropriate locations within the confectioners' premises. The reason for this is that, at this stage, the *Ovos Moles de Aveiro* mixture is quite sensitive to sharp changes in temperature and can all too easily adsorb extraneous aromas.

After this stage, depending on the way in which the product is finally to be presented, the cooled mixture may be used:

— to fill the containers, which are then sealed with the appropriate cover and removable film in order to insulate and protect the product,

— to fill the wafers, which are then compressed in a manual press after being sealed; the wafers may not be sealed using unpasteurised egg white. The wafers are then separated using scissors and cut in straight lines into the various shapes. The shapes are set out on trays and dried in ovens (if necessary) and may be covered in syrup, which affords additional protection against changes,

— put up for sale in bulk in cups.

In view of the characteristics of the product, in order to avoid any contamination and prevent changes to the filling or the wafer, *Ovos Moles de Aveiro* are marketed packed at source in containers, of a type approved by the Group, which are in the authorised format, materials and motifs or packaged in cardboard or in a controlled atmosphere. *Ovos Moles de Aveiro* may be put up for sale in bulk, with or without wafer, only in confectioners' premises and always with documentation certifying its origin, lot number and date of manufacture.

*Ovos Moles de Aveiro* must be transported, kept and displayed at between 8 and 25 °C, which gives it a normal shelf life of 15 days.

4.6. *Link:*

Historical:

*Ovos Moles de Aveiro* have been manufactured for centuries. The tradition of manufacturing the product, which originated in convents, was maintained by ladies who had been educated in convents and who passed the secret of its manufacture from generation to generation. There are documents showing that, in 1502, King Manuel I granted 10 'arrobas' of Madeira sugar per year to the Convent of Jesus in Aveiro for the manufacture of confectionery products in the convent, which at the time was used to help patients during their convalescence. *Ovos Moles de Aveiro* are referred to in 1908 as a dessert dish for royalty, are expressly mentioned in 1888 by the greater Portuguese writer Eça de Queiroz in 'Os Maias' and 'A Capital' and by the great Brazilian author Erico Veríssimo, who mentions the product in 'Solo de Clarineta-Memórias', in 1973. The distinctive barrels in which the *Ovos Moles de Aveiro* are presented, the shapes of the wafers, which are almost always on maritime themes, and the typical sellers often feature in tiled panels, prints, popular poetry, plays and the regional songbook. As early as 1856 there existed a register of reputable manufacturers.

Geographical:

The phytoclimatic aspects of the region are dominated by the basin of the River Vouga, which flows into the Ria de Aveiro, which is another significant geographical feature. This gives rise to specific conditions for agriculture, in particular those relating to the growing of maize and the raising of poultry which has developed with particular vigour along the banks of the ria.

The area of the Baixo Vouga has always been marshy and the Médio Vouga a fertile region for the production of good-quality maize in large quantity. Although centuries ago this form of farming was at subsistence level, by the end of the 19th and the beginning of the 20th Century it had gained an entrepreneurial dimension with the establishment in the districts bordering on the River Vouga of undertakings with a large production capacity and a reputation for quality.

The traditional maize used in chicken feed no doubt has contributed to the quality which distinguishes the product resulting from it.

The temperature and the humidity of the ria are also propitious to the manufacture of *Ovos Moles de Aveiro* and the wafer, giving it the appropriate and long-lasting plasticity which is impossible to reproduce outside the region.

Cultural:

Both the use of the barrels made of wood or china and the moulds used in the manufacture of the wafer attest to an unmistakable link with the Ria de Aveiro and its lagoon motifs, in particular by means of the use of the lighthouse on the ria or of typical 'moliceiro' river craft as trade marks or by making the wafers in the shape of fish, shellfish and barrels and buoys to mark fishing nets, another of the activities which is typical of the region. It is worth noting that barrels made locally of poplar wood and of china are made of traditional regional materials.

4.7. *Inspection body:*

Name: SAGILAB, Laboratório Análises Técnicas, Lda

Address: R. Aníbal Cunha, n.º 84 Loja 5
P-4050-046 Porto

Tel. (351) 223 39 01 62

Fax (351) 272 339 01 64

E-mail: info@sagilab.com

Sagilab, Laboratório Análises Técnicas L.da is acknowledged as complying with standard 45011:2001.

4.8. *Labelling:* The labelling must bear the words 'Ovos Moles de Aveiro — Indicação Geográfica Protegida', the certification mark, the Community logo, once protection is granted, and the logo of *Ovos Moles de Aveiro*, as shown here:

The certification mark (with the printed hologram) must show the name of the product, the name of the private inspection and certification body and the serial number allowing the product to be traced.