ISSN 1725-2555

Official Journal of the European Union

L 225

English edition

Legislation

Volume 52

27 August 2009

Contents

II *Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory*

DECISIONS

Commission

2009/608/EC:

★ **Commission Decision of 24 April 2007 relating to the aid measure implemented by Belgium in support of Inter Ferry Boats (C 46/05 (ex NN 9/04 and ex N 55/05))** *(notified under document C(2007) 1180)* [1] 1

2009/609/EC:

★ **Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements** *(notified under document C(2008) 2223)* [1] 53

2009/610/EC:

★ **Commission Decision of 2 July 2008 on the measures C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05) implemented by Greece in favour of Hellenic Shipyards** *(notified under document C(2008) 3118)* [1] 104

2009/611/EC:

★ **Commission Decision of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM)** *(notified under document C(2008) 3182)* [1] 180

(1) Text with EEA relevance

Price: EUR 38

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 April 2007

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

(notified under document C(2007) 1180)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2009/608/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

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

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

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

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

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

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

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

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

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

1.2. **Case C 46/05**

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

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

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

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

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

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

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

2. DETAILED DESCRIPTION OF THE RESCUE AND RESTRUCTURING MEASURES

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

2.1.1. *IFB*

2.1.1.1. Description of the company

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

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

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

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

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

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

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

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

2.1.1.2. Markets concerned and IFB's market shares

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

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

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

2.1.2. *SNCB*

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

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

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

— Infrabel, the railway infrastructure operator, and

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

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

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

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

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

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

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

2.2.1. *The financial difficulties*

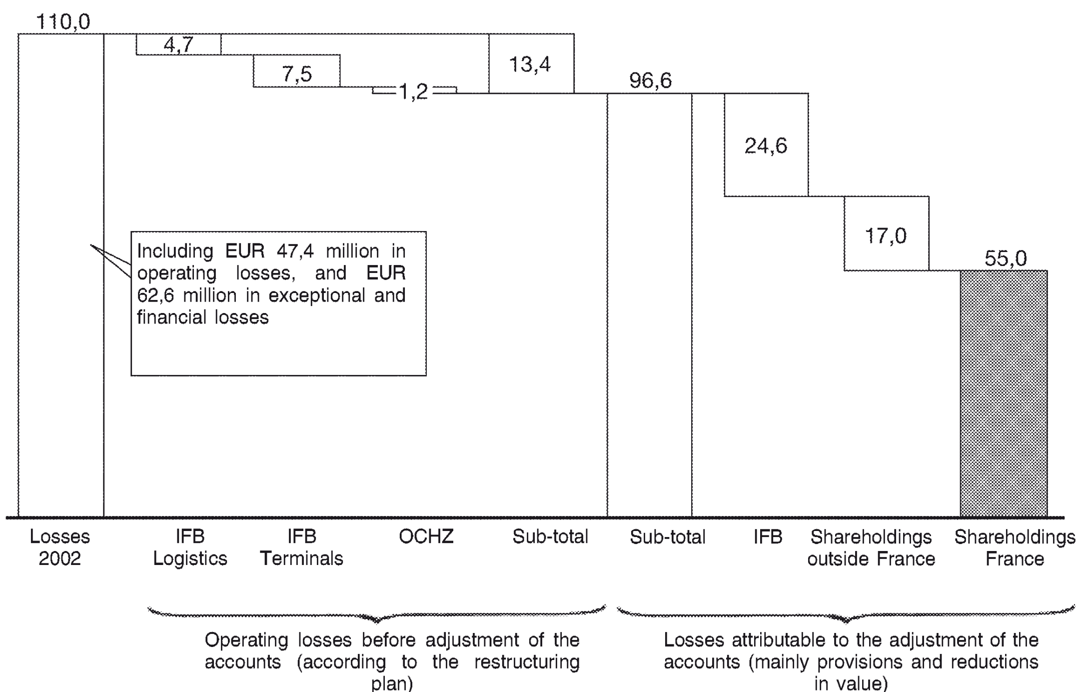
(31) The principal reason for IFB's difficulties reside in the financial difficulties encountered by its holdings in France, all situated in the port of Dunkerque, in 2001 and 2002. The financial difficulties also concerned the activities of 'IFB Logistics' and 'IFB Terminals', which suffered losses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

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

Diagram 1

Breakdown of losses in 2002

(EUR million)



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

2.2.2. *The response from IFB and SNCB management*

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

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

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

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

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

— 6.8.2002: transfer of EUR 1 000 000,

— 17.9.2002: transfer of EUR 1 000 000,

— 30.9.2002: transfer of EUR 500 000.

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

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

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

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

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

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

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

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

2.3.1. *Terms and conditions governing the rescue measures*

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

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

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

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

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

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

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

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

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

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

2.3.2. *Terms and conditions governing the restructuring measures*

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

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

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

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

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

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

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

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

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

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

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

(EUR)

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

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

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

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

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

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

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

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

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

Divestiture of french shareholdings: Summary of costs incurred

(in M EUR)

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

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

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

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

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

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

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

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

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

(b) ***Acimar***

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

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

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

(*) Confidential data.

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

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

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

(d) ***IFB France***

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

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

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

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

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

(f) ***SSTD***

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

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

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

— Restructuring of 'IFB Logistics',

— Restructuring of 'IFB Terminals'.

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

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

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

(EUR million)

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

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

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

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

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

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

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

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

General Measures

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

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

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

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

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

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

Restructuring of the logistics activities

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

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

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

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

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

[8] Full-time equivalents.

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

Restructuring of the 'IFB terminal' activities

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

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

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

Investments provided for in the restructuring plan

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

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

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

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

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

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

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

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

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

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

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

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

3. BELGIUM'S COMMENTS

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

3.1. Belgium's observations on the procedure

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

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

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

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

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

3.2.1. *Absence of State resources*

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

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

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

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

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

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

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

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

---

(11) OJ L 195, 29.7.1980, p. 35.

(12) Court judgment of 16 May 2002, *France* v *Commission* (Case C-482/99 [2002] ECR I-4397), '*Stardust Marine*' judgment.

(13) Judgment of the Court of First Instance of 27 January 1998 in Case T-67/94, Ladbroke Racing [1998] I-1, paragraph 109, confirmed by the Court of Justice judgment of 16 May 2000 in Case C-83/98 P, Ladbroke Racing [2000] I-3271, paragraph 48.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.3.1. Divestiture of French shareholdings

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

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

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

Acimar — judicial administration followed by liquidation

Financial situation in 2002

(in EUR million)

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

Cost of alternatives

(in EUR million)

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

Comments

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

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

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

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

— Acimar ceased trading on 1.9.2003.

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

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

NFTI-ou — Handover

Financial situation in 2002

(in EUR million)

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

(*) From 1.5.2001 to 31.12.2001.

Cost of alternatives

(in EUR million)

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

Comments

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

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

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

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

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

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

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

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

IFB France (AGEP) — Cession a NFTI-ou

Financial situation in 2002

(in EUR million)

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

Cost of alternatives

(in EUR million)

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

Comments

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

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

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

Dry Port Dunkerque (DPD) — Liquidation with partial sale

Financial situation in 2002

(in EUR million)

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

Cost of alternatives

(in EUR million)

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

Comments

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

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

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

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

SSTD: Cession

Context:

— IFB owns a shareholding of 50 %.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

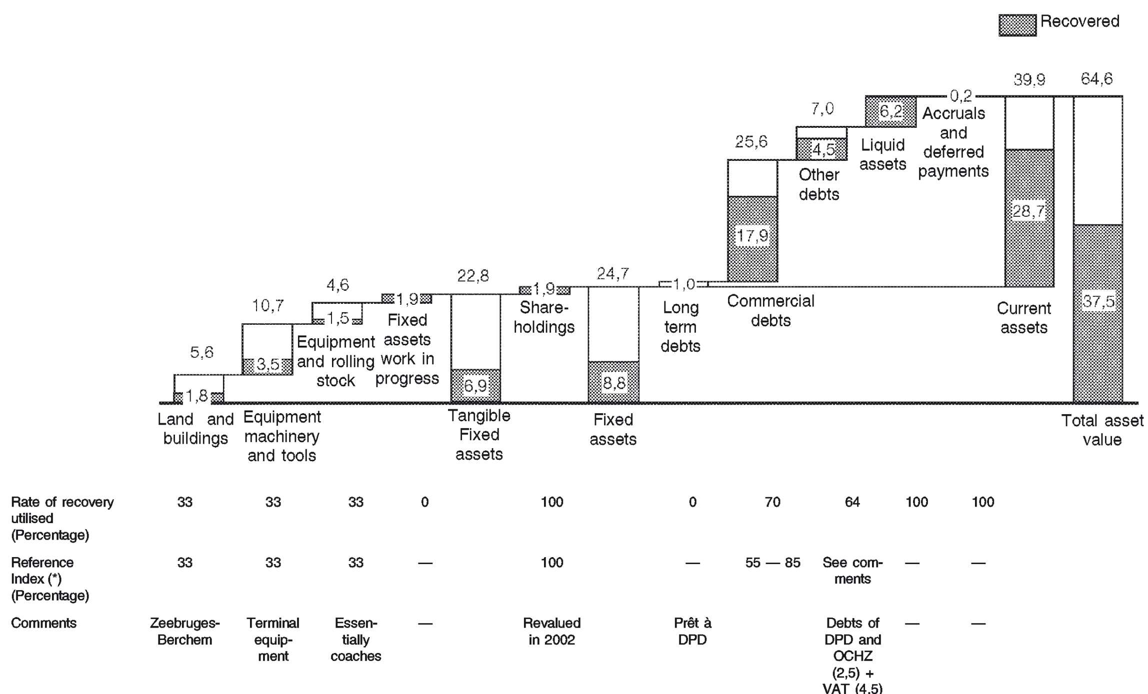
— Liquid assets and accruals and deferred payments: this involves a total of EUR 6,4 million which is considered to have been recovered in its entirety.

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

Diagram 2

Recovery of assets

(EUR million)



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

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

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

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

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

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

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

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

— maintenance of terminals: EUR 3,3 million,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Diagram 4

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

(EUR million)

Assumptions

— The cash flows are calculated based on the profits before tax included in the restructuring plan of 2003, for which the provisions run until end 2005

— The results have been amended as follows:

— In 2006, net margin of 3,2 % (*) assumed (which corresponds to a profit before tax of EUR 1 800 000)

— From 2006 on, pre-tax profit growth rate of 3 % (*) assumed

— No taxes

— Payment of interest EUR 527 000 assumed constant in 2003 and added to result

— Amortisation assumed constant based The figures from 2002: added to result

— Capital expenditure assumed to be constant based on amortisation; reduced to counter-balance amortisations

— Development of floating capital based on a growth rate of 3 % from 2004 on

— The cashflows are calculated over 10 years And discounted at average cost and balanced with capital of 8 %

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

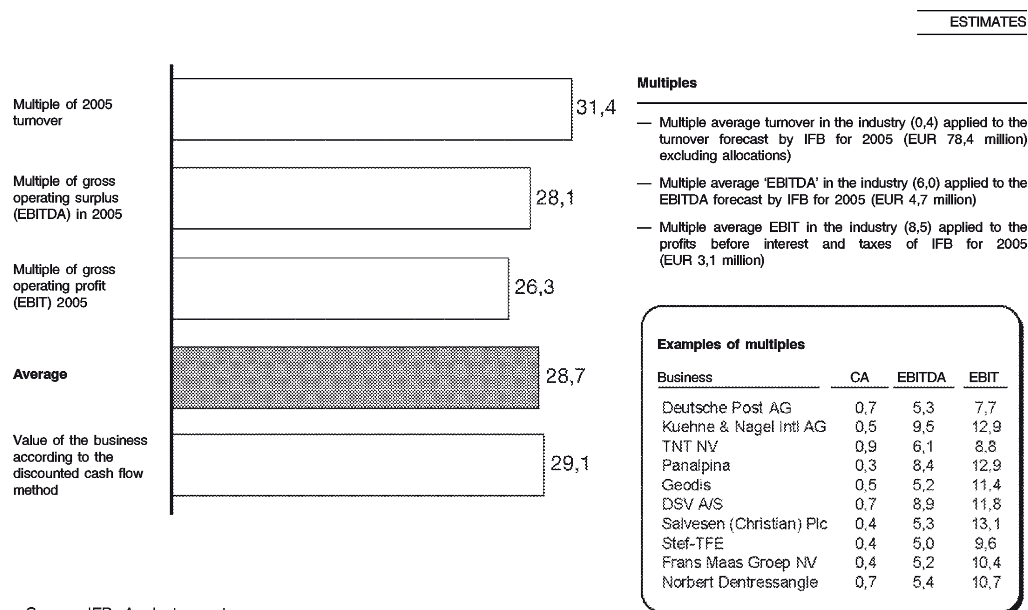
(*) Industry practices
(**) EBITDA
(***) Net present value

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

Diagram 5

Value of the ifb business

(EUR million)



Examples of multiples

Business	CA	EBITDA	EBIT
Deutsche Post AG	0,7	5,3	7,7
Kuehne & Nagel Intl AG	0,5	9,5	12,9
TNT NV	0,9	6,1	8,8
Panalpina	0,3	8,4	12,9
Geodis	0,5	5,2	11,4
DSV A/S	0,7	8,9	11,8
Salvesen (Christian) Plc	0,4	5,3	13,1
Stef-TFE	0,4	5,0	9,6
Frans Maas Groep NV	0,4	5,2	10,4
Norbert Dentressangle	0,7	5,4	10,7

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

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

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

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

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

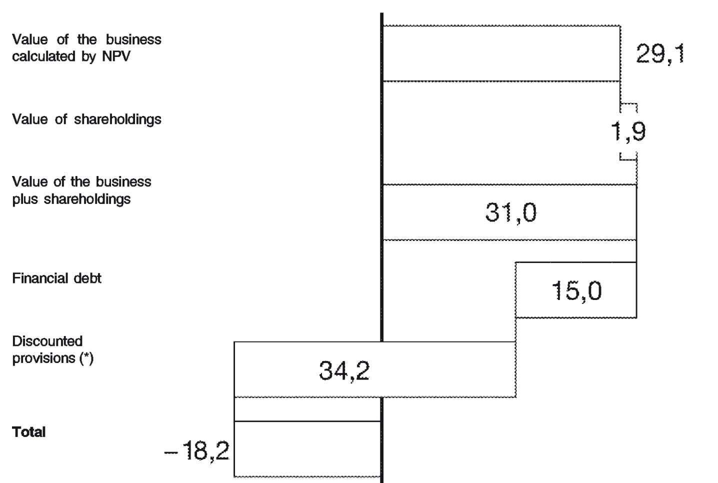
(148) As in the preceding estimate of the cost borne by SNCB in the event of the liquidation of IFB, the above calculations do not take account of the debts of EUR 63 million resulting from the unpaid invoices during the period between 2000 and 2002.

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

Diagram 6

Evaluation of the investment option, January 2003

(EUR million)



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

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

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

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

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

3.2.4. *Absence of distortion of competition*

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

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

3.3.1. *IFB is not a newly created business*

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

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

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

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

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

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

3.3.3.1. Applicability of the 1999 guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

([20]) See 1999 guidelines, point 36.
([21]) See notably the guidelines concerning the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, point 24 in particular.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.3.3. Limitation of the increase in capital to the minimum

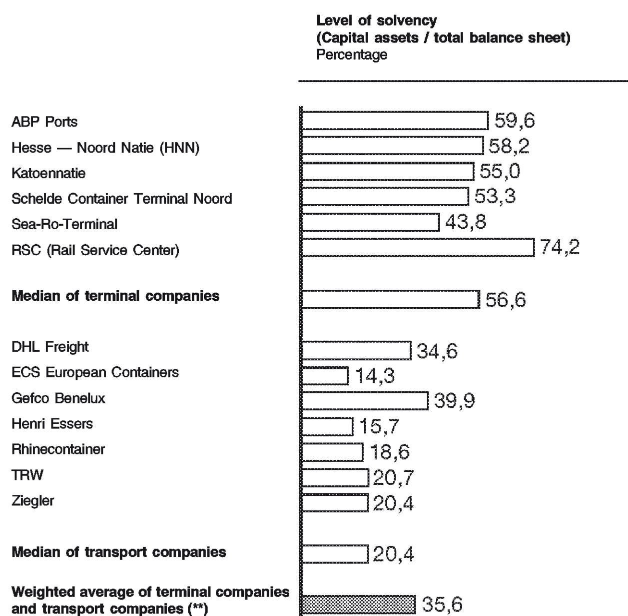
(177) According to the Belgian Government, SNCB and IFB carried out an in-depth analysis of IFB's capital requirements on the basis of the results as at 31 December 2005 and the forecasts for the year 2006. The aim was to allow IFB to pursue its activities in the freight transhipment and logistics markets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

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

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

Diagram 16

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



(*) The 2003 figures were used for ABP, HNN and Sea Ro as their 2004 annual accounts had not yet been published.
(**) Weighted as a function of the utilisation of IFB assets (42 % terminals, 58 % assets).

Source: Belfirst; Amadeus; IFB

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

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

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

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

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

3.3.3.4. IFB's own contribution

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

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

(184) The following table shows the financing details:

Finance requirements and sources

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

(EUR 1 000)

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

(EUR 1 000)

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

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

(186) The financing requirements cover the following categories:

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

(EUR million)

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

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

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

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

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

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

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

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

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

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

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

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

4. ASSESSMENT

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

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

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

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

4.1.1.1. State resources

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

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

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

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

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

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

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

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

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

4.1.1.2. Imputability

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

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

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

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

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

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

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

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

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

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

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

— the period subsequent to 20 December 2002.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Press articles*

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Conclusion*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1.2.1. Cost of restructuring IFB

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

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

4.1.2.2. Hypothetical cost of the liquidation of IFB

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

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

SNCB's responsibility for IFB's liabilities

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

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

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

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

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

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

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

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

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

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

The amount of additional social cost for SNCB

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

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

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

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

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

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

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

4.1.2.3. Conclusion

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

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

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

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

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

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

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

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

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

4.1.4. *Conclusion: existence of State aid*

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

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

4.2. **Compatibility of the aid**

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

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

4.2.1. *Compatibility as rescue aid*

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

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

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

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

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

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

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

'Rescue aid must:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2. *Compatibility of restructuring aid*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The restructuring plan must make it possible to restore the long-term viability of the firm within a reasonable period,
- Measures must be taken to mitigate, as far as possible, any adverse effects of the aid on competitors,
- The aid must be limited to the strict minimum needed to enable restructuring to be carried out, and the firm must make a contribution to its restructuring,
- The Commission must be able to satisfy itself, on the basis of regular detailed reports, that the restructuring plan is being implemented properly,
- The restructuring aid should be granted once only.

4.2.2.1. Restructuring plan restoring the economic viability of the firm

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

> '(31) The grant of the aid is conditional on implementation of the restructuring plan which must be endorsed by the Commission in the case of all individual aid measures.
>
> (32) The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss making even after restructuring.
>
> (33) The restructuring plan should describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It should take account, inter alia, of the present State of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It should enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.

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

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

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

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

4.2.2.2. Prevention of undue distortions in competition

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

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

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

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

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

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

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

— Withdrawal from its transhipment activities in France,

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

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

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

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

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

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

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

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

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

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

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

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

— IFB's market share less than 5 %,

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

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

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

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

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

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

(c) ***Conclusion***

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

4.2.2.3. Aid limited to a minimum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) ***Acimar***

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

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

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

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

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

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

(c) ***IFB France***

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

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

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

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

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

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

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

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

(e) ***SSTD***

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

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

(f) ***Conclusion***

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

(b) **Beneficiaries' own contribution**

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

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

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

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

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

(i) *Costs of restructuring*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

— Autocare Europe and IFB France in 2003,

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

— CNC Ferry Boats Intermodal in 2005.

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

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

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

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

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

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

Conclusion on own contribution

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

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

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

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

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

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

[…]

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

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

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

5. CONCLUSIONS

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24 April 2007.

For the Commission

Jacques BARROT

Vice-President

COMMISSION DECISION

of 4 June 2008

on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements

(notified under document C(2008) 2223)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2009/609/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1], and having regard to those comments,

Whereas

1. PROCEDURE

(1) By letter dated 31 March 2004, registered on the same day, the Hungarian authorities notified the Commission of Government Decree 183/2002 (VIII.23) [2] under the procedure referred to in Annex IV, paragraph 3, subparagraph 1(c) to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (interim procedure). The notified Decree provides for a system of compensation of the costs borne by the State-owned electricity wholesaler (*közüzemi nagykereskedelmi engedélyes*), the company Magyar Villamos Művek Zrt. (hereinafter referred to as MVM). The Commission registered the notification under State aid case number HU 1/04.

(2) A number of official letters were exchanged between the Hungarian authorities and the Commission concerning the measure [3]. The Commission also received comments from third parties [4]. In the course of the interim procedure, the Commission discovered that the Hungarian electricity wholesale market was essentially structured around long-term Power Purchase Agreements (hereinafter referred to as PPAs) between MVM and certain power generators. Based on the information available to it at that time, the Commission suspected that the PPAs contained unlawful State aid elements.

(3) By letter dated 13 April 2005, registered on 15 April 2005, the Hungarian authorities withdrew the notification of Government Decree 183/2002. On 4 May 2005, in line with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [5], (hereinafter the 'Procedural Regulation') the Commission registered a State aid file on its own initiative (case number NN 49/05) concerning the PPAs.

(4) By letter dated 24 May 2005 (D/54013), the Commission requested additional information from the Hungarian authorities. The reply, dated 20 July 2005, was registered by the Commission on 25 July 2005. Further information was provided by the Hungarian authorities by letter dated 28 September 2005, registered on 30 September 2005.

(5) By letter dated 9 November 2005, the Commission informed Hungary that it had decided to open the procedure laid down in Article 88(2) of the EC Treaty in respect of the PPAs (hereinafter referred to as the 'Opening Decision'). The Opening Decision was published in the *Official Journal of the European Union* [6].

(6) In the Opening Decision, the Commission expressed its doubts as to the compatibility of the PPAs with the common market and called on interested parties to submit their comments.

(7) Following a request for an extension of the deadline for comments, accepted by the Commission [7], Hungary submitted its comments on the Opening Decision on 31 January 2006, registered by the Commission on 1 February 2006.

[1] OJ C 324, 21.12.2005, p. 12.
[2] Government Decree 183/2002 (VIII.23) on the detailed rules for the definition and management of stranded costs.
[3] Letters of the Hungarian authorities dated 4 June 2004, registered on the same day and 20 October 2004, registered on 21 October 2004.
[4] Letter dated 21 December 2004 from the power generator AES-Tisza Erőmű Kft.
[5] OJ L 83, 27.3.1999, p. 1.
[6] OJ C 324, 21.12.2005, p 12.
[7] Request of 14 December 2005 accepted by the Commission on 20 December 2005.

(8) Following a number of requests for an extension of the deadline for comments, accepted by the Commission [8], the comments of third parties were registered by the Commission as follows: comments submitted by MVM on 11 January 2006; by a third party that requested its identity to be withheld on 20 January 2006; by Marta power plant on 20 January and 6 March 2006; by the bank […] on 10 February 2006; by AES-Tisza power plant on 13 and 14 February 2006; by the bank […] on 13 February 2006; by Electrabel S.A. and its subsidiary Dunament power plant on 14 February 2006; by Budapest power plant on 21 February 2006; and by Csepel power plant on 21 February 2006.

(9) Following confirmation by the Hungarian authorities of the confidential treatment of information provided by third parties in the context of this procedure [9], the Commission forwarded the above comments to Hungary by letter of 25 April 2006.

(10) The Hungarian authorities submitted the first part of their observations on the third parties' comments by letter of 28 June 2006, registered on 29 June 2006, and the second part by letter of 24 July 2006, registered on 25 July 2006.

(11) Aware of the planned legislative changes in the energy sector in Hungary, Commissioner Kroes sent a letter to Minister Kóka on 17 October 2006 urging the Hungarian Government to settle in the new legislation the question of the PPAs and potential compensatory measures in line with EU law.

(12) The company AES-Tisza submitted further comments complaining about several aspects of the Commission's procedure on 19 December 2006.

(13) By letters of 21 November 2006 (registered on 23 November 2006) and 15 January 2007 (registered on the same day) and at meetings on 18 December 2006 and 8 March 2007 with the Commission, the Hungarian authorities confirmed their intention of making legislative amendments in connection with the liberalisation of the energy sector and thereby also changing the existing situation on the wholesale electricity market.

(14) The Commission sent a request for further information on 23 April 2007. Hungary replied on 5 June 2007 and sent additional information on 6 August 2007.

(15) By letter dated 4 May 2007 the Hungarian authorities informed the Commission that it was setting up a working committee to conduct negotiations with all the generators concerned regarding the termination or substantial amendment of the PPAs. Accordingly, on 11 May 2007 the government adopted Decision No 2080/2007 (V.11) on the long-term power purchase agreements in the energy sector [10], thereby establishing the aforementioned working committee (governed by the Prime Minister's Office) with a view to resolving without delay the matter of the PPAs in accordance with EU State aid rules and ordering the opening of official negotiations in this regard with the power generators concerned. By letter of 3 July 2007 the Hungarian Government informed the Commission of the outcome of the first negotiations that took place in June 2007.

(16) In the context of the liberalisation process, the new Act on Electric Energy [11] was published on 2 July 2007 and entered into force partially on 15 October 2007 and partially on 1 January 2008. By letter of 25 July 2007, the Hungarian Government informed the Commission of the achievements of the new Electricity Act as regards the opening up of the Hungarian electricity market. However, the new Act did not alter the PPAs themselves, which remained in force, unchanged, between MVM and the power generators listed in the Opening Decision.

(17) By letter dated 26 July 2007, the Commission put further questions to the Hungarian authorities.

(18) On 7 September 2007, the Commission registered a letter from the Hungarian Government requesting more time to bring the negotiations with the generators to a successful conclusion.

(19) On 24 September and 31 October 2007 the Commission registered Hungary's replies to its questions of 26 July 2007.

(20) On 14 December 2007, pursuant to Article 5(2) of Regulation (EC) No 659/1999, the Commission sent a reminder to the Hungarian authorities listing the questions for which the information provided was still incomplete. The Hungarian authorities replied by letter dated 16 January 2008.

(21) As the companies Dunament and AES-Tisza did not provide the requested data, the Hungarian authorities argued they were not able to furnish a complete answer to the Commission's questions.

[8] Requests registered on 9 January 2006 (Budapesti Erőmű), 16 January 2006 (AES-Tisza, […] (*), 17 January 2006 (Electrabel), 19 January 2006 […] and 20 January 2006 (Csepeli Erőmű), accepted by the Commission in letters dated 13, 18, 20, 24 January and 27 February 2006.

(*) Data covered by the obligation of professional secrecy is indicated is the text of the Decision by a […] sign.

[9] Letter registered on 3 April 2006.

[10] 2080/2007 (V.11) Korm. Határozat a villamos energia iparban kötött hosszú távú szerződések rendezéséről.

[11] Act LXXXVI of 2007.

(22) Accordingly, on 15 February 2008, the Commission adopted an information injunction enjoining Hungary to supply the data listed in the decision within a period of fifteen days.

(23) On 27 February, Dunament power plant sent to the Commission a copy of its reply to the Hungarian authorities' questions and explained the reasons why it could not answer the questions put to it. The Hungarian authorities replied on 4 and 13 March 2008. In response to Dunament power plant's explicit request, the Hungarian authorities attached to their reply letters sent by Dunament to the Ministry of Finance and to the Hungarian Energy Office dated 14 May 2007, 21 August 2007, 13 September 2007, 7 December 2007, 14 January 2008 and 20 February 2008. The Hungarian authorities had not forwarded a copy of these letters to the Commission at an earlier stage ([12]); however, in their replies to the Commission's questions throughout the procedure they had included the information they found relevant.

(24) It appears from the Hungarian authorities' replies that AES-Tisza did not give Hungary any reply. By fax dated 10 March 2008, AES-Tisza sent a letter to Commissioner Kroes expressing its view that the Hungarian authorities were already in possession of all the data that had been requested by the Commission.

(25) In their answer dated 13 March 2008, on the basis of the information available to them the Hungarian authorities provided the Commission with the relevant data for questions (1)(a) to (d) of Chapter III of the information injunction. However, they did not give any additional data relating to the question asked under point (1)(e) of Chapter III of the information injunction concerning the investments of the two abovementioned power generators.

(26) A substantial part of the information exchanged since the registration of case HU 1/04 concerned the interpretation and concrete application of the Commission Communication relating to the methodology for analysing State aid linked to stranded costs (the Stranded Costs Methodology) ([13]). On the basis of the documents submitted in the present procedure, it seemed that the Hungarian authorities planned to introduce a system of stranded cost compensations, the assessment of which could have been included in this Decision. Consequently, substantial discussions took place throughout the present procedure between the Commission and the Hungarian authorities on the details of a compensation system which Hungary could adopt in order for such a system to meet the criteria of the Methodology.

(27) Notwithstanding the technical discussions about a potential future compensation mechanism, the Hungarian authorities, until the date of this Decision, have not submitted to the Commission a comprehensive compensation mechanism officially confirmed by the Hungarian Government. In their letter of 13 March 2008, the Hungarian authorities explicitly confirmed that, at present, they did not wish to grant stranded costs compensation; however, they reserved their right to grant such compensation to certain power generators at a later stage.

(28) The Commission asked for the confirmation of certain data by the Hungarian Government in a letter dated 7 April 2008. The Hungarian authorities provided the requested information by letter registered on 22 April 2008.

(29) In their letter of 20 May 2008, the Hungarian authorities informed the Commission that the PPA of the Paks power plant had been terminated by the parties on 31 March 2008. Although the Csepel and Pannon power plants signed termination agreements in April 2008, the entry into force of the agreements is, at the date of this Decision, still dependent on approval by shareholders and banking institutions.

Other connected procedures pending

(30) The Opening Decision was challenged by Budapest power plant before the Court of First Instance by way of an application lodged on 3 March 2006 and registered as case T-80/06. On 6 June 2006, Csepel power plant requested leave to intervene in the procedure in support of Budapest power plant and this was granted by an order of the Court dated 11 March 2008.

(31) Furthermore, two international arbitrage procedures are pending before the International Centre for the Settlement of Investment Disputes in Washington, D.C, launched against the Republic of Hungary by the electricity generation companies […] and […], both shareholders of power plants under PPA in Hungary. The proceedings are based on the investment protection provisions contained in the Energy Charter Treaty.

2. DESCRIPTION OF THE MEASURE

Historical background to the PPAs

(32) From 31 December 1991 to 31 December 2002 the Hungarian electricity market was structured around a 'Single Buyer', the company Magyar Villamos Művek (MVM). MVM is a 99,9 % State-owned entity whose activities comprise power generation, wholesale, transmission and retail. Under the 'Single Buyer' model, the

([12]) With the exception of the letters of 7 December 2007 and 14 January 2008.

([13]) Adopted by the Commission on 26 July 2001. The Methodology is available on the Commission's website: http://ec.europa.eu/comm/competition/state_aid/legislation/specific_rules.html

power generators could supply energy directly to MVM only (unless MVM cancelled the regional distribution companies' contracts) and MVM was the only company authorised to supply electricity to the regional distribution companies. Under Act XLVIII of 1994 on Electric Energy (Energy Act I), MVM was required to ensure security of energy supply in Hungary at the lowest possible cost.

(33) Act CX of 2001 on Electric Energy ('Energy Act II', replacing Energy Act I) entered into force on 1 January 2003. It established a dual model of the Hungarian electricity market which remained in force until 1 January 2008, when Act LXXXVI of 2007 on Electric Energy ('Energy Act III', replacing Energy Act II) entered into force. Under this dual model there was a public utility segment and a competitive segment, and eligible customers (the scope of which gradually enlarged) were allowed to switch to the competitive segment. On the public utility segment, MVM remained the only wholesaler, whereas in the free market segment other traders appeared. Energy Act III put an end to the existence of the public utility segment but nevertheless kept household customers and some commercial customers – as permitted by the second Electricity Directive [14] – under a universal service obligation.

(34) Energy Act I required MVM to assess the country's total energy demand and to prepare, every two years, a National Power Plant Construction Plan (*Országos Erőműépítési Terv*). This Plan had then to be submitted to and accepted by the Hungarian Government and the Parliament.

(35) It appears from Energy Act I and from the submissions of the Hungarian government [15] that the most urgent objectives on the Hungarian energy market in the mid-1990s were security of supply at the lowest possible cost, modernisation of the infrastructure with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the power sector. With a view to achieving these general objectives, long-term power purchase agreements were proposed to foreign investors that would undertake to invest in the construction and modernisation of power plants in Hungary. The PPAs were signed by the power generators on the one hand and by the company MVM on the other hand.

The PPAs

(36) The PPAs entered into between MVM and individual power plants [16] established a balanced production portfolio enabling MVM to meet its obligation of ensuring security of supply. They allow MVM to satisfy both base load demand (with lignite-fired and nuclear power stations) and peak load demand (with gas-fired power plants).

(37) The PPAs require the power generators to duly maintain and operate their generation facilities. They reserve all or the bulk of the power plants' generation capacities (MW) for MVM. This capacity allocation is independent of the actual use of the power plant. Beyond the reserved capacities, the PPA requires MVM to purchase a specific minimum quantity of electricity (MWh) from each power plant.

(38) Some PPAs include so-called 'system services' [17] in the case of power plants technically capable of providing them, which MVM provides to the system operator, MAVIR.

(39) The PPAs signed in 1995-1996 (seven of the ten PPAs under assessment) were awarded in view of the privatisation of the power plants. These PPAs followed a model agreement drafted by an international law firm at the Hungarian Government's request. There was no tendering procedure for the signature of these PPAs. There was, however, a tendering procedure for the privatisation of the power plants. The PPAs (signed before privatisation) formed part of the privatisation package. Some of these agreements (mainly the Mátra, Tisza and Dunament agreements) were partially amended by the parties after privatisation.

(40) The PPA of Csepel power plant was signed in 1997 and followed a somewhat different model. However, there was no tendering procedure in this case either and the signature of the PPA was similarly linked to the power plant's privatisation.

(41) The PPA of Ujpest power plant (one of the three plants of Budapest power plant) was signed with Budapest power plant in 1997, likewise without a specific tendering procedure.

(42) Only the PPA of the Kispest plant (another – aging – plant of Budapest power plant which was essentially rebuilt at the time) was signed in 2001 as a result of an open tendering procedure.

[14] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37).

[15] Submissions of 20 July 2005, registered on 25 July 2005.

[16] In some cases there were separate PPAs for the power plants' different production blocks, such as for Mátra and Dunament.

[17] Such as balancing power, tertiary reserves, black start capability, etc.

(43) From 2000 to 2004, the capacities reserved by the PPAs covered approximately 80 % of total Hungarian electricity demand (MW). From 2005 to the date of this Decision, the share has been around 60-70 %. It was expected that this would gradually decrease in the period between 2011 and 2024 [18].

(44) Of the nearly twenty PPAs signed between 1995 and 2001, ten were still in force at the date of Hungary's accession to the EU (1 May 2004).

(45) This Decision concerns only those PPAs that were in force on 1 May 2004. It does not cover PPAs that ended before that date. Although some PPAs (see recital 28 above) were ended by the parties in April 2008, this Decision covers these and assesses their State aid nature and compatibility with the common market in the period between 1 May 2004 and their end date (April 2008).

The power plants under PPA and the duration of the PPAs

(46) The power plants under PPA covered by this Decision are listed in the table below. The duration shown refers to the initially scheduled end date of the PPAs as established in the PPAs themselves.

Table 1

Overview of the generation companies under PPA, the main shareholders and the duration of the PPAs

Name of generation company	Majority shareholder group	Power plant under PPA	Duration of PPA
Budapesti Erőmű Rt.	EDF	Kelenföldi Erőmű	1996-2011
		Újpesti Erőmű	1997-2021
		Kispesti Erőmű	2001-2024
Dunamenti Erőmű Rt.	Electrabel	Dunament F blocks	1995-2010 (signed in 1995, entered into force in 1996)
		Dunament G2 block	1995-2015 (signed in 1995, entered into force in 1996)
Mátrai Erőmű Rt.	RWE	Mátrai Erőmű	1995-2022 (initial duration until 2015, extended to 2022 in 2005)
AES-Tisza Erőmű Kft.	AES	Tisza II Erőmű	1995-2016 (signed in 1995, entered into force in 1996) ([…])
Csepeli Áramtermelő Kft.	ATEL	Csepel II Erőmű	1997-2020 (signed in 1997, entered into force in 2000)
Paksi Atomerőmű Rt.	MVM	Paksi Atomerőmű	1995-2017 (*) (signed in 1995, entered into force in 1996)
Pannonpower Holding Rt.	Dalkia	Pécsi Erőmű	1995-2010 (signed in 1995, entered into force in 1996)

(*) Terminated by common agreement in March 2008.

[18] These rates are based on the calculation of generation capacity reservations (MW) and not on the volume of electricity sale (MWh). They were submitted to the Commission by the Hungarian authorities by letter of 4 June 2004. The same figures appear in the report on the study of the Hungarian electricity market carried out by the Hungarian Competition Authority (15 May 2006).

Prices

(47) In Government Decree 1074/1995 (VIII.4) on electricity price regulation, the government made a commitment that, as of 1 January 1997 (the beginning of the so-called first price regulation cycle), 'in addition to covering the justified operating costs, wholesale and retail prices shall ensure 8 % return on equity'. The government thereby guaranteed an 8 % rate of return on capital to the power plants under PPA.

(48) As of 1 January 2001 (the beginning of the second price regulation cycle), the official prices included 9,8 % profit on assets (*eszközarányos megtérülés*) for the power plants. The increase in percentage did not necessarily mean a change in actual amounts, as the bases of the two rates of return were different (the first one was calculated on equity while the second one was calculated on assets). The prices reflected changes in inflation.

(49) The regulated prices remained in place for the power plants until 31 December 2003.

(50) During this period of price regulation, the Hungarian Energy Office analysed the cost structure of each power plant and fixed the price for the purchase of electricity by MVM at a value that ensured guaranteed profitability.

(51) The list of costs covered by this price-setting mechanism included the following main cost items ([19]):

— fixed costs: depreciation, insurance, certain fixed maintenance and operating costs, loan interest *['hitel-kamatok']*, decommissioning *['rekultivációs költségek']*, fiscal costs (taxes), personnel expenditure *['személyi jellegű költségek']*, environmental protection costs, expenditures to the Central Nuclear Fund *['Központi Nukleáris Alap befizetések']* for the nuclear power plant and extraordinary expenses *['rendkívüli ráfordítások']*;

— variable costs: fuel costs.

(52) The Hungarian Energy Office had the task of ensuring that the costs covered were reasonable and necessary.

(53) The official price overwrote the price established by the PPAs.

(54) As of 1 January 2004, the prices were determined on the basis of the PPAs' price formulae. The exact meaning of the formulae was clarified in the context of the yearly price negotiations between MVM and the power generators.

(55) The price formulae applied in the PPAs are extremely complex; however, they follow the same principles as the methodology applied by the Hungarian Energy Office before January 2004. According to the submissions of the Hungarian authorities ([20]), the annex to the PPAs concerning price definition was drawn up using the formulae and definitions of the above-mentioned Government Decree 1074/1995 on electricity price regulation. (According to the submission, 'the agreements copied in the formulae and definitions contained in the decree'.) Consequently, the price-fixing principles of the PPAs are based, similarly to the mechanism used for setting regulated prices, on the justified cost categories.

(56) Each PPA contains two main types of fee components: the *capacity fee (or fee for making capacity available) for the reserved capacities (MW) covering fixed costs + profit (cost of capital)*, and the electricity fee covering variable costs. The different PPAs provide for different additional charges. Depending on the PPAs, these additional fees can be bonus/malus fees applied as an incentive for the power generators to operate in accordance with the lowest cost principle, and supplementary fees for maintaining generating reserves, rescheduling maintenance at MVM's request, increasing load in peak periods and minimising load below that contracted during the minimum demand period, etc. The periodical (annual, quarterly, monthly) changes of capacity fees depend on a number of factors: activation of implemented retrofit projects, various interest categories, foreign exchange rates, inflation indices, etc. The capacity fee and the supplementary fees also cover the system services (covered by the PPA). Essentially, electricity fees are related to fuel costs and specific fuel heat utilisations (*fajlagos tüzelőhő felhasználása*). They are calculated on the basis of the principle of *pass-through* of the variable costs.

(57) It must be noted that the definition of the covered cost categories was not necessarily identical in the price regulation before 1 January 2004 and in the PPAs. Hungary's submissions ([21]) show that, for example, the capacity fee of […] and Dunament power plants were higher in their PPA than under price regulation. This was because these PPAs took retrofitting into account, thereby leading to higher fixed costs. These higher fixed costs appeared gradually (following the gradual retrofitting) in higher capacity fees under the PPAs than under price regulation. Other differences due to bilateral negotiations between MVM and the generators could also be observed between regulated prices and PPA prices.

([19]) List based on information provided by the Hungarian authorities on 20 October 2004 and on the guidelines of the Hungarian Energy Office for the implementation of a cost review with a view to the price setting of January 2001 (*A Magyar Energia Hivatal irányelve a 2001. januári ármegállapítás előkészítését célzó költség-felülvizsgálat végzéséhez*).

([20]) Letter dated 20 July 2005, registered on 25 July 2005.

([21]) Letter of 28 June 2006, registered on 29 June 2006.

(58) Notwithstanding such differences, in Hungary's submissions of 20 October 2004 and 20 July 2005 each power plant under PPA confirmed that the price calculation method as well as the cost categories applied after the end of price regulation were largely similar to those applied by the Hungarian Energy Office before that date.

(59) The prices under the PPAs applied after 1 January 2004 thus remained based on the calculation of justified (fixed and variable) costs + profit.

(60) It follows from the above that although price regulation ended on 31 December 2003, prices were not genuinely liberalised as the wholesale pricing of electricity remained driven by the principle of return on investments enshrined in the PPAs ([22]).

(61) On 6 February 2006, the Hungarian Parliament adopted Act XXXV of 2006 ([23]) which reinstated governmental price regulation for the electricity sold to MVM under the PPAs. The first new price decree entered into force on 9 December 2006. As of that date, the price regulation of the PPAs was again overwritten by the governmental price formula for a period of approximately one year (until 31 December 2007).

(62) As of 1 January 2008, in the context of the liberalisation of the market, Energy Act III put an end to the regulated generation prices as well as to the existence of the dual public utility and free market segments.

(63) Consequently, as of 1 January 2008 the price of the electricity sold by the power generators to MVM under the PPAs is again defined by the price formulae of the PPAs. The underlying principles of these formulae have not been altered since their last application: they thus follow the same principles as in the period between 1 January 2004 and 8 December 2006 (see recitals 54 to 59 above).

(64) Accordingly, pricing under PPA remains driven by the principle of return on investment.

Reserved capacities

(65) The PPAs reserve for MVM all or a substantial part of the capacities of the generating units under PPA.

Table 2

Hungary's domestic generation capacity ([24])

(MW)

Capacity	2004	2005	2006	2007
Installed total generation capacity ([1])	8 777	8 595	8 691	8 986
Gross available capacity ([2])	8 117	8 189	8 097	8 391
Net available capacity ([3])	7 252	7 792	7 186	7 945
Peak load of the Hungarian electricity system	6 356	6 409	6 432	6 605

([1]) Installed total generation capacity (*Beépített teljesítőképesség*): the nominal generation capacity in MW of the machinery in the Hungarian power plants. Can change only with expansion or removal.
([2]) Gross available capacity (*Rendelkezésre álló állandó teljesítőképesség*): the power plant's actual available capacity taking into account permanent permissible overload and permanent shortfalls. Installed capacity after deductions for reasons of a permanent nature and after addition of permissible overloads.
([3]) Net available capacity (*Igénybe vehető teljesítőképesség*): the capacities actually available after deduction of planned maintenance works.

([22]) See also the report on the study of the Hungarian electricity sector carried out by the Hungarian Competition Authority (15 May 2006).
([23]) A villamos energia árszabályozását érintő egyes törvények módosításáról szóló 2006. évi XXXV. törvény (Act XXXV of 2006 on amendments concerning the price regulation of electricity).
([24]) The figures of the table are based on the statistics published in the Statistical Yearbook for Electricity (*Villamosenergia Statisztikai Évkönyv*). See also the letter of the Hungarian authorities submitted on 21 April 2008.

Table 3

Generation capacity of the power plants under PPA ([25])

(MW)

Power plant	Capacity	2004	2005	2006	2007
Kelenföld	Net available capacity	90,1	97,6	97,2	78,0
	Contracted capacity ([1])	83,3	89,8	89,4	71,9
Ujpest	Net available capacity	106,3	106,1	106,2	106,0
	Contracted capacity	99	98,8	98,9	98,7
Kispest	Net available capacity	46,1	110,2	110,2	109,6
	Contracted capacity	43	102,6	102,6	102,3
Dunament F	Net available capacity	1 020	1 020	1 020	1 020
	Contracted capacity	928,2	923,1	923,1	923,1
Dunament G2	Net available capacity	187,6	223,1	223,1	223,7
	Contracted capacity	178,4	212,4	212,4	213
AES-Tisza	Net available capacity	638,0	824,7	824,7	824,7
	Contracted capacity	[…] ([a])	[…] ([b])	[…] ([b])	[…] ([b])
Csepel	Net available capacity	348,9	331	355	349,5
	Contracted capacity	323	307	329	324
Pannon	Net available capacity	25,9	25,9	25,9	25,9
	Contracted capacity	20,1	20,1	20,1	20,1
Mátra	Net available capacity	593	552	552	552
	Contracted capacity	496	460	460	460
Paks	Net available capacity	1 597	1 596	1 596	1 596
	Contracted capacity	1 486	1 486	1 485	1 485
Total net available capacity of the power plants under PPA		4 652,0	4 886,6	4 910,3	4 885,4
Total contracted capacity		[…] ([c])	[…] ([d])	[…] ([e])	[…] ([f])

([1]) Average available capacity contracted (*Rendelkezésre álló átlag teljesítősépesség szerződött értéke*).
([a]) Between 400 and 700 MW (footnotes indicated by small letters do not appear in the authentic version of the Decision but have been included in the public version to indicate a range of magnitude of certain data covered by the obligation of professional secrecy).
([b]) Between 600 and 900 MW.
([c]) Between 4 057 and 4 357 MW.
([d]) Between 4 725,9 and 5 025,9 MW.
([e]) Between 4 749,6 and 5 049,6 MW.
([f]) Between 4 724,7 and 5 024,7 MW.

(66) The above figures show that in the period under assessment, around 60 % of Hungarian net available generation capacity is contracted by MVM under PPAs. If the actually available capacities of the power plants (*Ténylegesen igénybevehető teljesítőképesség*) minus their own consumption (*Önfogyasztás*) are taken into account, the ratio is higher than the above.

(67) The above tables also show that the capacity reserved under the PPAs for MVM cover all or the bulk of the respective plants' available capacities.

([25]) The figures of the table are based on the PPAs as submitted to the Commission by the Hungarian authorities. See also the letter of the Hungarian authorities registered on 21 April 2008.

(68) MVM pays a capacity fee for these capacity reservations (recital 56 above), irrespective of the actual use of the plant.

(69) Import capacity in Hungary is around 1 000-1 300 MW. Around 600 MW of this import capacity is reserved for MVM under other long-term agreements.

Sold quantities

(70) When MVM actually makes use of its reserved capacity and buys electricity from the power plant, it then pays the energy fee for the off-taken electricity (see recital 56 above).

(71) There is a certain minimum off-take guaranteed by the PPAs for each power plant.

(72) The overall domestic electricity production in Hungary is between 32 and 36 TWh (= 32 – 36 000 000 GWh) a year.

Table 4

Electricity produced under PPAs ([26])

(GWh)

Power plant	Produced electricity	2004	2005	2006	2007
Budapest (including Kelenföld, Újpest and Kispest)	Total generated electricity	1 228	1 510	1 643	1 742
	Own consumption	87	89	91	84
	Minimum guaranteed off-take	Kelenfold: […] Ujpest: […] Kispest: […]	Kelenfold: […] Ujpest: […] Kispest: […]	Kelenfold: […] Ujpest: […] Kispest: […]	Kelenfold: […] Ujpest: […] Kispest: […]
	Actual off-take	939	1 302	1 451	1 538
Dunament (*) (F + G2)	Total generated electricity	4 622	3 842	3 450	4 300
	Own consumption	174	148	147	188
	Minimum guaranteed off-take	F: […] G2: […]	F: […] G2: […]	F: […] G2: […]	F: […] G2: […]
	Actual off-take	4 232	2 888	2 495	3 296
AES-Tisza	Total generated electricity	1 621	1 504	1 913	2 100
	Own consumption	96	97	117	116
	Minimum guaranteed off-take	[…]	[…]	[…]	[…]
	Actual off-take	1 525	1 407	1 796	1 984
Csepel	Total generated electricity	1 711	1 764	1 710	2 220
	Own consumption	48	49	48	53
	Minimum guaranteed off-take	[…]	[…]	[…]	[…]
	Actual off-take	1 662	1 715	1 661	2 166
Pannon (*)	Total generated electricity	673	266	237	232
	Own consumption	116	52	34	29
	Minimum guaranteed off-take	[…]	[…]	[…]	[…]
	Actual off-take	361	206	203	203

([26]) The figures of the table are based on the PPAs as submitted by the Hungarian authorities, the statistics published by the Hungarian Energy Office on its website: www.eh.gov.hu, and the letter of the Hungarian authorities dated 21 April 2008. The quantities of guaranteed off-take stipulated in the yearly commercial agreements may differ somewhat from the quantities provided for in the PPAs themselves. The actual off-take figures cover all the sales of the power plant concerned to MVM.

(GWh)

Power plant	Produced electricity	2004	2005	2006	2007
Mátra (*)	Total generated electricity	5 688	5 698	5 621	6 170
	Own consumption	675	670	667	710
	Minimum guaranteed off-take	[…]	[…]	[…]	[…]
	Actual off-take	3 730	3 762	3 587	4 082
Paks	Total generated electricity	11 915	13 833	13 460	14 677
	Own consumption of the plant	750	821	800	848
	Minimum guaranteed off-take	[…]	[…]	[…]	[…]
	Actual off-take	11 112	13 012	12 661	13 828

(*) The total generated electricity and own consumption data also cover the blocks of these plants which are not under PPA.

(73) The minimum guaranteed off-take is the quantity MVM is required to purchase irrespective of market demand. Should MVM not purchase the fixed minimum quantities, it still has to pay for the fuel costs incurred (Dunament, Kelenfold, Pécs and […]), all costs or compensation incurred by the generator on the basis of its Fuel Supply Agreement (Csepel), and all justified costs (Kispest and Ujpest).

3. GROUNDS FOR INITIATING THE PROCEDURE

3.1. The PPAs

(74) In its Opening Decision, the Commission reached the preliminary conclusion that the PPAs constituted State aid within the meaning of Article 87(1) of the EC Treaty to the power generators parties to a PPA with MVM.

(75) It expressed the view that PPAs were applicable after accession within the meaning of Annex IV, paragraph 3, subparagraph 1(c) to the Accession Act [27] and that they did not constitute existing aid, since they do not come under the aid categories that were regarded, as of accession, as existing aid within the meaning of Article 88(1) of the EC Treaty.

(76) Firstly, none of the PPAs entered into force before 10 December 1994. Secondly, none of the PPAs had been included on the existing aid list annexed to Annex IV to the Accession Act. Thirdly, the Commission had not been given notice of the PPAs under the so-called 'interim procedure'.

Existence of State aid

(77) The Commission expressed the view that the guaranteed return on investment and the high purchase price secured by the PPAs put power generators operating under a PPA in a more advantageous economic situation than other power generators not parties to a PPA, including possible new entrants on the market and companies in other, comparable sectors in which such long-term agreements have not even been offered to market players. The measure was therefore found, on a preliminary basis, to confer a selective advantage on those power generators.

(78) The Commission also noted that the electricity markets had been opened to competition and that electricity had been traded between Member States at least since the entry into force of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [28]. Measures favouring particular companies in the energy sector in one Member State were therefore regarded as potentially impeding the scope for companies from other Member States to export electricity to that Member State, or favouring exports of electricity from that Member State to other Member States.

(79) The Commission also expressed the view that this advantage stemmed from the use of state resources, because the decision to sign the PPAs was a consequence of state policy implemented via the State-owned public utility wholesaler MVM. Under the case law of the Court of Justice of the European Communities (Court of Justice), when a State-owned company uses its funds in a way that is imputable to the State, these funds should be regarded as State resources within the meaning of Article 87(1) of the EC Treaty [29].

[27] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded; OJ L 236, 23.9.2003.

[28] OJ L 27, 30.1.1997, p. 20.

[29] Case C-482/99 *French Republic* v *Commission* [2002] ECR I-04397. Decision of 16 May 2002.

(80) The Commission therefore came to the preliminary conclusion that the PPAs constituted State aid to the power generators within the meaning of Article 87(1) of the EC Treaty, such aid being 'still applicable after' within the meaning of Annex IV, paragraph 3, subparagraph 1(c) to the Accession Act.

Compatibility of the PPAs with the EC Treaty

(81) The Commission went on to state that the Stranded Costs Methodology should be used to analyse the State aid received by the power generators. On the basis of the documents in its possession at the time of the Opening Decision, the Commission had doubts as to the PPAs' compatibility with the criteria set out in the Methodology.

(82) Firstly, the Commission had doubts that the very principles governing a PPA which create a barrier to free competition on the market could be deemed compatible with the fundamental objective of the Methodology, i.e. to assist by means of State aid the liberalisation of the sector by granting adequate compensation to incumbents facing new conditions of competition.

(83) Secondly, the Commission doubted that the State aid element included in the PPAs was compatible with the detailed criteria of the Methodology as regards the calculation of eligible stranded costs and the determination of adequate compensation.

3.2. **Government Decree No 183/2002 (VIII.23) on stranded costs**

(84) In order to enable MVM to honour its PPAs and, at the same time, keep the resale prices on the public utility segment approximately at the level of the free market price, Government Decree 183/2002 (VIII.23) provided for the payment of State compensation to MVM in certain circumstances.

(85) In their initial notification of case HU 1/04 (withdrawn on 13 April 2005), the Hungarian authorities considered that this compensation constituted State aid to MVM.

(86) In its Opening Decision, however, the Commission concluded that the compensation payments did not constitute State aid to MVM, but that the amount received under Government Decree 183/2002 (VIII.23) formed part of the purchase price paid by MVM to the power stations under PPA and thus constituted part of the advantage the generators received from the PPAs.

(87) Consequently, the Opening Decision opens the formal investigation procedure on the PPAs only and not on Government Decree 183/2002 (VIII.23).

4. **COMMENTS BY HUNGARY ON THE OPENING DECISION**

(88) Hungary expresses its view that individual assessment of the PPAs would seem to be justified given the differences in their exact terms and conditions.

(89) With regard to the opening of the Hungarian electricity market, Hungary takes the view that it was successful (i.e. in line with the European average) in terms of the number of consumers switching to the free market. Hungary concludes that the PPAs did not create a barrier for consumers to switch to the free market. Such a barrier would be much more likely to be constituted by Hungary's limited cross-border capacities and the consequently high prices.

(90) Hungary furthermore considers that the long-term nature of the PPAs cannot in itself constitute a competitive advantage to generators as such long-term contracts are widespread in the electricity sector both in Europe and on other continents.

(91) With regard to the reference price referred to in the Opening Decision, the Hungarian authorities suggest that the Commission should take into account the regional specificities of Hungary and the recent increase in fuel prices when establishing a reference price.

(92) With regard to new entrants on the electricity market, Hungary informs the Commission that there have been none since 1 May 2004 (the date Hungary joined the EU and the date the energy market was liberalised). The Hungarian authorities point to the time-consuming nature of any such investment and, as a result, to the unlikelihood of any investment being operational before 2011.

(93) Finally, in response to the Commission's doubts as to the compatibility of the PPAs with point 4.6 of the Methodology, Hungary confirms that it will grant no State aid for the rescue and restructuring of the companies benefitting from the PPAs under assessment.

5. **COMMENTS FROM INTERESTED PARTIES**

(94) Following the publication of the decision to initiate the procedure (21 December 2005), and within the relevant deadline (in most cases following a deadline extension requested by the interested parties and accepted by the Commission), the Commission received comments from:

— the following electricity generating companies: AES-Tisza Erőmű Rt., Budapesti Erőmű Zrt., Csepeli Áramtermelő Rt., Dunamenti Erőmű Zrt. and its main shareholder, Electrabel S.A., and Mátrai Erőmű Rt.,

— the following banks that provided financing to the electricity generators: […] Bank, acting as Facilities Agent on behalf of twelve banks, lenders to Csepeli Áramtermelő Kft. and […] Bank acting as Facilities Agent on behalf of nine banking institutions, lenders to AES-Tisza Erőmű Kft. and

— MVM and,

— a third party that requested its identity to be withheld.

(95) Most of the comments submitted to the Commission by the parties follow very similar lines of argument. For that reason, instead of describing the comments of each interested party separately, the Commission has grouped them into general categories (see points 5.1 to 5.7 below).

5.1. **Comments on the individual assessment of the PPAs**

(96) The Mátra power plant and another interested party that requested its identity to be withheld expressed the view that the PPAs should be assessed individually by the Commission given the differences that exist between their exact content. Other power generators implicitly requested individual assessment of their PPA by giving the Commission details of the specific terms and conditions of their own PPA.

5.2. **Comments on the existence of State aid**

The relevant time of assessment

(97) AES-Tisza Erőmű, Budapesti Erőmű, Csepeli Áramtermelő and Dunamenti Erőmű argue that the criteria for the existence of State aid at the time of the conclusion of the PPAs should be assessed in the context of the market conditions that prevailed at that time. Some of the comments state this requirement explicitly, while others imply it by referring to the circumstances of the conclusion of the PPAs in their assessment of the existence of State aid. Reference is made to the Court's case law in this regard ([30]).

No economic advantage

(i) *Wrong reference price/No advantageous prices*

(98) All the power generators argue that the PPAs do not confer any economic advantage.

(99) They criticise the Commission's preliminary finding that the prices established under the PPAs are higher than generators' market prices.

(100) They argue that the reference price of EUR 36/MWh used in other decisions and referred to in the Opening Decision is inappropriate in this procedure as it originates from a completely different geographical and temporal context. They argue that the price assessment should take into account the circumstances that prevailed at the time of conclusion of the PPAs. They also stress that prices under any long-term agreement will always be lower than spot market prices. Moreover, generators that provide MVM with mainly peak load electricity also argue that their prices cannot be compared to base load prices. Most of them suggest that the Commission should take into account the substantial increase in fuel prices in recent years.

(101) Many of the generators argue that their actual rate of return was below the rates mentioned in the Opening Decision.

(102) The generators also emphasize that they do bear important risks (contrary to what is suggested in the Opening Decision), in particular construction, regulatory, environmental, maintenance and fiscal/financial risks. Price regulation was mentioned as one of the principal categories of regulatory risks. Generators also consider that the reservation of a significant share of their generation capacities by MVM constitutes a disadvantage, as it prevents them from using these capacities to produce energy for other potential customers. Moreover, the PPAs provide for clear obligations on the generators which, if the generators do not meet them, lead to lower payments or to damage claims.

(103) […] maintained that one of the advantages gained by Hungary as a result of the PPAs were the reliable balancing services which could only be offered by itself and Dunamenti Erőmű. This generator argued that it would not have entered the market and offered these services without a PPA.

(104) The Mátra power plant argues that it has cheap mining costs because it has its own coal mine, enabling it to offer very competitive prices. It argues that its prices are even below MVM's resale prices, contrary to other PPA prices.

(ii) *Privatisation price*

(105) The Dunament power plant argues that it obtained no advantage from the PPA as it paid the market value for the privatisation of the power plants and the purchase price took into account its rights and obligations under the PPA. Consequently, it paid for the PPA (and for any advantage it might confer on it) in the privatisation price.

([30]) Reference is made to Case T-366/00, Scott S.A.

(iii) *Market investor principle*

(106) The Budapest, AES-Tisza, Mátra and Csepel power plants argue that the PPAs reflect market conditions at the time of their conclusion, both for MVM and for the generators. With regard to MVM, they argue that any private operator in MVM's position (legal obligation of security of supply as single buyer, etc.) would have chosen to enter into the PPAs. With regard to the generators themselves, they argue that their 'advantage' from the PPAs does not go beyond what should be considered as normal commercial advantage for any party in any commercial agreement. At the time of their conclusion, in the sector concerned, the PPAs reflected normal market conditions. Furthermore, PPAs represent normal commercial business methods and a standard form of risk allocation and management.

(107) The PPAs were the only way to secure investments which met the requirements of the electricity sector in Hungary (in particular, modernisation of the whole system, environmental protection and security of supply). Applying the private investor principle should lead to take account of those requirements, and the only way of meeting the requirements was PPAs. The interested parties note that PPAs impose investment and availability obligations on power generators.

(iv) *Service of general economic interest*

(108) The Budapest and Csepel power plants argue that generators party to PPAs provide services of general economic interest (SGEI). In their view, the PPAs serve as a tool for MVM to meet its obligation of security of supply and therefore fulfil a public service obligation. Budapest power plant argues that it can also be considered that it is actually the Budapest power plant itself that has to discharge a public service obligation imposed on it by its PPAs. Both interested parties refer to the Commission's decision of 16 December 2003 in State aid case N 475/03 (Ireland) [31] whereby the Commission accepted that the construction of new generation capacity to ensure security of supply could be considered a service of general economic interest.

(109) The interested parties are of the opinion that, as in to the Irish case, State aid under the PPAs – if it exists – meets the four cumulative criteria laid down by the Court in its judgment in case C-280/00 (the Altmark judgment) [32]. They argue as follows.

(110) Firstly, it followed from the Hungarian Energy Acts that MVM had several public service obligations, such as security of supply at the lowest possible cost, environmental protection and efficiency. MVM's public service obligations are thus clearly defined by law and the power generators parties to the PPAs are entrusted with providing the SGEI.

(111) Secondly, the compensations were set in advance by the government price decrees and by the price formulae of the PPAs. The compensations could thus be calculated on the basis of objective and transparent parameters.

(112) Thirdly, the compensation paid on the basis of PPAs does not exceed the costs of the SGEI provided. PPAs are strictly cost-based and the profit margins do not exceed usual profit margins on the market. This is ensured by the fact that, as Budapest power plant argues, its PPAs were openly and transparently tendered (see below). The power plants were sold to the tenderer with the highest bid and the best business plan. It follows from the tendering procedure that the compensation under the PPAs cannot exceed what is necessary to cover all costs incurred in the discharge of the public service obligation and a reasonable profit margin.

(113) Fourthly, Budapest power plant argues that its PPAs were all openly and transparently tendered, either as an essential part of the privatisation package or separately. Csepel power plant argues that although the plant was not chosen on the basis of a public tender, it still receives a compensation that is limited to cover costs and a reasonable profit margin. The pricing mechanisms ensure that overcompensation is avoided.

(114) In the light of the above, the interested parties conclude that the PPAs fulfil the four cumulative criteria referred to in the Altmark judgment and do not therefore constitute aid within the meaning of Article 87(1) of the EC Treaty.

---

[31] OJ C 34, 7.2.2004, p. 8.

[32] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-07747.

(115) The Budapest power plant also argues that even if PPAs were deemed not to fulfil the four cumulative criteria of the Altmark judgment, they could still be declared compatible with the common market under Article 86(2) of the EC Treaty. The interested party expresses its view that the impact of its PPAs on the alleged foreclosure of the Hungarian electricity market is negligible, since they cover only 3 % of Hungarian electricity consumption. Moreover, for technical reasons, an increase in electricity imports was impossible at the time the PPAs were concluded. Consequently, its PPAs would not have any adverse effect on trade. The interested party also stresses in its comments the importance of its cogeneration technology for district heating, which meets the objectives of EU energy and environmental policy.

(116) The Mátra power plant argues that it was required to reserve a certain minimum capacity for MVM in order to secure the energy supply in the Hungarian market using indigenous coal resources. It argues that, in line with Article 11(4) of the Electricity Directive [33], State aid should be considered as compatible with the common market when, for reasons of security of supply, it finances the generation of electricity from indigenous coal.

(v) *No advantage in long duration*

(117) Csepel, Mátra and Budapest power plants argue that the long duration of a contract should not be construed as an advantage per se. The Csepel power plant argues that in a long-term agreement both parties pay a price for the certainty the long term offers. The power generators agree to offer a lower price than the spot market price and to be bound by the agreed price, whatever the spot prices are. They also agree to reserve their capacities for one company for the entire duration of the agreement. It is argued that long-term agreements therefore represent a balancing of economic risks and opportunities for both parties and cannot be seen as a pure advantage.

(118) On the basis of the above arguments, all power generators conclude that the PPAs do not provide them with an economic advantage and that consequently they do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Selectivity

(119) AES-Tisza argues that the PPAs do not provide a selective advantage. The interested party refers to the existence of long-term agreements in the entire electricity sector, not only between the generators and MVM but also between MVM and the distribution companies and between fuel suppliers and electricity generators, as well as for the import of electricity. As far as the generators are concerned, the Energy Act I (from 1994) and Government Decree 34/1995 explicitly required generators to conclude a power purchase agreement with MVM in order to obtain a construction and operation licence. Consequently, all generators had agreements with MVM and only renewable and cogeneration plants could have shorter term agreements, as these generators have different legal guarantees (e.g. mandatory off-take).

Transfer of State resources

(120) Mátra power plant submits that only the price can be considered State aid in the PPAs. The duration of the PPAs and the guaranteed sales volumes cannot be viewed as State aid because even if they confer an advantage, they do not lead to the transfer of State resources. The third party concludes that given Mátra power plant’s very competitive prices (see (i) above), there is no State aid element whatsoever in its PPA.

Imputability to the State

(121) The company AES-Tisza argues that the PPA prices are imputable not to the State but to the parties to the PPAs. AES-Tisza criticises the imputability assessment of the Opening Decision in that it concentrates only on the imputability to the State of the actual conclusion of the PPAs and not on the imputability of the price setting, whereas at the same time the Commission argues that the unfair advantage is secured by the advantageous prices. After the period of central price setting (i.e. after January 2004, and with the exception of 2007), the prices were negotiated between MVM and the power generators and cannot be attributed to the State.

Distortion of competition and impact on trade between Member States

(122) AES-Tisza, Budapest and Csepel power plants contest the distorting effects of the PPAs and their potential to impact trade between Member States.

(123) Firstly, the power plants in question submit that this criterion should also be assessed in the light of the time the PPAs were concluded. At that time Hungary was not part of the EU and its electricity market was not liberalised. Consequently, it is argued that the PPAs could not by definition distort competition in the common market.

[33] Directive 2003/54/EC.

(124) Secondly, they argue that competition and trade between Member States are influenced by factors other than the PPAs. Specifically, they contend that Hungary's cross-border capacities are the main factor influencing trade between Hungary and other countries. These cross-border capacities are used at their maximum. Clearly, then, trade in electricity is limited because of Hungary's restricted cross-border capacities and not because of the PPAs. Legislation is argued to be the other factor influencing trade between Member States. Under Hungarian legislation, the power generators were in any event not authorised to sell electricity abroad directly.

(125) Csepel power plant argues that in any event it sells electricity in Hungary only, so its PPA cannot have any *de facto* effect on trade between Member States.

(126) It is also argued that the Hungarian electricity market has been gradually opened up to competition in line with EU obligations. A significant percentage of consumers had switched to the free market segment within a short time. New players would be deterred from entering the Hungarian electricity market or extending their presence in that market by the unpredictability of returns, not the existence of the PPAs. Csepel power plant argues that in recent years power stations have been built in Hungary only when the State has offered some form of stability and predictability of project returns through long-term agreements or in the form of compulsory off-take, or where the use of new capacities was guaranteed by demand for the vertically integrated distribution activity. In any event, the existing PPAs were not a factor deterring new entry.

(127) It is furthermore argued that there is no market demand in Hungary for additional capacities. This is evidenced by the fact that at electricity auctions by MVM a huge majority of the capacities offered for sale remained unsold.

5.3. **Applicability after accession**

(128) This observation was submitted by Budapest power plant.

(129) Budapest power plant argues that the PPAs cannot be regarded as 'still applicable after accession' within the meaning of Annex IV, paragraph 3, subparagraph 1(c) to the Accession Act.

(130) The interested party argues that in line with the general principle of non-retroactivity, measures that were established in accordance with the law prior to accession should not be reviewed by the Commission after accession. As Community State aid rules apply only from the date of accession, only aid measures that provide an additional benefit after accession can be defined as applicable after accession. They argue that the PPAs do not provide any additional benefit after accession as their price formulae were defined before accession, and consequently the State's financial exposure was entirely known prior to accession.

5.4. **Existing aid**

(131) This argument was submitted by Budapest, Csepel, AES-Tisza and Mátra power plants and by […] Bank.

(132) The interested parties argue that even if one were to accept that the PPAs constituted State aid within the meaning of Article 87(1) of the EC Treaty, such State aid should be regarded as existing aid within the meaning of Annex IV, paragraph 3, subparagraph 1(c) to the Accession Act. They are of the view that the Commission did not object to the measure within the period of 3 months required by the Accession Act. The Hungarian authorities notified the measure on 31 March 2004. After an exchange of information, the Commission did not, the parties claim, react to Hungary's letter of 19 October 2004 within a period of 3 months, thereby ruling out classification of the measure as 'new aid'.

(133) Budapest power plant also takes the view that a decision determining whether aid awarded prior to accession and continued after accession should be regarded as 'new aid' or 'existing aid' should not be based solely on Annex IV to the Accession Act. According to Budapest power plant, if such aid does not qualify as existing aid under Annex IV to the Accession Act, it should still be examined in the light of Article 1(b)(ii)-(v) of Regulation (EC) No 659/1999.

(134) Budapest power plant further argues that Article 1(b)(v) of Regulation (EC) No 659/1999 applies to the PPAs and that the PPAs therefore constitute 'existing aid'. In its view, the last sentence of Article 1(b)(v) of Regulation (EC) No 659/1999 referring to new aid does not apply to the PPAs for three reasons.

(135) First, in the *Alzetta Mauro* judgment ([34]), the Court ruled that aid that existed in a certain market which was initially closed to competition before its liberalisation is to be regarded as existing aid from the time of liberalisation. According to the interested party, this judgment is based directly on an interpretation of Article 88(1) of the EC Treaty, and therefore takes precedence over Regulation (EC) No 659/1999.

([34]) Judgment of the Court of First Instance of 15 June 2000 in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98.

(136) Second, in any event, given that Regulation (EC) No 659/1999 had not yet entered into force when the electricity market was liberalised under Directive 96/92/EC or when the PPAs were signed, the rules as set out in the *Alzetta Mauro* judgment applied, not Regulation (EC) No 659/1999.

(137) Third, a comparison of the wording of the different categories in Article 1(b) of Regulation (EC) No 659/1999 leads to the conclusion that Article 1(b)(v) applies only to State aid schemes, since individual aid is not explicitly mentioned.

(138) Conversely, AES-Tisza argues that if the PPAs were to be classified as new aid, then such classification should be based on Article 1(b)(v) of Regulation (EC) No 659/1999.

5.5. **Validly concluded private agreements cannot be ended by the Commission (pacta sunt servanda) — Legal uncertainty**

(139) These arguments were submitted by Budapest and AES-Tisza power plants and […] Bank.

(140) The parties stress that they entered into the PPAs in good faith in the market circumstances that prevailed at the time. They accepted major investment obligations borne by credit institutions through financing agreements. In their view, the Commission's investigations lead to significant legal uncertainty which should be avoided. AES-Tisza questions the Commission's right to terminate, on the basis of the State aid rules and, more generally, the EC Treaty's competition rules, validly concluded commercial agreements [35].

5.6. **Proportionality**

(141) The AES-Tisza power plant expresses its concerns regarding the proportionality of the Commission's request to terminate the PPAs and refers to the possibility of renegotiation of the agreements by the parties.

5.7. **Comments on the compatibility of PPAs with the common market**

(142) The companies Csepel and AES-Tisza submit that the PPAs were not designed to be a compensation scheme and it is therefore inappropriate to compare them to the Stranded Costs Methodology. At the time of their conclusion, the PPAs could not be construed as a stranded cost compensation as the Methodology did not even exist at that time. In their view, the use of the Methodology is only appropriate in a situation where the PPAs were ended previously.

(143) Conversely, […] Bank argues with regard to the Csepel PPA that the consideration paid under the PPA is limited to covering costs that are actually eligible under the Methodology (i.e. fixed costs, variable costs and a reasonable profit margin). It maintains that the Csepel PPA does not provide for compensation exceeding eligible stranded costs.

(144) Csepel furthermore argues that the PPAs fulfil the criteria of Article 87(3) of the EC Treaty in that they significantly contribute to the security of electricity supply in Hungary and, more generally, to the overall development of the Hungarian economy.

(145) The company AES-Tisza suggests (without giving detailed reasons) that the PPAs should be regarded as securing investment in an Article 87(3)(a) region.

(146) Moreover, AES-Tisza notes the Opening Decision's lack of clarity with regard to the 'benchmark' market price to be used, the meaning of 'inefficient investment' and the economic scenarios and time periods applied for the Commission's assessment of compatibility with the common market.

6. **REPLY FROM HUNGARY ON COMMENTS FROM INTERESTED PARTIES**

(147) In reaction to the comments of Csepel power plant, Hungary submits that, contrary to what might be inferred from Csepel's comments, its PPA also contains guaranteed minimum off-take quantities.

(148) As regards Dunament's argument that it cannot refuse generation under conditions dictated by MVM even to the detriment of Dunament's free market sales, the Hungarian authorities point out that in 2006, MVM initiated the termination of the PPAs with regard to 4 F blocks which, as a result, could have competed directly on the free market for system services. However, Dunament refused to take this opportunity.

(149) On the comments of AES-Tisza whereby generators without PPA mainly invested if they fell under the guarantee of mandatory off-take, the Hungarian authorities submit that important power plants and power plant blocks sell electricity on the free market without both PPAs and mandatory off-take (for instance the Dunament G1 block, the Vértes power plant and the Mátra I-II blocks).

(150) Hungary also stresses that, contrary to AES-Tisza's comments, MVM's negotiating position is also limited by the PPAs themselves (price formulae and guaranteed off-take quantities).

[35] Letter registered on 19 December 2006.

7. ASSESSMENT BY THE COMMISSION

7.1. Unlawful aid

(151) The aid contained in the PPAs was not notified to the Commission in accordance with the State aid procedural rules. The aid thus constitutes unlawful aid.

7.2. General comment on the individual assessment of the PPAs

(152) In their comments, certain interested parties and the Hungarian authorities suggested that the PPAs should be assessed individually given the differences in their exact terms and conditions.

(153) This Decision covers all PPAs between MVM and power generators that were in force when Hungary joined the EU (see recitals 44 and 45 above). The Commission considers that the governing principles of the PPAs present similarities which, in a State aid procedure, justify their common assessment. As shown below, the Commission is of the view that the main advantage flowing from the PPAs is common to all of them, and that the decision on their conclusion in the period 1995-2001 followed the same policy objectives and the same type of solution. In concrete terms, they all provide for a purchase obligation on the part of MVM – for a duration covering a substantial part of the lifetime of the assets – of reserved capacities and a guaranteed quantity, with a pricing mechanism allowing the generators to cover their fixed and variable costs. Furthermore, the other criteria for the existence of State aid also present similarities that justify their common assessment. Their selectivity is based on the same principles; the question of whether the PPAs lead to a transfer of State resources requires largely the same assessment for each of them; and their affect on competition and trade also follows the same economic assessment and must also take into account the coexistence of the PPAs on the Hungarian market. The Commission is thus of the view that in order for this State aid decision to accurately reflect the reality of the Hungarian power generation market, the PPAs must be assessed jointly, with a single decision closing the procedure.

(154) This comprehensive approach does not prevent the Commission from taking into account the differences that indeed exist between the PPAs in question. This Decision thus sets out the differences between the PPAs where such differences are relevant for the purpose of this Decision.

7.3. Existence of State aid within the meaning of Article 87(1) of the EC Treaty

(155) Below the Commission analyses each of the four cumulative criteria which comprise the definition of State aid within the meaning of Article 87(1) of the EC Treaty: the involvement of state resources, the existence of an economic advantage, the selectivity of the advantage, and the impact on trade.

The relevant time of assessment

(156) In their comments, the interested parties argued (with reference to several assessment criteria) that the Commission should consider only the situation that prevailed when the PPAs were signed. The findings of this analysis should then extend to the whole duration of the PPAs. In this regard, Budapest power plant refers to the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([36]).

(157) In establishing the relevant time of assessment, the Commission must first take into account the Accession Act of Hungary to the EU, the Procedural Regulation and the Court's case law.

(158) The relevant part of Annex IV to the Accession Act reads as follows:

'*ANNEX IV*

List referred to in Article 22 of the Act of Accession

[…]

3. *Competition policy*

1. The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article 88(1) of the EC Treaty:

(a) aid measures put into effect before 10 December 1994;

(b) aid measures listed in the Appendix to this Annex;

(c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the acquis, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in paragraph 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty.

([36]) OJ C 119, 22.5.2002, p. 22.

The above provisions do not apply to aid to the transport sector, nor to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty with the exception of fisheries products and products derived thereof.

The above provisions shall also be without prejudice to the transitional measures regarding Competition Policy set out in this Act.'

(159) The relevant part of Article 1 of the Procedural Regulation reads as follows:

'(b) "existing aid" shall mean:

[…]

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

(160) It follows from the above provisions that measures which did not constitute State aid at the time they were granted can, in certain circumstances, *become* State aid measures within the meaning of Article 87 of the EC Treaty. This is without prejudice to the classification of the measure becoming State aid as existing or new aid.

(161) Although it is true that, in analysing the existence of State aid in a specific case, the Commission must assess the situation prevailing at the time the measure entered into force, this does not mean that the assessment of the four criteria in the definition of State aid should in all circumstances be limited only to the time at which the aid was granted.

(162) From Article 1(b)(v) of the Procedural Regulation, it clearly appears that there are exceptional circumstances, such as the evolution of the common market or the liberalisation of a sector, where substantial economic and legal changes take place in a sector or several sectors of the economy and where, owing to these changes, a measure that initially did not come within the scope of Article 87 of the Treaty may fall under State aid control. When liberalising a sector of the economy, to keep all measures which did not qualify as State aid owing to the substantially different market conditions at the time they were granted, but which as of liberalisation meet all the criteria of State aid, would *de facto* perpetuate a large part of the pre-competitive market circumstances. This would go against the precise intention of putting an end to such an uncompetitive situation on a market, i.e. the decision of the Member States to liberalise the given sector. The purpose of special provisions whereby a measure can become State aid is to avoid prolonging any measures which, although not constituting aid under previous economic and legal circumstances, might harm the interests of players in the new market conditions ([37]).

(163) The question of whether such State aid is to be classified as existing or new aid should be assessed separately once the Commission has established the existence or otherwise of State aid.

(164) Hungary's economy underwent a drastic change in the 1990s. The country took the decision to join the European Union, becoming a full Member State on 1 May 2004. It was well aware of its obligation to bring its existing measures into line with the competition rules of the internal market it wished to join, since the Europe Agreement ([38]), signed by Hungary in 1991, explicitly refers to that obligation.

(165) In joining the European Union, Hungary also joined the liberalised internal energy market. The competition rules of the Accession Act do not provide for any exception as regards the Hungarian energy market. In the light of this, contrary to the interested parties' comments, the Commission is of the view that the PPAs, entered into in substantially different economic conditions (as recognised by the interested parties) before accession to the liberalised internal energy market, may very well become State aid in the new legal and economic circumstances. To establish the existence of such aid, the four criteria of the existence of State aid within the measure should be assessed under the new economic and legal circumstances.

([37]) The judgment of the Court of First Instance of 15 June 2000 in the *Alzetta Mauro* case referred to by Budapest power plant also confirms that the measure needs to be assessed in the light of the new market circumstances after liberalisation when recognising that the measure which may not have constituted State aid before liberalisation becomes (existing or new) aid.

([38]) Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, signed on 16 December 1991.

(166) The question of the relevant time of assessment should furthermore be assessed in the light of the Accession Act. Unlike in previous accessions, the Member States agreed to introduce specific provisions to the Accession Act whereby all aid measures applicable after accession and concluded after 10 December 1994 were to be notified to the Commission before accession and reviewed by it on the basis of the *acquis communautaire*.

(167) The vast majority of the countries that joined the EU on 1 May 2004 had, for historical reasons, a strong tradition of State interventionism. However, there may be measures that could not fulfil the four criteria of State aid before accession owing to the very different market conditions then prevailing. However, with the new legal and economic conditions of post-accession, these conditions may very well become fulfilled.

(168) The relevant articles of the Accession Act aim at ensuring undistorted competition on the internal market for the period after the date of entry into force of the Treaty. Consequently, the purpose of the relevant articles of the Accession Act is to avoid distortions of competition on the common market due to incompatible State aid measures after accession. In this regard, it is irrelevant whether in the 1990s when the measure was granted, it actually fulfilled all the criteria of State aid or not. Consequently, the relevant time for the assessment of the criteria for the existence of aid as to be the time period following the date Hungary joined the EU and the liberalised internal energy market.

(169) Any other approach would lead to a situation where the economic conditions of the pre-accession and pre-liberalisation period (corresponding, in the case of most new Member States, to a transition period following the communist regime) could be perpetuated long after the country's accession to the European Union. Measures which might not have constituted State aid before accession could be maintained and even prolonged as long as the Member State wished, even if they constituted State aid under post-accession conditions, as they would not fall under the Commission's State aid control.

(170) This is precisely the intention of the interested parties' comments in this regard. All the interested parties' arguments concerning the relevant time of assessment aim to show that the economic and legal assessment of the PPAs in the context of the present State aid procedure should be based only on the circumstances that prevailed at the time of the signature of the PPAs (i.e. between 1995 and 2001), and to lead to the conclusion that the PPAs, because of those legal and economic circumstances, do not constitute State aid. They argue that the market economy operator test and the criteria of distortion of competition and effect on trade should be analysed in the economic context of the mid-1990s, that the Commission should take into account MVM's obligations at that time (security of supply) and the model of the energy sector prevailing at that time ('Single Buyer' model, etc.). In their view, the result of the assessment under these circumstances should prevail until the end date of the PPAs (2024 for the longest contract), irrespective of such changes as Hungary's accession to the EU and the subsequent mandatory liberalisation of the energy market.

(171) The Commission cannot agree with this line of argument. The Commission is of the view that the relevant articles of the Accession Act aim precisely at avoiding such situations, by requiring the immediate application of State aid rules to the players of the economy. The Accession Act does provide for exceptions for certain sectors of the economy (e.g. provisions on transport), but no exception whatsoever is provided for operators on the electricity market. The *acquis communautaire*, including Directive 96/92/EC, thus applies to all contractual conditions of the Hungarian electricity market immediately as of accession.

(172) In its assessment of the PPAs, the Commission thus takes the view that, by joining the liberalised internal energy market, Hungary agreed to apply the principles of that market's economy to all the players on its existing market, including all existing commercial relations.

(173) The Commission must therefore assess whether, as of the day on which Hungary joined the European Union, the measure meets the criteria for the existence of State aid.

Advantage

(174) As an introduction to the assessment of the existence of an advantage, it is useful to note that most of the power generators acknowledged in their comments that they could not have invested in those plants without the guarantees offered by the PPAs. […] power plant argues in its comments that 'The PPAs are an important element for the banks to agree to finance the investment and pre-finance the operating costs on a continuous basis. […] On […], […] asked for the consortium's [i.e. the financial institutions'] view on a potential amendment of the PPAs. However, the banks refused the decrease of both the reserved capacities and the guaranteed off-take' ([39]).

([39]) Quotation from point 3 of the generator's comments.

(175) In this regard, […] (as facility agent for the twelve banks, lenders of nearly […] to Csepel power plant) argues that ‘The view of the Banks is that the PPA is part of a package of closely related commercial agreements that secured and still secure the Facility Agreement that provides the financing for the project at market conditions. Thus, any change of the PPAs would automatically affect the Banks and, owing to the contractual mechanisms available to the Banks to protect their financial interests, in turn endanger the Csepel II Project as a whole’.

(176) […] (as facility agent for the nine banks, lenders of nearly […] to AES-Tisza) argues that ‘The principal basis for this financing was the existence of the PPA along with the other pertinent project documents (e.g. the Fuel Supply Agreement). […] The PPAs provide stability to demand risk (volume of electricity sold and pricing).’ ‘The demand stability feature […] is critical in giving banks the necessary security to provide long-term financing in an immature market’.

(177) In order to assess the existence of an advantage under the PPAs, the Commission first carried out a preliminary analysis to determine what line of reasoning to follow in the assessment. As a result of the preliminary analysis, outlined in recitals 180 to 190, the Commission concluded that in order to establish whether an advantage existed, it should be ascertained whether under the conditions prevailing when Hungary joined the European Union, a market operator would have granted the generators a similar guarantee as that enshrined in the PPAs, namely a purchase obligation on the part of MVM of the capacities reserved in the PPAs (corresponding to a substantial proportion and, in many cases, to all the power plant’s available capacities), a guaranteed minimum quantity of generated power over a period of 15 to 27 years corresponding to the typical expected lifetime of the assets concerned or their depreciation, at a price covering the plant’s fixed and variable costs (including fuel costs) ([40]).

(178) As a second step, the Commission analysed the answer to this question in the light of standard commercial practices on European electricity markets.

(179) Finally, the Commission briefly assessed the impact of the PPAs on the market in the period following Hungary’s accession to the European Union. Although this analysis is not necessary to determine the existence or otherwise of an economic advantage within the PPAs, it is useful in order to duly address certain comments submitted by interested parties.

([40]) Irrespective of whether the price is based on the price formula contained in the PPAs or on pricing decrees, given that both are based on principles similar to pricing regulation.

(1) *Preliminary analysis: the reasoning that should be followed in order to assess the existence or otherwise of an advantage*

(180) In the comments submitted in the course of the procedure, third parties analysed the existence or otherwise of an advantage in the light of the conditions under which the PPAs were signed in the mid-1990s. In essence, they concluded that in that period, and in the context of the privatisation of the generating companies, an average market operator would have granted similar guarantees to the generators as those enshrined in the PPAs in order to attract investors and thereby ensure security of supply in Hungary.

(181) The Commission analysed the merits of this approach and came to the conclusion that it was inappropriate for two reasons. First, it does not take into consideration the actual beneficiaries of the measure under assessment. Second, the period considered under the approach is not relevant in assessing the existence of an advantage.

The beneficiaries of the potential advantage

(182) The Dunament power plant argues that it received no advantage through its PPA as it paid the market value for the privatisation of its power plants, and the purchase price took into account its rights and obligations under the PPA. Consequently, it paid for any advantage the PPA may have conferred on it in the privatisation price.

(183) The Commission considers that this reasoning is unsound in the present case. In the case at issue, the beneficiaries of the aid are the privatised power plants (for those which were indeed privatised) and not the shareholders of those plants. The privatisation of the power plants took the form of share deals.

(184) The Court of Justice has analysed how a change in the ownership of a company during a share deal affects the existence of unlawful aid granted to the company and its recipient. It ruled that the unlawful aid remains with the company that benefited from the aid, despite the change in its ownership ([41]). The transfer of shares at the market price merely ensures that the buyer itself does not benefit from State aid. However, this does not affect the existence of an advantage for the activity of the beneficiary power plant.

(185) In the case under assessment, the beneficiaries of the aid are the Hungarian companies that operate the power plants and signed the PPAs, and not the shareholders of the power plants. Furthermore, the change in the

([41]) Joined cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 83.

ownership of the power plants occurred before the date from which the existence of State aid is to be assessed and is of no relevance in assessing the existence of State aid to the companies operating the power plant. The companies that signed the PPAs thus benefited from the advantages contained in the PPAs regardless of their ownership structure.

Period to be considered for the assessment of the existence of an advantage

(186) The Commission is aware that in the market circumstances of the mid-1990s in Hungary, the governing principle of the PPAs, that is the guarantee of the return on investment, was the essential condition under which the necessary investments could take place.

(187) The fact that, owing to the characteristics of the generation sector and the political and economic context of that period in Hungary, there was the need for the State to intervene in the common interest and the best solution was to award PPAs to a number of generators, does not in any way contradict the fact that the PPAs do confer an advantage on the generators.

(188) Most generators argue that the PPAs do not confer any advantage on the generators as they correspond to the normal market behaviour of any market economy operator in both MVM's and the generators' position. They argue that any private actor in the position of MVM (with legal obligation of security of supply, as a single buyer) would have chosen to enter into the PPAs, and that the economic advantage from the PPAs does not go beyond what, in the circumstances of the immature energy market of the 1990s in Hungary, was a normal commercial advantage for the parties. Moreover, generators had the legal obligation to enter into an agreement with MVM in order to obtain their operating licence. The generators argue that applying the private investor principle should lead the Commission to take account of the legal requirements and economic reality of the time of conclusion of the PPAs.

(189) With regard to the interested parties' arguments on the private investor principle, the Commission refers to the recitals of this Decision concerning the time to be established as relevant for the assessment of the existence or otherwise of State aid under the PPAs. The Commission reiterates that it does not intend to call into question the fact that it was necessary to enter into PPAs in the circumstances prevailing at the time those agreements were concluded. However, as explained above, this does not in any way mean that the PPAs did not confer an advantage on the generators. The interested parties in fact argue only that these agreements corresponded to the market conditions prevailing at the time of their conclusion. None of the interested parties argues that they correspond to current market conditions on the internal market.

Conclusion of the preliminary analysis

(190) The Commission concludes that in order to assess the existence of an advantage within the PPAs, it should be ascertained whether, under the conditions prevailing when Hungary joined the European Union, the average market operator would have granted generating companies a similar guarantee to that enshrined in the PPAs, as described in recital 177.

(2) *Assessment of the existence of an advantage to the power generators when Hungary joined the European Union*

(191) To answer the question referred to in the previous recital, the Commission identified the main practices of commercial operators on European electricity markets that are relevant for the purpose of this analysis, and assessed whether PPAs are in line with these practices or provide generators with guarantees that a buyer would not accept if it acted on purely commercial grounds.

(192) As a preliminary remark, it is useful to note that traditionally, electricity markets are divided into four markets: (i) generation/import and wholesale supply, (ii) transmission/distribution, (iii) retail, and (iv) balancing services. The relevant markets for the assessment of the PPAs are the first and fourth category, as MVM purchases electricity from domestic generators, imports electricity and sells it to regional distribution companies and commercial suppliers (suppliers on the retail market). MVM also provides reserved capacities to the Transmission System Operator in order to ensure the balancing of the system.

(193) In Hungary, the retail market is divided into two segments in the period under assessment: (i) a public-utility segment where regional distribution companies supply power at regulated prices to non-eligible consumers and consumers that do not make use of their eligibility; (ii) a free market segment where commercial suppliers provide power to eligible consumers at prices resulting from market mechanisms. Under the regime introduced by Energy Act III, the public utility segment is limited to the household and commercial consumers that are covered by a universal supply obligation.

(194) In the period of assessment, MVM supplied power to both the regional distribution companies (suppliers on the public utility segment) and to suppliers on the free market segment. However, as outlined in recitals 221 to 231, MVM's sales to suppliers on the free segment were only intended to release the surplus quantities purchased under the PPAs and not needed by the public utility segment. It is a consequence of the PPAs themselves rather than an autonomous commercial activity.

Therefore, the existence of an advantage must be analysed against the primary objective assigned to MVM, which was to supply enough power to the regional distribution companies to fulfil the needs of the public utility segment. Consequently, what needs to be verified is whether, in the absence of PPAs, a market operator entrusted with supplying the regional distribution companies with sufficient amounts of electricity, and acting on purely commercial grounds, would have offered the same guarantee as that enshrined in the PPAs. This assessment has to be carried out in the light of the operation of competitive wholesale markets. The recitals below provide first, an overview of typical commercial practices relevant for this analysis and second, a comparison between the PPAs and these practices. Finally, in the light of this comparison the Commission analysed the consequences of the PPAs that the public authorities could expect when Hungary joined the European Union, and whether they could have expected a better balance between positive and negative consequences from other types of agreements.

(2)(a) Short description of commercial practices on European electricity markets relevant for the assessment of the existence of an advantage within the PPAs

(195) In its Sector Inquiry on electricity markets in Europe ([42]), the Commission examined in detail the conditions governing trade in electricity on European wholesale markets.

(196) Depending on the delivery period, bulk electricity can be traded on spot and forward markets. Spot markets are mainly day-ahead markets, on which electricity is traded one day before physical delivery takes place. Trade in power on spot market exchanges is always based on marginal pricing, which guarantees only that short-run marginal costs are covered ([43]).

(197) On forward markets, power is traded for delivery further ahead in time. Forward products include weekly, monthly, quarterly and yearly products. Both spot and forward products can be traded on power exchanges or over-the-counter (OTC) markets. As a result of continuous arbitrages, prices of identical products on power exchanges and OTC markets tend to converge. Therefore, power exchanges tend to set reference prices for all spot and forward products, and therefore for the entire wholesale market.

(198) Furthermore, the price of forward products results from the expectations of market players with regard to future price development on spot markets. Since market players engage in forward contracts because they prefer price certainty to unknown spot prices in the future, forward prices also include a risk element. In practice, prices of forward products include a central element which reflects market players' expectations with regard to the development of spot prices and, depending on whether they attach a high value to price certainty, a risk premium or discount, though in practice it often appears to be a premium. Consequently, spot prices constitute references for all electricity prices. If a spot market exchange is in place, prices on that exchange constitute references for the whole market. In many wholesale markets, buyers usually try to cover a large share of their expected needs with forward contracts in order to have visibility over their costs. The needs additional to those met with forward contracts are covered by purchases on spot markets.

(199) The Energy Sector Inquiry noted that apart from standardised exchange and OTC trading there are also 'bespoke bilateral transactions'. These contracts can be very different in terms of products delivered or services and the prices of such transactions are usually not reported. However, in competitive market conditions, the existence of standardised power exchanges and OTC trading necessarily influence such transactions, as a generator or importer would not agree to engage in a bespoke bilateral contract that would offer clearly worse conditions than a standardised spot or forward contract. Therefore, standardised spot and forward contracts on European wholesale markets constitute a relevant basis for comparison in assessing the existence of an advantage conferred on generators by PPAs.

(200) On forward markets the longest delivery period is one year. The longest duration between the conclusion of the contract and the beginning of the actual delivery period is four years in NordPool (Scandinavian countries), three years in Powernext (France), five years in UKPX (United Kingdom) and six years in EEX (Germany). On some exchanges, like OMEL in Spain, no forward contracts are concluded. A standardised forward contract places on the supplier the obligation to provide a certain amount of energy at a price agreed in advance, over a maximum period of one year starting within at maximum 6 years of the conclusion of the contract.

([42]) In June 2005 the Commission opened an inquiry into the operation of the European gas and electricity markets. The final report of this Energy Sector Inquiry, which was issued on 10 January 2007, is used in this Decision as a source of information concerning main commercial trends and practices on European electricity markets which were already prevailing when Hungary joined the European Union on 1 May 2004. The report is available at http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/

([43]) Short-run marginal costs are the costs that power generators can avoid by choosing to stop generating electricity in the short term. These costs are more or less equal to variable costs, since both are primarily driven by fuel costs.

The order of magnitude of these timeframes is significantly below the usual depreciation and lifetime of any power generation station. Consequently, in normal market conditions and even if they trade most of their output in the form of forward contracts, generators have no visibility on prices and sales volumes over the depreciation and lifetime of power generation assets. Furthermore, as prices are fixed in advance, generators run the risk that their costs will exceed the agreed prices. This risk is not negligible, owing in particular to the volatility of fuel costs, which is for most generation technologies the main component of variable costs. Furthermore, generators are faced with competitive pressure as they have to renew their forward contracts a significant number of times during the lifetime of their generation assets, and therefore adapt their offers to evolving competitive conditions.

(201) Contracts involving the reservation of generation capacities may also be encountered on wholesale markets in the form of 'drawing rights', which are therefore worth comparing with the PPAs. Acquiring drawing rights consists in reserving part of the generation capacities of a given power plant, usually for the expected lifetime of the power station, and paying a 'capacity fee' to the plant operator, corresponding to the capital and fixed costs linked to the reserved capacities. The technical risks are borne by the operator of the plant. The holder of the drawing rights can decide on the level of use of the reserved capacities and pays to the power plant operator a price corresponding to the variable costs incurred for the energy generated from the reserved capacities.

(202) In order to further assess the existence or otherwise of an advantage within the PPAs, it is also useful to consider the situation of large business or industrial end-consumers, even though they act not on wholesale markets but on retail (downstream) markets. As generators sometimes directly supply power to large business or industrial consumers, the comparison with the PPAs is relevant.

(203) The Energy Sector Inquiry has shown that it was common practice for electricity suppliers to sign fixed-price contracts with large business or industrial consumers. The duration of such contracts is usually limited to one to two years. They usually provide for a delivery schedule based on historical consumption. The price is derived from wholesale prices on forward markets and contains other cost components such as expected costs of balancing or the supplier's margin. Deviation from the delivery schedule entails the application of a 'take or pay' clause, which compels the buyer to pay for energy which it does not need, or to pay an excess charge. In this respect, such contracts may be regarded as based on a minimum guaranteed off-take combined with the reservation of capacity [44].

(204) Another type of agreement has to be considered for the purpose of assessing the advantage within the PPAs, namely contracts concluded for the provision of balancing services to the Transmission System Operators (TSOs). As electricity cannot be stored, demand and supply must be matched at each point in time. If demand or supply deviate from forecasts and result in a need for additional generation, it is the responsibility of the Transmission System Operator to call on certain generators to increase production at short notice. In order to ensure the availability of generation capacities to face such situations, TSOs reserve capacities in generation units which are capable of modifying their production level at short notice. In Hungary, as there is no pump storage plant, natural gas fired plants have the most appropriate technical characteristics to provide these services.

(205) The Energy Sector Inquiry has provided an overview of European TSOs' practice with respect to capacity reservation contracts for the provision of balancing services. This overview shows that capacities are reserved by means of tenders. One year may be regarded as a standard duration, which grants flexibility to TSOs to adjust the amounts of reserved capacities to their actual needs. The contracts generally specify the technical characteristics of the required service, the reserved capacity and a price either for the energy provided or for both energy and capacity.

(2)(b) Comparison of the PPAs with standard commercial practices

(206) The Commission has compared the purchase obligation enshrined in the PPAs with the main features of standard forward and spot contracts, 'drawing rights' contracts, long-term contracts concluded by large end-consumers, and contracts concluded between generators and TSOs for the provision of balancing services.

Standard spot and forward contracts

(207) It follows from the description presented in recitals 195 to 200 that the combination of long-term capacity reservation, a minimum guaranteed off-take and price-setting mechanisms covering variable, fixed and capital costs do not correspond to usual contracts on European wholesale markets and that they shield generators from more risks than standard forward and spot contracts.

[44] The fact that the supplier commits to deliver the quantity set in the contract may be regarded as equivalent to capacity reservation.

(208) Trade in power on spot-market exchanges is always based on marginal pricing, which guarantees only that short-run marginal costs, and not all fixed and capital costs are covered. Furthermore, on spot markets, a power generating company has no assurance as regards the level of utilisation of its generating capacities. This risk is much higher than for most manufacturing sectors and is due to the fact that it is impossible to store electricity economically, a very specific feature of that industry. If at a given point in time enough power to meet demand is offered at lower prices than those offered by a given generator for one of its power generation units, that unit will not be despatched, which means that its generation capacities will be lost for the concerned period of time.

(209) Therefore, sales on spot markets entail a significant degree of uncertainty concerning the remuneration of fixed and capital costs and the level of utilisation of generation capacities.

(210) Nor do forward markets, whose prices are derived from spot prices, provide assurance to generators that all their fixed and capital costs are covered by their sales, because prices are fixed in advance. If fuel costs increase unexpectedly over the period of delivery, the costs of producing electricity may exceed the price set in advance. On forward markets, the risk concerning the use of the production capacities is lower than in the case of spot products owing to the longer time horizon of forward contracts. However, even if a generator is able to sell most of its output through forward contracts, it enjoys visibility over the utilisation rate of its power generation units over a limited period of time compared to their lifetime.

(211) Interested parties emphasize that the generators do bear important risks under their PPAs, in particular constructional, regulatory, environmental, maintenance and fiscal/financial risks. The Commission recognises that the PPAs do not eliminate all risks linked to the operation of a power plant. Indeed, these risk elements listed by the generators in their comments are certainly borne by the generators themselves. However, this corresponds to normal risks any market player on the electricity generation market would need to bear, including in the case of sales in the form of standard spot or forward markets. However, the commercial risks associated with fluctuations in electricity generation costs and, in particular, fuel costs, the risk associated with fluctuations in end-user electricity prices, and the risk associated with fluctuation in end-user electricity demand are born by MVM on a substantial part (or entirety) of the lifetime of the assets under PPA.

(212) Interested parties also argued in their comments that the reservation of capacities for MVM entailed a disadvantage for them, because they could not use these capacities for other purposes than for sales to MVM. However, the system of guaranteed minimum off-take mitigates that constraint to a large extent. The system of minimum guaranteed off-take should be regarded as a guarantee for generators that they will not be prevented from using their capacities for energy production and sale should MVM not make use of its reserved capacities. As a matter of fact, as shown by the following table, the minimum guaranteed off-take corresponded to a utilisation rate of the reserved capacities exceeding the average utilisation rate of the total available capacities in Hungary.

Table 5

Minimum guaranteed off-take and reserved capacities

	2004	2005	2006
Guaranteed off-take (GWh)	23 234	23 528	23 516
Reserved capacities (MW)	4 242	4 460	4 481
Ratio between minimum guaranteed off-take and reserved capacities (number of hours per year)	5 477	5 275	5 248
Ratio between net electricity generation and net available generation capacities for all Hungarian power generation units (number of hours per year)	4 272	4 225	4 601

(213) Therefore, spot and forward contracts entail a much higher level of risk for generators than the PPAs, which provide certainty both as regards the remuneration of fixed and capital costs and the level of use of the generation capacities.

Drawing rights

(214) As regards drawing rights, the main difference between this form of agreement and the PPAs is that drawing rights are normally not associated with minimum guaranteed off-take. The holder of the drawing rights bears commercial risks linked to the sale of the energy produced out of the reserved capacities. However, it has the assurance that it will be able to sell all that energy at prices covering at least variable costs, because it can decide not to generate energy if prices fall below variable costs. That assurance is not provided by the PPAs to MVM, owing to the existence of the minimum off-take obligations on MVM for the benefit of the generators.

Long-term purchase contracts concluded by large consumers

(215) As regards standard long-term purchase contracts concluded by large consumers, it is clear that they are much more advantageous for the buyer than the PPAs are to MVM because the price, which is usually fixed for

the whole duration of the contract, is normally not indexed on parameters such as fuel costs whose development over the duration of the contract is unpredictable, and is not designed in such a way as to cover fixed and capital costs, as it depends on price quotations on wholesale markets. Indeed, buyers have an interest in concluding long-term contracts only if these contracts provide them with some hedging against fluctuations in the electricity market, and in particular against changes linked to fluctuations in fuel costs. For this reason a buyer would have an economic interest in a long-term contract of this type only if the seller offered to take part of the risk associated with fluctuations in fuel costs or if the generating technology ensured stable fuel costs, as is the case with hydropower plants and, in certain conditions, nuclear plants. Furthermore, these contracts are usually concluded for much shorter periods than the PPAs and therefore give buyers the option to change suppliers if better prices are offered by competitors. In order to obtain the lowest prices possible, buyers often use tendering procedures.

Balancing services contracts

(216) Balancing services contracts are relevant to the assessment of the existence of an advantage between the PPAs because a minor part of the capacities reserved under PPAs is assigned by MVM for the provision of balancing services to the TSO ([45]). In practice, MVM sells capacities to the TSO on an annual basis as a package and uses part of the capacities reserved under the PPAs for that purpose. In practice, it means that the generators do not bear the risk attached to the annual tenders ([46]) and to the uncertainty concerning the amount of energy that they will provide. From their point of view, the contractual conditions governing the provision of balancing services are those of the PPAs. However, as shown in recital 204, the specifications of the PPAs, especially their long duration and the existence of minimum guaranteed off-take, cannot be justified on commercial grounds even for the provision of balancing services. The Commission recognises that in Hungary, few generation units may be able to provide the necessary balancing services to the TSO, as claimed by interested parties, but has come to the conclusion that even in such circumstances the conditions offered by the PPAs go further than what a TSO may consider acceptable on commercial grounds.

Conclusion on the comparison between PPAs and standard commercial practices

(217) This comparison shows that PPAs structurally provide more guarantees to generators than standard commercial contracts. The generators are thus in a more advantageous situation that the one they would face on the free market without their PPA. In order to complete the assessment of the existence of an advantage, it is necessary to assess the positive and negative effects that the public authorities could expect from the PPAs when Hungary joined the European Union and to verify whether they could have expected a better balance between the positive and negative effects from other approaches based on standard commercial practices.

(2)(c) Foreseeable consequences of the PPAs for the public authorities in the light of the comparison with buyers' standard commercial practices on European electricity markets

(218) The public authorities could expect from the PPAs that MVM would be able to find enough energy to fulfil the needs of the public utility market over a long period of time.

(219) However, they had no assurance concerning the level of price that would have to be paid by MVM over that same period because the PPAs do not provide hedging against risks of price fluctuations, which are due in particular to fluctuation in fuel costs.

(220) Furthermore, the combination of long-term capacity reservation and the associated minimum guaranteed off-take deprives the public authorities of the possibility of benefiting from more attractive prices offered by other generators and importers. The capacities and minimum guaranteed off-take of the PPAs, the long-term import contracts concluded by MVM and the quantities purchased by it under the mandatory off-take system ([47]) were sufficient to cover its needs. MVM could thus not diversify its supply portfolio, although alternative generation capacities were available. In 2004, several power generators were not engaged in long-term power purchase agreements. The PPAs of two power plants accounting for 470 MW of installed capacity expired at the end of 2003, which significantly increased the supply capacity outside PPAs. Around 700 MW of import capacities are not covered by long-term import contracts and could have been used by MVM to import electricity if it had not been bound by the system of reserved capacities and minimum guaranteed off-take.

([45]) 15 % of contracted capacities in 2005.

([46]) Owing to the annual tenders, the amount of capacity that can be offered to the TSO and the price obtained vary on an annual basis and may decrease if the TSO's needs decrease and/or if lower prices or larger amounts are offered by other suppliers.

([47]) The Hungarian legislation requires MVM and the regional distribution companies to buy the electricity produced in cogeneration or from waste or renewable energy sources at regulated prices.

(221) As shown in the following recitals, it was clear when Hungary joined the European Union in 2003 and 2004 that the system of reserved capacities and minimum guaranteed off-take, which was designed under a Single Buyer Model whereby all electricity consumed in Hungary transited through MVM, entailed significant risks that the PPAs would require MVM to purchase energy beyond its needs.

(222) An important element to be taken into consideration in this respect is the partial opening of the electricity market in 2003. On 18 December 2001 the Hungarian Parliament adopted Energy Act II, which allowed large consumers, defined as those which consumed more than 6,5 GW/year, to become 'eligible consumers' and therefore be allowed to choose their supplier of electricity. This legislative measure, which came into force on 1 January 2003, led to the creation, alongside the pre-existing public utility segment, of a free market where prices resulted from the confrontation of supply and demand. The foreseeable effect of that measure was to reduce the quantities needed by MVM for supply to the regional distribution companies for the fulfilment of demand on the public utility segment. The following table shows the continuous increase in quantities actually sold on the free market between 2003 and 2006 and the corresponding decrease in quantities actually sold on the public utility segment through regional distribution companies.

Table 6

Sales on the retail market (regulated segment and free segment)

(GWh)

	2003	2004	2005	2006
Total consumption	33 584	33 836	34 596	35 223
Sales on the free segment	3 883	7 212	11 685	13 057
Sales on the regulated segment	29 701	26 624	22 911	22 166

Source: Statistical data of the Hungarian power system, 2006 (1).
(1) See amongst others the website http://www.mvm.hu

(223) Between 2003 and 2006 the quantities sold on the public utility segment, which correspond to MVM's actual purchase needs, decreased by 25 %. The decrease of MVM's needs was largely foreseeable at the time when Hungary joined the European Union, particularly in the light of the significant difference between the official prices on the public utility segment (prices paid by consumers to regional distribution companies) and the prices observed on the free segment in 2003 and 2004.

Table 7

Price differences between the regulated segment and the free segment on the retail market in 2003 and 2004

(HUF/kWh)

	2003	2004
Average price on the free market	11,1	12,7
Average prices on the public utility sector (1)	19	21,1

Source: Statistical data on the Hungarian power system, 2006
(1) Resulting from the regulated tariffs, which depend on the level of consumption.

(224) Prices on the free market indeed constituted clear incentives for eligible consumers to make use of their eligibility rights. It was also well known in 2003 and 2004 that the forthcoming accession of Hungary to the European Union would entail the entry into force of the Second Electricity Directive [48], and consequently the rights of all consumers to become eligible as from 1 July 2007, which would lead to a further reduction of MVM's needs over a much shorter period of time than the remaining validity of the PPAs.

(225) Consequently, it was clear in 2003 and 2004 that the PPAs, which had been designed in the context of a Single Buyer Model whereby all electricity needed by the Hungarian market transited through MVM, would not only prevent MVM from diversifying its supply portfolio and obtaining more favourable prices by fostering competition between its suppliers, but was also likely to result in the obligation on MVM to purchase more energy than it actually needed.

(226) This risk had actually been identified by the public authorities. In 2002, the Hungarian Government issued a Decree [49] which required MVM to initiate a renegotiation of the PPAs with all generators with a view to adjusting the amount of reserved capacity. Although that Decree did not require the termination of the PPAs, it is in itself a clear indication that the amounts of capacity reserved under the PPAs (and subsequently, the minimum guaranteed off-take) were too high in the light of the gradual liberalisation of the retail market. That Decree also introduced the possibility for MVM, in the event of failure to complete negotiations with generators, to sell capacities and energy which prove to be in excess of the amounts actually needed to supply the regulated segment, through three 'release mechanisms': capacity auctions, capacity tenders and sales on a virtual Internet-based trading platform called 'the Marketplace' (*Piactér*). Although the form of these three mechanisms vary, all three of them in essence

(48) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, p. 37-55.
(49) Governmental Decree 183/2002.

consist in MVM offering for sale on the free market, in the form of a variety of forward delivery products, the surplus energy that it does not need to supply the public utility sector but that it has to purchase in accordance with the terms of the PPAs.

(227) The following table displays data concerning the first three auctions carried out by MVM. It shows that the prices received by MVM for the energy sold through the release mechanisms were significantly below the prices paid for that same energy under the PPAs.

Table 8

MVM's three first auctions

	First auction June 2003	Second auction December 2003	Third auction June 2004
Baseload products			
Quantities of electricity sold (GWh)	375	240	133
Sale prices on auctions (HUF/kWh)	8,02	9,5	8,4
Off-peak load products			
Quantities of electricity sold (GWh)		259	421
Sale price on auctions		5,6	3,5
Average annual PPA prices			
	2003		2004
	11,3		11,7

(228) The Hungarian legislation had actually anticipated that effect and provided for a compensation to be paid by the Hungarian State to MVM for the losses incurred owing to the difference between the price paid for the quantities released through capacity auctions and the sales prices obtained on the market. The compensation paid to MVM amounted to 3,8 billion HUF in 2003 ([50]). According to MVM's annual report for 2004, the compensation increased by HUF 2,4 billion in 2004.

(229) From the point of view of the public authorities, it is clear that such a system cannot be justified on commercial grounds as it amounts to subsidising the sales of generators for supply to the free market segment.

(230) The following table shows the total quantities of energy sold by MVM through the release channels between 2003 and 2004 on the basis of the information provided by Hungary on 24 September 2007 and 21 April 2008.

Table 9

Quantities sold by MVM through the release mechanisms

(TWh)

Year	2003	2004	2005	2006
Total sales by MVM through the release mechanisms ([1])	0,6	1,9	6,5	6,5

([1]) Capacity auctions, capacity tenders and MVM Marketplace.

(231) It is clear that under normal market circumstances buyers do not engage in contracts which entail a significant risk of being compelled to buy more electricity than needed and incurring substantial losses when reselling that energy. This risk is theoretically present in forward contracts and long-term contracts concluded by large end-consumers, but to a much lower degree.

(232) The duration of forward contracts is significantly less than that of the PPAs. The buyer has a much better overview of its needs for such timeframes than for a period ranging from 15 to 27 years. Furthermore, buyers tend to cover only part of their expected needs with forward contracts, buying any additional quantities needed on spot markets.

(233) Long-term contracts concluded by large end-consumers also entail only a limited risk of excess purchase because of their limited duration, and also because the consumption of large industrial and business end-consumers entering into such contracts is as a rule stable and predictable, which is not the case for MVM for the reasons outlined above.

(234) Furthermore, it is useful to recall that under forward contracts or long-term purchase contracts concluded by end-consumers, buyers commit to buying a certain amount of energy several months or years before actual delivery takes place because their purchase contract provides hedging against price fluctuations. This benefit is not present in the PPAs because prices cover variable costs, which owing to variation in fuel costs may increase in unpredictable proportions.

Conclusion on the existence of an advantage

(235) The Commission concludes that the benefits obtained by the public authorities from the PPAs do not provide the hedging on energy prices that the average market operator would expect from a long-term contract and entail significant risks of being compelled to purchase energy in excess of actual needs and incurring losses when reselling the surplus quantities. These risks were

([50]) See the letter of the Hungarian authorities registered on 4 June 2004.

well known by the Hungarian authorities when Hungary joined the European Union. The comparison between PPAs and standard commercial practices on European electricity markets shows that a buyer acting on purely commercial grounds would not have accepted such detrimental effects and would have adopted other purchase strategies and entered into different types of agreements in line with standard commercial practice.

(236) In the light of the above, the Commission concludes that the core principles of the PPAs entail an advantage to the power generators beyond normal commercial advantage. In this respect, it is essential to stress that the main principles of the PPAs, i.e. the long-time capacity reservation, minimum guaranteed off-take and pricing mechanisms based on a capacity fee and an energy fee to cover fixed, variable and capital costs, cannot be isolated and assessed separately. The existence of an advantage lies in the combination of these elements. As shown above, the long duration of the PPAs contributes to a great extent to the existence of an advantage.

(3) *The impact of the PPAs on the market in the period following Hungary's accession to the European Union*

(237) Interested parties argue in their comments that the prices applied under the PPAs are not higher than wholesale market prices. The Mátra power plant especially stresses that is prices are competitive because it has its own coal mine, so it has low mining costs. Consequently, they conclude that they do not benefit from any advantage.

(238) The Commission cannot agree with this line of argument.

(239) First, as discussed in detail above, the price actually paid under the PPAs is one consequence of the PPAs but it does not constitute the core of the advantage entailed in them. The comments by the banking institutions referred to above (see in particular recitals 175 and 176) also confirm that all the elements of the PPAs guaranteeing the generating units the return on the investment of the assets and shielding the generators from the commercial risks of their operation constitute together the core of the advantage of these agreements.

(240) Second, the price difference compared to market prices depends on a great number of factors linked to market evolution which are independent of the PPAs and can only be assessed *a posteriori*. The PPA prices are unit prices at a certain point in time; they do not take into consideration the advantage flowing from all other elements of the PPAs, such as the capacities and quantities which the generators could have sold if their sales depended on market demand. As discussed above, the Commission is of the view that there is an economic advantage for generators inherent to all PPAs under assessment, whether or not they actually lead, at a given period of time, to prices above market prices.

(241) For the sake of completeness of the Commission's answers to the comments received and to better understand the consequences of the PPAs in this regard, the Commission nevertheless compared the PPA prices actually applied with prices achieved on the part of the wholesale market not covered by PPAs.

(242) In this comparison, the Commission does not take into account 2007 prices as in that year (more precisely, from 9 December 2006 to 31 December 2007) the PPA prices were overwritten by official prices. Accordingly, the applied prices do not necessarily reflect the exact prices to which the application of the PPA price formulae would have led.

(243) Consequently, the Commission compared the applied PPA prices with free market prices for 2004 to 2006.

Table 10

The average price of electricity sold to MVM under the PPAs [51]

HUF/kWh

Power plant under PPA	2004	2005	2006
Dunament F blocks	[…]	[…]	[…]
Dunament G2 block	[…]	[…]	[…]
Tisza II	[…]	[…]	[…]
Pécs	[…]	[…]	[…]
Csepel II	[…]	[…]	[…]
Kelenföld	[…]	[…]	[…]
Újpest	[…]	[…]	[…]
Kispest	[…]	[…]	[…]
Mátra	[…]	[…]	[…]
Paks	[…]	[…]	[…]

[51] The figures in the table are based on the letters from the Hungarian authorities registered on 24 September 2007 and 16 January 2008. There are certain minor differences (of less than 5 %) between the figures provided in the two information letters with regard to the prices for 2006. This Decision is based on the most recent information (letter of 16 January 2008).

Table 11

The quantity and average price of electricity sold by domestic generators without PPA to the free market [52]

Power plant	2004		2005		2006	
	Quantity (MWh)	Price (HUF/kWh)	Quantity (MWh)	Price (HUF/kWh)	Quantity (MWh)	Price (HUF/kWh)
Mátra ([…] blocks)	989 097	8,15	972 813	8,33	1 082 699	9,26
Vértes	157 701	8,02	942 999	8,79	1 213 622	10,51
Dunamenti […] block	215 647	8,57	805 381	9,85	814 702	13,29
EMA	133 439	11,07	129 252	11,83	101 607	12,92
AES Borsod	[…]	[…]	18 301	11,25	n.a. (*)	
AES Tiszapalkonya	364 869	12,76	86 673	9,87	119 218	14,27

(*) The quantities sold are below 1 000 MWh. The Commission considers that the price for such limited quantities does not constitute an adequate basis for comparison with PPA prices.

Table 12

The quantity and average price of electricity imports purchased by MVM [53]

Import	2004		2005		2006	
	Quantity (MWh)	Price (HUF/kWh)	Quantity (MWh)	Price (HUF/kWh)	Quantity (MWh)	Price (HUF/kWh)
Ukrainethrough Slovakia ([…] (*))	1 715 200	[…] (**)	1 525 600	[…] (**)	1 311 400	[…] (**)
Switzerland through Slovakia ([…] (*))	1 768 100	[…] (**)	1 761 700	[…] (**)	1 709 200	[…] (**)
Switzerland ([…] (*))	631 700	[…] (**)	629 500	[…] (**)	626 200	[…] (**)

(*) Name of import partner company.
(**) The average weighted price of all electricity imports covered in this table was 9,14 HUF/kWh in 2004, 10,41 HUF/kWh in 2005, and 11,49 HUF/kWh in 2006.

(244) Since 2003, in line with Energy Act II [54], MVM has been releasing surplus power (i.e. power in excess of what it needed for the public utility segment) for supply to the competitive market through three release channels: (i) public generation capacity auctions, (ii) capacity tenders and (iii) its virtual on-line trading platform, the 'Piactér'. The table below presents the average prices achieved at these sales:

[52] Information based on the letter from the Hungarian authorities registered on 24 September 2007. The company E.ON DKCE also sold electricity to the free market in 2005 and 2006. However, according to information provided by the Hungarian authorities by letter registered on 22 April 2008, the quantities sold were minor, so the Hungarian authorities did not have the corresponding price data.

[53] Information based on the letters of the Hungarian authorities registered on 24 September 2007 and 16 January 2008. There are minor differences (of less than 2 %) between the figures provided in the two information letters. This Decision is based on the most recent information (letter of 16 January 2008). The imports by MVM are also based on long-term agreements; those agreements are not covered by the present procedure.

[54] See recital 32 of this Decision.

Table 13

Average price achieved by MVM capacity auctions, tenders and Marketplace ([55])

Year of delivery of auctioned product (*)	Weighted average price at capacity auctions (HUF/kWh)	Year of Tenders and Marketplace sales	Average price at tenders and Marketplace (HUF/kWh)
2004	4,7	2004	6,5
Auction of 17 June 2004	Off peak: 3,48 Base: 8,4		
2005	5,4	2005	8,1
Auction of 9 December 2004	Off peak: 4,54 Base: 8,32		
Auction of 10 June 2005	Off peak: 4,6 Base: 8,5		
Auction of 21 July 2005	Base: 9,3 Peak: 10,42		
2006	9,9	2006	9,1
Auction of 9 November 2005	Off peak: 6,02 Base: 9,74 Peak: 11,76		
Auction of 31 May 2006	Base: 11,33		

(*) The quantities sold are between 25 000 and 2 000 000 MWh per type of product (off-peak/base/peak).

(245) The above figures show that the average prices at which electricity was sold in Hungary on the competitive sector in 2004 at the wholesale level varied between 4,7 and 12,76 HUF/kWh. Of the generators with PPAs, the Paks nuclear power plant and Mátra sold to MVM at prices in that range. Dunament […] sold its electricity under PPA at […], the highest price ([…]) achieved without PPA. All other generators charged MVM an average price between 13,86 and 25,46 HUF/kWh. This pricing is 10 % to 100 % higher than the *highest* free market price.

(246) In 2005, the prices of sales outside the PPAs under assessment varied between 5,4 and 12,91 HUF/kWh. Of the generators with PPA, only the Paks and Mátra power plants sold electricity under their PPAs within this price range. All other generators charged their electricity under PPA at an average price between 13,99 and 25,64 HUF/kWh. This pricing is between 10 and 100 % higher than the *highest* free market price.

(247) In 2006, sales prices outside the PPAs in question varied between 9,1 and 14,27 HUF/kWh. Of the generators with PPA, only the Paks and Mátra power plants sold electricity under their PPAs within this price range (in the case of Paks, actually below the lowest free market price). All other generators charged their electricity under PPA at an average price between 16,67 and 33,49 HUF/kWh. This is between 15 % and 135 % higher than the *highest* free market price.

(248) The above calculations are based on *average* price figures, i.e. they do not calculate separately with off peak, base or peak prices. Generators that would mainly sell peak load products in the absence of PPAs ([56]) argue that their prices should not be compared to base load prices. Indeed, the Commission recognises that peak electricity prices are normally higher than those of base load electricity. When comparing those prices with free market sales (for instance, at the electricity auctions by MVM), peak products show an average price level around 10-30 % above base load prices.

([55]) The average prices represent indicative weighted prices.

([56]) According to the Hungarian authorities, in the absence of PPAs the various generators currently under PPAs would achieve maximum profit in the following way: the Paks and Pécs power plants would sell 100 % of their production in the form of base load products, the Mátra, Dunament G2, Kelenfold, Ujpest and Kispest power plants would sell approximately 50 % of their produced electricity as base and 50 % as peak products, while the Csepel, Dunament F block and Tisza II power plants would sell mostly peak electricity (approximately 70 %).

(249) However, when comparing the prices of Csepel, Dunament F and […] with peak prices achieved at the capacity auctions, it can be seen that their prices were higher than the price of any peak product obtained at the auctions during these years. Moreover, amongst the generators selling electricity without PPA to the free market and listed in Table 11 above, there are some (for instance the EMA plant) which also sold mainly peak products.

(250) The above comparison shows that the PPA prices of the generators under PPA in years 2004 to 2006, with the exception of the Paks and Mátra power plants, were actually higher than the highest free market prices.

(251) Accordingly, the Commission disagrees with the arguments of interested parties that their PPA prices were not higher than free market prices.

(252) As far as the Paks and Mátra power plants are concerned, the above tables show that their prices were below the highest price achieved on the free market. Mátra plant's prices were in the higher range of free market prices. Although its prices are indeed likely to be more competitive than most PPA prices, the Commission cannot exclude that it could not have achieved at least the same prices without its PPA. The Commission notes that the prices Mátra achieved from sales of its blocks without PPA were significantly below its PPA prices.

(253) The Commission is aware that the prices achieved in the free market sector (without PPAs) cannot be considered as corresponding to the exact market price the generators would have achieved without PPAs if the PPAs had not existed in the period in question. PPAs covering approximately 60 % of the generation market undoubtedly impact prices on the rest of the market. However, this comparison gives an indication of the order of magnitude of the difference between the PPA and the actually observed 'non-PPA' prices.

Service of general economic interest (SGEI)

(254) The Budapest and Csepel power plants have argued that the PPAs should be regarded as implementing SGEIs for the purpose of securing electricity supplies. They considered that they fulfil the criteria laid down in the *Altmark* judgment, which means that their PPAs do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(255) The Commission has analysed these arguments and cannot agree with them for the following reasons.

(256) Under Community legislation, Member States have a certain margin of discretion to define services they consider to be SGEIs. Defining the scope of SGEIs in a Member State is, within the limits defined by Community legislation, a prerogative of the State itself and it is not for the beneficiaries of aid measures to qualify their own service as a public service.

(257) In the course of the present procedure, however, the Hungarian authorities never submitted the argument that any of the generators provided an SGEI, nor did they support the generators' arguments to that effect.

(258) The Commission also considers that the PPAs do not fulfil all the criteria laid down in the *Altmark* judgment.

(259) First, under the *Altmark* judgment, the recipient undertaking is actually required to discharge a public service and the obligations connected with that service are to have been clearly defined by the Member State.

(260) MVM did have an obligation of security of supply under Hungarian legislation in the time period under assessment, but this obligation was a general obligation whereby the Single Buyer at the time had to ensure the necessary supply of energy to cover total demand; however, it does not entrust any specific generator with a defined SGEI.

(261) The objective of security of supply is of a very general nature. To some extent, the view could be taken that any generator in the electricity sector contributes towards achieving this objective. The interested parties failed to submit any official document of the Hungarian State clearly defining an SGEI and entrusting a specific generator (or generators) with providing that specific service.

(262) The PPAs themselves are similar in this respect: they fix the obligations of the parties but do not define a specific public service obligation. The fact that all of the ten power plants under PPAs have to reserve their capacities to MVM does not in itself mean that they are specifically entrusted with a public service obligation. Again, such an approach could lead to the conclusion that the whole power generation sector fulfils an SGEI – which would clearly be in breach of the spirit Community legislation and practice means to give to the concept.

(263) In the present case, the alleged public service obligations have not been clearly defined and there is no specific generator required to discharge any such concretely defined public service obligation.

(264) The interested parties argue that PPAs are documents that entrust generators with SGEIs. But PPAs do not contain any specific definition of SGEIs and do not refer to these obligations or to legal provisions that would be a basis for the State to entrust SGEIs to other entities.

(265) In its decisions to date ([57]), the Commission has taken the view that security of supply could be an SGEI subject to the restrictions provided for in Article 8(4) of Directive 96/92/EC (which corresponds to Article 11(4) of Directive 2003/54/EC), i.e. provided that the generators concerned use indigenous primary energy fuel sources to produce energy and that the total volume of energy does not exceed in any calendar year 15 % of the total primary energy necessary to produce the electricity consumed in the Member State concerned.

(266) The only generator that submitted that it used indigenous primary energy fuel was Mátra power plant. However, Mátra power plant did not produce any official documents showing that the Hungarian State had specifically entrusted it with a clearly defined SGEI.

(267) In the light of the above, the Commission must reject the claim that the PPAs discharge a public service obligation in the field of security of supply.

(268) Second, the parameters on the basis of which the compensation is calculated should have been established beforehand in an objective and transparent manner, and the compensation should not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant revenue and a reasonable profit for discharging those obligations ([58]).

(269) In the absence of a clear definition of the SGEIs to be provided, in particular one making a clear distinction between the services to be rendered and the power plants' normal business operations, it is impossible to establish parameters for compensation and/or to determine whether the compensation exceeds the amount necessary to cover the costs incurred in discharging these obligations. It is not even possible to define exactly what the compensation is.

(270) The existence of certain parameters for establishing the PPA prices is not equivalent to the existence of precise parameters for calculating compensation for SGEIs, since the price is not equal to the compensation. Furthermore, the fact that the price covers only the costs of generating electricity plus a margin for profit does not mean that it does not include any excess compensation, since many of the costs of generating electricity may be the normal costs covered by any electricity generator as opposed to the surplus costs associated with SGEIs.

(271) Third, where the company which is to discharge public service obligations has not been selected via a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and provided with adequate means of production to meet the public service requirements, would have incurred in discharging those obligations, taking into account the associated revenue and a reasonable profit for discharging its obligations.

(272) Nine of the ten PPAs were signed without tendering procedures. Even in the one tendering procedure for Kispest power plant, no specific objective for the SGEIs was defined. This makes it difficult to assess what exact part of the power plant's activities would correspond to the SGEI and thus what the level of compensation would be that would not exceed what is necessary to cover the costs incurred in the discharge of the public service obligation.

(273) Furthermore, neither the Hungarian authorities nor the interested parties provided an analysis of the costs of the generators in question to support the contention that they correspond to the costs incurred by a typical undertaking.

(274) Finally, the Commission notes that, with the exception of the Kispest PPA, all of the other PPAs under assessment were signed without a tender procedure.

(275) The PPAs thus do not fulfil the criteria of the *Altmark* judgment.

(276) The interested parties argued that Article 86(2) of the EC Treaty might apply to the PPAs even where they do not fulfil the criteria of the *Altmark* judgment. The compatibility of the measure with Article 86(2) of the EC Treaty is assessed under point 7.7 of this Decision.

([57]) See Commission decisions in cases N 34/99 (OJ C 5, 8.1.2002, p. 2), NN 49/99 (OJ C 268, 22.9.2001, p. 7), N 6/A/2001 (OJ C 77, 28.3.2002, p. 25) and C 7/05 (not yet published).

([58]) These are actually the second and third criteria of the *Altmark* judgment.

Selectivity

(277) The PPAs were concluded with a number of companies in a certain sector of the economy. The companies benefiting from the PPAs at stake are listed in Table 1 above.

(278) AES-Tisza argues that the PPAs are not selective as long-term agreements exist in the entire electricity sector: between MVM and the generators, between MVM and the distribution companies, and for the import of electricity. They argue that, as a result of the legislative measures at that time in Hungary, all generators had agreements with MVM and only renewable and cogeneration plants had shorter term agreements.

(279) The Hungarian authorities observe in their submissions relating to the interested parties' comments that important power plants and blocks of power plants sell electricity on the free market without PPAs and mandatory off-take (e.g. the Dunament G1 block, the Vértes power plant and the Mátra I-II blocks).

(280) Indeed, there are important power plants and blocks which operate without PPAs (see the examples provided by the Hungarian authorities). The company AES itself owns two power plants which do not operate under PPAs.

(281) The Commission notes that the fact that an aid measure is not aimed at one or more specific recipients defined in advance, but that the beneficiaries are identified on the basis of a number of objective criteria, does not mean that this measure does not confer a selective advantage on its beneficiaries. The procedure for identifying beneficiaries does not affect the State aid nature of the measure [59].

(282) Furthermore, it is also confirmed by the case law of the Court that even a measure that would favour an entire sector compared to other sectors of the economy in a comparable situation must be considered as conferring a selective advantage on that sector [60].

(283) In the light of the above considerations, the Commission concludes that the PPAs constitute a selective measure.

State resources and imputability to the State

(284) The Commission needs to assess whether the PPAs involve the transfer of State resources.

(285) The core principle of all the PPAs under assessment is the purchase obligation by MVM of a fixed generation capacity and fixed minimum quantities of generated power at a price covering the fixed and variable costs of the power plant, over a duration of 15 to 27 years. In economic terms, this purchase obligation creates a continuous obligation for MVM to pay a certain price for a certain capacity (capacity fee) and a certain quantity of energy (energy fee) to the power generators over the entire duration of the contract. Further financial obligations of MVM are laid down in the individual PPAs, as described under Chapter 2 above. This ongoing transfer of financial resources to the generators and the payment of the fees referred to is inherent in all the PPAs and is present for the entire duration of the contracts. Naturally, the longer the duration of the PPA, the higher the amount of resources transferred.

(286) In order to establish whether the resources transferred by MVM to the generators constitute State resources, the Commission has assessed the measure on the basis of the following considerations in particular:

Existence of State resources — the PreussenElektra ruling [61]

(287) In its PreussenElektra ruling, the Court of Justice examined a mechanism under which privately owned companies were compelled by the State to purchase electricity from specific electricity producers at a price fixed by the State and higher than the market price. The Court ruled that, in such a case, there was no transfer of public resources and therefore no State aid.

(288) The Commission considers that the Hungarian scheme is significantly different from the system examined by the Court in the aforementioned ruling, owing in particular to the difference in the ownership structure of the companies under a purchase obligation.

(289) The company on which the State imposed the purchase obligation was privately owned in the PreussenElektra case, while MVM is entirely State-owned. The resources used are therefore resources belonging to and controlled by a fully State-owned company.

(290) In the PreussenElektra case, when tracing the monies from the beneficiary back to their origin it transpired that they never came under the direct or indirect control of the State. However, in the present case they do come under State control since, in tracing them back to their origin, it can be seen that they go to a state company.

---

[59] Case T-55/99 of the Court of First Instance of 29 September 2000, *CETM* v *Commission*, paragraphs 40 and 52.

[60] Case 203/82 of the Court of 14 July 1983, *Commission* v *Italy*, paragraph 4.
Case 173/73 of the Court of 2 July 1973, *Italy* v *Commission*, paragraph 18.

[61] Case C-379/98 of the Court of Justice of 13 March 2001.

Imputability to the State: the Stardust ruling ([62])

(291) The Commission also considers that the behaviour of MVM is imputable to the Hungarian State. It must be added that the Hungarian authorities never argued during the present procedure that the PPAs were not imputable to the State and thus did not involve the transfer of State resources.

(292) The underlying principle of MVM's purchase obligation designed to guarantee the viability of the power plants concerned is imputable to the Hungarian State. As this core principle governing the PPAs throughout their entire duration was established when the PPAs were entered into, the Commission needs to examine the conditions of the signing of the PPAs (i.e. the circumstances of the establishment of this core principle) in order to clarify whether it is imputable to the Hungarian State.

(293) In its assessment of the imputability question, the Commission took into consideration, in particular, the following circumstances.

(294) At the time the PPAs were entered into, under Energy Act I MVM had the legal obligation to ensure security of supply in Hungary at the lowest possible cost.

(295) The same Energy Act I required MVM to assess electric energy demands and initiate the extension of production capacities based on the prognosis resulting from the assessment. MVM had to prepare a National Power Plant Construction Plan (*Országos Erőműépítési Terv*) which then had to be submitted to the Government and the Parliament for approval.

(296) The Hungarian Government and all interested parties agreed in their comments that at the time of their conclusion the PPAs constituted the tool identified by the Hungarian Government to ensure security of supply and other governmental objectives, such as the modernisation of the energy sector with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the sector ([63]). As Csepel power plant states in its comments: 'The PPA must thus be assessed as what it is: an integral part of the Hungarian State's attempt through MVM to build a diversified generation portfolio at a time when the State did not have the financial means to achieve this on its own' ([64]).

(297) The Hungarian authorities informed the Commission ([65]) that preparation for the signature of the PPAs had started in the context of the privatisation procedure for the power plants, on the basis of Governmental Decree 1114/1994 (XII.7). The entire procedure of drawing up the PPAs and privatisation was characterised by strong cooperation between the Hungarian Energy Office (the regulator), the Ministry of Industry and Trade, the Ministry of Finance, the 'Allami Vagyonügynökség Rt' i.e. the governmental body responsible for the privatisations, MVM, and a number of international advisors.

(298) A working committee was set up in this context with representatives from the above bodies, which adopted guidelines on the drafting of, *inter alia*, the PPAs and the pricing methods.

(299) At the request of the Hungarian Government, a standard PPA was drafted by an international law firm. The Hungarian authorities confirmed that the PPAs were based on this standard model. They also confirmed that the price setting mechanism of the PPAs had been prepared on the basis of the Government Decision of 1074/1995 (III.4) on the price regulation of electric energy, which included detailed rules on the calculation of regulated electricity prices. The PPAs took over the formulae and definitions of the Government Decision ([66]).

(300) The decision on the signature of the PPAs was taken by the Board of Directors of MVM, both in the context of the privatisation and after. The members of the Board of Directors are elected by the General Meeting. According to the information received from the Hungarian authorities ([67]), 'as MVM is more than 99 % State-owned, the members of the Board of Directors are appointed, elected and recalled as seen fit by the State'.

(301) Under Government Decree 34/1995 (IV.5) on the implementation of Energy Act I, MVM was required to organise a call for tenders within ninety days following the approval of the Power Plant Construction Plan.

(302) The PPA of Kispest power plant was signed following a tendering procedure in accordance with the legal procedure set out below

(303) Joint Guidelines of the responsible Ministry and the Hungarian Energy Office were issued in 1997 on the authorisation procedure for power plant construction and the general rules of the tender procedure.

([62]) Case C-482/99 of 16 May 2002 of the Court of Justice.

([63]) See e.g. the letter of the Hungarian authorities registered on 25 July 2005.

([64]) Page 5 of the comments.

([65]) Letter registered on 25 July 2005.

([66]) '*A szerződés mintegy átemelte a Kormányhatározatban szereplő képleteket, meghatározásokat.*' Letter of the Hungarian authorities registered on 25 July 2005.

([67]) Letter dated 20 July 2005 registered on 25 July 2005.

(304) The Joint Guidelines set out the main reasons for the need to transform the ownership structure and establish new power generation capacities. It clearly identifies the targets: security of supply at the lowest possible cost, modernisation to meet environmental protection standards, diversification of the primary energy sources, more flexible power plant park possessing the necessary reserve and able to cooperate with the western European electricity system. It also stresses that the operation of the future power plant park 'shall allow profitable operation and maintenance, at a development of prices being in accordance with the provisions of the law' ([68]).

(305) Under point 2, the Joint Guidelines of the Ministry and the Hungarian Energy Office also add that the implementation of the above targets should result in 'a modern electricity system satisfying the requirements of environment protection, guaranteeing the European cooperation, the return of justified investments and the costs assumed by efficiently operating license holders, as well as prices containing a profit necessary for a durable operation. All the above aims shall be achieved in a way guaranteeing …the safety of the primary energy supply, enable those intending to invest in this area to feel their investments, the return on investments in safety, …, the fulfilment of the declared government intentions in safety.'

(306) The Joint Guidelines then regulate the competition procedure relating to the establishment of power plant capacities.

(307) A Principal Evaluating Committee (Értékelő Főbizottság) made the final proposal to the winner of the tender. The members of this Committee were the representatives of the Ministry of Economy, the Ministry of Environment, the Hungarian Energy Office, MVM and the ERSTE Bank. The final decision was taken by the Board of Directors of MVM. Under the Joint Guidelines, the official result of the tender was to be published (exclusively) in the official bulletin of the Ministry.

(308) Energy Act II was constructed in a way as to presuppose the existence of the PPAs. This Parliamentary Act that is the main legal framework for the operation of the Hungarian energy market in the period under assessment refers numerous times to the long-term purchase obligations of MVM.

(309) Article 5(2) of Government Decree No 183/2002 (VIII.23) on stranded costs lays down an obligation for MVM to initiate the renegotiation of the PPAs in order to decrease the purchased capacities. The decree thus obliges MVM to propose the amendment of the PPAs.

(310) AES-Tisza argued in its observations that the prices under the PPAs were not imputable to the State after the period of price regulation (i.e. after 1 January 2004, with the exception of new price regulation in 2007), but were the result of negotiations between the power plant and MVM.

(311) The Commission acknowledges that the exact amount of resources transferred to the beneficiaries does not solely depend on the clauses contained in the PPAs, which are imputable to the State, but also to periodic bilateral negotiations conducted by MVM with the generators. In fact, PPAs offer a certain latitude to the parties to negotiate the quantities of electricity actually purchased by MVM as well as certain components of the price, notably with respect to the calculation of the capacity fees, which as indicated in recital 356 depend on a number of factors and necessitate periodic adjustments. However, the negotiations on purchased quantities can never lead to quantities below the minimum guaranteed off-take level established in the PPAs. Similarly, negotiations on prices can only be conducted in the framework of the price-setting mechanisms enshrined in the PPAs, which are imputable to the State. The price negotiations thus did not call into question the principle of purchase obligation covering justified costs and a level of profit necessary for the operation of the power plant.

(312) Furthermore, the fact that the PPAs provide for the reservation of the bulk of the capacities of the power plants under PPAs and a payment for these capacities entails in itself a transfer of State resources to the beneficiaries, independently of periodic negotiations between MVM and the generators.

(313) In their comments ([69]), the interested parties all agreed that the main formulae and definitions applied on the basis of the PPAs after 1 January 2004 followed the main rules of price regulation. […] ([70]) itself explains both in its abovementioned comments and in its comments on the Opening Decision that the price negotiations 'clarified' the application of the pricing formulae and 'interpreted' its content (*). It recognises that the PPA prices have always been cost based, covering justified costs, and that from the beginning they largely took into account the price calculation method applied by the price decrees.

(314) […] furthermore explains that the price formulae of the […] amendment to its PPA are also based on government decrees: 'The formula in the […] Amendment (Schedule […] Annex […]) for the calculation of the availability fee is the same as that

([68]) The text of the Joint Guidelines was submitted to the Commission in English only.

([69]) Forwarded to the Commission by the Hungarian authorities on 20 October 2004 and, in respect of Dunament, on 25 July 2005.

([70]) Annex 3 to […]'s submissions.

(*) Name of power generator.

included in the applicable Decrees (footnote reference to Decree 55/1996 of the Minister of Industry, Trade and Tourism (IKIM) and Decree 46/2000 of the Minister of Economic Affairs (GM), and the last applicable one (re generators) before 1 January 2004 was Decree 60/2002 of the Minister of Economic Affairs and Transportation (GKM)) setting out the maximum availability (= capacity) and energy fees for generators listed therein'.

(315) The above shows that neither the price negotiations nor the amendments to the PPAs affected the core principle of the PPAs as established in the circumstances described, when the PPAs were signed. The same principle of a purchase obligation in order to ensure return on investment governs the PPAs today.

(316) It is apparent from the above circumstances that the existence of MVM's purchase obligation vis-à-vis the power generators, with the principle of covering justified fixed and variable costs, is imputable to the Hungarian State.

(317) Furthermore, it is settled case law that a measure does not constitute State aid only when an advantage is conferred on undertakings by way of a direct and clear mobilisation of State resources, but also when the granting of the advantage may, if certain conditions are fulfilled in the future, entail an additional financial burden for the public authorities which they would not have had to bear if the advantage had not been granted [71]. In 2004, it was clear that MVM would bear such an additional burden in the likely event that power generators and importers not engaged in PPAs offered lower prices than the PPA prices, because the development of such offers would create incentives for MVM to modify its supply portfolio and consequently reduce the quantities purchased from the power generators actually under PPAs and obtain price reductions from them. However, owing to its obligations stemming from the PPAs, MVM cannot make such decisions because, as shown above, MVM cannot reduce the quantities purchased from generators operating under PPAs below a minimum level (the guaranteed off-take quantity) and cannot negotiate prices on the basis of alternative offers provided by competing generators, but only within the cost-based price formation mechanism enshrined in the PPAs. This fact, together with the conclusion reached in recitals 315 and 316, leads the Commission to conclude that the condition of transfer of State resources has been present in the PPAs since 1 May 2004 and will be present as long as they are valid, independently of actual market conditions, because they prevent MVM from carrying out the arbitrages that might prove appropriate to minimise the amounts of resources spent for the purchase of the electricity necessary to fulfil its needs.

(318) It follows from the above considerations that the PPAs lead to the transfer of State resources.

([71]) See in particular the judgement of the Court of First Instance of 13 June 2000 in Joint Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-02267.

Distortion of competition and impact on trade between Member States

(319) The electricity markets have been opened to competition and electricity has been traded between Member States in particular since the entry into force of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricit [72].

(320) Measures that favour undertakings in the energy sector in one Member State may therefore impede the ability of undertakings from other Member States to export electricity to that State, or favour the export of electricity from that State to the other Member State. This is particularly true for Hungary, which owing to its central location in Europe is connected or can easily connect to the networks of numerous present or future Member States.

(321) This is particularly true for Hungary, which is a centrally located country in Europe surrounded by seven countries, four of which belong to the EU. Of the EU Member States, it has interconnectors with Slovakia, Austria and Romania. In 2004 it imported nearly 14 000 GWh and exported 6 300 GWh. From 2005, imports increased to above 15 000 GWh and exports to between 8 000 and 10 000 GWh.

(322) In the years following Hungary's accession to the EU, approximately 60 % of Hungarian generation capacity was contracted by MVM under PPAs. The PPAs expire between the end of 2010 and the end of 2024. The above conditions of MVM's purchase obligation will remain unchanged until the end of the agreements.

(323) The first step of the opening up of the market in Hungary took place on 1 July 2004, when all non-household consumers became eligible to switch to the free market. On 1 January 2008 the public utility segment ceased to exist and accordingly all customers became 'eligible'.

(324) Notwithstanding the market opening since 2004, a sizable proportion of eligible customers did not choose the free market segment. The Report of the Office of Economic Competition on the sectoral investigation on the Hungarian energy market [73] explicitly concluded that the lack of available capacities on the free market due to the substantial volumes of capacities reserved under the PPAs creates a serious obstacle to choosing the free market. Through the PPAs, around 60 % of Hungarian generation capacities were tied to the public utility sector, to MVM only, and only the remaining capacities could in reality compete for new customers.

([72]) OJ L 27, 30.1.1997, p. 20.
([73]) Published on 15 May 2006.

(325) The reserved capacities, i.e. the guaranteed quantities over a long duration also create a barrier to the entry of new generators on the wholesale market, as 60 % of all capacities is linked to one (State-owned) company with a purchase guarantee.

(326) In this regard, the Commission also took into account the results of the sectoral investigation by the Hungarian Office of Economic Competition, which explicitly concluded that the PPAs lead to foreclosure of the competitive market by limiting the *de facto* possibility of eligible consumers to switch to that free market and deterring potential wholesalers from entering the market ([74]).

(327) The scarcity of capacities available outside the PPAs furthermore lead to an increase of prices on the competitive market. The substantial volume of capacities and quantities of energy reserved by the PPAs affect prices also on the free market.

(328) According to a quantitative study by the Regional Centre for Energy Policy Research on the impact of the PPAs on wholesale electricity prices in Hungary ([75]), the PPAs lead to higher prices on the wholesale market than could be achieved without PPAs. More generally, this study also argues that the PPAs constitute one of the major factors which lead to a market structure that is '*incompatible with the principles of a free competitive market*' ([76]). This study actually proposes the termination of the PPAs as a solution to achieve free competition on the Hungarian electricity wholesale market.

(329) In its Energy Sector Inquiry ([77]) the Commission also assesses the effects of PPAs on competition and trade. In recitals 467 to 473, it concludes that 'Long-term power purchase agreements (PPAs) are another factor which may affect the volumes that are traded on a regular basis on wholesale markets.' With regard to the PPAs in Poland, it argues that 'they may well constitute a significant barrier to the development of the Polish wholesale market.' It then goes on to say that 'A similar situation exists in Hungary, where Magyar Villamos Művek (MVM) is the public utility wholesaler and acquires electricity by means of long-term PPAs that is subsequently sold to the local retailers. The Hungarian PPAs cover the vast majority of that Member State's electricity needs, which may have effects on wholesale trading similar to, or even going further than, those described above in the context of the Polish wholesale market'.

([74]) Point 24 of the Conclusions (*Összefoglalás*) of the Report.

([75]) Published in November 2006. The original title is 'A hosszú távú áramvásárlási szerződések megszűnésének hatása a villamos energia nagykereskedelmi árára'.

([76]) Quotation from point 2 of the Study: 'összeegyeztethetetlen a versenypiaci működés elveivel'.

([77]) 10 January 2007; http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/

(330) The various studies referred to above thus all conclude that the PPAs distort competition and may affect trade between Member States.

(331) Interested parties argue further that it is untrue that the scarcity of available free capacities leads to the distortion of competition, as the capacity auctions of MVM show that it could not even sell all of its proposed electricity products.

(332) A comparison between the proposed quantities and successfully auctioned products ([78]), however, shows that MVM sold all proposed products at nearly each auction. Indeed, in most cases it even needed to use the 10 % maximum additional products it is legally allowed to propose.

(333) The interested parties also submitted comments to emphasize that many other factors affected trade and influenced the success of the development of free competition on the wholesale energy market in Hungary. The Commission obviously agrees that the PPAs are not the sole factor influencing competition and trade. All the above-mentioned studies also recognize that a great number of other elements (legislation, limited access to cross-border capacities, significant influence of price evolution on international energy markets, etc.) equally affect the overall success of market opening and the actual price levels. However, all the studies submitted to the Commission in the course of the present procedure and otherwise available to it, except the one submitted by AES-Tisza and commissioned by it ([79]), clearly recognise that the PPAs do have a significant effect on competition and trade.

(334) The reserved capacities, the guaranteed off-take and the pricing mechanism provided for by the PPAs shield the power generators under PPA, for the entire duration of the PPA, from the commercial risk associated with operating the power plants. As indicated under recital 211 above, this includes the risk associated with fluctuations in electricity generation costs and, in particular, fuel costs, the risk associated with fluctuations in end-user electricity prices, and the risk associated with fluctuation in end-user electricity demand. As these risks are the typical risks that power generators without a PPA would have to bear, the PPAs create an obstacle for a level playing field in the power generation sector and distort competition based on merit.

([78]) The information is available on the website of the Hungarian Energy Office: www.eh.gov.hu

([79]) Study by Dr Theon van Dijk, March 2006.

(335) The Commission also notes that most generators benefiting from the PPAs belong to major international groups that are present in several Member States. Conferring a competitive advantage on those groups indubitably has an effect on trade and the potential to distort competition on the common market.

(336) The majority of the interested parties' assessments of the criteria for impact on trade and distortion of competition refer to market circumstances at the time of conclusion of the PPAs and, in any case, to market circumstances before Hungary's accession to the EU. The Commission cannot accept this line of argument and refers in this regard to recitals 156 to 172 above.

(337) Certain interested parties also argue that their PPA, viewed individually, does not affect trade as the generation capacity of their power plant is minor compared to the country's overall generation capacities. As the core principle of the PPAs is the same for all of them (obligation to purchase a certain minimum quantity of generated electricity, reservation of generation capacities, a price covering the justified fixed and variable costs over a duration of 15 to 27 years), each PPA has an impact on the market. However, by definition, the extent of the effect is multiplied by the co-existence of the ten PPAs on the Hungarian market. The more capacities covered by PPA, the greater the above effects are.

(338) In the light of the above, the Commission concludes that the terms and conditions of the PPAs described above have an effect on trade and the potential to distort competition.

(339) In point 3.1 of its Opening Decision, the Commission expressed its doubts as to the State aid character of Paks power plant owing to differences that may exist between the PPA of this plant and the other PPAs with regard to its governing principles. However, as a result of its investigations the Commission concludes that the above assessment of the State aid criteria applies equally to Paks PPA, as the same core principles are present in it with the specific features set out under the relevant criteria.

(340) On the basis of the above assessment, the Commission takes the view that the main terms and conditions of the purchase obligation enshrined in the PPAs, i.e. the capacity reservations and guaranteed off-take by MVM under such conditions as to ensure the return on investment of the power plants by shielding them from the commercial risks of the operation of their plant, constitute State aid within the meaning of Article 87(1) of the EC Treaty. This State aid is achieved by the combination of the capacity reservations, the minimum guaranteed off-take, the pricing mechanism based on a capacity fee and an energy fee to cover fixed, variable and capital costs, over a long duration beyond normal commercial practice.

7.4. **Applicability of the PPAs after accession**

(341) The interested parties argue that in accordance with the general principle of non-retroactivity, measures that were established in accordance with the law prior to accession should not be reviewed by the Commission after accession.

(342) The Commission cannot agree with this argument. All measures, irrespective of their legality under national rules before accession, become subject to the rules of the *acquis communautaire* at the date of accession. The specific rules for State aid measures set forth in Annex IV to the Accession Act do apply to aid measures, even if they were otherwise established in accordance with national legal rules prior to accession.

(343) Annex IV.3(1) to the Act of Accession defines as existing aid only three categories of measures: (i) those put into effect before 10 December 1994; (ii) those that – having been examined by the Commission – were included in the list in Annex IV to the Treaty of Accession; and (iii) those approved by the Commission under the so-called interim mechanism. All the measures still applicable after the date of accession, which constitute State aid and do not fall within one of these three categories, are considered as new aid upon accession; the Commission therefore has full powers to prohibit these measures if they are incompatible with the common market. This application of State aid rules to the future effects of measures still applicable after accession does not entail any retroactive application of the EC State aid rules and is in any event mandated by the Act of Accession.

(344) Annex IV.3(2) to the Act of Accession defines the 'interim mechanism'. It provides a legal framework for the assessment of aid schemes and individual aid measures put into effect in a new Member State before the date of accession and still applicable after accession.

(345) The interested parties argue that, as Community State aid rules apply only from the date of accession, only aid measures that provide an additional benefit after accession could be defined as applicable after accession. They argue that the PPAs do not produce any additional benefit after accession, as their price formulae were defined before accession and, consequently, the State's financial exposure was entirely known prior to accession.

(346) The Commission makes the following observations. The PPAs expire between 2010 and 2024, i.e. after accession. Only in very exceptional circumstances has the Commission considered that an aid measure still in force after accession does not constitute aid applicable after accession within the meaning of the Accession Act. Such exceptional practice should nevertheless, as all exceptions in law, be interpreted *stricto sensu* to avoid removing from the Commission's State aid control measures that the signatories of the Accession Act intended to be under such control.

(347) In this context, the Commission has indeed considered in its practice ([80]) that aid measures for which the State's exact economic exposure was precisely known before accession were not applicable after accession within the meaning of Annex IV to the Accession Act.

The 'exact economic exposure of the State'

(348) The PPAs do not cap at a maximum amount the State's financial exposure, nor could it be precisely calculated before accession for the entire duration of the PPAs.

(349) On the contrary, the State's economic exposure under the PPAs depends on parameters whose future evolution was unknown at the time of accession. Moreover, the PPAs guaranteed generators protection from fluctuations in costs which were unrelated to pre-accession transactions or events but concerned future developments and were therefore unknown on the date of accession.

(350) In particular, the fact that the State's exposure under the PPAs was not known on the date of accession and that the PPAs imposed obligations on the State after accession is demonstrated by the following circumstances.

(351) First, the exact energy prices at which the power generators sell electricity to MVM are not laid down in the individual PPAs. The prices are the result of calculations made using a formula comprising a series of parameters that fluctuate in an unforeseeable way.

(352) The price formulae of the PPAs include a capacity fee and an electricity fee, with other different supplementary fees depending on the generators.

(353) The formulae define only the admissible costs and charges under each category of fees and the importance of that category of fees in the price.

(354) The generators themselves as well as MVM recognised in their observations that the exact meaning of certain categories of fees must have been further clarified in negotiations with MVM.

([80]) E.g. see the Commission decision of 28 January 2004 on State aid, CZ 14/2003 – Czech Republic 'Česka spořitelna, a.s.'.

(355) A great number of cost categories recognised by the PPAs are variable and cannot have been precisely known prior to accession. For instance:

(356) *Capacity fee*

This cost category takes into account both the guaranteed capacities and the capacities actually used for MVM. This cost category depends, amongst others, on yearly, monthly and weekly planning. Each of the PPAs refers to the rules of the periodical planning, and the exact final price depends in each PPA of the yearly, monthly and weekly plans. By definition, these cost categories cannot be precisely defined in advance. The parties can for instance foresee 'overcapacities' for a given period in their plans. The overall price to be paid by MVM will necessarily depend on other parameters, e.g. the weather, influencing electricity demand.

This cost category also depends on the exchange rates of HUF.

(357) *Energy fee*

This cost category depends primarily on fuel costs. These costs fluctuate according to market rules outside the control of the parties. The costs linked to the future price evolution of fuel are not subject to any concrete cap in the PPAs.

The exact amount of the energy fees payable over a certain period of time furthermore naturally depends on the exact quantity of sales to MVM, which can only be calculated *a posteriori*.

(358) *Supplementary fees (where applicable)*

Certain PPAs provide for a supplementary fee for capacities that were reserved but in the end not used. Its exact amount cannot, by definition, be specified in advance.

(359) In most PPAs there is a system of bonus/malus whereby generators are entitled to a bonus if they operate more capacities in peak periods than provided for in the PPA, or generate more electricity. A malus is provided for if a generator provides less capacity than forecast by the PPA and the yearly/monthly plans.

(360) These calculations, like the others listed above, are based on periodic operating plans and depend also on the generator's own behaviour. They can under no circumstances be defined in advance.

(361) All the above shows that fixing the exact final price for the purchase of electricity for contracts of a duration of 15 to 27 years is technically impossible. The exact price takes into account periodic production plans and depends on electricity demand, the behaviour of the parties to the contract, fuel prices, etc.

(362) Even if not all of these arguments apply to all PPAs (as the admissible cost categories vary to a certain extent depending on the PPAs), all PPAs contain price elements which it is impossible to define with exactitude in advance.

(363) Against this background, the Commission takes the view that the existence of the price-setting formula does not constitute a sufficient cap on the State's economic exposure. The very existence of a number of changing parameters in the formula makes it impossible to determine the future level of the State's exposure with sufficient precision.

(364) As a subsidiary argument, MVM's financial exposure under the PPAs is very much contingent on demand. It is equivalent to the difference between the purchase price under the PPAs and the revenue MVM can generate by selling the electricity. However, the price at which MVM sells its electricity cannot be predicted. It depends on the exact revenues generated by MVM's sales under its agreements with the regional distributors, the outcome of its auctions, tenders and its sales at the 'Marketplace' (Piactér). These prices are also influenced by periodic official price regulation and fluctuation of market demand. This increases the unpredictability of the State's exposure under PPAs. It may even be the case that the guaranteed off-take provided for in the PPAs is increasingly in excess of real MVM needs, in particular after full liberalisation of the energy market in January 2008. The electricity surplus may lead to even higher unknown costs, increasing the unpredictability of the State's exact exposure under PPAs still further.

(365) Therefore MVM's payments to the power generators after accession are not the mere disbursement of tranches within an overall fixed cap established before accession.

(366) Consequently, the PPAs under assessment in this Decision are applicable after Accession within the meaning of point 3 of Annex IV to the Accession Act.

7.5. **PPAs as 'new aid' as opposed to 'existing aid'**

(367) According to point 3 of Annex IV to the Accession Act, 'if the Commission does not object to the existing aid measure on the ground of serious doubts as to the compatibility of the measure with the common market, within 3 months of receipt of complete information on that measure or of receipt of the statement of the new Member State in which it informs the Commission that it considers the information provided to be complete because the additional information requested is not available or has been already provided, the Commission shall be deemed not to have raised an objection.'

(368) Based on this article, certain interested parties argue that the Commission missed the three months' deadline after Hungary's notification of 31 March 2004 and thereby implicitly approved the measure under the interim procedure.

(369) In this regard, the Commission points out that the subject of the notification of 31 March 2004 under the interim procedure was a decree on compensations granted to MVM, and not the PPAs. The notification was withdrawn by Hungary and an NN case was later opened by the Commission on the PPAs themselves (see Chapter 1 above).

(370) It should also be noted that, as shown by the Table below, the Commission did not in fact miss the three-month deadline referred to by the interested parties:

Event	Date	Deadline after receipt of information
Notification by Hungary	31.3.2004	
Questions by the Commission	29.4.2004	29 days
Answers by Hungary	4.6.2004	
Questions by the Commission	10.8.2004	2 months and 6 days
Answers by Hungary	21.10.2004	
Questions by the Commission	17.1.2005	2 months and 27 days
Answers by Hungary	7.4.2005	
Withdrawal of the notification by Hungary	15.4.2005	8 days

(371) In addition to the above written correspondence, personal meetings took place between the Commission and the Hungarian authorities on 15 July 2004, 30 November 2004 and 12 January 2005.

(372) As far as the present procedure is concerned, the Commission hereunder assesses whether the PPAs contain existing or new aid on the basis of the provision of the Accession Act and the Procedural Regulation.

(373) In accordance with Chapter 3 of Annex IV to the Accession Act, all State aid measures that entered into force before accession, are still applicable after that date and do not fall under one of the categories of existing aid listed below shall be regarded, as of accession, as new aid within the meaning of Article 88(3) of the EC Treaty.

(374) The PPAs concerned by this Decision entered into force between 1995 and 2001, i.e. before Hungary joined the EU on 1 May 2004. This Decision concerns only the PPAs that were in force at the date of accession. It does not cover any PPA that ended before that date. For all additional reasons mentioned under point 7.4 above, the measure is applicable after accession within the meaning of the Accession Act.

(375) The three categories of existing aid referred to in the Accession Act comprise:

1. Aid measures put into effect before 10 December 1994.

   All the PPAs were signed and entered into force after 10 December 1994.

2. Aid measures which were included in the list of existing State aid measures attached to the Accession Act.

   Neither the PPAs in general nor any of the individual PPAs were included in the Appendix to Annex IV to the Accession Act referred to in point 1(b), Chapter 3, Annex IV, which contains the list of existing aid measures.

3. Aid measures which prior to the date of accession had been assessed by the State aid authority of the Member State and had been found to be compatible with Community law and which the Commission had not objected to because it had serious doubts regarding compatibility with the common market pursuant to the procedure laid down in the Accession Act, the so-called 'interim procedure' (cf. second paragraph, Chapter 3 of Annex IV to the Accession Act).

   No PPAs were submitted to the Commission under the so-called interim procedure.

(376) As the PPAs do not belong to any of the categories of existing aid enumerated in the Accession Act, they constitute new aid as of the date of accession.

(377) The Commission notes that this categorisation is also in line with the last sentence of Article 1(b)(v) of the Procedural Regulation. This Article states that where measures become aid following liberalisation under Community law (in this case liberalisation of the energy market pursuant to Directive 96/92/EC, which entered into force in Hungary when it joined the European Union), such measures are not deemed to be existing aid after the date fixed for liberalisation, i.e. they must be treated as new aid.

(378) Budapest power plant argues that this last sentence of Article 1(b)(v) of the Procedural Regulation should not apply. The plant invokes the *Alzetta Mauro* judgment [81], arguing that aid awarded in a market that was closed to competition before its liberalisation is to be regarded as existing aid from the date of liberalisation.

(379) The Commission cannot accept this argument. As already discussed above, the Commission takes the view that the purpose of the State aid provisions contained in the Accession Act was precisely to ensure that all measures which might distort competition between Member States as of the date of accession were reviewed by the Commission. In contrast to the accession treaties prior to 1 May 2004, the Accession Act entered into on 1 May 2004 is designed to restrict measures deemed to constitute existing aid to the three specific cases described above. The *Alzetta Mauro* judgment does not concern a measure under the scope of the Accession Act and cannot therefore be deemed applicable in this regard to the PPAs under assessment. Furthermore, the *Alzetta Mauro* judgment concerns a situation prior to the entry into force of Regulation (EC) No 659/1999.

(380) Budapest power plant also argues that Article l(b)(v) is not applicable to individual aid measures '*since individual aid measures are not explicitly mentioned*'. The Commission cannot accept this submission. There is no reason why the reference to 'aid' and to 'certain measures' should not refer to both individual aid and aid schemes. Article 4 of Regulation (CE) No 659/1999 consistently refers to notified 'measures', but the Commission presumes that the interested party would not argue that Article 4 exclusively governs the preliminary examination of notified aid schemes.

(381) Therefore, on the basis of the Accession Act and the Procedural Regulation, the Commission concludes that the PPAs constitute new aid.

---

[81] See footnote 32.

7.6. **Validly concluded private agreements cannot be ended by the Commission (pacta sunt servanda) — Legal uncertainty — Proportionality**

(382) The Commission wishes to respond to comments submitted by the interested parties to the effect that private-law contracts cannot be ended by the Commission, as this outcome would, according to the interested parties, go against State aid rules of the EC Treaty, the principle of legal certainty and the requirement of proportionality.

(383) The Commission rejects these arguments. The form of aid (private-law contract in the case of the PPAs) is not relevant from the State aid viewpoint; only the effect of the measure is relevant to the Commission's analysis. Should the terms and conditions of a private law contract give rise to unlawful and incompatible State aid to one of the parties, such terms and conditions must be ended by the Member State. The termination of the illegal and incompatible State aid measure must be ordered by the Commission, even if the State aid constitutes such an essential part of the agreement that its termination will actually affect the validity of the agreement itself.

(384) As far as legal certainty is concerned, the Commission makes the following observations. The Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, which paved the way for accession, was signed on 16 December 1991 and entered into force on 1 February 1994, i.e. before the conclusion of the PPAs. Hungary officially applied for accession on 31 March 1994. At the time when the parties concluded the PPAs (1995 to 2001), in line with Article 62 of the Europe Agreement Hungary was already required to bring the rules of competition into line with the EC Treaty. It was also clear that the PPAs were signed for such a long duration that they would not end before Hungary's accession to the EU.

(385) The Republic of Hungary signed the Accession Treaty on 16 April 2003 [82]. The Accession Treaty entered into force on 1 May 2004. From the date of accession, the provisions of the original basic Treaties and those of the secondary legislation became binding in Hungary, in line with Article 2 of the Accession Act. Consequently, the so-called *acquis communautaire* applies to all contractual relations in the new Member States, and any exceptions to this rule can stem only from the Accession Act itself. The Accession Act annexed to the Treaty and its Annexes do not provide for any exception under the State aid rules that would exempt the PPAs or the energy sector in general from the direct application of EU State aid legislation.

(386) The Commission is thus bound to apply EU competition law to Hungary in the same way as it does to all other Member States as regards the energy sector. Contrary to the arguments of interested parties, the Commission is of the view that it is in fact the non-application of State aid rules to the PPAs that would introduce legal uncertainty on the common energy market. The accession of a Member States may indeed give rise to situations whereby a measure not infringing any domestic legislation before accession qualifies as State aid as of accession and, as such, falls under the Commission's State aid control.

(387) The Commission therefore found no valid arguments in the interested parties' comments as to why the present procedure is incompatible with the principle of legal certainty.

7.7. **Compatibility assessment**

(388) Article 87(1) of the EC Treaty provides for the general prohibition of State aid within the Community.

(389) Articles 87(2) and 87(3) of the EC Treaty provide for exemptions to the general rule that such aid is incompatible with the common market as stated in Article 87(1).

(390) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the measure does not have a social character, was not awarded to individual consumers, is not designed to make good damage caused by natural disasters or exceptional occurrences and was not awarded to the economy of certain areas of the Federal Republic of Germany affected by the division of that country.

(391) Further exemptions are provided for in Article 87(3) of the EC Treaty.

(392) Article 87(3)(a) states that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be declared compatible with the common market. Hungary's entire territory could be regarded as such an area at the time of accession and most of its regions can still benefit from such aid [83].

[82] OJ L 236, 23.9.2003.

[83] Regional aid map of Hungary, approved by the Commission on 13 September 2006 and published in OJ C 256, 24.10.2006, p. 7.

(393) The Commission adopted guidelines for the assessment of such aid. When Hungary joined the EU the guidelines on national regional aid ([84]) (the previous Regional Aid Guidelines) were in force. These guidelines also governed the assessment of regional aid in the light of Article 87(3)(c) of the EC Treaty. For the period after 1 January 2007, new guidelines on regional aid were adopted by the Commission ([85]) (the new Regional Aid Guidelines).

(394) Under both Regional Aid Guidelines, State aid could in principle be authorised only for investment costs ([86]). According to both Guidelines:

(395) 'Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence and importance of any handicaps' ([87]).

(396) The aid cannot be regarded as investment aid. Investment aid is defined using a list of potential eligible costs which are indicated in both the Regional Aid Guidelines. Payments under the PPAs clearly cover other costs as well. The most obvious example is that PPAs guarantee the fuel costs associated with operating the power plants. Staff costs are also covered by the PPAs. Clearly, these costs are not eligible for investment aid. On the contrary, they come under the operator's current expenses and as such must be included in operating costs as defined by both Regional Aid Guidelines.

(397) As far as operating aid is concerned, during the procedure neither the Hungarian authorities nor the interested parties demonstrated any regional handicaps relating to specific regions targeted by the PPAs, nor did they show the proportionality of the aid level to such handicaps.

(398) Moreover, both Regional Aid Guidelines provide that operating aid should in any case be progressively reduced and limited in time. The aid granted through the PPAs is not reduced progressively and the duration of 15 to 27 years goes far beyond what can be allowed under both Guidelines. Nor do the PPAs come under any specific exemption in the Regional Aid Guidelines and neither the Hungarian authorities nor the interested parties ever argued to that effect.

(399) In the light of the above, the Commission concludes that the aid is not eligible for the derogation provided for in Article 87(3)(a) of the EC Treaty.

(400) Article 87(3)(b) of the EC Treaty states that 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State' may be declared compatible with the common market.

(401) The Commission notes that the aid in question is not designed to promote the execution of an important project of common European interest.

(402) Nor has the Commission found any evidence that the aid is designed to remedy a serious disturbance in the Hungarian economy. The Commission acknowledges that electricity is an important product for any Member State's economy, and that there was a need to modernise this sector in Hungary in the 1990s.

(403) However, the Commission takes the view that the notion of 'serious disturbance in the economy of a Member State' refers to much more serious cases and cannot be applied to agreements providing for normal electricity supply. Moreover, the Commission notes that this concept entails an aspect of urgency that is incompatible with the PPAs.

(404) Neither the Hungarian authorities nor the interested parties argued that the PPAs were compatible with Article 87(3)(b) of the EC Treaty.

(405) In view of the above, the Commission concludes that the aid does not qualify for the derogation enshrined in Article 87(3)(b) of the EC Treaty.

(406) Article 87(3)(d) of the EC Treaty states that aid to promote culture and heritage conservation may be declared compatible with the EC Treaty if such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest. This Article obviously does not apply to the PPAs.

(407) Article 87(3)(c) provides for the authorisation of aid to facilitate the development of certain economic activities or economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has developed several guidelines and communications that explain how the derogation contained in this Article is to apply.

([84]) OJ C 74, 10.3.1998, p. 9.
([85]) OJ C 54, 4.3.2006, p. 13.
([86]) Point 4.15 of the old and point 5 of the new Regional Aid Guidelines.
([87]) The quotation is from point 5 of the new Regional Aid Guidelines.

(408) As far as both the old and the new Regional Aid Guidelines are concerned, the PPAs' incompatibility with those Guidelines is shown in recitals 393 to 398 above.

(409) The Commission notes that the Environmental Guidelines applicable at the time of Hungary's accession to the EU ([88]), like the Regional Aid Guidelines, primarily allow investment aid. Operating aid is limited to specific objectives. The first is aid for the management of waste and for energy saving (section E.3.1), which is limited to a maximum duration of 5 years. The second is aid in the form of tax reductions or exemptions (section E.3.2). The third is aid for renewable energy sources (section E.3.3). Clearly, none of these provisions apply in the present case.

(410) The fourth and last type of operating aid that can be authorised is aid for the combined production of power and heat, hereinafter referred to as 'cogeneration' (section E.3.4). Some of the generators concerned produce heat and power. However, the conditions of point 66 and hence the conditions of the options under points 58 to 65 of the Environmental Guidelines were not met by the PPAs. One of the conditions set out in point 66 is that the support measure is beneficial in terms of the protection of the environment because the conversion efficiency is particularly high, because the measure will allow energy consumption to be reduced or because the production process will be less damaging to the environment. Nothing in the information available to the Commission indicates that this condition is met.

(411) The three options that Member States may use to grant operating aid for cogeneration are the following:

— option 1: aid to compensate for the difference between the production costs of the cogeneration plant and the market price of the energy produced,

— option 2: introduction of market mechanisms such as green certificates or tenders,

— option 3: aid to compensate for the external costs avoided, which are the environmental costs that society would have to bear if the same quantity of energy was not produced by cogeneration,

— option 4: aid limited to 5 years, either digressive or limited to 50 % of the eligible costs.

([88]) Community guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3.

(412) It is obvious that the PPAs do not fulfil the conditions of option 2 and option 3. The conditions of option 1 are not fulfilled either, as the market price of the energy produced is not used to calculate the amount of aid. The amounts of aid transferred under a given PPA depend not on the prices offered by any other power generator, but solely on the investment and operating costs incurred by the generator in question.

(413) Furthermore, neither Hungary nor any of the producers concerned has actually argued compatibility on the basis of these articles or ever demonstrated that the plants meet the criteria of the Environmental Guidelines for operating aid to cogeneration.

(414) On 23 January 2008, the Commission adopted new guidelines on State aid for environmental protection ([89]). These new Guidelines also allow operating aid only in the cases of energy saving, cogeneration, the use of renewable energy sources and tax reductions and exemptions. As mentioned above, none of these apply to the PPAs.

(415) As far as cogeneration is concerned, there are three options Member States can choose from when granting such aid:

— option 1: aid to compensate for the difference between the production costs of the cogeneration plant and the market price of the energy produced,

— option 2: introduction of market mechanisms like green certificates or tenders,

— option 3: aid limited to 5 years, either digressive or limited to 50 % of the eligible costs,

None of the conditions of these options are fulfilled by the PPAs. Neither the Hungarian authorities nor the power generators provided evidence of any kind on the fulfilment of these criteria of the new Environmental Guidelines.

(416) Of the guidelines and communications the Commission developed to explain how exactly it will apply the derogation contained in Article 87(3)(c), the only one which could apply in the present case is the Stranded Costs Methodology (see recital 26 above).

([89]) OJ C 82, 1.4.2008, p. 1.

(417) The Stranded Costs Methodology concerns aid granted to incumbent companies that invested in power plants prior to liberalisation of the electricity sector and that may have difficulties in recouping their investment costs in a liberalised market. Since one of the essential features of the PPAs is to allow certain companies which invested in power generation assets before the liberalisation of the electricity sector to continue to benefit from a guarantee of revenues which secures a return on investment, the Methodology is to be regarded as a relevant basis for the assessment of the compatibility of the PPAs.

(418) The Commission notes that neither the Hungarian authorities nor any of the power generators concerned argued in their comments that the PPAs were themselves compatible with the criteria of the Methodology. Most generators actually conclude that the PPAs are commercial agreements established well before the existence of the Methodology, and the criteria of a compensation mechanism are simply inadequate to assess the PPAs.

(419) The main purpose of the Stranded Costs Methodology is to help the transition of the energy sector to a liberalised market by allowing the incumbent electricity undertakings to adapt to the introduction of competition [90].

(420) The Methodology outlines the principles applied by the Commission in assessing aid measures designed to compensate for the costs of commitments or guarantees that it might no longer be possible to honour on account of the liberalisation of the electricity market. Such commitments or guarantees are referred to as 'stranded costs' and can take a variety of forms, notably investments undertaken with an implicit or explicit guarantee of sale.

(421) Since the PPAs themselves constitute an explicit guarantee of sale pre-dating liberalisation, the power plants under PPAs may be regarded as falling within the scope of the Methodology.

(422) However, the Commission notes that several elements of the main principles constituting the PPAs do not meet the conditions laid down in section 4 of the Methodology. First, they do not meet the condition set out in paragraph 4.2 of the Methodology, which requires that the arrangements for paying the aid must take account of future development in competition. The price-setting mechanisms of the PPAs are designed in such a way as to take into consideration only specific parameters of the power plant concerned to establish the price. Prices offered by competing generators and their generation capacities do not have to be taken into account.

(423) According to point 4.9 of the Methodology, the Commission has the most serious misgivings when the amount of aid is not likely to be adjusted to take due account of the differences between the economic and market assumptions initially made when estimating stranded costs and real changes in them over time. The PPAs fall within this category, as no market assumption has been used to design the aid measure. Furthermore, the fact that the core principles of the PPAs have remained unchanged in spite of the gradual opening of the electricity market and therefore entail the obligation on MVM to purchase energy in excess of its needs and to release it on the free market, clearly shows that the PPAs take no account of actual market developments.

(424) Furthermore, as shown under Chapter 3 above, one of the main advantages of the PPAs for the power generators is the purchase obligation by MVM of fixed capacities and guaranteed quantities at a price covering fixed, variable and capital costs, over a duration corresponding approximately to the lifetime or depreciation time of the assets. As a consequence, PPAs have the effect of obliging one of the parties to purchase its electricity from the other party, irrespective of the actual development of offers by competitors.

(425) Several Member States have put in place compensation mechanisms whereby a maximum aid amount is set in advance on the basis of an analysis of the future competitive market and in particular of future market prices resulting from the confrontation of supply and demand. If actual revenues obtained by the generators concerned turn out higher than forecast, the actual grants are recalculated and set at a lower level than the maximum amount. The impact of the compensation on the market is therefore limited to the minimum, notably because it does not secure a minimum level of production and sale to the beneficiaries.

(426) In this respect, instead of helping transition to a competitive market, the PPAs in fact create an obstacle to the development of real competition on a substantial part of the power generation market. Therefore, the arrangements for paying the aid do not allow account to be taken of future development in competition and the amount of aid is not conditional on the development of genuine competition.

(427) As a consequence, they also contradict the principles laid down in Section 5 of the Methodology whereby the financing arrangements must not conflict with the Community interest, notably competition. Under Section 5, the financing arrangements must not have the effect of deterring outside undertakings or new players from entering certain national or regional markets. However, as highlighted, *inter alia*, in recital 220, the system of capacity reservation and capacity fee tends to deter MVM – which is by far the largest buyer on the wholesale market – from shifting to producers other than those under PPAs. Furthermore,

(90) See the introductory provisions of the Methodology.

the opening of the market and the conditions set out in the PPAs compel MVM to purchase more electricity than it needs and lead it to resell that electricity on the free market through release mechanisms. This in itself hampers new entries on the wholesale market. Finally, the Commission considers that the PPAs entail distortions of competition on the Hungarian wholesale electricity market over a period largely exceeding the time necessary for a reasonable transition to a competitive market.

(428) The rules constituting the PPAs do not meet the criteria set out in paragraph 4.5 of the Methodology, since the maximum amount of aid to be paid to generators between 1 May 2004 and the expiry of the PPAs is not specified in advance.

(429) Furthermore, point 4.8 of the Methodology indicates that the Commission has the most serious misgivings regarding aid that is intended to safeguard all or some of the income pre-dating the entry into force of Directive 96/92/EC [91], without taking strictly into account the eligible stranded costs that might result from the opening of the market.

(430) The fact that the PPAs were maintained when Hungary joined the European Union was designed precisely to safeguard most of the income obtained by the power generators concerned before the entry into force of Directive 96/92/EC. Furthermore, the plants under PPA cover a very important share of the market and for a very long duration, considerably exceeding the time necessary for a reasonable transition to the market.

(431) Moreover, within the main provisions constituting the PPAs, the Commission cannot isolate a set of elements that it might consider compatible with the common market under the Methodology. In particular, a reduction of the duration of the PPAs would not suffice to make the PPAs compatible, since the financing method, which is based on reserved capacities and guaranteed off-take quantities, would still hamper the development of genuine competition. The price formation mechanisms would also continue to contradict the objective of fostering the emergence of a truly competitive market where prices result from the interplay of supply and demand.

(432) In the light of the above considerations, the Commission concludes that the PPAs are incompatible with the criteria laid down in the Methodology.

[91] The date of liberalisation of the electricity market, which for Hungary was 1 May 2004.

(433) Certain interested parties have also argued that Article 86(2) of the EC Treaty could apply to the PPAs even where they do not fulfil the criteria of the *Altmark* judgment.

(434) The Commission takes the view that the considerations set out in recitals 255 to 275 with regard to the criteria of the Altmark judgment also lead to the conclusion that Article 86(2) cannot apply to PPAs.

(435) Article 86(2) can apply only to companies that provide specifically defined services of general economic interest, which is not the case in this particular instance, as demonstrated in recitals 256 to 267 above. Furthermore, compensation for providing the SGEI must be proportionate to the extra costs incurred; in other words, it must be possible to define the scope of the SGEIs in order to calculate the associated costs. This is not the case here, as is demonstrated in recitals 268 to 270 above.

(436) The aid under assessment thus constitutes incompatible State aid.

7.8. **Recovery**

(437) According to the EC Treaty and the Court of Justice's established case law, the Commission is competent to decide that the State concerned must abolish or alter aid [92] when it has been found to be incompatible with the common market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market is designed to re-establish the previously existing situation [93]. In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage it enjoyed over its competitors on the market, and the situation prior to the payment of the aid has been restored [94].

(438) Following that case-law, Article 14 of Regulation (EC) No 659/99 laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

[92] Case C-70/72, *Commission* v *Germany*, [1973] ECR 00813, point 13.

[93] Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission*, [1994] ECR I-4103, point 75.

[94] Case C-75/97, *Belgium* v *Commission*, [1999] ECR I-030671 points 64-65.

(439) Certain interested parties argued that the termination of private law contracts by way of a Commission decision would go against the principle of legal certainty because PPAs are private law contracts which generators entered into in good faith in the market circumstances that prevailed at that time. They also argue that such a decision would conflict with the principle of proportionality. The Commission rejects these arguments for the reasons set out under recitals 382 to 387.

(440) With regard to proportionality, the Court has held that the recovery of State aid unlawfully granted for the purpose of restoring the situation existing previously cannot in principle be regarded as disproportionate to the objectives of the provisions of the Treaty on State aid ([95]).

(441) The Commission therefore considers that there are sufficient grounds to recover the aid granted through the PPAs in order to re-establish the conditions of competition.

Quantification of the aid amount to be recovered

(442) It has been shown under recitals 176 to 236 that the advantage flowing from the PPAs goes far beyond any positive difference between the PPA prices and the prices that could have been achieved on the market without PPAs.

(443) However, the Commission is of the view that the overall value of all the conditions of MVM's long-term purchase obligations, as set out in recitals 174 to 236, for the period between 1 May 2004 and the termination of the PPAs, cannot be calculated with exactitude. Consequently, when ordering the recovery of unlawful aid, the Commission will limit its recovery order to the difference that may have existed between the power generators' revenues under their PPAs and the revenues they could have obtained on the market without PPAs over that time period.

(444) In determining the amount to be recovered from generators, the Commission acknowledges that accurately calculating the amount of State aid that has actually benefited the beneficiaries is fairly complex, as it depends on what the prices and amounts of energy produced and sold would have been on the Hungarian wholesale market between 1 May 2004 and the date of termination of the PPAs if none of the PPAs have been in force during that period. As PPAs cover the bulk of Hungarian generation capacities, the market would have been drastically different under the 'counterfactual scenario' ([96]) than it was in reality.

(445) A specific feature of electricity is that it cannot be stored economically once produced. In order to ensure network stability, electricity supply and demand have to be balanced at all times. Consequently, the amount of energy that power generators and importers can sell on the wholesale market during a certain period and the price that they can obtain for that energy do not depend on the overall amount of energy requested by buyers during that period, but on the amount of power requested at each point in time ([97]). Furthermore, electricity demand fluctuates significantly during the day and seasonally, which means that the generation and import capacities needed to satisfy demand at each point in time also fluctuate and that certain power generation units only supply energy during periods of high demand ([98]). Consequently, the operation of the market cannot be assessed with complete accuracy on the basis of the annual consumption, production and price data available to the Commission.

(446) However, according to the case-law of the Court, no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out the amount itself without too much difficulty ([99]).

(447) Accordingly, the Commission provides guidelines on how the recovery amount should be quantified. As mentioned above, the PPAs cover such an important share of the Hungarian generation market that prices without PPAs would have been different from the prices actually observed on the part of the market without PPAs. Consequently, the price generators could have obtained in the absence of PPAs can be calculated on the basis of a market simulation consisting in analysing the operation of the wholesale electricity market under the 'counterfactual scenario'. The purpose of the simulation is to estimate what the sales and prices would have been under the counterfactual scenario with

([95]) Case C-75/97, *Belgium* v *Commission*, [1999] ECR I-030671 point 68, Case C-142/87 Belgium v Commission, [1990] ECR I-00959 point 66, and Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, [1994] ECR I-04103, point 75.

([96]) Defined as a fictitious scenario whereby no PPA was in force between 1 May 2004 and the date of termination of the PPAs. The 'actual scenario' is what actually happened owing to the existence of the PPAs.

([97]) This parameter is expressed in MW and is commonly called 'system load'.

([98]) Periods of high demand are commonly called 'peak load' periods, as opposed to 'base load' periods.

([99]) See, in particular, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, point 25, and Case C-415/03, *Commission* v *Greece*, [2005] ECR I-03875, point 39.

a view to establishing reliable estimates of the amounts that MVM would have paid to the generators concerned for the energy purchased from them under that scenario. The simulation must meet the conditions set out in the following recitals.

(448) First of all, given that electricity has a very low price elasticity demand, the simulation should be carried out under the assumption that at each point in time the system load in the counterfactual scenario is identical to the load actually observed at that time.

(449) Second, as noted in recital 196, bulk electricity is sold on competitive wholesale markets through spot and forward contracts. The Energy Sector Inquiry showed that the level of forward prices depended on individual expectations with regard to the development of spot market prices. Unlike for spot markets, for which the economic theory suggests that in perfectly competitive conditions the price is at each point in time the highest short run marginal cost of all the generation units necessary to meet demand ([100]), there is no explicit price benchmark for forward markets that can be estimated using economic theory. Furthermore, it is not possible to simulate the impact of the strategies developed by both sellers and buyers with regard to arbitrage between spot and forward contracts. This fact is illustrated by the wide variety of situations observed on wholesale markets across Europe. The Energy Sector Inquiry has shown that the ratio between volumes traded in the form of spot products and the national electricity consumption varied significantly across Member States ([101]).

(450) As outlined in recital 198, spot prices, notably those observed on spot power exchanges, normally set references for the entire wholesale market, including for forward products. The Commission therefore takes the view that in order to establish the aid amounts to be recovered, the wholesale market should be simulated under the assumption that all electricity would be traded through spot contracts, with the exception of the particular elements referred to in recitals 453 to 456.

(451) The simulation should be carried out on the basis of the short run marginal costs of the generation units concerned. Consequently, the simulation should take into account relevant data specific to each power generation unit operated in Hungary ([102]) between 1 May 2004 and the actual date of termination of the PPAs, with respect notably to installed capacity, thermal efficiency, fuel costs and other main components of the variable costs, and periods of planned and forced outages. Moreover, the simulation should be carried out under the fundamental assumption that at each point in time there is one single price on the simulated spot market resulting from supply and demand mechanisms. This single price varies over time owing to variation in demand and variable costs.

(452) The simulation should take account of the fact that under the counterfactual scenario, MVM would not have to purchase power in excess of what it needs to fulfil the needs of the public utility segment ([103]). Consequently, the release mechanisms referred to in recital 226 would not exist under the counterfactual scenario and MVM's needs would be limited to the amounts necessary to fulfil demand on the public utility segment.

(453) The simulation should also take into account certain specific, duly justified situations which may entail deviation from the marginal cost principle underlying the whole simulation. Such specific situations may be encountered by cogeneration units. Depending on their contract or statutory obligations with regard to heat supply, these units may have to sell power at a price lower than their short run marginal cost.

(454) Such situations may also concern generation units benefiting from a public support scheme on the grounds that they are based on environment-friendly technologies. This is the case in Hungary where the legislation imposes on MVM and regional distribution companies a mandatory off-take of electricity generated in cogeneration or from waste or renewable energy at officially regulated prices usually higher than the prices observed on the competitive sector of the wholesale market. The simulation must take into account that under the counterfactual scenario, this mandatory off-take scheme would have also been in place. Therefore, the quantities purchased by MVM under the mandatory off-take regime and the prices paid for that energy would have been identical to those observed under the actual scenario ([104]).

([100]) In perfectly competitive conditions, all the generation units necessary to meet demand at each point in time are those which have the lowest short run marginal costs and are able to supply the network with all the power needed to meet demand. Power generation units can be ranked according to their short run marginal costs. Their access to the market at each point in time depends on their ranking in this 'merit order', on the system load and on the power supplied by the generation units that have a higher ranking in the merit order.

([101]) E.g. the ratio is 5 % in France, 11 % in the United Kingdom, 44 % in Italy and 84 % in Spain.

([102]) Whether under PPA or not.

([103]) Taking due account of the losses on the transmission and distribution networks.

([104]) The actual scenario corresponds to the market as it has stood since 1 May 2004 with the existence of the PPAs.

(455) The simulation should also take account of the fact that certain physically available generation capacities are not available for supply of electricity on the wholesale market, since they are reserved for the provision of balancing services to the Transmission System Operator. Under the actual scenario, balancing services were provided both by generators engaged in a PPA and by other generators. The simulation should be carried out under the assumption that under the 'counterfactual scenario' the capacities reserved for the provision of balancing services to the TSO, the energy provided on the basis of these capacities and the price obtained for it were the same as under the actual scenario.

(456) Under the counterfactual scenario, the quantities of electricity imported and exported and the prices obtained for them may have been different from under the actual scenario. However, it would not be possible to accurately assess that effect without extending the scope of the simulation to the markets of the exporting and importing countries, because market actors' decisions with regard to export or import from one country to another are influenced by the market conditions prevailing in both the exporting and importing country. Considering that the volumes imported into and exported from Hungary are limited compared to those generated and consumed internally and taking into account that one third of total imports are covered by long-term contracts ([105]), the Commission considers that such an extension of the scope of the simulation may require disproportionate efforts. Hungary may thus consider that under the counterfactual scenario, the quantities imported and exported and the corresponding prices were the same as under the actual scenario.

(457) The Commission is aware that certain generators not engaged in a PPA with MVM have concluded long or medium term power supply contracts with other customers. However, the Commission takes the view that such contracts should not be taken into account for the purpose of the simulation because the termination of the PPAs at 1 May 2004 or before, which is the basic assumption of the counterfactual scenario, would have necessarily modified the commercial strategies of all generators given the large proportion of installed capacities reserved under the PPAs. As substantiated in recital 449, it is not possible to estimate the proportion of electricity sold in the form of spot and forward products. Therefore, it is reasonable to consider that all generators would sell all their output in the form of spot products, unless they fall in one of the situations referred to in recitals 453 to 456.

(458) The most accurate way of simulating a wholesale electricity market is to do it on an hourly basis, taking account of all parameters specific to each single hour. However, the Commission will accept that the simulation be limited to representative time samples and that the results of the simulations carried out on each representative time sample be extrapolated to the whole period under assessment.

(459) The simulation should yield reliable estimates of the amount of power supplied by each generation unit and the price obtained for it under the counterfactual scenario. The ratio between the power needed by MVM to fulfil the needs of the regulated segment ([106]) and the overall amount of power supplied on the wholesale market at each point in time should be estimated on the basis of historical data concerning the overall consumption of end-users on the regulated segment and the overall consumption of all end-users under the actual scenario.

(460) This proportion should be used to estimate the amounts of power that each generator would have sold to MVM at each point in time under the counterfactual scenario. On the basis of these estimates, the overall amounts that MVM would have paid to each generator for the energy purchased to meet demand on the regulated segment under the counterfactual scenario should be estimated over the whole period of assessment ([107]).

(461) The final step of the calculation of the recovery amounts should take account of the fact that under the actual scenario, generators did not sell all the output of the generating blocks covered by PPAs to MVM but used their unreserved capacities for sale to customers other than MVM. For each generating block concerned the amount of aid to be recovered should be computed on an annual basis according to the difference between the revenues obtained from the sale of energy to MVM under the PPAs ([108]) under the actual scenario and the amounts that would have been paid by MVM under the counterfactual scenario, as calculated in accordance with the principles outlined above.

(462) However, the Commission acknowledges that under the counterfactual scenario, the generators concerned may have obtained higher revenues from customers other than MVM than those obtained from those customers under the actual scenario. This is due in particular to the fact that under the counterfactual scenario no

([105]) Which would have remained in force under the counterfactual scenario.

([106]) This amount corresponds to the power actually consumed by consumers on the regulated segment and an additional amount needed owing to losses on the transmission and distribution networks.

([107]) Between 1 May 2004 and the actual termination of the PPAs.

([108]) These revenues are to be computed on the basis of the prices actually paid by MVM. For the period when regulated prices overrode the price formulae of the PPAs (between 9 December 2006 and 31 December 2007), regulated prices should be taken into account for that calculation.

capacity is reserved by MVM, which offers the generators additional opportunities to sell their output to customers other than MVM. Consequently, Hungary may deduct from the amounts calculated in accordance with recital 461 the difference between the revenues that the generators would have obtained from customers other than MVM under the counterfactual scenario and the revenues that they obtained from customers other than MVM under the actual scenario, if that difference is positive.

(463) The interest to be recovered pursuant to Article 14(2) of Regulation (EC) No 659/1999 should also be calculated on an annual basis.

(464) In order for the Commission to assess the accuracy and reliability of the simulation carried out by Hungary, the latter should provide it with a detailed description of the underlying methodology and of the set of data fed into the simulation.

(465) The Commission is aware of the existence of suitable tools capable of performing the necessary simulation. Such a tool was actually used by the Commission in the context of the Energy Sector Inquiry to assess the structure and performance of six European wholesale markets [109]. Such tools are also used by a number of power generators and traders to do long-term electricity forecasting, conduct resource planning studies and optimise generation despatch. Furthermore, as outlined above, the Commission is willing to accept certain simplifications, notably the use of representative time samples instead of a simulation on an hourly basis. Therefore, on the basis of the principle of loyal co-operation set out in Article 10 of the Treaty, Hungary is required to carry out a simulation in accordance with the principles outlined above and to calculate the amount of aid to be recovered on the basis of that simulation within a reasonable timeframe.

Implementation of the Decision

(466) The Court of Justice considers that a Member State encountering unforeseen or unforeseeable difficulties or perceiving consequences overlooked by the Commission may submit those problems for consideration by the Commission together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the EC Treaty provisions [110].

(467) The Commission therefore invites Hungary to submit to the Commission for consideration any problem that it may meet in implementing this Decision.

8. **CONCLUSION**

(468) The Commission concludes that the PPAs confer illegal State aid on the power generators within the meaning of Article 87(1) of the EC Treaty and that this State aid is incompatible with the common market.

(469) As explained in point 7.3, the State aid element provided for in the PPAs consists in the purchase obligation by MVM of a certain capacity and a guaranteed minimum quantity of electricity at a price covering capital, fixed and variable costs over a significant part of the lifetime of the generating units, thereby guaranteeing a return on investment.

(470) Since this State aid is incompatible with the EC Treaty, it must be ended,

HAS ADOPTED THIS DECISION:

Article 1

1. The purchase obligations as set out in the Power Purchase Agreements between Magyar Villamos Művek Rt. and Budapesti Erőmű Rt., Dunamenti Erőmű Rt., Mátrai Erőmű Rt., AES-Tisza Erőmű Kft, Csepeli Áramtermelő Kft., Paksi Atomerőmű Rt. and Pécsi Erőmű Rt. (signatory of the initial PPA and predecessor of Pannon Hőerőmű Rt.) [111] constitute State aid within the meaning of Article 87(1) of the EC Treaty to the electricity generators.

2. The State aid referred to in Article 1(1) is incompatible with the common market.

3. Hungary shall refrain from granting the State aid referred to in paragraph 1 within six months following the date of notification of this Decision.

Article 2

1. Hungary shall recover the aid referred to in Article 1 from the beneficiaries.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

[109] The Member States concerned were Belgium, France, Germany, Italy, the Netherlands, Spain and the United Kingdom, which are among the largest wholesale markets in Europe.

[110] See Case C-94/87 *Commission* v *Germany* [1989] ECR-175, point 9 and Case C-348/93 *Commission* v *Italy* [1995] ECR-673, point 17.

[111] The company names listed are those that applied at the time of signature of the PPAs.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 [112] as amended by Regulation (EC) No 271/2008 [113].

Article 3

1. Within two months following notification of this Decision, Hungary shall submit to the Commission information concerning measures already taken and measures planned to comply with this Decision, and notably the steps taken to perform an appropriate simulation of the wholesale market in order to establish the amounts to be recovered, the detailed methodology intended to be applied and a detailed description of the set of data that it intends to use for that purpose.

2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures taken and planned in order to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 4

1. The exact amount of aid to be recovered should be calculated by Hungary on the basis of an appropriate simulation of the wholesale electricity market as it would have stood if none of the Power Purchase Agreements referred to in Article 1(1) had been in force since 1 May 2004.

2. Within six months following notification of this Decision, Hungary shall calculate the amounts to be recovered on the basis of the method referred to in paragraph 1 and submit to the Commission all relevant information with regard to the simulation, notably its results, a detailed description of the methodology applied, and the set of data used to carry out the simulation.

Article 5

Hungary shall ensure that the recovery of the aid referred to in Article 1 is implemented within ten months following the date of notification of this Decision.

Article 6

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 4 June 2008.

For the Commission
Neelie KROES
Member of the Commission

---

[112] OJ L 140, 30.4.2004, p. 1.
[113] OJ L 82, 25.3.2008, p. 1.

COMMISSION DECISION

of 2 July 2008

on the measures C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05) implemented by Greece in favour of Hellenic Shipyards

(notified under document C(2008) 3118)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2009/610/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By letter dated 9 September 2003, the Greek authorities submitted to the Commission an application by Hellenic Shipyards S.A. (hereafter 'HSY') for amendments to the investment plan for its restructuring, in favour of which aid was authorised by Commission decision of 15 July 1997 in case N 401/97 [2] (hereafter 'decision N 401/97'). According to the amended plan, dated November 2002, HSY applied for, and eventually received the approval of the Greek authorities to complete the implementation of the investment plan by 30 June 2004. Moreover, according to the amended plan, the aid approved by the Commission in 1997, has not yet been paid out to HSY.

(2) By letter dated 31 October 2003, the Greek authorities explained that the amended plan was communicated to the Commission 'for its information', and was not meant to be a notification.

(3) By letter dated 18 November 2003, the Commission asked the Greek authorities to clarify whether they intended to grant or disburse aid to HSY for the purposes of the amended investment plan. In the same letter, the Commission reminded the Greek authorities that in such a case, and in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [3] (hereafter 'Regulation (EC) No 659/1999') this aid should be notified to the Commission and should not be implemented before the Commission has taken a formal decision in that respect.

(4) By letter dated 16 January 2004 the Greek authorities stated that the aid they intend to grant is 'existing aid', covered by the terms of the Commission's approval decision of 1997, and that the Greek authorities have jurisdiction to approve amendments to the restructuring plan, including the prolongation of the timetable for the plan's implementation.

(5) By letter dated 20 February 2004, the Commission communicated to the Greek authorities its doubts regarding the validity of the above statements.

(6) By letter dated 27 February 2004, the Greek authorities stated that no aid had been granted to HSY to that date.

(7) By decision C(2004) 1359 of 20 April 2004 [4] (hereafter 'the opening decision'), the Commission initiated the procedure laid down in Article 88(2) of the Treaty with respect to the amendments made to the investment plan which is partly financed by the investment aid authorised by decision N 401/97. The opening decision indicates also that the State-owned bank Hellenic Bank of Industrial Development (hereinafter 'ETVA') granted several loans and guarantees to HSY and that the Greek authorities have not provided yearly reports as they should have done.

(8) After having requested and received extensions of the deadline to submit comments, Greece submitted comments on the opening decision by letter of 20 October 2004.

(9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [5]. The Commission invited interested parties to submit their comments on the measures.

(10) After having requested and received extensions of the deadline to submit comments, HSY made comments on the opening decision by letter of 18 October 2004. These comments are the same as the ones submitted by Greece on 20 October 2004. Elefsis, a Greek competitor of HSY, submitted comments by letter of 10 September 2004. These comments were sent to Greece by letters of 16 December 2004 and 23 December 2004, which

replied respectively by letters of 20 January 2005 and 26 January 2005. By letter of 29 March 2005, the Commission sent additional comments of Elefsis to Greece, which replied by letter of 23 May 2005.

(11) From 2002, the Commission had started to receive letters of complaint from Elefsis, which asserted that HSY has benefited from several unlawful and incompatible aid measures and misused aids authorised by the Commission. These letters were dated 23 May 2002, 28 May 2002, 14 August 2002, 24 April 2003, 3 February 2004, 4 March 2004, 30 June 2004, 8 April 2005, 27 April 2005, 24 May 2005, 10 June 2005, 15 July 2005, 28 July 2005, 13 September 2005, 16 September 2005, 21 October 2005, 12 December 2005, 23 December 2005, 6 January 2006, 10 January 2006, 12 January 2006, 18 January 2006, 23 January 2006, 3 February 2006, 9 February 2006, 23 March 2006, 28 March 2006, 6 April 2006, 20 April 2006, 24 May 2006 and 2 June 2006. The Commission sent letters to the complainant on 27 June 2002, 22 July 2004 and 12 August 2005.

(12) These complaints were registered under the numbers CP 71/02 and CP 133/05.

(13) The Commission asked Greece for information by letters dated 30 January 2003, 30 July 2004, 2 May 2005, 24 May 2005, 24 March 2006, 24 May 2006 and 29 May 2006. Greece answered by letters dated 31 March 2003, 21 October 2004, 17 December 2004, 20 June 2005, 25 April 2006, 30 May 2006 and 1 June 2006.

(14) The Commission met the Greek authorities on 22 March 2006 (on this occasion the Greek authorities were accompanied by representatives of HSY as well as Piraeus Bank and provided the Commission with some additional documents), the complainant on 10 January 2003, 14 January 2005, 10 March 2005, 20 May 2005, 19 October 2005, 8 November 2005 and 23 March 2006, and Thyssen Krupp Marine Systems AG (hereafter 'TKMS') on 21 March 2006.

(15) By decision C(2006) 2983 of 4 July 2006 ([6]) (hereafter the extension decision), the Commission extended the procedure laid down in Article 88(2) of the Treaty to include several additional measures in favour of HSY. This extension decision also concludes that several non-notified measures either fall within the scope of Article 296 of the Treaty or do not constitute aid in the meaning of Article 87(1) of the Treaty.

(16) This extension of the procedure in case C 16/04 was made without prejudice to any other existing or forthcoming State aid procedure concerning HSY, notably procedure C 40/02.

(17) After having requested and received an extension of the deadline to reply, Greece replied to the extension decision by letter of 5 October 2006.

(18) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* ([7]). The Commission invited interested parties to submit their comments on the measures.

(19) The Commission received comments from the following interested parties. HSY submitted comments by letter of 30 October 2006. Greek Naval Shipyard Holding (hereafter 'GNSH') and TKMS made a joint submission by letter of 30 October 2006. Piraeus Bank submitted comments by letter of 27 October 2006 and — following a meeting with the Commission on 15 November 2007 — by letter of 27 December 2006. After having requested and received an extension of the deadline to reply, Elefsis submitted comments by letter of 17 November 2006.

(20) By letter of 22 February 2007, the Commission forwarded these comments to Greece, which commented them by letter of 7 March 2007 and 19 March 2007. By letter of 27 April 2007, the Commission sent to Greece annexes to the comments of third parties which it had omitted in the letter of 22 February. In the letter dated 27 April 2007, the Commission also raised several questions to Greece, which replied by letter of 29 June 2007. By letter of 23 August 2007, the Commission asked questions to HSY, which replied by letter of 9 October 2007. By letter of 13 November 2007, the Commission requested from Greece further information and forwarded the answers of HSY of 9 October 2007. Greece replied by letters of 4 December 2007 and 14 December 2007. The Commission met the Greek authorities on 16 October 2007 and on 21 January 2008. The Commission sent additional questions to Greece on 12 February 2008, which replied by letter of 3 March 2008.

(21) A meeting was held on 8 May 2007 between the Commission and TKMS/GNSH as well as HSY's laywer. TKMS/GNSH submitted additional comments by letter of 21 June 2007. The Commission forwarded this letter on 11 September 2007 to Greece, which submitted comments by letter of 11 October 2007. Following a second meeting held on 9 January 2008 between the Commission and the same persons, TKMS/GNSH made an additional submission by letter of 18 January 2008, which was forwarded to the Greek authorities by letter of 12 February 2008.

(22) The Commission met Elefsis on 15 March 2007 and on 7 August 2007. Following the latter meeting, Elefsis made additional comments by letter of 8 November 2007, which were submitted to Greece by letter of 17 January 2008. Greece commented by letter of 15 February 2008.

(23) Piraeus Bank submitted additional comments by letter of 22 October 2007, which were forwarded to Greece by letter of 13 November 2007. On 12 February 2008, Piraeus Bank asked to meet once more the Commission. The meeting took place on 5 March 2008.

(24) Article 6 of Regulation (EC) No 659/1999 indicates that the Member State and the other interested parties have a one-month period to submit comments and 'In duly justified cases, the Commission may extend the prescribed period'. In the present case, the parties have continued to make submissions (and to request meetings with the Commission) after the expiration of this period. Initially, the Commission has forwarded these submissions to Greece for comments and thereby signalled to Greece that the Commission has accepted these submissions made after the expiration of the one month period. The Commission also accepted initially the meeting requests from the interested parties and, during these meetings, it accepted when the interested party in question asked to be allowed to make a submission to complement the issues discussed during the meeting. However, the Commission has never indicated to the interested parties that their other submissions made after the expiration of the one month period would be accepted. In particular, the Commission has never indicated to the interested parties that they could indefinitely submit comments or that the Commission would inform them when it will stop to accept submissions.

(25) The Commission considers that a prolongation of the prescribed period beyond one month was justified in the present case because the extension decision covers a large number of measures. In addition, the assessment of several of these measures requires complex legal analysis and the clarification of facts as old as 10 years.

(26) However, some interested parties have continued to make submissions to the Commission more than one year after the publication of the extension decision. If the Commission had not decided to ignore the comments submitted after a certain date, this continuous submission of comments would have prevented the Commission to arrive at a final decision in a reasonable period [8]. In addition, in some submissions, some parties were commenting again issues which they had already commented in their previous submissions, without bringing new factual elements. This can not be the purpose of extending the period for submitting comments.

(27) Consequently, the Commission has decided that any submission received from 5 March 2008 (i.e. date at which the Commission received the 4-pages-letter dated 3 March 2008 by which Greece replied to the Commission letter of 12 February 2008) would be considered as submitted after the expiration of the period for submitting comments. This concerns the submission of Elefsis dated 7 Mars 2008, 24 April 2008, and 2 June 2008 [9], and the submission of GNSH/TKMS of 2 April 2008. This means that these submissions have not been sent to Greece for comments and have not been taken into account in the present decision.

2. PRIOR DECISIONS OF THE COMMISSION AND OF THE COUNCIL

(28) The facilities of HSY are among the largest of the eastern Mediterranean. The yard is situated in Skaramanga, West of Athens, Attica. HSY was established in 1939 by the Hellenic Navy and purchased in 1957 by Mr Niarchos' group. The extended crisis in the shipping sector, which followed the first oil crisis, had a negative effect on HSY's level of activity. In April 1985, the situation was so critical that the firm ceased operations and entered into liquidation process. In September 1985, the State-owned bank ETVA bought the company. The activities resumed after this sale. However, the activities of the firm were insufficient in view of the large facilities and the large number of employees [10].

(29) Greece obtained in 1990 from the Council a special provision in Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (hereafter 'Directive 90/684/EEC') [11] allowing operating aid for restructuring in the framework of the privatisation of several yards.

(30) In 1992, due to its financial obligations and accumulated losses, HSY was put into liquidation. In November 1993, following two unsuccessful efforts to sell HSY, the liquidation process was revoked. On the basis of the undertakings given by the Greek Government that its public yards would be privatised by 31 March 1993, the Commission authorised on 23 December 1992 [12] a debt write-off in favour of HSY. The Greek Government having failed to respect the March 1993 deadline, the Commission opened on 10 March 1994 a procedure (C 10/94) for misuse of the authorised aid [13]. On 26 July 1995, the Commission decided [14] to close the procedure with a negative decision concerning the aid in favour of HSY. However, at the request of the Greek Government, claiming that the sale of the yard was imminent, the Commission decided to suspend notification of that decision. Finally, the Greek authorities

informed the Commission that 49 % of HSY's shares had been sold to its employees, Greece using the opportunity to keep a majority holding in one of the yards, justified by defence reasons as provided for in Article 10(3) of Directive 90/684/EEC. On 31 October 1995, the Commission revoked the final negative decision for HSY ([15]). In the meanwhile, the amount of debts was growing and restructuring had not been carried out. The Commission therefore extended on 8 January 1997 the procedure initiated in case C 10/94 ([16]). Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring ([17]) (hereafter 'Regulation (EC) No 1013/97'), including HSY, was then adopted.

(31) On 15 July 1997, the Commission approved aid for HSY in two separate decisions:

— by the first decision ([18]) (hereafter 'decision C 10/94'), the Commission closed the procedure C 10/94 launched in 1994 by approving a debt write-off amounting to GRD 54,5 billion (EUR 160 million) under Regulation (EC) No 1013/97,

— by decision N 401/97, the Commission, further to a notification of the Greek authorities of 20 June 1997, approved a grant of GRD 7,8 billion (EUR 22,9 million) for an investment programme of GRD 15,6 billion (EUR 45,9 million) aimed at the restructuring of the shipyard.

(32) In 2001, the government decided to fully privatise HSY. The Greek State initiated an open bidding competition, for which a tender document was established. On 31 May 2002, ETVA and HSY's employees sold their HSY shares to a consortium constituted of HDW and Ferrostaal ([19]) (hereinafter 'HDW/Ferrostaal'). This consortium founded GNSH in order to harbour the holding in HSY. HDW and Ferrostaal were equal shareholders of GNSH. ThyssenKrupp took over HDW in January 2005 ([20]) and acquired Ferrostaal's shares in GNSH in November 2005 ([21]). Since the end of 2005, ThyssenKrupp has therefore 100 % ownership and control of HSY. GNSH and HSY are harboured in TKMS, ThyssenKrupp's division specialised in systems for naval vessels and specialised commercial ships.

(33) In August 2001, during the bidding process for the sale of HSY, the Greek State has adopted law 2941/2001, which includes several measures aimed at facilitating the sale of HSY. First, the law gives incentives to the workers to voluntarily leave the company. Second, the Greek State will take over some of the one-off pension costs of HSY. Third, the law makes it possible for HSY to benefit from a number of tax-exempt reserves if they are set off against losses from previous years. Fourth, the law contains a provision for the compensation for the workers that were shareholders in HSY prior to the privatisation. More precisely, the Greek State will reimburse the workers for the amounts they invested in HSY in the framework of the capital increases carried out over the preceding years. On 5 June 2002, the Commission adopted a two-fold decision (hereafter 'decision N 513/01') ([22]) regarding several measures included in law 2941/2001 and which Greece had notified in 2001 (notification registered under number N 513/01). The Commission decided to approve closure aid of EUR 29,5 million in favour of HSY and to open (under the case number C 40/02) the formal investigation procedure laid down in Article 88(2) of the Treaty as regards: (1) payment by the State of some of the one-off costs of the retirement of HSY employees; (2) transfer of a number of reserves of the balance sheet without paying the statutory 10 % tax. The final Decision taken on 20 October 2004 ([23]) (hereafter 'decision C 40/02') concluded that these two measures constituted incompatible State aid that has to be recovered.

3. ASSESSMENT OF HORIZONTAL ISSUES

(34) The present decision concerns 16 measures. Before assessing them one by one, the Commission needs to clarify some key issues which are relevant for the assessment of several of these measures.

3.1. Horizontal issue 1: Creditworthiness and access to the financial market between 1997 and 2002

(35) For the assessment of most of the measures subject to the current decision, it is necessary to determine what the economic and financial situation of HSY was during the years 1997–2002 and whether one could have reasonably expected that the firm would return to long term viability. In addition, it has to be determined whether in these circumstances a market economy investor would have accepted to grant HSY loans and guarantees similar to the ones that have been granted by the State and the State-owned bank ETVA. The latter were the only institutions that provided financing to HSY during that period.

(36) The Commission will start by analysing the situation in 1997 and afterwards analyse the evolutions until 2002.

3.1.1. *Situation in 1997*

(37) To start this analysis, it is necessary to verify whether the Commission has already expressed itself on this issue in earlier decisions. First, the Commission recalls that in

decision N 401/97 and decision C 10/94, both adopted by the Commission on 15 July 1997, the Commission did not put into question the validity of the business plan submitted by Greece. Therefore, the Commission implicitly acknowledged that the implementation of this plan was able to restore the viability of HSY. Second, the descriptive part of decision N 401/97 indicates that the yard will finance a part of the restructuring plan by means of bank loans amounting to GRD 4,67 billion borrowed on market terms without State guarantees. By not putting into question the feasibility of this financing, the Commission acknowledged that the firm should be in a position to have access to the loan market, at least for the amount at stake. Indeed, if the Commission had been of the opinion that the yard was unable to obtain loans amounting to at least GRD 4,67 billion, it should have indicated that the restructuring plan was unfeasible and should have prohibited the large amounts of restructuring aid (including the investment aid). In conclusion, the Commission can not contradict these two earlier assessments in the present Decision.

(38) Without contradicting them, the Commission nevertheless recalls how weak the situation of the yard was in 1996–1997.

(39) First, as regards the physical infrastructure, decision N 401/97 indicates that equipments of the yard were old and outdated, and that the investment plan was the first investment plan since the construction of the yard ([24]). Decision C 10/94 also indicates that this modernisation of the infrastructures was necessary to restore competitiveness and viability. It can therefore be concluded that the return to viability was conditional on the rapid implementation of the investment plan.

(40) Second, as regards the commercial activities of HSY and the size of its order book, the Greek authorities themselves acknowledge that 'at the time of the presentation of the investment plan, the firm had not signed shipbuilding contracts, the activity of the yard being characterised by a great uncertainty regarding its future, an absence of clear commercial strategy and a lack of investments. The only serious activity was the termination of the MEKO type frigates for the Greek Navy' ([25]). Since the shipbuilding order book was empty and since the yard needed a sufficient level of shipbuilding activity to be viable in the future years, the Commission considers that the return to viability was depending on the rapid signature (i.e. conclusion) of profitable civil or military shipbuilding contracts.

(41) Third, as regards the financial situation of HSY, Table 1 provides the key accounting figures. As regards the solvability of the firm in 1997, one observes that the firm had a large amount of equity ([26]). However, this positive situation was entirely the consequence of the massive debt waivers implemented by the State in 1996. In particular, the State wrote off GRD 54,52 billion (EUR 160 million) of debts related to civil activities — this waiver was approved by decision C. 10/94 — and GRD 46,35 billion (EUR 136 million) of debts related to military activities. The seemingly healthy balance sheet observed on 31 December 1996 was somehow 'artificial' and in particular it was not at all a proof that the yard had restored its competitiveness and that the causes of the severe difficulties encountered over the last twenty years had been tackled. Without the complete implementation of the restructuring plan, the yard would most probably record losses which would rapidly deplete these own resources (i.e. the net equity). It has to be kept in mind that HSY had been put twice in liquidation during the preceding 12 years. In conclusion, this positive equity would not have sufficed to convince a bank to lend to HSY at a normal interest rate, i.e. at the interest rate charged when lending to healthy firms.

Table 1

Figures for HSY's turnover, profit and net equity from 1997 to 2005

(EUR millions)

	1997	1998	1999	2000	2001	2002	2003 ([1])	2004	2005
Share capital	86	91	92	95	65	106	106	121	121
Net Equity	82	88	54	17	− 4	− 78	− 83	− 111	− 182
Turnover	74	83	30	59	55	89	112	130	198
Profit	7	1	− 36	− 42	− 21	− 115	− 1	− 45	− 71

([1]) Financial year 2003 ran from 1.1.2003 till 30.9.2003.

(42) In conclusion, the Commission considers that in 1997 the yard was still in difficulty and not competitive yet, but a return to viability could be expected if the investment plan was implemented in full and in time and if the yard succeeded in rapidly concluding profitable shipbuilding contracts. Since the return to viability was conditional upon these two uncertain developments, lending to HSY in 1997 and in the following years presented 'a particular risk'. A private bank would have accepted to grant loans or guarantees to HSY, but at a price reflecting the significant risk. In a situation presenting 'a particular risk' the Commission notice on the method for setting the reference and discount rates [27] indicates that the adequate reference point to determine the existence and the amount of State aid is the reference rate for Greece (i.e. ATHIBOR plus 300 basis points until 31 December 2000 and 5 year EUR swap rate plus 75 basis points from 1 January 2001) increased by a risk premium of at least 400 basis points (i.e. this means ATHIBOR plus at least 700 bps until 31 December 2000 and 5 year EUR swap rate plus at least 475 bps from 1 January 2001). As regards guarantees on loans, the Commission will assess the existence of aid on the basis of the same method, i.e. by comparing the total cost of the guaranteed loan (i.e. interest rate paid by HSY to the bank plus guarantee premium paid by HSY to the guarantor) with the cost which HSY would have supported if it had concluded this loan on the market (i.e. reference rate for Greece plus at least 400 basis points).

3.1.2. *Evolution from 1997*

(43) As will be explained below, the Commission can not exclude that until 30 June 1999 HSY was still able to borrow from the market at the interest rate such as defined in the previous section [28].

(44) HSY recorded slight net profits in 1997 and 1998 [29]. However, during these two years it did not succeed in concluding any shipbuilding contract [30] — either military or civil — which would have been necessary to ensure a sufficient level of activity in the next years and to avoid making losses. The first shipbuilding contract that the yard succeeded to conclude concerned the construction of two ferries for Strintzis. It was signed only at the beginning of 1999 [31]. In addition, from the outset it was known that the sales price was too low to cover the costs and that this contract would therefore cause a loss [32]. In July 1999, the Greek navy awarded the construction of three submarines to HSY and HDW. The three submarines were planned to be constructed over nearly 10 years and the total contract was amounting to around GRD 350 billion (EUR 1 billion), of which around three quarters would go to HDW, which was due to supply the machinery, pressure components and sensitive electronics systems. In addition, the first submarine was to be constructed at HDW's yard in Kiel [33]. Therefore this project would not generate a lot of activities and income for HSY during the first years [34].

(45) In view of the failure to build a large and profitable order book in 1997, 1998 and in the first months of 1999, the management and any investor having analysed the situation of the yard must have realised at the latest in the first months of 1999 that the yard would not have a sufficient level of activity in 1999 and 2000 to cover its costs and that in these years the yard would record large losses reducing its net equity to a small amount [35]. In these circumstances a return to viability could not be expected anymore [36]. As a subsidiary element, the Commission notes that the first report performed by the Greek authorities regarding the implementation of the investment plan showed that on 30 June 1999 only a small part of the plan had been completed. Therefore, besides the commercial setbacks, the modernisation of the facilities was slow [37]. Finally, the Commission notes that the looming financial difficulties caused a dispute between the independent management team of the yard (i.e. Brown & Root, which was appointed in September 1996) and the employees/shareholders. In particular, the management insisted on the necessity to carry out additional workforce reduction due to the low level of activity. The union leaders opposed to such a reform and succeeded in getting the management team ousted [38]. Such an event, creating management discontinuity and illustrating the difficulty to implement sufficient reforms in the yard, was an additional element which would have deterred a market economy investor to lend money to HSY.

(46) From the foregoing, the Commission concludes that from 30 June 1999 it was not reasonable anymore to expect a return to viability. Consequently, the Commission considers that from that date no bank would have accepted to lend to the yard anymore, even at high interest rates, and no bank would have accepted to grant a guarantee anymore, even in exchange of a high guarantee fee. Since HSY would not have received a loan or guarantee from the market, any loan or guarantee granted after 30 June 1999 automatically constitutes aid. If found incompatible and still outstanding, any guarantee has to be stopped immediately, and any loan has to be immediately reimbursed. The reimbursement — following the normal time schedule laid down in the loan contract and following from the present decision — of any loan granted after 30 June 1999 is however not sufficient to restore the initial situation since until the reimbursement date HSY has had at its disposal a financing that it normally would not have obtained from the market. In order to restore the initial situation, this advantage, of which the size can only be approximated by using the interest rate of a very risky

loan, should therefore also be recovered. Therefore, for the period running from the pay-out of the loan to HSY until the reimbursement by HSY, the Commission has to order the recovery the difference between the interest rate actually paid by HSY and an interest rate theoretically adequate for a loan presenting a very high risk. In order to determine the latter interest rate, the Commission notes that the Commission notice on the method for setting the reference and discount rates indicates that the risk premium may be higher than 400 basis points above the reference rate 'if no private bank would have agreed to grant the relevant loan', which is the situation in the present case. In several decisions, the Commission has considered that a premium of 600 basis points above the reference rate was adequate minimum to reflect a situation containing a high risk [39]. The Commission considers that this constitutes the minimum for loans in the present situation. As regards State guarantees granted after 30 June 1999, the Commission will use the same approach: for the period for the pay-out of the guaranteed loan until the termination of the guarantee — whether following the normal calendar laid down in the guarantee contract or following from the present decision — the Commission will order the recovery of the difference between the cost of the guaranteed loan (interest rate paid to the bank plus guarantee premium paid) and the reference rate for Greece increased by 600 basis points.

(47) In order to underpin its claim that the loans and guarantees granted by the State and ETVA could have been granted at the same terms by a private bank, HSY has submitted the first Deloitte report [40]. In the section 5 of this report, Deloitte analyses the creditworthiness of HSY in 1999 and in the following years. It concludes that 'the Company could have alternatively borrowed or received letters of guarantee from another non-affiliated financial institution (i.e. with no other relationship, apart from the regular commercial collaboration) during the period under examination' [41]. The Commission observes that the report does not explain how this conclusion can be reconciled with the fact that HSY's attempts to raise funds from other financial institutions have failed [42]. In addition, the Commission notes that the analysis contains a series of errors [43], which significantly bias the conclusion.

3.1.3. *Intra-group analysis*

(48) All the loans and guarantees subject to the current procedure were granted by ETVA or by the State. The Greek authorities claim that since ETVA and the Greek State (through ETVA) were shareholders of HSY, the loans and guarantees could be seen as intra-group transactions. In this context, Greece makes two claims:

— First, that it is normal for a mother company to lend at favourable conditions to its subsidiary. Indeed, the advantage granted to the subsidiary increases the value of the shares held by the mother company. Therefore, even if the Commission would consider that ETVA and the State granted loans and guarantees at a price below the market price, this would have been acceptable to a market economy investor in a similar situation. Consequently, these loans and guarantees would not constitute aid,

— Second, it is normal for a mother company to lend to its subsidiary in difficulty. Indeed, such lending aims at preserving the value of the shareholding held by the mother company. Therefore, even if the Commission should consider that no private bank would have lend to HSY during a certain period because the yard's situation was too bad, loans and guarantees granted by ETVA and by the State should nevertheless be considered as acceptable for a private investor in similar circumstances. These loans and guarantees would therefore not constitute aid.

(49) The Commission consider that Greece's conclusions are not correct.

(50) First, the Commission notes the two following elements. In first instance, no market economy investor would have found itself in the situation of ETVA. Indeed, it is recalled for instance that when ETVA purchased HSY in 1985, it was a development bank, acting upon order of the government, in order to avoid the closure of a company of significant importance for the Greek economy [44]. In order to keep HSY alive, ETVA made in 1986 a capital injection, which was found to constitute aid by the Commission [45]. In 1995, ETVA kept 'a 51 % majority holding' in HSY because Greece claimed it was 'justified by defence interest', in accordance with Article 10 of Directive 90/684/EEC. In second instance, the Commission observes, when all the measures implemented by the State (including the measures implemented by ETVA, since, as will be demonstrated later in this Decision, they are imputable

to the State) in favour of HSY are taken into account — and in particular the repeated and large State aids granted to HSY in the period until 2002 —, it appears clearly that, during the period until 2002, the State has not acted as a market economy investor. It has constantly provided the large financial support necessary to keep HSY alive, what has been highly costly. In conclusion, since the State (through ETVA) found itself in the situation of being the shareholder of HSY only because it acted as a public authority willing to preserve the activities of HSY at all costs and since it has never acted like a market economy investor who wants to make money thanks to its shareholding in HSY, the claim that ETVA and the State acted in a way acceptable for a market economy investor because the too low interest rates (or guarantee fee) charged on the financing (loans and guarantees) which they granted to HSY was compensated by an increase of the value of the share of HSY lacks credibility. Since the State (included ETVA) has never acted like an investor trying to make profit but conversely accepted to keep HSY alive at that high price, Greece and HSY should have at least underpinned their claim by a detail analysis showing that, as shareholder of HSY, the State and ETVA could really expect a capital gain (i.e. an increase of the value of the shares) higher than the 'foregone revenues' (i.e. the insufficient interest rate or the insufficient guarantee premium). Since such an analysis has not been provided and since HSY and Greece made that doubtful and hypothetical claim without any supporting evidence, the Commission dismisses without further analysis their claim that the State (including ETVA) acted as a market economy investor since the financing granted at favourable terms triggered an increase of the value of HSY shares which was sufficiently important to compensate the 'foregone revenues'.

(51) Second, even if the foregoing reasoning were dismissed and the intra-group aspects should be analysed (i.e. the potential increase of the value of HSY's shares), there are ample evidence that the transactions carried out by ETVA would have not been acceptable for a market economy investor which would have hold a 51 % shareholding in HSY.

(52) At the end of 1995, 49 % of the ownership of HSY was transferred to the employees of HSY. The price that the employees would pay to purchase this 49 % stake was decided at that moment. Therefore, in the following years, when ETVA and the State were providing financing to HSY at a price below what a (non-affiliated) private bank would have charged, 49 % of the increase of the value of HSY resulting from this savings (i.e. HSY was paying lower interest rates) was benefiting the other shareholders of HSY. Only 51 % of the advantage (reduction of the interest rates charged and of the guarantee premiums charged) granted by ETVA and the State to HSY was returning to them in the form of an increase of the value of HSY. No market economy investor would have accepted to make such a gift to the other shareholders of HSY. In order to avoid losing money in favour of these other shareholders, a market economy investor would have charged an interest rate similar to the one charged by (non affiliated) private banks. The first claim of the Greek authorities is therefore unfounded.

(53) As regards the period after 30 June 1999, at a time when no private bank would have provided financing to HSY because the risk of bankruptcy was too high, the same reasoning applies. In particular, a rational investor holding only 51 % of a firm would have at least asked the other shareholders to provide financing in proportion to their shareholding in HSY. If these other shareholders did not have the resources to provide this financing, a rational investor would have at least negotiated the provision of financing to HSY against a higher shareholding in HSY. Providing significant financing to HSY without co-financing or without concessions by the other shareholders was similar to put one's own money at high risk to save the value of the shares held by someone else. No market economy investor in similar circumstances would have accepted to make such a gift to the other shareholders [46]. The second claim of the Greece authorities has therefore to be rejected.

3.2. **Horizontal issue 2: Imputability of ETVA's behaviour to the State**

(54) Several of the 16 measures analysed in the present decision were not granted directly by the State. They were granted by the State-owned bank ETVA. Since Greece, HSY and TKMS/GNSH contest the imputability to the State of these measures while Elefsis and Piraeus Bank confirm it, this issue has to be analysed.

(55) These measures were granted by ETVA between 1996 and 2002. According to case-law, such measures may qualify as State aid pursuant to Article 87(1) of the Treaty only if the State was in a position to control ETVA and if the public authorities have 'been involved, in one way or another, in the adoption of those measures' [47].

(56) ETVA, whose initials stand for Industrial Development Bank of Greece, was founded in 1964 following the merger of three organisations (the Industrial Development Organisation, the Economic Development Financing Organisation and the Tourist Credit Organisation). It was converted into a corporation by Law 1369/1973. Since 1973 it has therefore operated as a State-owned bank. According to Greece [48], 'The main purpose stated in the statue of ETVA as a development bank was promotion of the development of the country through the financing of production activities in the Greek economy (tourism, industrial production, etc.)'. ETVA was the only development bank in Greece. ETVA therefore endeavoured to play a decisive role in the economic and regional development of the country by financing enterprises, developing the regional infrastructure of the country, providing venture capital and participating in undertakings with strategic importance for the Greek economy. In 1995, following financial difficulties resulting from these activities, the recapitalisation, restructuring and modernisation of the bank became a top priority of the Greek government. This was done on the basis of a five-year programme within the framework of Law 2359/95. In addition to the provision of GRD 427 billion of capital by the government, the aim of the restructuring was to implement a new strategic orientation, change the organisational structure and formulate modern business procedures which respond to present-day conditions of competition. Consequently, 'In addition to its development activity, ETVA developed commercial banking services, in particular from 1997 onwards' [49].

(57) In 1999, the State, which held 100 % of ETVA's shares, decided to proceed with the bank's listing on the Athens Stock Exchange, offering 24 % of its share capital to the public. The State decided to proceed even further with the bank's privatisation and reduce the State's participation to below 50 %. A call for tender was conducted and Piraeus Bank was chosen. On 20 March 2002, shares representing 57,7 % of ETVA's capital were transferred to Piraeus Bank [50].

(58) Regarding the possibility for the State to control ETVA, the Commission observes that until the end of 1999 ETVA was fully owned by the Greek State. The State kept a majority shareholding until the transfer of the majority of the shares to Piraeus Bank on 20 March 2002. The State was therefore in a position to control ETVA at least until 20 March 2002. This also illustrate that State resources were involved in the measures implemented by ETVA.

(59) Regarding the involvement of the State in the adoption of the different measures, the Commission observes the following points:

— First, the Commission notes that the three most significant decisions regarding ETVA's shareholding in HSY have not been decided independently by ETVA's management: these decisions have been taken by the government and implemented by ETVA. Indeed, when ETVA purchased the bankrupt HSY in 1985, this was a government decision [51]. ETVA simply implemented this State decision and rapidly made a large capital injection in HSY, which was considered to be State aid by the Commission [52]. This illustrates that the relation between ETVA and HSY has from the outset been a relation of State support in favour of a company which was important — in terms of employment and of activities — for the Greek government. The second major decision was the sale by ETVA of 49 % of HSY's capital to the employees, which was decided by Law 2367/1995 [53]. In addition, this Law imposes significant restructuring measures on HSY [54] (and grants very large aid amounts to the yard). The third major event was the privatisation of HSY in 2001–2002 (i.e. ETVA had to sell its remaining 51 % shareholding in HSY). This privatisation was decided by decision No 14/3-1-2001 of the relevant Inter-ministerial Privatisation Committee and took place within the framework of the Greek Privatisation Law 2000/2091. This was constantly repeated in the tender documents submitted to the interested investors/bidders by Alpha Finance, which was the bank organising the sale of HSY on behalf of the State and of the Sellers (ETVA and the employees). The tender documents dated 2 April 2001 also indicate that the State will select the preferred bidder with the Sellers. In conclusion, the three crucial decisions concerning ETVA's shareholding in HSY were decided by the State.

— In addition to its direct involvement at these three occasions, the State granted very large amounts of aid during the period 1995 to 2002. The State wrote off GRD 54,52 billion (EUR 160 million) of debts related to civil activities — this waiver was approved by decision C 10/94 — and GRD 46,35 (EUR 136 million) of debts related to military activities. As indicated in decision N 401/97, the State also intended to grant GRD 7,8 billion (EUR 22,9 million) of investment aid. During the bidding process in 2001, the Greek State enacted law 2941/2001, which contained a large amount of financial support aimed at facilitating the privatisation of HSY (see recital 33 of the present decision). As the Commission indicated in decision N 513/01, the

State committed for instance to pay EUR 118 million as incentives to encourage employees to voluntarily leave the company. By granting large and repetitive aids, the government clearly signalled that it considered the survival of HSY as politically very important ([55]).

— Finally, the Commission observes that the State awarded strategic defence contracts to HSY during these years, like for instance the construction of the submarines. Consequently, the State had a direct interest in monitoring the activities of HSY and ensuring the continuation of the operations of the yard.

(60) By deciding the size of the shareholding of ETVA in HSY, by giving constantly large financial support to HSY and because it granted military contracts of high importance for Greece's security, the Greek government signalled very clearly that it attached a great importance to HSY's activities and was monitoring the situation of the yard carefully. In this general context, the Commission consider that, until ETVA's privatisation in March 2002, the imputability of ETVA behaviour to the State can not be questioned. Indeed, in these circumstances, it was impossible for ETVA's management to develop towards HSY a lending policy which would not have been in line with the policy of steady support adopted by the government. In particular, it would have been impossible for ETVA to take a decision creating financial problems for HSY. For instance, ETVA could not have charged a high interest rate (i.e. a high 'spread' above the interbank rate) on the loans granted to HSY, since this would have deteriorated HSY's financial situation, what would have been politically unacceptable for the government. Similarly, ETVA could not have refused to grant a loan demanded by HSY to finance its operations ([56]). In other words, ETVA had no other choice than remaining coherent with the policy of strong and continuous support toward HSY adopted by the State. Consequently, the Commission concludes that all the measures implemented by ETVA towards HSY (loans, guarantees, capital injections, etc.) were automatically imputable to the State, and that it is not necessary to bring forward additional evidence of the State's involvement at the moment when each of these measure were adopted by ETVA. In conclusion, the Commission considers that the different measures carried out by ETVA are imputable to the State.

(61) As subsidiary grounds, the Commission also notes the following elements confirming the imputability of ETVA's behaviour to the State.

(62) First, in 1995 ETVA sold only 49 % — and thus not 100 % — of HSY shares to the employees. 'Greece invoked its military needs in shipbuilding to justify retaining 51 % of the yard as allowed by Article 10 of the Directive' ([57]). Article 10(3) of the Directive 90/684/EEC indeed provides that 'Notwithstanding the obligation to dispose of the yards by sale referred to in paragraph 2, the Greek Government shall be allowed to maintain a 51 % majority holding in one of the yards if justified by defence interests.' This illustrates that ETVA's 51 % stake in HSY was aimed at allowing the State to control HSY with the goal of preserving the defence interests of Greece. It is obvious that in this context ETVA's management could not have developed towards HSY a relation based on commercial terms. Any decision regarding the provision of financing to HSY and the terms of this financing could not go against Greece's defence interests. In particular, the Commission fails to see how ETVA's management could have refused to grant a financing to HSY or could have charged a high interest rate on these financings. Moreover, if Greece's goal was the preservation of defence interests, one can suppose that the government was in fact directly supervising any significant decision of the management of HSY and any decision of ETVA regarding financing provided to HSY.

(63) Second, since ETVA's mandate as 'development bank' was defined by the State, it can be concluded that all the activities of ETVA implemented in the framework of that mandate were imputable to the State. In a similar manner, the case law indicates that, in order to analyse the imputability of measures adopted by a firm 'the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators' ([58]) may be relevant. In this context, the Greek authorities acknowledge that 'ETVA from its creation onwards did not function like a usual commercial bank but as a special development credit institution mainly active in the field of long-term credits playing a decisive role in the economic and regional development of the country' ([59]). In this context, the Commission recalls that ETVA purchased HSY in 1985. The involvement of ETVA within HSY was therefore developed within this mandate as 'development bank', and not within the framework of its commercial activities which started not earlier than 1997. Since ETVA had until then to support HSY within its mandate as 'development bank', ETVA could not suddenly from 1997 stop providing the loans and guarantees demanded by HSY and let the yard go bankrupt. In this context, the Commission recalls that, in the second half of the nineties, ETVA has been authorised to develop commercial activities besides its development activities, and not in replacement of its development activities, which had to be continued.

(64) Third, according to case-law, 'the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law' [60] may be relevant to show imputability. In this respect, since ETVA, as a State-owned development bank, has as its principal corporate object to further the country's development by financing the Greek economy, it was not subject to banking directives [61]. It is only when ETVA's shares were listed on the Athens Stock Exchange on 12 January 2000 that ETVA became subject to the standard supervisory rules applicable to commercial banks.

(65) Fourth, the Commission observes that during the period 1996–2002, the State was particularly attentive to the operations of ETVA. Indeed, the State adopted Law 2359/95 in order to restructure ETVA and injected hundred of billions of drachma whitin that framework. In 1999, it decided to list a part of the capital on the Athens Stock Exchange. One year later, it decided to privatise the majority of the capital of ETVA. This privatisation was completed in 2002. This illustrates that during the period 1996–2002, the State was deeply interested in the operations of ETVA. The loans and guarantees provided to HSY were of a size [62] sufficiently large such that the granting decisions could not have been taken by ETVA's management without endorsement or direct order of ETVA's sole shareholder.

(66) In the foregoing paragraphs the Commission has demonstrated that, in the period preceding the sale of the ETVA to Bank Piraeus in March 2002, all the measures implemented by ETVA involved State resources and all the measures implemented by ETVA towards HSY were imputable to the State. When it will assess individually each of the measures implemented by ETVA, the Commission will therefore not demonstrate these two points anymore.

(67) The Commission will only discuss again these two issues in the assessment of measure E18c, because some parties claim that this measure was granted by ETVA in May 2002, i.e. after the purchase of ETVA by Piraeus Bank.

3.3. **Horizontal issue 3: aid measures partially financing the military activities of HSY**

(68) In its answer to the extension decision, Greece claims that several of the measures investigated by the Commission have supported the military activities of the yard. Greece therefore claims that they fall under Article 296 of the Treaty, and can not be assessed — and even less recovered — under State aid rules.

(69) The Commission has therefore to assess whether some measures could partially or entirely fall within the scope of Article 296 of the Treaty.

(70) None of the parties to the present procedure contests that HSY has civil and military activities. Over the last 15 years, the main civil activity was the repair of civil ships. HSY has also built railstock material and hulls of civil ships. HSY's military activities consisted in the construction and repair of military ships and submarines for the Greek Navy.

(71) The Commission recalls that the extension decision has already identified the measures supporting exclusively the military activities of the yard. The extension decision concludes that these measures entirely fall under Article 296 of the Treaty and are not subject to State aid rules. The extension decision has not been challenged at the Court.

(72) Some of the State supports covered by the present decision were not assigned to a particular activity, i.e. they were not earmarked to finance a given project. The Commission has therefore to determine to which extent these State supports benefited the military activities and to which extent they benefited the civil activities. This calculation is made complicated by the fact that HSY did not keep separate accounts for the civil activities and for the military activities. In these circumstances, the Commission will base its analysis on the relative size of the two activities. It must therefore assess the relative weight each activity. The Commission observes that any State support (e.g. financing, capital injection, etc) granted to HSY (and not assigned to finance a particular activity) has at the same time covered losses of the past (i.e. losses generated by past contracts) and allowed the yard to finance future activities. In order to determine to which extent a given State support benefited the civil and the military activities, the Commission therefore considers that the analysis must not be limited to the division between civil and military activities (i.e. the relative weight of each activity) in the year when the support was provided, but it is necessary to calculate the average division between these two activities over a sufficiently long period. The fact that the relative weight of the two activities varies strongly from one year to another also justifies using an average over several years. Indeed, a given year may not be representative of the average division between the two activities over the medium and long term.

(73) In the framework of the procedure for the recovery of the aid found unlawful and incompatible by decision C 40/02, Greece has claimed that the civil activities accounted for 25 % of the activities of HSY and the military activities accounted for 75 % of the activities. To underpin this claim, Greece provided data regarding the work-hours and the turnover (i.e. sales value) of the two activities for the years 1997 to 2005 ([63]). In the context of the present procedure, Greece has not contested these figures. In addition, the Commission had already accepted a division 25 % civil/75 % military in the decision N 513/01, which has not been contested in front of the Court. On the basis of the foregoing, the Commission will consider that the civil activities accounted for 25 % of the activities of HSY and the military activities for 75 % of the activities.

(74) With regards to the military activities of HSY, the Commission has consistently accepted in earlier decisions that the support provided to them is outside the scope of the State aid rules ([64]). The Commission repeated that assessment in paragraphs 86 to 90 of the extension decision. Since the measures which are the subject of the present decision were granted to HSY (i.e. HSY as a whole) during the same period as the period analysed in these earlier decisions, it must be concluded that the part of these measures which has supported the military activities of HSY also fall within the scope of Article 296 of the Treaty and is exempted of State aid rules.

(75) When assessing each measure individually, the Commission will establish whether it has exclusively supported the civil activities of HSY or whether it was granted to HSY without being earmarked for a particular use ([65]):

— If only the civil activities were supported, the Commission considers that Article 296 of the Treaty does not apply and the entire measure can be assessed under Article 87 of the Treaty,

— If HSY as a whole was supported, the Commission considers that, since 75 % of the activities of the yard is related to military production, 75 % of the State support benefited the military activities and fall under Article 296 of the Treaty. The remaining 25 % of the State support can be assessed under State aid rules.

4. **THE MEASURES: DESCRIPTION, GROUNDS FOR INITIATING THE PROCEDURE, COMMENTS RECEIVED, ASSESSMENT AND CONCLUSION**

(76) As regards the comments of Greece and of third parties, the Commission observes that they cover a wide range of arguments. For instance, in its numerous submissions to the Commission, the complainant Elefsis has claimed that there exist numerous grounds on the basis of which the measures should be considered incompatible aid. Similarly, Greece, HSY, and TKMS/GNSH have claimed in their successive submissions to the Commission that there exist numerous grounds on the basis of which the measures could be found compatible with the common market.

(77) Pursuant to Article 253 of the Treaty, a Commission decision has to state the reasons on which it is based. However the Commission is not obliged to answer to each of the arguments raised by the parties. Consequently, the present decision will explicitly deal only with the major points raised by the parties. In particular, the decision will not deal with some grounds raised by the parties which are clearly irreconcilable with the facts, which are in contradiction with points made by the same party in its other submissions or which can be clearly dismissed on the basis of the facts and assessment presented in the present decision.

(78) Since the present investigation covers a significant number of measures, it is important to number them in order to facilitate the reading and avoid confusion. Therefore, the four measures covered by the opening decision will be numbered P1 to P4. The twelve measures covered by the extension decision will keep the number attributed to each of them in that decision, but preceded by an E.

4.1. **Misuse of the investment aid endorsed in 1997 (measure P1)**

4.1.1. *Description of the measure*

(79) By Decision N 401/97, the Commission authorised a GRD 7,8 billion (EUR 22,9 million) investment aid, which Greece had notified on 20 June 1997. In that decision, the aid has been assessed on the basis of Article 6 'Investment aid' of Chapter III 'Restructuring aid' of the Directive 90/684/EEC, which indicates that 'Investment aid […] may not be granted […] unless it is linked to a restructuring plan which does not involve any increase in the shipbuilding capacity of the yard […]. Such aid may not be granted to ship repair yards unless linked to a restructuring plan which results in a reduction in the overall ship repair capacity'. The Decision N 401/97 indicates that a business plan has been set up which aims at restoring the competitiveness of the yard through increased productivity and modernisation. The

first pillar of this plan is an important reorganisation and reduction of the workforce. In particular, the number of workers will be reduced to 2 000 by the end of 1997 and more flexible work methods will be introduced. The Decision N 401/97 indicates that most of the workforce reduction had already been implemented at the time of the decision, what will contribute to increase the productivity. The second pillar of the restructuring plan is an investment programme, which aimed at replacing the old and obsolete equipment with new updated technology. The Decision indicates that the plan foresees that the yard will have its viability restored at the end of the business plan, the year 2000. The total cost of the investment programme was estimated at GRD 15,62 billion (EUR 45,9 million). The descriptive part of the decision indicates that this programme will be financed in the following manner: GRD 7,81 billion (EUR 22,9 million) of State aid, GRD 3,13 billion (EUR 9,2 million) by an increase of the share capital, and GRD 4,67 billion (EUR 13,7 million) by bank loans. The capital increase will be made in the same proportion as the distribution of capital, i.e. 51 % by ETVA and 49 % by the employees of HSY. The decision further indicates that the bank loans will be raised at normal market conditions without State guarantees. In its assessment, the Commission notes that according to the restructuring plan, there is no increase in shipbuilding capacity and a decrease in the shiprepair capacity. The Commission also notes that the intensity of the aid (50 %) stays within the regional aid intensity allowed for Greece. The intensity is also justified by the extent of the restructuring involved.

4.1.2. *Grounds for initiating the procedure*

(80) The Exchange of Letters between Greece and the Commission which has preceded the opening of the procedure has been described in the chapter 1 'Procedure' of the present decision.

(81) In the opening decision, the Commission expressed doubts that the investment aid approved by decision N 401/97 may have been misused. First, the Commission observed that the investment plan was implemented only partially and with important delays. The Greek authorities granted several extensions of the deadline to execute the investment plan after 31 December 1999 without consulting the Commission. Second, whereas decision N 401/97 indicates that the investment programme will be financed by banks loans raised at normal market conditions without State guarantees, the firm seems to have received loans from a State-owned bank with non market-conform interest rates and it seems that one of the loans was covered by a State guarantee. Third, the Greek authorities did not send the yearly reports on the implementation of the plan, as requested by the decision N 401/97. Due to these three breaches of decision N 401/97, it seems that the investment aid was misused.

4.1.3. *Comments from interested parties*

(82) Elefsis underlines that the earthquake invoked to justify the delay occurred only in September 1999. That is four months before the end of the period to implement the investment plan, namely 31 December 1999. At the end of 1999 HSY had carried out only a small part of the investment plan. This shows that HSY had already accumulated significant delays in the implementation of the plan before the earthquake occurred and that HSY could not have finished on time the investment programme even if the earthquake had not occurred. Similarly, the privatisation of HSY invoked to justify a delay took place well after the end of 1999 and therefore could not justify HSY's failure to respect decision N 401/97. Finally, Elefsis claims that, since HSY received a loan guaranteed by the State and loans at non arm's length conditions, it has breached the conditions laid down in decision N 401/97. Therefore, this additional aid as well as the investment aid should be recovered.

(83) HSY submitted the same comments as Greece, which are summarised in the next section.

4.1.4. *Comments from Greece*

(84) In their letter of 20 October 2004, the Greek authorities confirm that they initially set the date of 31 December 1999 for the completion of the investment plan. In December 1999, they carried out the first control on the implementation of the plan, which related to the expenses incurred by HSY until 30 June 1999. It turned out that they amounted to GRD 2,7 billion (EUR 8,1 million), which is 17,7 % of the total expenses of the investment programme. On 27 June 2001, the Greek authorities granted a prolongation until 31 December 2001 for the completion of the investment, because the earthquake of 7 September 1999 had caused damages to the yard's facilities and delayed the execution of the investment plan. By decision of 28 December 2001, the Greek authorities granted a second prolongation until 30 June 2002 because the privatisation process, which started in January 2001 (and was finally completed on 31 May 2002), requested to freeze the investment plan. When the Greek authorities carried out the second control in May 2002, they determined that the expenses incurred by HSY until 31 December 2001 amounted to GRD 9,8 billion (EUR 28,9 million), or 63 % of the total investment costs. By decision of 14 June 2002, a new extension was granted until 30 June 2004. By decision of

23 July 2003, the authorities authorised a modification of the investment plan. On this occasion, the company asked to remove some of the investment expenses certified on the occasion of the second control. These expenses were advance payments concerning investments that the firm had decided to exclude from the investment plan. Therefore, the total amount certified after the second control was reduced to EUR 23,3 million, or 50,75 % of the total. By letter of 30 June 2004, the yard requested a new extension until 31 December 2004. As of today, the investment aid has not been paid out to the yard yet.

(85) The Greek authorities claim that, when granting the extensions, they considered in good faith that they acted within the limits of the approval decision of the Commission and that it concerned an existing aid for which no new notification was necessary. They considered that it was unrealistic not to provide for the possibility of a prolongation of an investment plan of such size and such scope, even more for a yard which had no experience with the implementation of such a plan, as acknowledged by the Commission itself in its approval decision. They also claim that they informed the Commission of the prolongation in November 2002. Concerning the modification of the investment plan which they have authorised in 2003, it did change neither the nature, nor the substance, nor the purpose of the approved aid. It simply aimed to adapt the content of the plan to the new circumstances: the privatisation of the yard, the new contracts of unforeseen nature (submarines), the 1999 earthquake, and the technological progress. The Greek authorities also fail to see how the prolongations could affect the substance of the aid and therefore its compatibility. Finally, they claim that the Commission should assess the compatibility of the prolongation of the investment plan on the basis of the point 52 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [66] (hereafter 'the 1999 R & R guidelines'). In this case, the aid should be found compatible since the revised plan foresees a return to viability in a reasonable period, namely before 30 June 2004. The Greek authorities claim in particular that the delay is not caused by the firm but by *force majeure* (earthquake of 1999 and privatisation of the firm). Finally, the 'one time, last time' principle would not be breached since the aid would take place in the adaptation of an existing restructuring plan.

(86) Concerning the non-submission of annual reports on the implementation of the investment plan, Greece considers that this fact is not of sufficient importance to prevent the modification of the plan.

4.1.5. *Assessment*

4.1.5.1. Article 296 of the Treaty

(87) Before undertaking an assessment of the compatibility under Article 87 and 88 of the Treaty, the applicability of Article 296 Treaty needs to be considered. In this respect, the Commission observes the following elements. First, the investment aid had been notified by Greece in 1997 in accordance with the procedure laid down in Article 88(3) of the Treaty. By notifying the aid, Greece acknowledged that the investment plan was mainly related to the civil activities of HSY (i.e. ship repair and ship building), because if the plan had been related to military activities and had been important for national security, Greece could have invoked Article 296 of the Treaty at the time and would not have had to notify this investment aid [67]. Moreover, Greece did not contest the approval decision in which the Commission assessed the notified aid under the State aid rules. Finally, Greece has not invoked Article 296 in its reaction to the opening decision. The prior elements are sufficient to conclude that the investment plan did not affect the security interests of Greece and any aid financing the investment plan can be dealt with under State aid rules laid down in Article 87 and 88 of the Treaty.

4.1.5.2. Existence of a misuse of the aid

(88) The three doubts raised in the opening decision will be analysed successively.

(89) As regards the breach of the condition that loans have to be raised at market rates and without State guarantees, the Commission considers that this breach affects the compatibility of the latter measures and not the compatibility of the investment aid. Indeed, the purpose of such a condition is to avoid the granting of additional aid in favour of the investment programme (i.e. to avoid the accumulation of aid above the intensity laid down in the decision N 401/97). Anyway, as will be explained later in the present decision, the Commission finds on the basis

of other legal grounds that the State guarantee granted to HSY constitutes incompatible aid that has to be recovered. As regards the loans, the Commission also finds that the aid element has to be recovered. Since the aid elements will be recovered, the initial situation will be restored and the financing costs of HSY will not be lower than the market rate. In other words, by means of these recoveries, the objective of the condition laid down in decision N 401/97 will be fulfilled, namely to avoid the granting of additional aid by means of financing granted to HSY below market price. The Commission therefore rejects Elefsis' aforementioned claim that both the aid element in the loans and guarantee and the investment aid endorsed by decision N 401/97 have to be recovered.

(90) As regards the absence of yearly reporting raised in the opening decision, the Commission considers that the non-submission of yearly reports does not as such constitute a misuse of the aid. Indeed, it does not change the characteristics of the aid, its effect or the characteristics of the investment programme. However, since Greece has not provided this information in due time and has therefore not informed the Commission about the delays at the moment when they occurred, it has prevented the Commission from adopting a decision on these issues at the appropriate moment. Consequently, this absence of reporting entails that the burden of proof falls on Greece: it is for Greece to prove that the Commission would have endorsed the successive prolongations of the period to implement the investment programme.

(91) As regards the delayed implementation of the investment plan, which was the main doubt raised in the opening decision, the Commission has reached the following conclusion. By Decision N 401/97, the Commission authorised aid to support investments which were 'linked to a restructuring plan', as requested by chapter III 'Restructuring aid' of Directive 90/684/EEC. As indicated in the description of the business plan in Decision N 401/97, the investment plan was in fact not simply linked to the restructuring; it was itself one of the two pillars of the restructuring because the yard had made no investments in the previous years and needed to replace 'old and obsolete equipment with new technology' to restore its competitiveness. In section 2.1 of their letter of 20 October 2004, the Greek authorities confirm that the investment programme aimed at restoring the competitiveness of HSY, by means of better productivity and modernisation, in order to become a competitive firm at the national and international level. Greece also confirms that the purpose was to replace outdated and unused equipments by new equipment with modern technology. In conclusion, from decision N 401/97 itself as well as from Greece's letters, it appears that the investment programme had a crucial role in the restructuring plan and in the restoration of viability [68]. Since it was 'linked to a restructuring plan' and crucial for the return to viability, it is obvious that the implementation of the investment programme could not be delayed significantly. In fact, its implementation was urgent in order to allow restoration of viability. In conclusion, the Commission authorised an aid to support an investment programme that had to be implemented in a precise period; it did not authorise an aid to support any investment project carried out in the future.

(92) As regards the precise timing of the implementation of this investment programme, decision N 401/97 did not include the planned calendar. Decision N 401/97 only indicates that 'the yard will have its viability restored at the end of the business plan, the year 2000'. In their letter of 20 October 2004, the Greek authorities indicate that, according to the Ministerial decision of December 2007 granting the subsidy, the investment programme had to be completed by 31 December 1999 [69]. However, this date does not appear in decision N 401/97. The Commission concludes that on the basis of decision N 401/97, the investment programme had to be completed at the latest at the end of 2000.

(93) From the foregoing, the Commission concludes that respecting the date of 31 December 2000 was important to ensure the success of the restructuring plan. In addition, any investment implemented significantly after 2000 could not be considered as linked to the restructuring plan which is described in decision N 401/97, as requested by Directive 90/684/EEC.

(94) After this analysis of the decision N 401/97, the Commission has to determine whether it would have granted a prolongation of the period to carry out the investments if Greece had requested it and correctly informed the Commission about the delays. In September 1999, an earthquake partially damaged the following of the yard's facilities: walls, roofs, windows, structure of three buildings, tubes, electrical networks, piers, and cranes' rails. Greece claims that the earthquake forced the yard to stop the investment plan and to focus on the repair of these damages.

(95) Justifying the delay on the basis of the earthquake, the yard asked in November 2000 a first delay of the date to complete the investment programme until 31 December 2001. The question is whether the Commission would have accepted this request if it had received it. The

Commission observes that, if it had applied paragraph 52 of the 1999 R & R guidelines, it would not have approved the first prolongation since the restructuring plan approved in 1997 had become clearly insufficient to restore viability in view of the situation prevailing in November 2000 and no other restructuring plan allowing a return to viability was available at that time. However, the Commission doubts that it would have applied paragraph 52 of the 1999 R & R guidelines since the aid had not been approved on the basis of these guidelines, since there was no 'amendment' of the content of the plan but only a delay of the date to complete the investments, and since there were not clear provisions regarding the modification of the date for completing the investments in decision N 401/97 and in Directive 90/684/EEC. In addition, since a severe earthquake is an event beyond responsibility of the yard and of the Greek authorities, which is exceptional and not related to the economy and the business, the Commission would have probably considered that it can justify some months of delay. In addition, the implementation of an investment plan is something difficult, which may necessitate some additional months. Consequently, even if one year is a long delay, it is reasonable to consider that the Commission might have accepted the prolongation.

(96) Regarding the second prolongation granted by the Greek authorities, Greece and HSY justified it by the privatisation of the yard during which the investment plan was frozen [70]. In other words, the delay in the implementation of the investment programme resulted from a conscious decision to suspend the implementation. The Commission can certainly not authorise a prolongation of the period to implement the investment programme when it was consciously decided to stop the implementation during several quarters of a year. As concluded previously, the respect of the calendar set for the implementation of the restructuring plan was crucial. The Commission has authorised aid to support a precise restructuring plan implemented at a precise moment. As a subsidiary argument, the Commission notes that if prolongations after 31 December 2001 were accepted, the restructuring period would be so long that the investments carried out after that date could not be considered as 'linked' — in the meaning of the Directive 90/684/EEC — to the restructuring that began as early as in 1996. The restructuring plan approved in 1997 was inadequate to tackle the difficult financial situation of the yard in the years from 2001. Moreover, significant restructuring measures were implemented in 2001–2002, which were new and not included in the restructuring plan described in decision N 401/97 (for instance, an additional reduction of the workforce). In view of the foregoing considerations, the Commission considers that it would not have endorsed a prolongation of the investment period after 31 December 2001.

(97) In conclusion, the Commission considers that any aid supporting investment expenses incurred after 31 December 2001 fall outside the scope of decision N 401/97.

(98) Greece claims that even if the Commission finds that aid in favour of some investment expenses would not fall within the scope of decision N 401/97, this aid should nevertheless be considered compatible as restructuring aid on the basis of the 1999 R & R guidelines. The Commission must therefore analyse whether aid in favour of the investment expenses incurred by HSY after 31 December 2001 could be found compatible. The Commission notes that there is no doubt that HSY was a firm in difficulty after 31 December 2001. For instance, the losses accumulated over the preceding years were so important that the net equity was negative. Therefore, any aid granted to the firm, and especially aid supporting the modernisation of obsolete equipment, should have been considered as restructuring aid. The Commission considers however that the firm did not comply with the conditions for receiving aid under the 1999 R & R guidelines. For instance, the 'one time, last time' condition laid down in paragraph 48 of these guidelines was breached because Greece had already granted restructuring aid to HSY by Ministerial decision of December 1997. Indeed, the investment aid approved by decision N 401/97 was a restructuring aid according to Directive 90/684/EEC and according to decision N 401/97 itself. Paragraph 48 of the 1999 R & R guidelines allows an exemption from the 'one time, last time' condition in 'exceptional and unforeseeable circumstances'. The Commission fails to identify which exceptional and unforeseeable circumstances could justify restructuring aid to be granted in favour of investment expenses incurred after 31 December 2001. In particular, the earthquake of September 1999 may, as concluded previously, justify a limited delay in the implementation of the investment plan. But it is not the cause of the delay of the implementation of the investment plan after 31 December 2001. As regards the freezing of the plan during the privatisation process, it does not fulfil the definition of 'exceptional and unforeseeable circumstances'. Greece claims that the 'one time, last time' condition would not be breached since the aid would take place in the adaptation of an existing restructuring

plan. As has been extensively explained, the Commission considers that the investment implemented after 31 December 2001 are not part of the investment programme described in decision N 401/97. In addition, paragraph 52 of the 1999 R & R guidelines indicates that 'the revised plan must still show a return to viability within a reasonable timescale'. According to the initial plan the yard should have its viability restored by 2000. The Commission therefore considers that the planned restoration of viability in June 2004 was a too long delay compared to the initial plan and was not within a reasonable timescale anymore. Finally, the Commission observes that accepting such a long prolongation of the restructuring period would be similar to a circumvention of the 'one time, last time' condition.

(99) In conclusion, the Commission considers that aid in favour of the investment expenses incurred until 31 December 2001 and related to the investment programme described in decision N 401/97 can be considered to be covered by decision N 401/97. Any other aid does not fall within the scope of decision N 401/97. In addition, any other aid in favour of the other investment expenses that have been incurred by HSY is incompatible with the common market. Since Greece has indicated that the investment aid has not been paid out to HSY yet, no aid has to be recovered from HSY.

4.2. **GRD 4,67 billion (EUR 13,72 million) loan granted in 1999 and covered by a State guarantee (measure P2)**

4.2.1. *Description of the measure*

(100) Greece indicates that this 8-year loan amounting to GRD 4,67 billion (EUR 13,72 million) was granted by ETVA to finance the investment programme ([71]). By decision of 8 December 1999, the government granted a guarantee and charged an annual guarantee fee of 100 basis points. The loan was concluded on 29 December 1999 and paid to HSY in successive tranches from that date until 26 October 2000, up to a total amount of EUR 12,76 million ([72]). The interest rate was ATHIBOR (EURIBOR from 1 January 2001) plus 25 basis points. On 31 May 2002, the State guarantee and the loan were prolonged until 30 June 2009 and the interest rate increased by 100 basis points. The reimbursement of the capital started with a first payment in December 2003.

4.2.2. *Grounds for initiating the procedure*

(101) The opening decision indicates that the State guarantee could constitute State aid, the compatibility of which is doubtful. In addition, leaving aside the qualification of aid or not, decision N 401/97 indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees. It seems therefore that State guarantees were per se prohibited by decision N 401/97.

4.2.3. *Comments from interested parties*

(102) Elefsis made the following comments concerning measures P2, P3 and P4. It recalls that decision N 401/97 required that the bank loans financing HSY will be obtained on normal market terms without State guarantees. It can be shown that all three loans were given upon a non-arm's length basis. First, these loans were granted from the end of 1999 onwards, when HSY's financial situation was catastrophic and raised the risk of the revocation of the company's operating licence. Second, the loans were granted at a time when it was clear that HSY had failed to implement its restructuring/investment plan and had failed to respect the terms of decision N 401/97. Third, given its catastrophic financial situation and the lack of arm's length security, HSY would not have been able to raise these loans from the private sector.

4.2.4. *Comments from Greece*

(103) The Greek authorities (as well as HSY) claim that the State guarantee does not constitute State aid and was offered at normal market conditions. They base their analysis on the following elements:

— the yard could have concluded a similar loan with any other bank by offering other types of securities than a State guarantee. In particular, the company could have offered as securities some claims related to large contracts or some mortgages on its assets,

— the annual guarantee fee of 1 % is the market rate. In addition, it is not selective since the Greek State granted several guarantees during that period and in some cases the fee charged by the State was much smaller,

— even if the Commission should consider that the guarantee fee was below the market rate, the State nevertheless acted as a market economy investor since it was shareholder of HSY (through ETVA) and would benefit from the return to profitability following from the implementation of the investment plan,

— the fact that the loan aimed at financing an investment plan which had been approved by the Commission should have constituted a sufficiently solid ground for the lending bank and the guarantor to expect that HSY would be able to reimburse the loan,

— the loan is regularly reimbursed and the guarantee fee paid.

4.2.5. *Assessment*

4.2.5.1. Article 296 of the Treaty

(104) Before undertaking an assessment of the compatibility under Article 87 of the Treaty, the applicability of Article 296 of the Treaty needs to be considered. The Commission notes that on the basis of the granting decision, HSY was obliged to use the guaranteed loan as well as the two others loans covered by the opening decision (i.e. measures P3 and P4) for the financing of the investment programme ([73]). As concluded in the assessment of measure P1, the investment programme does not fall within the scope of Article 296 of the Treaty. The Commission therefore considers that these three loans earmarked for the financing of the investment programme are subject to State aid rules and are not covered by Article 296 of the Treaty.

4.2.5.2. Existence of aid

(105) It first needs to be verified whether the State guarantee fulfils the conditions to be State aid in the meaning of Article 87(1) of the Treaty.

(106) In order to assess the existence of aid in the different guarantees investigated in this decision, the Commission will use the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees ([74]) (hereinafter 'the Notice on guarantees'), which was published in March 2000. However, as indicated in its section 1.4, it did not consist in a change of policy, but rather explains in more details the method that the Commission used until then to assess guarantees. Consequently, the principles laid down in the Notice on guarantees can also be used to assess the guarantees granted before March 2000. In accordance with this conclusion, in the opening decision the Commission used the Notice on guarantees to assess measure P2. Greece did not contest that application. Conversely, Greece also applied it to assess measure P2 ([75]).

(107) First, in order to fall under Article 87(1), a measure must involve State resources. This is the case for measure P2 since, by granting this guarantee, the State put State resources at risk.

(108) Second, it needs to be established whether the measure is selective. Greece claims that the State has granted several guarantees to other firms and charged also a premium of 1 %. Greece provided a list of these firms. The Commission considers that this fact does not show that the measure was a general measure. In order to be a general measure, a measure must be open to all economic agents operating within a Member State. It must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. The present measure can therefore not be considered to be a general one. In particular, it is not because certain firms have received a State guarantee that all the firms could receive one. Greece has not shown that the granting of a State guarantee is open to all economic agents on an equal access basis. In addition, all the firms that appear in the list provided by Greece are State-owned firms or firms carrying out some military activities. It seems therefore that private firms could not have received such a guarantee for the financing of their normal activities. In fact, Greece does not indicate the legal basis on the basis of which the Minister of Finance decided on 8 December 1999 to grant the guarantee. It is likely that it is Law 2322/1995, which is a selective measure as it will be explained in the assessment of measure E12b.

(109) Third, the existence of an advantage must be demonstrated. In accordance with point 2.2.2 of the Notice on guarantees, since the guarantee was granted before the granting of the loan and not 'ex post', there is no presumption of aid to the lender. It is therefore the aid to the borrower that needs to be investigated, as defined in point 2.1.1 of the Notice on guarantees. Greece claims that there is no advantage since HSY could have obtained a similar loan by offering a bank other securities instead of a State guarantee. The Commission considers that it does not have to investigate whether, by offering other securities, HSY could have obtained this loan. Indeed, the Commission must assess whether the actual transaction implemented by the State, namely granting a guarantee on a loan without benefiting of any security, would have been acceptable to a market economy investor. A guarantee on a loan secured by a lien on some assets or by the conveyance of claims constitutes a different transaction. As indicated in section 2.1.1 of the Notice on guarantee, one of the potential advantages of the State guarantee is the possibility for the borrower 'to offer less security'. In addition, even if the possibility to obtain a financing by offering more securities had to be assessed,

the Commission has already concluded in section 3.1 of the present decision that after 30 June 1999 HSY would not have received loans or guarantees from private banks, even by offering a security to the bank. The Commission concludes that, since the State guarantee was granted in December 1999, it gave an advantage to HSY by providing financing which HSY could not have received from the market.

(110) Greece also claims that the guarantee fee of 1 % was the market price and there is therefore no advantage. The Commission notes that Greece did not provide any market data showing that banks were ready to grant a guarantee at that price. Greece only provided a list of guarantees provided by the State during the same period for the same price. The Commission fails to understand how this list of State guarantees could prove that the guarantee fee asked from HSY is market conform and does not constitute aid. In particular, this list can not be considered as 'a State guarantee scheme [which] does not constitute State aid under Article 87(1)' since, as the guarantee in favour of HSY illustrates, it does not fulfil many of the conditions laid down in section 4.3 of the Notice on guarantees. Furthermore, even if a guarantee fee of 1 % might have been market conform for other (healthy) companies, this would not automatically make it market conform for a company in difficulties like HSY.

(111) As regards the claim that a guarantee fee below the market price could be acceptable for a private investor in similar circumstances because Greece was shareholders of HSY, the Commission has already dismissed this claim in section 3.1 of the present decision.

(112) Section 3.1 also shows that from 30 June 1999 there was sufficient information available to conclude that HSY had not succeeded to conclude enough shipbuilding contracts to restore its viability and would face heavy losses in 1999 and 2000. Therefore, whereas the fact that the loan was financing an investment plan approved in 1997 by the Commission would have comforted a potential lender in 1997 and 1998, it would not have comforted a bank in December 1999 since it was clear that the business plan had failed. The corresponding point made by Greece must therefore be dismissed.

(113) Finally, as regards the fact raised by Greece that the loan is reimbursed in accordance with the terms of the contract, the Commission fails to see how it could prove that a private bank would have granted the loan in question. Indeed, what matters is the situation of the firm and the information available when the guarantee was granted ([76]). As a subsidiary element, the Commission observes that, in accordance with the information available at the time of the granting of the guarantee and on the basis of which it could be expected that the yard would book severe losses in the following years, the yard has really recorded heavy losses in the following years and its net equity really became very negative. In addition, HSY only survived (and thus is able to reimburse the loan) because of the continued support by State aid.

(114) From the foregoing, the Commission considers that the measure gives an advantage to HSY.

(115) This selective advantage distorts competition because it provides financing at a time when HSY would not have received financing from the market and was in difficulty. The measure therefore contributed to keep HSY alive and to finance its activities. Since some competitors of HSY are located in other Member States ([77]), this distortion of competition affects trade between Member States ([78]).

(116) Since it fulfils all the conditions laid down in Article 87(1) of the Treaty, the guarantee constitutes State aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.

(117) Since the Commission has just demonstrated that a selective advantage granted to HSY distorts competition and trade, the Commission will not repeat the analysis of the existence of a distortion of competition and trade anymore when it will assess the remaining measures.

4.2.5.3. Compatibility of the aid

(118) As regards the compatibility under Article 87(2) and (3) of the Treaty, the Commission notes than none of the provisions laid down in Article 87(2) and Article 87(3)(b) and (d) apply. As regards the compatibility under Article 87(3)(a), (c) and (e), aid to shipbuilding was regulated from 1 January 1999 by Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding ([79]) (hereinafter 'Regulation (EC) No 1540/98'). Since the guaranteed loan aimed at financing an investment plan which was a part of a restructuring plan and since in addition HSY was in

difficulty, the State guarantee should be assessed on the basis of Article 5 of Regulation (EC) No 1540/98. It is clear that the measure does not fulfil the conditions laid down in this article. In particular, Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the grant were the 1999 R & R guidelines, which had been published in the Official Journal on 9 October 1999 ([80]) and which entered into force on the same day. Several of the conditions for authorisation of the aid laid down in section 3.2.2 of these guidelines are not fulfilled. For instance, regarding condition (b) 'Restoration of viability', the Commission notes that the State guarantee financed an investment plan which was part of a restructuring plan which, in December 1999, has become totally insufficient to restore the long term viability of HSY. Regarding the condition (d) 'Aid limited to the minimum', the Commission had already decided in decision N 401/97 that State aid could at the maximum amount to 50 % of the investment costs and the remaining 50 % would be financed by funds raised from the shareholders and by bank loans raised at market conditions. Consequently, no additional aid in favour of the investment plan could be granted otherwise the maximum aid intensity of 50 % would be breached. The State guarantee also breached the 'one time, last time' condition laid down in section 3.2.3 of the 1999 R & R guidelines since by decision N 401/97, the Commission had authorised investment aid, which, under Directive 90/684/EEC, was a kind of restructuring aid. This aid has been granted to HSY by Ministerial Decision of December 1997 (but, as described in recital 84 of the present decision, Greece indicates that it has not been paid out to HSY yet).

(119) On the basis of the foregoing, the Commission considers that the State guarantee constitutes unlawful and incompatible aid, which must be recovered. If it is still outstanding at the time of this decision, the State guarantee has to be stopped immediately. This is however insufficient to restore the situation that would have prevailed without aid since HSY has during several years benefited from a loan which it would not have received without State intervention. In order to recover this advantage, the Commission considers, in accordance with the conclusion reached in section 3.1 of the present decision, that the difference between the total cost of the guaranteed loan (interest rate and guarantee premium) and the reference rate for Greece increased by 600 basis points needs to be recovered for the years during which the guarantee was running.

(120) The Commission considers that this will restore the situation that would have existed without a State guarantee. Thereby, the breach of the prohibition of State guarantees and financing below market rate laid down in decision N 401/97 is eliminated.

4.3. GRD 1,56 billion (EUR 4,58 million) loan granted in 1999 (measure P3)

4.3.1. *Description of the measure*

(121) In 1999, HSY received a loan amounting to GRD 1,56 billion (EUR 4,58 million) from ETVA, which received as securities a right on the payment of the first tranche of the investment aid authorised by decision N 401/97. The loan was concluded on 28 July 1999 and fully paid out to HSY the next day. The initial duration was until 31 March 2001. After successive prolongations, it was reimbursed on 2 August 2004. The interest rate was ATHIBOR (EURIBOR from 1 January 2001) plus 100 basis points ([81]).

4.3.2. *Grounds for initiating the procedure*

(122) In the opening decision, the Commission indicates that the loan could constitute aid, the compatibility of which is doubtful. In addition, if it turned out that this loan benefited from a State guarantee, it seems to infringe decision N 401/97, which indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees.

4.3.3. *Comments from interested parties*

(123) Elefsis claims, in addition to the comments indicated previously with respect to measure P2, that since the measures P3 and P4 have been granted at a time when it was clear that HSY had failed to implement its restructuring/investment plan and had failed to respect the terms of decision N 401/97, there was a material risk that the security given for these loans, i.e. the payment of the approved investment aid, was unlawful and thus void and unenforceable.

4.3.4. *Comments from Greece*

(124) The Greek authorities (and HSY) claim that this loan was granted on market terms. In particular, the interest rate is similar to the one of some loans granted by ETVA to other firms during this period. HSY could have borrowed from any other bank but logically preferred ETVA which was its shareholder. In addition, the security in the form of the conveyance of the claims on the first tranche of the investment aid constituted a collateral acceptable to any bank. Finally, Greece notes that the loan was fully reimbursed to the bank.

4.3.5. *Assessment*

4.3.5.1. Article 296 of the Treaty

(125) The Commission has already concluded in the assessment of measure P2 that measure P3 does not fall within the scope of Article 296 of the Treaty. It must therefore be assessed under State aid rule.

4.3.5.2. Existence of aid

(126) First, the Commission notes that the loan has been granted by ETVA and was not covered by a State guarantee.

(127) As regards the selectivity of the measure, Greece observes that other firms received loans from ETVA at similar interest rates. However, as already explained in the assessment of measure P2, a measure is a general measure only if it fulfils strict conditions, which are clearly not fulfilled in the present case. For instance the measure is not open to all firms on an equal access basis, since interest rates vary from one borrower to the other and depend on the decision of ETVA to grant the loan or not, and on which conditions. The measure is therefore selective.

(128) As regards the existence of an advantage, the Commission notes that this loan was granted after 30 June 1999, at a time when the firm had no access to the loan market anymore, as explained in section 3.1 of the present decision. The fact that ETVA charged a similar interest rate for some loans to other firms during that period does not prove that this interest rate would have been acceptable for a private bank in similar circumstances. First, the interest rate demanded by a private bank on a particular loan depends on the creditworthiness of the borrower. Greece has not shown that the other borrowers in the list had a risk of default similar to the risk of default of HSY. The Commission recalls that the situation of HSY was very bad at the time. It is therefore likely that a market economy investor would have requested a higher interest rate for loans to HSY than for loans to healthy firms. Second, even if the other borrowers had a risk of default as high as HSY, the list provided by Greece would still be insufficient to conclude that this interest rate was the market price. Indeed, the list provided by Greece contains only loans granted by ETVA, which was a State-owned bank (and in addition a development bank), and it is therefore possible that the other loans also contain an aid element. It therefore does not prove that they would have been acceptable to a private bank.

(129) The Greek authorities also assert that the security in the form of the conveyance of the claims on the first tranche of the investment aid constituted a collateral, which would have rendered the loan acceptable to any private bank. The Commission notes that, according to the government decision by which the investment aid was approved, the payment of the first tranche of the aid would take place once the competent control body would have observed that the investment expenses amount to GRD 2,73 billion. In addition, the payment had to take place before 31 December 1999. As was revealed by the control made by the Greek authorities in December 1999 (see comments of Greece on measure P1), the amount of GRD 2,73 billion had just been reached by 30 June 1999. Therefore, since the loan was granted in July 1999 and since at the time it could probably be estimated already that the threshold of GRD 2,73 billion had been reached or would be reached soon, the probability of receiving the first tranche of the aid could at first sight be considered as quite high. However, different problems preventing the payment of the aid could still occur. First, in case of bankruptcy of HSY, it was not certain that the Greece authorities would have accepted to pay the investment aid to a firm that would have ceased operations ([82]). The bank would then have had to start costly and lengthy legal actions to recover the money. Second, it is not certain that the competent control bodies would have accepted to validate the investment expenses incurred, such that the threshold would not be reached in due time. Third, other administrative problem could happen. This is exactly what happened in reality ([83]), such that the Greek authorities did not pay the first tranche during several years. As indicated in chapter 1 ‘Procedure’ of the present decision, when the Commission later learnt about the delay in the implementation of the investment plan, it asked the suspension of the payment of the aid which had not yet been paid to HSY. The Commission concludes that the payment of the first tranche of the investment aid by the State was likely but not certain. In view of the difficult situation of HSY, a private bank would have required securities that could be enforced rapidly and with certainty, and would have not been satisfied with security of which the value could be zero in certain circumstances. The Commission thus concludes that a private bank would not have accepted to grant this loan. As indicated previously, this is confirmed by HSY’s unsuccessful attempts to raise funds from market economy investors.

(130) Greece also claims that, since ETVA was the shareholder of HSY, it served its interests by providing this loan to HSY. In section 3.1.3 of the present decision, the Commission has already rejected this claim.

(131) Finally, regarding the fact that the loan has been reimbursed, the Commission has already explained in the assessment of measure P2 why such a fact does not show that a private bank would have accepted to provide this financing to HSY at that moment.

(132) From the foregoing considerations, the Commission concludes that the loan gives an advantage to HSY since it could not have received this loan from the market.

(133) The Commission concludes that measure P3 constitutes aid in the meaning of Article 87(1) of the Treaty. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.3.5.3. Compatibility of the aid

(134) As measure P2, the compatibility of the present measure must be assessed under Regulation (EC) No 1540/98. Since, as measure P2, this loan aimed at financing an investment plan which was a part of a restructuring plan and since it was granted to a firm in difficulty, it should also be considered as restructuring aid covered by Article 5 of Regulation (EC) No 1540/98. It is clear that the measure does not fulfil the conditions laid down in this article. In particular, Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the grant were the ones published in the Official Journal on 23 December 1994 ([84]) and which entered into force on the same day (hereinafter the 1994 R & R guidelines). Several of the conditions for authorisation of the aid laid down in section 3.2.2 of these guidelines are not fulfilled. For instance, regarding condition (i) 'Restoration of viability', the Commission notes that the State guarantee financed an investment plan which was part of a restructuring plan which, in July 1999, had become insufficient to restore the long term viability of HSY. Regarding the condition (iii) 'Aid in proportion to the restructuring costs and benefits', the Commission had already decided in decision N 401/97 that State aid could at the maximum amount to 50 % of the investment costs and the remaining 50 % would be financed by funds raised from the shareholders and by bank loans raised at market conditions. Consequently, no additional aid in favour of the investment plan could be granted otherwise the aforementioned percentages of 50 % would be breached and the Commission could not consider that the aid is proportional to 'the restructuring costs and benefits'.

(135) On the basis of the foregoing, the Commission consider that the loan constitutes unlawful and incompatible aid, which must be recovered. Since after 30 June 1999 HSY could not have received any loan from the market, the entire loan has to be reimbursed. This is however insufficient to restore the situation that would have prevailed without aid since during several years HSY has benefited from a loan which it would not have received without State intervention. In order to recover this advantage, the Commission considers, in accordance with the conclusion reached in section 3.1 of the present decision, that the difference ([85]) between the interest rate of the loan and the reference rate of Greece increased by 600 basis points needs to be recovered for each year from the pay-out of the loan to HSY until its reimbursement.

(136) The Commission notes that in March 2002 the State sold the majority of ETVA's shares to Piraeus Bank. ETVA was therefore not owned by the State anymore in the last two years of the loan, which was reimbursed in 2004. The question could then be raised (for this loan and for the other loans and guarantees granted by ETVA before March 2002 and having a duration spreading beyond March 2002) whether the part of the aid relating to the period after March 2002 should be reimbursed to ETVA instead of being reimbursed to the State. In order to answer this question, the Commission recalls that when the State grants a loan with an interest rate below the market rate, the aid is granted at the time of the conclusion of the loan, even if the advantage only materialises at each interest payment dates, when the borrower pays a lower interest rate ([86]). In the same manner, the market value of a loan which has an interest rate not reflecting adequately the difficulties of the borrower decreases immediately ([87]) after the signature of the loan contract (i.e. not at the future dates when the borrowers pays an interest rate below the market interest rate). In turn, the value of a bank depends on the value of its assets, and notably its portfolio of existing loans. Therefore, the granting of loans at non market conform conditions decreased the value of ETVA and therefore diminished the price that the State later received when it sold ETVA's shares ([88]). This illustrates that it is the State which supported the cost of these aid measures, including for their duration running after March 2002.

4.4. **EUR 13,75 million loan granted in 2002 (measure P4)**

4.4.1. *Description of the measure*

(137) The loan contract between ETVA and HSY was concluded on 31 May 2002. The amount of the loan was EUR 13,75 million, its duration 2 years and its interest EURIBOR plus 125 basis points. The loan would be used as an advance on the second and third tranches of the investment aid. The loan was secured by the conveyance of the payment of the second and third tranches of the investment aid ([89]).

4.4.2. *Grounds for initiating the procedure*

(138) In the opening decision, the Commission indicates that the loan could constitute aid, the compatibility of which is doubtful. In addition, if it turned out that this loan benefited from a State guarantee, it seems to infringe decision N 401/97, which indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees.

4.4.3. *Comments from interested parties*

(139) Elefsis's comments on this measure are similar to the comments on measure P3.

4.4.4. *Comments from Greece*

(140) The Greek authorities claim that this loan was granted on market terms. In particular, the interest rate is similar to the one of some loans granted by ETVA to other firms during this period. HSY could have borrowed from any other bank but logically preferred ETVA which was its shareholder. In addition, the security in the form of the conveyance of the claims on the second and third tranches of the investment aid constituted a collateral acceptable to any bank. Finally, the loan was never paid out to HSY and it could therefore not constitute aid to HSY. In addition, the fact that ETVA has refused to pay out the loan when it realised that the payment of the investment aid had been 'freezed' for procedural reasons and that the payment of the aid was uncertain illustrates that ETVA acted as any other bank would have done.

4.4.5. *Assessment*

4.4.5.1. Article 296 of the Treaty

(141) The Commission has previously concluded in the assessment of measure P2 that measure P4 does not fall in the scope of Article 296 of the Treaty. It must therefore be assessed under State aid rule.

4.4.5.2. Existence of aid

(142) First, the Commission notes that the loan has been granted by ETVA and was not covered by a State guarantee.

(143) The Commission observes that, since ETVA refused to pay out the loan to HSY, HSY never received any money under the loan contract. Therefore, there is no advantage to HSY and the Commission can immediately conclude that the measure does not constitute aid.

(144) The two following elements concerning measure P4, even if they are irrelevant for the assessment of measure P4, may cast doubts on the validity of the assessment of other measures. Therefore the Commission will analyse them.

(145) First, Greece claims that the fact that ETVA, because there was a risk that the investment aid would not be paid, decided not to disburse the loan to HSY illustrates that ETVA acted as a normal private lender and did not offer to HSY a favourable treatment. The Commission notes that Greece's claim fails to take into account the fact that when ETVA refused to pay out the loan it was already under the control of Piraeus Bank and not under State control anymore. Therefore, the refusal to pay out the loan can not be taken as an illustration of the way ETVA behaved when it was under State control. Conversely, this confirms that a private bank would have avoided to lend to HSY.

(146) Second, the Commission notes that measure P4 has the same type of collateral as measure P3. Measure P4 was signed when Piraeus Bank had already taken control of ETVA. However, this does not show that measure P3 was in fact acceptable to a private bank. Indeed, the two situations are not comparable for several reasons. The Commission notes for instance that when the loan contract was signed on 31 May 2002, it was already known, and certainly to ETVA who was the shareholder of HSY until that date, that the payment of the investment aid had been 'freezed' for administrative reasons ([90]). Therefore, when ETVA signed the contract on 31 May 2002, it was already in a position to refuse to pay out the loan ([91]). It knew that it had the possibility to refuse to pay out the loan. This is different from the situation of ETVA when it signed the loan contract in July 1999. Another difference with measure P3 is that when the loan contract was signed on 31 May 2002, two international firms had completed the acquisition of HSY and would invest in it. The acquisition increased the chances of survival of the firm. Such an acquisition could not be foreseen in July 1999.

4.5. **Misuse of the GRD 54 billion (EUR 160 million) aid authorised in 1997 (measure E7)**

4.5.1. *Description of the measure*

(147) On 15 July 1997, besides decision N 401/97 endorsing the investment aid, the Commission adopted decision C 10/94. That decision closed the procedure pursuant to Article 88(2) by approving under Regulation (EC) No 1013/97 a debt write-off amounting to GRD 54 billion (EUR 160 million), which corresponded to the debts related to civil work of the yard. The write-off of the debts related to military work of the yard, which took place at the same time, has not been assessed under State aid rules.

4.5.2. *Grounds for initiating the procedure*

(148) In the extension decision, the Commission raises doubts that two conditions laid down in decision C 10/94 have been breached. First, the authorisation of the debt write-off was conditional on the implementation of the restructuring plan, of which the investment plan was one of the two pillars. As the Commission has explained in the opening decision (see description of measure P1), the Commission doubts that this investment plan has been implemented correctly. Second, decision C 10/94 prohibits the granting of additional operating aid for restructuring purposes. The Commission observes that the different measures included in the extension decision seem to constitute additional restructuring aid. It seems therefore that this condition was breached.

4.5.3. *Comments from interested parties*

(149) Elefsis claims that the breach of two conditions brought forward in the opening decision constitute a valid basis to conclude that the aid was misused. In addition, Elefsis claims the privatisation of 1995 never constituted a real privatisation. In particular, the employees never supported any financial risk as shareholders since they only paid a small part of what they should have paid and since the amounts they really paid were entirely reimbursed by the State at the time of the 2001–2002 privatisation. The Commission should consider the absence of any real privatisation, which was a condition for the waiver, as an additional breach of the decision C 10/94.

4.5.4. *Comments from Greece*

(150) In their comments on the extension decision, Greece and HSY ([92]) claim that the prohibition of additional restructuring aid only renders any new aid unlawful. This prohibition, if breached, does not have the effect of rendering the aid authorised by decision C 10/94 incompatible. In addition, Greece stresses that the decision prohibits additional 'operating aid' (as defined in Article 5 of Directive 90/684/EEC) for restructuring. It therefore contests that after 1997 no restructuring aid may be granted to HSY.

(151) As regards the investment plan, Greece and HSY contend that decision C 10/94 did not contain a condition concerning the implementation of an investment plan. Moreover, it could not have contained such a condition since Directive 90/684/EEC and Regulation (EC) No 1013/97, which formed the legal basis for the decision, did not contain such a condition. The only condition was the partial privatisation of HSY and the submission (i.e. not the implementation) of an investment plan.

4.5.5. *Assessment*

4.5.5.1. Article 296 of the Treaty

(152) Article 296 does not apply to the present measure since it concerns the write-off of debts exclusively related to the civil activities of the yard. In addition, decision C 10/94 was based on State aid rules and not on Article 296 of the Treaty

4.5.5.2. Implementation of the investment plan

(153) As regards the implementation of the investment plan, the Commission considers that it was a condition laid down in decision C 10/94. Indeed, the second before last paragraph indicates 'The investment plan has not yet started […]. Once it is executed, the ongoing restructuring should be completed and the yard should return to viability' In the one before last paragraph, the Commission recalls the prohibition of further restructuring aid. Finally, the last paragraph indicates 'In the light of the above, the Commission has decided to close the procedure pursuant to Article 93(2) by authorising the aid subject to the conditions described in this letter. Should the Commission consider that any of these conditions have not been complied with, it may require the suppression and/or recovery of the aid'. The fact that the Commission used the word 'conditions' in plural indicates that there was at least a second condition in addition to the prohibition of additional restructuring aid. On the basis of the structure and the content of the decision, it can be concluded that the implementation of the investment plan was a condition. The Commission

has already assessed in detail the implementation of the investment aid when analysing measure P1. The Commission has concluded that HSY has not implemented the investment plan in a reasonable period. On 31 December 2001 — after one prolongation of the date for completing the investment plan — HSY had executed only 63 % of the plan. The Commission concludes therefore that this condition has not been complied with.

(154) Greece claims that the implementation of the investment plan is not a condition laid down in Regulation (EC) No 1013/97, which is the legal basis of decision C 10/94. The Commission recalls that the aid was authorised by decision C 10/94. Therefore, the conditions laid down in the latter decision have to be respected. If Greece considered that the conditions laid down in decision C 10/94 did not comply with the conditions laid down in Regulation (EC) No 1013/97, it should have contested decision C 10/94. However, it has not done so within the time limit set by article 230 of the Treaty. As a subsidiary element, the Commission recalls that Regulation (EC) No 1013/97 is simply an amendment of the Directive 90/684/EEC and aimed at increasing the aid amount which can be granted to three groups of yards. With regards to HSY, Regulation (EC) No 1013/97 indicates that 'All other provisions of Directive 90/684/EEC shall apply to this yard.' The Commission recalls that the Directive 90/684/EEC authorises aid to Greek yards if 'granted for the financial restructuring of yards in connection with a systematic and specific restructuring programme linked to the disposal by sale of the yards.' This indicates that the Council could not be satisfied with the mere submission of a restructuring plan but really needed the implementation to be carried out. Indeed, how aid could be granted 'in connection with a systematic and specific restructuring programme' if this programme is not implemented.

(155) Since the condition has not been complied with, the aid has been misused and, in accordance with the last paragraph of decision C 10/94, it has to be recovered.

4.5.5.3. Prohibition of 'further operating aid for restructuring purposes'

(156) The one before last paragraph of decision C 10/94 indicates that 'the Commission notes that Regulation (EC) No 1013/97 was adopted by the Council with the condition that no further operating aid for restructuring purpose will be made available for the yards covered by the regulation. Accordingly, no such restructuring aid can be granted to this yard in the future.' The parties to this procedure disagree on the interpretation of this condition. According to Greece and HSY, this entails that any operating aid for restructuring purpose which would be granted after the adoption of the decision would be automatically incompatible and should be recovered. According to Elefsis, this condition entails that the grant of any operating aid for restructuring purposes after the adoption of the decision would be a misuse of the aid authorised by decision C 10/94 and should therefore lead to the recovery of the aid authorised by the decision C 10/94, in addition to the recovery of the additional operation aid for restructuring purposes.

(157) The Commission observes that the goal of the prohibition of further operating aid for restructuring is to avoid the accumulation of aid above the level set in the decision. The Commission considers that this objective is reached if any additional operating aid granted after the adoption of decision C 10/94 is recovered. Indeed, by the recovery of the additional aid, the initial situation is restored and accumulation of aid above the level set in decision C 10/94 is avoided. The Commission therefore concludes that the grant of additional operating aid for restructuring purpose after the adoption of decision C 10/94 does not trigger the obligation to recover the aid approved by decision C 10/94, as long as the additional aid is actually recovered.

(158) The Commission observes that, in order to determine whether the aid authorised by decision C 10/94 should be recovered, it is not necessary to determine which of the aid measures unlawfully implemented after the adoption of decision C 10/1994 constitute 'operating aid for restructuring purpose'. Indeed, in the present decision, the Commission will conclude that all the aid measures unlawfully implemented after the adoption of decision C 10/94 should be recovered. Consequently, any measure which could potentially qualify as further operation aid for restructuring purposes will have to be recovered. The recovery will restore the initial situation and therefore any potential accumulation of restructuring aid is avoided. Therefore, the objective of the condition laid down in decision C 10/94 will be complied with.

4.5.5.4. Non payment of the purchase price

(159) In the course of the deeper analysis of the case that took place during the investigation procedure, the Commission discovered an additional infringement of decision C 10/94: in the whole period during which the employees — as holder of a 49 % stake in HSY — were participating in the management of HSY, they have never paid the purchase price they were supposed to pay under the partial privatisation contract of September 1995.

(160) In order to understand this breach of decision C 10/94, it is first necessary to analyse the text of this decision and of the legal acts on which it is based.

(161) The preamble of the Directive 90/684/EEC indicates 'Whereas a short-term financial restructuring of the shipbuilding industry in Greece is necessary in order to enable its public owners to restore its competitiveness by selling it off to new owners'. On that basis, Article 10 of the Directive indicates '2. During 1991, operating aid for shipbuilding, ship conversion and ship repair not related to new contracts may be considered compatible with the common market if granted for the financial restructuring of yards in connection with a systematic and specific restructuring programme linked to the disposal by sale of the yards. 3. Notwithstanding the obligation to dispose of the yards by sale referred to in paragraph 2, the Greek Government shall be allowed to maintain a 51 % majority holding in one of the yards if justified by defence interests'. The Commission observes that the Directive uses the words 'selling […] to new owners' and not 'giving' to new owners. The new owners were thus supposed to pay a price in exchange for the ownership of the yards. The ownership can not be granted for free. The sentence 'to restore its competitiveness by selling it off to new owners' explains the purpose of this condition. Under State ownership, the yards have not taken the necessary measures to restore their competitiveness. Consequently, they constantly needed State aid. To remedy this situation, unacceptable on the basis of Article 87 of the Treaty, the Council authorises aid for a last time (i.e. aid can be granted in 1991) but impose the sale of the yards to new owners. The logic is therefore that the new owners will take the measures necessary to restore competitiveness, such that the yards will not need operating aid for restructuring [93] anymore.

(162) As indicated in section 2 'Prior decisions of the Commission and of the Council' of the present decision, the Commission took in July 1995 a negative decision in the procedure C 10/94 because HSY had not been sold, as requested by Directive 90/684/EEC. Greece asked the suspension of that decision by claiming that the sale was imminent. Greece itself then presented the contract of September 1995 as a sale of the yard. On that basis the Commission revoked its negative decision.

(163) The preamble of Regulation (EC) No 1013/97 indicates 'Whereas, in spite of the efforts made by the Greek Government to privatise all its public yards by March 1993, the Hellenic shipyards was only sold in September 1995 to a cooperative of its workers, the State having kept a majority holding of 51 % for defence interests; Whereas the financial viability and the restructuring of the Hellenic shipyard necessitates the provision of aid which allows the company to write-off the debt accumulated before its delayed privatisation'. Article 1(3) of Regulation (EC) No 1013/97 indicates 'Drachma aid in the form of a waiver of debts of "Hellenic shipyards", up to the amount of Dr 54 525 million, corresponding to debts relating to civil work by the yard, as existing on 31 December 1991 and with accrued interest rates and penalties until 31 January 1996 may be regarded as compatible with the common market. All other provisions of Directive 90/684/EEC shall apply to this yard'. Regulation (EC) No 1013/97 was therefore adopted because, in order to become viable, HSY needed more aid than what was authorised under Article 10 of the Directive 90/684/EEC. More precisely, the former regulation authorised the waiver of the interests and penalties related to debts existing on 31 December 1991 and which had accrued since then. Regulation (EC) No 1013/97 was applicable until 31 December 1998. The Commission observes that the Council again used the words 'sold' and 'privatisation' in respect of HSY. The Council authorised the aid because it considered that a valid sale contract had been concluded in September 1995, in compliance with the condition laid down in the Directive 90/684/EEC. In other word, it was not necessary to put the sale of the yard as a condition since a valid sale contract already existed.

(164) Decision C 10/94 starts by recalling that Article 10 of the Directive 90/684/EEC required the sale of the yard. Decision C 10/94 then indicates than this condition was fulfilled since '49 % of the shares in the yard were sold on 18 September 1995 to a cooperative of the yard's workers'. However, since the aid amount is larger than what the Directive 90/684/EEC authorised, 'The Commission could not give its approval on the basis of the provisions of the 7th Directive' which therefore was amended by Regulation (EC) No 1013/97 to increase the amount of aid that can be granted to HSY. Since the conditions laid down in the latter regulation and the

conditions laid down in Directive 90/684/EEC were met, Decision C 10/94 authorised the aid. The Commission observes that Decision C 10/94 again used the word ‘sold’ and considered that the contract between ETVA and the employees concerning the sale of 49 % of HSY shares was a valid sale. The Commission underlines that it had received a copy of the sale contract before the adoption of decision C 10/94 and was therefore aware of its content. The Commission concludes that, when adopting decision C 10/94, the Commission had no reason to request the sale of HSY (i.e. to put it as an explicit condition to be respected in the future) since a valid sale contract had already been signed in September 1995.

(165) However, the Commission recalls that the contract of September 1995 contained unusual provisions regarding the payment of the purchase price: the purchase price of GRD 8,1 billion (EUR 24 million) would not be paid immediately by the employees but it would be paid in 13 annual instalments after a grace period of 2 years, therefore from 1998 until 2010. Nevertheless, the ownership of the shares would be immediately transferred to the employees. Until the payment of the purchase price by the employees, ETVA will keep a pledge on the shares. In order to finance the payment of the yearly instalments to ETVA, HSY would retain a part of the monthly salary and of the allowances of the employees. In the months following September 1995, a contract was signed between ETVA, HSY, the association of the employees and each individual employee of HSY (the contract of September 1995 was concluded between ETVA and the association of employees). By this contract, each employee agreed to purchase a given number of shares in accordance with the terms of the September 1995 contract. These contracts also repeat that HSY will retain a part of the monthly wage and of the Easter and Christmas allowance to finance the annual instalments.

(166) The Commission has now established that the employees have never paid the yearly instalments. This means that they have not paid them while they were participating in the management of the yard as owner of 49 % of the shares. The first three instalments defined in the September 1995 contract — the ones that should have been paid in 1998, in 1999 and in 2000 — were not paid. In 2001, in the framework of the privatisation of HSY, the employees and ETVA concluded a contract by which the employees gave up their claim on 49 % of the revenue from the sale of HSY’s shares to HDW/Ferrostaal. In exchange, ETVA gave up its claim toward the employees concerning the payment of the purchase price of 49 % of HSY’s shares which should have been paid by the employees according to the September 1995 contract. This means that the employees as owners were never financially exposed to the success or failure of the restructuring.

(167) The Commission indicated to Greece and HSY that the non-payment of the purchase price by the employees seems to constitute a misuse of decision C 10/94 since it entails that the partial privatisation, aiming at restoring the competitiveness of the yard, never took place.

(168) Greece and HSY contest these conclusions. Among others, they raise the following three grounds to dismiss the Commission doubts.

(169) As a first ground, Greece claims that the privatisation is ‘real’ and ‘genuine’. In particular, the Greek Government underlines that: ‘The employees acquired the shareholder’s capacity according to the provisions of Greek law. They were registered in the company’s Shareholders’ Book and acquired all relevant rights as shareholders, including the right to participate and vote in the General Meetings and thus exercising control and influence on the day-to-day administration of the shipyards. In addition, the acquisition of shares entailed the risk that the shares might loose their value’. ‘The employees exercised their pre-emption rights, provided by the relevant laws, and participated in the share capital increase, pro rata to their stake in the share capital, therefore private capital was invested in the shipyards’ ([94]).

(170) As a second ground, Greece claims that the payment of the purchase price was not a condition laid down in decision C 10/94, and even if it was the case, the Commission considered it as already fulfilled. In particular, Greece recalls that ‘The Commission mentioned in its Decision of 31 October 1995 that it will continue to examine, within the procedure it had opened, all the actions of the Greek Government regarding the application of the agreement to transfer 49 % of the shares to the employees’ union, as well as its content, before taking a final decision on the authorisation of the debt write-off. By acting accordingly, it reached a final positive decision in 1997 which approved the write-off, without imposing the condition of privatisation. In other words, the Commission had already examined in 1997 the content of the agreement and had concluded that it is a matter of privatisation before authorising the debt write-off;’ ([95]).

(171) As a third ground, Greece claims that ETVA has correctly applied the sale contract. Indeed, the employees, since they already had to participate in three capital increases aimed at financing the investment plan [96], 'found it difficult to honour their commitment to pay the price of the shares. ETVA did not take out injunctions in order to recover the amount owed by each of the 2 000 employees because, realistically, there was no chance of bringing any such action to a successful conclusion […]. Rather than engaging in complicated, time-consuming, costly and ultimately futile court proceedings in order to satisfy its claims […], ETVA enforced the pledge on the unpaid shares and recovered its claim from the proceeds of the sale of the shares belonging to the employees, in that the said proceeds covered the debt in question' [97], In other words, Greece claims that, since in the framework of HSY's privatisation in 2001–2002 ETVA received from HDW/Ferrostaal 100 % of the sale price — instead of only 51 % — 'it may be seen that the price was received. It is evident that the discharge of the price of the workers' shares by means of the sale satisfied ETVA's requirement to be paid the price […]. […] there is no issue of non-payment of the buy-out price' [98]. In addition, it can not be contested that the sale to HDW/Ferrostaal constitutes a real privatisation.

(172) The Commission has reached the following conclusions. As indicated earlier, decision C 10/94 and Regulation (EC) No 1013/97 concluded that, since the shares of HSY had been sold to the employees by the September 1995 contract, the condition of the sale of the yard laid down in Article 10 of the Directive 90/684/EEC was fulfilled. As indicated earlier, the purpose of this condition was to transfer the ownership to owners who, since they would aim at maximising the value of their investment, would take the measures necessary to restore the competitiveness of the yards. In this context, the Commission accepted the September 1995 contract as a valid sale since it contractually obliged the employees to pay EUR 24 million in exchange of a 49 % stake in HSY. This price to pay entailed that, when participating to the management of the yard, the employees would take care of preserving and increasing the value of their investment [99]. It appears now that ETVA, which was controlled by the State, has never seriously tried to obtain the payment of the parts of the purchase price which, according to the September 1995 contract, should have been paid by the employees in 1998, 1999 and 2000. ETVA had several ways to obtain the payment of the purchase price. ETVA controlled HSY, which was legally entitled to collect the amounts from the wages and allowances of the employees [100]. In addition, HSY and the association of the employees were also contractually bound towards ETVA by the individual agreements signed with each employee in the months following September 1995. ETVA could therefore sue HSY and the association for the employees and did not need to sue the individual employees, as claimed by the Greek authorities. The Commission therefore concludes that the Greek authorities consciously did not request the payment of the annual instalments from the employees. By adopting this behaviour, Greece showed that it did not intend to obtain from the employees the payment of the purchase price. This dramatically modified the situation in which the employees found themselves. Instead of having to pay a purchase price, the employees would not have to put at risk this amount of own money. This means that, when participating in the management of the yard, they attached less importance to the preservation and the increase of the value of the shares and the restoration of financial viability (and more to the preservation of the employment and of the working conditions). In addition, since they were not paying the purchase price, it could be expected that over the medium or long term, ETVA would enforce its pledge on the shares and therefore the employees would simply have no shareholding anymore in the yard. In this context, the Commission fails to see how the employees could have been interested in preserving and increasing the value of HSY and taking the necessary measures to restore its competitiveness. The Commission therefore considers that the fact that the State did not seek to obtain the payment of the purchase price from the employees under the terms of the September 1995 contract dramatically changed the situation of employees when they were participating in the management of the yard. Consequently, because ETVA did not seek the payment of the purchase price from the employees, the change of ownership that took place in September 1995 did not constituted a real 'sale', aiming at restoration of competitiveness of the yard, as requested by Directive 90/684/EEC. In conclusion, by not seeking the payment of the purchase price from the employees, Greece has misused decision C 10/94. Indeed, the latter was adopted by the Commission on the basis of the legitimate assumption that the September 1995 contract would be implemented by the State-owned bank ETVA, and in particular that ETVA would collect the payment of the purchase price from HSY employees in accordance with the precise provisions laid down in the contract, hereby ensuring that these new owners have a financial interest in supporting the measures necessary to restore competitiveness and viability. The Commission could not expect that Greece, after having itself presented the September 1995 contract as a sale of HSY, would consciously refrain from obtaining the payment of the sale price from the purchaser, despite the existence of several contractual and legal provisions allowing the collection of the price. The Commission considers that such behaviour is similar to the submission of incorrect information to the Commission and to a misuse of aid.

The aid authorised by Decision C 10/94 should therefore be recovered from HSY.

(173) The Commission has reached the conclusion that the three grounds raised by Greece and HSY which have been summarised earlier should be dismissed.

(174) As regards the first ground — the privatisation was genuine and real because the employees got ownership of the shares and the corresponding control over HSY — the Commission observes that the transfer of the ownership was a necessary but not sufficient condition. Indeed, Decision C 10/94 as well as Regulation (EC) No 1013/97 are based on the fact that the shares have been 'sold' to the employees in September 1995. In other words, they are based on the hypothesis that the employees will pay the purchase price in accordance with the conditions laid down in the September 1995 contract. They are not based on the fact that the shares have been 'transferred' or 'given' to the employees. As explained earlier, it is logic that the Commission and the Council considered the payment of the purchase price as crucial since it forced the employees to attach importance to the value of the shares and manage the yard accordingly. As indicated earlier, since they did not had to pay this price, they were in a different situation from a market economy owner. As regards Greece's claim that 'the acquisition of shares entailed the risk that the shares might loose their value', the Commission notes that, while it is undisputed that the employees become formally the owner of the shares, they were much less concerned by the evolution of the value of the shares since they did not have to pay a high price (i.e. reduction of the wages and allowances during 12 years) to obtain them. In addition, since the employees were not paying the purchase price, they had to expect that ETVA would enforce its pledge on the shares, such that the employees would not remain the owners of these shares. Finally, as regards Greece's claims that 'The employees […] participated in the share capital increase, pro rata to their stake in the share capital, therefore private capital was invested in the shipyards', the Commission does not contest that the employees participated to the capital increase (this will be described in the description and assessment of measure E10). However, the Commission recalls that, according to the September 1995 contract, the participation to the capital increase did not entitle the employees to any new shares of HSY. The Commission therefore fails to see how this participation alone could incite the employees to manage the yard in a way that preserves or increases the value of the shares since this participation did not give them any new shares [101]. The Commission also fails to see how this participation could constitute a 'sale' of HSY since the employees did not receive additional shares in exchange of their investments. As a subsidiary element, the Commission recalls that the total amount invested by the employees on the occasion of the three capital increases was much smaller than what they should have invested if they would have participated to these capital increases and paid the purchase price according to the terms of the September 1995 contract. It is recalled that decision C 10/94 and Regulation (EC) No 1013/97 were based on the hypothesis that the September 1995 contract would be implemented, i.e. that the purchase price and the participation to the capital increases would be paid by the employees. Since the amount of money that the employees had to invest was much smaller than what the Commission legitimately expected when it adopted decision C 10/94 (and what the Council expected when it adopted Regulation (EC) No 1013/97), the Commission considers it insufficient to incite them to attach sufficient importance to the value of the shares and the restoration of the competitiveness of HSY.

(175) As regards the second ground raised by Greece — the payment of the purchase price was not a condition laid down in decision C 10/94, and even if it was the case, the Commission considered it as already fulfilled after having examined the September 1995 contract — the Commission has earlier recalled that the sale of the yard was a condition laid down in the Directive 90/684/EEC and explained what was the reason for this condition. The Commission has also already explained that it took a negative decision in July 1995 because the yard had not been sold. It was therefore evident to Greece that the Commission would not be satisfied by a mere transfer of ownership to the employees and it finally accepted the September 1995 contract only because it was a real sale, i.e. the employees would pay a significant purchase price and would thus have a real financial interest in restoration of competitiveness. The Commission also recalls that Regulation (EC) No 1013/97 amended Directive 90/684/EEC only in respect of the amount of operating aid for restructuring that can be granted to HSY. Since the September 1995 contract had already been submitted to the Commission and the Council at the time of the adoption of Regulation (EC) No 1013/97 and decision C 10/94, these legal acts did not need to repeat the condition of the sale of the yard. They simply recall that the shares of HSY have been 'sold'. On that basis, decision C 10/94 concludes that 'The conditions set in Article 10 of the Directive […] were met' In other words, the assessment made by the Commission in Decision C 10/1994 (and the one made by the Council in Regulation (EC) No 1013/97) takes into account the existence of the September 1995 contract, which

was presented as a sale by Greece and, above all, which contractually obliges the employees to pay EUR 24 million to ETVA for the purchase of 49 % of HSY and which precisely determines how this purchase price would be collected from the employees and paid to ETVA. Since the obligations and rights of the parties where precisely determined in a contract, since Greece itself presented the contract as a sale of HSY, and since the Greek government itself had adopted a law obliging the employees to pay the purchase price to ETVA (see footnote 100), the Commission had no reason to doubt that the State would correctly implemented the contract. In particular the Commission could not expect that the State itself will consciously refrain from collecting the purchase price from the purchaser. The Commission was entitled to consider that HSY had been sold and did not have to repeat that HSY had to be sold.

(176) As regards the third ground raised by Greece to dismiss Commission's doubts — the September 1995 contract was correctly implemented — the Commission observes that the September 1995 contract indicated clearly how the purchase price would be paid. The annual instalments would be paid from 1998 and they would be financed by retaining a part of the Christmas and Easter allowances as well as a part of the monthly wage. Since the employees had accepted a reduction of their future salaries and allowances, ETVA did not need to collect the purchase price from each individual employee: HSY was able to directly withhold a part of their monthly salary. In these circumstances, the Commission fails to see how the non-payment of the yearly instalments can be justified by the fact that 'the workers found it difficult to honour their commitment to pay the price of the shares'. ETVA had simply to ensure that HSY withheld the respective amounts from the allowances and wages. ETVA, being the majority shareholder, controlled HSY. In addition, HSY was supposed to withhold these amounts under the terms of the agreements concluded between ETVA, HSY, the association of the employees and each individual employee. Therefore, ETVA could have directly sued HSY if it did not act according to the terms of the contract [102]. The Commission therefore concludes that ETVA, which was controlled by the State, has not tried to obtain the payment of the purchase price as it was supposed to do under the provisions of the sale contract of September 1995. As earlier explained, this constitutes a misuse of decision C 10/94, since the latter legitimately supposed a correct implementation of that contract. As a subsidiary ground, the Commission notes that, even if Greece's claim that it was impossible for ETVA to collect the purchase price from the workers is true, this would also require the recovery of the aid authorised by decision C 10/94. Indeed, if this claim is true, it means that Greece has notified to the Commission a sale agreement which from the outset could not be implemented (i.e. the State can not collect the purchase price from the purchaser) [103]. In that case, the Commission should consider that decision C 10/94 is based on misleading information from Greece and should therefore rescind it.

(177) In relation to the third ground raised by Greece, the Commission also rejects the claim that the enforcement of the pledge on the unpaid shares and their sale in the framework of the privatisation of 2001–2002 is similar to obtaining from the employees the payment due under the September 1995 contract. First, since ETVA did not seek to obtain the payment of the purchase price from the employees, they did not expect to actually have to invest the corresponding amount of money and consequently did not risk losing this money if the value of the shares would decrease. As explained earlier, this is in contradiction with decision C 10/94, which supposed that HSY had been 'sold', i.e. that a private investor put a precise and large amount of its own money at risk by purchasing shares of HSY and it would therefore be incited to manage the yard with the objective of maximising the value of its holding. Second, the cash received by ETVA — and therefore by the State — is totally different. By enforcing the pledge on the shares, ETVA supported 100 % of the risk related to the value of HSY (thereby it reverted the partial privatisation). In addition, ETVA received only EUR 6,1 million when it sold 100 % of the shares of HSY to HDW/Ferrostaal. This means that ETVA received only EUR 3 million from the sale of the 49 % stake. This is much less than what ETVA should have received from the employees under the terms of the September 1995 contract, namely EUR 24 million paid in yearly instalment from December 1998 to December 2010.

(178) Finally, as regards the claim that a real privatisation took place when HDW/Ferrostaal acquired 100 % of HSY, the Commission does not contest that point. However, it recalls that Article 10 of the Directive 90/684/EEC authorised aid only in connection with a sale of the yard. Similarly, Regulation (EC) No 1013/97 and decision C 10/94 authorised aid because the yard had just been 'sold'. Therefore, the aid had to be granted in the context of the sale of the yard. It could not be granted

for a sale taking place several years later. Therefore, the fact that HSY was really privatised by the sale to HDW/Ferrostaal does not change the conclusion that decision C 10/94 has been misused. It is also recalled that at the time of the sale to HDW/Ferrostaal, both Directive 90/684/EEC and Regulation (EC) No 1013/97 had expired for several years. Therefore, HSY would not have been able to receive the aid approved by decision C 10/94 in the framework of the 2001-2002 privatisation.

(179) The Commission concludes that none of the grounds raised by Greece can dismiss the earlier conclusion that, by not seeking to obtain the payment of the purchase price from the employees, the State-controlled ETVA has misused decision C 10/94. This constitutes therefore a second misuse — besides the non implementation of the investment plant — of Decision C 10/94 and a second reason for the recovery of the aid authorised by this Decision.

4.5.5.5. Justification for the procedural choice of the Commission

(180) In the extension decision, the Commission has raised doubts that the employees have not paid the purchase price for their 49 % stake in HSY. However, these doubts were raised in the framework of the assessment of measure E10 (named measure 10 in the extension decision). These doubts were not raised in the assessment of measure E7 (named measure 7 in the extension decision). Consequently, the extension decision does not indicate that that the non-payment of the purchase price could constitute a misuse of decision C 10/94. The question could thus be raised whether according to Article 6 of Regulation (EC) No 659/1999 the Commission should have adopted a new decision extending for the second time the formal investigation procedure in order to raise doubts on this point. Greece claims this to be the case [104].

(181) The Commission does not consider that it was obliged to extend a second time the investigation procedure in this particular case. First, as indicated, the doubts concerning the precise fact (i.e. the payment or not of the purchase price by the employees) have been raised in the extension decision, thereby offering the possibility for the parties to comment on it. Second, as regards the legal reasoning that this fact could constitute a misuse of measure E7, the Commission only reached this conclusion in the framework of the in-depth analysis of all the facts and laws that took place in the framework of the formal investigation procedure. In such a large and complex case, which concerns measures as old as 10 years old, the investigation procedure will nearly automatically allow the Commission to refine its analysis since it provides a better knowledge of the facts and legal issues. Third, Greece has for a long time given confusing information regarding the payment of the purchase price by the employees. As late as in its answer to the extension decision, Greece and HSY claimed that the employees had started to pay the purchase price in 1998, as planned in the September 1995 contract [105]. However, in the framework of the investigation procedure, the Commission accumulated evidence that it was no the case. It therefore requested Greece and HSY to submit solid evidence for their claims [106]. Finally, HSY and Greece acknowledged that the employees did not pay the annual instalments in accordance with the September 1995 contract. The Commission, having eventually clarified the relevant facts of the case, was at that moment able to assess whether there has been misuses of earlier decisions.

(182) The Commission also stresses that, in order to allow Greece and HSY to participate effectively in the procedure and in order to be sure that the rights of defence had been respected, it offered the opportunity to Greece and HSY (i.e. the only parties that had submitted comments on measure E10, besides Elefsis which had however already indicated in its comments that it considered that, since the purchase price had not been pay, the Commission should order the recovery of the aid endorsed by decision C 10/94) to comment on its assessment that the non payment could be considered as a misuse of decision C 10/94 [107]. Both Greece and HSY submitted extensive comments [108].

4.6. **Misuse of the EUR 29,5 million closure aid authorised in 2002 (measure E8)**

4.6.1. *Description of the measure*

(183) On 5 June 2002, decision N 513/01 authorised aid amounting to EUR 29,5 million to encourage part of HSY's employees to voluntarily leave the yard. The Commission found that the EUR 29,5 million aid constituted compatible closure aid in the meaning of Article 4 of Regulation (EC) No 1540/98 and accepted as valid capacity reduction the limitation of the annual ship repair capacity of the yard to 420 000 direct man-hours, including subcontractors.

4.6.2. *Grounds for initiating the procedure*

(184) In the extension decision, the Commission expressed doubts whether this limitation has been respected. The obligation to submit bi-annual reports was not respected. In addition, the Greek authorities have submitted confusing figures when asked to submit the relevant information.

4.6.3. *Comments from interested parties*

(185) According to Elefsis, the turnover of HSY and the number of ships annually repaired in the yard are so high that they are irreconcilable with the compliance with the 420 000 hours limitation.

4.6.4. *Comments from Greece*

(186) According to Greece and HSY, the yard resorts intensively to subcontractors, which have to be divided in two categories. First, the 'subcontractors retained by HSY'. They are chosen and paid by HSY. Second, the 'contractors of third parties'. The latter are chosen by the ship-owner. The ship-owner selects them and discusses the price directly with them. The contractors of third parties pay a fee to HSY to use the yard's facilities. According to Greece, only the first category has to comply with the limitation laid down in decision N 513/01. However, HSY does not know how many hours these 'subcontractors retained by HSY' work since they are paid on a fixed price basis. Greece therefore proposes a method to approximate the number of hours during which they worked: first, the sum of the contract prices paid to them is reduced by 15 % — which accounts for the profit margin — and by a further 20 % [109] — which account for the indirectly productive man-hours. The amount obtained is then divided by the 'annual cost rate of a man-hour derived from HSY's official books' [110]. By using this method, Greece arrives at a total number of hours below 420 000 for the each of year from 2002 until 2006. Greece thus concludes that the limitation has been complied with. The method is summarised in the following table.

	1.1.2002 –31.12.2002	1.1.2003 –30.9.2003	1.10.2003 –30.9.2004	1.10.2004 –30.9.2005	1.10.2005 –31.8.2006
A. Directly productive man-hours preformed by HSY's workers	51 995	42 155	[…] (*)	[…]	[…]
B. Price paid to subcontractors retained by HSY (in Euro)	3 798 728	16 471 322	[…]	[…]	[…] (until 30.6.2006)
C. = B after deduction of profit margin (15 %) and indirect work (20 %)	2 469 173	10 179 134	[…]	[…]	[…]
D. Price per hour (in Euro) of HSY direct workers	25,97	27,49	[…]	[…]	[…]
E. Estimation of the directly productive man-hours preformed by workers of the subcontractors retained by HSY (= C divided by D)	95 077	370 284	[…]	[…]	[…]
F. Total directly productive man-hours falling under decision N 513/01 (= A + E)	147 073	412 440	[…]	[…]	[…]

(*) Covered by the obligation of professional secrecy.

4.6.5. *Assessment*

4.6.5.1. Article 296 of the Treaty

(187) As regards the potential application of Article 296 to the present measure, the Commission recalls that the separation between the military activity and the civil activity was already done in decision N 513/01, which considered that the part of the State support falling under State aid rules was 25 %. The EUR 29,5 million aid was therefore entirely related to the civil activities of HSY and can be assessed under State aid rules.

4.6.5.2. Existence of a misuse of the aid

(188) The Commission has reached the conclusion that each of the following elements is individually sufficient to conclude that the limitation laid down in the authorising decision was not respected and therefore the aid was misused.

(189) First, since it was subject to a limitation of the number of man-hours, HSY had to put in place a mechanism to calculate precisely these hours. By having not put in place a mechanism to calculate precisely the number of man-hours carried out by subcontractors, and therefore by preventing a precise calculation of the number of man-hours carried out by the yard, HSY has misused decision N 513/01. This is especially the case since it is Greece that proposed to use the indicator 'number of man-hours' to prove that HSY was reducing its production capacity.

(190) Second, the Commission contest Greece's assertion that 'contractors of third parties' are not covered by the limitation of hours. Greece claims it has no contractual relationship with them except renting the facilities. First, the Commission considers that accepting this reasoning would offer an easy way to circumvent the limitation: HSY, instead of signing contracts with subcontractors, would ask the shipowners to sign them, such that there is no contract between HSY and the subcontractors. Second, the aim of the limitation is to reduce the activities within the yard. It is therefore logic that when decision N 513/01 indicates that 'subcontracted labour' is included in the limitation, both the subcontractors of HSY and the subcontractors of the shipowner which are working within the yard are covered. Third, following detailed questions raised by the Commission [111], Greece acknowledged that HSY manages the payment to some of these 'third party contractors': The latter make an agreement with the shipowner regarding the tasks to be performed and the price, but then the shipowner pays HSY, which in turn transfers the money to the contractors. In such cases, there is a contractual relationship between HSY and the contractors, and the amounts paid by the shipowner for the work of the contractor appears in HSY income statement as a revenue (i.e. they are included in the sales/turnover of HSY). It is therefore beyond doubts that at least these contracts with 'contractors of third parties' fall within the limitation. Greece has neither calculated nor communicated to the Commission the number of man-hours performed by these 'contractors of third parties'. This constitutes an additional breach of decision N 513/01. In addition, the Commission observes that the turnover of the repair activities of HSY has rapidly increased since 2002. However this trend is not reflected at all in the total number of man-hours communicated by Greece. It is therefore likely that the number of man-hours performed by third party contractors paid by HSY has significantly increased. Since according to the figures provided by Greece, HSY was just below the limit of 420 000 hours in 2003, the Commission concludes that, if the contractors of third parties which are paid by HSY are included in the total number of man hours performed by HSY, it is reasonable to suppose that this limit has been breached in the following years.

(191) Third, even if it were accepted that 'contractors of third parties' do not fall under the limitation of hours laid down in decision N 513/01 (which is not) and that the man-hours performed by the 'subcontractors retained by HSY' can be approximated by dividing the amounts paid to them by the hourly cost of labour, the limitation is not respected. Indeed, the 'annual cost rate of a man-hour derived from HSY's official books', which is used by Greece, is an inappropriate approximation of the hourly cost of a worker working for a subcontractor. Indeed, the high volatility of the series (for instance, it goes from EUR 27 to EUR […] in the next year) proves that the annual cost rate of a man-hour derived from HSY's official books does not indicate how much a worker costs per hour [112]. Indeed, the hourly gross wage in an industry never evolve in such a manner: it increases steadily over time, but never doubles from one year to the other. In addition, yards use subcontractors precisely because it is cheaper than hiring more labour themselves. Consequently, the use of the annual cost rate of a man-hour derived from HSY's official books overestimates the cost per man-hour of the workers employed by the subcontractors. This fact has been confirmed by the consultant retained by the Commission. When more reasonable estimates of the cost per hour are taken into account, this significantly increases the number of man-hours performed by subcontractors [113], such that the limitation of 420 000 hours is breached in 2003 and 2005.

(192) Fourth, in the method proposed by Greece, the year 2003 has only nine months, i.e. until September 2003. Greece claims that from that moment the accounting year started to run from October to October. It can not be accepted that an annual ceiling is applied on the activity of nine months only. The Commission asked Greece to provide details over the activity during the last three months of 2003 but Greece has not provided the requested data [114]. If the activity of the last three months of the calendar year 2003 is approximated as a quarter of the activity of the business year 2004, it is clear that there is a breach of the limitation of man-hours.

(193) Since there are several independent grounds from which the misuse can be concluded, the Commission concludes that the aid must be recovered.

4.7. **Capital injection of GRD 8,72 billion (EUR 25,6 million) by the Greek State or ETVA in 1996–1997 (measure E9)**

4.7.1. *Description of the measure*

(194) In 1996–1997, ETVA made a GRD 8,72 billion (EUR 25,6 million) capital injection in HSY.

4.7.2. *Grounds for initiating the procedure*

(195) The extension decision raises doubts that this capital injection corresponds to the behaviour of a market economy investor. First, the Commission notes that Greece made contradicting submissions, indicating first that this amount had been granted by the State to compensate for the cost of a workforce reduction of 1 000 employees, and afterwards contradicted this explanation by claiming that this capital injection had been made by ETVA. Second, the Commission observes that the employees, who owned 49 % of the shares, did not participate in this capital increase. In addition, it is surprising that this capital injection by ETVA did not increase its shareholding in HSY.

(196) The Commission also indicated that, if found to constitute aid, it is doubtful whether this measure could constitute compatible aid.

4.7.3. *Comments from interested parties*

(197) Elefsis indicates that in 1996 49 % of the shares of HSY were owned by the employees. If ETVA made a capital injection without a pro rata participation of the employees, its shareholding should have increased to above 51 %, what was prohibited by law and what did not take place. This entails that ETVA did not receive any new shares in exchange for this capital injection. Such a scenario would have been unacceptable for a private investor.

4.7.4. *Comments from Greece*

(198) Greece confirms that ETVA made a GRD 8,72 billion (EUR 25,6 million) capital injection in 1996–1997 and received an equivalent amount from the State. Greece claims that the State acted as market economy investor since the reduction of the workforce financed by the capital injection significantly improved the efficiency of the yard and its future profitability. HSY explains that the amounts injected did not lead to the issuance of new shares and did not formally constitute a capital injection. That explains why the State shareholding did not increase above 51 %. Should the Commission nevertheless consider that this measure constitutes aid, Greece considers that it is compatible closure aid according to Article 7 of Directive 90/684/EEC.

4.7.5. *Assessment*

4.7.5.1. Article 296 of the Treaty

(199) This measure financed the entire activity of the yard and was not earmarked to support the civil activities only. Since, as concluded in section 3.3 of the present decision, 75 % of the activities of yard are military and Greece invokes Article 296 of the Treaty, only 25 % of the measure, which is GRD 2,18 billion (EUR 6,4 million), may be assessed under State aid rules.

4.7.5.2. Existence of aid

(200) The Commission observes that the State, through ETVA, gave money to HSY without receiving new shares, whereas it held only 51 % of HSY. A market economy investor would not make such a present to the other shareholders. It would have asked new shares or a pro rata capital injection by the other shareholders. Consequently, a private investor in similar circumstances would not have carried out this capital injection.

(201) Since the State provided resources to HSY which it would not have received from the market, this measure gave a selective advantage to HSY. The measure therefore constitutes aid in the meaning of Article 87(1) of the Treaty. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.

4.7.5.3. Compatibility with the common market

(202) As regards the compatibility of this aid, the Commission observes that it is undisputed that HSY's workforce was reduced from 3 022 persons in 1995 to 1977 persons in 1997. This reduction of the workforce was also reported in the two decisions adopted on 15 July 1997 (Decisions C 10/94 and N 401/97) because it constituted one pillar of the restructuring plan. Decision N 401/97 authorises investment aid, which, according to Directive 90/684/EEC, can be found compatible only if it is 'linked to a restructuring plan which results in a reduction in the overall ship repair capacity' and 'which does not involve any increase in the shipbuilding capacity'. Decision N 401/97 considers there is 'a reduction in the yard's repair capacity equivalent to the reduction in the number of employees, which will not be possible to compensate with the envisaged increase in productivity and a reduction of docking capacity for commercial vessels'. The Decision also indicates that there is a small reduction of the shipbuilding capacity.

Since the Commission itself acknowledged in decision N 401/97 that the workforce reduction in combination with the other measures proposed by Greece would lead to a reduction of the ship building and ship repair capacities, the Commission considers that there was a capacity reduction, as requested by Article 7 of Directive 90/684/EEC. As regards the amount and the intensity of the aid, the Commission observes that the aid amounted to EUR 25,6 million for a reduction of the workforce by 1 000 persons. In 2002, just six years later, the Commission found compatible an amount four time larger for a workforce reduction of a smaller size. The Commission considers therefore that the amount and the intensity of the aid are justified. In conclusion, the Commission considers that the conditions laid down in Article 7 of Directive 90/684/EEC were met and therefore finds that the aid is compatible with the common market.

4.8. **Capital increase in 1998–2000 to finance the investment plan (measure E10)**

4.8.1. *Description of the measure*

(203) As planned in decision N 401/97, three capital increases took place in 1998, 1999 and 2000, for a total amount of GRD 2,98 billion (EUR 8,7 million), in order to finance a part of HSY's investment plan. They were financed by ETVA and HSY's employees, in proportion to their shareholding in HSY.

(million GRD (million EUR))

	Total	Contribution of ETVA (51 %)	Contribution of the employees (49 %)
20 May 1998	1 569 (4,6)	800 (2,3)	769 (2,3)
24 June 1999	630 (1,8)	321 (0,9)	309 (0,9)
22 May 2000	780 (2,3)	397 (1,2)	382 (1,1)

(204) In 2001, the Greek State paid to the employees an amount equal to their contribution to the three capital increases (see recital 33 of the present decision, which describes Law 2941/2001).

4.8.2. *Grounds for initiating the procedure*

(205) In the extension decision, the Commission raised doubts that the participation of ETVA in the capital increases constitutes incompatible aid. Even if decision N 401/97 adopted on 15 July 1997 considers that the future participation of ETVA to the capital increases can in principle be considered free of aid within the implementation of the restructuring plan, this participation may nevertheless have constituted aid when it was implemented in 1998, 1999 and 2000. In particular, the situation of HSY worsened between these dates. The extension decision further indicates that the fact that the employees participated in the capital increase pro rata to their stake in HSY's capital does not exclude aid: first, it is not sure that they paid to ETVA the price for the 49 % stake in HSY in accordance with the partial privatisation agreement of September 1995. Second, it is not excluded that the State has secretly committed to reimburse the employees any amount they would inject in HSY's capital. Such a commitment would entail that the employees did not support any risk.

4.8.3. *Comments from interested parties*

(206) Elefsis supports the doubts expressed in the opening decision, recalls the Alitalia case-law [115] regarding employees' participation in the capital increase of their own firm, and conclude that the participation of ETVA to the capital increases constituted incompatible aid.

4.8.4. *Comments from Greece*

(207) Greece recalls that the participation of ETVA and of the employees in the capital increase was contractually settled in the partial privatisation agreement of September 1995. Decision N 401/97 also indicated that these capital increases would take place, with a participation of ETVA and HSY's employees of

respectively 51 % and 49 %, without considering that ETVA's participation would constitute aid. Finally, Greece and HSY contest both the hypothesis that the employees did not pay the purchase price to ETVA and the existence of a secret agreement promising the employees that the State would reimburse them any amount paid to finance the investment plan. HSY claims that if the Commission should consider the measure as aid, it would constitute compatible restructuring aid.

4.8.5. *Assessment*

4.8.5.1. Article 296 of the Treaty

(208) As regards the potential application of Article 296 of the Treaty, the Commission observes that the capital increases aimed at financing the investment plan. As already concluded in the framework of the assessment of measures P1, P2, P3 and P4, this investment plan and the State support financing it can be assessed under State aid rules.

4.8.5.2. Existence of aid

(209) The Commission has reached the following conclusions. On the basis of the partial privatisation agreement of September 1995, ETVA was contractually obliged to participate at a level of 51 % in the future capital increase of HSY, the remaining 49 % being contributed by the employees. The capital increase was necessary to partially finance the investment plan. In decision N 401/97 regarding the investment aid, the Commission implicitly considered that this participation of ETVA in the future capital increase of HSY will not constitute State aid. This was coherent with decision C 10/94 adopted the same day, in which the Commission considered that the sale of 49 % of HSY's shares to the employees was a valid partial privatisation and a return to viability could be expected.

(210) As regards ETVA's participation in the capital increases of 20 May 1998, the Commission considers that there are no sufficient grounds to deviate from the implicit non-aid assessment made in the decision N 401/97. In particular, the circumstances in May 1998 were not sufficiently different from the ones forecasted at the time of the adoption of the decision. In addition, the Commission found no proof of a (secret) commitment of the State to reimburse the employees any amount they would pay in the framework of the capital increases.

(211) Conversely, at the time of the capital increase of 24 June 1999 and 22 May 2000, fundamental elements that formed the basis of the no aid assessment of 15 July 1997 were not present anymore:

— First, as explained earlier, both decisions adopted on 15 July 1997 were based on the fact that Greece would implemented the partial privatisation agreement of September 1995, and in particular that the employees would pay the purchase price to ETVA, as laid down in the contract, thereby assuming a financial risk which would incentivise them to support the necessary measures for restoring competitiveness. Whereas the employees had to pay the first instalment of the purchase price to ETVA before 31 December 1998, no payment occurred. The State did not seek to obtain the payment. As indicated in the assessment of measure E7, this meant that the employees were not put in the situation of investors having to pay in total GRD 8,17 billion (EUR 24 million) over the next 12 years, contrary to what the Commission expected in July 1997 when the two decisions were adopted. This non payment also meant that the employees were not respecting their obligation under the partial privatisation contract of September 1995. ETVA was not contractually bound by the partial privatisation agreement anymore ([116]) since the employees had breached it. In conclusion, contrary to what could legitimately be expected at the time of the decision N 401/97 on the basis of the existing contracts, no real partial privatisation had taken place and the contract was not binding ETVA anymore. The Commission considers that these are major differences compared to what the Commission expected at the time of adopting decision N 401/97 on the basis of the September 1995 contract. This is therefore sufficient to revise the non-aid assessment made at that time,

— Second, as already analysed in detail in section 3.1 of the present decision, the commercial and financial success planned at the time of decision N 401/97 did not materialise. The company did not succeed in building a large and profitable orderbook in 1997 and 1998. Therefore, from the end of 1998, it progressively became more and more certain that the yard would be loss making in the next years. The Commission established the date of 30 June 1999 as the date from which no return to viability could reasonably be expected. It is certain that at the beginning of June 1999, most of the bad news was already known and a return to viability was highly hypothetical on the basis of the existing restructuring plan.

(212) On the basis of the foregoing, the Commission considers that a market economy investor which would have found itself in the same situation as ETVA would not have invested anymore in HSY ([117]).

(213) Since such a capital injection provides a selective advantage to HSY, the Commission concludes that the participation of ETVA to the second and third capital increase constitutes State aid in favour of HSY. Regarding the compliance with Article 88(3) of the Treaty, the Commission observes that it has never adopted any decision explicitly assessing and authorising ETVA's participation to the capital increases of HSY. The Commission therefore considers that the aid has been put into effect in contravention of Article 88(3) of the Treaty.

(214) The Commission observes that, even if it were considered that this measure has been authorised by Decision N 401/97 (the decision N 401/97 describes that ETVA will participate in the capital increases of HSY and, by not raising doubts on the compliance with State aid rules, implicitly considers that this participation would not be an aid), it would not change the forthcoming conclusion that the aid has to be recovered. Indeed, in such a case, it should be considered that this Decision has been misused by the State-owned bank ETVA which has not collected the purchase price from the employees in accordance with the September 1995 contract. Indeed, the conclusion that ETVA's participation to the future capital increases was not an aid was based on the expectation of the employees would pay the purchase price in accordance with the September 1995 contract. It should therefore be concluded that the part of Decision N 401/97 authorising ETVA's participation has been misused and therefore that ETVA's participation should be recovered from HSY.

4.8.5.3. Compatibility with the common market

(215) Greece claims that this measure could constitute compatible restructuring aid. The Commission recalls that the aim of the capital increases was to finance the investment plan. In the framework of the assessment of measure P2 and measure P3, the Commission has already explained why additional restructuring aid in favour of the investment plan can not be considered compatible with the common market.

(216) Since the two capital increases constitute incompatible aid, they have to be recovered from HSY.

4.9. **State counter guarantee in relation to HSY's contracts with OSE and ISAP (measure E12b)**

4.9.1. *Description of the measure*

(217) In the framework of contracts that HSY concluded with Hellenic Railway Organization (OSE) and Athens-Piraeus Electric Railways (ISAP) concerning the supply of rolling stock, ETVA granted guarantees for advance payments and good performance (hereinafter down payment guarantees or advance payment guarantees). ETVA issued the advance payment guarantees in relation to the ISAP contract in February 1998 and January 1999 and the guarantees in relation to the OSE contract in August 1999. ETVA in turn received corresponding counter-guarantees from the State. The guarantees in the framework of the contracts with OSE and ISAP amounted respectively to EUR 29,4 million and EUR 9,4 million.

4.9.2. *Grounds for initiating the procedure*

(218) In the extension decision, the Commission raised doubts whether a private bank would have provided these counterguarantees at the same conditions. In view of the difficulties of HSY, it could even be questioned whether a bank would have granted them at all.

4.9.3. *Comments from interested parties*

(219) Elefsis supports the doubts expressed by the Commission. In particular, the State did not act as a market investor because it assumed a multiple risk, being not only HSY's majority shareholder but also its sole creditor and guarantor, who bore nearly all the risk associated with its operations.

4.9.4. *Comments from Greece*

(220) Greece and HSY claim that, even if the State counter-guarantees were formally issued in December 1999, they were already promised to ETVA when it issued the advance payment guarantees in relation to the ISAP contract in February 1998 and January 1999 and the guarantees in relation to the OSE contract in August 1999. Greece claims that these counter-guarantees did not constitute selective measures. Indeed, they were granted pursuant to Law 2322/1995 ([118]) and several firms received State guarantees on the basis of that law. In addition, Greece claims that the annual fee of

0,05 % was adequate to remunerate the risk. As regards ETVA's behaviour, it was acceptable to a private bank since it received a counter-guarantee from the State and charged a premium of 0,4 % ([119]). HSY has submitted a report of a consultant — the first Deloitte report — which supports this assertion. This report also asserts that, without a State counter-guarantee, HSY could nevertheless have received from a private bank a guarantee similar to the one granted by ETVA by offering lien on certain assets as a security. Finally, Greece claims that the beneficiary of the State counter-guarantees is OSE and ISAP and not HSY.

4.9.5. *Assessment*

4.9.5.1. Article 296 of the Treaty

(221) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.9.5.2. Existence of aid

(222) It needs first to be clarified which of the two types of measures — the down payments guarantees granted by ETVA and the counter-guarantees granted by the State to ETVA — could constitute an aid measure. Since Greece claims that the State counter-guarantees were already firmly promised to ETVA when the latter granted the advance payment guarantees, it has to be concluded that when ETVA granted the guarantees, it was fully protected by the State counter-guarantees. Therefore, since ETVA run no risks (thanks to the State counter guarantees) while receiving a fee of 0,4 % per quarter, this measure would have been acceptable to a market economy investor in similar circumstances. Conversely, the State granted counter-guarantees, which were not secured by any collateral, and for which it received a guarantee premium of only 0,05 %. This second measure would clearly not be acceptable to a market economy investor. It is therefore this second measure which constitutes State aid. The Commission however observes that since the State owned 100 % of ETVA and all the measures implemented by the latter bank are imputable to the State, the separation between the two measures (i.e. guarantee and counter-guarantee) is somehow artificial.

(223) Since Greece claims that the beneficiary were OSE and ISAP, it needs to be clarified who is the beneficiary of this measure. The Commission observes that in the framework of contracts for the supply of rolling stock material, the seller has usually to provide bank guarantees to the purchaser for the advance payments the latter makes. Indeed, the purchaser wants to be sure to recover these amounts if the seller does not deliver the material, for instance because it went bankrupt. Therefore, it is the seller that has to obtain these guarantees from a bank and to supports their costs. In other words, it is a normal cost that a seller of rolling stock material has to support. In the present case, the State counter-guarantee allowed HSY to obtain from ETVA guarantees at a price of only 0,4 % per quarter. As will be shown afterwards, without State counter-guarantee, a private bank would have at least charged 480 bps per year for guarantees granted before 30 June 1999. After that date, no private bank would have provided such guarantees. It is therefore clear that in the period before 30 June 1999 the State counter-guarantees allowed HSY to obtain guarantees at a lower price. In the period after 30 June 1999, the State counter-guarantees allowed HSY to obtain guarantees, which HSY could not have received from the market at all. In conclusion, the beneficiary of the aid is HSY.

(224) As regards Greece's claim that the measure is not selective, the Commission recalls that, in order to be general, a measure must be effectively open to all economic agents operating within a Member State on equal access basis, and they must not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. The Commission considers that Law 2322/1995 is far from fulfilling this definition. First, Article 1 of the law states that the guarantee is granted by the Minister of Economy in agreement with three other ministers. Therefore the granting of the guarantee depends on the discretionary power of the authorities. Second, a State guarantee can be granted to a private firm only if it is located in a remote area and with the aim of improving the economic development of the area and not the specific firm (Article 1bb) or if it has suffered damages as a result of nature (Article 1cc). Conversely, companies that are 100 % State-owned or where the State holds the majority of shares can be granted State aid for general reasons such as covering some of their liabilities (Article 1B). It is therefore clear that State-owned firms have a much wider access to the State guarantees than private firms. This conclusion is confirmed by the analysis of the list of guaranteed loans provided in the first Deloitte

report ([120]). Third, the guarantees are not accessible on an equal access basis. Indeed, Article 1(4) of the Law indicates that when granting a guarantee the State may ask for some security (i.e. lien on fixed assets of the company). The decision to request a security or not is left at the discretion of the Minister of Economy. In the present case, the State did not ask a security when granting measure E12b. As regards the absence of access on an equal basis, the Commission observes that the guarantee fee is not the same for all loans. For instance, the guarantee premium amounted to only 0,05 % in the present case. In the case of measure E14, also granted on the basis of Law 2322/1995, the premium was 1 %. In the list of guaranteed loans provided in the first Deloitte report, some loans had also a premium of 0,1 % and 0,5 %. In conclusion, the Commission dismisses Greece's claim that Law 2322/1995 is a general measure.

(225) As regards the claim of the first Deloitte report that HSY could have received these down payment guarantees from a private bank by giving to the bank a lien on certain assets as collateral instead of giving to the bank a State counter-guarantee, the Commission considers that this claim is irrelevant in the analysis of the measure. Indeed, the Commission has to analyse whether the terms of the measures which were actually granted by the State constituted aid to the yard. The Commission does not have to verify whether by providing more security, the yard could have received the same guarantee from the market. As indicated in section 2.1.1 of the Notice on guarantee, one of the potential advantages of the State guarantee is the possibility for the borrower 'to offer less security'. In the present case, none of the State counter-guarantees was secured by a lien on some assets of the yard. Therefore, a counter-guarantee with an asset as security constitutes a different transaction, which does not have to be assessed. As a subsidiary ground, the Commission notes that, even if the claim of the first Deloitte report had to be assessed, HSY would not have been able to convince a private bank to provide such down payment guarantees by providing securities. Indeed, the assets of yards were already encumbered and they had a low liquidation value (see the second and third items discussed in footnote 43 of the present decision). Therefore, even a security in the form of a lien on certain assets of HSY would not have been sufficient to convince a market economy investor to lend to HSY.

(226) The Commission has earlier in this decision established the interest rate which a private bank would have charged for giving a loan to HSY. For the period until 30 June 1999, it was concluded that, since HSY presented a particular risk, it was necessary to add a risk premium of at least 400 basis points above the interest rate charged for loans to healthy firms. In order to apply the same approach to guarantees on down payments, it is necessary to determine which premium a market economy investor would charge for granting an advance payment guarantee to a healthy firm. No party to the current procedure has provided a reliable market price for such guarantees. In several State guarantees schemes targeted at the shipbuilding sector and approved by the Commission as free of aid ([121]), the annual guarantee premium for the borrower with the lowest credit risk was set at 0,8 %, or 80 basis points. In the absence of other reliable indicators, the Commission will use this rate as an estimation of the minimum annual guarantee premium paid by healthy shipbuilding firms in Greece at the time. Even if the contracts with OSE and ISAP do not concern shipbuilding but the construction of rolling stock, the Commission will use 0,8 % as benchmark since the construction of rolling stock remained a marginal activity for HSY and most of the activities of HSY, and therefore most of the risk of HSY, concerned ship building and ship repair. Consequently, for advance payments guarantees granted to HSY before 30 June 1999, the existence and amount of aid will be assessed by comparing the annual premium actually paid by HSY (including the counter guarantee fee paid to the State) with a premium of 480 basis points (i.e. 80 basis points increased by 400 basis points). As regards the period after 30 June 1999, the Commission earlier in the present decision concluded that the yard had no access to the financial market anymore, and that the aid element to recover in any loan would be the difference between the interest rate actually paid by HSY and the reference rate increased by 600 basis points. In case of down payments guarantees, the aid to recover will therefore be calculated by comparing the actual premium paid by HSY (including the counter guarantee fee paid to the State) with a premium of 680 basis points (i.e. 80 basis points increased by 600 basis points).

(227) The Commission notes that Greece claims that the counter-guarantees were already promised when ETVA granted the advance payment guarantees. Accordingly, the counter-guarantees related to ISAP's advance payments were granted before end of June 1999. The total annual cost of these guarantees (guarantee fee paid to ETVA plus counter guarantee fee paid to the State) was much less than 480 basis points. They therefore contain State aid, which amount to the difference between the latter premium and the total cost of the guarantees for HSY (premium paid to ETVA ([122]) and the premium paid to the State). Since,

contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.

(228) The counter guarantees related to the advance payments of OSE were granted after June 1999, at a time where no bank would have provided any guarantee anymore. Therefore, these entire counter-guarantees constitute aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid. If these aid measures are found to constitute incompatible aid and if they are still outstanding, they will have to be stopped immediately. This would however be insufficient to restore the initial situation since HSY would have during several years benefited from a guarantee which it would have not received from the market. For the period until the expiration of the guarantee, aid amounting to the difference between 680 basis points and the premiums actually paid by HSY would also have to be recovered.

4.9.5.3. Compatibility with the common market

(229) The Commission observes that the aid constitutes operating aid since it reduces the costs that HSY should normally have supported in the framework of commercial contracts. Since operating aid was not allowed in the sector of the production of rolling stock material, the aid can not be considered compatible with the common market and has therefore to be recovered.

4.10. **Deferment/rescheduling of obligations and waiver of penalties owed to OSE and ISAP (measure E12c)**

4.10.1. *Description of the measure*

(230) HSY was unable to meet its obligations stemming from the rolling stock contracts concluded with OSE and ISAP. In particular, HSY did not succeed in producing the rolling stock according to the agreed timetable. Consequently, in 2002–2003 some of the contracts were renegotiated and a new timetable for delivery agreed upon. In addition, it seems that application of penalty clauses and default interests as laid down in the initial contracts was waived or postponed.

4.10.2. *Grounds for initiating the procedure*

(231) In the extension decision, the Commission raises doubts that during the negotiations that took place in 2002–2003 OSE and ISAP, which are State-owned companies, behaved in a way acceptable for a private undertaking in similar circumstances. They may have applied and/or renegotiated the contracts in a way favourable to HSY, thereby granting State aid to the latter.

4.10.3. *Comments from interested parties*

(232) Elefsis claims that OSE and ISAP have not sought to obtain full payment of penalties and default interest which have arisen as a result of the delays, nor have they called upon the guarantees given on behalf of HSY for the good performance of its contractual obligations.

4.10.4. *Comments from Greece*

(233) The Greek authorities claim that HSY paid all the penalties and relevant interest amounts in accordance with its contractual obligations, and any renegotiation was effected in accordance with accepted commercial practice. OSE and ISAP never waived penalties and default interests.

(234) As regards the contracts between OSE and HSY, the following six programme agreements (PA) were concluded at the end of 1997: PA 33 SD 33, PA 33 SD 33[a], PA 35 SD 35, PA 37 SD 37[a], PA 39 SD 39 and PA 41 SD 41a. The programme agreements were activated in August and September 1999 through payment by OSE of the advance payments agreed in the contracts of 1997. OSE demanded timely implementation of the agreements from 2000 onwards after the first delays in the delivery of the material in that year. The consortia of which HSY was part of proposed amendments to the six contracts with the following terms:

— payment by the consortia of the established penalties and default interest in cash or in kind, according to OSE's preference,

— evolution of the price escalation formula on the basis of the agreed delivery timetables of the enduring contracts, and not on the basis of the new delivery timelines proposed by the consortia, in order to make this delivery dates acceptable,

— supply to OSE, for its use without a consideration, of equivalent rolling stock, in order, on the one hand, to make the new delivery timelines proposed acceptable, and, on the other hand, to stop further evolution of the penalty and default interest amounts. PA 39 (electric locomotives) was exempted from the provision of equivalent rolling stock because OSE had not completed the electrification of the Patras-Athens-Thessaloniki line, and PA 35 was exempted because the consortium wished for the evolution of the penalty and default interest amounts to continue in accordance with the contract,

— if the equivalent rolling stock was not supplied or if delivery (of the material provided for in the contract) was late, the penalty and default interest arrangements would continue to evolve, with recommencement from the point at which they were stopped on 31.12.2002.

(235) On 7.1.2003 the board of OSE approved the proposed amendments. Three PAs (33[a], 35 and 39) were amended in the first four months of 2003, and the corresponding amending contracts were signed on 28.2.2003, 17.4.2003 and 28.2.2003, respectively ([123]).

(236) Faced with the dilemma of choosing between denunciation or amendment of the PAs, and in view of its requirements for the 2004 Olympic Games, OSE judged that its business interest was best served by acceptance of the proposal of the consortia for amendment of the agreements, rather than by denunciation. Denunciation would have deprived OSE of the acceptance of additional new rolling stock, given that it would have taken at least 3 or 4 years for any new procedures for procurement of the rolling stock to reach fruition. The amended contracts were lawful and in accordance with the original ones.

(237) The above information shows in the opinion of Greece that the consortia, and thus HSY, were never given a treatment more favourable than that afforded to other suppliers of OSE, and that the penalty and interest amounts were claimed and collected in every case ([124]). The contract made no provision for default interest on penalty amounts, but OSE claimed the interest and invoiced the consortia accordingly.

(238) The same things apply with regard to the ISAP amounts, which are actual payments made by HSY, not provisions. It is emphasised, further, that there was no renegotiation or amendment in the case of programme agreement 1/97 ([125]). That agreement provided for the design, construction, delivery and placing in operation of 40 multiple units, each consisting of three vehicles. The delivery of the units was late, and therefore the penalties and interest envisaged in the programme agreement were imposed and withheld ([126]).

4.10.5. *Assessment*

4.10.5.1. Article 296 of the Treaty

(239) The present measure does not fall within the scope of Article 296 of the Treaty since it concerns exclusively civil activities.

4.10.5.2. Existence of aid

(240) The Commission observes that the Greek authorities have provided detailed information on the contracts concerned, as requested in the extension decision. On the basis of this information, the doubts raised by the Commission have been allayed. Indeed, HSY paid the penalty and relevant interest amounts in accordance with its contractual obligations, and, when renegotiations of contracts took place, the Commission did not find evidence that the renegotiations were not affected in accordance with accepted commercial practice. As acknowledged by Elefsis itself, the delays in the execution of the contracts have cost tens of millions of euro to HSY precisely because OSE and ISAP requested the payment of the penalties and default interest, or, alternatively, the supply of equivalent rolling stock. As regards Elefsis' claim that OSE and ISAP, if they had been private firms, would have turned down all the amendments proposed by the consortia, would have therefore requested the entire payment of the penalties and default interest and would have requested a rapid payment in cash rather than spreading the payments over a longer period, it can be said that this seems highly unlikely. Indeed, if OSE and ISAP had adopted such an inflexible approach before the closure of the sale of HSY, this would have probably deterred the new owner to purchase the yard. Without such a purchase, the yard, as will be explained in the analysis of measure E18c, would most probably have gone bankrupt. Even after the purchase by HDW/Ferrostaal, the financial situation of the yard did not improve. Consequently, if OSE and ISAP would have adopted a totally inflexible approach, there was a real risk that HSY would go bankrupt. This means that the execution of the existing contracts would have been stopped. This means that OSE and ISAP would have had to organise a new call for tender, the contract would have been awarded to a new supplier, and the delivery would have been delayed by several years. In such circumstances, the Commission considers that a market economy purchaser may accept a partial renegotiation which allows the completion of the existing contract within a reasonable timeframe, such that the purchaser finally receives the ordered railstock material with a limited delay. In this respect, the Commission observes that the probability that the contracts would be completed in a reasonable timeframe increased when HSY was privatised since the new private owner had experience with the management of complex projects and was a private firm motivated by profit and therefore willing to limit the delay to limit the negative financial consequences.

(241) In conclusion, the Commission considers that there is not convincing evidence that the behaviour of OSE and ISAP would not have been acceptable to a private company in similar circumstances. The Commission therefore concludes that the way in which the contracts with OSE and ISAP were implemented and the limited amendments of the contracts accepted by OSE in 2002–2003 do not involve aid elements.

4.11. **Loan of ETVA to finance the Strintzis contract (measure E13a)**

4.11.1. *Description of the measure*

(242) On 29 October 1999, ETVA granted a GRD 16,9 billion (EUR 49,7 million) loan to HSY to finance the construction of the two ferries ordered by the company Strintzis. The interest rate was LIBOR ([127]) plus 100 basis points. In June 2001, a preferential mortgage on the two ships under construction was created. The loan was repaid in full to the lending bank on 8 October 2004.

4.11.2. *Grounds for initiating the procedure*

(243) The extension decision raised doubts whether the conveyance of a mortgage on the ships and of insurance premiums constituted a sufficient security. In addition, it seemed that the loan was immediately paid out to HSY, whereas it should have been paid in parallel with the construction costs. Moreover, the interest rate seemed insufficient in view of the difficulties of the yard. Finally, the combination of this loan and the next measure (measure E13b) indicates that a substantial part of the financing of the two ships ordered by Strintzis was supported by ETVA.

4.11.3. *Comments from interested parties*

(244) Elefsis claims that no private banks would have granted this loan. First ETVA had no security when the loan was concluded since the mortgage on the ships was created much later. In addition, Elefsis agrees that the market value of hulls in construction is low.

4.11.4. *Comments from Greece*

(245) Greece and HSY stress that the conditions of the loan were usual for that time. The Deloitte report confirms that both the specific bank (ETVA) and in general the Greek banks were granting loans to firms at a similar interest rate. HSY gives details on the securities which were granted to ETVA at the time of loan contract (assignment of the price of the two vessels, of the insurance indemnities, and of all claims against third party arising from the charter or generally the exploitation of the ships) and at a later date (the mortgage on the ships), and conclude that they were adequate. Greece also gives the calendar according to which the loan was paid out by ETVA to HSY and which shows that it was paid in parallel with the evolution of the construction costs.

4.11.5. *Assessment*

4.11.5.1. Article 296 of the Treaty

(246) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.11.5.2. Existence of aid

(247) The Commission has reached the following conclusions. This loan was concluded after June 1999, at a time when no bank would have lent to HSY anymore. Greece claims that the security attached to the loan were reducing the risk so much that the granting of the loan would have been acceptable to a private investor. This claim can not be accepted. The assignment of the price of the ships represents a solid security only if the yard brings the construction of the ship to a good end, what is uncertain. If the yard goes bankrupt during the construction of the ship, this security has no value since the purchase price can not be claimed from Strintzis because the latter has not received the ordered vessels ([128]). This means that the security would be worthless exactly in the scenario where it would be needed. As regards the constitution of a mortgage upon each one of the ships under construction, it was granted to ETVA only in June 2001, well after the loan had been paid out to HSY. In addition, the Commission observes that the value of ships under construction is relatively low and they are difficult to sell. This is illustrated by the present case. Indeed, HSY did not succeed in completing the construction of the two ships and, consequently, the contract with Strintzis was revoked in July 2002. HSY needed not less than two years to sell the hulls in construction and HSY received only EUR 14 million, which corresponds to only a third of the amount borrowed from ETVA to finance the construction.

(248) As regards the assertion of Greece, HSY and Deloitte that the interest rate of the loan granted to HSY was similar to the interest rate of many other loans granted during the same period by ETVA and by Greek banks, it does not show that the loan granted to HSY is not an aid. Indeed, Greece, HSY and Deloitte have neither analysed nor shown that the financial situation of the other

borrowers used as comparison point was similar to the one of HSY, i.e. that their financial situation was as bad as the situation of HSY. They have therefore not shown that private banks were ready to lend to firms in difficulty at an interest rate similar to the one of the present loan. Comparing the interest rate of loans granted to different firms without verifying that the risk supported by the lending banks is similar is a pointless exercise. The Commission therefore concludes that no market economy investor in similar circumstances would have granted this loan to HSY, which therefore constitutes aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.11.5.3. Compatibility with the common market

(249) The Commission observes that the aid constitutes operating aid since it reduces the costs that HSY should normally have supported in the framework of commercial contracts. As concluded here above, the loan in fact allowed HSY to undertake this commercial contract, which HSY could not have financed by raising funds from the market. The Commission observes that, on the basis of Article 3 of Regulation (EC) No 1540/98, contract-related operating aid was authorised for shipbuilding contracts signed until 31 December 2000. However, HSY was not entitled to receive aid for the contract with Strintzis since HSY never finished the ships, they were never delivered, and the contract with Strintzis was cancelled ([129]). In addition, the hulls were sold to a new purchaser only in 2004, i.e. several years after 31 December 2000.

(250) Since the aid is unlawful and incompatible, it has to be recovered. Since the loan has been reimbursed, part of the advantage received by HSY has already been withdrawn. However, thanks to this loan of ETVA, HSY had at its disposal the amount of the loan during several years, an amount which HSY could otherwise not have had at its disposal during that period. This advantage needs also to be recovered. The Commission thus considers that aid has to be recovered which amounts to the difference between the interest rate paid to ETVA and reference rate for Greece ([130]) plus 600 bps for the period from the payment of the loan to HSY until the date when the loan was secured by a mortgage on the hulls. For the period thereafter until the reimbursement of the loan, the aid to recover is the difference between the interest rate paid to ETVA and the reference rate for Greece plus 400 bps. The reduction by one third of this risk premium reflects the fact that the mortgage on the hulls would have partially reduced the loss of the lender in case of default of HSY, and therefore reduced the risk of the loan for ETVA. In particular, as just indicated, HSY succeeded to sell the hulls at a price roughly equivalent to one third of the money lent by ETVA.

4.12. **Guarantee of ETVA in relation to the Strintzis contract (measure E13b)**

4.12.1. *Description of the measure*

(251) In 1999, HSY used two guarantees from ETVA to secure Strintzis's advance payments amounting to EUR 6,6 million. The guarantees have been cancelled in July 2002 when the shipbuilding contract with Strintzis was cancelled.

4.12.2. *Grounds for initiating the procedure*

(252) The extension decision considers that the two guarantees, the terms of which were not known at the time of the decision, could constitute aid.

4.12.3. *Comments from interested parties*

(253) Elefsis emphasizes the fact that the State/ETVA has at the same time assumed the role of guarantor, creditor, shareholder and largest customer of HSY. By doing so, the State was putting itself in a situation of serious financial risk. In assuming this multiple role, the State was in effect providing finance with no security since in the event of the company's default and/or insolvency, the State would have no recourse and would sustain a definite loss since the value of the yard's assets would be considered to be insufficient to cover all the liabilities.

4.12.4. *Comments from Greece*

(254) Greece indicates that a first guarantee was granted on 4 March 1999 and a second on 17 June 1999. According to the first Deloitte report submitted by HSY, they respectively amounted to EUR 3,26 million and EUR 3,38 million. Greece recalls that ETVA did not pay out any amounts under the guarantees after the cancellation of the Strintzis contract in 2002. This proves that HSY was not a borrower whose default risk was high. In addition, Greece and HSY indicate that ETVA received as security for this EUR 6,6 million guarantee the assignment of proceeds of HSY resulting from Agreement 39 with OSE, of which the contractual price for HSY amounted to EUR 8,5 million. The consultant confirms that HSY could have received the two guarantees from a private bank.

4.12.5. *Assessment*

4.12.5.1. Article 296 of the Treaty

(255) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.12.5.2. Existence of aid

(256) The Commission observes that both guarantees were granted before 30 June 1999. As explained previously, the Commission considers that HSY had still access to the financial market at that time, but at a price which reflected the very fragile economic situation of HSY.

(257) Greece and HSY claim that the assignment of proceeds resulting from Agreement 39 with OSE was an adequate security which would render the grant of the guarantee acceptable for a private investor. The Commission observes that, in case of bankruptcy of HSY, this security would not have allowed a bank to recover money. Indeed, if HSY had gone bankrupt, the construction of the rolling stock would have stopped, no delivery would have been made to OSE and no payment could be requested from OSE under that Agreement [131]. The Commission therefore fails to understand how this security would have significantly decreased the risk of a loan to HSY.

(258) HSY has been able to indicate neither to the Commission nor to its own consultant (see first Deloitte report, page 4–9) whether HSY was contractually obliged to pay a guarantee premium to ETVA and what was the level of this premium. As explained in the assessment of measure E12b, HSY should normally have paid an annual premium of at least 480 basis points for such a guarantee. Knowing the level of the other guarantee premiums paid by HSY to ETVA, it is highly unlikely that the guarantee premium actually paid by HSY was as high as 480 basis points. The Commission therefore concludes that the guarantee granted by ETVA constitutes State aid, which amounts to the difference between the annual guarantee premium actually paid to ETVA and a guarantee premium of 480 basis points. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.12.5.3. Compatibility with the common market

(259) As indicated in the assessment of measure E13a, the Commission considers that aid like the present one constitutes operating aid, which can not be found compatible on the basis of Regulation (EC) No 1540/98. It is therefore unlawful and incompatible and must be recovered.

4.13. **State guarantee securing a GRD 10 billion (EUR 29,3 million) loan (measure E14)**

4.13.1. *Description of the measure*

(260) After the earthquake of September 1999, ETVA granted on 13 January 2000 a GRD 10 billion (EUR 29,3 million) loan to HSY, which was secured by a State guarantee granted by decision of the Minister of Finance dated 8 December 1999. ETVA charged an interest rate of EURIBOR plus 125 basis points [132] and the State charged a guarantee premium of 100 basis points.

4.13.2. *Grounds for initiating the procedure*

(261) Given the financial situation of HSY at the time, it is doubtful that the terms of the guarantee would have been acceptable to a market economy investor. As regards the compatibility on the basis of Article 87(2)(b), Greece has not shown that the size of the measure was commensurate to the damage suffered by HSY.

4.13.3. *Comments from interested parties*

(262) Elefsis considers that no bank would have lent money to HSY at that time in view of its financial situation. The guarantee should be considered compatible aid only if it is limited to amounts strictly necessary to make good damage resulting from a specific natural disaster.

4.13.4. *Comments from Greece*

(263) Greece and HSY contest that the measure is selective since the guarantee was granted according to the provisions of Law 2322/1995, which stipulates the terms and conditions for the granting of a guarantee on behalf of the Greek State to any applying company. In addition, they claim that the guarantee premium of 1 % would have been acceptable for a private investor. In addition, HSY could have borrowed from the market without a State guarantee by using other forms of security, as for example the cession of claims from major contracts and the mortgage of its assets. Even if the measure should constitute aid, it is partially compatible on the basis of Article 87(2) b) insofar as the said capital was granted as compensation for the damage that HSY suffered by the earthquake and partially falls within Article 296 of the Treaty insofar as it relates directly to the military activities of HSY.

4.13.5. *Assessment*

4.13.5.1. Article 296 of the Treaty

(264) As regards the applicability of Article 296, the text of the decision by which ETVA decided to grant the guaranteed loan shows that ETVA was among others concerned by the continuation of the military activities of HSY. However, there is no contractual provision that forces HSY to use the guaranteed loan for the financing of the military activities. In other words, ETVA wanted to keep HSY alive in order to ensure the continuation of the military activities, but it did not assign the guaranteed loan to the financing of a particular activity. HSY was free to use the money as it wished to. As already explained, for such measures which are granted to the yard as a whole, the Commission considers that 25 % of the guaranteed loan was used for civil activities and 75 % for military activities. Therefore, only 25 % of the State guarantee (this means initially an amount of GRD 2,5 billion (EUR 7,34 million) has to be assessed under State aid rules, and could be recovered if constituting incompatible aid. 75 % of the State guarantee falls within the scope of Article 296 of the Treaty and is not covered by State aid rules.

4.13.5.2. Existence of aid

(265) As regards the selectivity of the measure, the Commission has already shown in the assessment of measure E12b that Law 2322/1995 is not a general measure.

(266) As regards the existence of an advantage, the Commission recalls that the guaranteed loan was granted in January 2000, at a time when no market economy investor would have provided a loan or a guarantee to HSY anymore, as previously concluded. Without a State guarantee, no bank would have therefore provided a loan to HSY. The State guarantee therefore gave a clear advantage to HSY.

(267) In conclusion, the part of the State guarantee which is not covered by Article 296 of the Treaty constitutes aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.13.5.3. Compatibility with the common market

(268) As regards the compatibility of this aid on the basis of Article 87(2)(b) of the Treaty, no party contests that the earthquake of September 1999 was a ‘natural disaster’. Whereas the loan contract was signed only on 13 January 2000, HSY demanded this financing to ETVA already in the weeks following the earthquake. According to the Greek authorities, the damage to the yard amounted first to the cost of repairing the physical installations and, second, to the costs generated by the delay in the execution of the contracts. However, Greece has not submitted any estimation of the second type of damage. If Greece wished to compensate HSY for the latter type of costs, it should have at least tried to quantify them and this calculation should have been done on the basis of a verifiable method. Since this was not done and since aid can be found compatible on the basis of Article 87(2)(b) only if it is strictly limited to the compensation for the damage suffered, the Commission considers that these hypothetical costs do not constitute a valid ground for the compatibility of the aid ([133]). As regards the first type of costs — the repair of physical damages — the Commission observes that no mechanism was set up to ensure that the size of the State guarantee would be reduced once the size of the damages suffered would be precisely established and once the indemnities would be paid out to HSY by the insurance companies. In its letter of 20 October 2004 ([134]), Greece estimated that the physical damages amounted to around GRD 3 billion (EUR 8,8 million). Consequently, the Commission considers that the amount exceeding that figures, namely EUR 20,5 million, was not related to damages caused by the earthquake. Conversely, EUR 8,8 million can be assumed to be commensurate with the damages suffered, but only until the first quarter of 2002, when the insurance companies paid an indemnification of EUR 3,52 million ([135]). From that date onwards, the State guarantee should have been reduced by an equivalent amount. Therefore, from that date, only the balance (EUR 8,8 million − EUR 3,5 million = EUR 5,3 million) could be considered to be commensurate with the net damages suffered (i.e. damages suffered minus the indemnifications paid to HSY by the insurance companies).

(269) As indicated previously, since 75 % of the guaranteed loan is considered to finance military activities, only 25 % of the guarantee is falling under State aid control and was found to constitute State aid. However, it is also reasonable to suppose that only 25 % of the damage suffered by HSY related to its civil activities because the earthquake has damaged HSY’s facilities without distinction between military facilities, civil facilities and facilities used for both types of activities. In other words, there is no reason to consider that 100 % of the damage suffered by HSY should be financed by the 25 % of the State guarantee which constitutes State aid. Consequently, only 25 % of the damages can be taken into account

when assessing whether the State aid is commensurate with the damages suffered. In conclusion, out of the State aid, an amount equivalent to 25 % of the part of the State guarantee considered commensurate with the damage suffered (such as defined in the previous paragraph) constitutes compatible aid on the basis of Article 87(2) b). In other words, out of part of the State guarantee constituting aid, GRD 750 million (EUR 2,20 million) — i.e. 25 % of GRD 3 billion (EUR 8,8 million) — is compatible until the payment of the indemnification by the insurers in the first quarter of 2002. After that date, only EUR 1,32 million — i.e. 25 % of GRD 3 billion (EUR 8,8 million) minus EUR 3,52 million — is compatible. The rest of the aid is incompatible with the common market.

(270) If the State guarantee is still outstanding, the part of this guarantee which constitutes incompatible aid (i.e. 25 % of the guarantee still outstanding, minus EUR 1,32 million which is compatible) should be immediately rescinded. The cancellation of the incompatible guarantee is not sufficient to restore the initial situation. Indeed, thanks to the incompatible State guarantee, HSY has had at its disposal during several years a loan which it would otherwise not have received. In order to recover this additional incompatible aid, the Commission considers that, from the granting of the guaranteed loan until the end of the incompatible State guarantee, an aid equal to the difference between the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY) and reference rate for Greece increased by 600 bps must be recovered. This amount has to be calculated in respect of the part of the State guarantee which constituted incompatible aid.

4.14. **Loans granted by ETVA in 1997 and 1998 (measure E16)**

4.14.1. *Description of the measure*

(271) This measure consists of three loans granted by ETVA to HSY in 1997 and 1998.

(272) First, on 25 July 1997, ETVA granted a credit line of GRD 1,99 billion (EUR 5,9 million), with an expiration date set at 31 October 1997. It had an interest rate of ATHIBOR plus 200 basis points and was granted to cover HSY's needs for working capital. It was secured by accounts receivable from the Hellenic Navy.

(273) Second, on 15 October 1997, ETVA granted a credit line of USD 10 million, also to cover HSY's needs for working capital [136]. The loan had an interest rate of LIBOR plus 130 basis points and was secured against accounts receivable from the contract with the Greek Navy. On 19 May 1999, ETVA received additional security for the loan through the conveyance of every claim in respect of Programme Agreement 1/97 which HSY had concluded with ISAP for the construction and supply of 125 rail cars. The loan was repaid in January 2000.

(274) Third, on 27 January 1998, ETVA granted a credit line of USD 5 million, also with an interest rate of LIBOR plus 130 basis points. The purpose was also to cover HSY's needs for working capital. No security was provided for this third credit line.

4.14.2. *Grounds for initiating the procedure*

(275) The extension decision indicates that these loans seem to constitute aid, the compatibility of which is doubtful. In addition, the fact that the first two loans were secured by receivables from the Hellenic Navy does not automatically entail that these loans are covered by Article 296 of the Treaty.

4.14.3. *Comments from interested parties*

(276) Elefsis submits that given the financial situation of the yard at that moment, no private bank would have provided these loans to HSY.

4.14.4. *Comments from Greece*

(277) Greece and HSY claim that ETVA obtained adequate security with the conveyance of claims on accounts receivable from the Hellenic Navy. Greece indicates that the three loans were repaid in full to the lending bank and claims therefore that any unlawful State aid, *quod non*, was recovered through the repayment. Finally, the Greek authorities assert that, in view of the type of securities provided to the lending bank and the fact that HSY was mainly active in the defence sector, the Commission is not allowed to analyse these measures on the basis of Article 88 of the Treaty but has to use the procedure laid down in Article 298 of the Treaty.

4.14.5. *Assessment*

4.14.5.1. Article 296 of the Treaty

(278) As regards the application of Articles 296 and 298 of the Treaty, the Commission observes that the two credit facilities granted in 1997 were secured by receivables from a military contract. However, this fact alone does not show that the facilities were granted to finance the

execution of these military contracts. Greece has not brought forward evidence that there existed a contractual obligation limiting the use of these funds to financing the execution of military contracts. Conversely, Greece indicates that the two loans were granted to cover HSY's needs for working capital. The first Deloitte report confirms that they were granted for working capital purposes and does not indicate that they were assigned to the financing of a particular activity. This is supported by the fact that an additional security related to a civil contract (i.e. contract with ISAP) was granted in respect of the USD 10 million credit facility. The Commission therefore considers that these three loans have financed the yard in its entirety and not only the military activities. As indicated in section 3.3 of the present Decision, the Commission considers in such a case that 25 % of the loans have financed the civil activities of HSY, are not covered by Article 296 of the Treaty and can therefore be assessed under State aid rules.

4.14.5.2. Existence of aid

(279) As regards the securities provided — the assignment of accounts receivable from the contract with the Hellenic Navy and with ISAP — the Commission considers that they did not offer a solid protection against losses in case of bankruptcy of HSY. Indeed, if HSY would have stopped its operations, the execution of the ongoing contracts with the Navy and with ISAP would have stopped. Since no product would be delivered to the Navy and to ISAP, they would not be liable to pay the purchase price [137]. As regards the existence of receivables for products already delivered to the Navy and to ISAP, Greece has not shown, first, that such claims existed, second, that they were collectible and, third, that they represented — on a continuous basis during the life of the loan — an amount sufficiently large to mitigate the risk of losses in case of bankruptcy of HSY.

(280) As concluded in section 3.1 of the present decision, in 1997 and 1998 private banks would have charged an interest rate amounting to reference rate plus 400 basis points, namely ATHIBOR plus 700 basis points. There exists no reference rate in dollars. However, since the reference rate in strong currencies was established by adding a premium of 75 basis points to the interbank rate [138] and since the two loans in dollars had a variable interest rate indexed on LIBOR, the Commission considers coherent with the former approach to calculate the aid amount on the basis of US LIBOR plus 475 basis points (i.e. US LIBOR plus 75 basis points to build the reference rate, plus a risk premium of 400 basis points to reflect the special risk of lending to HSY). On the basis of the foregoing, it appears that the premium charged for these three loans is below the rate which would have been charged by a market economy investor.

(281) The Commission concludes that the part of these three loans which does not fall under Article 296, namely 25 % of these loans, contains State aid. The aid amounts to the difference between the interest rate charged by ETVA and the interest rate which would have been charged by a market economy investor, as defined above. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.14.5.3. Compatibility with the common market

(282) These three loans were granted to cover HSY's needs for working capital. They therefore constitute operating aid, that is to say, aid granted to finance the operation of the yard in general and not a particular project. They were granted at a time where aid to the shipbuilding sector was still regulated by Directive 90/684/EEC. Articles 4 and 5 of this Directive provides that operating aid may be granted to shipbuilding and ship conversion activities, which are both defined in Article 1 of the Directive. However, in the years during which the loans were granted, namely 1997 and 1998, HSY did not have such activities. Directive 90/684/EEC prohibits aid to ship repair, which was the main civil activity of HSY in 1997 and 1998. The aid can therefore not be found compatible with the common market and, since it has been granted unlawfully, it has to be recovered.

(283) As underlined by Greece, the loans have been reimbursed. The aid as defined previously has therefore to be recovered for the period from the paying out of the loans to HSY until their reimbursement.

4.15. **Cross-subsidisation between military and civil activities until 2001 (measure E17)**

4.15.1. *Description of the measure*

(284) The extension decision indicates that there seems to have existed cross-subsidisation between military and civil activities. In particular, it describes two cases where, in the framework of military contracts, HSY received large advance payments exceeding its short term needs stemming from the execution of the corresponding contract, such that HSY was able to use this cash to finance other activities. First, HSY's 2001 Management Report mentions that 'amounts up to EUR 81,3 million have been received as advance payments for defence activities, but were mostly used on other activities and operation costs of the company'. Second, in its submission in the framework of a legal action before a Greek Court, the consortium HDW/Ferrostaal indicates that at least part of the funds (estimated by Elefsis to be in excess of EUR 40 million) given to HSY for the construction of the gunboats (contract signed on 21 December 1999) were used for other purposes.

4.15.2. *Grounds for initiating the procedure*

(285) The extension decision asserts that when documents explicitly refer to the use of funds received for military contracts for 'other activities', the Commission is entitled to doubt that these funds are covered by Article 296 and do not constitute State aid in the meaning of Article 87(1). The extension decision also recommends the introduction of separate accounts for civil and military activities, in order to avoid that civil activities are financed by State support provided for the military activities.

4.15.3. *Comments from interested parties*

(286) Elefsis asserts that cross-subsidisation is difficult to detect since there is no accounting separation of HSY's civil and military activities. Nevertheless, when the activities undertaken by the yard in 2001 are analysed, it turns out that the military activities were limited. It is therefore clear that the 'other activities' which, according to the Management report, were financed would mainly be civil activities.

(287) TKMS/GNSH, which has submitted comments only on this measure and on the following one (measure E18c), considers that Article 296(1)(a) of the Treaty acknowledges that certain restrictions on the disclosure of information can be justified. Consequently, the Commission cannot require Greece to disclose information which relates, for example, to the exact sums spent on different military projects. Second, TKMS/GNSH asserts that there is no legal basis for asking the separation of accounts between civil and military activities.

4.15.4. *Comments from Greece*

(288) Greece claims that to the extent that the amounts referred to in the complaint were linked to the defence activities of the yard, the procedure initiated by the Commission on the basis of Article 88(2) of the Treaty is erroneous and *ultra vires*. If the Commission thinks that the measures distorted competition, it should follow the procedure described in Article 298 of the Treaty. HSY adds that there is no legal obligation for HSY to keep separate accounts. No legal basis exists for the Commission request.

4.15.5. *Assessment*

4.15.5.1. Article 296 of the Treaty

(289) In order to establish whether Articles 296 and 298 of the Treaty are applicable, it is necessary to establish the facts. According to the documents quoted in the opening decision, during at least several quarters these advance payments were not used for the purpose of executing the military contract concerned. Neither Greece nor HSY has denied the quotes made in the opening decision. In addition, HSY's accounts confirm that HSY has received in 2000 and 2001 advance payments from the Navy far in excess of the funds needed in the short term to finance the execution of the corresponding military contracts. For instance, the balance sheet as of 31 December 2000 [139] shows that the advance payments received by HSY for the gunboats contract and the submarines contract amounted respectively to EUR 49,1 million and EUR 33,1 million. At the same date, the sum of the inventories, work in progress, advances for inventories and trade debtors (in accounting terms, these items are referred to as current assets) related to the contracts for the Navy amounted to EUR 14,8 million. In other words, the advance payments exceeded by an amount of EUR 67,4 millions the current assets which had to be financed. Since the amounts quoted in the extension decision have not been contested and since a different source shows that they seem to be a reasonable approximation of the reality, the Commission concludes that, during at least one year, these advance payments were not used for the purpose of executing the military contracts concerned.

(290) As regards the application of Articles 296 and 298 of the Treaty, the Commission rejects Greece's argument that any advance payment paid in the framework of a military contract would automatically fall under Article 296. In particular, in the present case the management of HSY itself acknowledged that some advance payments exceeded by far the amounts needed for the execution of the contracts in the short term and therefore were temporarily used for other purposes. A measure falls in the scope of Article 296 only if Greece considers it to be 'necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material'. The Commission observes that Greece has not explained why the part of the advance-payments that exceeded the funds necessary to execute the military projects concerned would have contributed to 'the protection of the essential interests of its security'. The Commission itself fails to understand why it would be the case since the yard did not need them to produce the war material concerned and did not use them for that purpose. In such a case, where the facts indicate that Article 296 does not apply, Greece should have explained why it nevertheless considers that these excess advance payments have contributed to its security. Since it was not done, the Commission concludes that these advance payments, in the period during which they were not necessary for the execution of the military contracts concerned, do not fall within the scope of Article 296 of the Treaty.

(291) Since the advance payments have initially been used for financing all the activities of the yards, the Commission considers that 75 % of these advance payments has financed military activities and 25 % has financed civil activities. In other words, during at least one year 25 % of EUR 81,3 million and 25 % of EUR 40 million fell under State aid rules.

4.15.5.2. Existence of aid

(292) These excessive advance payments constitute interest-free loans granted by the State. They therefore convey a selective advantage to HSY. One could argue that if the State purchases products in a way which would be acceptable for a private firm, the purchase contract — including its terms like the advance payments — can not convey a selective advantage to the producer. However, in the framework of the military contracts awarded to HSY, the State has never behaved in a way acceptable for a private firm wanting to purchase goods. In particular, a private firm would have sought to pay the lowest price possible by considering all potential suppliers in the world. Conversely, Greece has always limited its choices to suppliers active in Greece (or to consortia having a member active in Greece), in order to support employment in Greece and in order to maintain capacity of production of military products in Greece [140]. A private firm would therefore not have concluded these purchase contracts. In addition, a private firm would not have accepted to make advance payments exceeding what was needed to execute its orders, but would have tried to limit advance payments as much as possible.

(293) In these circumstances, the Commission considers these excessive advance payments as an interest-free loan. The aforementioned documents shows that at least during one year these funds have been used for other activities than the execution of the contracts concerned [141]. The Commission therefore considers them equivalent to a one-year loan free of any interest. In accordance with the analysis of the creditworthiness of HSY laid down in section 3.1 of the present decision, the amount of aid included in these loans granted after 30 June 1999 is equal to the reference rate for Greece plus 600 basis points. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.15.5.3. Compatibility with the common market

(294) The Commission has not found a basis on which this aid could be found compatible. Since this aid supports the general operation of the yard, it seems to be operating aid, but, as already explained in the assessment of prior measures, this yard was not entitled to receive operating aid in 1999, 2000 or 2001.

(295) Since the aid is unlawful and incompatible, it must be recovered.

(296) As regards the separation of accounts, the Commission will deal with this issue at the end of the present decision.

4.16. **Indemnifying clause in favour of HDW/Ferrostaal in the case where aid would be recovered from HSY (measure E18c)**

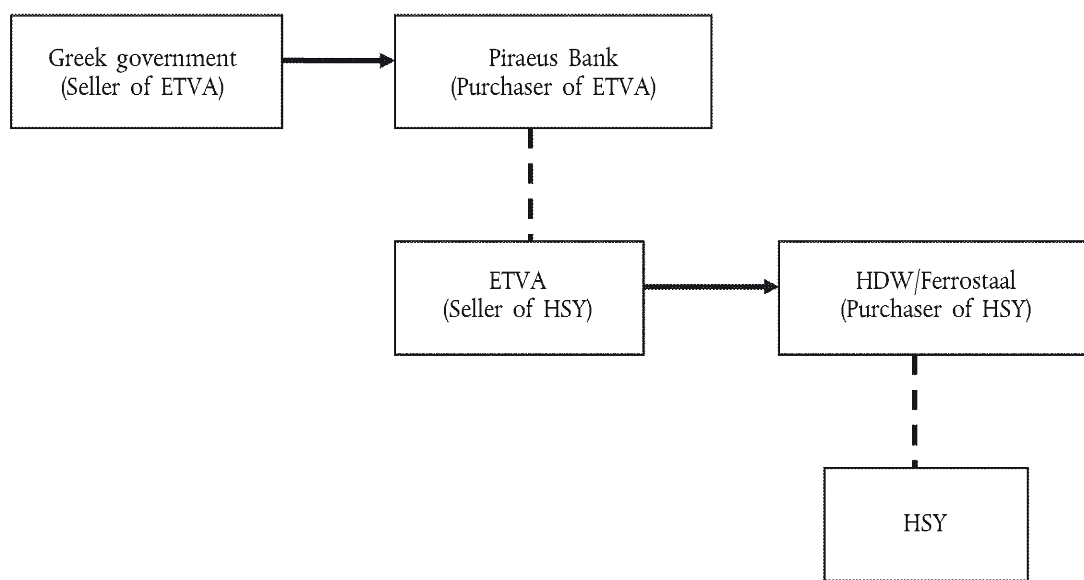
4.16.1. *Description of the measure*

(297) The extension decision indicates that the Greek State promised to indemnify the purchaser of HSY (i.e. HDW/Ferrostaal) in case incompatible aid granted before and at the time of the privatisation was recovered from HSY. From a legal point of view, this guarantee was granted through a two steps mechanism:

— On the one hand, ETVA granted a guarantee to the purchaser of HSY (i.e. HDW/Ferrostaal). According to this indemnification guarantee, ETVA would indemnify HDW/Ferrostaal for any aid recovered from HSY. The extension decision underlines that in the Agreement for the sale of the share of HSY (hereinafter 'HSY SPA') concluded between ETVA and HDW/Ferrostaal on 11 October 2001, ETVA, which was at that moment still under the control of the State, already promised to provide this guarantee to HDW/Ferrostaal. The guarantee granted by ETVA seems therefore imputable to the State,

— On the other hand, the State provided a guarantee to the purchaser of 57,7 % of the shares of ETVA (i.e. Piraeus Bank). According to this indemnification guarantee, the State would pay to Piraeus Bank 100 % of any amount paid by ETVA to the purchaser of HSY as a consequence of an indemnification guarantee granted by ETVA to the purchaser of HSY.

(298) The following graph illustrates the structure of the two steps guarantee, such a described in the extension decision (the continuous lines indicate the indemnification flows under each of the two steps of the guarantee, while the dotted line indicates the ownership after the closing of the sale of HSY and of 57,7 % of the shares of ETVA).



4.16.2. *Grounds for initiating the procedure*

(299) The extension decision indicates that a private seller would not have given such a guarantee because it is not limited in time or amount. In addition, a market economy shareholder would have preferred to let HSY go bankrupt and be liquidated rather than selling it in these circumstances. Indeed, the sale price received by the State was only EUR 6 million and the indemnity payments that the State should have expected to make under the guarantee were much larger.

(300) Whereas the legal beneficiary of the two steps guarantee is HDW/Ferrostaal, the extension decision indicates that HSY is the real beneficiary of the whole mechanism. Without such State indemnifying provision, no investor would have been ready to purchase HSY. The Greek State explicitly recognised this fact. Therefore, it is likely that without such a guarantee HSY would have remained unsold and unable to face its financial difficulties, and would have gone bankrupt.

(301) The extension decision also indicates that such a guarantee seems incompatible per se as it impairs the 'effet utile' of any recovery decision.

4.16.3. *Comments from interested parties*

(302) Elefsis claims, in accordance with the Commission's initial assessment, that no private seller would have granted such an unlimited guarantee. As regards the Commission's claim that no investor would have been ready to purchase the yard without such a provision, Elefsis contests it since Elefsis, who participated in the tender procedure and wanted to buy HSY, did not put that condition in its bid for HSY and was ready to purchase HSY without such a guarantee. According to Elefsis, the guarantee was exclusively granted to HDW/Ferrostaal. The latter and HSY are therefore the beneficiaries of the guarantee.

(303) Piraeus Bank, which commented only on that measure because it is the only one in which it is directly involved, provides several documents showing that ETVA already agreed to grant the indemnifying clause in favour of HDW/Ferrostaal at the time of conclusion of HSY's SPA in October 2001, at a time when ETVA was still controlled by the State. Piraeus Bank produces contracts, documents and press articles illustrating that the privatisation procedure of HSY was managed by the State. The agreement between the Greek government and Piraeus Bank, dated 20 March 2002, provides that, even though Piraeus Bank became the majority shareholder of ETVA, the privatisation process of HSY would continue to be managed by the State. Finally, Piraeus Bank shows that in the invitation to tender sent to potential bidders in July 2001, it was already explicitly stipulated that in the event that a recovery is imposed on HSY pursuant to a potential breach of the EU regulations regarding State aid, the highest bidder will not be responsible for the payment of such a recovery.

(304) TKMS/GNSH indicates that during the negotiations with ETVA for the purchase of HSY, it became clear that HSY had received some financial support from the Greek State. However, neither the extent of these measures nor the precise circumstances under which they had been taken was known to the potential buyers. During the bidding process the buyers received very little information on the various measures which are now subject of the present procedure. In other words, for the buyers the possible State aid implications of HSY were not quantifiable. In order to avoid being exposed to any risks from past or present aid, HDW/Ferrostaal insisted that approval or a comfort letter/negative clearance should be obtained from the Commission for past aid measures. Should this not be possible, the buyer would suggest an acceptable form of guarantee to the seller. Following contacts with the Commission, it became clear that it would not be ready to issue such a comfort letter/negative clearance. In the merger decision approving the acquisition of HSY by HDW/Ferrostaal, the Commission itself acknowledges that the extent of the subsidies was not known. In these circumstances, the indemnifying clause was agreed upon on 31 May 2002 as an Addendum to the HSY SPA, whereby ETVA as vendor of HSY guaranteed to make up for any financial loss the buyer would suffer in case of recovery of aid from HSY. TKMS/GNSH concludes that no investor would have agreed to buy HSY without such a guarantee. This claim was also confirmed by the second Deloitte report, which was submitted by TKMS/GNSH in June 2007.

(305) TKMS/GNSH considers that the measure is not imputable to the State since it was granted by ETVA at a time when it was not under the control of the State anymore. Indeed, on the basis of HSY's SPA concluded in October 2001, there was no contractual obligation for ETVA to indemnify GNSH. ETVA decided to grant this guarantee not earlier than in May 2002. TKMS/GNSH also claims that ETVA and the State acted as a private vendor. The probability that the guarantee would have to be paid out was relatively low. Conversely, if the yard was liquidated, the losses on the loans and guarantees granted to HSY would represent much larger amounts (The calculation justifying this claim was provided in the second Deloitte report submitted by TKMS/GNSH). In addition, TKMS/GNSH considers that the guarantee granted by the State to Piraeus Bank on 20 March 2002 provides that the State would pay indemnification to Piraeus Bank amounting to only 57,7 % of any amount paid by ETVA to the purchaser of HSY (i.e. HDW/Ferrostaal). Conversely, the guarantee granted by ETVA to HDW/Ferrostaal on 31 May 2002 provides that ETVA would pay indemnification to HDW/Ferrostaal amounting to 100 % of any aid recovered from HSY. TKMS/GNSH concludes that the guarantee granted by ETVA on 31 May 2002 is wider than the one received by Piraeus Bank on 20 March 2002. Therefore, this can not form one single guarantee mechanism and the fact that ETVA granted a wider guarantee proves that it acted as any private vendor.

(306) TKMS/GNSH fails to see why such an indemnifying provision could constitute a circumvention of the recovery of aid. Indeed, if aid would be recovered from HSY, the State would not indemnify HSY, but the purchaser of HSY (i.e. TKMS/GNSH, which is the successor of HDW/Ferrostaal).

(307) TKMS/GNSH [142] also considers that the guarantee granted by the State to Piraeus Bank could constitute aid to Piraeus Bank and ETVA.

4.16.4. *Comments from Greece*

(308) According to Greece and HSY, the indemnifying clause is not an aid. First, it is not imputable to the State since it was granted by ETVA Bank, at a time when it was not under State control anymore. Second, Greece and HSY claim that the Greek State acted as a market investor when it sold its stake in HSY as the main shareholder of ETVA. The guarantee granted to the purchaser by the vendors of HSY is a standard and normal condition in commercial agreements. Indeed, Greece recalls that it did not provide a guarantee to HSY with regard to the liability to repay unlawful State aid, but to the buyer of HSY. Such indemnification burdens the vendor regardless of whether it is included as a clause in the commercial agreement or not. The Commission's statement that the Greek State knew or should have known about the considerable number of further potentially unlawful and incompatible State aid measures and that the amounts would have to be recovered and thus trigger the indemnifying clause is without basis. In the period in which the indemnifying clause was provided, there was no Commission decision ruling that HSY had received unlawful State aid. In addition, the closure and liquidation of HSY would have been more costly to the State, taking account the social cost.

(309) In addition, HSY fails to see how it could have benefited financially from a guarantee, which was agreed upon between ETVA Bank and HDW/Ferrostaal, or from a guarantee agreed upon between the Greek State and Piraeus Bank. Even if HDW/Ferrostaal was to receive compensation, there is no obligation for the consortium to inject this amount in HSY. Therefore the Commission also fails to show why the indemnifying clause would neutralise a recovery decision. According to the Courts' case law, by repaying the aid, the recipient forfeits the advantage, and the situation prior to the granting of the aid can be restored.

(310) Finally, if the Commission considered the indemnifying clause to be State aid, Greece claims that Articles 296 to 298 of the Treaty would be applicable. In this context, HSY indicates that, given that the Hellenic Navy was always the most important client of the yard, the procedure and the terms of the privatisation, including the entry into force of Law 2941/2001, should be examined under the light of the State-client, which for national defence reasons is interested in maintaining the operation and the viability of the yard. In the present case, the Greek State has adopted such measures, which any private company, whose interests are related to the viability of another undertaking, would have adopted. Moreover, this assessment is even more important when the State has the obligation to bear the burden and the losses of the company's dissolution and liquidation, which would be more costly and thus non-profitable.

4.16.5. *Assessment*

4.16.5.1. Article 296 of the Treaty

(311) The Commission considers that the measure does not fall within the scope of Article 296 of the Treaty. Indeed, the indemnification mechanism applies in case of recovery of State aid from HSY. As has been claimed by Greece and accepted consistently by the Commission [143], the military activities of HSY are essential for Greece's security, are falling under Article 296 and therefore the State aid rules do not apply to them. Since all State support provided to the military activities of HSY is exempted from State aid rules, any recovery of State aid can only be the recovery of State support provided to the civil activities of HSY. Consequently, the present guarantee is directly and exclusively related to the civil activities of HSY.

(312) Some parties claim that, without this guarantee, no investor would have purchased HSY and the yard would probably have gone bankrupt. Therefore, even if it relates exclusively to the civil activities of HSY, this measure was nevertheless indispensable to ensure the survival of the military activities of HSY and therefore falls under Article 296. The Commission cannot accept this argument. On the basis of Article 296, Greece could have granted to the military activities the financial support they needed to ensure their continuation. Greece would have thereby avoided the demise of the military activities. Alternatively, Greece could have granted the financial support necessary to render the military activities attractive for a potential investor, such that these military activities would have been purchased and thereby their continuation would have been ensured. An investor purchasing the military activities would not have needed a guarantee like the present one since, as just explained, no aid could be recovered from the military activities of HSY. Consequently, the present measure was solely necessary in order to find a purchaser for the entire HSY, i.e. including the civil activities. The effect of the present measure was thus to permit to find a purchaser for the civil activities of HSY, and thereby to ensure the continuation of these activities. It was not necessary to ensure the continuation of the military activities. It does therefore not fall within the scope of Article 296 of the Treaty.

4.16.5.2. Existence of aid

(313) Since some parties contests that the two guarantees — the one granted by the State to Piraeus Bank and the one granted by ETVA to HDW/Ferrostaal — constitute one single guarantee mechanism and that HSY is the beneficiary of the two guarantees, the Commission will first assess separately the guarantee granted by ETVA to HDW/Ferrostaal and demonstrates that it constitutes State aid in the meaning of Article 87(1) of the Treaty.

(314) In order to constitute a State aid in the meaning of Article 87(1) of the Treaty, a measure must be imputable to the State. Some parties contest that the guarantee granted by ETVA to HDW/Ferrostaal is imputable to the State. They claim that the decision to grant this guarantee was taken independently and freely by ETVA. They claim in particular that the guarantee was granted on 31 May 2002 by means of the Addendum to HSY SPA, at a date when ETVA was not under State control anymore but under the control of Piraeus Bank. The Commission dismisses this claim and considers that there is ample evidence that the measure is imputable to the State:

— First, during the privatisation process of HSY, this guarantee was appearing in the documents submitted to the potential bidders ([144]). In other words, already during the privatisation process, there was a promise that the purchaser of HSY would be indemnified for any State aid recovered from HSY. In addition, on 14 September 2001, ETVA explicitly and unambiguously committed to provide this guarantee to HDW/Ferrostaal if the European Union would not give clearance regarding past and present State aid granted to HSY ([145]). Clause 1.2.3 of HSY SPA signed on 11 October 2001 explicitly refers to the document signed on 14 September 2001. The discussion regarding the precise wording of the guarantee continued in the following months ([146]). Since the Commission did not give a letter of comfort/negative clearance regarding past and present aids to HSY, ETVA had on 31 May 2002 to issue the guarantee in favour of HDW/Ferrostaal, as had been agreed by the parties on 14 September 2001 and in Clause 1.2.3 of HSY SPA. All the foregoing illustrates that, even though the Addendum containing the guarantee to HDW/Ferrostaal was signed on 31 May 2002, ETVA already committed to grant this guarantee (if the EU did not clear past and present aids) at a time when ETVA was still under the control of the State. In other words, the Addendum of 31 May 2002 is the execution of a contract entered into by ETVA when it was still under State control. As shown in section 3.2 of the present decision, when ETVA was under State control, all the actions it took towards HSY can be considered imputable to the State ([147]). All these elements were confirmed by Greece in its letter of 23 May 2005 ([148]),

— Second, even if it were considered that, on the basis of the aforementioned documents concluded by ETVA when it was under the control of the State (i.e. until end March 2002), there existed no contractual obligation of ETVA to grant this guarantee to HDW/Ferrostaal, the measure would still be imputable to the State. Indeed, the Commission observes that Greece continued to manage the sale of HSY even after the sale of ETVA to Piraeus Bank. Article 8.2.2 of the Agreement of 20 March 2002 between the State and Piraeus Bank provides that ETVA will not be responsible for the sale process of HSY, which the State will continue to manage. Article 8.2.2.(b) for instance provides that the State 'shall assume the control, care and responsibility of the acts and negotiations with the third purchaser of the Holding in Hellenic Shipyards'. In accordance with Article 8.2.2 of the Agreement of 20 March 2002, Piraeus Bank asked by letter of 28 May 2002 the agreement of the State regarding the guarantee that ETVA intended to grant to HDW/Ferrostaal. The State gave its authorisation by letter of 31 May 2002. All this shows that the grant of the guarantee is imputable to the State,

— Third, even if the two foregoing points were dismissed, the guarantee would still be imputable to the State. The Commission indeed observes that the State decided to privatise HSY ([149]). When Piraeus Bank took control of ETVA, it was therefore obliged by law to privatise HSY. As acknowledged by TKMS/GNSH itself, HDW/Ferrostaal would not have purchased HSY if they would not have received such a guarantee. Since the State decided that HSY had to be sold, and since the grant of the guarantee was indispensable to sell HSY, it can be concluded that the State put ETVA in a situation where it was forced to issue the guarantee. Therefore, even if it would be concluded that ETVA decided to grant the guarantee in May 2002 without any direct involvement of the State, the measure would remain imputable to the State,

— Fourth, even if all the previous points were dismissed, it should be concluded that ETVA accepted to grant the guarantee on 31 May 2002 only because its controlling shareholder (i.e. Piraeus Bank) had received a guarantee from the State protecting him against any financial damage stemming from this guarantee. Indeed, as will be shown, a market economy investor would never have granted such a guarantee without having received a counter guarantee from the State. The granting of the guarantee occurred only because the State had protected the economic unit (i.e. the group) granting the guarantee from any negative consequence (by granting a counter guarantee). In such a case, where a firm simply transfer an aid to a second firm, the granting of the measure is imputable to the State.

(315) In order to constitute a State aid in the meaning of Article 87(1) of the Treaty, a measure must be financed by State resources. The Notice on guarantees indicates that 'The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid […] must be assessed at the moment the guarantee is given'. As indicated above, the Commission considers that ETVA contractually committed to grant this guarantee to HDW/Ferrostaal at a time when the State still owned the large majority of the shares of ETVA. Since the Notice on guarantees indicates that the existence of aid has to be analysed at the time of the grant of the guarantee and not later when the guarantee is invoked, it can be concluded that by committing to grant the guarantee, the State put State resources at risk and the guarantee therefore involves State resources. The fact that ETVA was sold to Piraeus bank shortly after does not affect this conclusion. Indeed, if the State has correctly informed the bidders about the contractual obligations of ETVA — including this commitment of ETVA to provide the guarantee to HDW/Ferrostaal if the Commission does not issue a comfort letter — the bidders must have taken into account this commitment of ETVA. They must therefore have revised downwards the price they were ready to pay to purchase ETVA. This means that the State sold ETVA at a lower price and therefore lost resources. As indicated above, even if it were concluded that, at the time when ETVA was still under State ownership, ETVA did not contractually commit to issue the guarantee, the Commission considers that by deciding to privatise HSY in January 2001 — at a time when ETVA was still under State ownership — the State put ETVA in a situation where it was forced to issue such a guarantee since the latter was indispensable to find a purchaser for HSY. This entails that when the bidders made their bid for ETVA, they must have taken into account the fact that ETVA would have to issue this guarantee. According, they proposed a lower price for purchasing ETVA and this therefore also leads to the conclusion that State resources have been lost.

(316) Even if it were concluded that when the State sold ETVA there was no obligation (neither contractually nor de facto) to issue this guarantee, it can still be demonstrated that the guarantee granted by ETVA involves State resources. Indeed, the State granted to the purchaser of ETVA (i.e. Piraeus Bank) a guarantee by which the State promised to refund Piraeus Bank 100 % of any amount which ETVA would have to pay under the guarantee ETVA will issue in favour of HDW/Ferrostaal. This counter guarantee was granted in successive contracts. In the Agreement of 18 December 2001 between the State and Piraeus Bank for the sale of 57,7 % of ETVA, the State committed to pay to Piraeus Bank 57,7 % of any amount which ETVA would pay to the purchaser of HSY. In the Agreement of 20 March 2002 between the same parties and which amended the agreement of 18 December 2001, the State committed to pay to Piraeus Bank 100 % of any amount ETVA would have to pay to the purchaser of HSY [150]. By letter dated 31 May 2002 sent to Piraeus Bank, the State confirmed to the latter that it would refund 100 % of any amount paid by ETVA to HSY's purchaser [151]. In other words, when ETVA signed the Addendum to HSY SPA on 31 May 2002, Piraeus Bank had received a guarantee from the State providing that it would be 100 % indemnified for any amount ETVA would have to pay as a consequence of the guarantee planned to be granted to HDW/Ferrostaal [152]. This shows that any amount paid by ETVA would ultimately be financed by the State budget and that the guarantee involves State resources.

(317) In order to prove the existence of a State aid in the meaning of Article 87(1) of the Treaty, it is necessary to show that the State did not behave as a market economy investor would have behaved in similar circumstances. In this respect, Greece, HSY and TKMS/GNSH claim that in similar circumstances a market economy investor would have accepted to issue this guarantee in favour of HDW/Ferrostaal. They argue that the test of the market economy investor should be applied at the level of ETVA, which was the legal entity which sold HSY, and at the level of the Greek government, which was the seller of ETVA.

(318) The Commission recalls that, as has been indicated in section 3.2 of the present decision, when ETVA purchased HSY and directly thereafter injected capital to keep it alive, it did not acted as a market economy investor but as a public authority granting aid to keep alive a firm deemed important for the Greek economy.

Therefore, no market economy investor would have found itself in the situation of ETVA. No market economy investor would have found itself in the situation of selling these shares of HSY. Therefore, the Commission considers that the market economy investor test can not be used in the present case to justify the fact that the State is putting additional State resources at risk (by granting the guarantee).

(319) Even if nevertheless one considers that the market economy investor test should be applied, the Commission considers that if the State had been a private firm acting under normal market conditions, it would not have accepted to grant the guarantee. Each of the three following points is alone sufficient to prove this.

(320) First, the Commission observes that ETVA (and the State through ETVA), whereas it had only a 51 % shareholding in HSY (the remaining 49 % were owned by the employees ([153])), promised to pay to the purchaser of HSY (i.e. HDW/Ferrostaal) 100 % of any aid that would be recovered from HSY. A market economy investor would not have accepted to give an indemnification amounting to 100 % of the damage suffered by the company sold. In certain circumstances, a market economy investor may accept to take responsibility for certain future liabilities of the firm sold, but only in a proportion equal to its shareholding, which was 51 % in the present case. A market economy investor would have asked the other shareholders to assume responsibility for the remaining 49 % of the liabilities concerned. By accepting to support 100 % of potentially huge liabilities (it is recalled that the contract does not define a ceiling for the indemnification payments) of the firm sold, ETVA made a gift to the other shareholders of HSY (i.e. the employees). A market economy investor would not have accepted to make such a gift by assuming potentially huge liabilities of the sold firm in a proportion exceeding by far its shareholding. Therefore, from the mere fact that the indemnification guarantee granted by ETVA to HDW/Ferrostaal amounts to 100 % (i.e. instead of 51 %) of the aid that could be recovered from HSY, it can be concluded that no market economy investor would have provided such a guarantee.

(321) Second, Greece, HSY and TKMS/GNSH claim that the net proceeds (i.e. revenues minus costs) were higher in case of sale of HSY — including the expected payments due under of the guarantee — than if HSY would have been liquidated. TKMS/GNSH supports its claim by means of the second Deloitte report. This report compares the net costs in the two scenarios. This analysis is done at the level of ETVA and then at the level of the State. The Commission considers that applying the test at the level of ETVA is a misuse of this test. Indeed, as discussed in section 3.2 of the present decision, the privatisation was decided and financially supported — see for instance the State aid included in Law 2941/2001 ([154]) — by the government and ETVA has never been in the position of an independent economic unit free to design the sale of HSY in a way maximising its revenues and minimising its losses. It is therefore the intervention of the State as a whole that must be scrutinised and not the behaviour of one of its parts.

(322) If the test is nevertheless applied at the level of ETVA, one has to compare the net proceeds (i.e. revenues minus costs) for ETVA in case of liquidation of HSY and in case of sale of HSY. In the case of liquidation of HSY, it has to be established what would be the costs incurred by ETVA. TKMS/GNSH claims that the loss would amount at least to the loans and guarantees granted by ETVA to HSY and which were not counter-guaranteed by the State. The Commission observes however that none of these loans and guarantees constitutes a normal cost of winding up a firm ([155]). Indeed, all these loans and guarantees have been granted by ETVA as public authority because either they constituted State aid to the civil activities or they were measures to protect the security of Greece in accordance with Article 296 of the Treaty ([156]). These loans and guarantees can therefore not be taken into account when applying the market economy vendor test. Consequently, it turns out that ETVA as a market economy operator would have had no significant cost to support in case of liquidation of HSY. In case of sale of HSY, ETVA received the sale price of EUR 6 million. As regards the costs incurred in case of sale of HSY, ETVA had to issue the guarantee currently analysed, which was unlimited in size and therefore entailed potential payments of tens or even hundreds of millions of Euro. Comparing the two scenarios, it turns out that a market economy investor would have preferred to liquidate the yard ([157]). ETVA therefore did not behave as a market economy investor. If the comparison between the sale of HSY and the liquidation of HSY is performed at the level of the State, it leads exactly to the same conclusions. There were no large costs for the State in its capacity as entrepreneur/owner in case of liquidation of HSY since all the loans and guarantees granted by the State (directly or via ETVA) to HSY have been granted by the State as public authority, because either they constituted State aid to the civil activities or measures to protect the security of Greece in accordance with Article 296 of the Treaty. In case of sale of HSY, the State would just receive a few million Euro while, because it granted the guarantee, it ran the risk of having to pay tens or hundreds of millions of Euro. In conclusion, the State did not act in a way acceptable to a private firm in similar circumstances.

(323) Greece, HSY and TKMS/GNSH claim that the risks of HSY having to reimburse State aid were very limited, since at that time there were no ongoing investigations by the Commission. They therefore claim that the risk for ETVA and the State of having to pay indemnification under the guarantee was small. The Commission can not accept this claim. It is akin to claim that, since Greece over the prior years had succeeded to hide the grant of unlawful and incompatible State aids to HSY and the misuses of aid previously approved by the Commission, it was allowed to grant this guarantee. As a subsidiary ground, the Commission observes that HDW/Ferrostaal insisted to receive this guarantee and was not ready to sign the closing of the sale of HSY before receiving the guarantee. The importance attached to the guarantee by HDW/Ferrostaal proves that this private investor considered that the probability that HSY would have to reimburse State aid was not small. The fact that, from the beginning of the privatisation procedure, Greece committed to grant such a guarantee to the highest bidder proves also that Greece considered that a private investor would find such a guarantee very important (a condition *sine qua non*, according to Greece's letter of 23 May 2005 quoted in footnote 148 of the present decision and according to the second Deloitte report), which can only be the case if a private investor considers that the probability of recovery is not very limited.

(324) The Commission also observes that in this context where the amount of aid which could be recovered from HSY was difficult to estimate, a market economy vendor selling HSY would have at least introduced in the sale contract a ceiling limiting the potential payment to the purchaser. A market economy vendor would not have accepted to run the risk of having to pay hundreds of millions of Euros, even if it were accepted that the probability of such a high payment could be very low. Therefore, the fact that no ceiling was introduced in the guarantee constitutes an additional proof that ETVA and the State did not behave in a way acceptable to a market economy operator.

(325) Third, when assessing whether the State acted as a market economy investor, it is necessary to take into account the entire intervention of the State. In the present case, the State has granted several large aids to facilitate the privatisation of HSY (i.e. the State aid included in Law 2941/2001 ([158]). It notably repaid to the workers of HSY the amount of EUR 4,3 million they had invested in the framework of the three capital increases of HSY. This measure, which aimed at ensuring that the employees would not hinder the sale of HSY, would have been unacceptable to a market economy investor, among others since there was no contractual obligation to do it and since in addition the employees still owed EUR 24 million to ETVA as purchase price for the shares. Finally, the State asked the bidders to pay a part of the purchase price of HSY in the form of a capital increase ([159]). All these elements illustrate that during the sale of HSY, the State did not behave with the objective of maximising its revenues and minimising its costs, but with the goal of facilitating the sale of HSY and the continuation of the yard's operations. Therefore, during the sale of HSY, the Greek State did not act as a market economy investor.

(326) On the basis of each of the three foregoing considerations, the Commission concludes that a market economy investor would not have granted the guarantee.

(327) As regards the existence of an advantage and the identification of the beneficiary, the Commission considers that no investor would have purchased the entire HSY (i.e. including the civil activities) without the guarantee. The second Deloitte report confirms this conclusion: 'Based on our experience and the above analysis, we tend to believe that no rational investor would have been prepared to acquire HS and in parallel assume any additional risk related to State aid (which at that time was neither certain nor quantified by the EC), for the company that a) was under the ownership and management of a State-owned company (ETVA Bank) for a number of years, and at the same time b) had a significant negative shareholders' equity position, amongst other operational problems (i.e. low productivity, high operational costs, excess staff, etc.)'. This conclusion is also confirmed by the fact that Greece, anticipating that such a guarantee would be necessary to attract private investors, promised in the tender documents that the highest bidder would receive such a guarantee ([160]). This conclusion that such a guarantee was necessary to find a purchaser for HSY is logic since an investor performing a due diligence of HSY would have found that HSY had benefited of several measures which could constitute aid of which the recovery could be asked by the Commission ([161]). Contrary to this conclusion, Elefsis claims that this guarantee was not necessary and claims in particular that it would have been ready to purchase HSY without such a guarantee, what is illustrated by the fact that, in its bid for the purchase of HSY, it did not put this guarantee as a condition for purchasing HSY. The Commission considers that Elefsis' claim lacks credibility. The Commission first recalls that, even if this it was true that Elefsis did not request such a guarantee in its bid, it does not prove that, if Elefsis had been selected as the preferred bidder, it would not have requested this guarantee at a later stage of the negotiation with the seller ([162]). This is very likely that Elefsis would have done

so. Indeed, as soon as HSY was sold to HDW/Ferrrostaal, Elefsis started to file complaints with the Commission, claiming that HSY had benefited from several and large aid measures that the Commission should recover. An investor convinced that a firm has received tens of millions of Euro of incompatible aid will not himself take the risk of purchasing this firm, except if he receives a guarantee. The Commission therefore dismisses Elefsis' claim and considers that without this guarantee no market economy investor would have purchased the entire HSY, i.e. HSY including the civil activities. As indicated earlier, if HSY had not been sold, Greece could have continued to support the military activities on the basis of Article 296 of the Treaty. Conversely, because of Article 87 of the Treaty, Greece would not have been allowed to provide financial support to the civil activities. The Commission observes that the financial situation of HSY deteriorated dramatically between 1998 and 2002. Even if HSY does not publish separate accounts for civil activities, it is reasonable to suppose that these activities were deeply loss-making during these years. Besides the ship repair activity, the three main civil contracts performed during these years were the contracts with ISAP, OSE and Strintzis. As has been explained in the present decision (see description and assessment of measure E12c), the contracts with ISAP and OSE were executed with significant delays, forcing HSY to pay high penalties and to provide rolling stock for free, what also represented a high cost for HSY. It is therefore clear that these contracts were highly loss-making. As has also been explained in the present decision, the contract concluded with Strintzis at the beginning of 1999 was a big failure for HSY. The contract was cancelled in 2002, HSY had to pay the contractual indemnities to Strintzis and sold the hulls in 2004 at a price which was only a small fraction of the tens of millions of Euro of costs which HSY had incurred to build these hulls. This contract was therefore also highly loss-making. Finally, the last civil activity was the ship repair. It is a low margin business since there is fierce competition between yards. The Commission therefore doubts that this activity has been profitable, and, in any event, it was certainly unable to compensate the big losses stemming from the ISAP, OSE and Strintzis contracts. It is therefore reasonable to suppose that the civil activities were strongly loss making until 2002. As has been shown in the present decision, these activities have been constantly supported by aid, a part of which has now to be recovered. Above all, the failure to carry out correctly the ISAP, OSE and Strintzis contracts proves that, without being purchased by a large firm and without benefiting from the technical and project management skills of the latter, the civil activities would have remained loss-making. The second Deloitte report confirms that HSY had 'operational problems (i.e. low productivity, high operational costs, excess staff, etc.)'. Consequently, if the civil activities had not been sold, they should have ceased rapidly (except if Greece would have continued to provide unlawful and incompatible aid to these activities). In summary, the Commission has shown in this paragraph that without the guarantee, no investor would have purchased the civil activities of HSY and, if these activities had not been purchased, they would have stopped rapidly. The Commission concludes that the beneficiary of the guarantee is HSY and that the advantage is to allow the continuation of the civil activities.

(328) Elefsis disagree with the prior conclusion regarding the identification of the beneficiary. Elefsis claims that, in addition to HSY, HDW/Ferrostaal was also a beneficiary of the guarantee granted by ETVA. The Commission disagrees with this assessment. As has been shown, in the tender document submitted to the bidders, it was already indicated that they would be indemnified in case of recovery of State aid from HSY. This means that when HDW/Ferrostaal made its bid for the purchase of HSY, it made the assumptions that, if any aid would be recovered from HSY, it would receive a corresponding indemnification from ETVA [163]. In order words, the purchase price proposed by HDW/Ferrostaal was already taking into account the indemnification guarantee. The guarantee has therefore not favoured HDW/Ferrostaal.

(329) The Commission concludes that the guarantee granted by ETVA to HDW/Ferrostaal constitutes State aid in the meaning of Article 87(1) of the Treaty and the beneficiary of this aid is HSY. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

(330) As regards the guarantee granted by the Greek State to Piraeus Bank, it also constitutes aid. It is a selective measure financed by State resources. A market economy investor selling ETVA would not have granted such a guarantee. Indeed, the only justification for granting this guarantee was the guarantee granted by ETVA to HDW/Ferrostaal. If the latter guarantee had not been granted, it would not have been necessary to provide the guarantee to Piraeus Bank. Since, as has been explained, no market economy investor would have granted the guarantee granted by ETVA, which constitutes State aid, no market economy investor would have granted the guarantee to Piraeus Bank (since the latter guarantee would not have been

necessary, i.e. it would have been irrelevant). As regards the identification of the beneficiary of the guarantee granted by the State to Piraeus Bank, the Commission recalls that the present procedure concerns potential State aid to HSY. No other potential beneficiary is mentioned in the extension decision. Therefore, only aid to HSY can be investigated in the framework of the present procedure. If the guarantee granted by the State to Piraeus Bank were to constitute aid to HSY, it would not constitute additional State aid on top of the State aid included in the guarantee granted by ETVA to HDW/Ferrostaal. Indeed, it is thanks to the latter guarantee that a private investor accepted to purchase HSY and that the civil activities of HSY were thereby saved. In other words, the guarantee granted by the State to Piraeus Bank does not provide an additional advantage to HSY and can therefore not constitute additional aid to HSY: all the advantage to HSY is granted by the guarantee granted by ETVA to HDW/Ferrostaal. In the present procedure which concerns potential State aid to HSY, the Commission therefore does not have to take a final view on the identity of the beneficiary of the guarantee granted by the Greek State to Piraeus Bank and the Commission does not have to further investigate the latter guarantee. It is sufficient to investigate the former guarantee — the guarantee of ETVA to HDW/Ferrostaal — and to cancel it if it constitutes incompatible aid to HSY.

4.16.5.3. Compatibility with the common market

(331) As regards the guarantee granted by ETVA to HDW/Ferrostaal, the Commission fails to see how this aid could be found compatible on the basis of Article 87(2) and (3) of the Treaty. As regards Article 87(3)(c) of the Treaty, the Commission observes that HSY was in difficulty. The Commission has already indicated that aid to shipbuilding was regulated from 1 January 1999 by Regulation (EC) No 1540/98. Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the granting of the guarantee were the 1999 R & R guidelines. The guarantee clearly did not fulfil all the conditions for authorisation of the aid laid down in section 3.2.2 of the guidelines. For instance, under condition (b) 'Restoration of viability', the granting of the aid must be 'conditional on implementation of the restructuring plan which must be endorsed by the Commission in the case of all individual aid measure'. The Commission observes that the grant of the guarantee was not conditional on implementation of a restructuring plan. In addition, this plan, since it was not submitted to the Commission, has not been endorsed by it. The guidelines also indicate 'the plan must be submitted in all relevant detail to the Commission'. This pre-consultation of the Commission was especially necessary in the present case since the Commission had already approved a restructuring plan in 1997, which had failed to restore the viability of HSY. The guarantee also breached the 'one time, last time' condition laid down in section 3.2.3 of the 1999 R & R guidelines. Indeed, by decision N 401/97, the Commission had authorised investment aid under the Directive 90/684/EEC, which was a kind of restructuring aid [164]. As noted in the analysis of measure P1, the State granted this aid in December 1997 (but did not pay it out). As has been shown in this decision, the firm also received several non-notified and incompatible aids in the years before the 2001–2002 privatisation. The restructuring aid authorised by decision C 10/94 was granted to the yard but the conditions attached to its approval were not respected.

(332) Since the guarantee granted by ETVA to HDW/Ferrostaal constitutes incompatible aid in favour of HSY, the Commission considers that it has to be stopped immediately.

4.16.5.4. Per se prohibition of the guarantee

(333) As indicated in the extension decision, the guarantee granted to HDW/Ferrostaal is incompatible with the common market for a second reason. The Commission considers that it is per se incompatible since, by preventing any recovery of aid from HSY to have an 'effect utile', it prevents the application of the State aid rules.

(334) TKMS/GNSH and HSY contest this position. In particular, they recall that HSY is not the recipient of any indemnity payment. Indeed, the guarantee issued by ETVA insures HDW/Ferrostaal and not HSY. Therefore, if the Commission would order the reimbursement of aid, HSY would have to make the reimbursement and this would restore the initial situation. TKMS/GNSH fails to understand why the indemnification of TKMS/GNSH (as successor of HDW/Ferrostaal) would invalidate this conclusion. Indeed, there is no obligation for TKMS/GNSH to re-invest in HSY the indemnification received.

(335) The Commission observes that 100 % of the shares of HSY were purchased by HDW/Ferrostaal and are now held by TKMS/GNSH. This means that, even if HSY and its shareholder are two different legal entities, they form one single economic unit. Thanks to the guarantee, this economic unit would be 100 % indemnified for any aid it would have to reimburse to the State. The Commission therefore considers that this constitutes an elimination of the 'effet utile' of any recovery decision.

(336) As regards the absence of a legal provision forcing TKMS/GNSH to re-inject into HSY any indemnification received, the Commission fails to understand how it would invalidate the prior conclusion. In addition, the Commission observes that, if there is no obligation, there is also no prohibition to do it. Therefore, TKMS/GNSH could inject in HSY the indemnification received. Moreover, one can reasonably assume that, since TKMS is a successful private group, its financial resources are optimally allocated among the different legal entities of the group. Therefore, it is reasonable to suppose that, if one legal entity of the group has to pay a fine and another legal entity receives an indemnification for that fine, the management of the group will decide to transfer the latter amount to the former entity, thereby re-establishing the optimal allocation of resources among the different legal entities of the group. In other words, even if there is no obligation for TKMS/GNSH to re-inject the funds in HSY, it seems likely that the management will decide to do it.

(337) The Commission concludes that the guarantee granted by ETVA to HDW/Ferrostaal is per se incompatible with State aid rules.

5. CONCLUSION

(338) The Commission has found that, out of the 16 measures covered by the formal investigation procedure, some do not constitute State aid in the meaning of Article 87(1), some constitute compatible aid, several constitute incompatible aids and several aids approved by the Commission in the past have been misused. For the cases of incompatible aid granted in breach of the provisions of Article 88(3) of the Treaty and for the cases of misused aid, the Commission concluded that the aid has to be recovered.

(339) The Commission considers that the following problem could hinder an effective recovery of this aid and that it is necessary to impose additional conditions to avoid this happening. This will be explained in the next section.

5.1. Necessity to ensure that the reimbursement of the aid, which has benefited the civil activities of HSY, is not partially financed by the military activities

(340) As explained in section 3.3 of the present decision and applied to the measures concerned, the Commission has accepted that if a State support was provided to the yard without being earmarked to finance a precise activity, it can be considered that 75 % of the support benefited the military activities and 25 % benefited the civil activities. This conclusion follows from the fact that HSY has no separate accounts and therefore the use of the funds can not be traced.

(341) However, if the Commission accepts that 75 % of any inflow of State money will finance the military activities of the yard, it must also conclude that 75 % of any outflow of money from the yard will be supported by the military part of HSY. In other word, 75 eurocent of any Euro recovered from HSY is paid by the military part of HSY. Asking HSY to reimburse the aid received by the civil activities will restore the initial situation of the civil activities of the yard only if Greece submits solid evidence to the Commission that this reimbursement has been financed exclusively by the civil part of the yard.

(342) In other words, since the majority of the HSY's activities are military and since HSY does not hold separate accounts for the civil activities, there is a clear risk that the reimbursement of aid received by the civil activities will be mainly financed by funds which otherwise would have financed the military activities. The recovery which should have been entirely supported by the civil part of the yard would mainly be supported by the military part. Since the State has provided large and repeated financial support and financing to the military activities of HSY ([165]), using funds — which otherwise would have financed the military activities — in favour of the civil activities of HSY is akin to a transfer of State aid to the civil activities of the yard. In other words, a part of the financial support granted by the State to the military activities would in fact support the civil activities of HSY (and therefore does not fall within the field of application of Article 296 of the Treaty. Indeed, these funds can not be deemed to be necessary for the financing of military production because they are not used for that purpose). The initial situation in the civil markets will therefore not be restored and, in addition, additional incompatible aid would be automatically granted to the civil activities of HSY.

(343) Consequently, in order to re-establish the situation that would have prevailed without State aid and to prevent the granting of additional aid to the civil activities, Greece will have to ensure that the aid is recovered exclusively from the civil part of the yard ([166]),

HAS ADOPTED THIS DECISION:

Article 1

The aid in favour of the investment expenses which were incurred by HSY before 31 December 2001 and which were related to the investment programme described in Commission decision of 15 July 1997 concerning the case N 401/97 (this measure was named 'measure P1' in the preamble of the present decision) falls within the scope of the Commission decision of 15 July 1997.

Any aid in favour of the other investment expenses incurred by HSY — and in particular the investment expenses incurred after 31 December 2001 — does not fall within the scope of the decision of 15 July 1997 and is incompatible with the common market.

Article 2

The guarantee which Greece granted to ETVA by decision of 8 December 1999 and which covers a loan of GRD 4,67 billion (EUR 13,72 million) granted by ETVA to HSY (this measure was named 'measure P2' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

If the guarantee is still outstanding at the date of the present decision, the State guarantee has to be stopped immediately. In addition, aid has to be recovered for the period running from the pay-out of the guaranteed loan to HSY until the expiration of the guarantee.

The aid to recover amounts to the difference between the reference rate of Greece increased by 600 basis points and the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY).

Article 3

The loan amounting to GRD 1,56 billion (EUR 4,58 million) which was granted in July 1999 by ETVA to HSY and was reimbursed in 2004 (this measure was named 'measure P3' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the EC Treaty and which is incompatible with the common market.

For the period from the pay-out of the loan to HSY until its reimbursement, the aid to recover amounts to the difference between the reference rate of Greece increased by 600 basis points and the interest rate of the loan.

Article 4

The 2-year loan amounting to EUR 13,75 million which was concluded on 31 May 2002 between ETVA and HSY and was never paid out to HSY (this measure was named 'measure P4' in the preamble of the present decision) does not constitute aid.

Article 5

The aid amounting to GRD 54 billion (EUR 160 million) which was authorised by Commission decision of 15 July 1997 regarding the State aid case C 10/94 (this measure was named 'measure E7' in the preamble of the present decision) has been misused and must be recovered.

Article 6

The aid amounting to EUR 29,5 million which was authorised by Commission decision of 5 June 2002 concerning the case N 513/01 (this measure was named 'measure E8' in the preamble of the present decision) has been misused and must be recovered.

Article 7

75 % of the injection of capital amounting to GRD 8,72 billion (EUR 25,6 million) made by ETVA into HSY during the years 1996 and 1997 (this measure was named 'measure E9' in the preamble of the present decision) is covered by Article 296 of the Treaty. The remaining 25 % constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is compatible with the common market.

Article 8

The injection of capital amounting to GRD 800 million (EUR 2,3 million) made by ETVA into HSY on 20 May 1998 (this capital increase, as well as the two following ones, were named 'measure E10' in the preamble of the present decision) does not constitute aid.

The injections of capital amounting to GRD 321 million (EUR 0,9 million) and to GRD 397 million (EUR 1,2 million) made by ETVA into HSY respectively on 24 June 1999 and on 22 May 2000 constitute aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market. This aid must be recovered.

Article 9

The counter guarantees granted by the State to ETVA to guarantee the guarantees that ETVA had issued in the framework of contracts that HSY concluded with Hellenic Railway Organization (OSE) and with Athens-Piraeus Electric Railways (ISAP) (these measures were named 'measure E12b' in the preamble of the present decision) constitute aid, which has been put into effect in contravention of Article 88(3) of the EC Treaty and which is incompatible with the common market.

In the case of the counter guarantees related to the ISAP contracts, the aid amounts to the difference between an annual fee of 480 basis points (i.e. 4,8 %) and the premiums actually paid by HSY (i.e. the guarantee premium paid to ETVA plus the guarantee premium paid to the State). This aid has to be recovered for the period until the State counter guarantees expired.

In the case of the counter guarantees related to the OSE contracts, if they are still outstanding, they have to be stopped immediately. In addition, aid has to be recovered for the period running from the counter guarantees were in force. The aid to recover amounts to the difference between an annual fee of 680 basis points (i.e. 6,8 %) and the premiums actually paid by HSY (i.e. guarantee premium paid to ETVA plus guarantee premium paid to the State).

Article 10

The implementation of the contracts existing between HSY on the one hand and OSE and ISAP on the other, as well as the amendments of the contracts accepted by OSE in 2002–2003 (these measures were named ‘measure E12c’ in the preamble of the present decision), do not constitute aid.

Article 11

The loan amounting to GRD 16,9 billion (EUR 49,7 million) granted on 29 October 1999 by ETVA to HSY and reimbursed in 2004 (this measure was named ‘measure E13a’ in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

The aid to recover for the period until June 2001 is the difference between the reference rate for Greece increased by 600 basis points and the interest rate actually paid to ETVA by HSY.

For the period thereafter until the reimbursement of the loan, the aid to recover is the difference between the reference rate for Greece increased by 400 basis points and the interest rate actually paid by HSY to ETVA.

Article 12

The guarantees of EUR 3,26 million and of EUR 3,38 million granted by ETVA respectively on 4 March 1999 and on 17 June 1999 and which were cancelled in 2002 (these measures were named ‘measure E13b’ in the preamble of the present decision) constitute aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

The aid to recover for the period until the cancellation of the guarantees amounts to the difference between an annual guarantee premium of 480 basis points (i.e. 4,8 %) and the guarantee premium actually paid by HSY.

Article 13

75 % of the State guarantee granted on 8 December 1999 to guarantee a loan amounting to GRD 10 billion (EUR 29,3 million) granted by ETVA to HSY (this measure was named ‘measure E14’ in the preamble of the present decision) is covered by Article 296 of the Treaty.

The remaining 25 % of the State guarantee is not covered by Article 296 of the Treaty and constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty. GRD 750 million (EUR 2,20 million) of this aid was compatible with the common market until 31 March 2002. After that date, only EUR 1,32 million was compatible with the common market.

The rest of the aid is incompatible. If the State guarantee is still outstanding, the part of this guarantee which constitutes incompatible aid (i.e. 25 % of the guarantee still outstanding, minus EUR 1,32 million which is compatible) has to be stopped immediately.

In addition, for the period running from the paying out of the guaranteed loan to HSY until the termination of the incompatible State guarantee, aid amounting to the difference between the reference rate for Greece increased by 600 basis points and the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY) has to be recovered.

This aid has to be calculated in respect of the part of the State guarantee which constituted incompatible aid.

Article 14

75 % of the loans amounting to GRD 1,99 billion (EUR 5,9 million), USD 10 million and USD 5 million granted by ETVA to HSY respectively on 25 July 1997, 15 October 1997 and on 27 January 1998 (these measures were named ‘measure E16’ in the preamble of the present decision) are covered by Article 296 of the Treaty.

The remaining 25 % of the loans constitute aid.

The aid included in the first loan, which was denominated in drachma, amounts to the difference between the reference rate for Greece increased by 400 basis points and the interest rate paid by HSY. The aid included in the second and the third loan, which were denominated in US dollar, amounts to the difference between US LIBOR increased by 475 basis points and the interest rate paid by HSY.

In the three cases, the aid has been put into effect in contravention of Article 88(3) of the Treaty and is incompatible with the common market.

This aid has therefore to be recovered.

Article 15

25 % of EUR 81,3 million and of EUR 40 million, which represent approximations of the advance payments made by the Greek Navy in 2000 and 2001 in excess of the costs incurred by HSY in the execution of the corresponding contracts during that period (these measures were named ‘measure E17’ in the preamble of the present decision), constitute aid during one year.

This aid has been put into effect in contravention of Article 88(3) of the Treaty and is incompatible with the common market. The aid to recover amounts to the reference rate for Greece increased by 600 basis points, which has to be counted during one year.

Article 16

The indemnification guarantee granted by ETVA to HDW/Ferrostaal providing that ETVA would indemnify HDW/Ferrostaal for any State aid recovered from HSY (this measure was part of the measure named 'measure E18c' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market. In addition, the guarantee is per se incompatible with the common market. The guarantee has therefore to be stopped immediately.

Article 17

Since the aid to recover, such as defined in Articles 2, 3, 5, 6, 8, 9 and 11 to 15, has exclusively benefited the civil activities of HSY, it has to be recovered from the civil activities of HSY. In this respect, Greece shall provide detailed evidence — including a confirmation of the independent firm auditing its accounts — that the reimbursement has been financed exclusively by the civil part of HSY.

Article 18

1. Greece shall recover from HSY the aid to recover such as defined in Articles 2, 3, 5, 6, 8, 9 and 11 to 15.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of HSY until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 [167].

4. Recovery of the aid shall be immediate and effective.

5. Greece shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 19

1. Within two months following notification of this Decision, Greece shall submit the following information to the Commission:

(a) the amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 20

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 2 July 2008.

For the Commission

Neelie KROES

Member of the Commission

(1) The initiation of proceedings was announced in OJ C 202, 10.8.2004, p. 3. The extension of proceeding was announced in OJ C 236, 30.9.2006, p. 40.

(2) OJ C 47, 12.2.1998, p. 3. The decision has been sent to Greece on 1 August 1997 (letter SG(97)D 6556).

(3) OJ L 83, 27.3.1999, p. 1.

(4) OJ C 202, 10.8.2004, p. 3.

(5) See footnote 1.

(6) See footnote 1.

(7) See footnote 1.

(8) Indeed, it is recalled that any submission of an interested party has to be sent to Greece for comments. Greece has one month to reply. Some submissions having a large size, Greece could have requested to be given more time to reply. If some assertions are not underpinned in a solid manner, the Commission services may have to ask more documents to underpin these claims. The Commission services may also have to ask precise questions to Greece on new issues raised in the submission of the interested party.

(9) This letter has 65 pages, plus 290 pages of annexes. The letter dated 24 April 2008 has 35 pages, plus 900 pages of annexes and the letter dated 2 June 2008 has 63 pages, plus 1 750 pages of annexes.

(10) The information provided in this section comes to a large extent from the document: 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was distributed to the interested bidders. A copy of this report was provided by TKMS/GNSH in its letter of 21 June 2007.

(11) OJ L 380, 31.12.1990, p. 27; special provisions referring to Greece are in Article 10.

(12) OJ C 88, 30.3.1993, p. 6.

(13) OJ C 138, 20.5.1994, p. 2.

(14) PV(95) 1258, 26.7.1995, SEC(95) 1322/2, 24.7.1995.

(15) OJ C 68, 6.3.1996, p. 4.

(16) OJ C 80, 13.3.1997, p. 8.

(17) OJ L 148, 6.6.1997, p. 1.

(18) OJ C 306, 8.10.1997, p. 5.

(19) The merger was authorised by the Commission by Decision M.2772 of 25.4.2002 (OJ C 143, 15.6.2002, p. 7).

(20) The merger was authorised by the Commission by Decision M.3596 of 10.12.2004 (OJ C 103, 29.4.2006, p. 30).

(21) The merger was authorised by the Commission by Decision M.3932 of 10.11.2005 (OJ C 287, 18.11.2005, p. 5).

(22) OJ C 186, 6.8.2002, p. 5.

(23) OJ L 75, 22.3.2005, p. 44.

(24) The Greek authorities have confirmed this assessment in their letter of 20 October 2004.

(25) Section 2.1 of the letter of 20 October 2004.

(26) In order to assess the own resources of the firm, the net equity is much more relevant than the share capital. Indeed, the net equity takes into account the retained profits and the losses of the previous years, which respectively increase and decrease the own resources of the firm.

(27) OJ C 273, 9.9.1997, p. 3.

(28) The Commission observes that HSY tried to borrow from the market at a lower rate, but without success. This fact appears from the HSY's Board of Directors minutes dated 1 December 1998 and 27 January 1999, copies of which were provided by TKMS/GNSH in its letter of 21 June 2007. The attempt to borrow from the market was also reported in the press ('Hellenic Shipyards set first euromarket loan', *Reuters News*, 19 March 1999).

(29) Thanks to the debt write-off implemented by the State, HSY was nearly debt-free, such that the interest expenses (i.e. interest rate paid to the lending banks) were extremely low in 1997 and 1998 (they dramatically increased the following years). If in 1997 and 1998 the interest expenses had been at a more normal level, the financial results would have been less favourable and most probably no profit would have been recorded in 1998.

(30) The restructuring plan also planned a dramatic increase of the ship conversion activities after 1998. HSY did not succeed in achieving this goal.

(31) This was in fact the first shipbuilding contract concluded with a private firm in nearly two decades.

(32) From the first year, the accounts of HSY contained a provision for the anticipated losses resulting from the execution of this contract. This provision has increased each of the following years. In addition, it seems that these provisions were insufficient since TKMS/GNSH has initiated proceeding against the seller of HSY on that issue. Regarding the reasons for concluding a contract which, when taken separately, is not profitable, the Commission notes that, by concluding this contract, the management probably expected to cover a part of the fixed costs of the yard (the shipbuilding orderbook was empty at that time) and therefore to reduce the expected loss of the yard.

(33) This contract was reported by the press. See for instance 'Hellenic lands crucial submarine contract', *Lloyd's List International*, 30 July 1999.

(34) According to page 5-12 of the report of Deloitte Financial Advisory Services (hereafter 'the first Deloitte report') submitted by HSY in support of its comments on the extension decision, the construction of the submarines would start only in 2003.

(35) According to press articles, the management of HSY warned the shareholders already in October 1998 regarding the expected difficulties (see the press article quoted in footnote 38). According to HSY's Board of Directors Minutes dated 1 December 1998, losses were expected for 1999. HSY's management publicly acknowledged at the beginning of December 1999 that the yard was planned to register losses of GRD 10 billion (EUR 29 million) for the year 1999 and for the year 2000 (H'ellenic boss expects profit in 2001', *Lloyd's List*, 6 December 1999). The possibility of such a large loss for 1999 was already reported by the press in November 1999 ('Brown & Root team ousted from Hellenic', *Lloyd's List*, 19 November 1999).

(36) Except if the State would provide additional (incompatible) aid to support the civil activities of the yard and would provide large support to the military activities.

(37) Therefore, the yard ran the risks of not receiving the investment aid promised by the Greek authorities, which set the date of 31 December 1999 to complete the programme. According to the Greek law, in order to obtain a prolongation of this period, at least 50 % of the expenses had to be incurred.

(38) In the document 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was provided to interested bidders (a copy of this document was provided by TKMS/GNSH in its letter of 21 June 2007), the following description appears: 'In 1999 though, the financial results of the Company became negative again. Brown & Root insisted to proceed with structural personnel changes. Such changes were not accepted by the Shareholders (ETBAbank and Employees), and Brown & Root's contract was revoked.' (page 15). Press articles are more explicit: 'It is thought management informed Hellenic's owners as early as last October that the current year would be a bad one unless steps were taken to rationalise the workforce, which co-owns the yard with a State bank. With money being spent on modernising Hellenic for the first time in years, new equipment has made the reported overmanning problem starker, but shareholders have so far dismissed proposals for shedding a minimum of 250 mainly white-collar jobs. At the same time, management has sought to introduce greater flexibility in the yard's working practices. But the main result appears to have been to alienate union leaders who have sought the removal of the eight-man management team, headed by Mr Groves, which is on secondment from the UK's Brown & Root'.

[39] Recital 68 of Commission Decision of 16 June 2004 on the measures implemented by Spain for Siderùrgica Anón SA (OJ L 311, 26.11.2005, p. 22); Recital 42 of Commission Decision of 11 December 2002 on the State aid implemented by Spain for Sniace SA (OJ L 108, 30.4.2003, p. 35).

[40] See footnote 34.

[41] Page 5-19 of the report.

[42] See footnote 28.

[43] The Commission describes here some of the errors that appear in Chapter 5.0, 'Credit Worthiness of Hellenic Shipyards S.A.', of the first Deloitte report.
Firstly, regarding the 'Implementation of the Investment Plan (Status and Evolution)' the first Deloitte report claims on page 5-4 that on 30 June 1999 'The amount certified exceeded the 50 % of the total investment'. However in reality the amount certified on 30 June 1999 accounted for 18 % of the total investment programme. This shows that the implementation of the investment plan was slow. The 'Status and Evolution' of the plan was therefore rather a 'negative' factor in the table at page 5-2 of the report.
Secondly, regarding the criteria 'Availability of property that could be encumbered' (page 5-5 and 5-6), the Commission considers that this element is irrelevant to assess whether a private bank would have granted the loans and guarantees granted by ETVA and the State. Indeed, the latter loans and guarantees were not secured by any lien on property. When assessing whether a loan or guarantee granted by the State constitutes aid, one must assess whether this precise transaction would have been acceptable for a private investor. The Commission does not have to assess whether HSY, by concluding another type of contract granting more right to the lender, would have been able to obtain the loans and the guarantees. Even if the existence of property that could be encumbered would be relevant, the Commission observes that the existing property were already encumbered for an amount of EUR 199 million until 1998 and for an amount of EUR 51 million until 2003. Therefore, a potential lender would have been able to get a first lien only on a limited part of the property. Moreover, the tangible assets of HSY had a low liquidation value. This is confirmed by Deloitte Financial Advisory Services itself in page 8-8 and 8-9 of its second report written on 18 June 2007 (hereinafter the second Deloitte report) and submitted by TKMS/GNSH in support of its letter to the Commission dated 21 June 2007. In conclusion, the Commission considers the 'Availability of Property that could be encumbered' is irrelevant in the assessment of the measures, and, even if it would be relevant, a potential lender would not have considered this element as positively as Deloitte indicates in the first Deloitte report.
Thirdly, the 'Availability of construction relating to work in progress that could be encumbered' (page 5-7) is not offering a solid protection to a creditor if HSY defaults and ceases activity. Indeed, the market value of a work-in-progress in usually low compared to the funds borrowed to build it and compared to the contract value. This was illustrated by the two hulls of the ferries ordered by Strintzis lines, which were sold at a low price and only (i.e. not earlier than) two years after the revocation of the shipbuilding contract. Regarding the conveyance of HSY's receivables to a lending bank, it is not a solid protection either since if the yard ceases its activities, the purchaser would not receive the ordered product and would therefore not have to pay the purchase price. This means that the security would be worthless exactly in the scenario where it would be needed. The assignment of contracts related claims therefore does not allow the lending bank to recover much money in case of bankruptcy of HSY (see for instance footnotes 128 and 131 of the present decision). Consequently, a potential lender would not have considered this element as positively as Deloitte indicates in the first Deloitte report.
Fourthly, as regards 'Total bank loans to shareholder's Equity ratio & debt obligations outstanding at the time', 'Signed Client Contracts (HS's orderbook)', 'Evolution of revenue generation' and 'Evolution of profitability', the Commission refers to its comments developed earlier in the present decision. Among others, the Commission recalls that as soon as in the last quarter of 1998 it could be foreseen that HSY would show a loss in 1999. In the following months, it became clear that the size of this loss would be large, and that a large loss should be expected also for the year 2000, such that the net equity of the HSY would nearly vanish. In summary, the Commission considers that the first Deloitte report does not take into account that the negative financial results of the years 1999 and 2000 were already foreseeable before the start of the respective year.
Fifthly and lastly, as already explained, any potential lender would have seen the circumstances and reasons why HSY's existing management was ousted as a negative factor. Therefore, the classification as 'Indefinable' in page 5-2 can not be accepted by the Commission.

(44) This point is developed in the next section (section 3.2) where the Commission analyses the imputability of ETVA's behaviour to the State. Being a development bank was the only mandate of ETVA at that moment. The Greek authorities indicate in footnote 63 of their reaction to the extension decision: 'ETVA was the only development bank in Greece, and thus there is no way of comparing its development activity against that of other credit institutions'.

(45) See footnote 52.

(46) As regards the period after 30 June 1999, the Commission also fails to see what 'value' the share of HSY had and therefore what 'value' ETVA was trying to preserve. Indeed, the financial situation was so bad that one fails to see how the shares could have had any significant value.

(47) ECJ, case C-482/99, *France* v *Commission* ('Stardust') ECR [2002] I-4397, paragraph 52.

(48) Letter of 5 October 2006, paragraph 156.

(49) Letter of 5 October 2006, paragraph 156.

(50) The Share Purchase Agreement was signed on 18 December 2001 and amended on 20 March 2002, at which date the closing of the sale took place.

(51) There are many press articles showing the government involvement in that decision. See for instance 'Deadline for Greek shipyard — Government to decide on purchase of Hellenic Shipyards', *Financial Times*, 19 April 1985, 'According to the Greek minister of national economy and shipping, Mr G. Arsenis, the government is under pressure to buy the Hellenic Shipyards because of the structure of Greek industry', *Lloyd's List International*, 29 June 1985, 'Government to buy ailing Greek shipyard', *Financial Times*, 17 July 1985; 'Mr A. Drossoyannnis, the Greek Minister for National Defence, has announced that all future naval newbuilding orders will be placed with Hellenic Shipyards', *Lloyd's List International*, 26 July 1985; 'Jobless shipyard workers march in Athens', *The Wall Street Journal*, 12 July 1985.

(52) By letter of 25 November 1986, Greece notified to the Commission a capital injection of USD 58,3 millions by ETVA into HSY. The case was registered under number N 230/86. By letter of 20 March 1987 (reference SG (87) D/3738), the Commission informed Greece that it has decided that the capital injection by ETVA constitutes State aid, which is however compatible with the common market.

(53) Chapter E (article 12-15) of Law 2367/1995.

(54) For instance Article 13 of Law 2367/1995 provided for the reduction of 600 in the company's workforce and specified the redundancy incentives. Also, according to article 14 of this law, 99 % of the then existing debts of HSY will be written off.

(55) As indicated previously, the State in fact started to provide large aids to HSY as soon as it purchased it.

(56) As established previously, HSY had no access to the banks from 30 June 1999. Since HSY could not borrow from the market and since it was in a precarious financial situation, if ETVA had refused to grant the loan or had required higher interest rates, this would have aggravated the difficulties of HSY (or even triggered the bankruptcy), what would have been unacceptable for the State. ETVA had therefore, given the state influence, no choice but to grant a loan demanded by HSY.

(57) Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid which Greece has decided to grant to Hellenic Shipyards plc (OJ C 80, 13.3.1997, p. 8).

(58) ECJ, case C-482/99, *France* v *Commission* ('Stardust') ECR [2002] I-4397, paragraph 56.

(59) Letter of the Greek authorities dated 18 September 2002 (registered by the Commission on 23 September 2002 with number A/36895), sent in the framework of the case CP 101/02.

(60) ECJ, case C-482/99, *France* v *Commission* ('Stardust') ECR [2002] I-4397, paragraph 56.

(61) Letter of the Greek authorities dated 20 November 2003, sent in the framework of the case CP 101/02.

(62) Moreover, they were granted in addition to the already existing involvement of ETVA in HSY, such that the total exposure of ETVA towards HSY was significant. The proof of the significance of this exposure is that ETVA's Annual Report of the year 2000 acknowledges the damages brought to the bank by the involvement in Hellenic Shipyards (p. 42-43).

(63) Greece's letter dated 15 June 2006 (the recovery procedure has number CR 40/02).

(64) In decision C 10/94, the Commission does not assess the waiver of debts stemming from 'the building of military vessels' because it is an 'activity which is outside the scope of the EC Treaty'. Similarly in decision N 513/01, the Commission does not assess 75 % of the State support amounting to EUR 118 million because it is related to military shipbuilding.

(65) It is recalled that HSY did not keep separate accounts between military and civil activities during the years concerned. Therefore, a measure can be considered to finance a particular activity only if the granting decision indicates precisely which activity is financed.

(66) OJ C 288, 9.10.1999, p. 2.

(67) During the same year, the waiver of debts related to the military activities of the yard was not assessed under State aid rules by the Commission.

(68) This is also clear from the wording of decision C 10/94.

(69) This was also the information provided to the interested bidders during the privatisation process in 2001, as can be concluded from the 'Due Dilligence' report of 19 June 2001 performed by Arthur Andersen for HDW and Ferrostaal, p. 23 (provided as Appendix C of the report submitted by TKMS and GNSH in their letter of 21 June 2007).

(70) The Commission recalls that the 2001–2002 privatisation — and even less the freezing of the investment programme during that process — was not something requested by the Commission.

(71) Section 1.3.b of the letter dated 20 October 2004.

(72) Amount provided in EUR by the Greek authorities.

(73) This information appears in section 1.3 and in Annex 4, 5 and 6 of Greece's letter dated 20 October 2004.

(74) OJ C 71, 11.3.2000, p. 14.

(75) See footnote 14 in Greece's letter of 20 October 2004.

(76) Point 2.1.2 of the Notice on guarantees indicates 'even if no payments are ever made by the State under the guarantee, there may nevertheless be a State aid under Article 87(1). The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given'.

(77) For instance, 'Portugal shipyards' were mentioned as competitors of HSY on page 10 of the document 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was distributed to the interested bidders. A copy of this report was provided by TKMS/GNSH in its letter of 21 June 2007.
The Commission also observes that the Commission Decision in Merger case No COMP/M.2772 — HDW/FERROSTAAL/HELLENIC SHIPYARD indicates under the heading 'Geographical market definition' that 'The parties argue, that the market for construction, repair and conversion of all kinds of commercial vessels are world wide in geographical scope, as the transportation costs for ships are comparatively low and there is no significant trade barriers'.

(78) The Commission also observes that prior decisions of the Commission and of the Council concerning State aid provided to HSY hinged on the existence of a distortion of competition and an effect of trade. These decisions have never been contested. Therefore, when assessing measures implemented during the same period, an extensive verification of the fulfilment of these two criteria is not necessary.

(79) OJ L 202, 18.7.1998, p. 1.

(80) OJ C 288, 9.10.1999, p. 2.

(81) This information was provided by Greece in section 1.3.a and Annex 4 of its letter of 20 October 2004.

(82) If the yard had ceased operations, the competent control bodies could have decided not the make any control regarding the implementation of the plan and therefore the condition to pay the first tranche would not have been met.

(83) In section 1.2.2 'First control made by competent organs' (English translation) of their letter of 20 October 2004, the Greek authorities explain that the Ministry of national economy has been late in the writing the control form, such that the deadline of 31 December 1999 set in the Greek government approval decision has been missed. In order to pay the aid after that date, a prolongation of the period to implement the investment plan needed to be authorised by the Greek authorities. The decision authorising the prolongation supposed itself the prolongation of the commission taking such a decision, which was made complicated by legislative changes.

(84) OJ C 368, 23.12.1994, p. 12.

(85) The difference between the two interest rates has to be multiplied by the principal of the loan outstanding (i.e. not yet reimbursed) during the year concerned.

(86) In a similar manner, the Notice on guarantees indicates that the aid is given when the guarantee is granted and not at a future date (see footnote 76).

(87) Indeed, the market value of a loan depends on the present value of the future cash flows, which are discounted using an interest rate reflecting the risk of the loan. If the interest rate set in the loan contract is below the latter interest rate, the market value immediately decreases below the nominal value of the loan.

(88) If the new owner of ETVA decided after the privatisation to prolong a non-state guaranteed loan beyond its initial maturity, there is no aid in the period beyond the initial maturity since there are no State resources according to the reasoning just explained.

(89) This information was provided by Greece in section 1.3 and Annex 6 of its letter of 20 October 2004.

(90) See footnote 83.

(91) One could ask why ETVA signed the loan contract on 31 May 2002 if the intention was not to pay out the corresponding amount to HSY. The Commission observes that the contract date is exactly the date of the signature of the closing of the sale of HSY. It is therefore likely that the purchasers of HSY put ETVA under pressure to grant more financing to HSY by threatening not to accept the closing of the sale. In these circumstances, ETVA probably accepted to conclude this loan contract, but put in the contract provisions allowing her to refuse to pay out the loan when HSY would ask such a payment. As will be explained in the assessment of measure E18c, under section 8.2.2 of the contract of 20 March 2002, Piraeus Bank was supposed to help the State to complete the sale of HSY. On that basis, the State has probably also put pressure on ETVA to sign this loan contract in order to facilitate the closing of the sale of HSY.

(92) HSY submitted comments on the extension decision by letter of 30 October 2006. Paragraph 4 of this letter indicates 'Given the fact that HSY has closely cooperated with the Greek State within the context of its reply to the European Commission, the Company does not believe it is necessary neither to resubmit information that has already been submitted by the Greek State, nor to set out the same arguments, the content of which it fully supports, but for the purpose of completion of the reply and in order to assist the Commission with its task, it will summarise the arguments already put forward and will submit any new evidence that was gathered during the time that has lapsed between the Greek State's reply and the present reply and will present any new or supplementary arguments'. In the present decision, the comments of HSY and Greece on the extension decision will therefore be merged, instead of repeating twice the arguments.

(93) Under Directive 90/684/EEC, the restructuring aid (Chapter III) is divided between investment aid (Article 6), closure aid (Article 7), R & D aid (Article 8) and operating aid for restructuring (Articles 9 and 10).

(94) Letter of the Greek authorities dated 15 February 2008, paragraph 26.

([95]) Letter of the Greek authorities dated 19 March 2007. This was repeated in the letter of 29 June 2007, paragraphs 62 and 63.

([96]) The details of this participation will be provided in the analysis of measure E10.

([97]) Letter of the Greek authorities dated 31 March 2003, extract of answer to question 5.

([98]) Letter of the Greek authorities dated 29 June 2007, extract of paragraphs 49, 50 and 51.

([99]) The Commission could not and did not ignore that employees have objectives like the preservation of the employment and therefore try to defend these objectives when managing their own firm. However, the high purchase price meant that the preservation and the increase of the value of the shares would also have become an important objective for the employees.

([100]) It is recalled that the payment of the purchase price by the employees by means of a withholding on their wages and allowances, in addition to being laid down in the September 1995 contract, was also laid down in Article 12 of Law 2367/1995.

([101]) It is recalled that ETVA could enforce its pledge on the shares if the employees did not pay the purchase price as provided with in the September 1995 contract.

([102]) It is recalled that the payment of the purchase price by the employees by means of a withholding on their wages and allowances, in addition to being laid down in the September 1995 contract, was also laid down in Article 12 of Law 2367/1995.

([103]) It was clearly indicated in the September 1995 contract that the employees would have to pay in parallel the purchase price and the contribution to the capital increase. This double payment is therefore not something unexpected. It is an essential part of the September 1995 contract. Greece should have verified whether the basic provisions of the contract were feasible before presenting it to the Commission as a privatisation. If essential provisions of a contract which Greece submitted itself to the Commission turn out to be unenforceable, it must be concluded that the Decision C 10/94 was based on misleading information from Greece and the decision should be repealed.

([104]) Paragraphs 59 and 60 of the letter of the Greek authorities dated 29 June 2007.

([105]) Paragraph 191 of Greece letter of 5 October 2006 indicates: 'From 31.12.1998 to the time of the sale of the shares of HSY to HDW/FS consortium (11.10.2001) a portion of the salaries of the employee shareholders was withheld, as explained above, as payment to ETVA of the price for the purchase of 49 % of the shares.' A similar statement was made by HSY in paragraphs 35 and 36 of its letter of 31 October 2006. Before the extension decision, the Greek authorities had made similar statements in the 8th chapter of its letter of 26 May 2005. In addition, in several letters Greece indicated that the employees were the owners of 49 % of the shares. Thereby, Greece gave the impression that the September 1995 contract had been implemented. The Commission only discovered after the opening that Greece had not implemented its own law (i.e. Law 2367/1995), since it had transferred the ownership of 49 % of HSY to the employees but had not implemented the rest of the contract, namely requesting the payment of the purchase price from them. Conversely, in their letter of 31 March 2003, the Greek authorities had implicitly suggested that (part of) the employees had not paid (part of) the annual instalments as planned.

([106]) Commission's letter of 27 April 2007 sent to Greece (question 3) and Commission's letter of 23 August 2007 sent to HSY.

([107]) Commission's letter of 27 April 2007 sent to Greece (question 4) and Commission's letter of 23 August 2007 sent to HSY. The latter letter was sent to Greece for comments on 13 November 2007, what offered the opportunity to Greece to comment a second time.

([108]) Points 2.3.c and 2.4 of Greece's letter of 29 June 2007, HSY's letter of 9 October 2007, and Greece's letters of 14 December 2007 and 15 February 2008.

([109]) In respect of the repair of the KEYMAR in the first months of 2003, Greece claims that, since the reparation were much more sophisticated than in other cases, it is reasonable to suppose that the percentage of indirect hours was 25 % instead of 20 %.

([110]) Paragraph 144 of Greece's letter of 5 October 2006.

([111]) Commission's letter of 27 April 2004 (question 2.2) to which Greece replied by letter of 29 June 2007.

([112]) Most probably, this figure indicates how much a productive hour of HSY's employees costs per hour for HSY in a given year. The number of productive hours performed by a worker is only a fraction of the number of hours paid by HSY to this worker. This number depends on many factors, notably the structure and efficiency of the yard. Conversely, the subcontractors are in competition with each others. Therefore, they have to be competitive and flexible. They have limited fixed costs (i.e. permanent workers) and their costs have to be low. Yards use subcontractors precisely because it is cheaper than hiring more labour themselves.

([113]) The consultant observes:
'The number of man-hours of subcontractors can be derived from the costs, by using a mean man-hour cost which is comparable between subcontractors of the same trade and country.
Based on the "Pay development 2006" report published by the European Foundation for the Improvement of Living and Working Conditions, the minimum monthly gross salary is equal to EUR 625,97 in Greece and to EUR 1 254,28 in France.
The average man-hour market price in shiprepair in France ranges between EUR 40 and EUR 50, by applying the ratio of 2 which exists between France and Greece for minimum salaries a price of EUR 20 to 25 could be expected for shiprepair man-hour price in Greece.
As a result of enquiries we made, it appears that this rate was ranging between EUR 30 early 2007 and EUR 36 in early 2007. This price is the price invoiced for each direct man-hour and it includes all related costs: indirect hours, management hours, general expenses and overheads.
As we did not identify where the mean wages of the shiprepair sector stand versus the minimum wages in both countries, we prefer to use a conservative figure, hence our estimations will be calculated with man-hour prices ranging between EUR 30 and EUR 36 per hour.
The man-hour rates of subcontractors mentioned in the annex 6 of the submission of Greece to the Commission are as follows:

(EUR)

Year	Direct	Including profit (15 %) and indirect costs (20 %), following the methodology included in annex 6 of Greece's submission
2002	25,97	40
2003	27,49	42,3
2004	[…]	[…]
2005	[…]	[…]
2006	[…]	[…]

If we calculate the subcontracted man-hours quantity based on man-hour costs ranging between EUR 30 and EUR 36 for 2006 and derived from these figures for the previous years by using the escalation index published by Eurostat, we obtain the following figures:

INDEX: Invlci-tot	2002	2003 (9 m)	2004	2005	2006
EU 27 index	108,9	112,8	116,5	119,7	121,6
Greece index	113,5	116,6	127,0	127,7	133,9
Balance of contracted labour	3 804 891	16 471 323	[…]	[…]	[…]
Consultant estimate					
Manhour cost (min value)	25,4	26,1	28,5	28,6	30
Subcontractor's direct Manhours (max estimate)	149 598	630 388	[…]	[…]	[…]
Consultant estimate					
Manhour cost (max value)	30,5	31,4	34,2	34,3	36
Subcontractor's direct Manhours (min estimate)	124 665	525 324	[…]	[…]	[…]
Hellenic shipyard figures					
Manhour cost	25,97	27,49	[…]	[…]	[…]
Manhour cost + indirect + profit	40,0	44,5	[…]	[…]	[…]
Subcontractor's direct Manhours	95 232	370 142	[…]	[…]	[…]'

([114]) Commission's letter of 27 April 2004 (question 2.2.d) to which Greece replied by letter of 29 June 2007.

([115]) Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraphs 82 and 84.

([116]) In particular, ETVA can not, on the one hand, not implement the part of the September 1995 contract concerning the payment of the purchase price (i.e. not seeking to receive the corresponding annual payments) and, on the other hand, claim that on the basis of the same contract it was obliged to participate to the capital increases. In other words, since ETVA and Greece had decided not to implement correctly major provisions of the contract, they can not at the same time selectively invoke other provisions of this contract to pretend that ETVA was contractually obliged to do certain things (i.e. participate in the capital increases).

([117]) HSY's employees participated in the capital increase. However, they did not find themselves in the same situation as ETVA. Indeed, they had already breached the September 1995 contract as they were not paying the purchase price to ETVA. Moreover, they were in a different situation than ETVA and than a market economy investor. Indeed, they were concerned by the preservation of their jobs, what incites them to invest in HSY, even if the expected financial return is insufficient to convince a market economy investor to invest.

([118]) Greece provided a copy of this law as Annex 10 of its letter of 5 October 2006.

([119]) It is not totally clear from Greece's and HSY's submissions (including the first Deloitte report) whether the premium amounted to 0,4 % annually, but paid on a quarterly basis, or amounted to 0,4 % per quarter. While this is important in the framework of the recovery procedure, this does not change the conclusion in the present decision.

([120]) This list was provided on pages 3–11 and 3–12 of the report, in the framework of the analysis of the GRD 10 billion loan that benefited from a State guaranteed granted on the basis of Law 2322/1995 (measure E14 of the present decision).

([121]) The Commission has authorised aid free guarantee schemes for shipbuilding in Germany (OJ C 62, 11.3.2004, p. 3), the Netherlands (OJ C 228, 17.9.2005, p. 10), France (OJ C 259, 27.10.2006, p. 14) and Finland (OJ C 152, 6.7.2007, p. 6). The two latter schemes explicitly include guarantees on advance payments.

([122]) Since the State owned 100 % of ETVA when the latter granted the down payments guarantees, the guarantee premium paid by HSY to ETVA was already a remuneration for the State.

([123]) The amendments were as follows:
Programme Agreement 33a – SD 33a (Supply of 20 HA/A): the penalties were calculated up to 31.12.2002 and recorded in the amendments as established amounts. It was agreed that those amounts should be paid in 10 instalments, with the first instalment being payable when the first vehicle was delivered and the other nine instalments being payable when each of the last nine electric trains was delivered. It was agreed that the evolution of the penalties would stop from 1.10.2003, provided that the consortia (Siemens AG, Siemens SA and HSY) supplied OSE with equivalent rolling stock. The consortia met that condition only partially, and thus OSE calculated and claimed the penalty amounts for the entire period.
Programme Agreement 39 – SD 39 (Supply of 24 electric locomotives): the penalties were calculated up to 31.12.2002 and recorded in the amendments as established amounts. It was agreed that those amounts should be paid in 10 instalments, the first instalment being payable when the first vehicle was delivered and the other nine instalments being payable when of each of the last nine deliveries was made. A penalty-free period was granted as an extension of the delivery time. No provision was made with regard to equivalent rolling stock in the case of PA 39 SD 39, but the delivery timetable was amended. OSE claimed the penalty clause amounts that had been established by 31.12.2002 and collected them from the consortia (Siemens AG, Siemens SA and HSY).
Programme Agreement 35 – SD 35 (Supply of 29 rail buses): a penalty-free period was not granted, and therefore OSE claimed and collected the penalty clause amounts. Default interest on the penalty amounts was charged and claimed for the period for which the amounts were not paid.

([124]) Up to the time of Greece's letter of 5 October 2006, the sum of EUR 9 932 511,99 has been withheld and the sum of EUR 826 556 remained to be withheld.

([125]) The consortium for the programme agreement consisted of HSY, Siemens AG and ABB Daimler-Benz Transportation (Bombardier Transportation from 1.5.2001). The implementation percentages for the agreement were 22,06 % of the total final price paid for HSY and 77,94 % for the other companies.

([126]) That agreement also provided for the configuration and installation of an automatic train protection and identification system in 50 multiple units. The timetable provided for completion of the work in January 2004. The board decided unanimously in decision No 578/4/4-9-2002 to extend the delivery time to 19.5.2004, in view of the fact that the consortium was not to blame for the delay. The work was finally completed on 4.6.2004. Under paragraph 14 of the programme agreement, the penalties for non-compliance with an agreed delivery time were to commence 40 days after the contractual delivery date and only if the supplier was to blame for the non-compliance. Consequently, there was no ground to impose penalties and interest on account of this delay.

([127]) It is not totally clear from the submission of Greece and HSY (including the first Deloitte report) whether the loan was initially denominated in drachma or in euro. Greece's answer to the opening decision only gives amounts in Euro and indicates an interest rate based on 3 months Euribor. Conversely, the first Deloitte report indicates that the loan amounted to GRD 16,92 billion and the interest rate was based on Libor. This issue can be clarified in the framework of the recovery procedure.

([128]) In their letter of 21 June 2007, TKMS and GNSH submitted the second Deloitte report. Appendix C of this report is 'The Due Diligence Report on Hellenic Shipyards S.A. titled "Copy for Presentation Purposes" and its Executive Summary prepared by Arthur Andersen, dated 19 June 2001'. Page 7 of this due diligence report analyses the receivables of HSY and indicates that trade debt due by Strintzis Lines 'is only collectible upon delivery of the vessels in 2002'. This confirms that, except for the limited advance payments which anyway had already been paid at the time and were therefore not collectible anymore, the rest of the purchase price was not collectible before the delivery of the vessels.

([129]) In the letters dated 21 October 2004 and 17 December 2004 in the case CP 71/02, the Greek authorities confirmed that HSY applied to receive operating aid of 9 % for the two ships, which was accepted by the competent Ministry. The Greek authorities however confirmed that finally no aid was paid out since HSY did not complete the construction of the ships. The granting decisions were finally revoked. Measure 13(c) of the extension decision deals with this topic.

([130]) See footnote 127.

([131]) As regards the possibility to collect proceeds during the execution of the contract (i.e. before delivery), the Commission again refers to the document quoted in footnote 128 of the present decision, which indicates that on 31 December 2000 the trade debt related to the contracts with OSE amounted to only EUR 0,5 million. In addition, the document indicates that 'These receivables will be set off against the respective advances received'. This illustrates that at that moment no money was collectible from OSE.

([132]) The initial margin is 25 bps, which increased to 125 bps from 1 April 2000. The Commission bases itself on the first Deloitte report.

([133]) The following press article suggests that the ship repair activity was not significantly disturbed: 'Contracts — Hellenic declares business as usual after Athens earthquake', *Lloyd's List International*, 14 September 1999.

([134]) The letter by which Greece made comments on the opening decision.

([135]) Figure from the letter of Greece dated 29 June 2007.

([136]) On 19 May 1999, this credit line was converted from USD into EUR.

([137]) As regards the possibility to collect money before the delivery of the products, the Commission refers to the document quoted in footnote 128, which is also referred to in footnote 123. This due diligence report refers to a period after the reimbursement of the loans currently assessed. However, it is useful to illustrate that before the delivery of a product, nearly no money is collectible. This due diligence report shows in particular that on 31 December 2000, nearly no money was collectible from Strintzis, the Greek Navy, OSE and ISAP.

([138]) See Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

([139]) This balance sheet appears in the documents submitted by TKMS and GNSH, described in footnote 128 of the present decision.

([140]) In the case of the submarines, the conditions put by the Greek State lead to the result that the first submarine will be entirely built in Kiel (Germany) while the two following ones will be assembled in HSY (see recital 44 of the present decision). It would most likely have been cheaper and more efficient to produce all three submarines in Germany. It would also have been more rationale not to include HSY, which was a firm in difficulty and in addition had no experience with submarines, within the consortium.

([141]) At a point in time, these funds must have been necessary to cover the costs generated by the execution of the military contracts concerned. At that point in time, the funds were not available anymore to finance other activities of HSY. In other words, at that point in time, a part of the advantage granted by the State was withdrawn. The remaining advantage was that during the preceding quarters, the yard has had at its disposal the funds for free, whereas it could not have borrowed that money from banks.

([142]) Page 30 of the letter of 30 October 2006.

([143]) E.g. the very large debt waiver related to military activities was mentioned in decision C 10/94 but not assessed under State aid rules, the closure expenses related to military activities were mentioned in decision N 513/01 but not assessed under State aid rules, and the same was done with several measures in the extension decision.

([144]) For instance, the invitation to submit binding offers for the acquisition of shares of Hellenic Shipyards S.A. dated 2 July 2001 indicates that 'It is stipulated that in the event that a fine is imposed pursuant to a potential breach of EC regulations regarding State aid, the highest bidder will not be responsible for the payment of such fine. This assurance will take precedence over the transfer of the Shares'.

([145]) The minutes of the meeting held on 14 September 2001, which were signed by the parties, indicates that 'It is agreed that EU-clearance will be a condition precedent to the closing of the contract subsequent to its signature. Alternatively, in the event that such a decision is delayed by the EU […] or it is not satisfactory, the parties agreed that ETBAbank will undertake the obligation to provide a guarantee to HDW-Ferrostaal in relation to any outstanding issues related to EU, regarding past and present state subsidies, if any, related to HSY'.

([146]) For instance, in a letter dated 6 December 2001 and addressed to HDW and copied to Ferrostaal, Alpha Finance, which was the adviser of the State and of ETVA, indicates: 'we have been instructed by the Ministry of Development and ETVAbank to provide you with the attached language, proposed by ETVAbank, for […] the letter of guarantee to be provided by ETVAbank to HDW-Ferrostaal in the case that Clause 1.2.3 of the Agreement is not fulfilled'. In fax messages dated 23 January 2002, 31 January 2002 and 8 March 2002, HDW sent to Alpha Finance comments regarding the exact wording of the guarantee.

([147]) Bank Pireaus submitted several press articles relating to the period October 2001 to May 2002 illustrating that the government was directly involved in the privatisation process of HSY.

([148]) The letter of 23 May 2005 indicates:
'The sale of HSY was conducted with the procedure of denationalisation (Law 2001/1990). The procedure of declaration, which preceded the conclusion of, initially, the promissory contract of 11.10.2001, and, subsequently, of the executing contract (31.5.2002), contained all the essential conditions of the transfer, and also the delivery of the analytical memorandum of the financial advisor (dated April 2001) and the submission of offers. During all these stages, in which all the interested parties (including the complainant) had access to the information, the condition of the guarantee was stipulated. Consequently, as it is also underlined in the letter of 17.12.2004, it concerns not only a legal and financially common condition, but also a condition which is included in the negotiations for the privatisation of the Shipyard from the outset and, in particular, in the form of a critical (*sine qua non*) condition, without which the completion of the sale of HSY's shares would not have been possible. It is characteristic that, as it has been mentioned above, this condition, with different stipulations but always with the same objective, i.e. the reasonable facilitation of the transaction in the framework of the market rules, appears from the beginning of the privatisation procedure in the following texts:
The Declaration of the Advisor
The Invitation for the Submission of Binding Offers
The Offer of the Purchasing Joint Venture (particularly without being included in the Declaration of Quitting from its condition)
In the texts of the Negotiations and, lastly,
In the Share Purchasing Agreement of 11 October 2001.
Consequently, the declaration of guarantee that is included to the addition of the guarantee contract of 31.5.2002 was addressed to the candidate bidder from the outset and therefore does not constitute state aid to the final purchaser. The same condition would have been valid for every bidder, since, as it has already been mentioned, it has been included in the procedure of denationalisation. It is also self-evident that, since the procedure of denationalisation began in February 2001 (at a time when the main shareholder of the then selling Bank ETVA was the Greek State), the State, as a seller of ETVA to Bank Piraeus, ought to also provide and did actually provide its own guarantee to the purchaser of its shares in ETVA (Bank of Piraeus), regarding the asset that was for sale, i.e. the Shipyards, because the seller had to provide such a guarantee. These guarantees, which, as it has already been stressed, are included with absolute transparency and clarity in all the contractual texts of the denationalisation and mainly in the promissory contract of 11.10.2001, pertain to the character of the transaction (sale of a definite asset), are valid for all candidate bidders and do not confer any additional benefit to anyone. On the basis of the abovementioned, the true nature of this guarantee is proven (as a condition necessary to the transaction and common under market rules), as well as its binding character, on the basis of all the procedures preceding privatisation but also of the Sale-Purchase Agreement of the shares of HSY of 11.10.2001 itself, which was subsequently followed by the Sale-Purchase Agreement of the shares of ETVA of 18.10.2001 and the First Amending Act of 18.3.2002 between ETVA and the Greek State. The fundamental point, however, is — and this is emphatically stressed — that the condition on the guarantee is included in the entire procedure of denationalisation and is not stipulated for the first time after the conclusion of the contract. It does not, therefore, constitute a last-minute "invention", as the complainant desires to show, whose aim is circumventing the Community Rules on the legality of State aid.
The Greek State as a seller of the shares of ETVA ought to, not only at the time of the contract of 18.10.2001, but also according to law, to transfer to Bank Piraeus its shares in ETVA free from any obligation. Given that Bank of Piraeus had no involvement in the procedure of the denationalisation of HSY, it should be, according to law and transaction customs, secured against any obligation emanating from the contract of transferring HSY to which it was not participating. And it is this securing that the guarantee of the Greek State of 18.3.2002 provides to it. This guarantee was self-explanatory and legal. The Greek State gave it since it had a contractual obligation, acting towards Bank Piraeus as a party to a contract, i.e. as a fiscus, and not as an agent of public power.'
The Commission recalls that at the time of that letter, Greece, commenting on Elefsis' allegation that the guarantee constituted aid to HDW/Ferrostaal, wished to show that this guarantee did not constitute an advantage selectively granted to HDW/Ferrostaal but was offered to all the bidders (including Elefsis) that participated in the privatisation process of HSY. In its following submissions to the Commission, Greece, realising that the Commission could consider this guarantee as aid to HSY, tried to put in doubt the imputability of the measure to the State by claiming that the guarantee has been concluded not earlier than in May 2002, which is a total contradiction of the claims made in the letter of 23 May 2005.

([149]) As indicated in recital 59 of the present decision, the privatisation was decided by decision No 14/3-1-2001 of the relevant Inter-ministerial Privatisation Committee.

([150]) The Commission acknowledges that the wording and the structure of the agreement of 20 March 2002 is confusing. Article 8.2.4 of the Agreement of 20 March 2002 provides that, in respect of the aid included in Article 3 to 6 of Law 2941/2001 (see recital 33 of the present decision for a description of that law), the State would pay to Piraeus Bank 100 % of the amount which would be paid by ETVA to HDW/Ferrostaal. However, in case of recovery of aid not included in Article 3 to 6 of Law 2941/2001, Article 8.2.4 of the agreement of 20 March 2002 does not apply. Therefore, Article 8.2.1 would be applicable. This article provides that the State will pay to Piraeus Bank only 57,7 % of the amount which would be paid by ETVA to HDW/Ferrostaal. However, the Commission observes that Article 8.2.2 of the Agreement indicates that, despite the sale of the majority of the shares of ETVA to Piraeus Bank, it is the State — and not Piraeus Bank/ETVA — that is going to manage the on-going sale of HSY. This article, and in particular point 8.2.2(d), indicates that the State undertakes that the Purchaser (i.e. Piraeus Bank) will suffer no damage in relation to the privatisation of Hellenic Shipyards. Since, as shown by Article 8.2.4 (and by Article 7.4 of the Agreement of 18 December 2001), the agreement was based on the assumption that Piraeus Bank and ETVA would soon merge, the commitment made by the State in Article 8.2.2 would not be respected if it would pay to Piraeus Bank only 57,7 % of the sum paid by ETVA to HDW/Ferrostaal. In order words, in order to implement the commitment made in paragraph 8.2.2 — namely to ensure that Piraeus Bank will not suffer from the sale of HSY — the mechanism laid down in Article 8.2.4 must apply to all cases of recovery of aid, and not only to cases of recovery of aid stemming from Law 2941/2001.

([151]) By letter dated 28 May 2002, Piraeus Bank consulted the government on the wording of the guarantee that ETVA intended to provide to HDW/Ferrostaal and asked confirmation that, in case of calling of this guarantee, what is envisaged in Article 8.2.4 of the Agreement of 20 March 2002 would apply. By letter of 31 May 2002, the government gave its agreement that ETVA issues this guarantee and confirmed that, in case it would be invoked, what is envisaged in Article 8.2.4 would apply. This means that even if, contrary to the foregoing conclusion, the agreement of 20 March 2002 had obliged the State to pay to Piraeus Bank only 57,7 % of the amount paid by ETVA to HDW/Ferrostaal, this has been modified by the letter of the government of 31 May 2002, which states unambiguously that the mechanism provided in Article 8.2.4 of the Agreement of 20 March 2002 (i.e. 100 % indemnification) applies.

([152]) In answer to a precise question by the Commission sent by letter of 12 February 2008, Greece confirmed in its letter of 3 March 2008 that it would be obliged to pay to Piraeus Bank the full (i.e. 100 % and not 57,7 %) amount paid by ETVA to HDW/Ferrostaal.

([153]) As indicated in the assessment of measure E7, the employees were the owner of these shares but had not paid the purchase price they should have paid to ETVA.

([154]) See recital 33 of the present decision for a description of that law.

([155]) Case C-334/99, *Federal Republic of Germany* v *Commission*, paragraphs 133 to 141.

([156]) In addition, the Commission observes that, to its knowledge, none of the loans and guarantees covered by Article 296 comply with the conditions laid down in section 3.1 of the present decision. They would therefore not have been acceptable to a market economy investor.

([157]) Taking into account the risk aversion of the economic agents, the sale of HSY would be preferred over the liquidation of HSY only if the statistical expectancy of payments following from the guarantee would be significantly smaller than EUR 6 million.

([158]) See recital 33 of the present decision for a description of that law.

([159]) This has already been analysed by the Commission in the extension decision, in particular in the description and the assessment of measure 18(a). The Commission also notes that the second Deloitte report indicates: 'The clause d) above, regarding the allocation of the consideration between an amount destined for a share capital increase and price offered for the acquisition of existing shares, at a set ratio of 2:1, from our experience in similar transactions, is not a very common term. However, taking into consideration the significant operational problems and deteriorating financial position of the Company, we believe that the decision taken by the Sellers (and their Advisors) to set such terms was both rational and reasonable' (page 9–2). The Commission interprets this quotation as confirming that this allocation of the purchase price was a rational and reasonable request of the State if one considers that its objective was to ensure the continuation of the activities of HSY over the long term (goal as public authority), not if one considers that its objective was to maximise the revenues from the sale (goal as market economy investor).

([160]) See footnote 148.

([161]) The Commission does not claim that a due diligence would have allowed to identify all the measures which have to be recovered according to the present decision, but some of them. In its letter of 21 June 2007, TKMS/GNSH has submitted some due diligence reports performed in 2001 by Arthur Andersen on behalf of HDW/Ferrostaal. Arthur Andersen indicates in these reports that it is not excluded that HSY has received State aid which should be recovered in the future.

([162]) In particular, since ETVA and Greece had promised to grant this guarantee in the tender document submitted to the bidders, the fact that this guarantee was not mentioned as a condition in the bid documents submitted by Elefsis would not have prevented it from requesting it later in the negotiation process.

([163]) This point is underpinned in the second Deloitte report which claims that, if HDW/Ferrostaal had had to support the risk of having to reimburse State aid received by HSY in the previous years, it would not have purchased HSY.

([164]) This is clear from the text of the Seventh Shipbuilding Directive and from its structure, in which 'Investment aid' is a part of 'Chapter III Restructuring aid'.

([165]) See the very large debt waiver mentioned in decision C 10/94, the payment of the closure costs mentioned in decision N 513/01, and all the financial supports provided by the State and falling under Article 296 which were mentioned in the extension decision.

([166]) For instance, as regards State financial support which was provided to HSY without being earmarked to the financing of a precise activity, the Commission has considered that only 25 % of the State support benefited to the civil activities. However, if only 25 % of the State support is recovered, only 6,25 % (i.e. 25 % of 25 %) of the State support would in fact be recovered from the civil activities. This will not restore the initial situation of the civil activities of HSY, because they received 25 % of the State support and will only reimburse 6,25 %.

([167]) OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION

of 8 July 2008

concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM)

(notified under document C(2008) 3182)

(Only the French text is authentic)

(Text with EEA relevance)

(2009/611/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those articles [1], and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 18 February 2002, the French Republic notified the Commission of the planned restructuring aid for *Société Nationale Maritime Corse-Méditerranée* (SNCM) [2], completed on 3 July 2002 [3]. The restructuring aid consisted in the recapitalisation of SNCM by the *Compagnie Générale Maritime et Financière* (CGMF) [4] for the sum of EUR 76 million.

(2) By letter of 19 August 2002, the Commission notified the French authorities of the decision to initiate the formal investigation procedure pursuant to Article 88(2) EC laid down in Article 6 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 [5].

(3) On 8 October 2002 [6], the French authorities communicated to the Commission their comments on the decision of 19 August 2002 [7].

(4) At the request of the French authorities, meetings were organised with the Commission on 24 October 2002, 3 December 2002 and 25 February 2003.

(5) In the context of initiating the procedure, the Commission received observations from two undertakings, namely *Corsica Ferries France* (CFF) on 8 January 2003 [8] and the *Stef-TFE* group on 7 January 2003, and from various French regional and local authorities on 18 December 2002 and 9 and 10 January 2003. It sent those observations to France for its comments by letters of 13 and 16 January and 5 and 21 February 2003.

(6) The French authorities submitted their comments on the observations of CFF and *Stef-TFE* on 13 February 2003 [9] and 27 May 2003 [10].

(7) On 16 January 2003, the Commission sent a request for additional information to which the French authorities replied on 21 February 2003.

(8) By letter of 10 February 2003 [11], the French authorities expanded their arguments seeking to demonstrate that the planned aid complied in every respect with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [12] (the 1999 Guidelines).

(9) At the Commission's request, on 25 February 2003 [13], the French authorities forwarded a copy of the shareholders agreement binding SNCM and the *Stef-TFE* group.

(10) By decision 2004/166/EC of 9 July 2003 (the 2003 decision) [14], the Commission approved, under certain conditions, the grant of restructuring aid to SNCM payable in two parts, one of EUR 66 million and the other of a maximum amount of EUR 10 million to be determined on the basis of net products arising from disposals of assets made after the adoption of the 2003 decision.

(11) On 13 October 2003, CFF brought an action for annulment of the 2003 decision before the Court of First Instance of the European Communities (the CFI) (Case T-349/03).

(12) On 8 September 2004, the Commission decided to regard the amendments requested by France on 23 June 2004, namely the swap of the vessel *Aliso* with the vessel *Asco* in the list of vessels which SNCM was authorised to use following the 2003 decision and the sale of the *Aliso* instead of the *Asco*, were not such as to call into question the compatibility with the common market of the restructuring aid authorised by the 2003 decision [15].

(13) By decision of 16 March 2005 (the 2005 decision), the Commission approved the payment of the second part of the restructuring aid, for EUR 3,3 million, which brought the total amount of restructuring aid to EUR 69 292 400.

(14) On 15 June 2005, in Case T-349/03, the CFI annulled the 2003 decision on account of an incorrect assessment of the minimal nature of the aid. That judgment resulted in returning the Commission back to the formal investigation procedure initiated by decision of 19 August 2002 and rendering inoperative the decisions of 8 September 2004 and 16 March 2005, which were based on the annulled 2003 decision.

(15) On 25 October 2005 [16], the French authorities sent the Commission information relating to the financial situation of the company since the notification of the planned restructuring aid of 18 February 2002.

(16) On 17 November 2005 [17], the French authorities provided information relating to the updating of the 2002 restructuring plan and the rebuilding of SNCM's capital [18].

(17) On 15 March 2006, a briefing note on the market, the business plan (revenue part) and the account of the provisional results were delivered to the Commission by the French authorities [19]. Other documents were delivered to the Commission on 28 March 2006 and 7 April 2006 [20]. In the latter mail, the French authorities also called on the Commission to classify, on account of its 'public service compensation' nature, a part of the 2002 restructuring aid, in particular the amount of EUR 53,48 million, not as a measure taken under a restructuring plan but as non-aid in accordance with the *Altmark* [21] case-law or as an autonomous measure independent of the restructuring plan pursuant to Article 86(2) EC.

(18) On 21 April 2006, a planned merger under which the undertakings Veolia Transport (VT) [22] and Butler Capital Partners (BCP) acquired joint control of SNCM [23], was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 [24]. A decision approving the merger process was adopted by the Commission on 29 May 2006 [25].

(19) On 21 June 2006 [26], the French authorities sent the Commission the order of 26 May 2006 of the Ministry of Economics, Finance and Industry approving financial transactions carried out by CGMF, Decree No 2006-606 of 26 May 2006 transferring SNCM to the private sector and the order of 26 May 2006 approving financial transactions carried out by SNCF.

(20) Information concerning the public service delegation and the aid of a social nature relating to the operation of services to Corsica was sent to the Commission on 7 June 2006 [27].

(21) On 13 September 2006, the Commission decided to initiate the procedure laid down in Article 88(2) EC concerning the new measures implemented in favour of SNCM while integrating the restructuring plan notified in 2002 [28] (the 2006 decision).

(22) On 16 November 2006, France sent the Commission its comments on the 2006 decision [29].

(23) On application by a number of interested parties to extend the time-limit for submitting comments by one month [30], the Commission decided to grant that additional period to all interested parties [31].

(24) The Commission received comments from CFF [32] and *STIM d'Orbigny* (STIM) [33] which were forwarded to the French authorities by post on 20 February 2007. A third party also sent comments which were also forwarded to the French authorities, and withdrawn by that party on 28 May 2008.

(25) The French authorities sent their observations on the comments of the interested third parties on 30 April 2007 [34].

(26) On 20 December 2007, CFF lodged a complaint in respect of State aid against SNCM which completed the sending of information of 15 June 2007 and 30 November 2007. That complaint concerns Article 3 of the new public service delegation agreement signed in June 2007 between the *Collectivité territoriale de Corse* (Corsican regional authorities) and the *Compagnie Méridionale de Navigation*-SNCM group for 2007 to 2013. According to CFF, the application of that clause would mobilise new financial resources for SNCM in the region of EUR 10 million for 2007. Furthermore, it stated that the compensation paid to SNCM in respect of public service obligations is State aid which is, moreover, unlawful since it has not been notified to the Commission.

(27) Since a certain amount of information was sent to the Commission after expiry of the time-limit initially set for 13 February 2007 [35], the Commission informed the interested parties of its decision to extend the period for submitting comments of third parties to 14 March 2008.

(28) On 26 March 2008, the Commission forwarded the comments of the interested third parties to France, which communicated its comments on 28 March 2008, 10 April 2008 and 28 April 2008.

2. IDENTIFICATION OF THE RECIPIENT OF THE MEASURES COVERED BY THIS DECISION

(29) The recipient of the measures covered by this decision is the *Société Nationale Maritime Corse-Méditerranée* (SNCM), which groups together several subsidiaries in the maritime sector and operates sea transport of passengers, cars and heavy goods vehicles on the routes between mainland France and Corsica, Italy (Sardinia) and the Maghreb (Algeria and Tunisia).

(30) SNCM is a limited liability company which came into being in 1969 with the merger of the *Compagnie Générale Transatlantique* and the *Compagnie de Navigation Mixte*, both established in 1850. At that time called *Compagnie Générale Transméditerranéenne*, it was renamed *Société Nationale Maritime Corse-Méditerranée* in 1976, after the *Société Nationale des Chemins de Fer* (SNCF) had acquired a share in its capital. The company was chosen by the French Government to implement the principle of territorial continuity with Corsica, bringing maritime transport fares into line with SNCF rail transport fares on the basis of an agreement concluded on 31 March 1976 for a term of 25 years. The French Government had already entrusted the *Compagnie Générale Transatlantique* with the operation of services to Corsica through an earlier agreement of 23 December 1948.

(31) At the time of the notification of the recapitalisation in 2002, 20 % of SNCM was held by SNCF and 80 % by CGMF. As a result of the flotation of the capital of SNCM on 30 May 2006 (see paragraph 18 of this decision), BCP and VT hold 38 % and 28 % respectively of SNCM's capital, while CGMF retains capital in the amount of 25 % (9 % of the capital is reserved to employees).

(32) The main subsidiaries of SNCM are *Compagnie Méridionale de Navigation* (CMN) [36], the *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH) [37], *Aliso Voyage* [38], *Sud-Cargos* [39], the *Société Aubagnaise de Restauration et d'Approvisionnement* (SARA) [40], *Ferrytour* [41] and *Les Comptoirs du Sud* [42].

(33) Following the disposal of the high-speed vessels *Aliso* in September 2004 and *Asco* [43] in May 2005, the SNCM fleet comprises 10 vessels (5 car-ferries [44], 4 mixed vessels (freight and passenger) [45] and a high-speed vessel (NGV) operating principally from Nice [46]), 7 of which it holds in its name [47].

(34) For the sake of completeness, it should be recalled that the regular sea transport services between the ports of mainland France and Corsica have been operated since 1948 under a public service operated by SNCM and CMN between 1976 and 2001 pursuant to a framework agreement concluded originally for 25 years. In accordance with the Community rules in force [48] and following the European invitation to tender [49] organised by the Corsican regional authorities [50], SNCM and CMN jointly secured the public service delegation to operate services from Marseille to Corsica in exchange for financial compensation during the period 2002 to 2006.

(35) Since the public service delegation expired at the end of 2006, the aforesaid public service by sea, being the subject of a new European invitation to tender [51], was awarded to the SNCM – CMN group from 1 May 2007 to 31 December 2013 for a subsidy of approximately EUR 100 million per annum.

(36) Similarly, obligations relating to the frequency of services are imposed on all operators providing services to the island from Toulon and Nice. On those routes, since 2002 Corsican residents and other categories of passengers are entitled until 2013 to social aid established pursuant to Commission decisions of 2 July 2002 [52] and 24 April 2007 [53].

3. COMPETITIVE ENVIRONMENT

(37) SNCM operates primarily on two distinct markets for both passenger traffic and goods traffic: services to Corsica and the Maghreb, from France, and, to a lesser extent, services to Italy and Spain.

3.1. Services to Corsica

Passenger transport

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

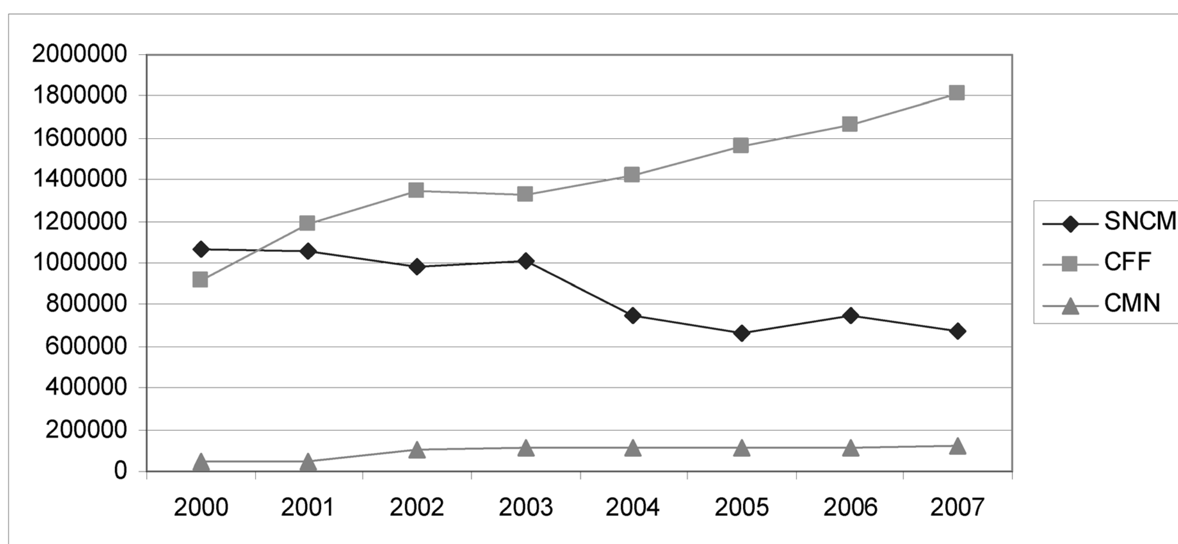
(39) SNCM is the very first operator to link Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under a public service delegation; the other third of its activities are routes with other departure points or destinations (Nice-Corsica,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

(40) SNCM has always had a monopoly over its principal activity. Since 1996, however, it has faced competition which has grown very quickly. Accordingly, *Corsica Ferries France* (CFF) is the dominant player in services by sea between the mainland and Corsica and its market share has not stopped increasing. Although it has only been present on that market since 1996, CFF has seen its 'passenger' traffic increase […] (*) per year between 2000 and 2005, and that growth continues. Thus, today, nearly […] passengers by sea between the mainland and Corsica take a CFF ferry, whereas only […] use a SNCM service, and CMN transports the remaining passengers, that is […].

(41) The position attained by CFF over seven years on the market under consideration is also reflected in the number of passengers transported per season between Corsica and mainland France. The diagram below shows that CFF's market share went from 45 % in 2000 to […] % in 2007 and SNCM's from 53 % to […] % during the same period, with a difference of more than a million passengers transported.

Diagram 1

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



Source: Observatoire régional des transports de la Corse

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

(43) In 2006 and 2007, SNCM's capacity and its market shares for services to Corsica have decreased, with a reduction of […] % on the availability of seats (- […] % for services from Nice and […] % for services from Marseille).

(44) However, the continued reduction of market shares demonstrates that the renewal of confidence on the part of passengers, which had been greatly damaged by the strikes and disruptions caused by the social conflicts of 2004 and 2005, in particular at the time of the privatisation of the undertaking, is very slow. It is a necessary condition for curbing the reduction of SNCM's market share recorded in those recent years. In that context, the rise in turnover in 2007 is reassuring for the viability of the undertaking although it has ceded considerable market share to the advantage of its only competitor, whose market share is easily greater today.

(45) Passenger transport by sea between the mainland and Corsica has grown on average by 4 % over the last 15 years; its growth should continue, with an increase of […] % also forecast for 2008 for moderate growth over the next years. None the less, new players do not appear to be seeking to enter that market. At the time of the call for tenders put out by the Office des Transports de Corse to award the public service delegation to operate services by sea to a number of Corsican ports over the period 2007 to 2013, no candidates other than CFF and SNCF-CMN came forward, even though part tendering on a given route was possible.

(46) CFF, SNCM's main competitor, greatly increased its passenger capacity from 500 000 to […] million between 1999 and 2007 (of which […] % increase between 2006 and 2007), which enabled it to increase its traffic (from […] million in 2005 to […] million in 2007) and its market share. For structural reasons, that policy results nonetheless in lower passenger rates for CFF than for SNCM, with a difference in the region of […] percentage points in 2007. For SNCM, the average passenger rate in 2007 was […] %, which is normal having regard to the fact that the market is very seasonal (see above).

Transport of freight

(47) As regards freight traffic to Corsica, in 2005 SNCM held around […] % of the Marseille-Toulon market to Corsica.

(48) SNCM and CMN have a de facto near-monopoly for unaccompanied general goods transport. Under the public service delegation contract, the two firms operate frequent services from Marseilles to all Corsican ports.

(49) For accompanied trailers loaded onto ferries, accounting for 24 % overall of general goods transport measured in linear metres, there is competition among all the passenger transport operators. SNCM and CMN also have the main share of the market in this accompanied transport. The other operators, in particular CFF, have a 10 % share, that is 2 % of the overall market.

(50) For accompanied automotive vehicles [54] loaded onto ferries (approximately 24 % of general goods traffic in 2003), SNCM and CMN also hold the majority of the relevant market. However, since 2002 CFF has been developing its services and holds approximately […] % of the market.

3.2. **Services to the Maghreb**

(51) Tunisia and Algeria are an important market of approximately 5 million passengers, with air transport predominating. In that connection, transport by sea represents about 15 % of traffic. While Algeria represents a significant maritime market of approximately 560 000 passengers, Tunisia is a smaller market in the region of 250 000 passengers.

(52) The French maritime transport market to the Maghreb has seen steady growth over recent years, of around 13 % between 2001 and 2005. Having regard to the prospects for growth in tourism in that region, maritime transport should see an annual growth rate of around 4 % by 2010.

(53) In Algeria, SNCM fills the position of second operator on the market to Tunisia after the *Entreprise Nationale de Transport Maritime de Voyageurs* (ENTMV), an Algerian public undertaking. The market share of SNCM has increased from 24 % in 2001 to […] % in 2005.

(54) SNCM fills the position of second operator on the market to Tunisia after the *Compagnie tunisienne de navigation* (CTN). Although SNCM has lost market share to CTN since 2001, going from 44 % to […] % in 2004, an improvement was, however, recorded in 2005 ([…] %).

4. DESCRIPTION OF THE MEASURES COVERED BY THIS DÉCISION

4.1. **The 2002 recapitalisation of SNCM**

4.1.1. *Description*

(55) Following the Commission decision of 17 July 2002 to authorise rescue aid to SNCM [55], the French authorities notified the Commission on 18 February 2002 of planned restructuring aid to SNCM. That measure involved the recapitalisation of SNCM, through its parent company, CGMF, for the sum of EUR 76 million, EUR 46 million of which was for restructuring costs [56]. That capital increase was intended to increase SNCM's capital from EUR 30 million to EUR 106 million.

(56) In accordance with the 1999 guidelines, the French authorities submitted to the Commission a restructuring plan [57] for SNCM concerning 5 points:

(i) a reduction in the number of crossings and the redeployment of its vessels between the different routes (a reduction in services to Corsica and an increase in those to the Maghreb) [58];

(ii) a reduction of four vessels of its fleet which was to provide EUR 21 million of liquid assets;

(iii) the transfer of certain property assets;

(iv) a reduction in staff [59] of approximately 12 % which, combined with a fair wage policy, was to make it possible to reduce crew costs from EUR 61,8 million in 2001 to […] EUR […] million on average from 2003 to 2006 and ground costs from EUR 50,3 million in 2001 to EUR […] million over the same period;

(v) the closure of two of its subsidiaries, the *Compagnie Maritime Toulonnaise* and the *Corsica Marittima* company, the residual activities of which would be taken over by SNCM.

(57) Following the observations made by the Commission in its decision of 19 August 2002, the French authorities, in their letter of 31 January 2003, set out the improvements made to the restructuring plan on the following points:

— commitments and details concerning wage policy,

— a plan for reducing costs in intermediate purchases,

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

(58) On the last point, the French authorities state that 'SNCM makes that commitment without reservations, because it takes the view that a fares war of its own making would be inconsistent neither with its strategic positioning nor its interest because it would lead to a reduction in its receipts, its usual practices and its expertise'.

(59) In their restructuring plan, the French authorities submitted to the Commission a detailed financial model for 2002 to 2007 on the basis of median hypotheses relating to a series of variables [60]. The financial projections show, inter alia, a return to profitability from 2003.

Table 1

Financial model for 2002-2007

(EUR million)

	2000	2001	2002	2002	2003	2004	2005	2006	2007
	Realised	Realised	Plan	Realised	Plan	Plan	Plan	Plan	Plan
Turnover	204,9	204,1	178	205,8	[…]	[…]	[…]	[…]	[…]
Operating subsidies	85,4	86,7	74,5	77,7	[…]	[…]	[…]	[…]	[…]
Current result	– 14,7	– 5,1	1,2	– 5,8	[…]	[…]	[…]	[…]	[…]
Net result	– 6,2	– 40,4	23	4,2	[…]	[…]	[…]	[…]	[…]
Capital	67,5	29,7	119	33,8	[…]	[…]	[…]	[…]	[…]
Net financial debt (excl. leasing)	135,8	134,5	67,7	144,8	[…]	[…]	[…]	[…]	[…]
Financial ratios					[…]	[…]	[…]	[…]	[…]
Current results/turnover + SUBSIDIES	– 5 %	– 2 %	0 %	– 2 %	[…]	[…]	[…]	[…]	[…]
Capital/debt on balance sheet	50 %	22 %	176 %	23 %	[…]	[…]	[…]	[…]	[…]

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

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

(61) The French authorities also provided a sensitivity study of expected results in relation to working hypotheses in respect of traffic on different routes. On that basis, the different simulations show that SNCM ought to return to profitability in the situations contemplated.

4.1.2. *Determination of the amount of the recapitalisation*

(62) The method chosen by the French authorities [61] to determine the amount of the recapitalisation involves calculating the need for financing on the basis of the average capital/debt ratio of 5 European shipping companies recorded in 2000. In spite of the differences in the balance sheets of those undertakings, the average found by the French authorities comes to 79 %. The French authorities submit that the financial projections for 2002 to 2007 give an average capital/debt ratio of 77 % with capital to reach EUR 169 million in 2007. Such a level of capital was to be obtained by means of a recapitalisation of EUR 76 million and the success of the action provided for in the restructuring plan.

4.2. **Measures subsequent to the 2002 recapitalisation**

4.2.1. *Preliminary remark*

(63) The recapitalisation and the restructuring plan of 2002 did not have the results expected and, from 2004, the economic and financial situation of SNCM greatly deteriorated. Both internal factors (social conflicts, insufficient and belated achievement of productivity objectives, loss of market share) and external factors (reduced appeal of Corsica as a destination, acquisition of market share by CFF, management errors by the State) [62] as well as the increase in the cost of fuel contributed to this deterioration.

(64) Accordingly, SNCM's ordinary profits come to EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. Net profit was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005.

(65) The deterioration in SNCM's economic and financial situation led the French authorities to sell assets over and above what was laid down in the 2002 restructuring plan and required by the 2003 decision and to initiate a procedure to seek private partners.

Table 2

List of assets sold by SNCM since 2002 [63]

	Proceeds of disposal	Date
Disposals proposed in the notification (in EUR)	25 165 000	
Aliso (replacing Asco, in accordance with the decision of 8 September 2004 of the Commission)	[…]	30.9.2004
Napoléon	[…]	6.5.2002
Monte Rotondo	[…]	31.7.2002
Liberté	[…]	27.1.2003
All Schuman property	[…]	20.1.2003
Additional disposals required by the Commission in its decision of 9 July 2003 (in EUR)	5 022 600	
SCI Espace Schuman	[…]	24.6.2003
Southern Trader	[…]	22.7.2003
Someca	[…]	30.4.2004
Amadeus	[…]	12.10.2004
CCM	[…] [1]	—

	Proceeds of disposal	Date
Additional disposals occurring after the decision of July 2003 (in EUR million)	12,6	
Asco	[…]	24.5.2005
Sud-Cargos	[…]	15.9.2005
Sales of flats of SNCM's housing stock (formerly occupied by SNCM staff)	[…]	September 2003 to 2006
Total (EUR million)	42,385	

(1) […]

4.2.2. *Measures subsequent to the 2002 recapitalisation*

(66) Following an open, transparent and non-discriminatory selection procedure [64], an agreement was finally reached on 13 October 2005 between the State, BCP and VT in a very difficult social and financial context. Thus VT is SNCM's industrial operator (28 % holding) whereas BCP is the key shareholder with a holding of 38 %. The State undertook, in particular as regards salaried staff, to retain a shareholding in the company of 25 % [65]. BCP and VT drew up a business plan for SNCM which was notified to the European Commission on 7 April 2006.

The content of the memorandum of understanding

(67) The memorandum of understanding, under which 75 % of SNCM's capital is to be sold to private purchasers, was signed on 16 May 2006 by the parties (BCP, VT and CGMF).

(68) Section II of the memorandum of understanding provides that CGMF undertakes to approve, subscribe to and fully pay up an increase in SNCM's capital totalling EUR 142,5 million.

(69) Following the increase in capital, it is envisaged that SNCM's share capital be reduced by cancellation of shares to be brought back to the legal minimum for a limited liability company not making a public offer.

(70) In addition to the increase in capital, CGMF undertakes to make EUR 38 million available to SNCM, in the form of a current account advance. That current account advance, which will be paid by SNCM to a trustee (the bank CIC), is intended to finance the part of the 'generosity' cost which is in addition to amounts payable under provisions of law and those relating to agreements in the event of a plan to reduce staff implemented by the purchasers [66]. The payment of compensation over and above compensation paid in accordance with statutory provisions and provisions under agreements is done on an individual and case-by-case basis corresponding to salaried staff who have left the undertaking and whose employment contract was terminated.

(71) Section III of the memorandum of understanding provides that CGMF, following those transactions, is to sell to private purchasers its shares representing 75 % of the shares making up the share capital of the undertaking and the […] intended to finance the part of the planned redundancy scheme over and above any obligations under agreements or statutory obligations.

(72) Section III of the memorandum of understanding also provides for the joint and concurrent subscription by the purchasers and CGMF of new shares totalling EUR 35 million and a current account contribution of EUR 8,75 million by BCP/VT, made available to SNCM on the basis of its cash requirements. Paragraph III.2.7 of the memorandum of understanding provides that the value of the shares of CGMF is to be equal, at all times, to their original nominal value increased by […] % of their paid up nominal value, multiplied by J/365, J being the number of days since the date of realisation, subject to deduction of all amounts paid (for example dividends). Those conditions do not apply in the case of receivership or liquidation of the company by the court.

(73) The memorandum of understanding (Section III.5) includes a right to sell SNCM which may be exercised concurrently by the purchasers should one of the following events occur inasmuch as they have the effect of calling into question the credibility of their business plan and the viability of the company:

— Non-award of the public service delegation for public services by sea to Corsica for the period commencing 1 January 2007 […],

— Any negative decision of the European Commission or a judgment of the Court of First Instance or of the Court of Justice, such as a refusal of the transaction or the imposition of conditions having a substantial impact on the value of the company […].

(74) Section VII of the memorandum of understanding provides that CGMF is to pay a part of the labour commitments of SNCM in terms of the costs of mutual benefit societies of its retired workers for an amount valued at EUR 15,5 million from the day of the transfer of ownership of the undertaking.

(75) The detailed rules of governance of the undertaking are set out in Section IV of the memorandum of understanding. It provides that there will be a change in the way that SNCM is managed; it will be converted into a limited liability company with a board of directors and a supervisory board. The latter will be made up of 10, then 14 members. It will be chaired provisionally by a representative of the State. If the DSP is entrusted to SNCM, the President of the supervisory board will be replaced by a representative of BCP. The board of directors has the task of carrying out the operational management of SNCM.

(76) On 26 May 2006, the French Government confirmed the sale of SNCM as well as the measures cited above.

The measures

(77) In the light of the foregoing, the memorandum of understanding contains three types of state measures justifying an examination as regards the Community system of State aid:

— the sale of 100 % of SNCM at a negative price of EUR 158 million (capital contribution of EUR 142,5 million and payment of the costs of mutual benefit societies for a total of EUR 15,5 million),

— the current account advance by CGMF for the sum of EUR 38,5 million for staff laid off by SNCM,

— the increase in capital of EUR 8,75 million to which CGMF subscribed jointly and concurrently with the contribution in the amount of EUR 26,25 million of VT and BCP.

5. SUBJECT MATTER OF THE PRESENT DECISION

(78) This final decision relates to the measures implemented by France in favour of SNCM since 18 February 2002, namely:

— the capital contribution of CGMF to SNCM for the sum of EUR 76 million in 2002 (including EUR 53,48 million for public service obligations and the balance for restructuring aid),

— the negative sale price of SNCM by CGMF for the sum of EUR 158 million,

— CGMF's contribution of EUR 8,75 million,

— payment by CGMF of certain additional social measures for the sum of EUR 38,5 million.

(79) This decision does not concern the examination of financial compensation paid or to be paid to SNCM for public service obligations for the period 2007-2013, which is the subject of a separate procedure.

6. GROUNDS LEADING TO THE ADOPTION OF THE COMMISSION DECISIONS OF 2002 AND 2006

6.1. Initiation of the 2002 formal investigation procedure

(80) In its decision to initiate the procedure of 19 August 2002, the Commission, while recognising that SNCM was an undertaking in difficulty, expressed its uncertainty as to the compatibility of the measure notified with the criteria set out in point 3.2.2 of the 1999 guidelines in force at the time.

(81) The Commission voiced certain doubts regarding the restructuring plan having regard to the absence of an analysis of the causes for the undertaking's losses. In particular, the Commission raised questions concerning the links between the losses and the public service obligations, the impact of SNCM's policy of purchasing vessels on its income statements and the measures contemplated for increasing the undertaking's productivity.

(82) Moreover, the Commission noted certain lacunae in the restructuring plan, in particular the absence of specific measures to reduce the amount of intermediate consumption and the absence of a reference to SNCM's future pricing policy.

(83) The Commission also raised questions regarding the relevance of the calculation method adopted by the French authorities to determine the amount of the recapitalisation and regarding some of the hypotheses on which to base financial simulations.

6.2. The extension of the 2006 formal investigation procedure

(84) By its decision of 13 September 2006, the Commission decided to extend the 2002 formal investigation procedure to the measures laid down in connection with the sale of SNCM to the private sector.

(85) First of all, in view of the invitation of the French authorities of 7 April 2006 (see recital 17 of this decision) to examine a part of the 2002 capital contribution in the light of the *Altmark* case-law, the Commission raised uncertainty in that regard as to compliance with the conditions (in particular the second and the fourth) laid down by the Community court in that judgment [67].

(86) In the event that that amount is categorised as aid compatible with Article 86(2) EC, the Commission took the view, in its decision of 2006, that the new amount of aid to be assessed in the light of the guidelines for restructuring aid was EUR 15,81 million. In so far as the amount of restructuring aid is noticeably lower than that notified in 2002 and approved in 2003, the Commission expressed doubts as to whether it was appropriate to maintain all of the compensatory measures imposed on SNCM by the 2003 decision.

(87) The Commission also expressed doubts as to whether the conditions imposed by the 2003 decision had been complied with, namely the principle of price leadership and the frequency of services to Corsica.

(88) As regards the negative price at which SNCM was sold, the Commission had doubts regarding compliance of the recapitalisation by the State prior to the sale of SNCM with the principle of the private investor in a market economy. In particular, the Commission expressed doubts as to the validity of the calculation of the liquidation costs which the State shareholder would be required to pay in the event of the liquidation of SNCM.

(89) The Commission questioned whether the financial measures might be justified under the guidelines on rescue and restructuring aid.

(90) It also cast doubts concerning the second recapitalisation of EUR 8,75 million so far as concerns observance of the principles of concomitance of the individual and public investment and the similarity of the subscription conditions within the meaning of the case-law.

(91) Finally, the Commission expressed doubts as to whether the additional social measures of EUR 38,5 million of aid could constitute an indirect advantage for the undertaking. It also noted the risk of conflict with the supplementary redundancy payments as part of the risks borne by reasonable investors.

7. POSITION OF THE FRENCH AUTHORITIES

7.1. The 2002 recapitalisation

7.1.1. *The sum of EUR 53,48 million in the light of the* Altmark *case*

7.1.1.1. Fulfilment of the four Altmark criteria

(92) In their letter of 7 April 2006 and in connection with the comments submitted following the 2006 decision, the French authorities called upon the Commission to find that, on account of its 'public service compensation' nature for the period 1991 to 2001, a part of the capital increase of 2002, namely EUR 53,48 million, does not constitute State aid in the light of *Altmark*, considering that the four conditions laid down in that judgment are fulfilled in the present case.

(93) As regards, specifically, the second condition in *Altmark*, the French authorities note that under the *Altmark* judgment, only the parameters of the calculation must be established in advance in an objective and transparent manner. In the present case, they state that the amount of EUR 53,48 million was paid in November 2003 on the basis of calculation parameters established prior to the period in question (1991-2001) ([68]).

(94) Accordingly, in the opinion of France, the fact that the payment of the revaluation for under-compensation occurred *a posteriori* does not call into question its conclusion that the parameters on the basis of which the compensation of EUR 53,48 million is calculated were clearly established in an objective and transparent manner prior to the performance of public service tasks.

(95) In respect of the fourth condition in *Altmark*, the French authorities take the view that that refers to characteristics of an undertaking entrusted with a public service task fitting the description of average good management but, on the other hand, makes no reference to any requirement of minimum or average profitability of the undertaking in question.

(96) In that regard, the French authorities consider that SNCM may be entitled to a 'presumption of sound management' in the period 1991 to 2001 and that no 'presumption of poor management' can be made against it by the mere fact of financial losses suffered in the period 1991-2001. According to the French authorities, SNCM's losses are not to be ascribed to poor management but to the rigidity of the agreements signed in 1991 and 1996 and to the sudden disruption in the historic market of that company owing to the transition from a monopoly to a highly competitive environment. SNCM therefore acted as an averagely well-run undertaking would act.

(97) France notes that the public operator was the only undertaking capable of taking on those obligations in terms of annual regularity and frequency of service and did so in spite of the arrival in 1996 of a private operator, which only operated certain lines and only during the high season. Moreover, no other undertaking existed in the strict sense whose costs could be used as a reference for determining whether or not the level of compensation granted to SNCM exceeded the costs necessarily incurred in the performance of public service obligations. According to the French authorities, it would therefore be difficult to compare the costs structure of SNCM and that of other shipping companies, having regard to the specific nature of the activity of the latter and the market on which it operates.

(98) In spite of the practical impossibility of finding an undertaking which could be used as a reference point for that period, France believes that it sought to provide, during its dealings with the Commission which took place in 2005 and 2006, objective and justifiable evidence proving the nature of SNCM as a 'typical well-run and adequately equipped undertaking' and demonstrating that the fourth criterion laid down in the *Altmark* judgment is fulfilled ([69]).

(99) France considers, moreover, that a comparison based on the evidence available relating to the costs structure of CFF and that of SNCM is far from being inconsistent with the presumption of SNCM's good management, above all because it does not make it at all possible to take into account a not inconsiderable part of the costs of the public service activity which relates to the transport of goods.

(100) In addition, France states that, in a case like this, it is possible to take the view that the case-law which led to the judgment in *Altmark* (and in particular the *Ferring* case) must be understood as a review only as to the absence of overcompensation. In that respect, the French authorities state that the subsidies granted did not exceed the costs actually borne by SNCM on account of the public service obligations with which it is entrusted, as the Commission pointed out in its decision of 30 October 2001 ([70]).

(101) Finally, the French authorities maintain that the fact that the *Altmark* case-law applies to the public service agreement of 2002 to 2006 should contribute to dispelling the doubts concerning the applicability of that case-law to the compensation for public service costs relating to the period from 1991 to 2001. According to France, the compensation granted from 1991 to 2001 and from 2002 to 2006 is similar inasmuch as the parameters for defining it, namely onerous public service requirements, the presence of only one undertaking in a position to assume those requirements and a pattern of taking into account operating costs, are identical.

(102) In conclusion, France takes the view that the existence of public service obligations, in conjunction with the absence of over-compensation in the period 1991 to 2001, confirms that the 4 conditions in *Altmark* are fulfilled.

7.1.1.2. The compatibility of the amount of EUR 53,48 million in the light of Article 86(2) EC

(103) If the Commission were to conclude that that intervention were State aid within the meaning of Article 87(1) EC, the French authorities submit that the autonomous and independent measure of the 2002 restructuring plan is compatible in terms of Article 86(2) EC, since that basis of compatibility was not challenged by the Court of First Instance in its judgment in Case T-349/03.

(104) The French authorities point out that, in this case, the amount in question is a measure which should not be assessed in the light of the guidelines on restructuring aid of 1999 or 2004 and, in particular, should not be taken into account when evaluating the conditions imposed in the 2002 plan. According to France, the 2004 guidelines on restructuring aid (point 68) cannot justify the inclusion of EUR 53,48 million into restructuring aid.

(105) In that respect, France states that the amount of EUR 53,48 million covering compensation for public service costs for the period 1991 to 2001 is not a measure granted during restructuring, irrespective of whether it relates to the restructuring plan notified in 2002 or its updating, but rather a measure preceding the restructuring plans in question. Moreover, the French authorities submit that a measure designed to offset the costs burdening undertakings on account of their public service obligations is not in the nature of restructuring aid as defined in the guidelines.

(106) The French authorities submit that, even if that amount was notified in connection with the total cash injection in respect of restructuring aid, the Commission is not bound by the classifications adopted by the Member States and that, on the other hand, it is for the Commission to reclassify a measure, depending on the circumstances, as non-State aid, or, on the contrary, to classify a measure as State aid even though the Member State in question did not present it in that manner.

7.1.2. *The balance notified for restructuring aid*

(107) In the light of the foregoing, France takes the view that, if the amount of EUR 53,48 is considered to be free from aid elements or if it is classified as aid compatible with Article 86(2) EC, the amount of aid which must be considered to be restructuring aid under the 2002 notification would amount, not to EUR 76 million, but to EUR 15,81 million.

7.2. **Measures subsequent to the 2002 recapitalisation**

(108) France recalls, first, that the seriousness of the industrial action of 2004 to 2005 and the deterioration in the economic and financial situation of SNCM led the State shareholder to launch a procedure for selecting private investors in January 2005 and to implement urgent measures (in particular the sale of Asco and the shareholding in Sud Cargos ([71]).

7.2.1. *The negative transfer price of SNCM*

(109) Pursuant to the relevant Community case-law, the French authorities call upon the Commission to consider that the negative sale price of SNCM of EUR 158 million does not contain any measure which may be classified as aid within the meaning of Article 87(1) EC in so far as the French State acted like a private investor in a market economy.

(110) First of all, France observes that the final price of EUR 158 million, which is lower than the negative price which the purchasers asked for initially at the time of their audit of SNCM, is the result of a negotiation of transfer of control conducted in connection with an open, transparent and non-discriminatory competitive tendering procedure and, on that ground, does in fact constitute a market price.

(111) France takes the view that, in so far as that search for a private partner for SNCM was made in an open, transparent and non-discriminatory competitive tendering procedure, at the end of which the best bid was chosen, the sale price is a market price.

(112) According to the French authorities, the negative sale price of EUR 158 million took place in the most favourable conditions for the State in accordance with Community case-law and the Commission's line of decisions and contains no aid element. France takes the view that that negative price is lower than the liquidation cost which the State would have to bear in the event of the liquidation of the undertaking.

(113) That is the only conclusion which can be reached irrespective of whether the approach followed is that stemming from the case-law of the Court of Justice of the European Communities (the *Gröditzer* case-law' ([72])) or that based on the analysis of the actual liquidation costs of SNCM (the ABX decision ([73])).

(114) As regards the first method, based on the Gröditzer case-law, France states that that judgment confirmed the Commission's assessment in its decision of 8 July 1999, to the effect that 'the cost of liquidation comprises only the liquidation value of the asset's ([74]).

(115) In that respect, the reports of CGMF ([75]) and Oddo-Hastings ([76]) estimate the liquidation value of the assets at a minimum of EUR […] million on 30 September 2005 ([77]).

(116) Accordingly, in so far as the State as the owner and shareholder of a company is responsible for its debts only up to a maximum of the liquidation value of their assets (the *Hytasa* case ([78])), France asserts that the liquidation value of the assets of the company estimated at EUR […] million is considerably higher than the negative sale price of EUR 158 million.

(117) On the second method, France states that it follows from the Commission decision on the State aid implemented by Belgium for ABX Logistics, in which the Commission examined a negative sale price, having, as in this case, the character of a market price, by comparing it to the costs which the State shareholder would actually bear in the event of a voluntary liquidation or compulsory liquidation as assessed by an independent third party. According to France, the Commission recognises in particular in that decision the legality of a certain number of costs which can result from an action 'en comblement de passif' (to make good liabilities) by creditors or from the liquidation for other branches of the group liquidating its subsidiary.

(118) On the basis of the CGMF and Oddo-Hastings reports cited above, the French authorities submit that the actual costs which the French Republic would have to bear as a shareholder amounted to between EUR […] and […] million on 30 September 2005.

(119) That method takes account, in particular, of the risk that the French State would be called upon 'en comblement de passif' if the court were to consider it to be managing de facto SNCM. The French authorities believe that the risk of an action 'en comblement de passif' cannot be averted, particularly in light of a precedent of the Cour de Cassation (Court of Cassation) in France ([79]). Accordingly, in several letters to the Commission, the French authorities submitted that a situation in which a national court orders the State to make good the liabilities of the undertaking which it manages is a scenario which is more than plausible and that it had to be taken into account in calculating the actual cost of a possible liquidation of SNCM.

(120) On 30 September 2005, the residual value of SNCM's assets (EUR […] million) was, after payment of preferential debts, EUR […] million. Other cost elements taken into account under the action 'en comblement de passif' against the State include, inter alia, the costs of termination of the principal operating contracts, the costs related to the cancellation of the lease purchasing conditions of vessels and the payment of unsecured debts, which would lead to a shortfall in assets of EUR […] million. The French authorities consider that the State would have been ordered to pay between […] and […] % of that amount.

(121) Furthermore, the French authorities take the view that, because of its dependency on SNCM, and in accordance with another French case ([80]), the liquidation of the undertaking might have led the court to order the payment of damages to employees. According to that case-law, the French authorities believe that it would be very likely that a court would fix the amount of additional compensation on the basis of the compensation which would be paid under a social plan submitted prior to the liquidation.

(122) Applying the *Aspocomp* case-law to the present case, France considers that the State would have been called upon to pay additional redundancy payments for a total cost of between EUR […] and […] million, which would have led ultimately to a total liquidation cost chargeable to the State of between EUR […] and […] million.

(123) According to that approach, the analysis of actual costs which would have been paid by the State shareholder shows that the cost to the State of the sale of SNCM at a negative price of EUR 158 million is lower than the actual cost which it would have had to bear in the event of the compulsory liquidation of the undertaking.

(124) In conclusion, the French authorities consider that that amount cannot be classified as State aid.

7.2.2. *The joint capital contribution of the shareholders*

(125) France takes the view that, through that shareholding, it acted like a well-informed investor because, first, it intervened concurrently as a minority shareholder alongside BCP and VT and, secondly, that shareholding enjoys a fixed capital return of […] % per year, which exempts the State from exposure in respect of performance of the business plan. France states that that rate of return is very satisfactory for a private investor [81]. It states, however, that no payment would be due in the event that SNCM is put into receivership or compulsory liquidation or the cancellation clause is exercised by the purchasers.

7.2.3. *The additional social measures (aid to individuals)*

(126) France takes the view that, by relying on the Commission's practice in previous decisions, in particular the *SFP – Société française de production* file [82], that that financing constitutes aid to individuals which does not benefit the undertaking. Accordingly, the implementation from public funds of additional social measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social policy of the Member States and is not State aid.

7.2.4. *Conclusion*

(127) If the Commission were, however, to classify part or all of the new measures as State aid, France draws the Commission's attention to the fact that the new measures, by ensuring that SNCM becomes viable again, allows competition to be maintained on the markets in question, in particular the market in services to Corsica. According to France, that aspect is one of the principles of the guidelines in the rescue of an undertaking in difficulty as noted, in the present case, by the Commission (recital 283 of its annulled decision) and by the Court of First Instance in its judgment in Case T-349/03. In particular, the latter pointed out that the Commission could consider, in exercising its wide discretion, that the presence of an undertaking was necessary to prevent the emergence of an increased oligopolistic structure of the markets in question.

(128) As regards the determination of any compensatory measures to be imposed on SNCM, France suggests that the Commission take into account the structure of the market. Accordingly, a reduction in SNCM's capacity would be such as to strengthen the position of CFF on the market of services to Corsica as dominant from then on [83].

(129) According to the French authorities, the restructuring plan, as updated, complies with the compatibility criteria set out by the Commission in its 1999 and 2004 guidelines. All of the measures laid down in the context of SNCM's privatisation also serve to restore SNCM's long term viability from the end of 2009 and are restricted to the minimum necessary for that return to viability.

7.3. **The lifting of the restrictions placed by the annulled decision of 2003**

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

8. COMMENTS OF INTERESTED PARTIES

8.1. **The decision to initiate the 2002 formal investigation procedure**

8.1.1. *Comments of Corsica Ferries (CFF)*

(131) Disputing, first, that SNCM is an undertaking in difficulty within the meaning of the guidelines [84], CFF raises the question whether SNCM can become profitable on the non-subsidised routes. Moreover, CFF notes that, contrary to what is stated in the restructuring plan [85], services are still operated to Livorno.

(132) On the subject of cost reduction, CFF regrets that it does not have access to particular parts of the restructuring plan about which its representatives have levelled criticism [86].

(133) CFF is of the view that the calculation by the French authorities resulting in the sum of EUR 76 million is purely notional ([87]) while the capital to debt ratio of 79 % decided upon by the French authorities seems exaggerated ([88]). So far as concerns SNCM's shareholdings, CFF notes that some of the subsidiaries are of no relevance to the activities of the shipping company's activities ([89]).

(134) CFF concludes that the planned aid circumvents the cabotage regulation and renders the invitation to tender for Marseilles to Corsica services meaningless. CFF emphasises that the planned aid should not result in facilitating a more aggressive commercial bid on the part of SNCM. It suggests that restructuring aid should not be granted until 2007 and only if SNCM loses the next tender in 2006, which would be the only scenario that would genuinely put the public shipping company in difficulty.

8.1.2. *Comments of the Stef-TFE group* ([90])

(135) According to the Stef-TFE group, SNCM's shares in CMN should be analysed as purely financial assets. According to the *Stef-TFE* group, CMN and SNCM are independent and in competition with each other on routes other than those from Marseilles, even though both are co-contractors under the public service delegation contract.

(136) The letter states that the Stef-TFE group would undertake 'to buy back all or part, and preferably all, of SNCM's shares in CMN', whose value it estimates at between EUR 15 and 17 million, if the Commission were to take the view, under conditions it might impose in its final decision, that 'such a transfer is necessary to ensure that the restructuring plan is properly balanced'.

8.1.3. *Comments of representatives of local authorities*

(137) The mayor of the city of Marseille, the president of the general council of *Bouches-du-Rhône* and the president of the regional council of *Provence-Alpes-Côte d'Azur* pointed out the economic importance of SNCM's role in the regional economy.

(138) The president of the regional council of *Provence-Alpes-Côte d'Azur* added that the conditions for SNCM's restructuring plan to guarantee viability appear to be satisfied.

(139) The president of the executive council of the Assembly of Corsica submitted a resolution of that assembly of 18 December 2002 at which that assembly issued 'a favourable opinion' regarding SNCM's planned recapitalisation.

8.1.4. *Comments of the Corsica Transport Office*

(140) The Corsica Transport Office (OTC) ([91]) emphasised that the tender issued for the public service delegation contract had resulted in only one bid being submitted, namely that of the CMN and SNCM group. Wishing to maintain a reliable high-quality service, the Corsican regional and local authorities included in the contract financial mechanisms for compensation or correction linked with the efficiency and reliability of services. Moreover, it noted that the Corsican regional and local authorities took account of supply trends since 1996 in services from ports in mainland France in order to limit the public service obligations to services operated from Marseilles.

(141) The OTC also notes that the disappearance of SNCM 'would immediately lead to a major reduction in services' as it is currently the only company capable of meeting the requirements of the contract with regard to passenger transport. It notes, in addition, the influence of SNCM in the Corsican economy.

8.2. **The decision to extend the procedure of 2006**

8.2.1. *Comments of Corsica Ferries (CFF)*

(142) CFF notes the size of the amounts in question, their disproportionate nature in relation to SNCM's turnover and the fact that they were paid to SNCM before the Commission took a view on classification pursuant to Article 87(1) EC.

(143) CFF draws the Commission's attention to the fact that the French State's support for SNCM is a strategic step in the development of CFF. Those unauthorised measures enable SNCM to have a very aggressive tariff policy on the routes in respect of which CFF has been present for 10 years and on which, for the first time since it was set up, it is losing market share.

(144) CFF takes the view that there are alternatives to the presence of SNCM on all the routes at issue, falling within and outwith the public service delegation, which have various advantages both for SNCM and for competition in general. As regards the public service delegation ([92]), CFF takes the view that SNCM should reduce its services in respect of the routes operated under the pubic service delegation in order to prevent abuse of its dominant position on that market and avoid new investments and in order to implement a social plan restricted to 120 seasonal positions without having to terminate contracts for an indefinite term, which are more costly. So far as concerns the routes outwith the public service delegation, CFF suggests that SNCM withdraw a seasonal vessel.

8.2.1.1. The 2002 recapitalisation

(145) In respect of the amount of EUR 53,48 million, CFF wonders whether, there might be double counting in the calculation of the compensation of EUR 787 million authorised by the decision of the Commission in 2001.

(146) CFF considers that, in spite of the fact that *Altmark* is subsequent to the signing of the public service delegation, the compensation paid pursuant to the latter must be examined in the light of the criteria laid down by that case-law. In that respect, CFF submits that, with the exception of the first criterion, the criteria in *Altmark* are not satisfied.

(147) In respect of the fourth criterion in *Altmark*, CFF shares the Commission's doubts as to whether SNCM may be regarded as having been a well-run and adequately equipped undertaking. In that regard, CFF draws the Commission's attention to the fact that nearly 50 % of SNCM's losses were concentrated in the years 2000 and 2001, which suggests that SNCM's losses were not attributable exclusively to the public service obligations.

(148) As for the possibility of assessing that amount in the light of Article 86(2) EC, CFF considers that the Court of First Instance called upon the Commission to make an assessment merely as to the classification of that amount as aid and not as to whether it was justified pursuant to that article. The Commission was required to determine whether that amount was excessive in relation to the additional costs entailed by the public service obligations.

8.2.1.2. Measures subsequent to the 2002 recapitalisation

(149) In respect of the process of competitive tendering for the transfer of the company, CFF takes the view that it was not fully transparent in so far as the undertaking selected, namely BCP, no longer controls the operations of SNCM, having handed over to the VT group. Furthermore, since the financial conditions had changed to become much more favourable to the purchasers, CFF raise the question of the principle of the equal treatment of investors which ought to have prevailed throughout the transaction.

(150) As regards the negative transfer price of EUR 158 million, CFF is uncertain whether the criterion of the well-informed investor in a market economy applies to the present case. First, CFF wonders whether the view can be taken that the transaction at issue was managed by the State at the same time as a significant and concurrent action of private operators involved in comparable circumstances, although the State recapitalised the company before the joint recapitalisation of the shareholders and the new restructuring plan. On the other hand, CFF considers that, in the face of the serious financial circumstances of SNCM, a well-informed investor would have acted sooner in order not to have his investment depreciate [93].

(151) CFF takes the view that the reference to the *ABX Logistics* case is irrelevant. Besides the fact that the circumstances of that case cannot be transposed to the present case, SFF notes a significant contribution of the recipient of the aid in that case, which was clearly not the case with SNCM. Furthermore, according to CFF, the decision of the Commission in 2006 did not take account of the costs related to the risk of action by the court in a liquidation of the undertaking concerned. In that respect, CFF submits that the national case-law relied on by France to justify the costs related to SNCM's liquidation do not apply to the present case [94].

(152) CFF takes the view that the application of the Community case-law in *Gröditzer* and *Hytasa* to the present case can only lead to the conclusion that the State did not act like a private investor in so far as, in terms of that case-law, the capital contribution of the State was related to the sale of 75 % of its holding in SNCM, reducing accordingly the prospects of profit in return.

(153) Finally, CFF considers that the comparison between the liquidation costs and the recapitalisation costs should take into account the value of the assets, which is, in both cases, transferred to the purchaser. CFF submits that the value of the asset sold to the purchasers varies between EUR 640 million and EUR 755 million [95], compared to the market value of the fleet used by SNCM which CFF valued at between EUR 644 million and EUR 664 million in August 2006.

(154) As regards the determination of the measures subsequent to the recapitalisation of 2002 as restructuring aid, CFF is of the opinion that, although SNCM fulfils the conditions of an undertaking in difficulty under the 2004 guidelines in the period preceding the first recapitalisation of EUR 142,5 million, that classification becomes very questionable for the period preceding the second increase of capital of EUR 8,75 million inasmuch as the undertaking's capital was built up again.

(155) As regards the viability of the undertaking, CFF notes that the sale of SNCM is only partial and is not irrevocable having regard to the cancellation clauses negotiated with the purchasers. Those factors are important elements of uncertainty as regards the will and the ability of the purchasers to turn SNCM around and therefore secure the prospects of the undertaking's long-term viability. Further, CFF states that, unlike what is required by the 2004 guidelines, the French authorities did not contemplate discontinuation of the activities which remained structurally poor even after the restructuring [96]. In addition, CFF expresses its scepticism regarding the plan for reducing costs despite the fleet becoming larger [97] and the planned reduction of staff in particular in the light of the failure of the 2002 social plan.

(156) CFF is in doubt as to whether the new aid is limited to the minimum on account, first, of a lack of clarity as to what the social costs cover and, secondly, the content of the minutes of SNCM's meeting of 28 April 2006 according to which a part of that aid would be used to cover the operating losses of the company in 2006 and 2007. CFF also considers that the purchasers of SNCM do not contribute substantially to the restructuring of the undertaking.

(157) In order to prevent unwarranted distortions of competition, CFF considers it necessary to renew and specify the compensatory measures imposed on SNCM in 2003 and to add new measures relating to the reduction of SNCM's presence on the market [98]. CFF considers, moreover, that a part of the measures imposed on SNCM by the 2003 decision were not complied with [99].

(158) Regarding the nature of the second recapitalisation of EUR 8,75 million, CFF takes the view that, in addition to the concurrence of public and private investment, the private action must be significant and carried out in comparable conditions in order that the State action is validated. In the present case, those two conditions are not satisfied. First, the shareholding of the purchasers, closely linked to the first increase of capital of EUR 142,5 million, is not significant. Secondly, the action of the purchasers was not carried out in comparable conditions to those of the state action, in particular by virtue of the cancellation clauses and the expected profitability of the minority shareholdings of CGMF.

(159) As regards the social measures of EUR 38,5 million, CFF disputes the classification of that amount as aid to individuals. Although it true that that amount directly benefits SNCM's employees, CFF submits that that measure could give rise to indirect positive effects for SNCM, in particular in terms of calming of social relations.

8.2.2. *Comments of STIM d'Orbigny (Stef-TFE group)*

8.2.2.1. The 2002 recapitalisation

(160) STIM submits that through payment of the sum of EUR 53,48 million as public service compensation the State compensated SNCM twice for the same public service obligations. Moreover, STIM takes the view that that payment does not satisfy the criteria laid down in *Altmark*.

(161) As regards, specifically, the second and fourth criteria in *Altmark*, STIM disputes, first, the existence of parameters established in advance in an objective and transparent manner and, secondly, the comparability of SNCM's and CMN's ratios in the period from 1991 to 2001 [100] and claims, in that respect, that the information given to the Commission was manifestly biased [101].

8.2.2.2. Measures subsequent to the 2002 recapitalisation

(162) As regards the negative disposal price of EUR 158 million, STIM takes the view that that price is not a market price resulting from an open and non-discriminatory competitive tendering procedure because the recapitalisation took place under different conditions from those which must normally guide a private investor. STIM considers that the revalued net ledger assets would allow, in the worst of cases, a liquidation without costs for the State, or even yielding a gain on liquidation, that the sale price is derisory compared to the value of the undertaking (estimated at EUR 350 million by STIM) and that the aid is disproportionate in relation to the undertaking's needs.

(163) STIM also draws the Commission's attention to the exorbitant nature of the cancellation clause in respect of the transfer to the private sector.

(164) Finally, STIM disputes the justification for the negative sale price acclaiming that liquidation took place under socially difficult circumstances, which seems unrealistic.

(165) As regards the second recapitalisation of EUR 8,75 million, STIM considers that that capital contribution does not comply with the principle of the private investor in a market economy having regard to the inadequacy of the guarantees on return on investment. STIM challenges the argument regarding concurrence of private and public investment to deny that that contribution is State aid. Such concurrence, although it is settled, is only an indication and cannot be, in itself, a classification criterion [102]. STIM states, finally, that that contribution is a guarantee given to purchasers by the French Government that SNCM has indeed been awarded the public service delegation to operate services to Corsica.

(166) As regards the EUR 38,5 million of aid to individuals, STIM takes the view that that amount is in fact intended to give SNCM the means to comply with certain essential aspects of the recovery plan submitted to the Commission which have not been implemented, in particular the reduction of staff.

8.2.2.3. Compatibility with the 2004 guidelines

(167) STIM takes the view that the aid received by SNCM is not limited to the minimum. The contribution of STIM and the purchasers to the restructuring plan is insufficient having regard to the conditions imposed in the 2004 guidelines and it is not demonstrated that SNCM's situation was so exceptional that it justified a lower contribution. Furthermore, STIM notes the disproportionate nature of the aid granted in 2006 in so far as it enabled SNCM to set up reserves to cover future losses. Finally, the fact that SNCM did not provide for disposal of the assets which were not essential to the survival of the undertaking is contrary to the requirements laid down by the 2004 guidelines.

(168) STIM considers that the amounts were paid in breach of the principle of uniqueness established by the 2004 guidelines. The deterioration in the undertaking's financial situation and the social conflicts cannot be analysed as exceptional and unforeseeable circumstances for which the recipient company is not responsible.

(169) Accordingly, STIM demands additional compensation of half of the aid contributed, namely EUR 98,25 million, through the disposal of an additional vessel and its direct and indirect SNCM holdings in CMN. In that respect, STIM states that those holdings are not strategic as provided in the guidelines on restructuring aid as they are not 'essential to the firm's survival' nor are they inalienable assets.

(170) STIM also submits that the alleged synergies between SNCM and CMN do not exist inasmuch as SNCM has no real role in the management and development of CMN. STIM states, finally, that the shareholders' agreement linking the two undertakings has not existed since 15 March 2006, when CMN gave notice that it was no longer bound by it, as held by the *Cour d'Appel de Paris*.

8.2.3. *Comments of SNCM*

(171) SNCM sent the Commission a copy of a file summarising its economic and competitive position, together with legal advice assessing the risk that, in connection with liquidation proceedings, the State intervention would be characterised by the courts as de facto management of the company for the period preceding privatisation.

(172) Consulted by SNCM, the […] firm arrived at the conclusion that, on the basis of the company's social documents supplemented by correspondence, speeches and minutes of the auditing bodies, the French State […] ([103]) ([104]) ([105]) The report also notes that […] ([106]) Finally, the report refers to […].

(173) On that basis, SNCM's expert concludes that it is very likely that the Tribunal de Commerce de Marseille would have characterised the French State as de facto manager.

(174) Moreover, according to the findings in, inter alia, the reports of the Court of Auditors, the mismanagement attributable to the French State ([107]), de facto manager of SNCM, contributed to SNCM's stated shortfall in assets. The loss caused by mismanagement amounted to […].

(175) In that context, according to SNCM's expert, there is no doubt that the French State would be ordered to bear all or a part of the shortfall in assets under an action 'en comblement de passif', having regard to the very strong involvement of the State in SNCM's management, its manifest acts of mismanagement and the size of its financial resources.

(176) On the basis of the relevant case-law, SNCM's expert concludes that, if SNCM had been liquidated, the State would certainly have been ordered to pay all of SNCM's social security debts. That would have resulted in the State shareholder being made liable for an estimated share of between […] and […] % of the stated shortfall in assets (namely between EUR […] and […] million). Consequently, by deciding to privatise SNCM while strengthening in advance its capital in the sum of EUR 158 million, the French State acted like a well-informed investor.

9. OBSERVATIONS OF FRANCE ON THE COMMENTS OF THE INTERESTED PARTIES

9.1. Observations of France on the comments of the interested parties concerning the decision to open the 2002 formal investigation procedure

9.1.1. *The comments of Corsica Ferries*

(177) The French authorities have indicated that some of the data submitted by CFF concerning SNCM's services were inaccurate.

(178) The French State is of the opinion that, contrary to what is maintained by CFF, the restructuring plan was devised in such a way as to turn SNCM around as soon as possible and create the right conditions to ensure its medium- and long-term viability. The French authorities note that a significant part of the cost reduction programme has already been implemented ([108]). Further, in 2001 SNCM earmarked EUR 21,3 million to finance restructuring measures, in particular the scheme to safeguard jobs.

(179) In respect of the determination of the amount of the aid, the French authorities confirm that a 0,79 capital/debt ratio is quite typical for the balance sheets of most shipping companies, except in special situations ([109]).

9.1.2. *Comments of Stef-TFE*

(180) The French authorities conclude that the description which Stef-TFE gives of relations between SNCM and CMN in performing the public service contract does not reflect reality.

(181) According to the French authorities, the decision of SNCM and CMN to enter into a joint venture in which they are jointly and not severally responsible has in no way 'been rendered obligatory by the overall character of the consultation', contrary to Stef-TFE's observations. The decision to set up a SNCM-CMN joint venture was the result of an analysis made by the two companies which showed that the continuation in that form of their original natural partnership gave them the best chances,

in particular in terms of competitiveness, to win the tender. CMN's entry into that venture therefore resulted from a well-considered decision on its part based on an evaluation of its own interests and not on an obligation arising out of the tender as such.

(182) The French authorities explain that, contrary to Stef-TFE's observations, the companies SNCM and CMN are neither independent nor in direct competition. Such a situation would be in conflict with the very principle of the single public service delegation contract to which they are co-signatories.

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

9.1.3. *Observations of France on the comments of the representatives of the local authorities*

(184) Although France approves as a whole of the content of the letter of the president of the Region of *Provence-Alpes-Côte d'Azur*, it is nonetheless anxious to state that, contrary to what is asserted in point 2 of that letter ([110]), the supply of services between mainland France and Corsica is not 'in excess of demand' and SNCM's fares policy complies with commitments which it made not to start a fares war and not to be a 'price leader'.

9.2. **Observations of France on the comments of the interested parties concerning the 2006 decision**

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

(186) Concerning the public service delegation for the Marseille-Corsica routes, France challenges any argument that the procedure for the award of the public service delegation agreement was unlawful. Further, according to France, the existence of national procedures before the competent national courts as Community courts of ordinary jurisdiction implies that there is no Community interest for the Commission in examining questions relating to the procedure to award the public service delegation agreement.

9.2.1. *The early implementation of the measures laid down in the first restructuring plan and its amendments*

(187) The answer of the French authorities to the general remark concerning the early implementation of measures which may be classified as aid by France is that that implementation is justified by the specific features of the procedure, that is to say, the annulment in 2005 of the authorisation decision of the Commission of 9 July 2003, and not by an intention on the part of the French authorities to disregard their obligations under the EC Treaty. Indeed, France states that it has always kept the Commission informed of developments in the matter and with the different measures adopted since January 2005, in accordance with the duty to cooperate in good faith between the Member States and the Commission.

(188) Concerning those recent measures, the French authorities consider that since none of them constitute aid, Article 88(3)EC is not, ultimately, applicable to them and, accordingly, there is no obligation to suspend their application.

9.2.2. *The 2002 recapitalisation*

(189) First, the French authorities state that they did not cast doubt on the applicability of the *Altmark* judgment while noting, on the other hand, certain difficulties in applying the test laid down by that judgment, since the amount in question preceded it and could not therefore have taken into account those new criteria.

(190) France points out that the EUR 53,48 million in question is part of the EUR 69,3 million declared compatible by the Commission in 2003. The doubts expressed by the Commission in its initiation decision of 2006 do not therefore concern the compatibility of those measures, which are not called into question, as STIM seems to state in its observations, but concern the aid nature of that amount granted as compensation for public service costs.

(191) According to France, the observations of CFF and STIM do not call into question the applicability to the present case of the first and second *Altmark* conditions.

(192) In respect of the third criterion in *Altmark*, the French authorities deny the argument put forward by CFF and STIM that the payment of that sum necessarily results in overcompensation because the Commission authorised, by its decision of 30 October 2001, the payment of EUR 787 million as compensation for public service costs. In that respect, France states that the Commission, in its 2003 decision, stated that those obligations had been undercompensated and that the amount of EUR 53,48 million was justified as public service compensation.

(193) Regarding the fourth *Altmark* condition, the French authorities submit that, despite the absence of a reference undertaking and thus the impossibility of establishing an overall comparison between SNCM and other undertakings, as noted also by CFF, they endeavoured to provide information serving to make the most exact comparison possible with similar undertakings, that is to say, primarily with CMN. France also challenges the argument raised by STIM and CFF that the structural costs of SNCM are greater than those of CMN. Even if that were to be the case, the French authorities consider that the productivity ratios of SNCM are very similar to those of CMN. In conclusion, SNCM was managed as well as CMN to which STIM at no point refers as a badly-run undertaking.

(194) France states that the losses suffered between 1991 and 2001 were not attributable only to the public service delegation, as CFF appears to assert, but that the public service obligations prevented SNCM from adapting to the change in the competitive environment. The French authorities also state that those losses are not concentrated in the period 2000 to 2001 but gathered pace over that period on account of the increase in the round trips made by CFF.

(195) Concerning the compatibility of the EUR 53,48 million paid as compensation for public service costs in accordance with Article 86(2) EC, the French authorities note that, first, in its 2003 decision, the Commission had already declared that amount as compatible with that article and, secondly, the CFI did not call it into question in its judgment in Case T-349/03.

9.2.3. *Measures subsequent to the 2002 recapitalisation*

(196) As regards the sale process, France states that from its outset it provided for classic selection criteria based primarily on the price offered for the increase in value of SNCM's stock and, secondarily, on other criteria (industrial plan, social plan and so on), including the amount which the candidates were prepared to invest in the company for a recapitalisation. France firmly challenges the argument put forward by third parties that the process of putting up for sale was not transparent and notes that, in the present case, the State itself went beyond its legal and statutory obligations, substantial and restrictive as they were, provided for in the event of transfer of public shareholdings. France notes that the development following BCP's offer again to take up 100 % of SNCM's stock occurred in a very difficult financial and social context and that VT's joining BCP's offer did not change the commercial and financial terms of the transaction (except for capital ownership).

(197) As regards the negative price of EUR 158 million, the French authorities note that, having regard to SNCM's financial situation on 30 September 2005, the undertaking was sold at a market price and that the sale was economically more advantageous than a liquidation of the undertaking. In that respect, the French authorities state that the application of the criterion of the private investor in the event of a transfer of undertaking similar to liquidation must not be regarded in the same way as the search for 'profitability of public action' but as the prevention of greater losses which the shareholder would have to suffer through a more costly liquidation.

(198) In respect of the price paid, France challenges the argument that SNCM was transferred at a price which did not reflect its actual value [111].

(199) The French authorities also refute CFF's argument that the market value of SNCM's fleet was underestimated, which CFF assessed at between EUR 406,5 million and EUR 426,5 million. The French authorities argue that the vessels taken into account in CFF's calculation do not correspond to those held in SNCM's name on 30 September 2005. The absence of discounts applied to the market value of the vessels does not take account of the background in which a potential compulsory liquidation of those assets takes place and, finally, the date chosen to calculate that market value, August 2006, is not the date of potential liquidation of SNCM to which reference must be made, that date being 30 September 2005. However, France notes that, if the calculation proposed by CFF was to be accepted, the negative price would be three times lower than the liquidation value of the assets required by the *Gröditzer* case-law, which would therefore be more favourable than the cases presented to the Commission by the French authorities.

(200) In response to CFF's argument calling into question the application of the *Gröditzer* case-law by referring to the fact that the capital contribution of the State in SNCM was linked to the sale of 75 % of its holding, reducing in proportion the prospects of profit in return, the French authorities note that the negative sale price of EUR 158 million does correspond to the sale of the entirety of SNCM's capital, followed by a new investment by the State of 25 % giving a return of […] % per year. Accordingly, France takes the view that the return on investment remains guaranteed by virtue of its shareholding of 25 % in the company in so far as that holding enjoys a guarantee of very high return.

(201) France also challenges the argument put forward by CFF on the non-application to the present case of the ABX approach, taking as a basis in particular the analysis of the actual liquidation costs of SNCM and the risk that the State could be considered to be liable for the liabilities of the undertaking in an action 'en comblement de passif' as provided for by French insolvency procedures and confirmed by national case-law (judgment of the Court of Appeal of Rouen of 22 March 2005). Although the French authorities consider that their conduct as manager of SNCM cannot be described as being 'wrongful' in that action, they insist that there is a very high risk that an order would be made against the State by a national

court for the shortfall in SNCM's assets owing to flexible criteria for characterisation of mismanagement as provided for in Article L-651-2 of the Commercial Code and pursuant to the case-law cited above which can be transposed to the present case.

(202) In respect of the capitalisation of EUR 8,75 million, France notes that, contrary to the contentions of CFF and STIM, that capital contribution does not constitute State aid on account of the concurrence of that investment, the similarity of its subscription conditions and the higher-than-average return obtained by the State via CGMF.

(203) In particular, the French authorities submit that the principle of equality of investors is not called into question by the existence of cancellation clauses since the latter were laid down in connection with the 100 % sale of SNCM and not with the EUR 35 million recapitalisation which followed it.

(204) Further, France submits that its investment is much lower than that of the purchasers, since it is only the sum of EUR 8,75 million which must be compared to the investment made by the purchasers (EUR 26,25 million). The first recapitalisation of EUR 142,5 million should be examined only in the course of the comparison with the liquidation price.

(205) Finally, France challenges STIM's argument that that contribution is a guarantee given to private purchasers that SNCM has indeed been awarded the public service delegation to operate services to Corsica. The French authorities submit that that increase in capital is prudent and irrespective of the undertaking's performance and that the award of the public service delegation to SNCM does not serve to improve the return expected on that investment.

(206) As regards the EUR 38,5 million of social measures, France repeats the argument that those measures are aid to individuals and that their payment by the State cannot be considered to give an indirect advantage to the undertaking in so far as they are in addition to SNCM's statutory obligations and its obligations in agreements. Moreover, France recalls that those measures do not permit the departure of employees who would remain, in their absence, the responsibility of SNCM.

(207) Contrary to CFF's argument, the French authorities state that the EUR 38,5 million does not correspond to implementation of reductions in staff provided for in the 2003 social plan because those reductions have, despite the delay, already been implemented. The new social plan is therefore in addition to the first social measures of 2003.

9.2.4. *Compatibility with the guidelines*

(208) France considers that, in the light of the foregoing, the amount of aid to be assessed in the light of the guidelines is EUR 15,81 million.

(209) Contrary to the contentions of CFF, the French authorities consider that, having regard to point 11 of the 2004 guidelines, the first recapitalisation, although enabling SNCM to build up its capital, did not take away its nature of an undertaking in difficulty in so far as that recapitalisation was intended to ensure the continuation of the company's activities.

(210) France refutes CFF's contentions that it did not again have to inject money into the undertaking given that SNCM could have had recourse to bank credit. In that regard, the French authorities note that, on 24 August 2005, the banks refused to grant new cash lines to SNCM and that, accordingly, the only alternatives conceivable were privatisation or the liquidation of the undertaking.

(211) France challenges the arguments put forward by CFF and STIM concerning the failure of the 2002 restructuring plan which, despite some delay, was implemented and made it possible to achieve the objectives in 2005. The deterioration in SNCM's economic and financial situation owing to factors external to the undertaking itself then made necessary the extension of the plan notified in 2002 and the introduction of new measures.

(212) France takes the view that SNCM has good prospects for recovery and that the measures contemplated by the new shareholders, in particular the implementation of the social plan, the reinstatement of services and the renewal of certain vessels, will enable the undertaking to return to viability. In that regard, France observes that on account of the revenues deriving from the public service delegation (approximately […] of SNCM's turnover) and in view of the extent of the fixed costs and the difficulties in redeploying the 6 vessels used on the Marseille-Corsica route, the public service delegation constitutes an essential element of the undertaking's strategy and its viability.

(213) On the limitation of the aid to the minimum, France believes that it limited to the strict minimum the restructuring costs necessary to enable the restructuring to be carried out. To that effect, the French authorities note that, as the Commission recognised in its 2003 decision, the undertaking has itself contributed sufficiently to the restructuring plan from its own resources by virtue of the disposal of assets for the sum of EUR 30,2 million. In addition, having regard to other disposals made by SNCM for the sum of EUR 12,2 million, the total of the undertaking's own contribution comes to EUR 42,4 million. France considers that that amount is much greater than the amount of own contributions necessary to approve the restructuring aid, which finally amounts to EUR 15,81 million, since the other measures are not State aid.

9.2.5. *The conditions imposed by the Commission decision of 2003 and the possible new compensatory measures*

(214) Contrary to the contentions of STIM and CFF, the French authorities state that they complied with all of the conditions imposed by the 2003 decision, to which they were bound until the end of 2006, in particular the maintenance of the fleet of 11 vessels and the application of lower fares than those of its competitors.

(215) Indeed, France considers that, under the new final decision, the level of compensatory measures to be imposed on SNCM must be adapted in so far as the amount of restructuring aid was henceforth EUR 15,81 million rather than EUR 69,3 million.

(216) In that respect, France challenges STIM's observations concerning the possibility that the Commission may require SNCM to sell its shareholding in CMN as a compensatory measure. France challenges STIM's argument that the description of strategic assets was called into question in the 2004 guidelines as opposed to those of 1999.

(217) As regards measures referred to by CFF intended to reduce SNCM's market presence, the French authorities recall that, as the Commission noted, moreover, in its 2003 decision (recital 87), there is no excess capacity on the markets concerned (France — Corsica — the Maghreb) and that a reconfiguration of services to Corsica under and outwith the public service delegation would jeopardise the viability of the undertaking.

(218) As for the argument raised by CFF that the implementation of the measures described above in favour of SNCM involves a serious risk of eliminating its main competitor on the mainland France-Corsica market, namely CFF, the French authorities submit that, having regard to the current structure of the market on which CFF is in the majority, the maintenance of a competitive structure depends on the authorisation of SNCM's restructuring plan and the presence of the latter on the market in question.

10. **ASSESSMENT OF THE MEASURES**

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

(220) The classification of a national measure as State aid as provided for in Article 87(1) EC requires the following cumulative conditions to be fulfilled, namely: (1) the measure in question confers a selective economic advantage; (2) that advantage is financed via State resources; (3) that advantage distorts or threatens to distort competition and, finally, (4) that advantage has an effect on trade between Member States ([112]).

(221) The Commission notes that SNCM received State resources totalling EUR 274,54 million via CGMF wholly owned by the French Government.

(222) Since SNCM operates in the maritime transport sector, open to competition within Europe, the potential economic advantage that it has received is likely to distort competition and to have an effect on trade between Member States.

(223) The fact that the cabotage market to the Mediterranean islands was, until 1 January 1999, temporarily exempt from the application of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) ([113]) does not exclude prima facie that subsidies granted for operating cabotage routes to the Mediterranean islands under a public service delegation could have an effect on trade between Member States and distort competition.

(224) In any event, even if subsidies granted for operating cabotage routes could not have an effect on trade between Member States or entail distortions in competition before 1 January 1999, the situation changed after that date since, in accordance with Regulation (EEC) No 3577/92, cabotage activities were from then on open to all Community operators. In addition, it should be stated that SNCM does not carry on only cabotage transport but also operates on the international maritime market, which was liberalised by Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries ([114]).

(225) Accordingly, the Commission considers in the present case that the last three criteria of Article 87(1) EC cited in paragraph 220 of this decision are fulfilled. The following sections examine in turn, in respect of each measure, the existence of a selective economic advantage and, where applicable, compatibility with the common market of measures classified as State aid.

10.1. **The capital contribution of EUR 53,48 million for public service compensation**

(226) Although in its decision of 2003 the Commission recognised the public service compensation nature of a part of the EUR 76 million, namely EUR 53,48 million, for operating services to Corsica between 1991 and 2001, the Commission had assessed the capital contribution in its entirety, namely EUR 76 million, in terms of restructuring aid in so far as that amount had been notified by the French authorities for that purpose. In its judgment in Case T-349/03 annulling the Commission decision of 2003, the Community judicature called on the Commission to examine the sum of EUR 53,48 million in the light of the its judgment in the *Altmark* case.

(227) Moreover, the French authorities requested the Commission to consider that, by virtue of its 'public service compensation' nature, a part of the 2002 restructuring aid does not constitute aid in the light of the *Altmark* case-law.

(228) Since the French authorities relied on the application to the present case of the *Altmark* case-law and, in some circumstances, the derogation provided for in Article 86(2) EC, the Commission is required to make a ruling in that respect as those arguments have decisive importance in France's reasoning ([115]).

10.1.1. *Introductory remarks*

Applicability of the Altmark case-law to the present case

(229) First of all, the Commission notes that, despite the fact that the ruling in *Altmark* is subsequent to the implementation of the abovementioned measure, the criteria laid down by the Community judicature in that case are applicable to the present case.

(230) As recently pointed out by the Court of First Instance ([116]), the Court of Justice did not impose temporal limits on the scope of the statements made in the judgment in *Altmark*. In the absence of such temporal limits, those statements following from Article 87(1) EC are therefore fully applicable to the factual and legal situation of the present case.

Determination of the amount of compensation received for public service

(231) It should be noted, first of all, that SNCM suffered substantial deficits between 1991 and 2001 on all services to Corsica subject to the public service obligation, despite State subsidies authorised by the Commission decision of 2001 ([117]). The Commission found in paragraph 105 of that decision that the cumulative loss before tax for the period 1991-1999 for operating services to Corsica ([118]), as calculated in the report of the expert appointed by the Commission, and including the subsidies received, amounted to FRF 217 million, namely EUR 33,08 million.

(232) So far as concerns 2000 and 2001 ([119]), the Commission has adopted the same approach as the abovementioned expert report and has recalculated, on the basis of the analytical profit-and-loss account supplied, the result before tax, removing provisions for restructuring already included in the restructuring costs as notified. Moreover, the Commission has been able to verify that, according to the company's annual accounts, there was no disposal of vessels during the two years in question.

(233) The Commission takes the view that the loss in 2002 on the Marseilles-Corsica services cannot be accepted in view of the fact that, since 1 January 2002, the operating rates for services to Corsica from Marseilles and the amounts of financial compensation have been agreed between the public authorities and SNCM on a contractual basis, contrary to the practice followed for the 1991 and 1996 agreements.

(234) Accordingly, in accordance with the approach and the grounds for the 2001 decision, the Commission has reached the following conclusions:

Table 3

Analytical profit-and-loss account for 1991-2001

Corsica network	2001		2000		1991-1999 ([1])		Total 1991-2001	
	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR
Result before tax	– 302,575	– 46,127	– 40,256	– 6,137	– 216,98	– 33,078	– 559,811	– 85,343
Allocation to provision/depreciation Liamone ([2])	96,895	14,771	0,000	0,000	0,000	0,000	96,895	14,771
Allocation to provision/Social plan	112,110	17,091	0,000	0,000	0,000	0,000	112,110	17,091

Corsica network	2001		2000		1991-1999 [1]		Total 1991-2001	
	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR	Million FRF	Million EUR
Correction appreciation on vessels	0,000	0,000	0,000	0,000	182,100	27,761	182,100	27,761
Result before tax excluding appreciation and restructuring	– 93,571	– 14,265	– 40,256	– 6,137	– 216,980	– 33,078	– 350,807	– 53,480

[1] Data taken from Decision 2002/149/EC.

[2] A provision of EUR 14,8 million was set up in 2001 for the high-speed vessel Liamone. It concerns reduction of the annual charge of the vessel to the level of a vessel adapted to new restrictions imposed on that route and financed under the same conditions. That provision was set up pursuant to accounting rules on the basis of which an undertaking may adjust its balance sheet by formally noting an exceptional depreciation provided that it states that one of its assets has an actual or market value lower than its accounting value.

(235) In total, the cumulative loss recorded by SNCM on Marseille-Corsica services in addition to State subsidies authorised by the 2001 decision and adjusted by the capital gains on the vessels sold during that period and restructuring costs, amounts to EUR 53,48 million for the whole of the period 1991-2001.

(236) In the light of the foregoing, the Commission takes the view that, of the EUR 76 million capital contribution notified in 2002 [120], EUR 53,48 million may be evaluated as public service compensation.

10.1.2. *Existence of an economic advantage in the light of the* Altmark *case-law*

(237) According to the Court of Justice, in so far as a State measure is to be regarded as compensation for the services provided by the recipient undertaking in order to discharge public service obligations, so that that undertaking does not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) EC.

(238) However, in order for such compensation to escape classification as State aid, a certain number of cumulative conditions must be fulfilled (see footnote 67 of this decision).

(239) As regards, in particular, the fourth criterion identified by the Court of Justice in *Altmark*, it must be stated that SNCM was not chosen following a public procurement procedure serving to select the candidate able to provide the services at the lowest cost for the authority.

(240) In the absence of a public procurement procedure, the Commission considers that it is for the Member State to show that the level of compensation paid to SNCM does not exceed the costs incurred by an average well-run and adequately equipped undertaking, taking into account the relevant revenues and a reasonable profit for discharging the obligations, in accordance with the case-law of the Court.

(241) In the present case, the French authorities themselves recognise in their records of 16 November 2006 that is impossible in practice to find an undertaking which might serve as a reference point for that period of 1991-2001 because of the public service obligations of SNCM, which is the only undertaking able to take on those obligations. In those circumstances, the French authorities endeavoured to provide information serving to make the most exact comparison possible with similar undertakings, that is to say, primarily with CMN, stating, however, that those two undertakings did not have the same operating conditions as those imposed on SNCM by public service obligation agreements between 1991 and 2001.

(242) In that regard, the Commission takes the view that, in the light of the arguments of the French authorities, the latter did not demonstrate in what respect the undertakings they judged to be similar constituted the reference point as required by Community case-law. In that context, the Commission notes that the information sent by France regarding undertakings does not make it possible to assess the degree of similarity relied on or to analyse the impact of the differences in operating conditions claimed in the comparison which should be made for the purposes of applying the fourth criterion above.

(243) In those circumstances, the Commission considers that, on the basis of the information and data sent by the French authorities in the present proceedings, the latter still fail to prove that the fourth criterion in *Altmark* is fulfilled.

(244) Having regard to the foregoing arguments, the Commission takes the view that the measure in question gave SNCM an economic advantage. Given that the measure only benefited SNCM, that economic advantage was selective. Consequently, the compensation granted to SNCM under the 1991 and 1996 agreements for the sum of EUR 53,48 million constitutes State aid within the meaning of Article 87(1) EC.

10.1.3. *Compatibility with the common market of the measure in question pursuant to Article 86(2) EC*

(245) Since the French authorities have relied on the derogation provided for in Article 86(2) EC, the Commission will use the same approach and the same grounds as those of the 2001 decision in order to assess the measure in question.

(246) Under that article, the payment of State aid may escape the prohibition laid down in Article 87 of the EC Treaty provided that the sole purpose of the aid in question is to offset the extra costs incurred in performing the particular task assigned to an undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium.

(247) In the light of the case-law applicable to the 1991-2001 period ([121]), the Commission must, as it did in its 2001 decision:

— verify whether the services whose management has been entrusted to SNCM can be qualified as a service of general economic interest, and

— examine whether the amount of the subsidies awarded to SNCM in the context of its public service obligations for maritime services to Corsica matches the excess costs borne by SNCM to satisfy the fundamental requirements of the public service contract.

Public service justification

(248) In the present case, in respect of the compensation paid over the period 1991–2001, as stated by the Commission in its 2001 decision, the public service obligations imposed on SNCM and CMN stem from two five-year agreements signed by the latter and the Corsica Transport Office (OTC). Those agreements, of which the legal basis is the 1976-2001 framework agreement, specified the ways in which the public service was to be performed for the 1991-1996 and 1996-2001 periods. They also laid down the principles governing the payment of the lump-sum subsidy from the budget for territorial continuity in return for the obligations imposed.

(249) As for whether those obligations meet a real need for public service, the Commission stated in its 2001 decision that the framework agreement and the five-year agreements comply with the territorial continuity principle which aims to limit the drawbacks of insularity and ensure that Corsica is served in ways as close as possible to purely mainland connections. The Commission also notes that historically that objective, which is of legitimate public interest, has not been achieved through the interplay of market forces alone ([122]).

(250) The Commission therefore is of the opinion that the service system provided for by the framework agreement and the five-year agreements meets a real need for a public service.

The non-lump-sum character of the subsidy

(251) As the Commission stated in its 2001 decision, SNCM received over the 1991-2001 period under the legal framework described above an annual subsidy from the State, the amount of which is fixed for five years and is revised every year according to the changes in gross domestic product at market prices and the information and analytical accounts provided by SNCM.

(252) In paragraph 30 of its 2001 decision, the Commission notes the fact that 'under the terms of Article 4 of the 1976 agreement ([123]), the annual subsidy is awarded in the form of 12 equal monthly instalments. For the subsidy to be paid over, SNCM must submit its results for the previous financial year approved by the State financial officer. Any repayments owed by SNCM are deducted from the instalment or the instalments of the current financial year. The arrangements for adjusting instalments also provide for additional payments to be made by the State. Subsequent agreements also provide for penalties if the basic number of crossings that have not been made by SNCM in the course of the year exceeds 2 % of the basic number of crossings provided for in the agreement. The awarding authority may also notify SNCM that it is withholding the lump-sum payment for territorial continuity in the case of significant incidents causing the interruption of the public service.'

(253) In recital 82 of that decision, the Commission states that the second part of clause IV stipulates that 'should economic conditions and, in particular, operational costs and traffic levels that have served as the basis for calculating the subsidy deteriorate substantially, SNCM and the OTC will get together to study the measures to be implemented regarding the service, fares or raising of the amount of the award in order to re-establish the financial equilibrium of the company'.

(254) In the light of the foregoing, and as it concluded in its 2001 decision, the Commission is of the opinion that the compensation of EUR 53,48 million paid by the State is not a lump sum because of the mechanism serving to offset the financial imbalance which is connected to the disparity between the actual operational costs and the costs which served as the basis for calculating the subsidy.

Matching of the compensation to the public service costs

(255) As noted by the Commission in its decision of 2001 ([124]), the financial compensation received at the time of the application of the five-year agreements of 1991 and 1996 did not enable SNCM to make good fully the losses related to its public service obligations. The Commission estimated that that undercompensation amounted to EUR 53,48 million.

(256) The Commission concludes that the sum of EUR 53,48 million paid by the State is equal to the undercompensation noted for the 1991-2001 period and is consequently appropriate in the light of the net costs caused by the public service task entrusted to SNCM.

10.1.4. *Conclusion*

(257) On the basis of the foregoing, the Commission takes the view that the measure in question constitutes State aid which is compatible with the common market in accordance with Article 86(2) EC. Since the measure was implemented on 14 November 2003, the Commission finds that that State aid was unlawful.

(258) In that respect, the amount of aid to be regarded as restructuring aid under the 2002 notification amounts to EUR 22,52 million ([125]). That amount must be added to the measures notified in 2006 in so far as the latter include restructuring aid (see section 10.5 of the present decision).

10.2. **The disposal of SNCM at a negative sale price of EUR 158 million**

(259) In the present case, the Commission must examine whether the capital contribution of the State of EUR 158 million prior to the sale of SNCM to private purchasers, that is to say ultimately the negative sale price of the undertaking for an equivalent amount, does not contain aid elements.

(260) An open, transparent and non-discriminatory public selection procedure at the end of which the State disposes of the undertaking after a prior recapitalisation (for an amount greater than the sale price) does not necessarily exclude the presence of aid, capable of benefiting both the privatised undertaking and the puurchaser of that undertaking ([126]).

10.2.1. *Legal framework*

(261) In order to determine whether an undertaking has obtained an economic advantage from a capital contribution from the State, the Commission generally applies the criterion of the private investor in a market economy principle (the private investor principle). The private investor criterion comes from the principle of equal treatment between the public and private sectors which follows from Article 295 of the EC Treaty. According to that principle, the capital made available to the undertaking, directly or indirectly, in circumstances which correspond to normal market conditions, cannot be classified as State aid ([127]).

(262) To that end, the Commission may assess, inter alia, whether the supplier of the resources has acted like a private investor pursuing structural, global or sectoral policies and influenced by prospects of long-term profitability. The validity of that approach has been recognised by the Community judicature in several cases ([128]).

(263) According to settled case-law, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital constitutes State aid ([129]).

(264) The Community judicature have also laid down that a private investor pursuing a structural policy, whether general or sectoral, and guided by prospects of viability in the long term could not reasonably allow itself, after years of continuous losses, to make a contribution of capital which, in economic terms, proves to be not only costlier than selling the assets, but is moreover linked to the sale of the undertaking, which removes any hope of profit, even in the longer term ([130]).

(265) Specifically, in its *Gröditzer* judgment, the Court held that, in order to establish whether the privatisation of an undertaking for a negative sale price involves elements of State aid, 'it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up' ([131]).

10.2.2. *Application to the present case*

(266) In the light of the foregoing, in order to determine the aid nature of the measure in question, the Commission must 'assess whether the solution chosen by the State is, both in absolute terms and compared with any other solution including that of non-intervention, the least costly, which would lead, if that were the case, to the conclusion that the State has acted like a private investor' ([132]).

10.2.2.1. Observance of the principle of the private shareholder in a market economy

(267) In that context, it must be noted that large groups of undertakings currently cannot, when they close sites or wind up subsidiaries, disregard the social consequences which such closures or liquidations involve.

(268) Accordingly, more often than not they carry out social plans which may include measures for the redeployment of staff, assistance in finding work, redundancy payments and even action at the local economic level, which go beyond the requirements of statutory provisions and collective agreements.

(269) In the present case, the Commission notes that SNCM is a company controlled by the State through CGMF (*Compagnie Maritime Générale et Financière*).

(270) The Commission takes the view that, in the event of SNCM's liquidation ([133]), such measures would have been introduced which exceeded any statutory obligations with the aim of avoiding harming the brand image of the holding company to which it belongs and its ultimate shareholder ([134]).

(271) The Commission notes that the spectre of the liquidation of the undertaking in 2004 gave rise to major incidents of social unrest. The violent social unrest of September 2004, for example, brought SNCM's fleet to a standstill for 16 days. The Commission adds that the French authorities provided figures to show that the industrial action of 2004, by tarnishing the brand image of the holding company with customers, was considerably detrimental to the number of passengers transported by SNCM and therefore to the undertaking's turnover. The Commission points out, moreover, that as a result of the adverse effect of the social climate in the summer of 2004 on SNCM's financial situation, the shareholder of the undertaking implemented a social plan in spring 2005 which was suspended in April 2005, in consultation with the unions. On the basis of the foregoing, the Commission takes the view that it has been established that, in the event of a liquidation of SNCM, the CGMF group's failure to take responsibility for the additional redundancy payments would certainly damage the brand image of the holding company to which it belongs and its ultimate shareholder.

(272) Therefore the Commission is of the view that the costs associated with those measures must be included in the calculation of the costs of a liquidation. Those costs would then be charged to the liquidation value of SNCM in so far as that value were positive and/or paid directly by CGMF/the State as shareholder. The Commission considers that any other solution would overlook the social reality which large groups of undertakings face ([135]).

(273) To quantify the cost to the shareholder of liquidation, the Commission accepts a minimum amount corresponding only to the additional redundancy payments.

(274) In that respect, the French authorities consider that, on the basis of the 2005 social plan, itself based on the 2002 social plan, the range should be from EUR […] to […] per employee, that is, a total amount of between EUR […] million and […] million. The French authorities state that the low limits of the abovementioned range take account of the fact that the cost of the reference social plan is increased because of the very large proportion of employees approaching retirement age who leave under particularly advantageous conditions. In addition, account is also taken of the fact that the background of liquidation of the undertaking and redundancy of all the staff is not comparable to that of an adjustment in staff numbers enabling continuation of activities as is the case with the reference social plan.

(275) The Commission expert carried out a comparative analysis of the figures put forward by the French authorities with social plans implemented in France recently. Hewlett Packard's social plan in 2003 cost EUR 214 000 per person and in 2005 between EUR 50 000 and EUR 400 000. In 2004, the social plan set up by Péchiney, after the merger with Alcan, cost EUR 128 000 per person. For the social plan of Giat Industries in 2004, the total cost per employee was in the region of EUR 162 000 as against EUR 71 000 for Gemplus in 2002 and EUR 69 000 for Danone (biscuits division) in 2001. In 2002, Yves Saint Laurent Haute Couture announced a social plan costing EUR 115 000 per employee. The Power 8 plan announced by Airbus France in February 2007 forecast a cost of EUR 68 000 per employee ([136]). In 2008, Michelin's social plan amounted to EUR 157 400 per employee.

(276) As regards dockers, the Commission states that the French Court of Auditors, in its July 2006 public-domain subject report 'French ports faced with changes on maritime transport: the urgency of action' notes the total cost per person of the 2004 social plan, namely EUR 145 000 per departure to autonomous ports and EUR 209 000 per departure from the port of Marseille.

(277) The Commission notes that its decision of 17 July 2002 concerning the *Société Française de Production* illustrates the cost of generosity in the case of privatisation of an undertaking in difficulty. Accordingly, the cost to the State of generosity was EUR 43,1 million (that is, EUR 151 000 per employee under the plan providing for the departure of 285 employees) in addition to the cost of EUR 5,3 million in legal obligations and obligations in agreements (that is, in total a cost of EUR 169 000 per employee).

(278) In the light of that comparative analysis, the Commission considers the payment of EUR […] to each employee by way of additional redundancy payments is consistent with the cost per employee laid off under social plans implemented by private shareholders in the same period.

(279) Finally, the Commission considers that a situation in which all of SNCM's staff are laid off in a liquidation of the undertaking is the most probable situation, in particular because the grant for the public service delegation for the 2007-2013 period had not yet been covered by a call for tenders and, thus, by a final decision. Furthermore, in the light of SNCM's worrying financial situation, it is unlikely that a plan for continued operation had been drawn up so that the undertaking would be put into receivership and redundancies avoided.

(280) In the light of the foregoing elements, the Commission finds a total amount of EUR […] million which CGMF (the State) had to use for additional redundancy payments.

(281) At this stage in the analysis, the Commission must determine the value of the liquidation of SNCM apart from additional redundancy payments. It is in fact the difference between that liquidation value, to the extent that it is positive, and the additional redundancy payments which must be compared to the negative price resulting from the sale in order to verify whether the State acted as a private investor in a market economy. In order to do that, the Commission took as a basis the calculation of the revalued net assets. According to the revalued net asset method, an asset shortfall is determined when the economic value of the actual assets (generally higher than the net ledger assets) does not cover the economic value of the actual debts.

(282) In order to determine an asset shortfall in the present case the Commission, with the assistance of its expert ([137]), verified as explained above that on 30 September 2005 the value of SNCM's assets was not sufficient to pay off preferential and non-preferential creditors (including employees as classic debts).

Choice of valuation methodology

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

(284) As regards other valuation methods, in particular the present value method of unrestricted operating cash flows, the Commission considers that, having regard to the fact that that method presupposes that the company are continues to operate, which is not the case with SNCM, it is irrelevant to the present case.

The reference date

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

The value of SNCM's assets

(286) The Commission observes in particular that SNCM's shareholder, in collaboration with Ernst & Young, carried out a quantification of the cost of liquidation of the undertaking (the CGMF report cited above) on 30 September 2005 to which supplementary expert opinions were given by Oddo Corporate Finance and the firm Paul Hastings. The Commission notes that the Oddo-Hastings report cited above valued SNCM's assets at EUR […] million.

(287) As regards the valuation of the fleet held in its name ([138]), the gross market value of SNCM's vessels had been valued at EUR […] million on 30 September 2005 by the specialist broker BRS, but the Oddo report valued SNCM's fleet at EUR […] million after discount ([139]), brokerage commission ([140]) and legal uncertainty ([141]).

Table 4

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

(EUR million)

	Value of asset Oddo report	Value of asset Commission expert
Intangible asset	—	—
Property, Plant and Equipment		
— Fleet held in own name	[…]	[…]
— Buildings [1]	[…]	[…]
Investments [2]	[…]	[…]
Fixed assets	[…]	[…]
Inventories	—	—
Advances and payments on account	—	—
Debtors clients	[…]	[…]
Other debtors [3]	[…]	[…]
Net cash	[…]	—
Prepayments and accrued income	—	—
Other assets	[…]	[…]
Total Assets	[…]	[…]

(1) So far as concerns buildings (including SNCM's seat) the French authorities state that the liquidation value chosen is based on the valuation of a buildings expert of November 2003 updated by + […] % to take account of the increase in prices.
(2) Investments concern, essentially, SNCM's investments in Sudcargos, Aliso, CGTH, CMN and Ferrytour.
(3) That item concerns, essentially, accounts receivable from the State, inter alia, compensation for public service obligations in September 2005 and reimbursement of employers' social charges by Assedic for the 2004 financial year.
Sources: Oddo-Hastings report, report of the Commission expert.

(288) From the table above it is clear to the Commission that the fleet of vessels constitutes the main element in the valuation of the undertaking. In that respect, the Commission expert considered, having carried out, where possible, a comparative analysis, that the discount applied to the gross market value of the vessels and the legal uncertainty were consistent. On that basis, it concluded that there were no arguments to reject the assessment of the value of the fleet drawn up by the French State.

(289) As regards the discount, the Commission is of the opinion that its level is consistent with the discounts observed in sales of vessels in the event of compulsory liquidation. According to the Commission expert, the Régie des Transports Maritimes, a national Belgian company operating the Ostend-Ramsgate route, for example, sold two car ferries in 1997 with discounts estimated at 35 % to 45 %. More recently, the company Festival Cruises disposed of three cruise vessels at an average discount of 20 %. The discounts observed in similar cases are therefore in the region of the discounts applied by the French authorities in this case.

(290) Concerning the legal uncertainty, since no comparable transaction has taken place on the market, the Commission considers that the arguments justifying the application of legal uncertainty are consistent with the narrowness of the market for vessels of a certain type designed for a fairly specific use.

(291) The Commission notes, in addition, that its independent expert revised upwards the valuation of the investments, in particular that of the SNCM's holding in CMN (of EUR […] million to EUR […] million). In that respect, having regard to the offer to buy out that holding by *Stef-TFE* at EUR […] million sent to the Commission in the present investigation, the Commission considers that the valuation of SNCM's holding in CMN of EUR […] million is reasonable in the context of a company liquidation.

(292) As regards the valuation of the other items of assets, the Commission expert did not raise any specific objection. It did not, however, accept the item 'net cash', since that item was in deficit. The Commission takes the view that in fact that item should be reclassified under SNCM's liabilities.

(293) Having regard to the adjustments made, the Commission values SNCM's assets at EUR […] million on 30 September 2005.

The valuation of SNCM's liabilities

(294) The Commission notes that the French authorities quantify the amount owed as preferential debts at EUR […] million and at EUR […] million the amount owed under non-preferential debts (apart from additional redundancy payments).

(295) As regards, in particular, social liabilities, the French authorities value the cost of the social plan under collective agreement at EUR […] million. The costs relating to the social plan were determined on an individual basis taking into account the type of contract (contract for an indefinite term and fixed-term contract), applicable staff regulations and collective agreements (seagoing staff, office staff and staff captain), seniority, rank and pay of each employee. That amount covers notice payments (EUR […] million), payments for leave taken with notice (EUR […] million), contractual redundancy payments (EUR […] million) and the Delalande contribution (EUR […] million) [142].

(296) The cost of the social plan not covered by the agreement is assessed by the French authorities at EUR […] million. That social plan groups together all the accompanying measures related to SNCM's legal and statutory obligations in redundancy matters [143] and the indirect costs related to the social plan under collective agreement [144].

(297) The cost of termination of the principal operating contracts concerns, essentially, the calling of the bank guarantee of EUR […] million given to guarantee the proper performance by SNCM of its public service obligations, to which is added the penalty provided for by that agreement, equal to […] % of the reference financial compensation of EUR […] million for 2005, that is approximately EUR […] million in the event of fault of the delegatee.

(298) So far as concerns the net liabilities related to the sale of the leased vessels [145], the French authorities state that, on the basis of certain assumptions [146], the net sale proceeds are valued, by the specialist broker BRS, at EUR […] million on 30 September 2005 after discount, brokerage commission and financial cost of porterage. Since the savings on tax and bank debts amount to EUR […] million, there remains a balance of bank debts relating to the leased vessels to be reimbursed of EUR […] million.

Table 5

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

(EUR million)

	Value of liabilities Oddo report	Value of liabilities Commission expert
Preferential debts including:		
— Social and tax debts	[…]	[…]
— Financial debts guaranteed by assets [1]	[…]	[…]
Cost of social plan under a collective agreement	[…]	[…]
Cost of retired employees mutual benefit society [2]	[…]	[…]
Cost of liquidation process	[…]	[…]
Interim operating losses [3]	[…]	[…]
Paying off of preferential creditors	[…]	[…]
Unsecured debts [4]	[…]	[…]
Cost of social plan not covered by a collective agreement	[…]	[…]
Cost of termination of principal operating contracts	[…]	[…]

(EUR million)

	Value of liabilities Oddo report	Value of liabilities Commission expert
Additional cost related to disposal of leased vessels	[…]	[…]
Paying off of non-preferential creditors	[…]	[…]

(1) The vessels Napoléon Bonaparte and Paglia Orba guarantee the amount of naval loans which were used to finance them.
(2) That item falls under the practice according to which SNCM undertakes to be responsible for a part of the costs of the additional mutual benefit society in favour of its retired employees.
(3) Up to the closing of the liquidation. The interim losses take as an underlying basis the payment of salaries for one month only. They also include the cost of laying up vessels held in its name, not deducted from the value of the assets. That cost corresponds to the cost of immobilising vessels in dock awaiting their sale.
(4) Unsecured debts are broken down as follows: Provision for risk and charges (EUR […] million), apportioned debts/participations (EUR […] million), trading suppliers (EUR […] million), general representation (EUR […] million), group and associated debts (EUR […] million), liabilities adjustment account (EUR […] million).
Sources: Oddo-Hastings report, report of the Commission expert.

(299) The Commission notes that social liabilities constitute the main element of SNCM's liabilities. As regards the preferential social liabilities, that is to say the cost of the social plan, the Commission expert verified the formulae for calculating all the components of the plan on the basis of surveys and did not find any anomolies or errors. Having regard to that verification, the Commission considers the amount of EUR […] million put forward by the French authorities for the social plan under a collective agreement to be reasonable.

(300) In respect of the interim operating losses, the Commission considers that the estimate is cautious in the light of the legislation, in particular Articles L.622-10 of the Commerce Code and 119-2 of Decree No 85-1388 of 27 December 1985 pursuant to which SNCM may be obliged by the Commercial Court having jurisdiction to continue its operations for a term of two months, renewable at the request of the prosecuting authority on account of its public service obligations.

(301) So far as concerns the unsecured debts, the Commission expert did not raise any particular objection. However, it adjusted the amount of EUR […] million from the amount of EUR […] million resulting from a recalculation of the assets item 'net cash'. The Commission considers that to be in line with the changes made to the valuation of SNCM's assets.

(302) In respect of the cost of the social plan not covered by a collective agreement (apart from additional redundancy payments), the Commission expert considers that the assessment of the cost of the legal proceedings should be reduced to EUR […] million instead of the EUR […] million given by he French authorities. On that point, although the Commission is of the view that it is certain that trades union organisations asked for the fixed-term contracts to be reclassified as contracts for an indefinite term ([147]), it considers, on the other hand, that the figure must relate only to employees with a fixed-term contract for whom that risk is almost definite (namely, […] fixed-term contracts). Given a gross monthly salary of EUR […] with an allowance of 9 months' salary for the first […] fixed-term contracts and 6 months for the next […] contracts, the amount comes to EUR […] million.

(303) So far as concerns the net liabilities related to the disposal of the leased vessels, the Commission considers that the assumptions underpinning that calculation are justified in particular because of GIE's excessive regard for contractual formalities, which restricts any substitution of SNCM by third parties and makes tax relief subject to the operation of vessels under the French flag. In addition, it is also justified not to apply legal uncertainty to vessels operated under leasing agreements because those vessels were disposed of by the GIE's creditor banks. Against that background, the Commission takes the view that it is reasonable to take into account the financial costs of porterage between 30 September 2005 and the date of actual disposal of the vessel.

(304) In the light of the foregoing, the Commission is of the opinion that on 30 September 2005 SNCM's preferential liabilities were EUR […] million and SNCM's non-preferential liabilities EUR […] million.

The finding of a shortfall in assets

(305) In the light of the foregoing, the Commission considers that on 30 September 2005 the value of SNCM's assets (namely, EUR […] million) was insufficient to pay off preferential creditors (EUR […] million) and non-preferential creditors (EUR […] million).

Conclusion

(306) In the circumstances, in the absence of an action 'en comblement de passif' (see below), and having regard to recital 273 of this decision and the shortfall in assets, the cost of a liquidation of SNCM by CGMF is limited to the costs of additional redundancy payments, that is, EUR […] million.

(307) It follows that the choice made by the French authorities to dispose of SNCM at the negative price of EUR 158 million compared to the minimum liquidation cost of EUR […] million may be considered to be consistent with the choice which a private group of undertakings in a market economy would have made.

10.2.2.2. Consequences of a compulsory liquidation of SNCM

(308) The Commission also examined the argument of the French authorities that the State, as the majority shareholder, could be called upon 'en comblement de passif' in the event of the liquidation of the undertaking (see below). In that case, according to the French authorities, the calculation of the liquidation cost for the State shareholder must take into account national law, as accepted by the Commission in its ABX Logisitics decision [148], and must be determined on a case-by-case basis, taking account of the special features of the sector [149] and the circumstances of the case.

(309) In the present case, the Commission notes that on 28 March 2006 the French authorities delivered to it documents attesting that SNCM's shareholder had carried out research into the least costly solution for it by examining in parallel and from the outset two possibilities, namely the liquidation of the undertaking and its sale at a negative price.

(310) On the basis of the expert's reports cited above sent to the Commission, the French authorities submit that the total actual costs which the French Republic would have to bear as shareholder, through CGMF, amount to EUR […] and […] million on 30 September 2005. That estimate takes account, in particular, of the risk that the French State would be called upon 'en comblement de passif' if the court had had to consider it to be de facto managing SNCM. The French authorities consider that those risks must be taken into account in the calculation of the actual cost of a possible liquidation of SNCM.

(311) Accordingly the question arises as to the assessment of the actual costs as a whole which France would probably have to bear as shareholder in the event of a liquidation of SNCM by the court in order to determine if, in the light of the possibility of being ordered to bear those costs and the extent of such an order [150], a well-informed private investor would have preferred to sell its subsidiary directly at a negative price of EUR 158 million rather than run that risk.

(a) **A possible order against the State 'en comblement de passif'**

(312) In French law, the authorised liquidator of a company in compulsory liquidation has the power to initiate an action for damages against the former directors of the company, known as an 'action en comblement de passif' where there is cancellation of a safeguard plan or receivership or compulsory liquidation [151].

(313) The reason for the bringing of an action 'en comblement de passif' against the former directors of the insolvent company is the need to build up the company's assets, which is one of the tasks entrusted to the authorised liquidator.

(314) In several letters to the Commission, the French authorities submitted that a situation in which the State is ordered by a national court to make good the liabilities of the undertaking which it manages is a highly plaisible scenario and that it must be taken into account in the calculation of the actual cost of a possible liquidation of SNCM.

(315) In its records of 28 February 2008, SNCM provided an expert's report evaluating the consequences of an action 'en comblement de passif' against the French State. That report concluded that a commercial court hearing that case would very probably hold that the State was liable in that respect and would order it to pay SNCM's social debts in their entirety.

(316) In the present case, the Commission is of the view that, in the light of the SNCM's stated asset shortfall (see above) and having regard to the possible civil liability arising on the part of the authorised liquidator in the event of failure to act under the law of 1985 and the creditors' entitlement to bring an action since 2005, it is very likely that an action 'en comblement de passif' would be brought against the French State in the event of a liquidation of SNCM by the court [152].

(317) The relevant legislation provides that the social debts of the company in liquidation may be made chargeable to its former directors at law or in fact, subject to the cumulative fulfilment of four conditions.

(i) *Acknowledgment of the State as director at law or in fact of the undertaking in compulsory liquidation* [153]

(318) In the present case, the Commission notes that SNCM's expert provided a detailed analysis leading to the conclusion that it is very likely that the French State would be described as de facto manager of SNCM. Essentially, the aforesaid expert's report showed, in accordance with the relevant case-law [154], that the State had carried out actual acts as manager and director which did not manifestly fall within the administrative supervision required by law, and had done so over a long period. In particular, according to SNCM's expert report, the State took decisions under its powers of supervision which it had itself set up, thereby misusing its powers of supervision to take decisions on behalf of the undertaking instead of the directors to whom the power to take those decisions falls. Moreover, it appears that SNCM's management bodies did not in fact have any independence from the State in the management of the undertaking. Finally, the State assumed the role of SNCM's management bodies by taking strategic decisions alone without informing those directors.

(319) The Commission notes that the French authorities, in their records of 28 March 2008, did not have any reservations concerning the categorisation of the French State as de facto manager of SNCM. In their letter of 20 November 2006, the French authorities themselves state that the court would certainly categorise SNCM's State shareholder as de facto director of the undertaking. However, it is clear that such a declaration, made in proceedings concerning State aid, cannot in itself suffice to prove satisfactorily that a court considered the national authorities as de facto directors of the undertaking which received the measures in question and, above all, the degree of probability of such an eventuality.

(320) In the circumstances of this case, there is no need for the Commission to take any further view on the assessment of the evidence relied on by the French authorities, having regard to the conclusion reached by the Commission in section 10.2.2.1 above.

(ii) *The existence of one or more acts of mismanagement by the French State, de facto managing the undertaking in compulsory liquidation*

(321) In the present case, the Commission notes that SNCM's expert report referred, on the basis of a non-exhaustive list of facts, to a series of factors to show that the State mismanaged SNCM when acting as its de facto manager.

(322) In particular, it is stated that the French State made errors relating to investments […] The State also committed numerous errors of management with regard to […].

(323) In that respect, […] [155] In their letter of 30 April 2007, the French authorities described the risk of an order for damages against the State as very high, having regard to the […] criteria of categorisation of mismanagement as provided for in Article L.651-2 of the Commercial Code. However, it is clear that such a declaration, made in proceedings concerning State aid, cannot in itself suffice to prove satisfactorily that a court would have considered that the national authorities carried out the acts of mismanagement alleged and, above all, the degree of probability of such an eventuality.

(iii) *The finding of a shortfall in assets*

(324) In the present case, the Commission states that, in its letter of 16 November 2006, the French authorities provided a valuation of SNCM's shortfall in assets on the basis of the expert's reports of CGMF and Oddo-Hastings cited above. The Commission notes that SNCM's expert's report on the action 'en comblement de passif' sent to the Commission in February 2008 takes as a basis those same reports to find that there is a asset shortfall in the event of the compulsory liquidation of the company. In particular, the Oddo-Hastings report points up an asset shortfall of EUR […] million at 30 September 2005, calculated as the difference between the value of SNCM's assets (EUR […] million) and the value of the undertaking's liabilities (preferential and non-preferential debts valued respectively at EUR […] million and EUR […] million.).

(325) The Commission notes that, under the French legislation cited above, there is a shortfall in assets where the authorised liquidator of the company does not have sufficient assets at its disposal to pay off the creditors, whether or not they are preferential. In respect, in particular, of the social debts of the undertaking, the social liabilities of the company consist, at a minimum, of classic salary payables, that is to say those which originate directly in employment contracts, collective agreements or the law and are automatically entered by the authorised liquidator in the liabilities of the undertaking ([156]).

(326) The Commission previously estimated the shortfall in assets of SNCM at EUR […] million at 30 September 2005.

(iv) *The existence of a causal link between the mismismanagement and the state shortfall in assets*

(327) According to the French authorities, under French law, the applicant for an action 'en comblement de passif' does not have to determine the amount of the increase in liabilities caused by the director's mismanagement. The director of a natural person may be declared liable, on the basis of Article L.624-3 of the Commercial Code, even if his act of mismanagement is only one of the causes of the shortfall in assets and may be ordered to bear in whole or in part the social debts, even if his mismanagement is the cause of only a part of them ([157]).

(328) In this case, the Commission notes that SNCM's expert refers to the link between the mismanagement and the stated asset shortfall as obvious. On the basis of the estimates submitted by that expert, the financial loss resulting from the non-exhaustive list of the State's acts of mismanagement stated in recital 322 of this decision amounts to EUR […] million ([158]).

(329) The French authorities […] ([159]).

(330) Moreover, the Commission notes that the French authorities, in their records of 16 November 2006, 27 April 2007 and 28 March 2008 […] ([160]). The French authorities […] ([161]) The French authorities have themselves acknowledged, in their letter of 16 November 2005, that 'it is clear that the State shareholder, which the court would certainly refer to as the de facto director of SNCM, limited liability company, would probably be ordered pursuant to Article L.615-2 to bear the shortfall in SNCM's assets in its entirety'.

(331) In the circumstances of this case, there is no need for the Commission to take any further view on the assessment of the evidence relied on by the French authorities, having regard to the conclusion reached by the Commission in section 10.2.2.1 above.

(b) **The estimate of the total cost of the compulsory liquidation of SNCM**

Determination of the proportion of the shortfall in assets chargeable to the de facto director

(332) In the light of the foregoing, as the file currently stands, the Commission does not have to determine the actual economic cost of the shareholder's liability.

(333) In that respect, the Commission notes that, on the basis of Article L.624-3 of the Commercial Code, the director at law or in fact of the company in liquidation is ordered, in such circumstances, to pay all or part of the shortfall in assets established.

(334) The Commission notes that the aforesaid article leaves the courts entirely at liberty to assess if there is any need to order the director to bear the social debts in whole or in part. In the light of the relevant case-law, it appears that the courts take into account the conduct of the director against whom proceedings are brought and adjust orders according to the facts proven.

(335) As stated above, the French authorities consider that the French State would be called upon to bear a proportion estimated between […] % and […] % of the established shortfall in assets, that is, a range between EUR […] million and EUR […] million.

(336) The Commission states that, in a situation similar to SNCM's relating to the company Les Mines de Salsignes, a sub-branch of BRGM (public company of an industrial and commercial nature) ([162]), the commercial division of the Court of Cassation ordered BGRM and its subsidiaries, as de facto directors, to pay the entirety of the shortfall in assets jointly and severally with the other directors of the company Les Mines de Salsignes ([163]). The portion of the social debts chargeable to the company Coframines and BGRM and therefore, ultimately, to the State, was 73,6 %. As set out in that decision, the Court of Cassation noted that the management board was a dependent of the two bodies under consideration.

(337) However, the Commission takes the view that the French authorities have not shown, in the light of the rules on State aid, in what respect the aforesaid acts of mismanagement of the State prejudicial to the undertaking are acts which any other private shareholder in a market economy might have carried out. In that regard, it must be stated that only such acts, duly proven, may be taken into account in order to determine whether, having regard to the likelihood of being ordered to bear those costs and to the extent of those costs (that is, the present net value of the likelihood of any such future order), a well-informed private operator would prefer to pay directly a negative price of EUR 158 million rather than run that risk. The view cannot be taken that a private investor would be led to carry out wrongful acts owing to considerations of a general rather than entrepreneurial nature (for example, for social or regional development purposes).

(338) The Commission does not deny that, in certain exceptional cases, there is national legislation which enables third parties to bring proceedings against the shareholders of a liquidated company, in particular if those shareholders may be considered to be directors at law or in fact who have carried out acts of mismanagement prejudicial to the undertaking. However, although such a possibility exists under French law, the Commission considers that the French authorities have not sufficiently dispelled the Commission's doubts in the present case concerning the arguments relating to the likelihood that, in the event of SNCM's liquidation, the French State would be ordered to make good that company's liabilities. It is not, however, necessary to reach a conclusion on that point in this decision in the light of the conclusion reached by the Commission in section 10.2.2.1 above.

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

(339) According to the French authorities, in addition to the asset shortfall, having regard to the relevant case-law [164], a court would certainly find it necessary to order the French State to pay the additional redundancy payments (between EUR […] million and EUR […] million). According to the French authorities, the actual costs which the French State as shareholder would have to pay as a whole fall within an inclusive range of between EUR […] million and EUR […] million.

(340) The French authorities state that, in recent judgments, French courts have ordered the director at law or in fact to pay, in addition to the asset shortfall, additional redundancy payments calculated on the basis of a social plan drawn up by the undertaking before it was put into liquidation.

(341) The French authorities state in particular that, in the *Aspocomp* case, the French company Aspocomp SAS, 99 % subsidiary of the Finnish company Aspocomp Group Oyj, signed a company-level agreement on 18 January 2002 describing the conditions for indemnification of a social plan relating to 210 employees of a total of 550. That agreement described, in particular, the amount of compensation and additional payments as well as assistance for voluntary redundancy. Following a change in group strategy, the parent company Aspocomp Group Oyj decided on 21 February 2002 to stop financing its subsidiary Aspocomp SAS and thus caused the voluntary liquidation of the latter. That decision de facto prevented the subsidiary from meeting the commitments under the company-level agreement and led it to lay off all of its other employees.

(342) In those circumstances, the judgment of the Court of Appeal of Rouen confirmed the judgment of the Evreux labour court and thus ordered the company Aspocomp Group Oyj, which had 99 % control of the management of its subsidiary, to pay: (i) the employees affected by the company-level agreement, the entire compensation and additional payments provided for in that agreement alone, as well as damages for redundancy without actual and serious basis and (ii) the employees laid off under the voluntary liquidation of Aspocomp equivalent payments given that, by not meeting the commitments made, the parent company had acted unfairly and in a culpably thoughtless manner.

(343) In the present case, the Commission observes that, according to the supporting documents in the file, a negotiated social plan, based on the 2002 social plan and implemented in the spring of 2005, was suspended on 25 April 2005 by SNCM's shareholder without consultation with the undertaking's management. The Commission states, moreover, that the the social plan was drawn up prior to the decision of the State to sell SNCM.

(344) The Commission takes the view that, had SNCM been liquidated, the employees of the undertaking would certainly have relied on the provisions of that social plan before the courts.

(345) In order for such a step to be relevant in a case such as this one, the Commission should ascertain (i) whether a court would censure the Member State for having suspended the social plan in question without consulting the undertaking's management (ii) the amount which the Member State could have been ordered to pay in that eventuality and (iii) the degree of probability of that eventuality [165].

(346) The Commission notes that a judgment of the commercial division of the Court of Cassation, in which that court states that it would be prepared to grant an action in damages against a dominant company the wrongful conduct of which led to the downfall of the subsidiary, and as a result, collective redundancies [166], is to the same effect as the Aspocomp case-law.

(347) The Commission notes, however, that the line taken by the judgment of the Court of Appeal of Rouen has so far not been reflected in other judgments of the same kind. The Commission therefore considers that the French authorities have not sufficiently dispelled the Commission's doubts regarding the fact that SNCM's shareholder would be at a reasonably certain risk of its liability being put in issue and of having to make additional redundancy payments on the basis of that case-law. It is not, however, necessary to reach a conclusion on that point in this decision in the light of the conclusion reached by the Commission in section 10.2.2.1 above.

10.2.2.3. Conclusion

(348) The Commission takes the view, on the basis of the foregoing, that the choice to sell SNCM at a negative price of EUR 158 million is consistent with the choice which a private group of undertakings in a market economy would have made taking account of the social costs which a liquidation of the undertaking would entail.

(349) The Commission based the above analysis only on the assumptions which it considered reasonable and sufficiently motivated. Those estimates lead to the view that the discrepancy between the scenario chosen by the French authorities and the alternative solution would be at least EUR […] million, which should more than cover a possible error in the estimates arrived at after analysis.

(350) Further, the Commission is of the opinion that the negative price of EUR 158 million is the result of a commercial negotiation between the State and the private purchasers following an open, transparent, non-discriminatory and unconditional public selection procedure. In that respect, the Commission considers that that price, which is the best possible price, constitutes a market price.

(351) In spite of the restrictions referred to in paragraph 284 of this decision, the Commission states that the Commission expert verified the valuation scenarios of SNCM on the basis of the present value method of unrestricted operating cash flows stemming from a report of HSBC bank commissioned by the French authorities. The Commission's expert considers that HSBC's calculations were made correctly. On the basis of the results of those simulations, it may be concluded that the price paid for SNCM is consistent with the value of the undertaking estimated on the basis of the present value method of unrestricted operating cash flows at the time of the transaction.

(352) It follows from section 10.2.2.1 above, without any need to reach a conclusion on the aspects set out in section 10.2.2.2 above, that that measure does not confer any economic advantage on either SNCM or its private purchasers. Therefore the State's capital contribution of EUR 158 million prior to the sale of the undertaking to private purchasers, that is to say, the negative sale price of EUR 158 million, does not constitute State aid within the meaning of Article 87(1) EC.

10.3. **The capital contribution of CGMF of EUR 8,75 million**

10.3.1. *Legal framework*

(353) If intervention by the public authorities at issue takes place concurrently with significant intervention by private operators, under comparable conditions, the existence of an economic advantage may be automatically ruled out [167].

(354) The Commission's practice in previous decisions, confirmed by the Community judicature, automatically excludes the aid nature of a capital contribution by the State in such circumstances provided that three conditions are fulfilled:

— The private intervention must come from economic operators. That is not the case with an acquisition of a holding by employees in the capital of the undertaking concerned [168],

— The private intervention must be significant. That is not the case, for example, where such private intervention relates only to 3,3 % of the total amount involved [169],

— The private intervention must also be concurrent with the public intervention. The Court has thus confirmed the Commission's analysis that public contributions may constitute State aid when private investments in the same undertaking are made only after the allocation of the public contributions [170]. The Commission accepts, however, sometimes to take account of private intervention which took place shortly after public intervention, in particular when the private investor has already signed a letter of intent at the time of the public intervention [171].

10.3.2. *Application to the present case*

(355) The Commission notes, first, that the shares in SNCM were transferred to the economic operators BCP and VT. Following the transfer transaction, the State had to contribute concurrently a sum of EUR 8,75 million to the undertaking in order to maintain the 25 % holding in SNCM in accordance with its commitment in particular vis-à-vis the employees.

(356) Next, the contribution of the French State of EUR 8,75 million must be compared to the contribution of the private purchasers, that is EUR 26,25 million. That distribution follows, as stated previously, from the commitment of the French authorities to maintain a 25 % holding in the undertaking concerned. Since the private intervention relates to 75 % of the total amount, the Commission considers it to be significant. Moreover the Commission notes, solely in the interest of completeness, that the private partners have a sound financial structure, that the acquisition of SNCM fits perfectly into their entrepreneurial strategy and that the business plan of those purchasers provides for a return to profitability for the end of 2009.

(357) As regards, finally, the concurrent nature of the two capital contribution transactions, the Commission's expert verified that that capital had been paid by all SNCM's shareholders, including CGMF.

(358) It was verified that, on 31 May 2006, the management board of SNCM stated that the two transactions cited above had been carried out. In particular, the related and concurrent increase in capital of all shareholders for the sum of EUR 35 million took place on 31 May 2006. It took place in two concurrent stages: (i) a first increase in capital of […] shares to which the purchasers subscribed in full, in cash and at nominal value (EUR […]), and (ii) a second increase in capital of […] shares (a quarter paid up) to which the purchasers ([…] shares, that is, EUR 26,25 million) and the French State ([…] shares, that is, EUR 8,75 million) subscribed in part, under the same conditions, namely subscription in cash for a nominal amount of EUR […].

(359) The public and private capital contributions are therefore plainly concurrent.

(360) In the light of the foregoing, the Commission considers that the criteria laid down by the case-law to exclude automatically the aid nature of the measure in question are fulfilled. The Commission therefore considers that the French State's capital contribution of EUR 8,75 million does not confer any economic advantage on SNCM since that contribution was made in parallel to a contribution of private capital under comparable conditions in accordance with Community case-law.

(361) In any event, the Commission is of the opinion that the rate of return of the State's contribution, that is, […] % per annum, constitutes adequate long-term profitability for capital invested by a private investor.

(362) In that regard, the Commission notes that the fixed yield of the State's capital investment in SNCM exempts the latter from any exposure in respect of performance of the business plan since that yield is completely dissociated from the performance (upwards or downwards) of the undertaking. Accordingly, the grant of the public service delegation will not enable the State to increase the yield expected from its holding.

(363) The Commission's expert concluded that in terms of risks the French State's capital contribtution bore more similarity to a bond at a fixed rate than to an investment in shares. It follows that the rate of return of […] % should be compared to the rate for bonds in the French private sector at the time of the transaction. According to the Commission's expert, that rate was established at 4,15 % at the end of May 2006.

(364) The Commission considers, finally, that the existence of the clause to cancel the sale of SNCM is not such as to call into question the principle of equal treatment of investors. That clause relates, in fact, to the entire sale of SNCM to private purchasers and not to the concurrent investment (EUR 35 million) by private investors (EUR 26,25 million) and the State (EUR 8,75 million) in the privatised SNCM.

(365) In the light of the foregoing, the Commission finds that the measure at issue does not constitute State aid within the meaning of Article 87(1) EC.

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

10.4.1. *Legal framework*

(366) In order to determine whether a measure gives an undertaking an economic advantage, 'it is necessary […] to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions' [172] or if the undertaking avoids 'having to bear costs which would normally have had to be met out of the undertaking's own financial resources, and thereby prevented market forces from having their normal effect' [173].

(367) The Court has consistently held that a normal charge is a charge which an undertaking must normally be able to bear as part of its day-to-day running or its normal activities [174]. To be more precise, the Court stated that a reduction in social charges constitutes State aid when such a measure is 'intended partially to exempt undertakings in a particular sector from the pecuniary social charges arising from the normal application of the general social security system when such an exemption is not justified by the nature or general scheme of that system' [175]. In that judgment, the Court clearly states that the existence of an economic advantage must be determined in relation to the social security system in general, thereby applying a logic similar to that used tax cases.

(368) On 20 September 2001, the Court reaffirmed that approach: 'an aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question, whereas a special charge is, on the contrary, an additional charge over and above those normal charges' [176].

(369) Accordingly, in order to identify what constitutes an advantage in accordance with the case-law on State aid, it is crucial to determine the rule of reference or the common system applicable within a given legal system on the basis of which the advantage in question is to be compared [177]. In this respect, the Court has also held that the determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only in relation to 'normal' taxation, that is the tax rate in force in the reference geographical area [178].

(370) Furthermore, it is established case-law that 'for the application of Article 92 of the Treaty, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time. […] The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour "certain undertakings or the production of certain goods" within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question' [179].

10.4.2. *Application to the present case*

(371) It follows from the case-law and the Commission's past practice [180] that, in order to rule out the aid nature of the measure in question, the Commission must ascertain that the measure does not exempt SNCM from having to pay charges arising out of its day-to-day operations, that is, in the present case, charges arising out of the normal application of social legislation applicable to the sector in respect of employment contracts.

(372) In that respect, the Commission confirms that, in compliance with the memorandum of understanding signed by the parties, the escrow account may be used solely for the purpose of financing compensation paid to individuals whose employment contracts with SNCM have been terminated prematurely. Therefore, it is neither the intention nor the effect of those measures to make it possible for employees to leave who, without those measures, would have been able to remain the responsibility of SNCM.

(373) The Commission also notes that the grant of that compensation to workers laid off after the sale of SNCM was approved by the State in the exercise of its public authority and not by the company.

(374) Furthermore, the Commission notes that those additional social measures go beyond the compensation provided for by social legislation and the applicable collective agreements. The costs arising out of the application of the latter therefore continue to be borne in their entirety by SNCM.

(375) Finally, the Commission observes that those additional social measures will be implemented if, once SNCM has been sold, the purchasers decide to reduce staff numbers. In other words, that compensation does not relate to the planned staff reductions provided for under the 2002 restructuring plan.

(376) Therefore, the Commission is of the opinion that the cost of the additional social compensation does not overlap either with the cost of the social plans borne by the State which were in existence prior to the transfer, or with the social costs estimated previously in the event of the compulsory liquidation of SNCM.

(377) Accordingly, the additional social measures do not constitute charges arising out of the normal application of the social legislation applicable to cases where employment contracts have been terminated.

(378) For the sake of completeness, the Commission notes that, even when the amount of EUR 38,5 million is added to the State's capital contribution of EUR 142,5 million, the adjusted negative selling price of EUR 196,5 million is still well below the cost of compulsory liquidation of SNCM (see point 3 of this decision).

(379) In light of the foregoing and in accordance with its previous decisions [181], the Commission considers the implementation by means of public funds of additional social measures in favour of persons laid off, without the measures in question relieving the employer of the normal charges it has to bear, to be a matter for the Member States within the scope of their social policy, and does not constitute direct aid within the meaning of Article 87(1) EC. The Commission considers that it does not constitute indirect aid either, as it only benefits staff after they have been laid off.

10.5. **The balance of EUR 22,52 million notified as restructuring aid**

(380) In light of the foregoing and in accordance with recital 258 of this decision, the amount of the subsidy to be assessed as State aid other than public service compensation is EUR 22,52 million [182] and represents part of the capital injection notified by the French authorities in 2002.

(381) The Commission finds that that amount confers on SNCM a selective economic advantage and, consequently, that the subsidy in question constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

10.5.1. *Compatibility of the measure with the Community Guidelines on rescue aid and restructuring aid*

(382) The measure in question was notified in 2002 by the French authorities in accordance with the 1999 Community Guidelines on rescue aid and restructuring aid [183].

(383) For the purposes of assessing restructuring aid for shipping companies [184], the Community guidelines on State aid for maritime transport refer back to the above-mentioned Guidelines. Under point 19 of those Guidelines, 'the only basis whereby aid for rescuing or restructuring firms in difficulty can be deemed compatible is Article 87(3)(c)'.

(384) As regards the compatibility of State aid for restructuring with Article 87(3)(c) EC, according to the case-law, the Commission's decision must state the reasons why it considers the aid to be justified having regard to the conditions laid down in the Guidelines, in particular, the existence of a restructuring plan, satisfactory demonstration of long-term viability and the proportionality of the aid in the light of the recipient's contribution to it.

Nature of firm in difficulty

(385) In order to be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the 1999 Guidelines [185].

(386) In the present case, the Commission reiterates that this criterion was ascertained in its decision of 17 July 2002 on rescue aid for SNCM ([186]) and in its decision of 19 August 2002 initiating the formal investigation procedure against the recapitalisation plan on the basis of SNCM's annual accounts for 2001.

(387) For the purpose of this decision, the Commission has verified that SNCM satisfied the condition in question on the basis of the company's annual accounts for 2002. Accordingly, the company's capital (excluding regulated provisions) ([187]) is still negative: EUR – 26,5 million in 2002 as opposed to EUR – 30,7 million in 2001. That level reflects the disappearance of more than half of the company's share capital, more than a quarter of which disappeared during the last 12 months following the notification, thus confirming the sufficient but non-obligatory condition described in point 5(a) of the Guidelines.

(388) Besides that trend in the share capital, the Commission notes, inter alia, that

— between 2001 and 2002, pre-tax losses increased from EUR – 5,1 million in 2001 to EUR – 5,8 million in 2002, with net losses in 2002 reduced only through the sale of a number of ships,

— SNCM's cash flow decreased to EUR 35,7 million at the end of 2002 from EUR 39,2 million at the end of 2001,

— net financial debt, excluding leasing, increased from EUR 135,8 million in 2000 to EUR 144,8 million in 2002,

— financial charges (interest and similar charges) increased from EUR 7 million in 2000 to EUR 9 503 million in 2002.

(389) Moreover, the French authorities have confirmed to the Commission that the banks are now refusing to lend money to the company because of its indebtedness, even though SNCM has proposed to put up its newest vessels, free from mortgages or other burdens, as security.

(390) Finally, the public service delegation contract does nothing to change that analysis. While the contract will certainly enable SNCM, in conjunction with the success of the restructuring plan, to attain positive operating results, the fact remains that its acute lack of capital, its growing indebtedness and the cost of operational measures under the restructuring plan are expected, after a certain period of time, to result in the insolvency of the company.

(391) In light of the foregoing, the Commission takes the view that SNCM satisfies both the condition laid down in point 5(a) of the Guidelines and the condition laid down in point 6. The Commission therefore notes that, in 2002, SNCM was a firm in difficulty within the meaning of the Guidelines.

Restoration of viability (points 31 to 34 of the Guidelines)

(392) According to the 1999 Guidelines, aid is granted on condition that a restructuring plan, to be validated by the Commission, is implemented. As indicated in paragraph 79 of the decision in 2006 to extend the formal investigation procedure and in view of the fact that the Commission did not consider the measures implemented after the 2002 notification to constitute State aid, the Commission notes that the compatibility of the capital injection of EUR 22,52 million with the 1999 Guidelines must be examined on the basis of the 2002 restructuring plan. 'It is necessary to place oneself in the context of the period during which the financial support measures were taken in order to […] refrain from any assessment based on a later situation' ([188]).

(393) On the basis of the information provided by the French authorities, the Commission notes that, even though the 2002 restructuring plan envisaged a return to profitability by 2003 due to measures introduced gradually in 2002 and 2003 in particular, the fact remains that SNCM regained a 'adequate' level of equity capital only around 2005-2006. Accordingly, the Commission sets 31 December 2006 as the end of the restructuring period.

(394) The return to profitability of services between Marseilles and Corsica is expected in the short term and services to the Maghreb are already profitable. Only services from Nice remain more uncertain but their relative importance is diminishing and the early depreciation of the Liamone in 2001 will make it possible to turn the company around to positive results on that route. Moreover, the Commission accepts the argument that a presence, even a reduced one, from Nice remains necessary for the company's position on the market as a whole. Redeployment to the Maghreb will help to reduce the company's dependence on its traditional routes and should also help it to restore viability in view of […].

(395) With regard to long-term viability, that is, beyond the term of the current public service delegation contract, the Commission takes the view that implementation of the plan should make it possible for the company to face competition effectively when contracts are renewed. Finally, it notes that, even if there is a partial loss (a car ferry), that contract should enable the company to maintain positive results. If the loss of that contract

should lead to a 40 % or higher reduction in company revenue in its traditional market, as envisaged in another scenario, the Commission believes that that would bring about a situation which few restructuring plans, with or without public support, could remedy, and that it is premature to envisage it at this stage.

(396) As the market study makes 'realistic assumptions as to future operating conditions', the Commission considers the study to be a serious one and to be a sound basis for scenarios of company growth.

(397) The Commission observes that in order to help the company restore its viability, the restructuring plan sets out to achieve greater viability mainly by implementing internal measures such as better control of its production costs and better productivity. Moreover, if SNCM's financial situation is improved by redeploying its activities on services to the Maghreb in view of the growth prospects of that market, the 2002 restructuring plan also contains measures aimed at withdrawing certain activities, in particular of its Italian subsidiary Corsica Marittima.

(398) The Commission considers that the impact of the measures contained in the notified plan and the success of that plan are not dependent on market trends, except for the increase of services to the Maghreb which corresponds above all to a return to the position which SNCM had until the mid-1990s.

(399) Moreover, the Commission notes that the restructuring plan takes account of the situation relating to and foreseeable changes in supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and SNCM's specific strengths and weaknesses.

(400) Finally, the Commission believes that the restructuring plan proposes a transformation of SNCM so that it can cover all its costs, including depreciation costs and financial charges, once the restructuring has been completed.

(401) In light of the foregoing, the Commission notes that, on the basis of the information available at the time at which the financial support measures were taken, the criterion relating to the viability of the company has been satisfied.

Avoidance of undue distortions of competition (points 35 to 39 of the Guidelines)

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

(403) In the present case, such a condition should be implemented by limiting the presence which the company can enjoy on its traditional market, namely services to Corsica, which is also the market in which it faces competition from companies established in the Community, which is not the case for services to the Maghreb.

(404) The Commission is of the opinion that there is no excess capacity on services by sea to Corsica in view of the highly seasonal character and the significant growth in traffic. The Commission also notes that the average occupancy rate on ships of SNCM's main competitor is lower than that of the public company. As there is no excess capacity on the market within the meaning of the Guidelines, there is no need to contribute to its improvement. The sale of ships — rather than their demolition — therefore constitutes a reduction in capacity admissible under the Guidelines.

(405) The compulsory limitation or reduction of the company's presence on the relevant market or markets in which the company operates effectively represents a compensatory measure in favour of competitors. The measure should be in proportion to the distortive effects which the aid will cause or is likely to cause.

(406) The restructuring plan significantly reduces the firm's presence on its market to the direct benefit of its competitors, due to the implementation of the following:

— the closure of the Corsica Marittima subsidiary (82 000 passengers in 2000) which was responsible for services between Italy and Corsica, and thus the withdrawal of the SNCM group from the market relating to services between Italy and Corsica,

— the virtual withdrawal by SNCM of services between Toulon and Corsica, a market which in 2002 accounted for as many as 460 000 passengers,

— the limitation of the total number of available seats and the number of round trips operated by SNCM each year from 2003, specifically on services between Nice and Corsica,

— the sale of four ships.

(407) Throughout the Gulf of Genoa and from Toulon, SNCM is reducing the services it offers by more than one million seats a year compared with 2001, that is by more than half, which is to the immediate benefit of its competitors, even though it is those services which have the strongest growth.

(408) Despite the considerable scope of those measures, they were supplemented by an obligation on SNCM not to finance, during the restructuring period, any new investments other than the costs included in the restructuring plan for redeploying activities to the Maghreb.

(409) In the light of the foregoing, the Commission notes that the criterion relating to the avoidance of undue distortions of competition is satisfied.

Aid limited to the minimum (points 40 to 41 of the Guidelines)

(410) The amount of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs, without thereby jeopardising its chances of restoring viability.

(411) In its Decision of 19 August 2002, the Commission expressed misgivings about the method of calculation submitted by the French authorities in order to determine the amount of aid. Notwithstanding the additional explanations supplied by France, the Commission has made its own assessment.

(412) Indeed, with regard to the approach adopted by the French authorities, namely, an approach based on the capital/debt ratio, the Commission believes that:

— the panel of five companies used by the French authorities is not sufficiently representative of the maritime cabotage sector,

— the 79 % capital/debt ratio produced by this panel of companies is in fact in no way a reliable indicator of a company's health,

— the French authorities have not explained what exactly is covered by the amount of financial debts of those five companies and therefore cannot guarantee that that data is consistent with the amount of SNCM's indebtedness as stated in the restructuring plan,

— the French authorities have not shown that the 79 % capital/debt ratio emerging from that panel of companies is properly taken into account for the period 2002-2007 in the financial model included in the restructuring plan.

(413) The Commission is critical of the other approaches put forward by France to demonstrate that the capital provided was limited to a minimum, and doubts their relevance ([189]).

(414) The Commission takes the view that the primary aim of the capital injection should not be to increase the company's equity (simple financial restructuring) but to help the company to move from its monopoly position under the 1976 agreement to a competitive position. This is why the Commission is reluctant to base the level of aid on the method adopted by the French authorities, as it is difficult to specify the appropriate level of SNCM's capital. The Commission points out that by adding or removing certain companies from the panel chosen by the French authorities, the average capital/debt ratio may vary significantly.

(415) The Commission is of the view that the restructuring aid can cover the costs of the various restructuring plan activities required as a result of the changes in the company's legal and competitive environment (operational restructuring). With regard to the costs associated with the operational restructuring measures, the Commission bases its decision on the figure of EUR 46 million (see recital 55 of this decision) ([190]).

(416) As the calculation should be an accurate estimate of SNCM's need for aid, the Commission reiterates that 'it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to […] refrain from any assessment based on a later situation' ([191]).

(417) In the present case, the Commission notes, having regard to point 40 of the Guidelines, that significant sales of essentially naval assets amounting to EUR 26,25 million in net proceeds from associated debts ([192]) occurred between 18 February 2002, the date on which the restructuring aid was notified by the French authorities, and 9 July 2003, the date on which the Commission issued its decision to approve the restructuring aid.

(418) Nevertheless, those sales are not enough to restore viability to SNCM, whose financial situation remains characterised by significant liabilities (EUR 19,75 million) at the end of that operation. As SNCM is unable to obtain a bank loan (even if it proposes its newest vessels, free of mortgages or other burdens, as a mortgage guarantee) the Commission therefore considers that the company is not able to find other internal resources to finance its restructuring.

(419) Having regard to the foregoing, the Commission therefore reaches the conclusion that the sum of EUR 19,75 million is justified as a means of restoring the company's viability in the short term.

(420) The Commission finds therefore that, of the EUR 22,52 million of restructuring aid originally notified, only EUR 19,75 million can be justified on the basis of SNCM's cash-flow requirements and of the sales of assets carried out by 9 July 2003, subject to inclusion of the proceeds from asset disposals (see below) imposed by the Commission in its 2003 decision in addition to the disposals included in the restructuring plan.

Compliance with the 'one time, last time' principle

(421) The Guidelines ([193]) provide that a company which in the past has already benefited from restructuring aid cannot normally receive such aid a second time during the ten years following the end of the restructuring period. Among the forms of aid already allocated to SNCM, there is no restructuring aid. This is in fact SNCM's first restructuring programme since its inception in 1976.

10.5.2. *Continuation of compensatory measures*

(422) As suggested by the Court in its 2005 judgment and set out in point 137 of the 2006 extension decision, the fact that the aid amount validated under the 1999 Guidelines was subject to a downward adjustment raises the question as to the continuation of compensatory measures imposed by the Commission in its 2003 decision.

(423) In its 2003 decision the Commission approved a capital injection of EUR 76 million under the 1999 Guidelines subject to the following conditions ([194]):

(i) to refrain, until 31 December 2006, from acquiring new ships and signing contracts for building, ordering or chartering new or refurbished ships;

(ii) to use, until 31 December 2006, only the 11 ships already in SNCM's possession;

(iii) to dispose of all its direct and indirect holdings in Amadeus France, Compagnie Corse Méditerranée, Société Civile Immobilière (SCI) Schuman, Société Méditerranéenne d'Investissements et de Participations, SOMECA;

(iv) to refrain, until 31 December 2006, from pursuing a fares policy in respect of published fares intended to offer lower fares than those of each of its competitors for equivalent destinations and services and identical dates;

(v) to limit, until 31 December 2006, the annual number of round trips on the various sea links to Corsica.

(424) The Commission expert has verified that all the conditions laid down in the 2003 Commission decision were implemented.

(425) It confirmed that the conditions relating to the acquisition of ships was respected (see condition (i) above). It should be noted at this point that the Superfast, renamed the Jean Nicoli, was acquired by VT and leased to SNCM from February 2007, that is, after the end of the period stipulated in the 2003 decision ([195]).

(426) As regards the use of SNCM's existing fleet (condition (ii) above), the Commission expert confirmed that SNCM had maintained its fleet of 10 ships, that is to say, one unit less than the limit of 11 ships imposed by the 2003 decision, following the replacement of the Aliso by the Asco in 2004 ([196]) and the disposal of the Asco on 24 May 2005.

(427) With regard to the replacement of the Aliso by the Asco, the Commission notes that the Asco and the Aliso are 'sister ships', that is twin vessels built using the same plans and by the same shipyard. They have exactly the same size, shape and capacity. The Commission finds that the swap of the two ships does not result in an increase in SNCM's capacity. The Commission also notes that the composition of SNCM's authorised fleet may only be modified for reasons beyond SNCM's control. In the present case, the Commission is of the opinion that the problems which SNCM encountered in disposing of the Asco were beyond the company's control. The Commission considers that if SNCM had found a buyer for the Aliso instead of the Asco, the sale of the Aliso would have had the same effect on the Company's capacity as the sale of the Asco and that the French authorities would have complied with the restructuring plan with regard to the sale of four vessels from SNCM's operational fleet.

(428) Furthermore, the expert stated on the basis of accounting records that all disposals of assets imposed by the 2003 decision (condition (iii) above) had been effected. The net proceeds of the disposals amount to EUR 5,02 million ([197]). The Commission points out that, in addition to the disposals contained in the 2002 restructuring plan or imposed by the 2003 decision, SNCM effected other disposals ([198]) which have been verified by the Commission expert and which generated net proceeds of EUR 12,6 million.

(429) With regard to the condition to refrain from price leadership ([199]), the Commission expert has verified that SNCM has an internal procedure to ensure that that condition is met. The expert also examined how SNCM applied that condition on its various services during the period from 16 March 2005 to 31 December 2006 ([200]). On the basis of that examination, the Commission expert concludes that, in […] % of cases, the tickets issued by SNCM were in compliance with condition (iv). The Commission notes that, based on the information provided by the French authorities, SNCM still applies conditions (iv) and (v) today even though the 2003 decision only required it to do so until 31 December 2006.

(430) As for condition (v), the expert confirmed that SNCM had complied with the number of crossings during the 2005 and 2006 financial years. However, the company had exceeded the standard maximum number of seats available on crossings departing from Marseilles in 2005 and 2006 and, to a very slight extent, the maximum number of linear metres offered on crossings departing from Toulon in 2005 and 2006 and from Marseilles in 2006.

(431) With regard to the last point, the Commission notes, however, that exclusive cabin occupancy per family makes it difficult to estimate accurately the extent to which the standards were exceeded. That single factor should not therefore result in SNCM's being considered to have failed to meet the conditions imposed upon it by the 2003 decision.

(432) In the light of the foregoing, the Commission concludes that SNCM implemented the compensatory measures imposed by the 2003 decision.

10.5.3. *Conclusion*

(433) The Commission observes that SNCM has complied with almost all the compensatory measures in the 2003 decision. In view of the large reduction in the amount of aid approved under the 1999 Guidelines compared to the amount approved in 2003 (the amount in question having led the Commission to impose the abovementioned conditions), the Commission does not deem it necessary to impose additional conditions or requirements to avoid a distortion of competition which would be contrary to the common interest.

(434) In the light of the foregoing and taking into account the precise amount of the net proceeds of the disposals on the date on which the 2005 decision was adopted, the Commission considers the State aid granted in the form of a capital contribution of EUR 15,81 million [201] to be compatible pursuant to Article 87(3)(c) EC.

11. **CONCLUSION**

(435) In conclusion, the Commission considers that the measures which are the subject of this decision do not constitute aid under Article 87(1) EC or is aid compatible with the common market.

(436) The Commission calls upon France to:

— inform the Commission as soon as possible, and not later than 15 working days after the date on which this decision is received, of the elements which it believes should be covered by the obligation of professional secrecy provided for in Article 25 of Regulation (EC) No 659/1999,

— inform the recipient of the aid of this decision as soon as possible, without divulging, where appropriate, any elements which it considers to be covered by professional secrecy, of which communication to the recipient of the aid could be harmful to some interested parties, and indicate in the version transmitted, where appropriate, any other elements which it deems to be covered by professional secrecy and which it has divulged.

(437) The Commission reminds France that, under the guidelines, further restructuring aid cannot normally be considered, save in exceptional and unforeseeable circumstances for which the company is not responsible, during the 10 years following the end of the restructuring period, that is to say in this case 31 December 2006,

HAS ADOPTED THIS DECISION:

Article 1

The compensation of EUR 53,48 million for public service obligations paid by the French State to SNCM for the period 1991-2001 constitutes unlawful State aid for the purpose of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

The negative sale price of SNCM of EUR 158 million, the EUR 38,5 million in social measures aimed at employees and borne by CGMF, as well as the related and concurrent recapitalisation of SNCM by CGMF for the sum of EUR 8,75 million do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The EUR 15,81 million in restructuring aid operated by France to benefit SNCM constitutes illegal aid within the meaning of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 8 July 2008.

For the Commission

Antonio TAJANI

Vice-President

(1) OJ C 308, 11.12.2002, p. 29.

(2) That restructuring plan followed the notification by the French authorities on 20 December 2001 of a cash advance granted by the Compagnie Générale Maritime et Financière to SNCM for the sum of EUR 22,5 million for rescue aid. By decision of 17 July 2002 (OJ C 148, 25.6.2003, p. 7), hereinafter 'the 2002 decision', the Commission authorised rescue aid in favour fo SNCM under the preliminary examination procedure for aid as provided for in Article 88(3) EC. On 19 November 2002, the French authorities transmitted a copy of the cash advance agreements between SNCM and CGMF and proof of the refunds of the advance by CGMF to SNCM through two bank transfers of 13 May and 14 June 2002.

(3) Registered under Reference TREN (2005) A/61846.

(4) CGMF is a fully-owned French State financial holding which acts on it behalf for all operations concerning maritime transport, fitting out and leasing vessels in the Mediterranean.

(5) OJ L 83, 27.3.1999, p. 1. Since the French authorities decided on 11 September 2002 to correct some factual errors in the decision of 19 August 2002, the Commission adopted a decision on 27 November 2002 amending the decision of 19 August 2002 (published in the OJ C 308, 11.12.2002, p. 29). Interested parties were invited to submit their observations on the planned aid from that date.

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

(7) Registered under Reference SG (2002) A/10050.

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

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

(10) Registered under Reference TREN (2005) A/21531.

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

(12) OJ C 288, 9.10.1999, p. 2.

(13) Registered under Reference TREN (2005) A/21701.

(14) OJ L 61, 27.2.2004, p. 13. By decision of 8 September 2004 (the 2004 decision), the Commission made a minor amendment to the 2003 decision, allowing SNCM to make a swap, in some circumstances, between the two vessels Aliso and Asco through an amendment to Article 2 of the 2003 decision.

(15) OJ L 19, 21.1.2005, p. 70.

(16) Registered under Reference TREN (2005) A/27546.

(17) Registered under Reference TREN (2005) A/30842.

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

(19) Registered under Reference TREN (2005) A/116904.

(20) Registered under Reference TREN (2005) A/19105.

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

(22) Veolia Transport is a wholly owned subsidiary of Veolia Environnment. It operates under the Connex name passenger transport services on behalf of public bodies (suburban, interurban and regional public transport systems) and, for that purpose, manages road and railway networks and, to a lesser extent, transport services by sea.

(23) OJ C 103, 29.4.2006, p. 28.

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

(25) OJ C 148, 24.6.2006, p. 42.

(26) Registered under Reference TREN (2005) A/25295.

(27) Registered under Reference TREN/A/24111.

(28) OJ C 303, 13.12.2006, p. 53.

(29) Registered under Reference TREN (2005) A/37907.

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

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

(32) On 11 January, 16 January et 9 February 2007 registered under References TREN/A/21142, A/21669 and A/23798.

(33) On 13 February 2007 registered under References TREN/A/24473 and TREN/A/23981.

(34) Registered by the Commission as TREN A/30979. The French authorities requested and obtained two further additional periods of one month for submitting their comments by post of 15 March 2007 and 19 April 2007 registered under References TREN/A/27002 and A/29928.

(35) That information was communicated by CFF on 15.3.2007 (TREN/A/27058), 27.9.2007 (TREN/A/43510 of 1.10.2007), 30.11.2007 (TREN/A/49918 of 6.12.2007), 20.12.2007 (TREN/A/51600 of 26.12.2007), 14 March 2008 (TREN/A/87084), by Stim on 20.12.2007 (TREN/A/51391) and by SNCM on 28 February 2008 (TREN/A/85681). France also sent information on 21.12.2007 (TREN/A/51441), 7.1.2008 (TREN/A/86344) and 8.2.2008 (TREN/A/83661). Other documents were delivered by the French authorities at a work session of 29 February 2008

(36) SNCM holds a direct non-majority shareholding of 45 % in CMN an indirect non-majority shareholding of 24,1 % through the *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH). Effective control was given to the *Stef-TFE* group since 1992 through its 49 % holding in *Compagnie Méridionale de Participations* (CMP). SNCM and CMN were partners in the public service delegation over the period 2001-2006 and jointly won the new public service delegation contract for the period 2007-12/13.

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

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

(39) At the time of the adoption of the 2003 decision, SNCM held, equally with the transport group Delmas, a holding in the French freight transport shipping company Sud-Cargos, specialising in services to Morocco. That holding was subsequently sold at the end of 2005 for the sum of EUR […] million, as is apparent from the 2005 investment plan submitted by the French authorities on 28 March 2006.

(40) SNCM wholly owns that company which carries out the victualling of SNCM's vessels.

(41) The Ferrytour partnership is a tour operator that is 100 %-owned by SNCM. It organises trips by sea to Corsica, Sardinia and Tunisia but also flights to many destinations. In addition to its main line of business, it also organises mini-cruises and offers business travel services.

(42) Comptoirs du Sud, a subsidiary set up in 1996 which is 100 %-owned by SNCM, manages all the shops onboard its ships.

(43) See footnote 12.

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

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

([46]) The *Liamone* (capacity 1 116 passengers and 250 cars, power 65 MW, speed 42 knots) which also operates crossings from Toulon.

([47]) All leased, except for *Danielle Casanova, Pascal Paoli*, Liamone.

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

([49]) OJ S 2001/2010 – 007-005.

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

([51]) OJ 2006/S 100-107350.

([52]) State aid N 781/01 authorised by decision of the Commission of 2 July 2002, OJ C 186, 6.8.2002, p. 3.

([53]) State aid N 13/07 authorised by decision of the Commission of 24 April 2007, published on the Commission's Internet site: http://ec.europa.eu/community_law/state_aids/transports_2007.htm

(*) Information covered by professional secrecy.

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

([55]) OJ C 148, 25.6.2003, p. 7.

([56]) That amount broke down as follows: EUR 20,4 million as restructuring plan in the strict sense, EUR 1,8 million for laying up costs of ships on sale, EUR 14,8 million for depreciation of Liamone and EUR 9 million for redeployment cost of activity to the Maghreb.

([57]) That plan was adopted on 17 December 2001 by the SNCM management board.

([58]) The restructuring plan provided for a reduction in the number of crossings from 4 138 (3 835 for SNCM and 303 for its subsidiary Corsica Marittima) to 3 410 in 2003 with the following route changes:
- changes to routes between Marseille and Corsica in accordance with the terms and conditions of the 2001-2006 public service contract,
- near-withdrawal of routes between Toulon and Corsica,
- reduction of services between Nice and Corsica,
- closure of the Livorno-Bastia line with dedicated equipment, actually closed in 2003,
- consolidation of services from Algeria and Tunisia by the vessels Méditerranée, Ile de Beauté and Corse and the withdrawal of the Genoa-Tunis service.

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

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

([61]) The French authorities described two alternative methods which they rejected as being too costly.
The first valuation method consists of aggregating the costs of all restructuring measures. It leads to a EUR 90,9 million financing requirement based on the following:
— accumulated losses from 1991 to 2001, that is to say, EUR 41,7 million (EUR 29 million — figure validated by Decision 2002/149/EC of 30 October 2001 (OJ L 50, 21.2.2002, p. 66), EUR 6,1 million in respect of 2000 and EUR 6,6 million, before restructuring costs, in respect of 2001);
— the reduction in resources made up opf special amortisation between the same dates, that is, EUR 24 million (the item falls from EUR 86 to 62 million on the balance sheet over the period, which reflects the extension of the amortisation period from twelve to twenty years, the lesser use of that resource and the use of 'leasing' for the last units delivered);
— appreciation of disposal generated during restructuring, namely EUR 21 million, deducted from the financing requirement;
— cumulative effect of restructuring charges of EUR 46,2 million (see footnote 56),
The second method consists of determining what the amount of capital required by the banks for the entire fleet would be, given that for financing of the purchase of a vessel the banks in general require capital corresponding to 20 to 25 % of the vessel's value. On the basis of the total sum of EUR 843 million representing the past cost of vessels acquired for the fleet, the French authorities calculated a capital requirement of between EUR 157 and 196 million. After deducting existing capital at the end of 2001, this method leads to a recapitalisation requirement of EUR 101 to 140 million.

([62]) See below.

([63]) In its restructuring plan, SNCM makes provision for laying up and selling four of its vessels in 2002: The Napoléon, the Liberté, the Monte Rotondo and the high-speed vessel Asco, the latter having in fact been subject of a swap with its sister vessel the Aliso. All those ships have now been sold. The stated net proceeds of disposal amount to EUR 25 165 000.
In accordance with the 2003 decision, SNCM sold holdings in SCI Espace Schuman, Southern Trader, Someca, Amadeus and CCM for net proceeds of disposal of EUR 5,02 million.
Since the 2003 decision, SNCM sold its holding in Sud Cargos, the vessel Asco and flats in SNCM's housing stock for the sum of EUR 12,2 million.

([64]) The process of selection of private partners took place from 26 January 2005 to the end of September 2005. On 26 January 2005 and 17 February 2005, the French Government announced that it was going to begin seeking a private partner to take a holding in SNCM's capital, with a view to strengthening its financial structure and supporting it in the changes necessary for its growth.
The Agence des Participation de l'Etat (APE) appointed an independent party to supervise the search process and instructed an advisory bank (HSBC) to contact the potential purchasers.
In that regard, 62 industrial and financial investors were contacted for the purpose of specifying the financial conditions of a proposal intended to support the company's industrial plan and preserve jobs and the sound performance of the public service. […] of them submitted expressions of interest, […] confidentiality agreements were signed and […] information notes were sent. […] undertakings submitted offers in the first round on 5 April 2005 and three offers ([…], […] and […]) were received in the second round on 17 June 2005 as well as an expression of interest for a minority holding ([…]). Three offers were received in the third round on 28 July 2005. On 14 September 2005, each undertaking was invited to submit its firm and final proposal before 15 September 2005. On that date, since the company […] had withdrawn, the State departments received two firm proposals of capital contributions and repurchase of the entire capital from the French groups Butler Capital Partners (BCP) and […].
On 27 September 2005, France published a press release stating that, on the basis of an in-depth examination of the two proposals, the proposal lodged by the BCP group was chosen because, while being the most acceptable from the financial point of view, it was in the best position to deal with the interests of the company, the public service and jobs. BCP's initial proposal put forward a negative price of EUR […] million and was the lowest estimate of the negative price.
That initial offer from the potential purchasers provided expressly for the possibility of adjusting their initial proposal following the carrying out of audits. The French authorities stated that the initial price was revised upwards following the audits presented on 16 December 2005 owing to objective elements influencing the regulatory and economic context in which SNCM operates which occurred after the submission of the proposal on 15 September 2005. The negative price was thus revised to EUR […] million.
The negotiations between the French authorities and the future purchasers made it possible to lower that figure to EUR 142,5 million, increased by the payment of a part of the expenses relating to the retired employees mutual benefits society (EUR 15,5 million).

([65]) SNCM's internal process relating to the implementation of the recapitalisation and privatisation operations was formally begun on 12 April 2006 and completed on 31 May 2006. It must be stated that on 27 November 2007, the employee capital participation scheme had not been implemented.

([66]) That mechanism is laid down in Article II.2 of the sale agreement of 16 May 2006 which provides that that account is intended 'to finance the proportion of the cost of possible voluntary departures or breach of employment contracts […] which is in addition to sums of all kinds which must be paid by the employer under statutory provisions and provisions under agreements.' The task of the sequestration is 'to release funds as soon as the employees in question who have not been redeployed internally within the SNCM group actually leave the company and to release the balance of the amount seized at the end of its sequestration'. […]

([67]) The four criteria are as follows:
- (i) the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined;
- (ii) The parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner to avoid their affording an economic advantage which could favour the beneficiary firm over competing firms;
- (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- (iv) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.

([68]) In that regard, the French authorities also note that the compensation was calculated on the specific basis of obligations (number of crossings, seats available, means of substitution, maximum fares, and so on) and therefore of the parameters in the five-year public service agreements signed in 1991 and 1996 between SNCM and the competent public authority and that those agreements also provided for an adjustment of the compensation on the basis of revenue received.

([69]) In particular, the French authorities supplied, in their letter of 8 October 2002 (TREN/A/10050), evidence to show that the structure of SNCM's operating costs for the period 1991 to 2001 was comparable to that of similar sea passenger transport undertakings such as Brittany Ferries, Seafrance and CMN. As regards the latter, the French authorities assessed SNCM's efficiency by comparing activity of cargo and passenger vessels. Those two companies operate in a similar context, with almost equivalent vessels (3 cargo and passenger vessels for CMN and 4 cargo and passenger vessels for SNCM) and to equivalent destinations. The data gathered from 1991-2001 made it possible to verify that the productivity ratios (link between salary costs on one hand, and turnover, crossings and vessels on the other) for cargo and passenger vessel activity which are different in 1993, get appreciably closer over the period examined. Accordingly, that data shows that during that period, SNCM's productivity ratios became reconciled with those of an average undertaking in the sector.

([70]) OJ L 50, 21.2.2002, p. 66. The French authorities note that, following the expert report referred to by the Commission concerning the accounting and management data submitted by the French authorities, the latter concluded in paragraph 68 of its decision of 30 October 2001 that 'the public service subsidies did not serve to offset the costs of SNCM's competitive activities. The separation of accounts concerning the supply of that service and the audits carried out by the regional and national audit bodies also guarantee that the annual accounts relating to the use of the territorial continuity subsidy give a true picture of the cost of the supply of the public service'.

([71]) In 2002 the French authorities had championed the strategic nature of SNCM's holding in Sud-Cargos. The development of goods traffic (container growth to the detriment of Roll-On Roll-Off), the repurchase of Delams, another shareholder of Sud-Cargos, by CMA CGM and the economic difficulties of Sud-Cargos are equally factors which explain that that holding was no longer considered as strategic and could be sold in 2005 by SNCM.

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

([73]) Commission Decision of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (No C 53/03 (ex NN 62/03)), OJ L 383, 28.12.2006, p. 21.

([74]) Commission Decision of 8 July 1999 on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH, OJ L 292, 13.11.1999.

([75]) That report was sent to the Commission in March 2006 and was drawn up by CGMF with the assistance of Ernst & Young, SNCM's legal auditor (the CGMF report).

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

([77]) Having regard to intangible assets (EUR […] million) and capital assets (EUR […] million), client debtors (EUR […] million), other debtors (EUR […] million) and a cash deficit of – EUR […] million. France stated that a more realistic estimate, in the light of later financial items, brings that value to EUR […] million.

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

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

([80]) Case Aspocomp Group Oyj; Judgment of the Court of Appeal of Rouen of 22 March 2005.

([81]) By comparison, the rates of return of an OAT (Obligation Assimilable du Trésor, a bond issued by the State) on maturity after 30 years, 10 years, 5 years and 2 years respectively are 3,95 %, 3,82 %, 3,75 % and 3,72 % at 31 October 2006.

([82]) Commission Decision of 17 July 2002, Société Française de Production, C(2002) 2593 final — OJ C 71, 25.3.2003, p. 3.

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

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

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

([86]) CFF's criticism relates to the following points: no actual reduction in staff, no realisation of SNCM's shareholdings for the restructuring effort, no account taken of appreciation on vessels.

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

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

([89]) CFF cites the shareholding of 50 % in the shipping company Sud-Cargos, the holding of 13 % in Amadeus, an undertaking specialised in air transport reservation systems, the holding in CMN and CGTH's property assets.

([90]) *Key shareholder in CMN.*

([91]) For the record, the OTC is, together with the Corsican regional and local authorities, the awarding authority in respect of the public service delegation contract.

([92]) As regards the public service delegation for Marseille-Corsica services, the majority of CFF's observations relate to the procedure for granting the new public service delegation for the period 2007-2012/2013 and the contentious proceedings initiated by CFF before the national courts, which were subsequently dismissed by the national courts.

([93]) In that regard, CFF notes that, in the second six-month period of 2005, an emergency procedure was initiated before the Tribunal de commerce of Marseille and that voluntary liquidation could have been intended for autumn 2005 in respect of the losses estimated at EUR million in 2005.

([94]) According to CFF, the Court of Cassation, in the case of Mines et produits chimiques de Salsignes, does not refer at all to the direct liability of the State shareholder in the event of liquidation of the undertaking of which it is the shareholder but rather the possibility of conducting an action for payment of social debts against a public company of an industrial and commercial nature and the fact that it is impossible for their managers to escape from their obligations by relying on action by the public authorities.
As regards the non-application to the present case of the case-law of the Court of Appeal of Rouen in the *Aspocomp* case, CFF submits that the subject-matter of that case-law, relating to an order that a parent company pay to the employees of a subsidiary social benefits for 'failure to comply with an agreement' ratified by the former, is very different from the facts of the SNCM file. There is therefore no definite risk that CGMF or the State will be ordered to pay the redundancy payments in the event of compulsory liquidation. However, CFF doubts the estimated figure for the other social costs on account of the fact that they seem to differ depending on the experts asked to provide them.

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

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

([97]) On 1 January 2007, with the arrival of Superfast X.

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

([99]) SNCM acquired new vessels in breach of Article 2 of the Commission decision of 2003. In addition, SNCM did not sell its shareholding in CCM in breach of Article 3 of the Commission decision. Finally, SNCM has had an aggressive tariff policy since 2003 with prices lower than those applied by CFF in breach of Article 4 of that decision (tickets up to 30 % cheaper for identical or comparable services).

([100]) Owing, on the one hand, to the lack of knowledge of the respective methods of accounting and analytical allocation of the two companies and, secondly, to the fact that CMN did not participate in such a study.

([101]) According to STIM, SNCM deliberately underestimated its financial results. According to the audit of an independent expert on behalf of the Office des Transports de Corse, the overall deficit of the Corsican network amounts to FF 125 million (approximately EUR 19 million) for the years 1996–2001, excluding the exceptional results of 2001.

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

([103]) Among the facts relied on by that report, it appears that […]

([104]) In support of the report of the Court of Auditors, the report refers, for example, to […]

(105) Among the facts relied on by that report, it appears that […]

(106) The State, for example […]

(107) The report severely criticises, inter alia, the following acts of mismanagement: […]

(108) The number of vessels has been reduced and the programme for the disposal of assets is going ahead according to the industrial plan. Services have been reorganised and the action plan to reduce intermediate consumption is beginning to bear fruit. Finally, the employment component of the industrial plan is steadily being implemented.

(109) The 0,497 ratio announced by Corsica Ferries for CMN in 2001 is incorrect because it fails to take account of liquid assets on the balance sheet. With the appropriate correction, CMN's ratio is 0,557. According to the French authorities, that level is in any event still insufficient for CMN and the cash-flow problems which CMN came up against in 2002 illustrates that. In fact CMN had to borrow up to EUR 8 million from *STEF-TFE* to finance a cash deficit not covered by its banks.

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

(111) In particular, it refutes STIM's estimated value of the undertaking of nearly EUR 350 million which takes into account only the items of the balance sheet which improve the value from accounting capital (special depreciation, residual gains from vessels and so on) without taking account of liabilities which then reduce it. That method of calculation of a purely accounting nature deos not reflect the economic reality of a shipping company such as SNCM having assets of value on the balance sheet but also a limited profitability and considerable off balance sheet liabilities.

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

(113) OJ L 364, 12.12.1992, p. 7.

(114) OJ L 378, 31.12.1986, p. 1.

(115) The Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, and Joined Cases 204/97 and 270/97 *EPAC* v *Commission*, [2000] ECR II-2267, paragraph 35).

(116) Case T-289/03 *BUPA and Others* v *Commission* [2005] ECR II-741.

(117) See, in that regard, the Commission Decision of 30 October 2001 on the State aid awarded by France to SNCM, OJ L 50, 21.2.2002, p. 66.

(118) Figure reduced by capital gains on disposals of vessels.

(119) For 2000 and 2001, which were the last two years of application of the 1996 agreement, the expert report at the time, because of a lack of available data, could not calculate the result obtained in respect of the Corsica services through analytical accounting so far as concerns services to Corsica.

(120) In accordance with its practice in previous decisions, the Commission is unconcerned as to the means of compensation used by the Member State in so far as it can verify the absence of cross subsidy for competitive activities. See, inter alia, Commission decision of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA (OJ L 282, 19.10.2002, p. 29) and Commission decision of 23 July 2003 concerning the capital increase of EUR 297,5 million in favour of La Poste Belge/De Post (OJ C 241, 8.10.2003, p. 13).

(121) In addition, it must be recalled that in 1997 the Commission established Community guidelines on State aid to maritime transport, specifying the conditions under which State aid awarded in exchange for fulfilling public service obligations will be considered compatible with the common market — OJ C 205, 5.7.1997, p. 5.

(122) Commission Decision 2002/149/EC (OJ L 50, 21.2.2002, p. 66).

([123]) Conditions of the rules regarding the State financial contribution, set out in point IV of the five-year agreement between SNCM and OTC for 1996-2001.

([124]) In particular, as stated in footnote 71 of this decision, the Commission determined that there was a separation of the accounts relating to the provision of those services in respect of the period under examination.

([125]) That amount arises from the difference between the amount notified originally (EUR 76 million) and the amount paid in terms of public service obligations (EUR 53,48 million).

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

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

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

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

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

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

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

([133]) See, in that regard, Commission Decision 2006/947/EC of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (OJ L 383, 28.12.2006, p. 21).

([134]) See, in that regard, *Italy* v *Commission* [1991] ECR I-1433.

([135]) See, for example, Commission Decision 92/266/EEC of 27 November 1991 on the conversion activities of French public industrial groups outwith the steel and coal industries and excluding the Compagnie Générale Maritime, pursuant to Articles 92 to 94 of the EEC Treaty (OJ L 138, 21.5.1992, p. 24). See also the social plans referred to below.

([136]) It should however be noted that half of the staff concerned were interim staff or onsite subcontractors. It may therefore be assumed that the cost per employee for the 5 000 positions involving permanent Airbus staff was much higher.

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

([138]) These are the following vessels: Corse, Ile de Beauté, Méditerranée, Napoléon Bonaparte, Paglia Orba, Monte d'Oro, Monte Cino.

([139]) That discount, which is EUR […] million (that is on average […] to […] % of the gross market value), is, inter alia, justified by the specific nature of SNCM's vessels which are adapted to the services provided by the undertaking, by the state of the vessels and by the background of the placing on the market of the entire fleet (in particular the weakness of the seller's position). BRS's valuation is based in particular on the case of a sale of vessels fully in order and updated, well-maintained and in good working order under normal conditions of trade.

([140]) Estimated at EUR […] million.

([141]) Legal uncertainty is justified by the probability that the authorised liquidator is forced to dispose of the vessels very quickly and by a glut in the market because of its limited absorption capacity.

([142]) At issue is an obligation introduced by Article L.321-13 of the Employment Code which provides for the payment by the employer of an indemnity upon the redundancy of an employee aged at least 50.

([143]) Cost of revitalisation of the labour market area (EUR […] million), costs of redeployment agreements (EUR […] million), cost of the deployment support and assistance unit known as 'mobility' (EUR […] million).

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

([145]) On 30 September 2005, SNCM operates three leased vessels. the NGV *Liamone* (from GIE Véronique Bail), the *Danielle Casanova* (GIE Joliette Bail) and the *Pascal Paoli* (GIE Castellane Bail).

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

([147]) Having regard to the heavy and repeated use by SNCM of fixed-term contracts.

([148]) In its decision 2006/947/EC of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (OJ L 383, 28.12.2006, p. 21), the Commission stated: The Commission does not deny that, in certain exceptional cases, some national legislation provides for the possibility of third parties to bring proceedings against the shareholders of a liquidated company, in particular if these shareholders may be considered […] and/or as being guilty of mismanagement. However, in the case in point, although French law does provide for this possibility and the Belgian authorities have provided some indications of such a risk, they have not sufficiently erased the doubts expressed regarding this case when the procedure was extended in April 2005. The Commission concludes that it is not legitimate in this case to include among the costs of this scenario the EUR 58 million which, according to the Belgian authorities, are linked to the risk of […].

([149]) Communication of the Commission concerning the aid which France has decided to grant to the Société Marseillaise de Crédit (OJ C 49, 19.2.1997, p. 2).

([150]) i.e. the current net value of the risk of a future order, having regard to the fact that the persons accused of being responsible for the liabilities would defend themselves against such a claim.

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

([152]) The scenario of cancellation of a safeguard plan does not apply to the present case since the abovementioned law of 2005 entered into force subsequently whereas, on the basis of the evidence available to the Commission, nothing supports the conclusion that any receivership of SNCM would fail.

([153]) Pursuant to the relevant laws, the public undertakings incorporated under private law fall within the scope of the above laws governing compulsory liquidation. Furthermore, the law make it possible for legal persons under public law to incur liability as director in an action 'en comblement de passif'.

([154]) French case-law requires the de facto director to have carried out 'actual acts as manager or director recurrently'.

([155]) Response of the French authorities to certain observations submitted by SNCM (see recital 172 of this decision).

([156]) It is interesting to note that, in addition to classic salary payables, there are judicial salary payables originating in decisions of labour courts. In the present case, the employee applies to the labour court for a ruling on the validity of his application and when that application is accepted, it is entered in the statement of debts of the company.

([157]) Judgment of the Court of Cassation, 30 November 1993, No 91-20 554, Bull.civ. IV, No 440, p. 319.

([158]) That assessment was made by Sorgem Evaluation, an investments adviser. The author of the assessment, Maurice Nussenbaum, is a financial expert at the Court of Appeal in Paris and is accredited by the Court of Casssation.

([159]) Response of the French authorities to certain observations submitted by SNCM (see recital 174 of this decision).

([160]) Response of the French authorities to certain observations submitted by SNCM (see recitals 175 and 176 of this decision).

([161]) Response of the French authorities to certain observations submitted by SNCM (see recitals 175 and 176 of this decision).

([162]) Bureau de Recherches Géologiques et Minières (BRGM).

([163]) See, for example, the judgment of the Court of Cassation of 6 February 2001 No 98-15129.

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

([165]) Having regard to the fact that the persons accused of having suspended that plan wrongfully would probably have defended themselves vigorously in order not to be rendered liable.

([166]) Cass. com., 19 April 2005, Métaleurop.

([167]) Application of Articles 92 and 93 of the EC Treaty to acquisition of holdings by public authorities, Bulletin EC 9/1984, point 3.2. iii.

([168]) Case T-296/97 *Alitalia* v *Commission* [1997] ECR II-3871.

([169]) See, for example, Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70.

([170]) See Case 301/87 *France* v *Commission* [1990] ECR I-307, paragraph 40.

([171]) See the communication concerning possible aid contained in a planned contribution of public capital in the capital of Klöckner Stahl, OJ C 390, 31.12.1994, p. 1.

([172]) Case C-39/94 *SFEI* v *La Poste* [1996] ECR I-3547, paragraph 60.

([173]) Case 301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41.

([174]) Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 82.

([175]) Case 173/73 *Italy* v *Commissio*n [1974] ECR 709, paragraph 33.

([176]) Case C-390/98 *HJ Banks* [2001] ECR I-6117, paragraph 33.

([177]) Case T-308/00*Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 79. See also the Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, point 16).

([178]) Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 56.

([179]) Case C-143/99 *Adria-Wien Pipeline GmbH* [2001] ECR I-8365, paragraph 41.

(180) See, for example, the Commission's decision of 10 October 2007 on the reform of supplementary pensions in the banking sector in Greece (OJ C 308, 19.12.2007, p. 9) and the Commission Decision of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ L 63, 7.3.2008, p. 16).

(181) See Commission Decision of 17 July 2002 on Société française de production (OJ C 71, 25.3.2003, p. 3). 'The State financing of a plan to reduce staff numbers which enables a company to rid itself of some of its staff while not bearing the full costs of such a plan, is a selective advantage which may be prohibited under State aid rules. On the other hand, the implementation from public funds of additional social welfare measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social security policy of the Member States and does not constitute State aid within the meaning of Article 87(1) EC. […] SFP will meet these costs in full. Therefore, the additional social welfare measures benefitting SFP's laid-off staff which will be implemented when the staff in question have left the company does not in any way relieve the company of its obligations and does not constitute State aid in favour of SFP'.

(182) That amount arises from the difference between the amount actually notified (EUR 76 million) and the amount approved as public service compensation (EUR 53,48 million).

(183) OJ C 288, 9.10.1999, p. 2.

(184) OJ C 205, 5.7.1997, p. 5.

(185) See point 30 of the 2002 Guidelines.

(186) Decision cited above.

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

(188) Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 71.

(189) The first alternative method, based on the capital necessary to finance the existing fleet, seems inappropriate in that the French authorities have included in that calculation the value of fleet acquisition and not its sales value in 2002. The fact is, however, that if a new company were to start up with the same fleet as SNCM's such as it exists today it would have to find capital proportionate to the purchase value of all the ships together and not their construction value. Moreover, such an approach fails to take account of other major assets such as the computer booking system and the buildings in which the company has its headquarters.
In the Commission's opinion, the second alternative method, based on SNCM's expenditure, seems more appropriate. However, the Commission would like to see a revision of the amount of EUR 41,7 million for previous losses, in particular to take account of the 2002 results and only losses connected with services to Corsica prior to 1999.

(190) It should be noted that the Commission's independent expert estimated the actual costs of the 2002 restructuring plan at EUR […] million based on SNCM's accounts.

(191) Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 71.

(192) See Table 2 of this Decision. This figure includes the assets disposed of at the time of the 2003 decision, namely the sale of the Napoléon, Monte Rotondo and Liberté vessels, as well as fixed asset disposals (Schuman and SCI Espace Schuman real estate).

(193) See point 48 of the Guidelines.

(194) See Annex I.

(195) It should be noted that, on 11 December 2007, an agreement to sell the Jean Nicoli was signed between VT and a third-party buyer with ownership being transferred in April 2008.

(196) The Commission was notified of this by letter dated 23 June 2004.

(197) This figure includes the sale of SCI Espace Schuman (EUR […] million) on 24 June 2003 but does not include the negative net disposal proceeds from the sale of the Aliso (EUR […] million) on 30 September 2004.

(198) The Asco, the company's holdings in Sudcargos and the company's real estate.

([199]) The Commission finds that, when determining whether or not Article 4 of the 2003 decision has been complied with, account should be taken of the published prices, that is the prices on any advertising materials or communications published by SNCM. That condition does not apply to the prices proposed by SNCM's reservation system because those fares are subject to dynamic quotas (yield management) both at SNCM and its competitors. The way in which the systems are set up makes it impossible to take account of the special fares offered by SNCM's competitors and, therefore, to verify the non-existence of price leadership in the case of SNCM.

([200]) It appears that, on the basis of the information provided by the French authorities, SNCM at no time between 9 July 2003 and 16 March 2005 published prices lower than those published by its competitors in its corporate communications, advertising campaigns or public documents.

([201]) This amount is the difference between SNCM's net cash needs (EUR 19,75 million) and the net proceeds of the assets disposed of following the 2003 decision (EUR […] million from the sale of the Aliso and holdings in Southern Trader, Someca and Amadeus). It brings the State's total capital contribution to SNCM to EUR 69,29 million.

ANNEX I

OPERATIVE PART OF THE 2003 DECISION

Article 1

The restructuring aid which France plans to grant to the Société Nationale Maritime Corse-Méditerranée (SNCM) is compatible with the common market under the conditions laid down in Articles 2 to 5.

Article 2

From the date on which this Decision is notified and until 31 December 2006, SNCM shall refrain from acquiring new ships and signing contracts for building, ordering or chartering new or renovated ships.

From the date on which this Decision is notified and until 31 December 2006, SNCM can only operate the 11 ships which SNCM already possesses, namely: the *Napoléon Bonaparte, Danielle Casanova, Île de Beauté, Corse, Liamone, Aliso, Méditerranée, Pascal Paoli, Paglia Orba, Monte Cinto* and *Monte d'Oro*.

If for reasons beyond its control SNCM has to replace one of its ships before 31 December 2006, the Commission may authorise such a replacement on the basis of a duly reasoned notice served by France.

Article 3

The SNCM group shall dispose of all its direct and indirect holdings in the following companies:

— Amadeus France,

— Compagnie Corse Méditerranée,

— Société civile immobilière Schuman,

— Société Méditerranéenne d'Investissements et de Participations,

— Someca,

Instead of disposing of its holdings in Société Méditerranéenne d'Investissements et de Participations, SNCM may sell this company's sole asset, the Southern Trader, and close down this subsidiary.

The disposals may be made, at the choice of the French authorities, either through public auction or through a call for expressions of interest published in advance, providing for a minimum period of two months for any response.

France shall provide the Commission with proof of all these disposals. The low level of bids which SNCM might receive cannot be invoked as a reason for not going ahead with the disposals. If there are no bids and if France can show proof that all the necessary publicity has been made, the condition laid down in the first paragraph shall be deemed to have been complied with.

Article 4

In respect of all links to Corsica, SNCM shall, from the date on which this Decision is notified and until 31 December 2006, refrain from pursuing a fares policy in respect of published fares intended to offer lower fares than those of each of its competitors for equivalent destinations and services and identical dates.

The Commission reserves the right to initiate an investigation procedure whenever it finds that the conditions laid down in this Decision have not been complied with, and in particular the condition laid down in the first paragraph.

The condition laid down in the first paragraph is complied with if every day the lowest prices advertised by SNCM are higher than the lowest promotional prices advertised by each of its competitors for equivalent destinations and services.

The condition laid down in the first paragraph shall no longer apply if the prices of the said competitors exceed SNCM's fares that were in force in the reference year 1996, corrected for inflation.

Before 30 June each year, France shall inform the Commission of all the elements necessary to show that this condition has been duly complied with in the preceding calendar year in respect of all crossings to or from Corsica.

Article 5

In accordance with the commitments made by the French authorities in the restructuring plan, the annual number of round trips of ships on the various sea links to and from Corsica are until 31 December 2006 limited to the thresholds indicated in Table 3 of this Decision ([1]), save for exceptional reasons for which SNCM is not responsible that would oblige it to transfer particular round trips to other ports, and save for any change made to the public service obligations incumbent on the company.

Article 6

France is authorised to recapitalise SNCM through a first payment of EUR 66 million from the date on which this Decision is notified.

Until the end of the restructuring period, that is until 31 December 2006, the Commission may decide, upon a request from the French authorities, to subsequently authorise a second payment to SNCM which will correspond to the difference between the EUR 10 million remaining and the proceeds from the disposals required in Article 3, in accordance with the conditions laid down in that Article.

Such a decision can be taken only if the action required in Article 3 has been carried out, the proceeds from the disposals does not exceed EUR 10 million and the conditions laid down in Articles 2, 4 and 5 have been complied with, without prejudice to the Commission's right to initiate, where appropriate, the formal investigation procedure for failure to comply with any of these conditions. Failing this, the second instalment of aid shall not be paid.

Article 7

Within six months of the date on which this Decision is notified, France shall inform the Commission of the measures taken to comply with it.

Article 8

This Decision is addressed to the French Republic.

([1]) See Annex II to the present Decision.

ANNEX II

TABLE 3 OF THE 2003 DECISION

Trend in SNCM services

	Number of crossings		Places available		Linear metres available	
	2001	> 2003	2001	> 2003	2001	> 2003
Marseilles-Corsica	1 881	[…]	1 723 050	[…]	1 469 000	[…]
Toulon-Corsica	187	[…]	303 650	[…]	0	[…]
Gulf of Genoa	1 768	[…]	1 708 700	[…]	0	[…]
Sub-total Europe	3 836	3 067	3 735 400	2 357 500	1 469 000	[…]
Maghreb	302	372	444 000	635 000	0	0
Total	4 138	3 439	4 179 400	2 992 500	1 469 000	[…]

2009 SUBSCRIPTION PRICES (excluding VAT, including normal transport charges)

EU Official Journal, L + C series, paper edition only	22 official EU languages	EUR 1 000 per year (*)
EU Official Journal, L + C series, paper edition only	22 official EU languages	EUR 100 per month (*)
EU Official Journal, L + C series, paper + annual CD-ROM	22 official EU languages	EUR 1 200 per year
EU Official Journal, L series, paper edition only	22 official EU languages	EUR 700 per year
EU Official Journal, L series, paper edition only	22 official EU languages	EUR 70 per month
EU Official Journal, C series, paper edition only	22 official EU languages	EUR 400 per year
EU Official Journal, C series, paper edition only	22 official EU languages	EUR 40 per month
EU Official Journal, L + C series, monthly CD-ROM (cumulative)	22 official EU languages	EUR 500 per year
Supplement to the Official Journal (S series), tendering procedures for public contracts, CD-ROM, two editions per week	multilingual: 23 official EU languages	EUR 360 per year (= EUR 30 per month)
EU Official Journal, C series — recruitment competitions	Language(s) according to competition(s)	EUR 50 per year

(*) Sold in single issues:

up to 32 pages:	EUR 6
from 33 to 64 pages:	EUR 12
over 64 pages:	Priced individually.

Subscriptions to the *Official Journal of the European Union*, which is published in the official languages of the European Union, are available for 22 language versions. The Official Journal comprises two series, L (Legislation) and C (Information and Notices).

A separate subscription must be taken out for each language version.

In accordance with Council Regulation (EC) No 920/2005, published in Official Journal L 156 of 18 June 2005, the institutions of the European Union are temporarily not bound by the obligation to draft all acts in Irish and publish them in that language. Irish editions of the Official Journal are therefore sold separately.

Subscriptions to the Supplement to the Official Journal (S Series — tendering procedures for public contracts) cover all 23 official language versions on a single multilingual CD-ROM.

On request, subscribers to the *Official Journal of the European Union* can receive the various Annexes to the Official Journal. Subscribers are informed of the publication of Annexes by notices inserted in the *Official Journal of the European Union*.

Sales and subscriptions

Priced publications issued by the Publications Office are available from our commercial distributors. The list of commercial distributors is available at:

http://publications.europa.eu/others/agents/index_en.htm

EUR-Lex (http://eur-lex.europa.eu) offers direct access to European Union legislation free of charge. The *Official Journal of the European Union* can be consulted on this website, as can the Treaties, legislation, case-law and preparatory acts.

For further information on the European Union, see: http://europa.eu

Publications Office
Publications.europa.eu

OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES
L-2985 LUXEMBOURG

EN