

# Official Journal

## of the European Communities

ISSN 0378-6978

L 12

Volume 45

15 January 2002

English edition

## Legislation

### Contents

#### I Acts whose publication is obligatory

.....

#### II Acts whose publication is not obligatory

##### Commission

2002/14/EC:

- ★ **Commission Decision of 12 July 2000 on the state aid granted by France to Scott Paper SA Kimberly-Clark** <sup>(1)</sup> (notified under document number C(2000) 2183) ..... 1

2002/15/EC:

- ★ **Commission Decision of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company ('BAI' or 'Brittany Ferries')** <sup>(1)</sup> (notified under document number C(2001) 1422) ..... 33

##### Corrigenda

- ★ **Corrigendum to Commission Decision 2001/839/EC of 8 November 2001 laying down a questionnaire to be used for annual reporting on ambient air quality assessment under Council Directives 96/62/EC and 1999/30/EC (OJ L 319, 4.12.2001)** ..... 70

Price: EUR 19,50

<sup>(1)</sup> Text with EEA relevance

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 whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 12 July 2000

on the state aid granted by France to Scott Paper SA Kimberly-Clark

(notified under document number C(2000) 2183)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/14/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 given notice to the parties concerned to submit their comments in accordance with the said Article <sup>(1)</sup> and having regard to those comments,

authorities. By letter dated 14 February 1997, the French authorities requested a further extension of 15 days, which the Commission granted on 3 March 1997. By letter dated 19 March 1997, the French authorities supplied some of the information requested. Because the information was not complete, however, the Commission renewed its request in a letter dated 26 March 1997, to which the French authorities replied in part by letter dated 21 April 1997. In the same letter, they requested a further extension of 20 days, which the Commission granted on 2 May 1997.

Whereas:

1. PROCEDURE

(1) Following publication by the French Cour des Comptes (Court of Auditors) in November 1996 of the special public report entitled 'Local authority assistance for firms' <sup>(2)</sup>, the Commission received by letter dated 23 December 1996 a complaint concerning the preferential terms on which the Ville d'Orléans ('the city council') and the Conseil Général du Loiret ('the county council') (together referred to as 'the local authorities') had sold 48 ha of the La Saussaye industrial estate to the United States company Scott Paper, a manufacturer of household and sanitary paper.

(2) By letter dated 17 January 1997, the Commission requested further information from the French

(3) On 3 June 1997 the Commission received the supplementary information requested. On 8 August 1997 it once more asked the French authorities to clarify certain matters. It sent them reminders on 24 September and 24 October 1997. The French authorities provided additional information on 3 November 1997, which was communicated to the complainant on 17 November 1997. By letter dated 8 December 1997, the complainant provided further information, to which the Commission's services replied on 6 January 1998. The last additional information from the complainant reached the Commission on 29 January and 1 April 1998.

(4) On 20 May 1998 the Commission decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures, in view of the doubts it still had about the circumstances in which the French authorities had acted in regard to Scott Paper and the compatibility of those measures with the Treaty. By letter dated 10 July 1998 (SG(98) D/5663) the Commission informed the French authorities of this decision.

<sup>(1)</sup> OJ C 301, 30.9.1998, p. 4.

<sup>(2)</sup> 'Les interventions des collectivités territoriales en faveur des entreprises', Cour des Comptes, Paris, November 1996.

(5) By letter dated 31 July 1998, the French authorities requested a further extension of one month, which the Commission granted on 5 August 1998. By letter dated 18 September 1998 they requested a further extension of 20 days, which was granted on 25 September 1998. By letter dated 25 November 1998, the French authorities replied to the initiation of the said procedure.

(6) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(3)</sup>. The Commission invited interested parties to submit their comments on the measures in question.

(7) The Commission received comments on this subject from interested parties. The comments were translated into French and one third party was requested, by letter dated 16 February 1999, to withdraw its request for confidentiality. The comments were then sent to the French authorities by letter dated 2 March 1999. After the French authorities and third parties had submitted comments, there were still many aspects which needed clarification before the case could be closed. In the letter of 2 March 1999, therefore, the Commission also requested detailed information.

(8) By letter dated 18 March 1999, the French authorities requested a further extension of 10 days, which the Commission granted in its letter of 24 March 1999. The French authorities replied in part to the Commission's request in its letter of 30 April 1999.

(9) Since, after a considerable delay, its replies were still inadequate, the French authorities were ordered by the Commission on 8 July 1999 to provide the necessary information. This decision was notified to the French authorities by letter dated 20 July 1999 (SG(99) D/5459), requiring them to submit their observations within 15 working days of the date of notification of the decision, i.e. by 11 August 1999.

(10) By letter dated 9 August 1999, the French authorities asked for the deadline to be extended by 30 working days, which extension the Commission granted on 12 August 1999. On 15 October 1999, the French authorities replied in part to the order to supply information.

(11) At the request of the French authorities, a meeting with the Commission services was held on 7 December

1999. At that meeting, the Commission services exceptionally allowed the French authorities, in the interests of the proceedings, to provide additional information by the end of December 1999. This information was finally forwarded on 10 January and 21 February 2000.

## 2. DETAILED DESCRIPTION OF THE AID

### 2.1. AID BENEFICIARY

(12) In 1969 the Scott Paper Company purchased the French firm Bouton Brochard, subsequently founding a separate company, Bouton Brochard Scott, which took over Bouton Brochard's business. Bouton Brochard Scott changed its name to Scott SA in November 1987 <sup>(4)</sup>.

(13) Scott SA, whose shares were bought by Kimberly-Clark Corporation (KC) in January 1996, owned a household and sanitary paper production plant on the Orléans-Sologne industrial estate in the municipality of Saint-Cyr-en-Val, Loiret. Some 170 people were employed at the plant. KC announced its closure in January 1998. The plant's assets, i.e. the site and the paper mill, were bought by Procter & Gamble (P & G) in June 1998 <sup>(5)</sup>.

### 2.2. SALE OF THE LAND

(14) To enable Bouton Brochard Scott (Scott) to build a household paper factory, the French subsidiary of the Scott Paper Company, the county council and the city council commissioned the Société d'économie mixte pour l'équipement du Loiret ('Sempel') on 12 September 1987 to carry out all the studies and work necessary for developing some 68 hectares of land on the 'La Saussaye' industrial estate and the 'La Planche' sector (the La Saussaye industrial estate) <sup>(6)</sup>.

<sup>(4)</sup> Comments from Scott, 23 November 1998, point B1.

<sup>(5)</sup> Comments from Scott, 23 November 1998, point B1.

<sup>(6)</sup> Preamble to the agreement of 31 August 1987 concluded between Bouton Brochard Scott SA, Orléans City Council and Loiret County Council ('the Scott agreement'); preamble to the Agreement on the improvement of the La Saussaye and La Planche sites of 12 September 1987 concluded between Loiret County Council, Orléans City Council and Sempel ('the Sempel agreement'); extract from the minutes of the meeting of Orléans City Council of Friday, 27 May 1994 ('the city council's minutes of 1994'), p. 1.

<sup>(3)</sup> OJ C 301, 30.9.1998, p. 4.

- (15) To this end the city council sold the 68 hectares concerned to Sempel for a symbolic one franc <sup>(7)</sup>. The land, which was agricultural land at the time, had been bought by the city council between 1975 and 1987 for FRF 16/m<sup>2</sup> (EUR 2,4/m<sup>2</sup>), or a total price of FRF 10,9 million (EUR 1,7 million) <sup>(8)</sup>.
- (16) Sempel is a local semi-public company subject to private law and governed by law No 83-597 of 7 July 1983. Companies covered by this legislation are legal persons governed by private law which link local authorities (regions, departments and municipalities), and their associations, to private persons and, possibly, to other public persons, in order to carry out development and construction work, industrial and commercial services, or any other activity of public interest. Although controlled by public persons, in this case the local authorities, which must hold at least half the capital (subject to a ceiling of 80 %) they are governed by the rules of private law, in particular the Law of 24 July 1966 on trading companies <sup>(9)</sup>.
- (17) Under Article 2 of the Sempel agreement, Sempel was commissioned to carry out the following work in particular on land intended for Scott's proposed facilities:
- all surveys and preparations of preliminary plans,
  - all roads and miscellaneous networks, and all works for supplying with water, gas and electricity the site which is the subject of this agreement,
  - parking space for lorries and light vehicles,
  - the rail link to the site which is the subject of this agreement,
  - the lighting for the roads and parking spaces,
  - green areas,
  - the formation level for receiving the factory warehouse and its superstructure, these structures to be built under contract with the developer, the Scott Paper company,
  - tall primary, secondary and tertiary infrastructure facilities situated within the estate to be developed or necessary for directly connecting it to external networks, and
  - all the development work required to make the land suitable for the use to which it has been allocated'.
- (18) At the time when the Scott agreement was concluded, i.e. 1987, the city council and the Loiret undertook to finance the site-preparation costs 'up to a maximum of FRF 80 million' <sup>(10)</sup>. This amount was divided 'into two parts, FRF 50 million for Orléans City Council and FRF 30 million for the Loiret of the Loiret' <sup>(11)</sup>.

<sup>(7)</sup> Article 3.1 of the Sempel agreement and the city council's minutes of 1994, p. 1.

<sup>(8)</sup> By letters dated 17 March and 29 May 1997, the French authorities informed the Commission that the land had been bought by the city council for 15 FRF/m<sup>2</sup>. But, according to point 2.2 of the city council's minutes of 1994, the initial value of the land was FRF 10,9 million, i.e. FRF 16/m<sup>2</sup>.

<sup>(9)</sup> According to the letter from the French authorities, 21 April 1997, p. 3.

<sup>(10)</sup> Article 4 of the Scott agreement.

<sup>(11)</sup> Point 1.1 of the city council's minutes of 1994.

- (19) It is clear, however, from the statement of final account drawn up by Sempel for the improvement of the La Saussaye industrial estate and dated 26 July 1993 <sup>(12)</sup> (Sempel's statement of final account) and from the city council's minutes that the total cost of developing the site must have been considerably higher. According to Sempel's statement of final account, it was some FRF 140 million (EUR 21,4 million), broken down as follows:

| Expenditure                                        |                | Receipts                             |                |
|----------------------------------------------------|----------------|--------------------------------------|----------------|
| Purchase of land                                   | 2,00           | Advance from local authority         | 4 282 000,00   |
| Ancillary costs (land)                             | 47 181,35      | Borrowings                           | 57 304 659,94  |
| Other ancillary costs                              | 36,00          | Sale of land                         | 31 000 002,00  |
| Other, pre-concession studies                      | 2 372 000,00   | Annual payments from local authority | 39 424 345,03  |
| Topographical surveys                              | 118 295,63     | VAT refunded                         | 8 315 950,00   |
| Soil surveys and boreholes                         | 685 510,97     | Financial revenue                    | 38 486,81      |
| Other general studies                              | 621,26         | Open credit:                         |                |
| Studies for secondary works                        | 45 942,90      | — Loiret County Council              | 8 280,68       |
| Secondary water supply                             | 58 761,45      | — Orléans City Council               | 8 280,68       |
| Other secondary works                              | 490,57         |                                      |                |
| Other individual structures                        | 4 020 456,51   |                                      |                |
| Buildings studies and works                        | 76 082 967,38  |                                      |                |
| Financial charges on loans                         | 27 477 505,98  |                                      |                |
| Financial charges on non-interest bearing advances | 291 106,92     |                                      |                |
| Company expenses                                   | 1 590 000,00   |                                      |                |
| Other expenses concerning the sale                 | 519 283,08     |                                      |                |
| Miscellaneous charges                              | 2 030 054,14   |                                      |                |
| Other sundry debtors                               | 16 489 000,00  |                                      |                |
| VAT paid                                           | 8 552 789,00   |                                      |                |
|                                                    | 140 382 005,14 |                                      | 140 382 005,14 |

- (20) According to point 2.2 of the city council's minutes, the total cost of the operation to the Loiret was approximately FRF 37,2 million (EUR 5,7 million) and to the city council approximately FRF 92,5 million (EUR 14,1 million), of which FRF 65,85 million (EUR 10 million) was for the redemption of a loan of FRF 34,2 million (EUR 5,2 million) granted to Sempel, FRF 10,9 million (EUR 1,7 million) for the purchase of the land and FRF 13,6 million (EUR 2,1 million) for the land improvement operations carried out.

- (21) In 1987 Sempel sold 48 ha of the available 68 ha to Scott at a price of FRF 65/m<sup>2</sup> (EUR 9,9/m<sup>2</sup>), i.e. for a total price of FRF 31 million (EUR 4,7 million) <sup>(13)</sup>. This price was already laid down in the Sempel agreement (point 12.3): '[...] the price for selling the factory warehouse and the supporting land to the Scott Paper Company shall be FRF 31 million inclusive of tax.' The remaining 20 ha were sold back to the Orléans municipal authorities at a symbolic price of one franc in 1989 and 1992 <sup>(14)</sup>, after which Sempel was wound up <sup>(15)</sup>.

<sup>(12)</sup> Sempel's statement of final account prepared for Loiret County Council and Orléans City Council on the La Saussaye and La Planche industrial estate, 26 July 1993, p. 1.

<sup>(13)</sup> Point 2.1 of the city council's minutes of 1994; letter from the French authorities, 3 June 1997, p. 2. In its letter of 23 November 1998, section B2, Scott claims, however, that it purchased the Orléans site in March 1988.

<sup>(14)</sup> Point 2.1 of the city council's minutes of 1994.

<sup>(15)</sup> Letter from the French authorities, 21 April 1997, p. 3.

- (22) In 1998 the La Saussaye industrial estate covered some 200 hectares, on which 70 firms were established employing 2 000 staff <sup>(16)</sup>.

### 2.3. PREFERENTIAL RATE OF WATER TREATMENT LEVY

- (23) A water treatment levy expressed in FRF/m<sup>3</sup> is charged on the quantity of water consumed by a firm. Orléans City Council calculates the base for the levy in accordance with the interministerial circular of 12 December 1978 <sup>(17)</sup>. The circular explains how to calculate the base (number of m<sup>3</sup> metred × effluent coefficient × coefficient of degressivity × pollution coefficient) for users with a consumption of over 6 000 m<sup>3</sup>/year <sup>(18)</sup>. The amount of the levy has been freely decided by the city council's deliberative assembly since 1 January 1986 <sup>(19)</sup>.

- (24) However, for quantities of water exceeding certain thresholds, Article R. 372 of the Municipalities Code (Code des Communes) <sup>(20)</sup> stipulates that 'The number of cubic metres recorded, which serves as the basis for the water treatment levy, is adjusted upwards or downwards to reflect the special costs imposed on the water board as a result, in particular, of the level and type of pollution caused by the firm'. This is known as the 'coefficient of degressivity', which is also fixed by Orléans City Council.

- (25) Article 7 of the Scott agreement provides for a preferential rate of water treatment levy for Scott:

'Orléans City Council undertakes to change the rates of water treatment levy applicable to industrial users who are in an exceptional situation and to lay down a rate for them that does not exceed 25 % of the most favourable current rate. Subject to Scott's compliance with current technical standards and legislation, Orléans City Council will apply this preferential rate to it.'

- (26) On 1 January 1989 Orléans City Council set a new amount for the water treatment levy <sup>(21)</sup> and a new coefficient of degressivity <sup>(22)</sup>. For volumes between 0 and 50 000 m<sup>3</sup>, the coefficient of degressivity was

reduced from 1 to 0,5 in proportion to the volume. Between 50 001 and 150 000 m<sup>3</sup>, the coefficient increases from 0,6 to 0,8. According to the city council's minutes of 1988, the aim is to encourage large-scale consumers of water to reduce their effluent <sup>(23)</sup>. However, for consumption exceeding 150 000 m<sup>3</sup>, the coefficient is reduced to 0,25, without any reason being given. The coefficients of degressivity are shown in the following table:

| Coefficients of degressivity     |      |
|----------------------------------|------|
| 0 to 6 000 m <sup>3</sup>        | 1,00 |
| 6 001 to 12 000 m <sup>3</sup>   | 0,80 |
| 12 001 to 24 000 m <sup>3</sup>  | 0,60 |
| 24 001 to 50 000 m <sup>3</sup>  | 0,50 |
| 50 001 to 75 000 m <sup>3</sup>  | 0,60 |
| 75 001 to 150 000 m <sup>3</sup> | 0,80 |
| over 150 000 m <sup>3</sup>      | 0,25 |

- (27) In 1996 Scott's consumption was some [...] (\*) m<sup>3</sup> <sup>(24)</sup>. The company was thus eligible for the 0,25 coefficient in respect of a [a substantial part] (\*) of its consumption, i.e. that part which exceeded 150 000 m<sup>3</sup>. However, according to the French authorities, Scott is not the only entity to qualify for the 0,25 coefficient; the Hôpital de la Source does as well. In 1996 its water consumption was approximately 155 000 m<sup>3</sup> <sup>(25)</sup>; a coefficient of 0,25 was applied to that part in excess of 150 000 m<sup>3</sup>, i.e. 3 %.

### 3. GROUNDS FOR INITIATING THE PROCEDURE

- (28) In 1997 the Commission published a communication on state aid elements in sales of land and buildings by public authorities <sup>(26)</sup> (the communication). This clarifies a policy which had emerged over a period of more than 10 years. It describes a procedure for the sale of land and buildings which automatically excludes any state aid element (sale through an unconditional bidding procedure or on the basis of an asset valuation by an independent expert prior to negotiations in order to determine its market value) and lists the types of sale which have to be notified to the Commission.

<sup>(16)</sup> Letter from the French authorities, 26 November 1998, p. 1.

<sup>(17)</sup> Letter from the French authorities, 6 October 1999, p. 5.

<sup>(18)</sup> Idem.

<sup>(19)</sup> Extract from the minutes of the Orléans City Council's meeting of 16 December 1988 (the city council's minutes of 1988), p. 2.

<sup>(20)</sup> Decree No 77-241 of 7 March 1977.

<sup>(21)</sup> The city council's minutes of 1988 (p. 2) state that 'to ensure that the 1989 initial budget for water treatment is in balance, it is necessary to increase the current rate by about 5 %, i.e. to raise it from FRF 2,40 to FRF 2,52'.

<sup>(22)</sup> The city council's minutes of 1988, p. 3.

<sup>(23)</sup> The city council's minutes of 1988 (p. 2) state that '[...] to encourage water-intensive businesses to reduce their effluent, it was decided by the city council on 19 December 1980 to increase the coefficient of degressivity for the proportion in excess of 50 000 m<sup>3</sup>'.

<sup>(24)</sup> According to Kimberly-Clark's water treatment bill for 1996.

<sup>(25)</sup> According to the hospital's water treatment bill for 1996.

<sup>(26)</sup> OJ C 209, 10.7.1997, p. 3.

(\*) Business secret.

- (29) Since no unconditional bidding procedure or valuation by an independent expert took place in this particular case, the Commission took the view in the decision to initiate the procedure that the price at which the land was sold could be justified, provided (i) it covers at least the land-related costs incurred by the authorities or, if there were an excessive supply of similar sites bringing prices down, (ii) it corresponds at least to the market price <sup>(27)</sup>.
- (30) On the basis of the information available to it at the time, the Commission found that it was not possible to establish with certainty that the price at which the land was sold to Scott (i) covered the costs incurred by the French authorities or (ii) corresponded to the market price. It also wondered whether the rate of water treatment levy might not contain elements of state aid.

#### 4. GROUNDS FOR THE ORDER TO SUPPLY INFORMATION

- (31) Since the French authorities had not given a satisfactory reply to the questions raised in the decision to initiate the procedure, the Commission ordered them to provide the information requested. The questions were virtually identical to those set out in the Commission's letter to the French authorities dated 2 March 1999.
- (32) The Commission regarded the French reply as inadequate, since none of the following information was supplied:
- a detailed description, and evidence, of the publicity given to the sale in France and Europe,
  - a detailed breakdown, by type, of the work carried out by Sempel on the land occupied by Scott (levelling, electricity, infrastructure, construction, etc.) and its actual cost, a breakdown of the use of the funds arising from the loans contracted by Sempel, and a copy of the tripartite agreement between Orléans City Council, Loiret county Council and Sempel,
  - the various sales contracts concluded, including in particular the sale prices agreed between Orléans City Council and the other six firms which had bought plots on the remaining 20 ha <sup>(28)</sup>,

— an explanation of how Decree No 77-241 of 7 March 1977 can provide the legal basis for a reduction of the water treatment levy on the basis of the quantity consumed, since it stipulates that the levy should be adjusted according to the level of pollution caused by the firm,

— invoices for, and particulars of, all the other firms in the region which qualify, or would have qualified, for the same reduction of the water treatment levy as that offered to Scott Paper.

- (33) Lastly, in the light of the comments received from third parties following its decision to initiate the procedure, the Commission required the French authorities to provide it in particular with:

— a copy of the agreements, concluded in 1987, between Scott Paper, Orléans City Council and Loiret County Council,

— a copy of the joint and several guarantee agreement with Orléans City Council, and of the loans contracted by Sempel under its agreement with the city council and the county council.

#### 5. COMMENTS FROM THE PARTIES CONCERNED

- (34) Both the complainant and the beneficiary firm, Scott, in its capacity as a third party, commented on the initiation of the procedure.

##### 5.1. COMMENTS FROM THE COMPLAINANT

- (35) In its letter of 28 October 1998, the Complainant confirms and supports, in the main, the Commission's position as set out in the decision to initiate the procedure. The complainant stresses in particular (see recitals 36 to 43) the need to clarify the links between the local authorities, Sempel and Scott Paper and (see recitals 44 and 45) the respective contributions from the various authorities in the Loiret. In addition, the complainant comments (see recitals 46, 47, and 48) on the terms of the sale of the Saint-Cyr-en-Val site to P & G and the new KC location in the Loiret.

<sup>(27)</sup> For further details see OJ C 301, 30.9.1998, p. 4.

<sup>(28)</sup> The Commission would point out in this respect that, in their letter of 2 June 1999, the French authorities expressly stated that '(they)' are not prepared to send the Commission the documents it requests (agreement between the local authorities and Sempel, sale contracts with the other firms), as these have nothing to do with the case and some are private.

5.1.1. THE NEED TO CLARIFY THE LINKS BETWEEN THE  
LOCAL AUTHORITIES, SEMPEL AND SCOTT PAPER

for carrying out various infrastructure work for the exclusive benefit of Scott Paper:

(36) As regards the obscurity of the links between the local authorities and Sempel, the complainant requests clarification of Sempel's use of the funds arising from the loans it contracted. It also draws the Commission's attention to the fact that Sempel was dissolved following an administration order, shortly after the expiry of the tripartite agreement between Orléans City Council, Loiret County council and Sempel of 12 September 1987 relating to the period 1987 to 1993, and that its object was 'to carry out all the surveys and work needed for the development of the sites on the La Saussaye industrial estate'.

(37) In this respect the complainant also points out that, in its administration order on Sempel of 19 March 1996, the Orléans Commercial Court noted that an audit report on the company dating from January 1995 found 'a deficit of FRF 4 to 5 million in 1994 and in 1995'. The complainant also invites the Commission to ask the French local authorities concerned to submit the tripartite agreement between Sempel, Loiret County Council and Orléans City Council.

(38) As regards the work carried out by Sempel for the benefit of Scott paper on the Saint-Cyr-en-Val site, the complainant maintains that the loans contracted by Sempel are in reality explained by the hidden financing, for the exclusive benefit of Scott Paper, of a number of works which should have been financed, under undistorted competitive arrangements, by Scott Paper alone.

(39) According to the complainant, the Journal de Gien of 17 September 1987 <sup>(29)</sup> reveals very clearly what the local authorities' policy was from 1987 onwards as regards getting Scott Paper to locate in the Loiret:

'While Orléans is putting out the flags, we can now reveal the factors which, after one year's negotiations, made it possible to win the day. The authorities have revealed the resources which they deployed to hook the United States giant: FRF 80 million.'

(40) The complainant adds that the article clearly shows that the bulk of the aid granted by the local authorities was for developing the land for the Scott Paper site and also

'In this particular case the authorities are including in the package the public services needed to make the La Saussaye estate meet the expectations of Scott Paper, which also benefits from the sale free-of-charge, through Sempel, of 50 ha of land.'

(41) According to the complainant, the press article states in particular that: 'Sempel is responsible for all the work to be carried out: provision of services; miscellaneous development work and construction of a factory warehouse. Total bill: FRF 80 million, to be shared by the county council (FRF 35 million) and Orléans City Council (FRF 45 million). Next February, the two authorities will recover some of this stake when Bouton-Brochard-Scott, a subsidiary of Scott Paper, will buy the building for FRF 31 million. All these measures constitute the first instalment, the only one to which the authorities will make a financial contribution'.

(42) The complainant concludes that this information confirms the view set out in the French Court of Auditors' report of November 1996:

'To get round the urban planning rules, some authorities have no hesitation in hiding the purpose of the aid which they collect or allocate. This is the case with facilities in the Loiret, which are not eligible for regional planning grant. The agreements concluded with the firms stipulate that the aid relates to the land and its development; but, in several large cases, the aid is much greater than the cost of the developed land and is used to finance, quite illegally, much of the building work. In some cases, the aid intensity may be as high as 40 % to 50 % of the declared cost of the real estate investment project'.

(43) The complainant argues that the proposal from the Loiret authorities to finance such an infrastructure was thus decisive for Scott Paper's choice to locate in Saint-Cyr-en-Val rather than accept the 'competitive' offers of other French local authorities. Thus, in July 1987, the 'Nouvelle République' <sup>(30)</sup> noted Scott Paper's hesitations in deciding where it was going to locate in France:

'With the result that the Scott Paper dossier is making its way slowly between the government's

<sup>(29)</sup> Scott Paper. Local authorities overwhelmingly in favour.

<sup>(30)</sup> Scott Paper: 1 000 jobs to wrap up, *La Nouvelle République*, 18 to 19 July 1987.

doubts about opening national markets to a foreign giant and the municipalities' willingness to host the United States' firm, (a rivalry which Scott Paper is using) to obtain the best location terms'.

[...]

'As to the municipalities, Orléans seemed to have eliminated its rivals one after the other, when the availability of a 25 000 m<sup>2</sup> warehouse to the south of Sens caught Scott Paper's attention'.

[...]

'The challenge for Orléans now, therefore, is to find arguments that will save it time. The first is the commitment to put up buildings in no more than five months. This is an apparently satisfactory time frame, since it would enable Scott Paper to become operational at the end of that period, if the United States' multinational's initial aims are confined to using a warehouse and a processing chain which it would supply with paper from its Belgian and Italian factories (in Antwerp and Turin)'.

#### 5.1.2. RESPECTIVE CONTRIBUTIONS OF THE VARIOUS AUTHORITIES IN THE LOIRET

- (44) As regards the contributions of the different authorities, it should be noted that, in January 1998, Le Canard Enchaîné <sup>(31)</sup> mentioned that there was an agreement between Scott Paper and the local authorities:

- (45) 'Orléans City Council and Loiret County Council can hardly hope to recover their stake. Nothing in the contract signed with Scott indicates that they will get a penny back, if the company fails to meet its obligations. The only hope is Brussels [...]'.  
[...]

#### 5.1.3. TERMS OF THE SALE OF THE SAINT-CYR-EN-VAL SITE TO PROCTER & GAMBLE, AND KIMBERLY CLARK'S DECISION TO LOCATE IN THE LOIRET

- (46) Early in 1998, KC/Scott Paper sold the Saint-Cyr-en-Val site to P & G. La République du Centre on 19 September 1998 <sup>(32)</sup> stated that P & G had acquired the Saint-Cyr-en-Val site (which used to belong to Scott

Paper) on advantageous terms, noting that the site in question had been bought for 'a price of FRF 200 million when it is worth FRF 600 million'.

- (47) On 22 October 1998, i.e. barely 10 months after the announcement of the closure of the KC factory at Saint-Cyr-en-Val, the daily 'Les Echos' reported that the company was to set up a new plant in the Loiret <sup>(33)</sup>.

- (48) Finally, the complainant stresses that, for the Commission to be able to verify the information provided by the French authorities, it should have access to 'the tripartite agreement concluded between Sempel and the local authorities on 12 September 1987' and 'the agreement concluded initially by Scott Paper and the local authorities'.

#### 5.2. COMMENTS FROM THE PRESUMED BENEFICIARY OF THE AID

- (49) In its letter of 23 November 1998, Scott comments on the initiation of the procedure with regard to the purchase price of the Orléans site (see recitals 50 to 59), the grant to Scott of a concessionary rate of water treatment levy (see recital 60) and repayment of the aid by Scott (see recital 61).

##### 5.2.1. PURCHASE PRICE OF THE ORLÉANS SITE

##### 5.2.1.1. *The price paid by Scott was the market price*

- (50) In order to expand its market share to France, Scott announced in June 1986 that it was looking to set up a plant in France in the medium term, for an expected investment of up to USD 80 to 100 million. At that time, Scott used to supply France from its plants in Italy and Belgium. According to Scott, the company thereafter began to look for sites in France, which would meet its various needs (location, to take account of transportation costs; size, allowing for possible future expansion; infrastructure; skilled labour; and a sufficient supply of water and energy). In response to the announcement, several regions sent the firm information on available sites and the financial conditions concerning location. Scott states that, despite the consultants' extensive marketing efforts and budget, they did not 'find' Scott, but 'responded' to Scott's announcement that it was interested in setting up in France.

<sup>(31)</sup> *Le Canard Enchaîné*, 14 January 1998, US toilet paper absorbs FRF 550 000 in subsidies per new employee.

<sup>(32)</sup> 'Procter & Gamble Ex-Scott Paper: first clouds over the Saint-Cyr site'.

<sup>(33)</sup> *Les Echos*, Kimberly Clark: new location in the Loiret, 22 October 1998.

(51) Over the succeeding months Scott carefully investigated a large number of different sites. It finally shortlisted first eight and then four sites (March 1987), of which La Saussaye was one. Scott explains, however, that no definitive decisions were taken at that time, since it was understood that other local authorities in France were considering offering sites to the company.

(52) In this respect, Scott stresses that the market price is simply what a buyer and seller mutually agree is an acceptable price to each. The assessment that has to be made, therefore, is to determine the market price at which a private-sector owner and developer of the Sologne business park would itself have handled the case and the conditions on which such an investor would have sold the site.

(53) Scott remarks that, at the time, many local authorities were scanning the market for industrial investors, such as itself, to buy sites, invest in them and operate them. The number of such companies was limited at the time, however, so the market price had to reflect the fact that the demand for such firms exceeded their supply, thus enhancing their negotiating power.

(54) The price paid by Scott (FRF 31 million (EUR 4,7 million)) was the price it was prepared to pay for the site in question in the light of (i) the extensive research which it had carried out in the preceding months into the net cost of acquiring competing available sites and (ii) its own analysis of the total investment it was ready to make, plus the fact that (a) it could quite easily continue to supply the French market from elsewhere in the Community and (b) that the new French plant would be loss-making for five years.

(55) Scott claims that, apart from the fact that the company would have attracted other firms to the business park, the purchase price and the direct receipts generated by its activities would, over time, have more than repaid the costs incurred by the local authorities, who would of course have continued to benefit from this source of revenue thereafter. In this connection, Scott refers to the Commission decision in Daimler-Benz<sup>(34)</sup>, which, it asserts, shows that the business rate and other forms of local tax can be included in a local authority's revenue to determine if it has been paid a proper price.

(56) Regarding the price difference between the site sold to Scott and the adjoining sites, Scott points out that the difference in size between a site of 48 ha and sites of only a few thousand square meters would obviously be reflected in the sales' prices obtained. It also points out that the sales of the adjoining sites took place some years after the sale of the site to Scott, and therefore the prices of these sites could have been influenced by a large number of factors, including of course the increase in the value of land in the area following Scott's arrival.

#### **5.2.1.2. *The site was sold after extensive marketing campaigns***

(57) Scott believes that all the marketing and promotional initiatives undertaken by the local authorities, or on their behalf by e.g. Recherche et Développement International (RDI), more than meet the requirement that they must be 'sufficiently well-publicised', as this could have been understood in 1986/1987 in the absence of any clarification or guidance from the Commission; consequently, Scott believes that, by the standards of the communication relied upon by the Commission, even though this was only published in 1997, it could not have received any aid in this case.

#### **5.2.1.3. *Retrospective application of the principles in the 1997 communication***

(58) Scott does not accept that the 1997 communication can apply to a sale of public land which took place in 1987. The Commission, it claims, is trying to apply a policy developed over the following ten years and more, which, as the institution itself has stated, needed clarifying through the publication of the communication in 1997, even though during those ten years a number of decisions had been adopted on the sale of land by public authorities. Scott also considers that the legal instrument — the communication of 1997 — which the Commission appears to be relying on is 'soft law' and therefore has no binding legal effect.

#### **5.2.1.4. *The legal basis of the aid granted to Scott was notified***

(59) According to Scott, France advised the company that if aid, of whatever description, had been allocated by one or other of the local authorities, it would have been granted as indirect aid under Law No 82-6, and that this Law had definitely been sent to the Commission in 1982. Scott claims that, even if Law No 82-6 was not formally notified to the Commission in 1982, the Commission received a copy of it, so it was obliged to act expeditiously in compiling the file and in carrying

<sup>(34)</sup> Seventeenth Report on Competition Policy 1987, point 220.

out a preliminary investigation <sup>(35)</sup>, failing which Law No 82-6 could be implemented by France on the ground that it had become an existing aid measure in accordance with the principles in *Lorenz* <sup>(36)</sup>.

November 1998, 30 April 1999, 6 October 1999, 7 January 2000 and 21 February 2000), which are summarised below.

#### 5.2.2. GRANT TO SCOTT OF A PREFERENTIAL RATE OF WATER TREATMENT LEVY

- (60) Lastly, as to the alleged preferential rate of water treatment levy, Scott understands that the rate applies to all customers who use the same quantity of water as it does and that other firms or institutions pay the same rate. Thus Scott simply pays a rate provided for by law and available to all firms in the same category as itself.

- (63) According to the French authorities, Scott did not receive any aid for the following reasons: there was no market for industrial sites in rural areas at the time of the sale of the land (recital 64); if the Commission were to find that there was a market, the land was sold at the market price (recitals 65 to 72); the land was sufficiently well-publicised within the meaning of the communication (recitals 73 to 88); if the Commission thinks that the sale of land does constitute aid, the following costs should be deducted (recitals 89, 90 and 91); the preferential rate of water treatment levy (recitals 92, 93 and 94); the limitation period (recital 95), and the status of KC in the case (recital 96).

#### 5.2.3. REPAYMENT OF AID BY SCOTT

- (61) Scott maintains that, in accordance with the decisions of the Court of Justice, the beneficiary of aid granted unlawfully may invoke exceptional circumstances, as a result of which it had legitimately assumed the aid to be lawful. The reasons why aid granted unlawfully should not be repaid in this case are as follows: (a) any advantage that Scott may have had when it operated the plant has been entirely neutralised by P & G buying the site and the plant at their combined market value; (b) Scott is not now retaining any advantage from any incompatible aid, as the book value of the site and the plant at the time of the sale to P & G was much less than the total cost of those assets to Scott, and those assets were sold to P & G at less than half their book value; (c) the non-transparent manner in which the Commission dealt with the various laws either notified or sent to it by France in 1982, on the aid that may be granted by French local and regional authorities, made it almost impossible for a firm to obtain information about the status of these enactments from a Community law perspective.

#### 6.1. NO MARKET FOR INDUSTRIAL SITES IN RURAL AREAS

- (64) At the time of the sale of the land, there was no market at all for industrial sites in rural areas <sup>(37)</sup>. According to the French authorities, there were, in 1987, no private developers in the Orléans area carrying out this type of work. The lack of a market in industrial land made it difficult to set a market price within the meaning of the communication. The French authorities claim that, in order to create such a market, and stimulate and develop the local economy, the local authorities had to prepare the land and sell it to firms. They point out that the first firm to establish itself on the estate, i.e. Scott, attracted other companies. It is not possible in any way to conclude from the size of the business park in 1998 that there was a market in 1987 for this type of land.

#### 6.2. THE LAND WAS SOLD AT THE MARKET PRICE

- (65) Even if the Commission should conclude that there was a market, the land was in fact sold at the market price, and for three reasons <sup>(38)</sup>.

#### 6. COMMENTS FROM THE FRENCH AUTHORITIES

- (62) The French authorities replied to the Commission decision to initiate the Article 88(2) procedure and to its request for information by five letters (dated 25

<sup>(35)</sup> Case C-312/90 *Spain v Commission* [1992] ECR p. I-4117.

<sup>(36)</sup> Case 120/73 *Lorenz* [1973] ECR p. 1471.

<sup>(37)</sup> Letter from the French authorities, 25 November 1998, pp. 2 and 3; letter from the French authorities, 30 April 1999, p. 1 and letter from the French authorities, 15 October 1999, pp. 1 and 2.

<sup>(38)</sup> Letter from the French authorities, 25 November 1998, p. 3; letter from the French authorities, 30 April 1999, p. 2 and letter from the French authorities, 21 February 2000, pp. 2 to 4.

6.2.1. THE DIFFERENCE BETWEEN THE PRICE OF THE LAND SOLD TO SCOTT AND THAT OF THE REMAINING LAND IS DUE TO ECONOMIES OF SCALE

- (66) Sempel sold 48 ha to Scott in 1987 for FRF 31 million (EUR 4,7 million), i.e. FRF 65/m<sup>2</sup> (EUR 9,9/m<sup>2</sup>). Of the remaining 20 ha sold back to the city council, only 2,8 ha were sold to firms at an average price of FRF 72/m<sup>2</sup> (EUR 11/m<sup>2</sup>) between 1990 and 1994. By selling a plot of this size (48 ha) to Scott, the city council achieved economies of scale <sup>(39)</sup> of some FRF 11/m<sup>2</sup>, which justified a selling price of approximately FRF 65/m<sup>2</sup> (EUR 9,9/m<sup>2</sup>) instead of FRF 72/m<sup>2</sup> (EUR 11/m<sup>2</sup>). The different transactions are summarised in the table below:

| Period       | Number of transactions | Selling price          |
|--------------|------------------------|------------------------|
| 1986 to 1990 | 5                      | FRF 40/m <sup>2</sup>  |
| 1992         | 1                      | FRF 80/m <sup>2</sup>  |
| 1994         | 2                      | FRF 100/m <sup>2</sup> |

6.2.2. THE PURCHASE PRICE DID NOT COVER ALL THE EXPENSES <sup>(40)</sup>

- (67) The sale of the site by Scott to P & G clearly shows that sellers in the privately owned paper sector do not necessarily cover their expenses completely, even on the basis of the written down cost. Scott and KC sold the Orléans factory to P & G in May 1998 for [...]. The transaction was concluded under normal market conditions. The total cost, to Scott and KC, of the factory sold was [...]. The written down cost (or net value) of the factory was [...].

- (68) The factory sold to P & G belonged partly to Scott and partly to KC. The assets which Scott sold to P & G were the land bought from Sempel in 1987, the building on

the land included in Sempel's selling price, and other buildings which Scott itself had had built and had paid for. The total cost to Scott of what it sold to P & G was [...] (i.e. the FRF 31 million (EUR 4,7 million) paid to Sempel and the [...] paid for other buildings). At the time of the sale, the written down cost of these assets was [...]. Scott received [...] from P & G for the assets which it sold to that company. Scott therefore made a loss of [...] (or 38 %) compared with the purchase cost, and a slight profit of [...] (or 5 %) compared with the written down value.

- (69) In its communication on the decision to initiate the procedure, the Commission indicated that Scott had perhaps received aid of between FRF 59,3 million (EUR 9,0 million) and FRF 98,7 million (EUR 15 million). If one adds these sums to the price which Scott effectively paid for the assets it sold to P & G, the cost of these goes up from [...] to [...] or [...]. The losses which Scott would then have made on the sale to P & G would have been as follows:

Acquisition cost of [...]:

— on an undepreciated basis, the loss would have been [...] or 59 %;

— on a depreciated basis, the loss would have been [...] or 25 %.

Acquisition cost of [...]:

— on an undepreciated basis, the loss would have been [...] or 66 %;

— on a depreciated basis, the loss would have been [...] or 38 %.

<sup>(39)</sup> In their letter of 30 April 1999, p. 2, the French authorities give the following explanation of the difference between the price per m<sup>2</sup> paid by Scott and that paid by the other investors on the estate:

— the size of the plots, since the sale of a large plot reduces the landowner's financial carrying costs compared with a hypothetical situation involving many sales of smaller plots. [...] The costs associated with the servicing of the site are not to be taken into consideration in this particular case, since Sempel developed the 68 ha,  
 — the appreciation of the estate as a whole following Scott's move,  
 — the land was sold to Scott in 1987, the other sales took place between 1990 and 1994'.

<sup>(40)</sup> Letter from the French authorities, 21 February 2000, pp. 2 to 4.

- (70) According to the French authorities, the experience which Scott and KC gained from the Orléans site also taught them that experts' valuations should be treated with considerable caution, since the valuations given could often not be fulfilled on the market. The Galtier firm of consultants valued the assets belonging to Scott and KC, and sold to P & G, as follows: Scott [...]; KC [...], giving a total of [...].

- (71) The French authorities concluded that the expert valuation resulted in figures that were some 22 % lower than the written down cost of the assets [...] but the two companies did not manage to obtain a price that was anywhere near that given in the valuation: Scott and KC only found a buyer prepared to pay [...] they therefore had to accept a loss on the sale of their assets

to P & G of [...] (or 30 %) compared with Galtier's expert valuation, and of [...] compared with the written down cost of the assets.

industrial estate is planned, it is often not prepared, or a rough draft only is made: local authorities are disinclined to invest heavily in site preparation unless they are sure their search will succeed <sup>(44)</sup>.

#### 6.2.3. THE 1987 VALUE AS A FUNCTION OF THE ACTUAL 1998 MARKET PRICE <sup>(41)</sup>

- (72) The French authorities claim that the market value of the land in question was probably FRF 31 million (EUR 4,7 million), and for two reasons. First, Scott sold to P & G in 1998 for [...] what it had bought from Sempel in 1987 for FRF 31 million (EUR 4,7 million), despite the increase at the time in the price of land. Second, Scott applied the Commission's time value concept inversely to the land and buildings which it sold to P & G in order to calculate the current value of the aid granted in the past. At an average interest rate of 6 %, the market value in 1987 of what Scott sold to P & G in 1998 [...] would have been [...] and for just the land and buildings bought from Sempel would have been [...].

- (76) In the present case, the French authorities claim <sup>(45)</sup> that the county council and the city council made a substantial commitment over the years as regards marketing by setting up an agency for the economic development of the Loiret (ADEL) and *inter alia* a business investment consultant in the United States of America, RDI, to promote the location of new businesses in the city, including of course the Orléans-Sologne site. In 1986 a French consultancy, DML et Associés, was recruited by the county council to conduct the same campaign vis-à-vis European and non-European potential investors located in the Paris area <sup>(46)</sup>.

#### 6.3. THE LAND WAS SUFFICIENTLY WELL-PUBLICISED WITHIN THE MEANING OF THE COMMUNICATION

- (73) As regards the publicity given in France and the Community to the sale, the French authorities point out that Scott Paper set up its plant in 1987 and that it is difficult today to produce evidence of the publicity organised at the time <sup>(42)</sup>.
- (74) The French authorities emphasise first of all that to find a potential investor it is not enough to 'publish' in the press a notice announcing a piece of land is available. The search involves: (a) identifying target firms that could locate to Europe or France permanently and on a substantial scale; (b) approaching such firms directly or indirectly through a consultant or specialised intermediary; (c) presenting the region; (d) selecting, after initial contacts, those firms that are likely to react to the tender, and (e) the discussions associated with the final move <sup>(43)</sup>.

- (77) According to the French authorities <sup>(47)</sup>, marketing activities focused initially, in 1986 and 1987, on the state of Michigan. They took the form in particular of: (a) stands at industrial exhibitions to alert United States companies to investment opportunities in the Loiret (e.g. at Detroit in September 1986); (b) the search for investors wishing to come to the Loiret and/or Orléans; (c) a meeting in Orléans of local development agencies, to which representatives of agencies in Michigan and Hannover were specifically invited; (d) in May 1987, an official fifteen-day visit to the United States was organised for the city's and Loiret's local development agencies; and (e) important contacts were maintained in the United States with local chambers of commerce, lawyers' offices, accountants, French companies and banks, development agencies and DATAR (Directorate for Town and Country Planning and Rural Action). Through these activities, RDI succeeded in identifying a number of United States companies (such as Symplex Inc., Saturn Inc. or ICB) initially interested in investing in the Loiret or Orléans.

- (78) ADEL has also produced a business atlas entitled 'Orléans, an environment for business people' <sup>(48)</sup>. In Orléans, ADEL took on the role of the Chamber of Commerce and Industry in order to find buyers, having been specially set up and hired to find potential investors. As part of its programme, ADEL was in contact with other local chambers of commerce and industry <sup>(49)</sup>.

- (75) The search cannot be conducted on the basis of just one available site, in case negotiations with potential investors are concluded too quickly: as a rule, several sites are proposed to potential investors, and, if an

<sup>(44)</sup> Letter, 7 January 2000, p. 1.

<sup>(45)</sup> Letter from the French authorities, 25 November 1998, p. 3 and 4, and letter from the French authorities, 6 October 1999, p. 2 and 3.

<sup>(46)</sup> Letter, 7 January 2000, p. 1.

<sup>(47)</sup> Letter from the French authorities, 25 November 1998, p. 3 and 4 and letter from the French authorities, 6 October 1999, p. 2 and 3.

<sup>(48)</sup> Letter from the French authorities, 7 January 2000, p. 4.

<sup>(49)</sup> Idem.

<sup>(41)</sup> Letter from the French authorities, 21 February 2000, p. 4.

<sup>(42)</sup> Letter, 6 October 1999, p. 1.

<sup>(43)</sup> Letter, 7 January 2000, p. 1.

- (79) The French authorities also provided <sup>(50)</sup> a letter from the DML consultancy to Scott, dated 17 December 1999, describing how potential investors could be identified for the sites available in the Loiret in 1985/86. According to the letter, DML specialises in assistance for restructuring companies and industrial groups and assistance to local authorities and regional development agencies for identifying industrial investors.
- (80) In the letter DML explains its working methods. It first identifies the activities which the region concerned wants to attract, and the companies in those sectors in the target zone. Secondly, once it has identified a potential interest, its consultants meet the company to determine its requirements and the level of investment envisaged. ADEL then examines the sites available in the region, to identify those which are most likely to meet the potential investor's requirements. It presents them to the investor, which itself selects those it wants to visit. Lastly, ADEL presents technical and economic studies to enable the investor to decide whether its project is viable in the region selected and on the particular site proposed.
- (81) Regarding the present case, DML writes 'As an example of our work for ADEL, which began in July 1986, we initially identified over 500 companies to contact in the south of the Paris region. In the first three months, 150 companies were contacted, with the following results: 130 were not interested at all, 12 wanted more information about the Loiret and five wanted to be contacted. [...] In the following months, DML contacted the 350 remaining companies to determine their interest, identify new leads and follow up the projects identified'.
- (82) According to DML, the identification of potential investors is not usually achieved by placing advertisements in the press and waiting for companies to reply, but rather by directly contacting the managers of firms.
- (83) DML explains that 'DML's method of operation is predicated on the awareness that potential investors can be found only after substantial preparatory work has been carried out, personal contacts established and assistance provided over a long period. We have to persuade the potential investor to choose, first, the region concerned and then a particular site. The final decision as to its place of establishment or location is of course the investor's. The job of companies like ours, which have been hired by local development agencies, is to direct the potential investor to the region concerned rather than to a particular site. The choice of the site itself is determined by the technical and financial requirements of the investor'.
- (84) DML concludes by stating that 'lastly, we can confirm to you that DML was not involved, and did not play a part, in the identification and location of Scott Paper's investment project in Orléans'.
- (85) The French authorities consider that, since the Commission had not clarified its policy in 1987, the initiatives described above should be regarded as meeting the condition in the communication that the bidding procedure should have been 'sufficiently well-publicised', as this could have been interpreted at the time <sup>(51)</sup>.
- (86) In reply to the Commission's position that the circumstances of the Scott sale did not fall within the scope of the communication, since the advertising carried out by or on behalf of the public authorities was not sufficiently specific to the site, the French authorities emphasise that the Commission applied the 1997 communication flexibly in its decision on the Fresenius case <sup>(52)</sup>.
- (87) The French authorities claim that in Fresenius the conditions laid down in the communication were not met on two counts. First, the communication authorises land to be sold at up to 5 % below the valuation price, if no purchaser can be found after a reasonable period; in Fresenius' case, the land was sold at more than 10 % below the valuation price. Secondly, the communication also provides that if the land cannot be sold after a reasonable period for 95 % or more of the price at which it was valued, a new valuation may be carried out in order to determine a more realistic market value; no such valuation was done in the Fresenius case <sup>(53)</sup>.

<sup>(50)</sup> Letter from the French authorities, 21 February 2000, Annex 1.

<sup>(51)</sup> Letter from the French authorities, 25 November 1998, p. 3; letter from the French authorities, 30 April 1999, p. 1; letter from the French authorities, 6 October 1999, p. 2 and letter from the French authorities, 7 January 2000, p. 1 and 2.

<sup>(52)</sup> Letter from the French authorities, 10 January 2000, pp. 3 to 5; Notice C 36/92 (ex NN 108/92) concerning the terms of a land purchase agreement between the city council of Friedberg/Hessen and Fresenius AG (OJ C 21, 25.1.1994, p. 4).

<sup>(53)</sup> Letter from the French authorities, 7 January 2000, p. 3.

- (88) The French authorities conclude that Fresenius shows that in 1994 the Commission was not applying strictly and inflexibly the criterion which it was to establish more clearly three years later in the communication: the same approach should be adopted in the Scott case, especially since the events took place seven years before the Fresenius decision was adopted, with the result that in 1987 it was that much less clear which procedures the local authorities should apply in order to sell an undeveloped piece of land.

6.4. IF THE COMMISSION WERE TO FIND THAT THE SALE OF LAND CONSTITUTES AID, THE FOLLOWING COSTS SHOULD BE DEDUCTED

- (89) As regards the total cost of the project to the city council, the following sums should be deducted <sup>(54)</sup>:

- FRF 31,7 million (EUR 4,8 million) (FRF 65,85 million — FRF 34,2 million) for the amortisation of the loan of FRF 37,2 million (EUR 5,7 million). Only the nominal value of the loan should be included in the calculation of the cost,
- FRF 13,6 million (EUR 2,1 million) representing the cost of a public intercepting sewer serving not just Scott but the whole community, i.e. 25 000 inhabitants and other firms as well. Before this social overhead capital was built, waste water was treated and discharged directly into the river. Environmental pressures had for some time been leading the local authorities to consider such a facility. The decision was undoubtedly speeded up by Scott's locating to the area, but was not based on it,
- FRF 8,3 million (EUR 1,3 million) for the refund of VAT on the various site improvement operations,
- as a general point, it should be noted that these costs relate to 68 ha of land, and not just the 48 ha sold to Scott.

- (90) The French authorities point out that, in accordance with the Commission's decision in Daimler Benz <sup>(55)</sup>, 'the payment of local taxes by the purchaser of a site should be taken into account in the price paid for that site'. The Seventeenth Report on Competition Policy specifically notes that the expenses incurred by the Land of Baden-Württemberg and the Ratstatt authorities for

(i) clearing the site and (ii) connecting it to the public services, such as water supply, were not regarded as constituting aid, since the purchaser had to pay them through local taxes. It is clear from the report that these costs were specifically incurred for the benefit of Daimler Benz.

- (91) At its meeting on 7 December 1999, the Commission adopted a position whereby the payment of local taxes could not be taken into account in determining the price paid by the purchaser of the site. This was clearly neither the position nor the practice of the Commission when Scott bought the site from Orléans City Council (end of 1987), as the Daimler Benz case, which also occurred in 1987, shows.

6.5. THE PREFERENTIAL RATE OF WATER TREATMENT LEVY

- (92) The French authorities maintain that the rate of the water treatment levy applied to Scott is part of a general measure and does not, therefore, constitute a selective advantage within the meaning of Article 87(1) of the EC Treaty <sup>(56)</sup>. The Hôpital de la Source is subject to the same rate as Scott.
- (93) The French authorities claim that the reference in the city council's minutes of 1994 to a 'preferential rate of water treatment levy' is linked to the inclusion, in the overall financial statement for the development of the La Saussaye estate, of the receipts lost as a result of a meeting on 16 December 1988 at which a degressive rate of levy based on the level of water consumption was introduced. The location of Scott Paper was undoubtedly the catalyst for such a decision, but the latter is a general measure which benefits, and will benefit, all plants meeting the same requirements <sup>(57)</sup>.
- (94) According to the French authorities, taxpayers with a water consumption of more than 6 000 m<sup>3</sup> qualify for a coefficient of degressivity in the calculation of their water treatment levy, to take account of that consumption. Orléans City Council wanted, for its part, to encourage large-scale consumers (over 50 000 m<sup>3</sup>) to limit their effluent (hence the increase of the coefficient from 0,5 to 0,8 entered in the minutes), to reflect water treatment costs. This rationale is not applied in the case of taxpayers with a consumption of more than 150 000 m<sup>3</sup>, since the volume of water consumed makes it

<sup>(54)</sup> Letter from the French authorities, 25 November 1998, p. 5 and 6; letter from the French authorities, 30 April 1999, p. 2 and letter from the French authorities, 6 October 1999, p. 4.

<sup>(55)</sup> Letter from the French authorities, 10 January 2000, p. 3; see footnote 34.

<sup>(56)</sup> Letter from the French authorities, 25 November 1998, p. 5; letter from the French authorities, 30 April 1999, p. 3; letter from the French authorities, 6 October 1999, p. 5 and letter from the French authorities, 10 January 2000, p. 1 and 2.

<sup>(57)</sup> Letter from the French authorities, 6 October 1999, p. 5.

possible to cover the related water treatment costs. The incentive effect of raising the coefficient of degressivity of the levy is less or even zero, if consumption is very high (hence the reduction to 0,25 entered in the minutes) <sup>(58)</sup>.

unlikely that those authorities would have told KC that aid had been paid to Scott, if such were the case, and in what circumstances.

## 7. ASSESSMENT OF THE AID MEASURES

### 6.6. LIMITATION PERIOD

- (95) The French authorities draw the Commission's attention to the fact that Scott moved to the Loiret back in 1987 and that the first requests for information from the Commission date from 1997. The French authorities note that the new Procedural Regulation provides for a limitation period of ten years, and hope that in the case in point the virtually complete expiry of such a period will be taken into account by the Commission. They consider that the time the complainant has taken to acquaint the Commission with the facts shows that the loss suffered by the competition is probably non-existent <sup>(59)</sup>.

### 6.7. STATUS OF KIMBERLY CLARK IN THE CASE

- (96) According to the French authorities <sup>(60)</sup>, KC can reasonably expect not to have to repay the aid, and for the following reasons:
- (a) KC has received no aid from France. Any aid that may have been granted was paid to Scott some seven years before KC acquired an interest in the company;
  - (b) any diligence shown by KC with regard to Scott at the time of acquisition would not, in accordance with normal commercial and legal practice, have extended back as far as 1987 and would not have revealed any grant of aid to Scott in 1987;
  - (c) moreover, Scott's accounts between the date of their initial publication and 1995, the year when KC acquired Scott, did not show that the company had received any assistance whatsoever from any source in France;
  - (d) the only way KC could have discovered if Scott had received any aid in France would have been either to scan the relevant local or national press or the minutes of the meetings of the local authorities, or to contact the competent authorities. It is very

### 7.1. ASSESSMENT OF THE AID MEASURES IN THE LIGHT OF THE ORDER TO PROVIDE INFORMATION

- (97) Although the Commission ordered the French authorities to provide information, it still does not have any information, or has inadequate information only, on the following points:
- a detailed breakdown of the work carried out by Sempel on the land occupied by Scott, by type of operation (levelling, electricity, infrastructure, buildings, etc.), and their actual cost, plus a breakdown of the use of the funds arising from the loans contracted by Sempel,
  - the various sale contracts concluded, including in particular the selling prices agreed between Orléans City Council and the other six firms which bought plots on the remaining 20 ha. The Commission would point out in this respect that, in their letter of 2 June 1999, the French authorities expressly stated that 'they are not prepared to send the Commission the documents it requests (agreement between the local authorities and Sempel, sales contracts with the other firms), since these documents have nothing to do with the case and some are private',
  - invoices and details relating to all the other firms in the region which are, or would have been, eligible for the same 'discount' on the water treatment levy as that granted to Scott Paper.
- (98) According to the ruling in Pleuger, 'it is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested, that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aids are compatible with the common market' <sup>(61)</sup>. This power of the Commission's to take a decision on the basis of the information available if a Member State fails to comply with an information injunction was subsequently enshrined in Article 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty (the Procedural Regulation on state aid, hereinafter 'the Procedural Regulation') <sup>(62)</sup>.

<sup>(58)</sup> Letter from the French authorities, 7 January 2000, p. 2.

<sup>(59)</sup> Letter from the French authorities, 6 October 1999, p. 6.

<sup>(60)</sup> Letter from the French authorities, 7 January 2000, p. 4.

<sup>(61)</sup> Joined Cases C-324/90 and C-342/90 Pleuger [1994] ECR p. I-1173, point 26.

<sup>(62)</sup> OJ L 83, 27.3.1999, p. 1.

- (99) As a result, the Commission will have to base its assessment on the available information, in particular as regards calculating the value of the aid measures, the market prices of comparable plots and the preferential rate of water treatment levy.

## 7.2. LEGAL BASIS

### 7.2.1. PREFERENTIAL PRICE OF THE LAND

- (100) Scott maintains that the preferential price of the land was granted as an indirect aid under Law No 82-6 and that there is no doubt that this Law was sent to the Commission in 1982. The company adds, referring to Case C-312/90 *Spain v Commission* <sup>(63)</sup>, that even if Law No 82-6 was not officially notified to it in 1982, the Commission did receive a copy, so that it was obliged to act expeditiously as regards both the composition of the file and its preliminary examination, failing which Law No 82-6 could be implemented by France on the grounds that, in accordance with the principles laid down in *Lorenz* <sup>(64)</sup>, it had become an existing aid.
- (101) This position is rejected, for the following three reasons:
- (102) Firstly, the French authorities never invoked this Law as the legal basis of the measure in question. Although all the comments of third parties, including Scott, were sent to the French authorities, the latter never referred to the Law in their correspondence with the Commission. Nor did the local authorities cite it in the agreement which they concluded with Scott; rather, they made the general statement that 'this agreement is concluded in accordance with the statutory provisions and other rules governing the powers of local authorities' <sup>(65)</sup>. Furthermore, there was no reference to this Law in the city council's minutes of 1994.
- (103) Secondly, even supposing that the measure concerned was granted under Law No 82-6, it is still the case that the Law does not constitute an existing aid within the meaning of the *Lorenz* judgment, as Scott claims.
- (104) According to the *Lorenz* judgment, the effect of Article 88(3) of the Treaty is that, if the Commission, having been notified by a Member State of a plan to grant aid, fails to initiate the contentious procedure, that State may at the expiration of a period of two months grant the proposed aid, provided that it has given prior notice to the Commission, and that aid will then come under the system of existing aid ('the *Lorenz* rule') <sup>(66)</sup>.
- (105) In the case in point, the French authorities never submitted to the Commission that the Law should have been notified. Scott does not claim either that the aid was officially notified, but maintains that 'France advised Scott that [...] Law No 82-6 was sent to the Commission in 1982' <sup>(67)</sup>. Neither the French authorities nor Scott provided the Commission with written evidence that the Law had in fact been sent to it. In any event, contrary to Scott's position, the *Lorenz* rule does not apply where a measure has not been officially notified.
- (106) It should be pointed out in this respect that, in accordance with its practice as determined in Article 2 of the Procedural Regulation, the Commission informs the Member State concerned without delay of the receipt of a notification. If they had not received such information, the French authorities should have recontacted the Commission to verify that it had indeed received the said notification.
- (107) It should also be said that the quotation cited by Scott <sup>(68)</sup>, according to which, even if an aid measure has not been officially notified to the Commission, the latter is obliged to act expeditiously as regards both compiling the file and the preliminary investigation, failing which the measure will be governed by the rule in *Lorenz*, is taken out of context. Firstly, the quotation is taken from the Opinion of Advocate-General Van Gerven and not from the Court of Justice's judgment. Secondly, the statement is made in a footnote commenting on the time limit within which the Commission should investigate an aid which it has itself discovered or following complaints made by interested undertakings.
- (108) Advocate-General Van Gerven underlines that 'where unnotified aid is concerned, it is in principle not the case that the Commission has to complete its investigation within a two-month period. [...] This does not mean that the Commission is not under a duty to act expeditiously in compiling the file and carrying out its preliminary investigation of it.' This means that when the Commission does investigate a case, either pursuant to a complaint or ex officio, it has to act expeditiously, but it by no means implies that, failing such notification, the *Lorenz* rule is applied in all cases.

<sup>(63)</sup> See footnote 35.

<sup>(64)</sup> See footnote 36.

<sup>(65)</sup> Article 11 of the Scott agreement, p. 4.

<sup>(66)</sup> See footnote 36.

<sup>(67)</sup> Letter from Scott, 23 November 1998, p. 11.

<sup>(68)</sup> Case C-312/90 *Spain v Commission* [1992] ECR p. I-4117.

(109) It should be pointed out in this respect that, following the complaint lodged in December 1996, the Commission compiled the present file and carried out its preliminary investigation, which led to its decision in May 1998 to initiate an in-depth investigation.

region does not reach the ceiling laid down in the decree mentioned in the preceding paragraph.

Indirect aid may be granted by local authorities and their associations, and by regions, severally or jointly.

(110) Lastly, as regards the Lorenz rule, neither the French authorities nor Scott claimed that the French authorities had given prior notice to the Commission before implementing Law No 82-6. Without such notice, an aid measure does not come under the system applying to existing aid pursuant to the Lorenz rule.

Local authorities, their associations and regions must sell or lease buildings on market terms. However, discounts on those terms may be granted, and abatements on the cost of renovating old industrial buildings, in accordance with the rules on ceilings and zones laid down in the decree mentioned in the second paragraph.

(111) Thirdly, even if the Commission treated Decree No 82-809 <sup>(69)</sup>, which is based on Article 4(4) of Law No 82-6 <sup>(70)</sup>, as existing aid without prior notification, this does not mean that Article 4(6) constitutes existing aid <sup>(71)</sup>.

Other indirect aid shall be unconditional.

(112) At the time the measure was granted, Article 4 of Law No 82-6 approving the Interim Plan for 1982/83 of 7 January 1982 <sup>(72)</sup> stated that:

Local authorities and their associations and the regions shall determine the nature and amount of the guarantees required, where appropriate, of the firms receiving the aid and of their managers.

'The local authorities and their associations and the regions may, where the purpose of their action is to create or expand economic activity, grant direct or indirect aid to firms under the following conditions:

In addition, agricultural measures of an industrial character may be taken by local authorities, their associations and regions under agreements concluded by them with the central government laying down the procedures for the aid which they may agree.

Direct aid shall take the form of regional business start-up grants, regional employment grants, interest-rate subsidies or loans and advances at more favourable rates than the average yield on bonds. Direct aid shall be granted by the region under conditions laid down by decree of the Conseil d'Etat: the decree will determine in particular the rules as regards ceilings and zones which are essential for the implementation of national regional planning policy and compatible with France's international commitments.

This Law will be implemented as a national law'.

The various forms of direct aid may be supplemented by the Loiret, the municipalities or their associations, where the assistance from the

(113) In accordance with Article 4 of Law No 82-6 and French legal commentators <sup>(73)</sup>, French national law appears to distinguish three types of aid. First of all, there are direct aid measures, the terms of which must be laid down by decree of the Conseil d'Etat (direct aid) <sup>(74)</sup> and for which only assisted regions are eligible. Then there are indirect aid measures relating to firms'

<sup>(69)</sup> Decree No 82-809 of 22 September 1982 on aid for the purchase and leasing of buildings granted by the local authorities, their associations or the regions, *Official Journal of the French Republic*, 24 September 1982, (Decree No 82-809), p. 2853.

<sup>(70)</sup> Article 4 of Law No 82-6 was repealed by Law No 96-142 of 21 February 1996.

<sup>(71)</sup> Case C-295/97 *Piaggio* [1999] ECR p. I-3735, points 45 to 49.

<sup>(72)</sup> *Official Journal of the French Republic*, 8 January 1982, p. 222.

<sup>(73)</sup> L'action économique des collectivités locales, Ministry of the Interior (Local Authorities Department), Paris 1992 (report of the Ministry of the Interior), *Droit administratif: L'encadrement juridique des aides des collectivités territoriales aux entreprises*, Supplement No 1 to *La Semaine Juridique* No 5, 29 January 1998 (article in *La Semaine Juridique*), and Les interventions des collectivités territoriales en faveur des entreprises, special public report by the French Court of Auditors, Paris, November 1996 (report by the French Court of Auditors).

<sup>(74)</sup> Decree No 82-379 of 6 May 1982 on the land-use planning grant, (hereinafter Decree 82-379), *Official Journal of the French Republic* of 7 May 1982, p. 1294; see Report of French Court of Auditors, p. 16 and 62, the report by the Ministry of the Interior, p. 94.

real estate (type I indirect aid) <sup>(75)</sup>, for which rules on ceilings and zones have to be laid down by the same decree, i.e. only assisted regions may apply for them. Lastly, there is 'other indirect aid', which does not require supplementary implementing measures and which is 'unconditional' (type II indirect aid), i.e. independent of whether the region is assisted or not <sup>(76)</sup>.

(114) Decree No 82-379 lays down the procedures for implementing direct aid. It was notified as the legal basis of the French scheme of regional planning grants. Commission Decision 85/18/EEC of 10 October 1984 on the French regional planning grant scheme <sup>(77)</sup> Decree No 82-379 cites Article 4 of Law 82-6 as the legal basis. Article 4 of Law No 82-6 was not notified directly to the Commission.

(115) Decree No 82-809 lays down the procedures for implementing type I indirect aid, i.e. real-estate aid. It cites Article 4 of Law No 82-6 as its legal basis. Even if this decree was never notified to the Commission <sup>(78)</sup>, the latter has so far considered that the scheme constituted an existing aid.

(116) In the case in point, the measures concerned, namely (a) the building of a factory warehouse and (b) the development of the site, should be regarded as indirect aid within the meaning of Article 4(5) and (6) of Law No 82-6. It should be noted in this respect that the distinction between direct and indirect aid is still not recognised in Community law. This classification of the measures concerned is intended only to determine

whether these measures can be regarded as coming under Law No 82-6.

(117) Measure (a) — the costs associated with building a factory warehouse — should be regarded as constituting type I indirect aid for the purposes of French law, i.e. a measure whose implementing procedures should be laid down by Decree No 82-809 and for which only assisted areas are eligible.

(118) Irrespective of the fact that the Commission, at the time of the building of the factory warehouse, considered that Decree No 82-809 constituted an existing aid, measure (a) does not in any case come under the said decree, since the Loiret is not an assisted area. Moreover, Article 2 of Decree No 82-809 provides that:

'In addition to the aid granted under the preceding Article, in the zones listed in Annex I to the abovementioned Decree of 6 May 1982 (Decree No 82-379), and in order to promote the creation or expansion of economic activity, local authorities, their associations or regions may, severally or jointly, grant discounts on the price of property which they sell or lease to firms up to 25 % of the sale value of buildings or leases of corresponding market value.'

(119) Annex I to Decree No 82-379 lists the areas which qualify for industrial projects. However, according to Annex II of the same decree, the Loiret is not eligible for the grant at all. Consequently, the costs associated with the building of a factory warehouse are not covered by Decree No 82-809. Measure (a) should therefore be regarded as a new aid, which the French authorities should have notified to the Commission under Article 88(3) of the EC Treaty.

(120) Measure (b) site development, should be regarded as type II indirect aid for the purposes of French law. This measure is based directly on Article 4(6) of Law No 82-6. It should be pointed out in this respect that this legal basis does not require any supplementary implementing procedure and applies in all regions.

(121) As mentioned in recital 105, Article 4 of Law No 82-6 was never notified. It cannot be inferred that Article 4(6) must constitute an existing aid, simply from the fact that the commission approved the French scheme of regional development grants, based on Decree No 82-379, which refers in turn to Article 4(2), not notified. It cannot be claimed either that Article 4(6)

<sup>(75)</sup> Report by the French Court of Auditors, p. 19, 31, 37 and 62; article in *La Semaine Juridique*, p. 24 and report by the Ministry of the Interior, p. 94.

<sup>(76)</sup> Report by the French Court of Auditors, p. 16, 62 and 126, article in *La Semaine Juridique*, p. 41 and 42 and report by the Ministry of the Interior, p. 14 and 94. The latter states (p. 94) that: 'Since indirect aid, apart from aid for industrial buildings, is unconditional, it has not been subject to specific rules. It does not, therefore, fall within the scope of schemes notified, or to be notified, to the Commission, since it makes general action affecting the economic environment of the region concerned possible and is not therefore caught by Article 92'.

<sup>(77)</sup> OJ L 11, 12.1.1985, p. 28.

<sup>(78)</sup> Contrary to what is stated in Commission Decision 93/193/EEC of 23 December 1992 on the aid granted for the creation of industrial enterprises in Modane, Savoie (OJ L 85, 6.4.1993, p. 22), 'local authorities can provide assistance in Modane under Article 1 of Order No 82-809 of 22 September 1982, which was approved by the Commission at the same time as the PAT (regional development premium)'; the said decree was never notified to the Commission.

must constitute an existing aid, simply because the Commission considered that Decree No 82-809, which is based on Article 4(5), was an existing aid. Measure (b), therefore, should be regarded as a new aid, which the French authorities should have notified to the Commission pursuant to Article 88(3).

#### 7.2.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

- (122) The basis for the water treatment levy is calculated in accordance with the interministerial circular of 12 December 1978 <sup>(79)</sup>. The amount of the water treatment levy has been freely decided by the deliberative assembly of the City Council since 1 January 1986 <sup>(80)</sup>. The coefficient of degressivity is based on Article R. 372 of the Municipalities Code (Code des Communes) <sup>(81)</sup>. None of these legal bases was notified to the Commission, as is required by Article 88(3) of the EC Treaty.

#### 7.3. AID WITHIN THE MEANING OF ARTICLE 87(1)

##### 7.3.1. PREFERENTIAL PRICE OF LAND

- (123) The question arises whether the price of land which Scott was charged is a preferential price that is caught by the prohibition in Article 87(1) of the Treaty.
- (124) Under the said Article, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
- (125) Thus the preferential price of land is caught by the prohibition in Article 87(1), if it satisfies the following three tests:
- (a) it was granted by the state or through state resources;
  - (b) it favours certain undertakings and/or the production of certain goods;
  - (c) it distorts competition between the undertakings favoured and similar undertakings and/or types of production, where the products concerned are traded within the Community.

##### 7.3.1.1. *Granted by the state or through state resources*

- (126) The first test, i.e. the grant of the measure by the state or through state resources, concerns the advantages

granted both directly, i.e. by the public authorities themselves, and indirectly through bodies which are not strictly speaking part of the structure of the state. In the first scenario, the concept of the state should be understood in the broadest sense, comprising the organs of the central authority and also those of the decentralised local authorities at whatever level <sup>(82)</sup>. In the second scenario, public or sometimes even private bodies are responsible for granting state aid, the important thing being that the aid in question is chargeable to the state.

- (127) The criterion of chargeability is intended to determine whether the bodies in question act autonomously or whether their conduct, on the contrary, is dictated by the state under a supervisory power or controlling influence which it has in regard to them <sup>(83)</sup>. The second criterion, for its part, makes it possible to check whether the aid was in fact financed, either directly or indirectly, through state resources <sup>(84)</sup>.

- (128) In this particular case, it was Sempel which sold the land in question to Scott at a preferential price. The question arises, therefore, whether (a) this preferential price is chargeable to the state, i.e. to the local authorities ('state' in the broadest sense), and (b) whether it was financed by them.

- (129) The preferential price should be regarded as chargeable to the local authorities for the following reasons:

- (130) Firstly, the agreement was concluded between Scott and the local authorities. It is clear from Article 2 of this agreement that it was the local authorities, through Sempel, which carried out the land improvements <sup>(85)</sup>. To this end, the city council sold the land for development to Sempel for the sum of one franc <sup>(86)</sup>.

<sup>(82)</sup> Case 323/82 Intermills [1984] ECR p. 3809 and Case 248/84 Germany v Commission [1987] ECR p. 4013.

<sup>(83)</sup> Case 290/83 Commission v France [1985] ECR p. 439; Joined Cases 67, 68 and 70/85 Van der Kooy [1988] p. 219 and Case C-305/89 Italy v Commission [1991] ECR p. I-1603.

<sup>(84)</sup> Case 82/77 Van Tiggele [1978] ECR p. 25 and joined Cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR p. I-887.

<sup>(85)</sup> Article 2 states that 'the local authorities, through a specialist company, Sempel (Société d'économie mixte pour l'équipement du Loiret), in which the local authorities are majority shareholders, will carry out the necessary improvements, as defined: parking space, roads, miscellaneous networks, site development etc. ..., in accordance with Scott's specifications for the processing plant and warehouse (30 000 m<sup>2</sup> on the site of about 25 ha)'.

<sup>(86)</sup> Point 3.1 of the Agreement on the development of the La Saussaye and La Planche sites states that 'the city council undertakes to sell to Sempel the sites which are to be developed, in accordance with the attached plans and references, for the sum of FRF 1 (one franc)'.

<sup>(79)</sup> Letter from the French authorities, 6 October 1999, p. 5.

<sup>(80)</sup> City council minutes of 1988, p. 2.

<sup>(81)</sup> Decree 77-241, 7 March 1977.

(131) Secondly, Sempel is an undertaking controlled by the local authorities and governed by private law. The local authorities must hold at least half the capital up to a limit of 80 % <sup>(87)</sup>. Under Law No 83-597 of 7 July 1983, companies falling under this legislation are legal persons in private law, linking local authorities (regions, departments and municipalities) and their associations to private persons and, possibly, other public persons, in order to carry out development and construction operations, provide industrial and commercial public services or carry out any other activity of public interest.

(132) Thirdly and lastly, the price of the land and the factory warehouse was fixed by the local authorities. This is established by two documents: (a) Article 4 of the agreement between Scott and the local authorities sets the price for the sale to Scott of the factory warehouse and the land on which it is built at FRF 31 million <sup>(88)</sup>; (b) point 12.3 of the Sempel agreement sets the same price <sup>(89)</sup>.

(133) The preferential price must therefore be regarded as financed by the local authorities. According to point 12.1 of the Sempel agreement, the project is financed by the local authorities through the payment of annual instalments in respect of the loans contracted by Sempel for the purpose <sup>(90)</sup>.

(134) It is clear from the above, therefore, that Sempel's behaviour must be regarded as dictated by the local authorities through the controlling influence which they have with regard to the company, and that the preferential prices were financed by the local authorities. Thus the first test of Article 87(1) is satisfied.

<sup>(87)</sup> Letter from the French authorities, 17 April 1997, p. 1.

<sup>(88)</sup> Article 4(2) of the agreement states that 'initially these development works are estimated at FRF 50 million, it being understood that Scott will build, under the conditions referred to at Article 2 above, a factory (processing plant and warehouse) of about 30 000 m<sup>2</sup> which will be bought from Sempel for FRF 31 million [...]'.  
<sup>(89)</sup> Point 12.3 of the agreement states that '[...] the price for the sale of the factory warehouse and the site on which it stands to the Scott Paper Company [is] FRF 31 million inclusive of tax'.

<sup>(90)</sup> Point 12.1 of the agreement provides that 'the local authorities undertake to give financial assistance to Sempel in the form of an overall amount of FRF 20 million inclusive of tax in the case of Loiret County Council and FRF 30 million in the case of Orléans City Council.'

These sums will be paid in annual amounts by the local authorities to Sempel to ensure payment of the annual instalments on the loans required for the performance of the operations contracted for by Sempel, up to a ceiling of FRF 50 million, and in accordance with their respective liabilities.

### 7.3.1.2. *In favour of Scott*

#### 7.3.1.2.1. **Commission communication on state aid elements in sales of land and buildings by public authorities**

(135) As regards the second test, i.e. whether the aid favours certain undertakings or the production of certain goods, the Commission considers that the sale of land is not a selective advantage for the purposes of Article 87(1), if the land is sold at its market value. It was to this end that the Commission published the communication <sup>(91)</sup>. Although the sale of the land in question in the present case goes back to 1987, i.e. 10 years before the communication was published, the same principles apply, since the communication clarified a policy which, at the time, had emerged over a period of more than ten years. It should, however, be borne in mind that, at the time of the sale, case law on this subject was still limited.

(136) The communication describes two sale procedures which automatically exclude any element of state aid (sale through an unconditional bidding procedure, and on the basis of an asset valuation by an independent expert prior to the sale negotiations in order to establish its market value) and indicates those transactions which must be notified to the Commission. In the case in point, no valuation of the land was made at the time of the sale to Scott. The question arises, however, whether the manner in which the plot was sold met the criteria for a sale through an unconditional bidding procedure.

(137) The French authorities argue that, since in 1987 the Commission had not yet clarified its policy, their appointment of a consultant in France and the United States to promote the region (see recitals 73 to 88) should be regarded as satisfying the criterion that the bidding procedure should have been 'sufficiently well-publicised' within the meaning of the communication, as this could have been understood at the time. Scott takes the same line (see recital 57).

(138) This argument cannot be accepted.

(139) Under the communication, an offer is 'sufficiently well-publicised' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications (the intended sale of land and buildings of high value should be announced in publications having an international circulation) and through real-estate agents addressing a broad range of potential buyers, so

<sup>(91)</sup> See footnote 26.

that it can come to the notice of all potential buyers <sup>(92)</sup>.

- (140) Even if it cannot be expected that the advertising carried out at the time of this sale complied with the letter of the communication, the basic principles as stated in decided cases must be observed, in other words the tender for an industrial site and a factory warehouse must have been widely disseminated (a) in the national and international press and (b) through estate agents. The Commission emphasises in this respect that the use of only one of these two means of advertising a sale of land is not sufficient, and that a combination of the two is required if all potential buyers are to be informed of the tender.
- (141) It should be pointed out at the outset that the principles derived from the Fresenius case mentioned by the French authorities are not applicable. In that particular case the land in question was valued, whereas it was not in the present case. If the communication was not followed to the letter in Fresenius, it is because the events took place in 1994 and the communication was only published in 1997. However, and this is one of the requirements in the present case, the basic principle laid down by the communication with regard to sales through an unconditional bidding procedure was observed, namely that an independent expert should carry out a valuation, a certain discrepancy as to price having been considered consistent with market conditions.
- (142) The French authorities gave a long description of the advertising measures supposed to have been taken by ADEL and RDI (see recitals 73 to 88). However, despite an order to provide information, which explicitly called for a detailed description, plus evidence, of the advertising of the sale in France and Europe, the French authorities produced only two documents in support of their arguments.
- (143) The first of these, entitled 'Orléans, A businessman's environment' (Orléans, environnement pour hommes d'affaires) <sup>(93)</sup>, describes the Loiret under the following headings: (i) French government and Development of the Free-enterprise system; (ii) Political risk and union activity in the Loiret; (iii) Infrastructure; (iv) Industrial network and (v) Orleans Economic Policy. Nowhere does the document mention the creation of the La Saussaye business park nor the fact that a site and a factor warehouse are for sale. The document cannot be regarded, therefore, as meeting the criteria for a 'sufficiently well-publicised' tender within the meaning intended by the Commission in its established practice, as consolidated in the communication.

- (144) The second document is a letter from the DML consultancy to Scott, dated 17 December 1999. The letter describes the methods used to identify potential investors for the sites available in the Loiret in 1985/86 (see recitals 79 to 84). It is nevertheless not necessary to examine whether the methods described meet the criteria of a 'sufficiently well-publicised' tender within the meaning of the communication, since at the end of its letter DML explicitly confirms that it was not involved in Scott's location to the region in 1987: 'lastly we can confirm to you that DML was not involved and did not play a part in the identification and location of the Scott Paper investment project in Orléans'. The description given in the letter is therefore irrelevant and its author not competent to give an opinion on whether the land and the factory warehouse sold to Scott were 'sufficiently well-publicised' before they were sold to the firm.
- (145) As regards the description of the advertising measures taken by ADEL and RDI (see recitals 73 to 88), for which no evidence was produced, the Commission would point out that the plot of land was not advertised at all in the national or international press — a requirement of the communication (the first condition in (a)) as expressed in recital 140. As far as the second condition in (a) is concerned, namely through real-estate agents addressing a broad range of potential buyers, the efforts of the RDI consultancy were directed above all at the United States market, in particular the state of Michigan (see recital 77). The contention that DML et Associés was recruited by the Loiret 'to make the same approach to European and non-European potential investors in the Paris region' is totally at odds with DML's statement that it was never involved in Scott's location to the site in question.
- (146) The Commission also lacks information on what was actually publicised. It would seem from the document entitled 'Orléans, a businessman's environment' that the marketing activities of the local authorities were intended to promote the Loiret in general and not the site of the factory warehouse in particular. But, for the criteria laid down in the communication to be met, the advertising should have specified the site and, in particular, the improvements and the building of the factory warehouse. The site and the factory warehouse would then have been sold, in accordance with the Commission's established practice as consolidated by the communication, after an open and unconditional bidding procedure, comparable to an auction, which is carried out by definition at market value and consequently does not contain state aid.

<sup>(92)</sup> Communication, II Principles, 1 Sale through an unconditional bidding procedure, point (a) concerning the definition of the term 'sufficiently well-publicised'.

<sup>(93)</sup> Letter from the French authorities, 7 January 2000, Annex I.

(147) In the case in point, however, it is clear from the agreement concluded between Scott and the local

authorities that the operation was 'made to measure' in order to meet Scott's desiderata. Article 2 of the agreement in question states that the necessary improvements to the land should be carried out in accordance with Scott's specifications and that a processing plant and warehouse covering 30 000 m<sup>2</sup> should be built <sup>(94)</sup>.

any tax receipts be taken into account for this purpose, as is clear from Commission Decision 96/631/EC <sup>(96)</sup>.

- (148) It is clear from the above that the marketing measures taken by the local authorities cannot be regarded as meeting the criteria for a sale through an unconditional bidding procedure within the meaning intended by the Commission in its established practice, as consolidated in the communication. Consequently, given that neither of the two sale procedures was applied to the sale of land in question, it cannot be ruled out that the sale does not contain an element of state aid to Scott.

- (151) This conclusion does not contradict the Commission's decision in Daimler-Benz <sup>(97)</sup>, contrary to what the French authorities claim (see recital 72). It is clear from that decision that the Commission concluded that the proposed price for the sale of the site contained no aid element, since Daimler-Benz was to acquire unsuitable agricultural land at the market price for this type of land in the region and that the firm alone would then bear the costs of improving that land <sup>(98)</sup>.

#### 7.3.1.2.2. Principle of the private investor

- (149) The Commission considers that the sale of land does not constitute a selective advantage for the purpose of Article 87(1), if a private investor, on the basis of forecast potential profitability and ignoring any social, regional or sectoral policy considerations, would have invested in the land and then sold the plot at the same price as that asked by the local authorities <sup>(95)</sup>.

- (152) In its Daimler-Benz decision, the Commission considered that certain connection costs (drains, electricity, water, etc.) did not constitute aid, since the firm would contribute to them through local taxes. Such connection expenditure is an example of general infrastructure, which is normally funded from the budget of the central government or the local authorities. It is therefore a general measure, provided that the infrastructure is not built solely for one or more firms. Contrary to what the French authorities maintain, there is nothing in the decision to indicate that this connection expenditure was incurred specifically for the benefit of Daimler-Benz and was therefore no longer general in nature. As regards the demolition cost mentioned in the Daimler-Benz decision, the Commission concluded that the measure did not constitute aid, since it was expenditure which all landowners had to incur in order to sell a piece of land <sup>(99)</sup>.

- (150) Consequently, in contrast to the position defended by the French authorities, the Commission, in its assessment designed to determine whether, in the case in point, the public authorities behaved like a lender acting under normal economic conditions, cannot take account of the importance for the local authorities of promoting and developing the local economy. Nor can

<sup>(96)</sup> Commission Decision of 17 July 1996 concerning State aid that the City of Mainz has granted to Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co. KG, OJ L 283, 5.11.1996, p. 43, point IV: 'When assessing whether in the present case the state acted in line with a normal market investor's behaviour, the future possibility of tax receipts cannot be taken into account. Also in cases where the state sells its own property the terms and conditions should be in line with the normal behaviour of a private investor that does not have the particular position of the state with its responsibilities regarding public interest and its corresponding right to collect taxes'.

<sup>(97)</sup> See footnote 34.

<sup>(98)</sup> The Seventeenth Report on Competition Policy states that 'Contrary to the initial plan, Daimler-Benz AG will now be acquiring agricultural land unsuitable for industrial use and the company will bear site-preparation costs, currently estimated at DM 132 million (ECU 63,6 million)'. The decision itself states (section 2, Assessment) that the firm alone will now bear all the site-preparation costs.

<sup>(99)</sup> The decision itself states (section 2, Assessment) that, as owners of the site, the Land and the local authorities will also have to bear the normal cost of demolition, in accordance with usual practice before land is sold.

<sup>(94)</sup> Article 2 of the agreement between Scott and the local authorities states: 'The local authorities, through a specialist company, Sempel (Société d'économie mixte pour l'équipement du Loiret), in which the local authorities are majority shareholders, will carry out the necessary improvements, as defined: parking space, roads, miscellaneous networks, site improvements, etc., in accordance with Scott's specifications, for the processing plant and warehouse 30 000 m<sup>2</sup> on the site of about 25 ha'.

<sup>(95)</sup> Same principle as that established by the Court of Justice in Case 40/85 Belgium v Commission (Boch) [1986] ECR p. 2321.

(153) In accordance with its reasoning in the Daimler-Benz decision, the Commission is excluding the cost of a public interceptor sewer from the valuation of the aid in this particular case. The French authorities have shown that the sewer was not intended exclusively for Scott, but served the whole community (see recitals 168 to 172).

(154) The argument of the French authorities that, at the time of the sale of the land, there was no market for industrial sites in rural areas has to be rejected. It is absolutely clear from the comments submitted by Scott in its capacity as a third party that the La Saussaye industrial estate was in direct competition, initially, with at least eight other sites, and subsequently with four shortlisted ones (see in particular recital 51).

(155) It should be pointed out in this respect that only projects for which the Commission considers that there were no objective or bona fide reasons for reasonably expecting an adequate rate of return, at the moment the investment decision was taken, can be treated as state aid <sup>(100)</sup>.

(156) It is clear from the agreement concluded between the local authorities and Scott (Article 4) that, at the time of the sale, the former knew that the land improvement operations and the construction of a factory warehouse would cost at least FRF 80 million (EUR 12,2 million) and that Scott would pay FRF 31 million (EUR 4,7 million) for the plot:

'To enable Scott to set up under this project, which will have to be implemented in several stages, the local authorities undertake to improve the land on which the La Saussaye and La Planche industrial estate will be built, up to a ceiling of FRF 80 million.

In an initial stage, the improvements are estimated at FRF 50 million, it being understood that Scott will build, under the conditions referred to in Article 2 above, a factory (processing plant and warehouse) covering about 30 000 m<sup>2</sup>, which will be bought from Sempel for FRF 31 million [...].'

(157) If one includes the cost of the land, i.e. FRF 10,9 million (EUR 1,7 million), the local authorities knew when they concluded their contract with Scott that the loss would be at least FRF 60 million (EUR 9,2 million) (10,9 + 80 - 31) (see recitals 168 to 172). Consequently, there can be no doubt that the provision of public funds can only

be explained as the granting of state aid. The alternative for the local authorities would have been not to sell the plot and, hence, lose the FRF 10,9 million (EUR 1,7 million) originally invested. It should be remembered in this connection that a private investor aims not only to maximise its profit but also to limit its losses.

(158) The French authorities maintain that the land was sold to Scott at the market price. In their view, the difference between the price Scott paid for 48 ha, i.e. FRF 65/m<sup>2</sup> (EUR 9,9/m<sup>2</sup>), and the average price of FRF 72/m<sup>2</sup> (EUR 11/m<sup>2</sup>), which the city council obtained between 1990 and 1994 for 2,8 of the remaining 20 ha, was justified by economies of scale.

(159) The Commission does not share this view.

(160) Firstly, despite being ordered to provide information, the French authorities refused to account for the price paid for the remaining land by providing a copy of the sale contracts. Without those contracts the Commission cannot check the correctness of the prices claimed.

(161) Secondly, it should be remembered that, at the time of the sale of the remaining, already prepared land, the situation of the local authorities was different to what it had been at the time of the sale to Scott. The cost of preparing the land was already a sunk cost, and a private investor could quite easily maintain that it was better to sell the 2,8 ha than not to sell at all. This argument does not apply, however, to the local authorities' situation when they took the decision to invest FRF 80 million (EUR 12,2 million) in land improvements while aware of the price Scott was willing to pay, i.e. FRF 31 million (EUR 4,7 million), not forgetting the initial cost of the land, i.e. FRF 10,9 million (EUR 1,7 million).

(162) The French authorities object (see recitals 67 to 71) that a price which does not cover all the costs can still be the market price. They point out, for instance, that the price at which KC sold the La Saussaye industrial estate and the factories to P & G in 1998 did not enable it to meet all its costs. Yet that price should be considered the market price. They also add (see recital 72) that the market value of the land and the factory warehouse in question ought probably to be FRF 31 million (EUR 4,7 million), since (a) Scott sold to P & G in 1998 for [...] what it had bought from Sempel in 1987 for FRF 31 million (EUR 4,7 million) and (b) as a result of discounting the 1998 purchase at 6 % to 1987, the value of the site in 1987 was FRF 15,4 million (EUR 2,4 million).

<sup>(100)</sup> Commission communication to the Member States, OJ C 307, 13.11.1993, p. 3, point 28.

- (163) While there is no need to check the correctness of the French authorities' figures for the costs borne by KC for the La Saussaye estate and the price obtained from P & G for that estate (see recitals 67 to 72), their reasoning has to be refuted.
- (164) First, as regards the argument that a market price does not have to cover total cost, the Commission would emphasise that the situation facing KC in 1998 differed significantly from that facing the local authorities in 1987. In 1998, KC had already invested in the site in question, so that those costs should be regarded as sunk costs. Before P & G purchased the site, KC had already decided to close it as part of its world-wide restructuring. Everything suggests that the operation of the site in question involved heavy losses for KC <sup>(101)</sup>. Furthermore, in 1998, the household and sanitary paper sector in Europe was suffering from overcapacity <sup>(102)</sup>, especially in France <sup>(103)</sup>, whereas in 1987 it was booming (see recital 182 below). Consequently, the price paid by P & G for the site was probably the best price that KC could have obtained for a loss-making paper mill in a market suffering from overcapacity, regardless of the amount invested. The question, therefore, was not whether KC should invest in the La Saussaye estate, but what it could get out of it given the investments it had already made.
- (165) In 1987, by contrast, the local authorities found themselves in a situation where no investment had been made apart from the initial purchase of the land in question for FRF 10,9 million (EUR 1,7 million). As explained in recital 157, when the local authorities decided to prepare the land and to build the factory warehouse, they already knew that the investment would result in a loss of some FRF 60 million (EUR 9,2 million). A private operator would not have gone ahead with such an investment.
- (166) The same reasoning applies to the French authorities' second argument, namely that the market price in 1987 was probably that which Scott actually paid, i.e. FRF 31 million (EUR 4,7 million), given what P & G paid in 1998 and its discounted 1987 value. Irrespective of whether the [...] is a correct price (the French authorities have not supplied any evidence establishing that this sum relates to the land and the site which Scott actually bought in 1987 and that this really was the price paid for the site by P & G), the Commission would again refer to the conditions on the market in 1998, which determined the purchase price paid by P & G, as compared with those obtaining in 1987. The latter are confirmed by the fact that Scott was ready in 1987 to increase its capacity in France. Lastly, the commission rejects the argument that a simple discounting operation consisting in the reduction of a 1998 market value to its 1987 value gives an indication of the market price as established in 1987.
- (167) There were, therefore, no objective or bona fide reasons why the local authorities should have reasonably expected their investment, namely the transformation of agricultural land into an industrial site and the building of a factory warehouse before selling the plot to Scott, to give an adequate rate of return at the price paid by Scott for the site. The preferential price at which the local authorities sold the site in question to Scott must therefore be regarded as constituting an advantage for that firm.

<sup>(101)</sup> Extract from the *Tribune Desfossés*, 20 January 1998, 'Kimberly closes its doors': '[...] the factory, which had been occupied by 175 workers for several days, was liberated at the end of yesterday. The overproduction of household paper in France and the huge losses accumulated by the factory since it opened, more than FRF 500 million, made this decision apparently inevitable'.

<sup>(102)</sup> Extract from *Le Monde*, 9 January 1998: 'As part of its worldwide restructuring, Kimberly Clark is closing its Orléans factory': '[...] Although the market is growing very slowly (2 % to 3 % a year), excess capacity has increased and now stands at more than 90 000 tonnes in Europe'.

<sup>(103)</sup> Extract from *Le Figaro*, 9 January 1998: 'As part of its worldwide restructuring, Kimberly Clark is closing its Orléans factory': '[...] The closure of the site is part of a global restructuring of the household paper giant (handkerchiefs, toilet paper, kitchen towels). In France, Kimberley is a victim of the stagnant household paper market (+ 2 % a year) and has excess capacity of 50 000 tonnes a year and cumulative losses of nearly FRF 4 billion in ten years [...]'.  
Extract from the *Courrier Val de Loire-Sologne* (16 to 22 January 1998) 'The Chairman of Loiret County Council, Eric Doligé, reacts to the announcement of the proposed closure of the Kimberly-Clark Site at Saint-Cyr-en-Val': '[...] This development is justified by the group on the grounds of excess production capacity, which in France is about 49 %'.

#### 7.3.1.2.3. Value of the advantage

- (168) The problem in the present case is to establish with certainty the costs associated with the sale of the land in question and what those costs cover. Despite the order to provide information, the French authorities did not supply, as the Commission requested them, a detailed breakdown of (a) the work actually done by Sempel on the site (levelling, electricity, infrastructure, buildings, etc.), (b) the real cost of that work and (c) the method of financing used. The Commission must therefore restrict its assessment to the information available to it <sup>(104)</sup>.

<sup>(104)</sup> See footnote 61 (Pleuger, paragraph 26). The rule was consolidated later by Article 13(1) of the Procedural Regulation.

(169) Because it does not have this detailed information, the Commission is unable to determine whether, as Scott claims, part of the infrastructure could count as infrastructure which is normally provided from the central government or local authority budget and therefore does not constitute aid. Such infrastructure, though, may be caught by Article 87(1), if work is carried out for the benefit of one or more firms or a certain type of product. In the case in point, the preparation of the site must be regarded as benefiting Scott alone, because that firm was the owner and sole user of the infrastructure provided<sup>(105)</sup>. This is particularly so as far as the factory warehouse is concerned, which was built to Scott's specifications<sup>(106)</sup>.

(170) It is clear from the document entitled 'Statement of final account: La Saussaye and La Planche industrial estate', dated 26 July 1993, which is the most detailed document provided by the French authorities, that the total cost to Sempel of the land improvement operations is approximately FRF 140,4 million (EUR 21,4 million). To this should be added the cost of the original land, i.e. FRF 10,9 million (EUR 1,7 million).

(171) From this amount should be subtracted FRF 29,4 million (EUR 4,5 million) for the financial cost of the loans contracted by Sempel<sup>(107)</sup>, FRF 8,3 million (EUR 1,3 million) for the refund of VAT on land improvement operations and FRF 13,6 million (EUR 2,1 million) for the cost of a public intercepting sewer, which the French authorities showed was not intended solely for Scott but served the whole community, i.e. 25 000 inhabitants and other firms as well (see recital 89).

(172) The cost of the land sale is therefore some FRF 100 million (EUR 15,2 million). The cost of the transaction relating directly to Scott is 48/68 of FRF 100 million (EUR 15,2 million), or FRF 70,588 million (EUR 10,76 million). This figure, less the FRF 31 million (EUR 4,7 million) which Sempel received from Scott, gives a net loss of approximately FRF 39,58 million (EUR 6,03 million) or, at present value, FRF 80,77 million (EUR 12,3 million). In the absence of a breakdown of the work carried out by Sempel on the land occupied by Scott (levelling, electricity, infrastructure, buildings, etc.) and of an indication of its actual cost, which information the French authorities were requested to provide by the order that was sent to them, the

Commission has thought it reasonable and appropriate to use the fraction of 48/68 without taking account of any economies of scale. The present value includes the application of an interest rate from the date when the unlawful aid was granted, i.e. the date the Scott agreement was signed, until its repayment. The reference rate used by the Commission to measure the aid element of public subsidies in France is 5,7 % as from 1 January 2000<sup>(108)</sup>.

### 7.3.1.3. *Distorts competition and affects trade between Member States*

(173) For a measure to be caught by Article 87(1) EC, it must also distort competition and affect trade between Member States. In Phillip Morris<sup>(109)</sup>, the Court of Justice defined this criterion as follows:

'when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid.'

Accordingly, the product in question must be traded between Member States and the aid must strengthen the beneficiary's position vis-à-vis its competitors.

(174) In the present case, Scott manufactures paper products for sanitary use in particular<sup>(110)</sup>. In 1987 apparent consumption of toilet and hygiene articles in the Community was 2 427 thousand tonnes, net exports were 132 thousand tonnes and Community production was 2 295 thousand tonnes<sup>(111)</sup>. The relevant product is thus traded on at least a Community-wide basis. This conclusion is also supported by the fact that before the factory was established on the La Saussaye estate in the Loiret, Scott supplied France from its plants in Italy and Belgium (see recital 50).

(175) Even if the production of sanitary paper in the La Saussaye factory was mainly intended for the French market and was therefore not exported, the aid would still distort competition and affect trade between Member States, since Scott competes with products

<sup>(105)</sup> Commission Decision C 20/94 (NN 27/94) concerning state aid for the development of the site occupied by Kimberly-Clark-Industries at Toul/Villey-Saint-Etienne (Meurthe-et-Moselle), communication published in OJ C 283, 27.10.1995.

<sup>(106)</sup> Point 2.1 of the Sempel agreement refers in particular to 'the formation level for receiving the factory warehouse and its superstructure, these structures to be built under contract with the developer, the Scott Paper Company'.

<sup>(107)</sup> The present value is then calculated, taking the years 1987 and 2000.

<sup>(108)</sup> See website <http://europa.eu.int/comm/dg04/aid/tauxref.htm>.

<sup>(109)</sup> Case 730/79 Philip Morris v Commission [1980] ECR p. 2671, point 11.

<sup>(110)</sup> Scott Paper Company Annual Report 1987, p. 1.

<sup>(111)</sup> Panorama of Community Industry 1990, section 19-18.

coming from other Member States<sup>(112)</sup>. Such a situation may also arise where there is no overcapacity in the sector in question<sup>(113)</sup>. According to the Panorama of Community Industry 1990<sup>(114)</sup>, the sector concerned was one of the most dynamic in Community industry in the decade from 1980 to 1990 (output grew by about 5 % a year).

(176) The fact that Scott was able to buy the site at a preferential price strengthened its position vis-à-vis its competitors. The aid in question was intended to help Scott locate to the Loiret and, hence, increase its share of the French market (see recital 50). It thus reduced the cost of the investment to Scott and gave the company a competitive advantage over manufacturers making, or planning to make, a similar investment at their own expense.

(177) The French authorities claim that the time taken by the complainant to acquaint the Commission with the facts shows that the loss suffered by the competition is probably non-existent (see recital 95).

(178) This argument has to be rejected.

(179) Firstly, the possible strengthening of Scott's position through the preferential price granted to the company for the purchase of the site should be assessed in the light of the position of all its competitors generally and not just that of the complainant.

(180) Secondly, the fact that the complaint was not lodged until December 1996 does not prove that the loss suffered by the competition was non-existent. The Commission would point out that the complaint was lodged in December 1996 following the report in which the French Court of Auditors discussed the alleged aid measures and which was only published in November 1996 (see recital 1).

(181) It is clear from the above that the preferential price of the land was likely to affect competition within the Community.

(182) To sum up, given that the preferential price of the land satisfies the three tests of Article 87(1) of the EC Treaty, i.e. it was granted by the state or through state resources, it favours Scott, and it distorts competition between Scott and similar firms and/or types of

production, sanitary and household paper being traded within the Community, the aid is caught by the prohibition in that Article.

### 7.3.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(183) As with the preferential price of land, the question arises whether the preferential rate of water treatment levy granted to Scott constitutes a preferential price which is caught by the prohibition in Article 87(1) of the EC Treaty.

(184) The Commission would point out that, under the said Article, 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.

(185) Thus the preferential rate of water treatment levy will be caught by Article 87(1), if it satisfies the following three tests:

(a) it was granted by the state or through state resources;

(b) it favours certain undertakings and/or the production of certain goods;

(c) it distorts competition between the undertakings favoured and similar undertakings and/or types of production, where the products concerned are traded within the Community.

#### 7.3.2.1. *Granted by the state or through state resources*

(186) It should be pointed out that the concept of the state comprises the organs of the central authority and also those of the decentralised local authorities at whatever level<sup>(115)</sup> (see recitals 126 to 134).

(187) The preferential rate of water treatment levy was granted by the city council in two stages.

(188) As a first stage the city council explicitly undertook, in Article 7 of the Scott agreement, to apply a preferential rate of water treatment levy to Scott (see recitals 191 to 203).

(189) As a second stage, the city council, pursuant to the agreement, adopted on 16 December 1988 a decision on the new levy rates for 1989.

<sup>(112)</sup> Case 102/87 France v Commission [1988] ECR p. 4067, point 19.

<sup>(113)</sup> Idem.

<sup>(114)</sup> See footnote 111.

<sup>(115)</sup> See footnote 84.

(190) The preferential rate of water treatment levy should therefore be regarded as granted by the state. Thus the first test of Article 87(1) is satisfied.

rate of water treatment levy for 1989, consisting in a new amount for the levy plus a new coefficient of degressivity.

### 7.3.2.2. *Favouring Scott*

(191) Apart from its state character, the aid should, still in accordance with Article 87(1), be selective and favour only certain undertakings or the production of certain goods, thus affecting the balance which exists between beneficiary firms and their competitors. This selective character distinguishes state aid from general economic assistance measures, which are applicable to all firms in all sectors of a Member State's economy.

(192) In *Kimberly Clark* <sup>(116)</sup>, the Court of Justice held that where the body granting the aid enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided, the system is liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 87(1).

(193) Having examined the case in detail, and in particular in the light of the limited information provided despite the order to supply information, the Commission considers that setting the coefficient of degressivity at 0,25 for a level of consumption exceeding 150 000 m<sup>3</sup> should be regarded as constituting a selective advantage in favour of Scott Paper which is not justified on commercial grounds or by general tax policy considerations. The reasons for this are as follows:

(194) First, the city council explicitly undertook to grant Scott a preferential rate of water treatment levy. Article 7 of the Scott agreement concluded between that firm and the local authorities on 31 August 1987 lays down that:

'Orléans City Council undertakes to alter the rates of water treatment levy applicable to industrial users in special circumstances and to provide for them a rate which does not exceed 25 % of the most favourable current rate. Subject to Scott's compliance with the technical standards and legislation in force, Orléans City Council will apply this preferential rate to the company'.

(195) Second, pursuant to the agreement, the city council adopted on 16 December 1988 a decision on a new

(196) As described in recitals 23 to 27, the coefficient of degressivity (which was reduced from 1 to 0,5) for volumes between 0 and 50 000 m<sup>3</sup> is justified as a form of quantity discount. According to the city council's minutes, the coefficient increases (from 0,6 to 0,8) for volumes between 50 001 and 150 000 m<sup>3</sup> as a way of encouraging large-scale consumers of water to reduce their effluent (city council decision of 19 December 1980). The coefficient for volumes exceeding 150 000 m<sup>3</sup> is then set at 0,25 without justification. In their letter of 10 January 2000, the French authorities justify the latter rate by saying that 'the volume consumed makes it possible to cover the cost of water treatment'. Despite the order to supply information which was sent to them, the French authorities' 'justification' consists simply of this sentence, so that the Commission has nothing by which to judge whether such a claim has the slightest basis.

(197) The justification given by the French authorities seems to have been worked out after the event. To begin with, it directly contradicts the objective of reducing effluent, which is the reason given for the coefficient applicable to volumes exceeding 50 000 m<sup>3</sup>. Furthermore, not only does the paper industry consume a large quantity of water, but the liquid effluent from bleaching requires extensive processing before it can be discharged to the environment. Thus, even if, logically, large quantities of water generate higher receipts, this is not in itself sufficient reason to reduce the rate of levy accordingly, since, given the characteristics of the paper industry, those quantities create more pollution.

(198) In addition, by setting the threshold for the preferential rate at 150 000 m<sup>3</sup> it is only water-intensive industries like paper, and in particular the firm of Scott Paper, that will actually qualify for it. Despite being ordered by the Commission to supply *inter alia* water bills and particulars of all the other firms in the region qualifying for the same 'discount' on the levy, the French authorities only sent in a single bill, that for the Hôpital de la Source in 1996. According to this, the hospital, whose water consumption was approximately 155 000 m<sup>3</sup>, qualified for the 0,25 coefficient in respect of that part of its consumption which exceeded 150 000 m<sup>3</sup>, i.e. 3 % of its total consumption. That same year, Scott's water consumption was nearly [...] m<sup>3</sup>, so that the firm qualified for the preferential rate in respect of (a substantial part) of its total consumption.

<sup>(116)</sup> Case C-241/94 *France v Commission (Kimberly Clark)* [1996] ECR p. I-4551, points 23 and 24.

(199) The Commission considers that the fact that, for the period from 1989, when the preferential rate came into force, to the present day, the French authorities were able to show, for just one year, that a hospital had qualified for the rate in respect of 3 % of its total consumption when Scott Paper had qualified for it in respect of (a substantial part) does not, in the light of the factual information described in recitals 192 to 198, deprive the measure of its selective character.

(200) Consequently, by setting a coefficient of degressivity of 0,25 for volumes exceeding 150 000 m<sup>3</sup>, which de facto basically benefited Scott, the city council placed Scott in a more favourable situation than the others, which must be considered as constituting a selective advantage within the meaning of Article 87(1).

(201) Lastly, the value of the advantage should be calculated by multiplying the following factors: (a) the differential between a 'reasonable' coefficient of degressivity for a consumption level exceeding 150 000 m<sup>3</sup> and the preferential rate, (b) Scott's annual effluent coefficient, (c) the annual pollution coefficient and (d) Scott's annual offtake (m<sup>3</sup>). The calculation should be done for each year since 1989. The results obtained would then be added.

(202) However, the Commission is unable to determine the value of the advantage, since, despite its order to supply information <sup>(117)</sup>, the French authorities did not send it the information necessary for the calculations. As regards the 'reasonable' coefficient of degressivity for consumption exceeding 150 000 m<sup>3</sup>, the French authorities will have to determine this in connection with the proceedings for the recovery of the aid. To do this, they will have to show that the coefficient is reasonable by producing evidence of the rates applicable to firms with comparable levels of consumption and effluent established in other French departments. Irrespective of the outcome, the coefficient of degressivity should not be less than 0,5, since this is the most preferential rate regardless of the quantity of water consumed.

(203) It is therefore for the French authorities to determine the value of the advantage as part of the recovery proceedings. This was established by the Court of First Instance in *Ladbroke*, when it held that 'neither the case-law nor any provision of Community law requires the Commission to determine the sum to be reimbursed

when it demands repayment of aid declared incompatible with the common market' <sup>(118)</sup>.

### 7.3.2.3. *Distorts competition and affects trade between Member States*

(204) The Commission would point out (see recitals 173 to 182) that, for an advantage to distort competition and affect trade between Member States, (a) the relevant product must be traded between member States and (b) the aid must strengthen the position of the beneficiary vis-à-vis its competitors <sup>(119)</sup>. As regards the first condition, i.e. whether the relevant product is traded between Member States, the Commission refers to its assessment in recitals 173 to 182, which also applies to the preferential rate of water treatment levy. Regarding the second condition, the preferential rate of water treatment levy strengthens Scott's position vis-à-vis its competitors, since it reduces the costs which Scott would have to bear in the course of its normal business.

(205) It is clear from the above that the preferential rate of water treatment levy was likely to affect competition within the Community.

(206) To sum up, since the preferential rate of water treatment levy satisfies the three tests of Article 87(1) of the EC Treaty, i.e. (i) it was granted by the state or through state resources, (ii) it favours Scott and (iii) it distorts competition between Scott and similar firms and/or types of production, sanitary and household paper being traded within the Community, the aid is caught by the prohibition in that Article.

## 7.4. COMPATIBILITY OF THE AID

(207) Article 87(3) of the Treaty lists the types of aid that may be considered to be compatible with the common market. Compatibility must be determined with reference to the Community as a whole, and not with reference to one Member State, or region thereof, taken individually. To ensure that the common market functions normally and given the principle established in Article 3(g) of the Treaty, the exceptions listed in Article 87(3) should be interpreted strictly when it comes to examining any aid scheme or individual aid measure. In particular, the exceptions may be relied on only where it can be demonstrated that, without the aid, market forces would not be sufficient on their own to induce the beneficiaries to act in such a way that would enable one of the objectives mentioned in the exceptions to be achieved.

<sup>(117)</sup> See footnote 61. Rule consolidated by Article 13(1) of the Procedural Regulation.

<sup>(118)</sup> Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR p. II-1, point 187.

<sup>(119)</sup> See footnote 111.

(208) The aid measure in question does not qualify for the exceptions under Article 87(2)(a) to (c). It is not social aid granted to certain consumers, but aid designed to attract an investor to a particular city. Nor is it related to natural disasters or other exceptional occurrences, or to the former division of Germany.

(209) As regards the exceptions provided for in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest. The fact that a producer of household and sanitary paper is located in a certain city is not of common European interest. The aid is not intended, either, to remedy a serious disturbance in the economy of France, nor does it have the characteristics of such a project. Therefore the exception in Article 87(3)(b) does not apply. Neither is the measure intended to promote culture or heritage conservation (Article 87(3)(d)).

(210) As far as the exception in Article 87(3)(c) is concerned, namely aid to facilitate the development of certain economic activities, it is clear that the measures under examination are not meant to promote small and medium-sized firms, research and development, environmental protection, job creation or training in accordance with the Community guidelines and frameworks on state aid.

(211) To complete the assessment of whether the aid in question is possibly compatible under the regional exceptions provided for in the Treaty, a distinction has to be drawn between investment aid (the preferential price of the land) and operating aid (the preferential rate of water treatment levy).

#### 7.4.1. PREFERENTIAL PRICE OF THE LAND

(212) The preferential price of the land must be regarded as an ad hoc investment aid, aimed at reducing the cost to Scott of locating in Orléans-Sologne (see recital 182). The aid was granted outside the framework of an approved investment aid scheme (see recitals 100 to 121). Irrespective of whether this ad hoc aid may be regarded as contributing to the development of the Loiret, it should be noted that Orléans-Sologne is not situated in an area recognised as falling under Article 87(3)(a) or (c), so that the aid cannot be regarded as compatible with the common market because it is a regional investment aid (see recitals 100 to 121).

(213) Consequently, the aid granted to Scott in the form of a preferential land price does not qualify for one of the exceptions in Article 87(2) or (3) and should therefore be declared unlawful and incompatible with the common market.

#### 7.4.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(214) The Commission would point out (see recital 206) that the preferential rate of water treatment levy constitutes operating aid because it is intended to reduce the costs which Scott would have to bear in the course of its normal business.

(215) In the absence of any compensatory effects, operating aid may be granted on an exceptional and temporary basis to offset operating losses in Article 87(3)(a) areas, where justified by its contribution to regional development and its nature and where the amount of the aid is in proportion to the handicaps it is intended to alleviate. However, the exception provided for in that Article does not apply here, since the Loiret is not recognised as an area with an abnormally low standard of living or serious underemployment.

(216) Consequently, the aid granted to Scott in the form of a preferential rate of water treatment levy does not qualify for one of the exceptions in Article 87(2) or (3) and should therefore be declared unlawful and incompatible with the common market.

#### 7.5. RECOVERY OF ILLEGAL AND INCOMPATIBLE AID

##### 7.5.1. PREFERENTIAL PRICE OF THE LAND

(217) It has to be concluded that the sum of FRF 39,58 million (EUR 6,03 million), or at present value FRF 80,77 million (EUR 12,3 million), which is the net loss made by the local authorities from the sale of the La Saussaye site, including the factory warehouse, to Scott, should be declared unlawful and incompatible with the common market.

(218) Where aid granted unlawfully is found to be incompatible with the common market, Article 88(2) of the EC Treaty requires the Commission to request the Member State to recover it from the beneficiary, as the Court of Justice has confirmed on several occasions<sup>(120)</sup>. This practice is also established by Article 14 of the Procedural Regulation, according to which the Commission decides that the Member State

<sup>(120)</sup> See Case 70/72 Commission v Germany [1973] ECR p. 813; Case 310/85 Deufil v Commission [1987] ECR p. 901 and Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR p. I-3437.

concerned shall take all necessary measures to recover the aid from the beneficiary. The rationale behind recovering unlawful and incompatible state aid is that effective competition should be restored <sup>(121)</sup>.

#### 7.5.1.1. *Limitation period*

(219) Under Article 15 of the Procedural Regulation, the powers of the Commission to recover aid are subject to a limitation period of ten years, which begins on the day the unlawful aid is granted to the beneficiary. However, any action taken by the Commission with regard to the unlawful aid interrupts the limitation period.

(220) In the case in point, aid in the form of a preferential price for land was granted on 31 August 1987, when the Scott agreement was signed by Scott and the local authorities. The first measure taken by the Commission, following the complaint of 23 December 1996, dates from 16 January 1997. This took the form of a formal request for information made to the French authorities. The limitation period was therefore interrupted before the 10 years provided for had expired, so that the Commission has the power to recover the aid in question.

(221) Scott argues that the limitation period is designed to protect the beneficiary of aid and that, consequently, it is interrupted only where the beneficiary has been informed of the investigation which the Commission is conducting. Scott also maintains that it learned of the investigation being conducted only through the publication of the decision to initiate the procedure, i.e. on 30 September 1998. At that date more than 11 years had gone by since Scott had concluded the agreement with the local authorities. The Commission therefore no longer had the power to recover the aid.

(222) This argument has to be rejected.

(223) The purpose of the limitation period is to ensure legal certainty <sup>(122)</sup>. Both the addressees of Commission decisions (i.e. the Member States) and the wider community, including in particular the beneficiary of the aid, benefit from this legal certainty. However, the question of who, ultimately, benefits from the limitation period is a separate matter from how that period is calculated, which is determined by Article 15 of the Procedural Regulation. That Article does not refer to third parties; it is confined to the relation between the Commission and the Member States. It confers no specific right on the beneficiary and lays no obligation on the Commission with regard to third parties. The beneficiary of the aid is mentioned only to determine the date from which the limitation period starts to run,

i.e. 'the day on which the unlawful aid is awarded to the beneficiary'. The said Article 15, therefore, does not derogate in any way from the normal procedure, which is conducted exclusively between the Member State concerned and the Commission. In that procedure, the rights acknowledged to third parties are the procedural rights deriving from Article 88(2) of the EC Treaty.

(224) The Commission would point out that the beneficiary of aid must check whether the aid it was granted was notified <sup>(123)</sup>. If the aid is not notified and not approved, there is no legal certainty. The Commission should not be bound by any obligation to provide information which is intended to protect the beneficiary of aid not in a situation that should be the subject of such protection.

#### 7.5.1.2. *Exceptional circumstances*

(225) Scott claims that the beneficiary of unlawfully granted aid may rely on exceptional circumstances which led him reasonably to suppose that the aid was lawful.

(226) According to Scott, the reasons why any unlawfully granted aid should not be repaid in this case are as follows:

(a) [...] was neutralised by P & G buying the site and the factory at their combined market value (any advantage that Scott may have received when operating the factory), so that any competitive advantage deriving from the grant of the aid no longer affects competition; consequently, there is currently no distortion of competition which needs to be corrected by repaying the aid;

(b) [...] since, when the land and the factory were sold to P & G, their book value was much less than their total cost to Scott; these assets were sold to P & G at less than half their book value (Scott is not now retaining any benefit from any incompatible aid), and

(c) the non-transparent manner in which the Commission dealt with the various laws notified or sent to it by France in 1982 concerning the aid that could be granted by French local and regional

<sup>(121)</sup> Procedural Regulation, recital 13.

<sup>(122)</sup> Procedural Regulation, recital 14.

<sup>(123)</sup> Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR p. I-3437, point 14 and Case C-24/95 Land Rheinland-Pfalz v Alcan [1997] ECR p. I-1591, point 25.

authorities made it almost impossible for a firm to obtain information about the status of these enactments from a Community-law perspective.

- (227) None of these arguments can be accepted.
- (228) The first and second arguments are irrelevant. The Commission would point out that, in accordance with established case-law, the lack of residual benefit to the final purchaser (several years after the aid was granted) is immaterial, since the economic activity of the original target firm (subsequently absorbed), in this case Scott, continued uninterrupted. As long as the unlawful aid is not recovered, the distortion of competition continues. The distortion is attributable to the legal entity remaining, even though Scott no longer operates in the paper sector. In this respect, the Commission would point out that, unlike the acquisition of Scott by KC, P & G acquired only the assets of the La Saussaye site. The aid should therefore be recovered from Scott and not P & G <sup>(124)</sup>. The fact that the ownership of Scott has changed since the aid was granted is irrelevant.
- (229) As regards the third agreement, the Commission refers to its reasoning in recitals 100 to 121.
- (230) According to the French authorities, KC may rely on the legitimate expectation that it is not under a duty to repay the aid, in particular because any diligence exercised by KC with regard to Scott at the time of the acquisition would not have revealed if any aid had been granted to Scott. The only way KC could have discovered such aid would have been either to scan the local or national press or the minutes of the local authorities' meetings or to contact the competent authorities (see recital 96).
- (231) This argument cannot be accepted, even if the Commission considers that, in the case in point, it is for Scott as the beneficiary to repay the aid received.
- (232) The Commission would point out that firms receiving aid can in principle legitimately expect that aid to be lawful only if it has been granted in accordance with the procedure laid down by Article 88. A diligent economic operator should normally be able to ensure that that procedure has been followed <sup>(125)</sup>. KC could have established, before buying shares in Scott, whether or not the latter had checked that the procedure had been complied with.
- (233) At no stage did the French authorities show how KC's alleged legitimate expectation could be attributed to

some act of the Commission's. Neither Scott, when it received the aid, nor KC, when it bought Scott, asked the Commission, or claim to have asked the Commission, whether the aid had been notified and approved. The fact that KC's diligence did not reveal any state aid problems when the company bought Scott is not a legitimate reason for not requiring the recovery of the aid. In this respect the Commission can only stress how important it is for a firm interested in acquiring another firm to show all due diligence with regard to state aid as well as other issues.

- (234) As for whether it was possible for KC to detect if there was a state aid component in the preferential price of the land, the Commission would point out that the advantage conferred by the local authorities on Scott clearly derives from the agreement they concluded with that company (see recitals 191 to 203). Normally, Scott should have had a copy of that agreement.
- (235) The Commission concludes, therefore, that the arguments put forward by Scott and the French authorities respectively do not give it any reason not to proceed with the recovery of the incompatible aid.

#### 7.5.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

- (236) Likewise, the advantage conferred in the form of a preferential rate of water treatment levy, whose value it is for the French authorities to determine in the recovery proceedings (see recitals 191 to 203), must be declared unlawful and incompatible with the common market. The Commission would point out (see recitals 217 to 218) that, where aid granted unlawfully is found to be incompatible with the common market, Article 14 of the Procedural Regulation requires the institution to request the Member State concerned to recover the aid from the beneficiary.
- (237) The question whether the limitation period was interrupted or not does not arise as far as the preferential rate of water treatment levy is concerned, since the measure has been applied continuously since 1989, the year it was introduced. Given the continuous application of the preferential rate of water treatment levy, none of the arguments put forward by Scott applies. Not only Scott but KC too benefited from this advantage.
- (238) The Commission concludes therefore that the arguments put forward by Scott and the French authorities respectively give it no reason not to proceed with the recovery of the incompatible aid.

<sup>(124)</sup> Case C-305/89 *Italy v Commission (Alfa Romeo and Finmeccanica)* [1991] ECR p. I-1603.

<sup>(125)</sup> Case C-5/89 *Commission v Germany (BUG-Alutechnik)* [1990] ECR p. I-3437, point 14.

## 8. CONCLUSIONS

HAS ADOPTED THIS DECISION:

(239) In view of the above and, in particular, of the following considerations:

- (a) there are no objective or bona fide grounds why the local authorities should reasonably have expected their investment, namely the transformation of agricultural land into an industrial estate and the building of a factory warehouse before selling the plot to Scott, to give an appropriate rate of return at the price paid by Scott for the site, and
- (b) setting the coefficient of degressivity at 0,25 for a level of consumption exceeding 150 000 m<sup>3</sup>, with Scott as the de facto principal beneficiary, without this advantage being justified on commercial or general tax policy grounds,

the Commission finds that, in breach of Article 88(3) of the EC Treaty, France has unlawfully granted Scott the following aid:

- (a) an ad hoc preferential price of FRF 39,58 million (EUR 6,03 million), present value FRF 80,77 million (EUR 12,3 million), for a 48 ha industrial site on the La Saussaye industrial estate, and
- (b) a preferential rate of water treatment levy for any consumption of water exceeding 150 000 m<sup>3</sup>, pursuant to Article R. 372 of the Local Authorities Code, whose value will have to be determined by the French authorities in proceedings for the recovery of the aid.

The aid referred to in (a) and (b) should be regarded as incompatible with the common market.

Consequently, in order to re-establish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the French authorities must take all necessary steps to eliminate the advantages deriving from the aid and recover it from the beneficiary.

The aid must be recovered in accordance with the procedures of French law, and must include the interest which has accrued between the date on which it was granted and the date on which it is actually repaid, calculated using the reference rate for determining the net grant equivalent of regional aid in France <sup>(126)</sup>,

*Article 1*

The state aid in the form of a preferential land price and a preferential rate of water treatment levy granted by France to Scott and amounting, in the case of the land price, to FRF 39,58 million (EUR 6,03 million) or, at present value, FRF 80,77 million (EUR 12,3 million) and, in the case of the second advantage, to a value which the French authorities will have to calculate using a method worked out by the Commission is incompatible with the common market.

*Article 2*

1. France shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and already made available to it unlawfully.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 3*

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

*Article 4*

This Decision is addressed to the French Republic.

Done at Brussels, 12 July 2000.

*For the Commission*

Mario MONTI

*Member of the Commission*

<sup>(126)</sup> Commission letter to Member States SG(91) D/4577 of 4 March 1991. See also Case C-142/87 Belgium v Commission [1990] ECR p. I-959. Rule consolidated by Article 14 of the Procedural Regulation.

## COMMISSION DECISION

of 8 May 2001

concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company ('BAI' or 'Brittany Ferries')

(notified under document number C(2001) 1422)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/15/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 regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup>,

Having called on interested parties to submit their comments and having regard to those comments,

Whereas:

(4) Having sent further information to the Commission, France submitted a new notification as part of the same dossier by letter dated 15 October 1998. This aid was registered as N 618/98. By letter dated 30 December 1998, the Commission informed France of its decision to extend proceedings C 31/98 to include aid N 618/98.

(5) The Commission's decisions to initiate and extend the investigation procedure in the abovementioned case were published in the *Official Journal of the European Communities* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the aid in question.

(6) The Commission received comments from interested parties regarding both the initiation and the extension of the procedure. It forwarded them to France <sup>(3)</sup>, giving it the opportunity to react, and received France's comments plus additional information, notably by letters dated 20 November 1998 and 18 February and 9 April 1999.

## 1. PROCEDURE

(7) The French authorities sent the Commission the following documents, *inter alia*:

## 1.1. Procedural overview

(1) By a complaint of 25 March 1996, registered on 1 April 1996, the Commission was informed that France was intending to grant financial support to the Bretagne Angleterre Irlande shipping company (hereinafter 'BAI' or 'Brittany Ferries').

(2) In an exchange of letters between 1996 and 1998, France sent a certain amount of information on the matter, at the Commission's request.

(3) By letter dated 8 May 1998, the Commission informed France of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of aids NN 64/97 and N 9/98, as case C 31/98.

— in July and October 1998, a response to the initiation of the aforementioned procedure, comprising a study by Mazars & Guérard <sup>(4)</sup>, 'Comments from Brittany Ferries' and a document entitled '1999 to 2003 plan',

— by letter dated 30 March 1999, further comments and the 'May 1997 Agreement between the State and BAI', and documents entitled '1997 to 1999 three-year plan' and '1997 to 1999 restructuring plan' dated October 1996 and March 1997 respectively, and

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(2)</sup> OJ C 244, 4.8.1998, p. 9 (initiation of the procedure); OJ C 61, 3.3.1999, p. 11 (extension of the procedure).

<sup>(3)</sup> Letter dated 25.9.1998.

<sup>(4)</sup> Mazars & Guérard, (hereinafter 'M & G') 'Diagnostic sur la situation financière et les perspectives du groupe BAI' ('Diagnosis of the BAI group's financial situation and prospects'), April 1998; study commissioned by the French authorities.

- in May and June 1999, comments on the report by the Dynamar consultancy <sup>(5)</sup>, with particular reference to the findings of a counter-study carried out by the NERA consultancy <sup>(6)</sup> at the request of Brittany Ferries.

- (8) In addition, the Commission obtained a study by an independent expert, the Institute of Shipping Analysis, concerning ship financing.
- (9) The French authorities also provided the Commission with information on the 'semi-public companies' and on the system whereby those companies finance the ships BAI operates. This arrangement had also been questioned in the complaint.
- (10) In addition, a number of meetings took place between the Commission, the French authorities and BAI's representatives, the last two being held on 11 and 18 January 2001. In this context, and following these meetings, a number of documents was submitted to the Commission.
- (11) Meetings were also held with the complainant, notably on 19 September 2000 and 24 January 2001, and an exchange of letters took place. On 1 March 2001 the complainant instituted proceedings for failure to act in respect of the matters of complaint submitted on 29 February 2000 regarding the Brittany Ferries case.

### 1.2. Title of the aid

- (12) The aid in question is entitled 'Aid in favour of the Bretagne Angleterre Irlande company ("BAI" or "Brittany Ferries")', dossier C 31/98 (ex NN 64/97, N 9/98 and N 618/98).

<sup>(5)</sup> Dynamar Consultancy BV: 'Review — Restructuring Plan — Ferry Company', Alkmaar, the Netherlands, December 1998. Study commissioned by the Commission, DG 'Energy and Transport'. In particular, the consultant was asked to determine whether the information submitted to the Commission by the French authorities demonstrated adequately that:

- the public subsidies granted to Brittany Ferries in the recent past by the State or through State resources had been granted in accordance with criteria acceptable to a private investor,
- the planned restructuring measures (taking account of the earlier subsidies) would restore Brittany Ferries to long-term economic viability within a reasonable period of time, in accordance with the criteria laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994).

The Dynamar report was already finalised when the Commission received the 1996 to 1998 restructuring plan and the study by the NERA consultancy (see below). Accordingly, the NERA study was not examined by Dynamar.

<sup>(6)</sup> NERA: National Economic Research Associates, 'An assessment of Brittany Ferries' viability plan' 29 March 1999, London. Study commissioned by Brittany Ferries. The French authorities made use of this study. The NERA study was submitted as additional information for the dossier, and provided a certain amount of explanatory material which Dynamar had considered was lacking.

### 1.3. Recipients of the aid

- (13) The direct recipient of the restructuring aid was the Bretagne Angleterre Irlande shipping company ('BAI' or 'Brittany Ferries'). BAI and its partners have also received other State subsidies, as indicated below.

### 1.4. Purpose of the aid

- (14) The main purpose of the restructuring aid was to enable BAI to complete its restructuring process and so ensure its long-term viability. Other subsidies, most of which had already received Commission approval, were intended to support the company.

### 1.5. Possible effect of the aid

- (15) As Brittany Ferries operates between four different Member States (France, the United Kingdom, Ireland and Spain), subsidies granted to it are liable to cause a distortion of competition which would be contrary to the common interest.
- (16) These subsidies may, however, contribute directly towards preserving around 2 000 jobs through BAI's restructuring and may, in so doing, contribute towards the development of the regions BAI serves.

## 2. BAI, ITS ACTIVITIES AND THE RESTRUCTURING

- (17) This section first describes the company, its partners and its market. It goes on to describe the developments which forced the company to restructure and the strategic restructuring measures it implemented. It then sets out the cost of the restructuring and the State subsidies which accompanied it.

### 2.1. BAI and its subsidiaries

- (18) The Bretagne Angleterre Irlande maritime transport company ('BAI' or 'Brittany Ferries') was set up in 1972 by farming cooperatives and Chambers of Commerce and Industry from North Finistère and by a number of private investors <sup>(7)</sup>, essentially to boost vegetable

<sup>(7)</sup> A majority of Brittany Ferries' capital (64,81 %) is held by Soparfi (Economic Committee of Agricultural Cooperatives). Another significant share (12,35 %) is held by the Chambers of Commerce and Industry. The remainder is held by Divers Groupe SDR (8,52 %), Sofipar (5,37 %), the Caisse régionale d'assurances mutuelles agricoles (CRAMA) of Brittany (4,73 %) and other shareholders (4,21 %). (See correspondence from the French authorities dated 30 March 1999 and 16 February 1998 and 'Comments from Brittany Ferries' dated 31 March 1999). These figures show BAI's capital to be mainly private (80 %), with the remainder held by Divers Groupe SDR (8 %) (some shareholders quoted on the stock exchange) and by the CCIs (12 %).

exports to the United Kingdom and open up direct access to Brittany for British tourists. It operates routes between France and the United Kingdom (central and western Channel), France and Ireland, and the United Kingdom and northern Spain. In so doing, BAI plays an important part in improving communications with the regions concerned.

(19) The company carries out its activities either directly in the case of passenger transport, or through wholly owned subsidiaries: 'Truckline' for freight and 'Serstel' for on-board catering. Its foreign subsidiaries (BAI UK, Ireland and Spain) provide certain commercial services and perform reservation services and port operations abroad.

(20) Since being set up in 1972, BAI has thus helped develop the cross-Channel transport market, particularly in terms of carrying passengers and vehicles between Brittany and Normandy on the one hand and south-east England and Ireland on the other. Between 1972 and 1982 BAI bought or rented a number of ships to operate from Brittany.

(21) BAI currently runs four permanent daily connections between Great Britain and France using the following ships:

- Cherbourg/Poole (*Barfleur* and *Coutances*)
- Caen/Portsmouth (*Duc de Normandie* and *Normandie*)
- Saint Malo/Portsmouth (*Bretagne*)
- Roscoff/Plymouth (*Quiberon* and *Val de Loire*).

In season, BAI runs a weekly service between Brittany and Ireland (Roscoff/Cork: *Val de Loire*) and another between Great Britain and Spain (Plymouth/Santander: *Val de Loire*).

## 2.2. Operation of the BAI-SPC group

### 2.2.1. BAI and the SPCs: a closely linked economic group

(22) French law<sup>(8)</sup> provides for (local) semi-public companies (*sociétés d'économie mixte*) (hereinafter 'SPCs'). These are public limited companies whose majority shareholders are the local authorities and whose object is linked both to the public interest and to the jurisdiction of the said authorities. In other words, SPCs are characterised by the composition of their capital and by their company purpose.

(23) An SPC's object may only involve activities relating to the public interest and falling within the legal jurisdiction of the local authorities. Possible SPC objects may include running public services of an industrial or commercial nature, public services of common interest relating to cross-border cooperation and/or any activity of public interest. French law requires intervention by local authorities to respect the freedom of commerce and industry, and case-law requires it to be justified by particular circumstances, such as the need to meet a requirement of the local community.

(24) In view of their object, the SPCs' priority is not to generate maximum economic and financial return for their shareholders, but rather to achieve the regional development/general economic interest objectives pursued by the public authorities. SPCs have appreciable influence over the management and strategy of the private undertakings with which they associate.

(25) In 1982 the BAI group ran into financial difficulties owing to the substantial cost of acquiring ships. These difficulties prompted it to consider reducing its capacity, *inter alia*, by discontinuing several maritime services operated from the Brittany region. The local authorities reacted by successively setting up three SPCs to acquire the ships BAI needed in order to maintain its activities. Thus it was that the semi-public companies Sabemen<sup>(9)</sup>, Senacal<sup>(10)</sup> and Senamanche<sup>(11)</sup> were set up in 1982, 1985 and 1991 respectively, essentially to act as partners to BAI.

<sup>(9)</sup> In October 1996, 55,21 % of Sabemen's capital was held by various regional and local authorities and 44,8 % by BAI. (See 1997 to 1999 three-year plan, pp. 3 and 4). Currently, the regional and local authorities as a whole hold 69,07 % and Brittany Ferries 30,93 % of Sabemen's capital (see correspondence from French authorities dated 16.2.1998 and comments from Brittany Ferries dated 31.3.1999).

<sup>(10)</sup> In October 1996, 50,21 % of Senacal's capital was held by various regional and local authorities, 46,67 % by BAI, 2,35 % by the Caen Chamber of Commerce and Industry, 0,71 % by Crédit Agricole and 0,05 % by various shareholders (see 1997 to 1999 three-year plan, pp. 3 and 4). Senacal's share ownership is currently as follows: 65,83 % regional and local authorities, 32,03 % Brittany Ferries, 1,61 % Caen CCI, 0,49 % Crédit Agricole and 0,03 % various (see correspondence from French authorities dated 16.2.1998 and comments from Brittany Ferries dated 31.3.1999).

<sup>(11)</sup> In October 1996, 50,00 % of Senamanche's capital was held by various regional and local authorities, 49,98 % by BAI and 0,02 % by various shareholders (see 1997 to 1999 three-year plan, pp. 3 and 4). Currently, regional and local authorities hold 68,75 %, Brittany Ferries 31,24 % and various shareholders 0,01 % of Senamanche's shares (see correspondence from French authorities dated 16.2.1998 MABL/dm No 233 and comments from Brittany Ferries dated 31.3.1999).

<sup>(8)</sup> Code général des collectivités territoriales.

- (26) Though its partnership with the SPCs gives it access to public capital, BAI is at the same time bound by conditions laid down in its collaboration agreements with the latter. These agreements binding BAI to the SPCs and, ultimately, to the requirements of the SPCs' regional shareholders, require BAI to provide maritime transport services of at least a certain frequency from specific ports. It must also report the results of its operations and provide a forecast of proposed action to the SPCs' management boards. The agreements also give the SPCs observer status, with two observers (*censeurs*) on BAI's management board.
- (27) Both de jure and de facto, therefore, the legal and financial relations between BAI and the SPCs give the latter a decisive influence over the former. They have the power to guide BAI's strategic decisions, since it is they who decide on the acquisition/sale of the ships BAI operates (fleet composition), the operating conditions for those ships, the general traffic conditions BAI has to meet, and the capital increases needed to maintain those conditions.
- (28) Information from the French authorities <sup>(12)</sup> shows the SPCs to form an integral part of the Brittany Ferries group, in which their role is that of investment while BAI and its subsidiaries together constitute the group's operating and marketing structure.
- (29) A large part of Brittany Ferries' debt therefore lies with these three semi-public companies. The SPCs either own ships directly, where they have been financed by borrowing, or they hold leasing contracts with economic interest groupings ('EIGs') which have themselves acquired the ships, where this form of financing has been preferred. As shipowners, the SPCs have an appreciable influence over the BAI group's business decisions, particularly when it comes to deciding the group's strategy on the maritime connections (ports of departure/arrival, frequency, fleet composition, services to be provided, passenger/freight transport capacity, etc.) it has to provide inasmuch as the public authorities consider them necessary for the achievement of their objectives, particularly in terms of return and general interest.
- (30) In this context, the SPCs' shareholders have on several occasions increased the latter's capital. Except on the last occasion in 1996, these capital increases have involved all the shareholders (both public and private). It should nonetheless be noted that the main private shareholder in the SPCs is the BAI company.
- 2.2.2. EIGs
- (31) In this same context, several financial institutions established economic interest groupings ('EIGs'). These EIGs are governed by the order of 23 September 1967 and their financing mechanisms come under common law <sup>(13)</sup>. Forming an EIG opens the door to tax optimisation when acquiring heavy industrial assets. In practice, this involves fiscal transparency vis-à-vis the EIG members, i.e. any profits or losses made by the EIG are passed on to its members. EIGs are common in France and may be set up in any sector of economic activity. According to the French authorities, this mechanism comes under common law.
- (32) What the EIGs do is purchase ships, with the help of loans, and lease them to the SPCs. The information available to the Commission shows that fiscal EIGs were involved in the financing of three ships: the *Bretagne*, the *Normandie* and the *Barfleur*.
- (33) Specifically, in the three cases in this dossier in which ships have been financed by fiscal EIGs, it should be noted that the EIGs own the ships and have taken out bank loans to finance them. The EIGs rent the ships to the SPCs under leasing contracts. The SPCs then rent the ships to BAI through subchartering contracts, as described below.
- (34) In the EIG accounts, the acquired ships are written off degressively over a period of around eight years. Degressive amortisation produces fiscal deficits at the beginning of the contract; given the EIG's fiscal transparency these are passed on to the EIG members, which thus enjoy bank interest rate subsidies. As the EIG is normally in deficit during the first eight years, the tax savings made by its members are in some cases returned to it in the form of a loan. The EIG normally starts paying back this loan once it shows a profit.

<sup>(12)</sup> Letter from the French authorities dated 25 June 1999, p. 2.

<sup>(13)</sup> Applicable across the board irrespective of sector.

2.2.3. *The SPCs: rents charged to BAI*

(35) As indicated above, aside from three cases of financing through EIGs, the SPCs directly acquire ships to rent to BAI. The rent actually paid by BAI includes:

- the rent charged by the SPCs (corresponding to the leasing charged by the EIGs to the SPCs, including depreciation and financing costs) or rents directly charged by the leaser (Trovil for the *Quiberon*),
- the amortisation of additional ship-related investments (upgrading to meet standards, fitting-out, etc.) accounted for in BAI's books,
- exchange-rate differentials where ships are financed in foreign currencies (*Val de Loire*, *Normandie*, etc.), directly recorded in BAI's accounts.

(36) Since the credit institutions apply a margin to the interest rate charged to the SPCs, the SPCs pass on this margin to BAI. The French authorities and BAI have indicated that charging these rents allows the SPCs to

balance their budgets (no profit, no loss) until such time as the ships are definitively sold on.

(37) Dynamar's report criticised the fact that the level of rent the SPCs charge to BAI is around 15 % below the market rate. The French authorities and NERA <sup>(14)</sup> rejected this, arguing that Dynamar's finding was based on a misleading comparison with certain P & O ships.

(38) Moreover, in January 2001 Brittany Ferries and the broker Brax Shipping <sup>(15)</sup> produced a more detailed estimate of the bareboat chartering rates which would have been charged on the market in 1999 for the ships chartered by BAI. BAI also submitted figures for the rent paid since 1989 for the ships it chartered.

(39) The complainant, too <sup>(16)</sup>, has submitted its own estimates of the rent it believes BAI should be paying for the ships it operates. The complainant also argues that the rents charged to BAI are well below market rates, as they only cover the external financing of the ships. The complainant further argues that, (public) capital increases and investment aid allowed external financing to be kept at a level well below the market price. A list of rents actually paid by BAI has also been supplied <sup>(17)</sup>.

<sup>(14)</sup> See in particular the letter from the French authorities dated 25 June 1999, registered at the Commission on 28 June 1999.

<sup>(15)</sup> In its letter to the Commission dated 29.1.2001, Brax Shipping argues that it is unrealistic to estimate charter rates for Brittany Ferries' ships over the last 10 years, given the difficulty of obtaining meaningful results over such a period.

<sup>(16)</sup> See document sent by the complainant on 9.2.2000.

<sup>(17)</sup> See document submitted by BAI's representatives, registered at the Commission on 25.1.2001.

- (40) To test these various arguments and determine whether the rents paid are acceptable (in the past and in future, following restructuring), the following table compares the above claims regarding the market rents for ships of the type operated by BAI:

**Table 1**

| <b>Rent paid by BAI to the SPCs</b> |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
|-------------------------------------|---------------------------------------------|-----------------------------------------------------------------------------------------|--------------------------------------------------------|------------------------------------|------------------------------------|------------------------------------|------------------------------------|------------------------------------|
| SPC/Ship                            | BRAX estimate<br>July 1999<br>(annual rent) | Conversion of<br>BRAX estimate<br>to FRF (July<br>1999 rate:<br>\$ 1 = FRF<br>6,329602) | Complainant's<br>estimate of<br>market rent for<br>BAI | Rent<br>actually<br>paid<br>by BAI | Rent<br>actually<br>paid<br>by BAI | Rent<br>actually<br>paid by<br>BAI | Rent<br>actually<br>paid<br>by BAI | Rent<br>actually<br>paid<br>by BAI |
|                                     | 1999                                        | 1999                                                                                    | 1999                                                   | 1999                               | 1998                               | 1997                               | 1996                               | 1995                               |
|                                     | USD million                                 | FRF million                                                                             | FRF million                                            | FRF mil-<br>lion                   | FRF mil-<br>lion                   | FRF mil-<br>lion                   | FRF mil-<br>lion                   | FRF mil-<br>lion                   |
| Sabemen                             |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Armorique                           | out of service                              |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Bretagne (EIG)                      | 7                                           | 44                                                                                      | 43                                                     | [... (*)]                          | [...]                              | [...]                              | [...]                              | [...]                              |
| Quiberon                            | 3                                           | 18                                                                                      |                                                        | [...]                              | [...]                              | [...]                              | [...]                              | [...]                              |
| Duchesse Anne                       | out of service                              |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Cornouailles                        | out of service                              |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Val de Loire<br>(EIG)               | 9                                           | 58                                                                                      | 70                                                     | [...]                              | [...]                              | [...]                              | [...]                              | [...]                              |
| Senacal                             |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Duc de<br>Normandie                 | 4                                           | 23                                                                                      |                                                        | [...]                              | [...]                              | [...]                              | [...]                              | [...]                              |
| Normandie                           | 8                                           | 51                                                                                      | 82                                                     | [...]                              | [...]                              | [...]                              | [...]                              | [...]                              |
| Reine Mathilde                      | out of service                              |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Senamanche                          |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Barfleur (EIG)                      | 7                                           | 42                                                                                      | 53                                                     | [...]                              | [...]                              | [...]                              | [...]                              | [...]                              |
| Truckline<br>Ferries                |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Coutances                           | 100 % BAI owned                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Trovil Shipping                     |                                             |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |
| Quiberon                            | leasing                                     |                                                                                         |                                                        |                                    |                                    |                                    |                                    |                                    |

(\*) Passages between square brackets indicate business secrets or confidential information.

The table shows that while two rents are below the estimates of the experts and the complainant, all the others match or even exceed those estimates, so that the SPCs cannot be said to charge rents which are, all in all, below the market rates.

#### 2.2.4. *Financing system and return on investment*

- (41) It must be borne in mind that the SPCs' capital has been constituted by both public partners (the regions) and private partners (BAI and Crédit Agricole). BAI, which holds a significant proportion of the SPCs' shares, itself has a majority of private shareholders. Moreover, private financial institutions (mainly Crédit Agricole) have granted loans for successive acquisitions of ships.
- (42) All decisions to increase capital have been linked to new investments (to develop further the market the group has built up), with BAI subscribing to these capital increases in proportion to its holdings in the SPCs<sup>(18)</sup>. The capital increases have thus been implemented by both the public and the private shareholders at the same time and in proportion to their respective shareholdings.
- (43) It should also be emphasised that since being set up in 1995 the SPCs have been balancing their budgets by means of the rents charged to BAI; it is in selling on ships that they have realised capital gains giving them annual profits ranging from 5,9 % to 9 % (see Table 2)<sup>(19)</sup>. These profits have been regularly reinvested in the group.
- (44) According to the French authorities, this system enabled the SPCs to avoid making losses until 1995. The losses recorded from then on resulted from the difficulties Brittany Ferries encountered as of 1993 (see also below), which prompted the SPCs (and their majority of public shareholders) to grant a temporary deferment of part of

the rent paid for the ships (FRF 250 million), repayment of which was made conditional by a 'better fortunes' clause. The French authorities indicate that the regional and local authorities had never previously intervened to recapitalise Sabemen, Senacal and Senamanche following losses.

- (45) This system of financing is explained below.
- (46) Generally speaking, virtually all the SPCs' rights and obligations under these financing arrangements are delegated to BAI. Unless specifically decided otherwise, all the SPCs' costs and revenue are billed to BAI as rent under a chartering contract<sup>(20)</sup>. It is thus through its chartering contracts with the SPCs that BAI finances ships by paying rent. This rent is intended to cover both the depreciation of the ships and the SPCs' financing costs. This is how the SPCs balance their budgets, as mentioned above.
- (47) When ships are sold, the SPCs recover their capital, achieving an average annual return<sup>(21)</sup> of around 7 % on the invested capital<sup>(22)</sup>. These earnings have been regularly reinvested in new ships.
- (48) The capital gains break down as follows:

<sup>(18)</sup> Letter from the French authorities dated 25 June 1999, p. 2.

<sup>(19)</sup> The table also shows the purchase price and the capital made available by the group for each ship acquired.

<sup>(20)</sup> See copies of contracts submitted by Brittany Ferries at the meeting on 18 January 2001; see M & G, p. 8.

<sup>(21)</sup> Annual return for the duration of use is calculated from the original capital sum provided by the SPC shareholders and the capital gains realised on the sale of the ship (SPC's capital after disposal of the ship in question).

<sup>(22)</sup> According to information from Shippax, as submitted by BAI at the meeting held on 18 January 2001, the life expectancy of a ferry is around 40 years, i.e. around twice the depreciation period.

Table 2

(in FRF million)

| Return on ships |                        |               |                                   |                                    |                                |                                                                   |                                 |                                                                |                                                       |                                                               |                                                      |
|-----------------|------------------------|---------------|-----------------------------------|------------------------------------|--------------------------------|-------------------------------------------------------------------|---------------------------------|----------------------------------------------------------------|-------------------------------------------------------|---------------------------------------------------------------|------------------------------------------------------|
|                 |                        |               |                                   |                                    |                                | A                                                                 | B                               | A + B = C1                                                     | T1                                                    | A + B = C2                                                    | T2                                                   |
| SPC/Ship        | Date or entry into SPC | Initial value | Repurchase value (end of leasing) | Duration of use by SPC/BAI (years) | Date of sale of ship on market | Original capital provided by SPC shareholders (and reconstituted) | Capital gains from sale of ship | SPC capital after disposal and before recapitalisation in 1996 | Rate of return before recapitalisation in 1996 (in %) | SPC capital after disposal and after recapitalisation in 1996 | Rate of return after recapitalisation in 1996 (in %) |
| Sabemen         |                        |               |                                   |                                    |                                |                                                                   |                                 |                                                                |                                                       |                                                               |                                                      |
| Armorique       | 1982                   | [...]         |                                   | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 |                                                               |                                                      |
| Bretagne        | 1989                   | [...]         | [...]                             | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 | [...]                                                         | [...]                                                |
| Quiberon        | 1984                   |               |                                   | [...]                              | [...]                          |                                                                   | [...]                           |                                                                |                                                       |                                                               |                                                      |
| Duchesse Anne   | 1988                   | [...]         |                                   | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 |                                                               |                                                      |
| Cornouailles    | 1982                   | [...]         |                                   | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 |                                                               |                                                      |
| Val de Loire    | 1993                   | [...]         |                                   | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 | [...]                                                         | [...]                                                |
| Senacal         |                        |               |                                   |                                    |                                |                                                                   |                                 |                                                                |                                                       |                                                               |                                                      |
| Duc Normandie   | 1985                   | [...]         |                                   | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 |                                                               |                                                      |
| Normandie       | 1992                   | [...]         | [...]                             | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 | [...]                                                         | [...]                                                |
| Reine Mathilde  |                        |               |                                   |                                    |                                |                                                                   |                                 |                                                                |                                                       |                                                               |                                                      |
| Senamanche      |                        |               |                                   |                                    |                                |                                                                   |                                 |                                                                |                                                       |                                                               |                                                      |
| Barfleur        | 1992                   | [...]         | [...]                             | [...]                              | [...]                          | [...]                                                             | [...]                           | [...]                                                          | [...]                                                 | [...]                                                         | [...]                                                |

- (49) To examine market practice regarding financing methods and return on investment, as applied to ferries, the Commission referred, *inter alia*, to an independent expert study by the Institute of Shipping Analysis (ISA) <sup>(23)</sup>, and also compared the ISA's opinion with other sources of information, e.g. the material supplied by Brax Shipping and the complainant.

operational period to cover the cost of the capital and the costs subject to market fluctuation <sup>(25)</sup>.

- (50) According to the ISA's general description of financing arrangements for acquiring, renting and selling passenger ferries, it is common practice in the shipping industry for non-operating shipowners to rent their ships to operators. This may be by leasing or via a chartering contract. Market practice <sup>(24)</sup> shows that return on investment during the ship's life time can vary between a balanced return without profit during the period the ship is used and enough profit during the

- (51) It is also usual in the industry for shipowners to realise a profit on their ships only via the residual capital gains realised when they sell them. According to the ISA, 10 years ago some ferries were even sold at a premium over their original construction cost. However, for the last 10 years or so the second-hand market for ferries has been far less lucrative. Generally speaking, the ISA indicates that resale values can vary greatly and that investors may have highly different investment strategies

<sup>(23)</sup> Institute for Shipping Analysis working in collaboration with Shippax.

<sup>(24)</sup> Taken from Stena annual report, Annex 11 to the document submitted by BAI and registered on 25 January 2001.

<sup>(25)</sup> To maintain the borrower's liquidity, it is also common for loans taken out to finance ships to involve payments of large sums at the end of the loan ('balloon payments'). The normal depreciation period for ships is 20 to 25 years (sometimes up to 30) and payback arrangements are usually linear, based on interest rate development (e.g. LIBOR: London interbank offered rate).

depending on their anticipation of market developments.

- (52) Similar arguments have been advanced by Brax Shipping <sup>(26)</sup> which has also provided examples showing how the second-hand market for ferries has declined sharply since 1996 following the announcement that duty free was to be abolished, but that it could nonetheless pick up again.
- (53) Illustrative information received from Crédit Agricole Indosuez <sup>(27)</sup> shows that certain investors may consider an annual return of around 7 % acceptable <sup>(28)</sup>. This nonetheless reflects the relatively difficult present situation on the ferry resale market.

#### 2.2.5. Transactions within the group (BAI and SPCs)

- (54) The Commission considered it necessary to compare the way the three SPCs operate with BAI, to check for consistency.
- (55) It should be borne in mind here that the three SPCs do make a profit, as shown for instance in Table 2. However, only Senacal and Senamanche retain their profits. Sabemen's profits from rental income and from sales of the ships it acquires and which must be used from Roscoff and Saint Malo for services to Plymouth, Portsmouth, Cork and Santander, are transferred to BAI (in an internal transaction within the group). These transactions are stipulated by the chartering contract <sup>(29)</sup> between Sabemen and BAI, as is BAI's obligation to serve the ports of Roscoff and Saint Malo.
- (56) As explained above, Sabemen expects a return on its investments, even though this is returned to BAI within the (BAI-SPC) group. However, after the Commission indicated that the three SPCs' operations needed to be aligned within the group they form with BAI, the French authorities stated in a letter dated 8 March 2001 that Sabemen's operation would be aligned on that of Senacal and Senamanche in terms of the agreement linking it to BAI.

#### 2.2.6. Guarantees

- (57) BAI has also indicated that regional guarantees have been provided on three occasions as part of the financing of ships:
- a guarantee of FRF 24 million given to Sabemen in 1983 by the Brittany region for the financing of the *Quiberon*, the total loan being FRF 80 million,
  - a guarantee of FRF 270 million given in 1987 by the Brittany and Pays de Loire regions for the financing of the *Bretagne*, the total being FRF 295 million,
  - a guarantee of FRF 10 million given by the *Conseil général de la Manche* in 1992 as surety for Senamanche's obligations in the financing of the *Barfleur* (as part of the extension loan of FRF 178 million).

#### 2.2.7. The role of Crédit Agricole

- (58) Crédit Agricole, and more specifically *Crédit Agricole Caisse régionale du Finistère*, as Brittany Ferries' main banker since its creation in 1972, meets virtually all the company's operational cash requirements, and plays the leading role in fleet financing operations. Crédit Agricole was privatised in 1988.
- (59) The French authorities have explained <sup>(30)</sup> that the Crédit Agricole banking group is not a public undertaking but a strictly private credit institution. The capital of the *Caisse nationale du Crédit Agricole* (CNCA) is held exclusively by the 56 regional banks (*caisses régionales* — CRCA) and their directors. The capital of the CRCA is held by the 2 775 local banks (*caisses locales* — CLCA) or by individual members. The capital of the CLCA is in turn held by some 5,5 million members, either natural or legal persons.

### 2.3. BAI's market (geographical map Annex 1)

#### 2.3.1. The cross-Channel passenger market

- (60) The passenger and tourist vehicle market is subject to a certain degree of one-way substitutability, i.e. prices charged by operators in the North Sea and the central/western Channel are to some extent influenced by prices charged in the Channel strait between Calais and Dover, though the reverse is not evident <sup>(31)</sup>.

<sup>(26)</sup> Brax Shipping was consulted by BAI. Brax then wrote to DG 'Energy and Transport' on 29 January 2001.

<sup>(27)</sup> Shipping Finance Annual 2000/2001, a Euromoney publication, places Crédit Agricole Indosuez among the top 20 shipping financiers.

<sup>(28)</sup> As a practical example, BAI indicates that the resale value of the *Duc de Normandie*, as shown in Table 2, is the result of a real estimate provided by an expert in 1999.

<sup>(29)</sup> See copy of M & G, p. 8.

<sup>(30)</sup> Correspondence of 16 July 1998.

<sup>(31)</sup> Commission decision of 26 January 1999 (OJ L 163, 29.6.1999, p. 61).

Information supplied by Brittany Ferries <sup>(32)</sup>, NERA <sup>(33)</sup> and M & G <sup>(34)</sup> in the context of this case shows that the opening of the Channel tunnel in 1994 and the subsequent fire had a direct impact on the strait segment but a far more limited effect on the western Channel. The information also shows that BAI operates in the western and central Channel (west of the Dieppe/Newhaven line), and to Ireland and Spain.

(61) M & G and BAI indicate that in 1998 the western/central Channel sector represented around 5 million passengers and 1,2 million tourist vehicles. This corresponds to around 13 % of the market segment running from the central Channel to the strait in terms of passengers and 16 % in terms of tourist vehicles. BAI's share of passenger traffic is fairly stable at between 45 % and 50 % of the central/western Channel market <sup>(35)</sup>.

(62) According to the information at the Commission's disposal, in 1999 the central and western Channel sectors were shared between:

— BAI on the Roscoff/Plymouth, Saint Malo/Portsmouth, Cherbourg/Poole and Caen/Portsmouth routes,

— the P & O company on the Cherbourg/Portsmouth and Le Havre/Portsmouth routes <sup>(36)</sup>,

— the Condor Ferries company on the Saint Malo/Weymouth and Poole routes. It should also be noted that Condor Ferries operates via the Channel Islands, and only during part of the year.

(63) It should further be noted that BAI operates a route between the south-west of the United Kingdom and Santander, Spain, and a service to Ireland. On the Spanish route it competes with P & O (which operates on similar routes in the sector) and on the Irish route with Irish Ferries.

(64) BAI's representatives say it is the company's activity which has created a market from Brittany/lower Normandy which previously did not exist as such.

<sup>(32)</sup> Comments from Brittany Ferries, p. 11.

<sup>(33)</sup> NERA, pp. 14 and 15.

<sup>(34)</sup> M & G, p. 6, states that BAI's relevant market for cross-Channel traffic is the western/central Channel.

<sup>(35)</sup> Brittany Ferries operates west of the Dieppe/Newhaven line.

<sup>(36)</sup> The Dieppe/Newhaven line, operated by P & O-Stena until the beginning of 1999, is now operated on a very reduced basis by Hoverspeed.

### 2.3.2. *The cross-Channel freight market*

(65) Substitutability from the strait has a far more marked impact on the freight market than on the passenger market <sup>(37)</sup>. Brittany Ferries also comments that its relevant market in terms of freight has to be defined as a regional market consisting in the carriage of freight between the United Kingdom and the continent and comprising the strait and the Channel <sup>(38)</sup>. Nonetheless, Brittany Ferries has indicated <sup>(39)</sup> in the course of this case that the opening of the Channel tunnel caused freight traffic in the strait to fall by around 22 % (see also NERA <sup>(40)</sup>), while traffic in the central/western Channel remained stable. According to NERA, the impact on the western and central Channel market was borne by the Dieppe/Newhaven route <sup>(41)</sup>. With P & OEF having ended its operations on this route, and Hoverspeed having resumed them only in part, the strait market's impact on that of the central/western Channel would appear to have been weakened. Thus some distinction between the market segments of the strait and the central/western Channel might also be made with regard to the freight.

(66) According to BAI's estimates <sup>(42)</sup>, in 1998 the central/western Channel market represented 354 000 lorries carried, i.e. 14,5 % of the overall cross-Channel freight market of some 2,3 million lorries. BAI has a fairly stable share of between 45 % and 50 % of the central/western Channel freight market. On the other hand, its market share in terms of total cross-Channel traffic has gradually eroded in recent years, from 12 % in 1994 to 10 % in 1995, 9 % in 1996 and 1997, and 7,5 % in 1998.

(67) With regard to freight, for which the whole of the relevant market must be considered, BAI's competitors within the framework of this dossier (central/western Channel and the strait) are P & O Portsmouth, Commodore, P & O Stena Line, Sea France, Eurotunnel, Hoverspeed and Holyman Sally.

### 2.4. **Deterioration in Brittany Ferries' economic situation**

(68) Before describing the various restructuring aid measures, it will be useful to describe the main factors which led to the need to restructure Brittany Ferries.

<sup>(37)</sup> An analysis extending geographically beyond the strait towards the North Sea is not required in the context of this case, since BAI does not operate in the strait or in the North Sea.

<sup>(38)</sup> See also Commission decision of 30 October 1996 (OJ L 26, 29.1.1997, p. 23).

<sup>(39)</sup> Comments from Brittany Ferries, p. 13.

<sup>(40)</sup> NERA, p. 16.

<sup>(41)</sup> In terms of substitutability, the Dieppe/Newhaven route acts as a vector for prices charged in the strait and those charged in the central/western Channel.

<sup>(42)</sup> Comments from Brittany Ferries, p. 10.

- (69) Owing primarily to external factors, Brittany Ferries' economic situation began declining rapidly in 1992, indicating that the company needed to restructure internally in order to cope with its changing environment.

#### 2.4.1. The external factors

- (70) According to Brittany Ferries' indications, as submitted by the French authorities, two main coincident external factors prompted the crisis which hit the company in 1992:

- the devaluation of the pound sterling from FRF 9,70 to 8,50 in September 1992, followed by a further fall to below FRF 8, where it remained in 1995 and 1996, and
- the opening of the Channel tunnel in 1994.

#### 2.4.2. The internal results

- (71) As a result of these events, which of course did not only affect BAI, the scale of the company's losses threatened its very survival in 1996. The Commission's information <sup>(43)</sup> shows that a fall of FRF 0,50 in the value of the pound automatically reduces BAI's turnover by at least FRF [...](\*), quite aside from any impact on traffic and passenger yield.
- (72) The combined impact of the devaluation of sterling and the opening of the Channel tunnel caused increasing losses, as shown by the results below <sup>(44)</sup>:

**Table 3**

(in FRF million)

| Results prior to 1996 |           |           |           |           |
|-----------------------|-----------|-----------|-----------|-----------|
|                       | 30.9.1992 | 30.9.1993 | 30.9.1994 | 30.9.1995 |
| Turnover              | 1 342,6   | 1 389,6   | 1 451,2   | 1 284,5   |
| Operating result      | 24,3      | - 28,3    | 18,9      | - 44,9    |
| Financial result      | - 6,7     | - 4,8     | - 10,8    | - 16,3    |
| Net result            | 22,1      | - 12,3    | - 13,9    | - 80,3    |

According to the Commission's information <sup>(45)</sup>, one year later in 1996 the net accounting result would probably have fallen to FRF - 169 million had it not been for State assistance for 1996 <sup>(46)</sup>. As BAI's fortunes affect the entire group — BAI uses its revenue to pay rent to the SPCs, which use that rent to balance their annual budgets — the aforementioned result had a decisive influence on that of the BAI-SPC group.

## 2.5. The restructuring plan

- (73) Brittany Ferries' restructuring plan comprises a coherent set of measures. The Commission in fact received a succession of documents concerning Brittany Ferries' restructuring, and considers these to form an ensemble constituting a single restructuring concept. This set of documents describing the overall restructuring plan consists of a concept formulated in October 1996 and supplemented in 1997 and 1998 (1999 to 2003 plan), an audit carried out by M & G (see below), comments from BAI, the NERA study (see below), and the decision by the French State (central Government and regions) to grant the company restructuring aid (FRF 70 million, around FRF 246 million and then a sum of FRF 80 million). The restructuring measures concerned both BAI, as operator of the ships owned by the SPCs, and the SPCs themselves in their role as the ships' owners.

- (74) The aid proposed by the central Government involves two tranches of direct State aid to BAI, notified in succession to the Commission (FRF 70 million and then FRF 80 million), while regional support for restructuring totalled around FRF 250 million (some FRF 246 million of public capital). The latter amount consisted in a capital increase by the SPCs' shareholders (except BAI), which the SPCs passed on to BAI as a temporary waiver of rent (accompanied by a 'better fortunes' clause, whose conditions the French authorities say have now been met). The sums of FRF 70 and 250 million have been paid.

- (75) The aim of the restructuring support which the regional authorities provided in 1996 with a capital increase of FRF 250 million for the SPCs was first of all to implement financial restructuring measures, following which it would be possible to achieve the material and

<sup>(43)</sup> See M & G, p. 12 of the summary.

<sup>(44)</sup> Agreement of 26 May 1997 between the French Republic and BAI.

(\*) Passages between square brackets indicate business secrets or confidential information deleted.

<sup>(45)</sup> See M & G, p. 6 of the summary.

<sup>(46)</sup> ACOMO payment, see Table 4.

structural restructuring objectives (ship replacement and reorganisation of services) set out, *inter alia*, in the restructuring plan of October 1996 and adjusted in 1997 and 1998. This support in fact served both to finance the repayment of loans during a critical period, above all at the beginning of Brittany Ferries' restructuring, and to preserve the SPCs' initial investments (in ships), and contributed, lastly, to the acquisition of the *Normandie 2*, which is to replace the *Quiberon* in conjunction with a reassignment of ships among the existing routes with a view to rebalancing those routes and making them more profitable.

(76) The following expert documents require closer attention: the Mazars & Guérard audit <sup>(47)</sup> providing, in April 1998, a picture of the financial situation in the period 1996 to 1998; the Dynamar report <sup>(48)</sup>, whose main task was to check whether the documents held by the Commission were sufficient for assessing the restructuring (report produced in December 1998); the NERA study <sup>(49)</sup>, supplying the bulk of the outstanding documents needed to analyse the restructuring.

(77) The first of these, entitled *Diagnostic de la situation financière et les perspectives du groupe BAI*, was produced in April 1998 by Mazars & Guérard ('M & G') at the request of the French authorities. This detailed analysis of BAI's economic situation focuses chiefly on the years 1996 and 1997, with a forecast for 1998 and 1999.

(78) In April 1998 M & G concluded that:

'Internal measures and external support, in conjunction with positive developments such as the rise in value of the pound sterling, will enable BAI to achieve the recovery envisaged in the three-year plan.

This translates into short-term profitability. In the medium term this recovery will not provide lasting solutions to expected events, such as the financing — whether imposed by competition or by obsolescence — of the fleet or the ending of duty-free sales, or to unexpected events, such as the significant fall in the pound or the development of competition in the central/western market.'

(79) In December 1998, the Dynamar consultancy presented its report, and referred mainly to the findings of M & G to argue that the documents submitted to the

Commission did not constitute a restructuring plan, as certain key elements of analysis — such as an analysis by profit centre and an analysis of the relevant market — were lacking. Dynamar also criticised the company's high central costs, while acknowledging that Brittany Ferries had to maintain its image, which Dynamar described as the 'strongest brand'. Dynamar concluded that the data available to the Commission at the time it compiled its report (December 1998) were insufficient to settle the question of the company's long-term viability.

(80) In March 1999, Brittany Ferries submitted, *inter alia*, the NERA study, which supplied the missing information, particularly in the major areas indicated by Dynamar (including a market description, a company analysis by profit centre, a viability analysis-forward projection.

(81) While M & G focused mainly on the years 1996 to 1998, NERA focused essentially on Brittany Ferries' future development, projecting an economic model for the years 1998 to 2006. This projection took account of a preliminary study incorporating an analysis by profit centre, an analysis of central service costs, analysis of necessary future investments and a market analysis.

(82) On this basis NERA analysed Brittany Ferries and the three SPCs as a single economic entity, as described above, and concluded, around a year after M & G drew its conclusions <sup>(50)</sup>, that the group would be viable in the long term.

(83) With regard to this, the external factors (pound sterling/French franc parity, market developments) and internal factors in the group's restructuring are examined in section 5.

(84) The main measures involved in the restructuring are set out below.

#### 2.5.1. Capacity reduction

(85) BAI's downsizing consisted in withdrawing from two routes (Saint Malo/Poole and Saint Malo/Cork) out of a total of eight, reducing and rationalising the winter rotations and laying up and selling two ships (*Normandie Shipper* and *Duchesse Anne*) out of a fleet of nine, along with a programme to sell off non-core assets (e.g. its 17 % share in the British television company West Country TV).

<sup>(47)</sup> Requested by France.

<sup>(48)</sup> Requested by DG 'Energy and Transport'.

<sup>(49)</sup> Commissioned and submitted by Brittany Ferries. The French authorities based their arguments on this report.

<sup>(50)</sup> Market conditions had altered substantially during the intervening period, particularly the parity between the pound sterling and the French franc.

(86) The service Brittany Ferries supplies, measured in terms of sailings and rotations, will remain constant in 2001 compared with 1998, and well below what it was in 1995 before restructuring, without Brittany Ferries being able to increase the number of sailings, enter new routes or assign additional ships to existing routes <sup>(51)</sup>. Between the financial years 1995 and 1998, Brittany Ferries' passenger capacity was reduced by 12 % (– 1 375 passengers), its berth capacity by 9 % (– 539 berths) and its garage capacity by 17 % (– 1 480 lane metres). Between the financial years 1995 and 2003, once the *Quiberon* is replaced by the *Normandie 2* on the Caen/Portsmouth route in mid-2002, Brittany Ferries' overall capacity will remain below its pre-restructuring capacity, i.e. a reduction of 5 % in passenger capacity (– 554 passengers), 9 % in berth capacity (– 523 berths) and 4 % in garage capacity (– 367 lane metres) <sup>(52)</sup>.

#### 2.5.2. Reorganisation of sailings — replacement of a ship

(87) With regard to sailings, the Caen/Portsmouth route is currently operated using two ships, the *Normandie* and the *Duc de Normandie*, of very different size and capacity. Given the length of the crossing, there are three departures each day from Caen to Portsmouth and vice versa. Each ship thus makes a return journey plus a single leg each day, starting from Caen one day and from Portsmouth the next. The ships' differing capacities thus cause major fluctuations in supply from one day to the next (65 % from Caen to Portsmouth and 35 % from Portsmouth to Caen one day, and the other day round the next), causing logistical problems and significant productivity losses.

(88) To achieve in full the 1996 restructuring plan's objective of 'pursuing efforts to rationalise and save so as to improve the breakeven point' <sup>(53)</sup>, it was decided, in addition to the capacity reduction measures, to replace a ship in order to rebalance and thus improve profitability on the routes being served. Accordingly, the *Normandie 2*, of similar size and features to the *Normandie*, will be assigned with the *Normandie* to the Caen/Portsmouth route. The *Duc de Normandie* will replace the *Quiberon* on the Roscoff/Plymouth route, helping to optimise the operation of that route. Since an old ship is to be replaced in 2001 by a new one complying with the new safety rules, the total number of ships operated by Brittany Ferries, reduced from nine

to seven under restructuring, will not have risen at the end of the company's 1999 to 2003 plan.

#### 2.5.3. Refinancing of two ships

(89) BAI refinanced the ships for which this was both an option and of interest in the short term. Firstly, it arranged the leaseback of the *Quiberon* <sup>(54)</sup>, allowing a short-term refinancing (to generate short-term liquidity) but resulting in higher rent <sup>(55)</sup> of FRF [...] spread over the years 1995 to 2001 <sup>(56)</sup>.

(90) Secondly, the financing period for the *Val de Loire* was extended by means of a deferment of payment over a three-year period (from 1 January 1995 to 1 January 1998) on the loan taken out for that ship with Crédit Agricole (private bank). No capital was repaid during that period, generating costs (in additional interest) of FRF [...] <sup>(57)</sup>. This additional interest was charged to the SPC, which passed it on to BAI.

(91) By refinancing these two ships the SPC was able to reduce its operational cash requirements by around FRF [...] over three years (i.e. three repayments of FRF [...]). By easing its operational cash situation, the refinancing operation enabled Sabemen to limit BAI's operational cash requirements. In any event, the refinancing of the *Val de Loire* was without cost for Sabemen since the rent from BAI continued to cover both the depreciation of the ship and the additional financing costs of the refinancing.

#### 2.5.4. Injection of public capital (around FRF 246 million)

(92) To support the restructuring process, the SPCs granted BAI a partial deferment of rent over three years for the

<sup>(51)</sup> See comments from Brittany Ferries of 31 March 1999, p. 19, and letter from Brittany Ferries dated 9 July 1999, registered in DG 'Energy and Transport' as No 62620.

<sup>(52)</sup> See BAI correspondence of 9 July 1999, p. 2.

<sup>(53)</sup> Plan for a return to competitiveness, October 1996, p. 15.

<sup>(54)</sup> Sold to the Trovil Shipping company and leased back by BAI. The rent paid under the leaseback comprises capital repayment and payment of interest. As a result of the leaseback, the rent paid is considered high by M & G (M & G, Annex 4). Nonetheless, the operation was carried out with the general aim of financing the company.

<sup>(55)</sup> See M & G, Annex 4.

<sup>(56)</sup> See information sheet on the impact of the restructuring measures on Brittany Ferries, submitted by the company's representatives at a meeting and registered under No 60243.

<sup>(57)</sup> See information sheet on the impact of the restructuring measures on Brittany Ferries, submitted by the company's representatives at a meeting and registered under No 60243. See also M & G, p. 16 and Annex 7.

ships it operates. This deferment totalled FRF 250 million <sup>(58)</sup> for the financial years 1996 to 1998. It was financed by an increase of around FRF 246 million in the SPCs' public capital <sup>(59)</sup>.

- (93) Although this sum was the subject of transactions between the SPCs and BAI (within the group), the fact is that there was an input of (external) public capital of around FRF 246 million into the Brittany Ferries group.

#### 2.5.5. Reduction of central costs

- (94) It should first be recalled that, within the Brittany Ferries group, BAI reduced its capacity (two out of nine ships), reorganised services on its routes (closure of two out of eight routes) and reduced its traffic, thereby reducing the company's 'allocated costs'.
- (95) In addition to reducing its allocated costs, BAI also reduced its non-allocated costs, both by cutting its own costs (reorganisation of land-based services, renegotiation of contracts, sale of non-core assets) and by redistributing its terminal costs in proportion to the various routes it operates, thereby allocating some 20 % of the formerly non-allocated costs <sup>(60)</sup>.
- (96) The remaining non-allocated costs are made up of obviously general expenses. They relate to land-based services in the United Kingdom — including ticket sales, central BAI staff, Serestel staff (on-board services), Truckline staff (freight service), advertising and general expenses — which in total and following redistribution of harbour fees represent around 16 % of total operational costs <sup>(61)</sup>.

#### 2.5.6. Redundancy programme

- (97) The information supplied by the French authorities shows that BAI implemented a redundancy programme affecting 24 office staff and 58 regular seamen. It is also noted that further company measures, in addition to the redundancy plan, led to the shedding of 35 office staff and 129 on-board staff, i.e. staff reductions of 11 % and

10 % respectively <sup>(62)</sup>. All in all, these measures cost the company FRF 19 million.

- (98) In particular, the French authorities intervened through the National Employment Fund (NEF) in respect of four office staff <sup>(63)</sup>, and applied four types of measure in respect of seamen (introduction of part-time working, support for voluntary retirement, reduced working hours and early cessation of activity (ECA)). According to the French authorities, only the ECA scheme involves a State contribution. The ECA scheme was notified to the Commission by letter dated 25 January 1990 (registered on 26 January 1990) in the context of the 'Public programme for the commercial fleet'. The Commission approved this programme <sup>(64)</sup> for the period 1990 to 1994; it was renewed by France for the period 1995 to 1997 and approved by the Commission. The ECA scheme was re-notified by France by letter dated 7 September 1998 <sup>(65)</sup> and was again approved by the Commission <sup>(66)</sup>.
- (99) The measures financed through the ECA will have cost FRF 0,1 million, while the NEF measures will have cost FRF 0,01 million.
- (100) The French authorities indicate that no other arrangements were applied in the context of the redundancy programme.

#### 2.5.7. Savings

- (101) The internal and external cost-cutting measures included a wage freeze and abandonment of part of the 13th month, a 15 % cut in the advertising budget, reorganisation of land-based services and of the medical service, and the renegotiation of subcontracting contracts (e.g. laundry and cleaning).
- (102) The above restructuring measures (before the replacement of a ship) produced overall savings of FRF 60 million in 1996 and FRF 50 million in 1997 compared with the respective previous financial year. In conjunction with an improvement in the external context, the measures served to reduce the operating deficit by 60 % in 1997 and to eliminate it altogether in 1998 <sup>(67)</sup>.

<sup>(58)</sup> Of which Sabemen granted FRF 150 million, Senacal FRF 64 million and Senamanche FRF 36 million.

<sup>(59)</sup> NB: Around 1,49 % of the sum of FRF 250 million came not from the regional and local authorities but from the Chambers of Commerce and Industry, Crédit Agricole and other shareholders.

<sup>(60)</sup> See NERA, p. 31.

<sup>(61)</sup> See NERA, pp. 26 and 31.

<sup>(62)</sup> See in particular the letter from the French authorities dated 16 July 1998.

<sup>(63)</sup> See letter from the French authorities dated 15 October 1998. Involved were two pre-retirements and two shifts to part-time working.

<sup>(64)</sup> Letter to France dated 9 July 1990.

<sup>(65)</sup> Registered at the Commission on 8.9.1998.

<sup>(66)</sup> Letter to France dated 11 November 1998.

<sup>(67)</sup> Brittany Ferries' 1999 to 2003 plan, September 1998, Annex 3, p. 6.

## 2.5.8. Cost and cumulation of restructuring aid (1995 to 1999/2002)

- (103) A full picture is needed of the aid given to the Brittany Ferries group during the restructuring period. Accordingly, the restructuring aid proper and the parallel aid <sup>(68)</sup> granted during the restructuring period have been cumulated in Table 4 below:

Table 4 <sup>(69)</sup>

(in FRF million)

| Period 1995-2003<br>Cost of restructuring            |        |        |        |       |           |          |
|------------------------------------------------------|--------|--------|--------|-------|-----------|----------|
| Year                                                 | 1995   | 1996   | 1997   | 1998  | 1999/2002 | Total    |
| Cost of restructuring                                |        |        |        |       |           |          |
| Redundancy programme                                 | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| Withdrawal of the Normandie Shipper                  | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| Development of yield management                      | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| New reservation software                             | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| Sale of West Country TV                              | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| Leaseback of the Quiberon                            | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| Refinancing of the Val de Loire cost SPC             | [...]  | [...]  | [...]  | [...] | [...]     | [...]    |
| subtotal (1)                                         | [...]  | [...]  | [...]  | [...] | [...]     | 206,00   |
| Restructuring investments                            |        |        |        |       |           |          |
| Normandie 2                                          |        |        |        |       | 860,00    | 860,00   |
| subtotal (2)                                         |        |        |        |       | 860,00    | 860,00   |
| Other costs                                          |        |        |        |       |           |          |
| Investments under ACOMO                              | 87,30  | 108,30 | 129,60 | 0,00  | 0,00      | 325,20   |
| subtotal (3)                                         | 87,30  | 108,30 | 129,60 | 0,00  | 0,00      | 325,20   |
| Total costs (1+2+3)                                  | 105,40 | 169,00 | 200,40 | 51,20 | 6,20      | 1 392,20 |
| State aid                                            |        |        |        |       |           |          |
| Restructuring aid                                    |        |        |        |       |           |          |
| Ad hoc restructuring aid (*non-authorised)           | 70,00  | 80*    | 0,00   | 0,00  | 0,00      | 70,00    |
| Injection of public capital                          |        | 246,00 |        |       |           | 246,00   |
| subtotal (1)                                         | 70,00  | 246,00 | 0,00   | 0,00  | 0,00      | 316,00   |
| Other aid                                            |        |        |        |       |           |          |
| ACOMO (authorised)                                   | 40,00  | 70,00  | 50,00  | 0,00  | 0,00      | 160,00   |
| Early cessation of activity (ECA) (authorised)       |        |        |        |       |           | 0,10     |
| Reimbursement of business tax (authorised)           | 8,49   | 9,61   | 9,71   | 0,00  | 0,00      | 27,81    |
| Reimbursement employer's contributions (authorised)  | 0,00   | 0,00   | 0,00   | 37,77 | 39,70     | 77,47    |
| subtotal (2)                                         | 48,49  | 79,61  | 59,71  | 37,77 | 39,70     | 265,38   |
| Total (1+2)                                          | 118,49 | 325,61 | 59,71  | 37,77 | 39,70     | 581,38   |
| Intensity of cumulated aid                           |        |        |        |       |           | % 41,76  |
| Intensity of restructuring aid (in the strict sense) |        |        |        |       |           | % 29,62  |

<sup>(68)</sup> Apart from the ECA scheme (applied in the context of the redundancy programme), this parallel aid is not linked to the restructuring plan, but results from the application of schemes approved prior to restructuring.

<sup>(69)</sup> See information sheet on the impact of the restructuring measures on Brittany Ferries, submitted by the company's representatives at a meeting and registered under No 60243.

- (104) The cumulated measures taken during its restructuring phase will have cost the Brittany Ferries group FRF 1 392 million. Cumulated aid received during this period totals FRF 581 million.

The intensity of the restructuring aid proper is 30 %.

#### 2.5.9. Aid received before 1995

The intensity of the aid cumulated during restructuring is 42 %.

- (105) Aid paid before the restructuring period and which does not constitute restructuring aid is indicated in Table 5.

- (106) This aid involves the application to Brittany Ferries of schemes approved by the Commission, and payment of guarantees. The public programme for the French commercial fleet, which includes ACOMO, investment aid <sup>(70)</sup>, the reimbursement of business tax <sup>(71)</sup> and the ECA scheme, was approved in 1990 <sup>(72)</sup> and renewed up to 1997 <sup>(73)</sup>.

Table 5

| Period 1986-1994                        |                 |       |         |      |      |       |       |        |       |       |        |
|-----------------------------------------|-----------------|-------|---------|------|------|-------|-------|--------|-------|-------|--------|
| Year                                    | 1983            | 1986  | 1987    | 1988 | 1989 | 1990  | 1991  | 1992   | 1993  | 1994  | Total  |
| Aid                                     | 'existing aid': |       |         |      |      |       |       |        |       |       |        |
| Investments (authorised)                |                 | 18,49 | 40,00   |      |      |       | 40,00 | 65,00  |       |       | 105,00 |
| ACOMO (authorised)                      |                 |       |         |      |      | 13,00 | 12,00 | 10,00  | 22,00 | 28,00 | 85,00  |
| Reimbursement business tax (authorised) |                 |       | 0,73    | 0,98 | 1,05 | 1,66  | 2,03  | 3,30   | 4,03  | 6,01  | 19,06  |
| Aid for guarantees                      | 24 (*)          |       | 270 (*) |      |      |       |       | 10 (*) |       |       |        |
| Total                                   |                 | 18,49 | 40,73   | 0,98 | 1,05 | 14,66 | 54,03 | 78,30  | 26,03 | 34,01 | 209,06 |

(\*) Aid equivalent not established for these amounts.

## 2.6. Description of grounds for initiating the procedure

- (107) As a result of the complaint referred to at recital 1, the information received from the French authorities and articles in the press, the Commission had a body of material at its disposal which included information

regarding aid allegedly paid to Brittany Ferries and information according to which various interventions involving State resources (subsidies of around FRF 246 million, unpaid interest, alleged aid in respect of a redundancy programme, prolongation of the ACOMO scheme, investment aid, loans from Crédit Agricole and reductions in port charges (part NN 64/97)) were liable to benefit the company. The French authorities went on to notify restructuring aid first of FRF 70 million (part N 9/98) and then of FRF 80 million (part N 618/98).

<sup>(70)</sup> In its decisions of 1987, 1990 and 1995 on investment aid, the Commission raised no objections to investment aid up to and including 1997, or regarding its application prior to 1987.

<sup>(71)</sup> The submitted documents which led to notification of the scheme to reimburse business tax as part of the public programme for the French commercial fleet mentioned that the scheme was applied (partial reimbursement) for the 1980, 1981, 1987 and 1988 financial years. Partial application was also planned for 1989 and 100 % application was planned for the financial years 1990 onwards. In 1990 the Commission approved the scheme for the years 1989 to 1994. The scheme was then renewed up to 1997, and no objections were raised regarding its application prior to 1989.

<sup>(72)</sup> Commission Decision addressed to France by letter dated 9 July 1990.

<sup>(73)</sup> Commission Decision addressed to France by letter dated 10 June 1997.

- (108) In the light of this varied information, the Commission decided to initiate the formal investigation procedure provided for in Article 88(2) of the Treaty in respect of aids N 9/98 and NN 64/97 and to extend the procedure to aid N 618/98. It should be recalled that, in initiating and then extending the formal investigation procedure, the Commission has twice given interested parties the opportunity to have their full say on all the aspects involved, including the restructuring and financial arrangements of the Brittany Ferries group.

- (109) The text indicating the main points mentioned as remaining unresolved when the investigation procedure was initiated/extended is quoted below:

#### 2.6.1. *The restructuring*

As regards subsidies N 9/98 and N 618/98, 'the Commission would emphasise that these would have to be based on a plan aimed at restoring the long-term viability of Brittany Ferries. The French authorities did not include such a plan with the notification. Moreover, the Commission does not consider that the planned capital injection could overcome the structural handicaps suffered by the company, as detailed by the French Government, which have led to the present financial situation [...]'.

The Commission considered that, notwithstanding this rationalisation plan implemented in the process, 'the company and the French authorities have not so far provided significant evidence that a restructuring process is under way with the aim of restoring long-term viability. As a general rule, the measures to support the company appear to have been implemented as a reaction to the unfavourable financial situation in which the company has found itself since 1993 in order to cover successive operating losses and protect the company against the effect of market forces. Such aids are likely to distort competition between shipping companies in the various Member States to an extent contrary to the common interest'.

'The French authorities should therefore present a sound restructuring plan to which the aids are tied and furnish systematic proof that the proposed aid meets all the general conditions for authorisation referred to above.'

#### 2.6.2. *The SPCs, investment subsidies, regional guarantees*

Regarding part NN 64/97 the Commission raised the following points: 'As regards the semi-public companies (Sabemen, Senacal and Senamanche), it was stated that they agreed to reduce the rents for the ships paid by Brittany Ferries over three years and that in return the public shareholders [in the SPCs] increased their capital holdings in these companies. However, the three companies have generated losses and accumulated successive debts in spite of the fact that they receive investment subsidies from the State and loan guarantees from the regional authorities. Serious doubts persist, therefore, as to whether, in the two cases, the entities concerned (the three companies and the public shareholders) acted in the way private investors would' <sup>(74)</sup>.

#### 2.6.3. *Crédit Agricole*

'It was stated [to the Commission] that the *Caisse Régionale du Crédit Agricole de Bretagne* has covered the successive cash losses incurred by Brittany Ferries since 1993 (including those of FRF 80,2 million in 1995 and FRF 16,2 million in 1996). In spite of the restructuring measures taken by the company and its partners, both public and private, it is not very clear for which economic reasons and with which guarantees the bank agreed to cover the company's deficits. Under normal market conditions, a bank would not agree to cover the cash deficits of a company in such an economic position without having solid guarantees. It does not appear, therefore, that the intervention by *Crédit Agricole* has been made on terms which would be acceptable to an investor operating under free market conditions.'

#### 2.6.4. *Redundancy programme*

'In the application of its social plan, Brittany Ferries seems to have received State aid under the statutory provisions which apply specifically to the maritime sector. The Commission would like to receive further information on all these provisions which would allow it to determine whether these aid measures form part of measures applicable to all sectors of the economy or whether this is a special scheme for shipping companies.'

#### 2.6.5. *ACOMO*

'The Commission reminds the French [authorities] that the current general French scheme for aid to merchant shipping (which includes ACOMO aid) approved by the Commission extends over three years (1995 to 1997) and can no longer be applied in 1998, contrary to what they have stated. Any new aid scheme would therefore have to conform to the new Community guidelines.'

#### 2.6.6. *Reduction of port charges*

'The French authorities maintain that the measure relating to the port solidarity fund has not been implemented. However, they have stated that port charges have recently been reduced as a result of commercial decisions taken by the port authorities. The Commission would like more information on the ports concerned, the underlying reasons and the beneficiaries of the reductions.' France has explained with regard to this that rates are negotiated and set between ports (administered by chambers of commerce and industry) under the rules of private law with various (international) operators.

<sup>(74)</sup> See communication from the Commission to the Member States published in OJ C 307, 13.11.1993, concerning the principle of an investor in a free market economy.

### 3. COMMENTS FROM INTERESTED PARTIES

Brittany Ferries' competitors engaged in costly restructuring exercises without the benefit of State aid.

#### 3.1. Initiation of the procedure

- (115) P & OEF therefore believes that any aid granted to Brittany Ferries needs to be justified in accordance with the Community rules on State aid.

##### 3.1.1. *Permanent Representation of the United Kingdom to the European Union*

##### 3.1.3. *The Chamber of Shipping (United Kingdom)*

- (110) The United Kingdom believes any aid granted to shipping companies should comply with the Community guidelines on State aid to maritime transport and the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Moreover, it should be fully transparent so that compliance can be clearly demonstrated. The United Kingdom agrees with the Commission's view that the competitive situation faced by Brittany Ferries is no unique to that company and does not, of itself, justify State aid. Aid granted in these conditions cannot do otherwise but distort competition. The consequence is an adverse impact on other ferry companies competing within the market without the benefit of State aid.
- (111) It is reasonable to assume that the aid given to the company has protected it from market pressures and enabled it to take market share and revenue from other companies. This is evidenced by the fact that Brittany Ferries was able to expand its services in 1996, at a time when Stena withdrew from the western Channel and P & O European ferries rationalised its services in the area.
- (112) In the absence of a clear restructuring plan designed to ensure the company's longer-term viability, the Commission would seem to be right in inferring that the granted aid is disproportionate and inappropriate.
- (113) P & O European Ferries ('P & OEF'), which competes with Brittany Ferries on several routes in the western Channel, believes the Commission's preliminary findings warrant further investigation of the factors which the French Government claims justify the intervention of regional bodies in favour of Brittany Ferries.
- (114) According to P & OEF, Brittany Ferries cannot be said to be the only company affected by factors which in fact affect all operators, including its competitors. For instance, tougher competition on the market in question (which became even keener when the Channel tunnel opened in 1995) forced Stena Line to abandon its western Channel operations entirely in 1996, while P & OEF was obliged to undertake a material restructuring of its own western Channel operations. In both cases,
- (116) The Chamber of Shipping ('the Chamber') points out that the market for ferrying passengers and vehicles between the United Kingdom and the continent is keenly competitive. Recalling also that operating aid is incompatible with the common market, the Chamber argues that the market between the United Kingdom and the continent cannot in general be considered to be either 'peripheral' or 'thinly served', as would be necessary in order to justify a direct operating subsidy.
- (117) The Chamber also argues that the guidelines on State aid for rescuing and restructuring firms in difficulty are highly pertinent in this context.
- (118) Regarding case NN 64/97, the Chamber notes that the French Government is trying to justify the granting of subsidies by asserting that Brittany Ferries is at a commercial disadvantage vis-à-vis its competitors. It believes this assertion to be spurious.
- (119) Regarding the relations between Brittany Ferries and the semi-public companies, the Chamber, having reviewed the information presented by the Commission, believes the decision to reduce the ships' rents against a promise of reimbursement in more propitious trading conditions when none are in prospect lacks commercial credibility — and thus becomes a State aid.
- (120) According to the Chamber, the relations reviewed in this case appear to fit into a wider pattern of more or less opaque measures to support the operations of Brittany Ferries on the part of public and semi-public French organisations. The Chamber recalls, in particular, Commission Decision 88/437/EEC, which forbade an attempt by the French Government to grant an excessive subsidy for the building of a new ship for Brittany Ferries.
- (121) With regard to the restructuring aid (case N 9/98), the Chamber argues that there is no indication that the aid will address the handicaps from which Brittany Ferries is alleged to suffer.
- (122) Accordingly, the Chamber encourages the Commission to insist on an acceptable justification for these subsidies from the French authorities. If none is forthcoming or credible, the Chamber urges the Commission to ensure that the proposed State aid, or any amount found to be excessive, be prevented from reaching Brittany Ferries.

and causing further distortion of competition in the ferry services market between the United Kingdom and the continent.

### 3.2. Extension of the procedure

#### 3.2.1. *P & O European Ferries*

- (123) P & O European Ferries refers to the comments it submitted when the procedure was initiated (see above), stating that they also apply to the further aid tranche of FRF 80 million covered by the extension of the investigation procedure.

#### 3.2.2. *The Chamber of Shipping (United Kingdom)*

- (124) The Chamber states that the comments it submitted when the procedure was initiated (see above) still stand.
- (125) The Chamber disputes the French authorities' argument, recalling the latter's admission that the previously notified aid package (covered by the initiation of the procedure) was not sufficient to restore Brittany Ferries' long-term viability. The Chamber believes this confirms that the rationalisation programme did not constitute a meaningful restructuring of the company's core operations.
- (126) The Chamber maintains that it is implausible that activities which are currently loss-making will become viable simply as a result of an injection of aid, without restructuring.
- (127) The Chamber points out that restructuring aid:
- should normally only need to be granted once and that it is disingenuous to assert that repeated instalments of aid constitute a single one-off grant,
  - should include measures to offset as far as possible adverse effects on competitors, but that there has been no sign of such measures.
- (128) The Chamber therefore asks that, unless the French authorities can provide a credible justification for these subsidies, which must meet the abovementioned criteria, the Commission prevent these funds from reaching Brittany Ferries and distorting competition in the ferry market between the United Kingdom and the continent.

#### 3.2.3. *Ian Bruce, Member of Parliament — House of Commons*

- (129) According to Mr Bruce, the unfair subsidies received by the company have directly affected shipping operations

from Weymouth and Portland, in Mr Bruce's constituency, and have affected operations out of other south coast ports, particularly Poole, which is adjacent to Mr Bruce's constituency in Dorset.

- (130) Given that, according to Mr Bruce, countries such as France consistently act to prop up their inefficient companies simply because they are French-owned, thereby preventing the most efficient operator within Europe from providing the necessary services, Mr Bruce asks that the subsidies in question be sorted out.

#### 3.2.4. *Brittany Ferries*

- (131) Brittany Ferries presented a series of documents, the main ones being:
- 'Plan for a return to competitiveness' covering the period 1996 to 1998 (October 1996),
  - 'Plan for a return to competitiveness' covering the period 1996 to 1998 (March 1997),
  - 'Viability plan' covering the period 1999 to 2003 and annexes (September 1998),
  - Agreement of 26 May 1997 between the French State and Bretagne Angleterre Irlande (BAI SA),
  - comments from Brittany Ferries,
  - annexes to the comments from Brittany Ferries,
  - study by the NERA consultancy 'An assessment of Brittany Ferries' viability plan' dated 29 March 1999.
- (132) Brittany Ferries' argument in the abovementioned documents is designed to demonstrate that the Brittany Ferries group (BAI-SPCs) is returning to long-term viability following restructuring. This conclusion results from an overall analysis set out in various study and forecasting documents submitted by the company.

#### 3.2.5. *Associated British Ports, Plymouth*

- (133) Associated British Ports, Plymouth, ('ABP') is the harbour authority of Millbay docks within the port of Plymouth. In its comments, ABP points out that of a total of around 8 million pounds sterling (GBP) invested in the ferry facilities in the port of Plymouth, GBP 2,8 million has been funded by ERDF grants, Plymouth having Objective 5b status. Plymouth has been granted the status of an Objective 2 region, and the county of Cornwall, adjacent to Plymouth, has recently obtained Objective 1 status.

(134) According to ABP, over the last 20 years traffic volumes have increased year-on-year between Plymouth and Roscoff and now total 500 000 passengers a year, along with 130 000 passengers between Plymouth and Santander. Over 300 jobs — including high-tech jobs, which are scarce in the Plymouth region — depend directly upon Brittany Ferries' operations in the City of Plymouth, where the company has sited its information technology and training centre.

(135) A termination of the services offered by Brittany Ferries would be catastrophic for the port and the city of Plymouth, not only in terms of the severe economic and logistic effects on local commerce, but also in terms of the perceived isolation of the entire south-west community from the rest of Europe. Lastly, the linking of the regions of the Atlantic Arc is essential to the development of each of those regions.

(136) ABP therefore asks the Commission to decide in favour of Brittany Ferries and approve the aid in question, which will ensure that links from Plymouth to the continent and other Community regions continue.

#### 3.2.6. Poole Harbour Commissioners

(137) Poole Harbour Commissioners ('PHC') is the harbour authority for Poole, Dorset, in the United Kingdom. PHC states that Poole is in the top 15 of all United Kingdom ports and that PHC receives no public aid. PHC also emphasises that 50 % of its annual turnover is generated by the activities of Brittany Ferries, which is the only company providing a year-round ferry service out of Poole. PHC's other points are set out below.

(138) In addition to the 160 jobs provided directly by PHC, some 450 local jobs are dependent on the success of Poole harbour's commercial operations. Over the years PHC has invested GBP 15 million to help Brittany Ferries develop its services from Poole.

(139) PHC argues that the ferry services market in the western Channel displays no overcapacity and that Brittany Ferries operates in a niche market by having specialised in linking outlying regions of the United Kingdom and France. Complete termination of the Brittany Ferries service would result in an immediate loss of 100 to 120 jobs, which would be followed by the complete closure of the commercial port, given that the remaining trade would not cover operating costs. It is hard to see Poole harbour developing new trades, not least because of the shallowness of the harbour and the increasing size of ships.

(140) PHC also believes it is unlikely that other operators would use the facilities offered by the port of Poole.

(141) PHC negotiated a reduction in port charges with Brittany Ferries so as to help the company restructure and above all to avoid any further reduction in rotations by Brittany Ferries.

(142) For the above reasons, PHC asks the Commission to approve the aid to Brittany Ferries. It points out that Brittany Ferries' withdrawal from Poole would probably result in the closure of the commercial port.

#### 3.2.7. Port of Santander

(143) The port of Santander ('PoS') states that the United Kingdom is its main commercial partner, particularly in the area of ro-ro ferry transport. This is why PoS has continually invested in the expansion of its ro-ro infrastructure. Brittany Ferries, which is the only company offering a scheduled passenger service to the port, has been using PoS's facilities for over 25 years, linking Santander with Plymouth and Portsmouth on a twice-weekly basis.

(144) Brittany Ferries accounts for around 20 % of PoS's ro-ro activities and contributes substantially to the regional economy (PoS impacts the regional economy at a rate of some 16 % to 17 % in terms of the region's jobs, revenue, gross earnings and added value). The existence of the ferry link has improved the regional infrastructure.

(145) PoS also maintains that Brittany Ferries operates in a niche market between these outlying regions and that the Community has always supported initiatives to develop maritime links in the Atlantic Arc so as to relieve road congestion and reduce pollution from lorries.

(146) PoS therefore believes the Commission ought to approve the aid in question.

#### 3.2.8. Comments from the Conseil régional de Basse-Normandie, the Conseil général du Calvados and the Conseil général de la Manche

(147) The various regional authorities referred to above submitted comments to the Commission individually. For the most part, these comments expressed similar opinions, which have been grouped and summarised below.

(148) The Lower Normandy region, comprising the three departments of Calvados, la Manche and Orne, has

partial Objective 2 and 5b status, qualifying it for Structural Fund and regional aid in accordance with Article 87(3)(c) of the Treaty.

would fly in the face of other Community policies, such as cohesion and regional development. The regions point out that much of Brittany is eligible for Objective 2 and 5b programmes.

(149) Lower Normandy's two main ports, Caen-Ouistreham and Cherbourg, are both served by Brittany Ferries, which plays a crucial role in the economic life of the departments of la Manche and Calvados. In addition, both the Lower Normandy region and the departments of Calvados and la Manche became actively involved in maritime transport by becoming shareholders in the semi-public companies Senacal and Senamanche respectively (the SPCs), which own ships assigned to routes operated by Brittany Ferries. In view of the consequences of the opening of the Channel tunnel and the fact that the pound sterling fell to a significantly lower level and remained there for a long period, the SPCs agreed to support Brittany Ferries, granting it a temporary deferment of rent during its restructuring period.

(156) Moreover, Brittany Ferries directly employs 1 741 workers in the Brittany and Lower Normandy regions under French labour contracts, subject to the national social security scheme. Representing around 20 % of the French merchant navy, it also contributes to the sustainability of the French institutions, including the balance of the French merchant navy's pension fund.

(157) The future of the ports of Roscoff and Saint Malo is closely linked to Brittany Ferries continuing its activities. It is also argued that Brittany Ferries' operations have recovered thanks to the implementation of a company restructuring plan.

(150) Following the recent difficulties in the cross-Channel sector, Brittany Ferries has restructured and become a viable operator.

(158) In the light of the above arguments, the abovementioned public authorities invite the Commission to approve the aid notified by the French Government in order that the company may continue to play its key role in the regional economy.

(151) Following P & O's sudden closure of routes (Boulogne, le Havre and Dieppe, for instance) the regional authorities wanted at all costs to avoid tying the future of the region's ports to a single shipping company. The disappearance of Brittany Ferries would hand the P & O ferry company a monopoly on routes in the central and western Channel.

#### 4. COMMENTS FROM FRANCE FOLLOWING INITIATION/EXTENSION OF THE PROCEDURE

(152) The October 1998 report and opinion entitled *Basse-Normandie, les retombées du trafic transmanche en Basse-Normandie* (Lower Normandy, the impact of cross-Channel traffic for Lower Normandy) submitted to the Commission by the Conseil régional de Basse-Normandie support the above argument.

(159) The French authorities submitted a whole series of documents following the initiation and extension of the procedure, as cited in the descriptive section. Nonetheless, some features of the comments submitted during the procedure are given below.

##### 4.1. Recap of certain main arguments

3.2.9. *Comments from the Conseil régional de Bretagne, the Conseil général d'Ille-et-Vilaine, the Conseil général des Côtes d'Armor, the Conseil général du Finistère and the Conseil général du Morbihan*

(153) The various regional authorities referred to above submitted comments to the Commission individually. For the most part, these comments expressed similar opinions, which have been grouped and summarised below.

(160) The French authorities argue that the business handicaps which affected the company were compounded over a period of around four years by major economic handicaps (such as the relaxing of controls on duty-free sales in the strait, the opening of the Channel tunnel and the devaluation of the pound sterling), causing the company to make operating losses during that period.

(154) These regional authorities, too, emphasise the regional importance of Brittany Ferries, which they say should not be seen as a simple company when what is at stake is the survival of an economic player and the preservation of jobs in the Brittany region. Behind Brittany Ferries there lies an entire region.

(161) The problems affecting the company were so great that the French authorities agreed to lend their support to its restructuring process. The French authorities told the Commission that, given the exceptional circumstances described, public support for Brittany Ferries could in no way be seen as operational aid to offset the company's operating losses and protect it from normal competition forces. On the contrary, the company has engaged in a genuine restructuring of its operation, from which it will emerge stronger and more competitive, and able to operate without further need for aid.

(155) To slow down or stop the driving force of regional development which is the operation of Brittany Ferries

- (162) The French authorities point out what Brittany Ferries has meant for the last 25 years and emphasise that they want to see the company continuing to serve as a national instrument for European regional planning, indicating that the company is a means of satisfying national interests for strategic purposes.
- (163) On these grounds, the French authorities ask the Commission to recognise that the support they decided to grant to Brittany Ferries is in conformity with the Community guidelines on State aid to maritime transport and with the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

#### 4.2. Risk of monopoly

- (164) The French authorities also point out that they wish to maintain a credible competitive alternative in the central and western Channel, where Brittany Ferries' only serious competitor is P & O European Ferries (Portsmouth). The disappearance of Brittany Ferries would be liable to create a de facto monopoly for P & O in the sector.

#### 4.3. Temporary waiver of rent, financed by a capital increase

- (165) Regarding the capital increase which in 1996 allowed the SPCs to grant BAI a temporary waiver of rent, the French authorities state that the SPCs acted as a private investor would. As shipowners, the SPCs had the choice either of seeing Brittany Ferries run into difficulty, and having to sell their ships without recuperating the full value of their investments in terms of purchases and fitting-out, or of accepting a temporarily reduced rent (but higher than the realisable value of the ships or the

value of renting to other maritime transport companies) and so contributing to the company's recovery. The rent would be repaid once Brittany Ferries' capital was back up to its 1992 level.

- (166) These rent reductions were financed by SPC capital increases subscribed by all shareholders except Brittany Ferries, which thus saw its capital holding in the companies slip from around 45 % to 30 %. The local authorities intervened in accordance with the principle of equalisation, to protect all the economic and commercial activities in which they have a direct interest and to which the activity generated by Brittany Ferries contributes directly. The French authorities argue, in this context, that both the amortisation and the profitability of their commercial, port and touristic operations depend on the success of Brittany Ferries' operations, so that, all in all, it is in the local authorities' economic interest to lend temporary support to these loss-making activities, this being very much the sort of analysis an informed investor would make.

#### 4.4. Investment subsidies (granted in the past) <sup>(75)</sup>

- (167) In addition, in their letter of 15 October 1998 <sup>(76)</sup> the French authorities indicate that the subsidies referred to below were granted exclusively as part of public aid measures for the commercial fleet sector.
- (168) The particular measure which entered into force on 29 December 1989, i.e. post-dating the Commission guidelines of 3 August 1989 on financial and fiscal measures concerning shipping operations with ships registered in the Community, was approved by the Commission under Articles 87 and 88 of the Treaty.

<sup>(75)</sup> Past investments not relating to the restructuring.

<sup>(76)</sup> Letter from the French authorities dated 15 October 1998.

(169) Since 1982, the following ships and amounts have been involved:

**Table 6**

| Investment subsidies |                          |                                      |                   |             |
|----------------------|--------------------------|--------------------------------------|-------------------|-------------|
| Ship                 | Year of subsidy decision | Contract price of ship (FRF million) | Amount of subsidy | Rate (in %) |
| Quiberon             | 1986                     | 97,27                                | 8,38              | 8,60        |
| Duc de Normandie     | 1986                     | 101,80                               | 10,11             | 9,90        |
| Barfleur             | 1991                     | 495,10                               | 40,00             | 8,00        |
| Normandie            | 1992                     | 769,60                               | 40,00             | 5,20        |
| Val de Loire         | 1992                     | 700,00                               | 25,00             | 3,50        |

The *Quiberon* and the *Val de Loire* were acquired secondhand in Sweden and the *Duc de Normandie* secondhand in the Netherlands. The *Normandie* and the *Barfleur* were ordered from Masa-Yards of Finland.

(170) Lastly, the French authorities indicate that investment aid of FRF 40 million was granted to BAI in 1987 for the ferry *Bretagne*. In addition, FRF 70 million of shipbuilding aid was granted to Chantiers de l'Atlantique to build the ferry on the basis of a contract price notified to the Commission of FRF 450 million and in accordance with the decision taken by the Commission and notified to the French authorities.

#### 4.5. Crédit Agricole

(171) In their correspondence of 16 July 1998 the French authorities explained that the Crédit Agricole banking group is not a public undertaking but a strictly credit institution. The capital of the Caisse nationale du Crédit Agricole (CNCA) is held exclusively by the 56 regional banks (caisses régionales — CRCA) and their directors. The capital of the CRCA is held by the 2 775 local banks (caisses locales — CLCA) or by individual members. The capital of the CLCA is in turn held by some 5,5 million members, either natural or legal persons.

(172) Crédit Agricole's decisions are taken on an entirely internal basis and loans are granted using funds of private origin deriving from private savings. It is also indicated that the State provided no guarantee for the loans granted to Brittany Ferries by Crédit Agricole du Finistère.

(173) According to the same letter, Brittany Ferries asked Crédit Agricole for sums corresponding to the amount of aid expected from the State, which would not be rapidly available to it on account of administrative payment procedures. According to the French authorities, this step was taken without any intervention by the State, which had no reason to be informed.

(174) The French authorities also indicated that Crédit Agricole acted in accordance with the principle of an investor in a free market economy, taking into account both Brittany Ferries' recovery prospects and the declared intention of the French State to support the company in the implementation of its restructuring plan.

(175) Crédit Agricole, which holds mortgages on the ships as surety for the loans advanced to Brittany Ferries, indeed had every interest in preventing the company from going bankrupt between late 1996 and early 1997. Calling in the mortgages at this time would not have enabled Crédit Agricole to recover the value of what was owed to it. Although Brittany Ferries' fleet is the most modern in the Channel and therefore has high intrinsic value, the ship supply market was in a very depressed phase at the time, with older ships being offered at lower prices.

(176) Regarding Crédit Agricole's relationship with the EIGs, the French authorities point out that, in any event, the financing mechanisms in which the EIGs act as intermediaries, as described above, come under common law.

#### 4.6. ACOMO

(177) By letter dated 16 July 1998 the French authorities informed the Commission that up to 1997 Brittany Ferries had regularly received consolidation and modernisation aid in view of the international nature of its operations, but that there were no plans to extend such aid beyond 1 January 1998.

#### 4.7. Reduction of port charges

(178) The French authorities have indicated that there was no reduction of port charges as such, but rather a system of discounts on turnover, negotiated between the port concessionaires, the chambers of commerce and industry ('CCIs') and the shipping companies.

(179) According to the French authorities, this type of agreement is common where shipowners operate a scheduled route generating a large turnover, as in the case of ferry companies. Such agreements include obligations both for the port and for the shipowner, the latter undertaking, *inter alia*, to guarantee minimum takings to cover the port's financial commitments. They may also stipulate that, should actual takings be higher than the 'guaranteed' amount, the companies may enjoy a discount on any turnover in excess of the 'guarantee'. It is in this context that Brittany Ferries concluded such agreements with the CCIs of the ports it serves: Roscoff, Saint Malo, Caen and Cherbourg.

(180) According to the French authorities, Brittany Ferries is not the only company to have concluded agreements of this type with the CCIs: by way of example, they indicate that Irish Ferries concluded one with the CCI of Morlaix for the port of Roscoff, and P & O with the CCI of Cherbourg.

(181) The French authorities also point out that the ports served by Brittany Ferries fall into the category of 'ports of national interest'. They are operated under a 'public equipment' concession granted by the State to the CCIs, which legally are administrative public institutions administering an 'industrial and commercial public service' and which constitute a privately managed public service operating according to the rules applying to private undertakings. Accordingly, the agreements which the industrial and commercial services conclude with their users are common law contracts over which the public authorities exercise no control.

## 5. ASSESSMENT OF THE AID

### 5.1. Legal basis of the assessment

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

(183) However, Article 87(2) and (3) of the Treaty stipulates that some State aid is compatible or may be considered to be compatible with the common market.

(184) For assessing restructuring aid to shipping companies, the Community guidelines on State aid to maritime transport <sup>(77)</sup>, which interpret Article 87 of the Treaty

in respect of maritime transport, refer to the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(78)</sup>. The only basis for granting a derogation for rescuing and restructuring aid granted to firms in difficulty is Article 87(3)(c). By virtue of this Article, the Commission can authorise 'aid to facilitate the development of certain economic activities ... where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. Aid compatibility is analysed according to five main criteria, namely the existence of restructuring aid, the return to viability via a restructuring plan, the prevention of distortions of competition, the proportionality of the aid and, lastly, implementation of the restructuring plan.

(185) Furthermore, the Commission communication to the Member States on the application of Articles 87 and 88 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector <sup>(79)</sup> may be applicable in individual cases or in sectors which are unrelated to the manufacturing industry, in so far as the principles of the communication are applicable to those sectors and if the Commission considers it is essential to determine whether State aid exists.

(186) There follows an examination of the various elements of dossier C 31/98 in respect of the existence of State aid within the meaning of Article 87 and the possible compatibility of such aid with the Treaty. In this context, and so as to verify the extent to which the restructuring of Brittany Ferries will result in an operation which will not require aid in the future, there follows an analysis of the mechanism by which the ships operated by BAI are financed and of the parallel aid received in the past, as described by the complainant, notably in its correspondence of 29 February 2000 and as explained by the French authorities and Brittany Ferries at the meetings with them and in the documents they submitted.

### 5.2. BAI and SPCs: a single economic group

(187) The judgment of the Court of Justice of the European Communities in the Intermills case <sup>(80)</sup> confirms that such an approach is acceptable:

'It must therefore be accepted that, in spite of the fact that the three manufacturing companies each

<sup>(78)</sup> OJ C 368, 23.12.1994, p. 12.

<sup>(79)</sup> OJ C 307, 13.11.1993, p. 3.

<sup>(80)</sup> Judgment of 14 November 1984 SA Intermills v Commission, aid for the conversion of a paper-manufacturing undertaking, Case 323/82, ECR 1984, p. 3809.

<sup>(77)</sup> OJ C 205, 5.7.1997, p. 5.

has a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid granted by the Belgian authorities is concerned. The Commission was therefore justified in considering the entire group to be a single "undertaking" for the purposes of the application of Article 92 [now 87] of the Treaty.'

'Moreover, it should be noted that the applicants, in stressing that the restructuring carried out by means of the aid in question constituted an indivisible whole, from an industrial and financial point of view, have implicitly acknowledged that the original undertaking and the new manufacturing companies form a single economic unit.'

(188) In the light of the explanations given in section 2 and the above indications, and since it is essential for an analysis of restructuring to consider an undertaking's investment and operating activities together, the Commission believes it must in any case take account of all of BAI's assets and liabilities, as reflected in the accounts of the SPCs. Moreover, as the SPCs are closely linked to Brittany Ferries' operations, the Commission believes that in examining the granting of State aid it is relevant to analyse the whole of the Brittany Ferries (economic) group.

(189) Accordingly, the Commission will not analyse the group's internal relations from the point of view of State aid, as it wishes to avoid counting the State aid twice (once to the group and once within it).

(190) Nonetheless, the analysis presented in section 2 (see in particular Tables 1 and 2) shows that the rent-charging mechanism applied within the Brittany Ferries group (BAI-SPCs) is in line with market practice, including in terms of the amount of rent charged.

(191) In short, the above analysis serves both to clarify the group's internal transfers and to show that group practice is in line with market practice in the sector concerned.

### 5.3. Existence of aid in the form of financing of the BAI-SPC group

(192) In addition to the restructuring aid granted by the French Government, the Commission must check for the existence of any other aid resulting from BAI's partnership with the SPCs.

(193) Firstly, with regard to economic interest groupings and the tax advantages they may confer, the Commission

considers that they constitute a general measure, given that they are common in France, can be set up in all sectors of economic activity and come under common law.

(194) Regarding Crédit Agricole's operations in respect of the BAI group, both as a creditor and as a minority shareholder in the SPCs, it should be noted that, as the French authorities have explained, the institution's capital has, since privatisation, been held by a large number of members, most of them private. It is true that mutual agricultural credit institutions are subject to particular checks by the public authorities and that the CRCA and CLCA are themselves subject to CNCA checks, as stipulated for instance by certain provisions of the 'Code rural'. However, such checks are only to ensure that their books are in order and that they comply with current statutory or regulatory requirements, and do not extend to decisions the 'Caisses' take autonomously as part of their credit institution activity. Accordingly, the Commission considers that the State is no answerable for Crédit Agricole's activities and that there is therefore no need to check for the existence of other features inherent in the notion of State aid within the meaning of Article 87(1).

(195) It should be pointed out here that the SPCs are controlled by the public authorities and therefore have access to funds of State origin. The Commission's analysis has shown the following measures could involve State aid within the meaning of Article 87 of the Treaty: (a) the ship-financing mechanism employed by the Brittany Ferries group (BAI-SPCs) and (b) the guarantees provided for that financing.

(196) To determine any aid element involved in operations BAI conducted as a result of (public) financing of ships via the SPCs prior to 1996, the aspects below are considered with reference to the principle of an investor in a free market economy<sup>(81)</sup>, as interpreted in particular in the Commission's position on the application of Articles 92 and 93 of the EC Treaty to public authorities' holdings<sup>(82)</sup>.

#### 5.3.1. Financing mechanism and return on investment

(197) It should be borne in mind that from the creation of the SPCs up until the appearance of the difficulties which led to the restructuring (the 1996 unilateral capital increase being part of that restructuring), the financial

<sup>(81)</sup> Commission communication to the Member States on the 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).

<sup>(82)</sup> EC Bulletin 9-1984.

situation of the Brittany Ferries group (BAI-SPCs) was such that a normal return was earned. The group expected to achieve a return on investments via its operating revenue and via the residual value achieved upon the sale of the ships, covering the capital originally used to make the investments in question. The Commission can conclude, in this regard, that it is common and accepted practice in the industry for shipowners to rent their ships to operators and to make a profit when they resell them.

- (198) On this point, the third indent of point 3.2 of the Commission's position on public authorities' holdings is relevant:

'Nor is State aid involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply ... where the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance.'

- (199) It should be pointed out here that until 1995 all decisions to increase capital were linked to new investments, with BAI subscribing to the capital increases in proportion to its holding in the SPCs <sup>(83)</sup>. As required by the criteria set out above, BAI's holding as a private investor does indeed have real economic significance, involving a major holding for BAI and the SPCs (between 44,8 % and 49,98 % up until 1996).

- (200) Investment and reinvestment have significantly enhanced the value of the Brittany Ferries group, including increased value of assets acquired as operations expanded, the building-up of a market and a clientele (which had not previously existed as such) and the acquisition of maritime transport know-how, all of which has also earned the company an excellent market image (clearly identified by Dynamar and NERA). Moreover, since the restructuring the group's value is underpinned by the prospect of long-term viability and by the sustainability of the operations it has built up and has now been operating for over 20 years <sup>(84)</sup>.

<sup>(83)</sup> See letter from the French authorities dated 25 June 1999.

<sup>(84)</sup> This means that if the group were to be sold, its public and private shareholders would obtain a return from the value of the group as a whole, including not only its assets, but also other elements of value such as the market and clientele which have been built up and the group's excellent image, which is recognised on the market.

- (201) Given that the Brittany Ferries group's operation enables the SPCs to balance their budgets using the rental income from BAI and, upon the sale of ships, earned the group capital gains of around 7 % to 8 % a year per ship <sup>(85)</sup> before the difficulties which led to its restructuring, the said operation may be considered appropriate and in line with market practice in the sector in question.

- (202) The Commission concludes that the profits made by the group have enabled it to increase its value significantly, so that its return may be said to be normal in terms of dividends or capital gains <sup>(86)</sup>.

- (203) The Commission therefore considers that the public capital increases (prior to 1996) were carried out in accordance with market principles and that there are no elements of State aid in the way the Brittany Ferries (BAI-SPC) group's ships were financed prior to 1996.

- (204) In view of the foregoing, the Commission has decided not to cast doubt on the financing mechanism described above, which has been analysed in order to supplement the analysis of the Brittany Ferries group's (BAI-SPCs) restructuring.

### 5.3.2. Guarantees

- (205) With regard to the guarantees provided to the SPCs in 1983 and 1987, the Commission notes that the measures taken prior to 1989 were not covered by the initiation or the extension of the procedure or by requests for information sent to the French authorities before April 1999. As indicated in the initiation of proceedings C 31/98, the first letters the Commission sent to the French authorities before that date (in 1996 and 1997) dealt not with the question of guarantees provided to the SPCs, but with 'the intention of the French authorities to grant financial support to Brittany Ferries'. Accordingly, as from 16 April 1999, the date on which Regulation (EC) No 659/1999 entered into force, the limitation period laid down in Article 15 of the Regulation has expired, in the absence of any action to interrupt that period. It follows that the aid sums relating to the guarantees of 1983 and 1987 are to be deemed 'existing aid'.

- (206) Regarding the FRF 10 million guarantee provided in 1992, and in view of the fact that in 1992 the group was not yet in difficulties, the Commission considers that the fact that, as the recipient admits, there was no

<sup>(85)</sup> See Tables 1 and 2.

<sup>(86)</sup> See the aforementioned Commission position on public authorities' holdings.

proper return on the guarantee in line with market rates constitutes State aid according to the Commission notice of 11 March 2000 <sup>(87)</sup> on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(88)</sup>.

(207) It should be mentioned that, according to BAI's argument <sup>(89)</sup>, the element of subsidy deriving from this last guarantee should be deemed regional aid under the guidelines on State aid for regional purposes, this being an 'initial investment'. BAI also refers to the Community guidelines on State aid to maritime transport <sup>(90)</sup>, which it says allow investment aid in favour of shipping companies within the framework of regional aid.

(208) In this respect, the Commission refers nonetheless to the text of the guidelines, section 5 of which indicates that the Commission has never been favourable to this type of aid and that 'regional aid for maritime companies in disadvantaged regions, which often takes the form of investment aid to companies investing in the regions, may only be permitted where it is clear that the benefits will accrue to the region over a reasonable time period. This would, for example, be the case if the investment related to the construction of dedicated warehouses or purchase of fixed transshipment equipment ...'. Such aid must also comply with the regional aid rules. Moreover, there is no guarantee that investments financed in this way will comply with the Community shipbuilding rules, as the text also requires.

(209) The Commission concludes from the text that only fixed investments are acceptable under the rules on regional aid in the form of investment aid to shipping companies. Mobile investments such as ships may not be subsidised in this way.

(210) Accordingly, the aid element deriving from the guarantee provided in 1992 is deemed incompatible with the Treaty and must therefore be recovered in accordance with Article 14 of Regulation (EC) No 659/1999.

(211) In order to establish the exact amount of this aid element in the FRF 10 million guarantee granted in 1992, the Commission invites France to quantify it with reference to the market rate in the light of the Commission communication of 11 March 2000 <sup>(91)</sup>.

#### 5.4. Existence of restructuring aid

##### 5.4.1. The amounts of FRF 70 and 80 million

(212) The French authorities notified the amounts of FRF 70 and 80 million in restructuring aid as part of the BAI restructuring plan.

##### 5.4.2. Injection of public capital (FRF 246 million)

(213) In 1996, as part of the restructuring of Brittany Ferries and to that same end, the SPC shareholders provided a capital increase of FRF 250 million (mainly public money). However, this capital increase is quite distinct from those predating 1996, as it was carried out essentially by the public authorities using public funds totalling around FRF 246 million and was not matched by a concomitant increase from private funds, as had been the case prior to 1996.

(214) The said capital increase thus constitutes a unilateral injection of public capital into the Brittany Ferries group. Contrary to practice prior to 1996, the increase was not an across-the-board subscription as it did not involve the private shareholder BAI. The result was that the public holding reached a significantly higher level than originally, even though in 1996 the group was in financial difficulty. The Commission notes that the conditions laid down in the third indent of point 3.2 of its position on public authorities' holdings are not met and that the group's situation is in fact that described in the fifth indent of point 3.3 of the said position:

'There is State aid ... where the injection of capital into companies whose capital is divided between public and private shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook ...'.

(215) In view of the foregoing, the Commission concludes, on this point, that the unilateral capital increase of around

<sup>(87)</sup> OJ C 71, 11.3.2000.

<sup>(88)</sup> With regard to this, Crédit Agricole has indicated, by way of illustration, that in view of BAI's financial situation in 1992, a FRF 10 million bank guarantee should normally have carried an interest rate of 1 % per year.

<sup>(89)</sup> Document registered at the Commission on 30.1.2001 under number A/51686.

<sup>(90)</sup> OJ C 205, 5.7.1997.

<sup>(91)</sup> With regard to this, Crédit Agricole has indicated, by way of illustration, that in view of BAI's financial situation in 1992, a FRF 10 million bank guarantee should normally have carried an interest rate of 1 % per year.

FRF 246 million by the SPCs' public shareholders in 1996 constitutes State aid.

- (216) Accordingly, and given that the injection of public capital was made as part of a restructuring programme, the Commission considers that the said injection must be deemed restructuring aid to a firm in difficulty.
- (217) The question of the proportionality and compatibility of the aid is examined below.

#### 5.4.3. Redundancy programme

- (218) Given that the parallel measures by the French authorities have either already been approved or fall into the category of general measures applicable in France, and since the Commission regards the social costs of restructuring in a favourable light, it would appear that, aside from the parallel aid already approved, no State aid is to be identified within the meaning of Article 87(1) of the Treaty under this item.

#### 5.4.4. Reduction of port charges

- (219) It should be recalled that the question the Commission initially raised with the French authorities was whether the measure relating to the inter-port solidarity fund was to be introduced. When the French authorities indicated that it had not been introduced, the Commission asked for 'more information on the ports concerned, the reasons for these reductions and the beneficiaries'. The French authorities' reply is summarised in section 4 above.
- (220) Regarding the ports, it should be remembered that the Commission wanted to know whether an 'inter-port solidarity plan' had been introduced. When France said it had not, the Commission asked for additional information on the operation of those ports. On the basis of the information in its possession, the Commission has no reason to suppose that Brittany Ferries is not paying market rates.
- (221) It may therefore be concluded that, as regards this aspect of the current dossier, Brittany Ferries has not received State aid within the meaning of Article 87(1) of the Treaty.

### 5.5. Existence of aid in another form

- (222) The various aid paid to the Brittany Ferries group has been placed in two categories: restructuring aid (in which restructuring aid proper and parallel aid paid during the restructuring period have been cumulated) and aid paid before the restructuring period, which cannot be treated as restructuring aid (see Tables 4 and 5 in section 2).

- (223) The investment aid granted for the acquisition of certain ships is set out in Tables 4 (section 2) and 6 (section 4).

- (224) The other aid involves Brittany Ferries' application of schemes approved by the Commission. Since ACOMO, the investment aid up to and including 1997, the reimbursement of business tax and the ECA have all been approved by the Commission, there is no need to pronounce on them, even though these sums of parallel aid are duly taken into account for the proportionality of the restructuring aid. It should also be noted that the ACOMO scheme was discontinued at the beginning of 1998.

- (225) The Commission has no comments to make regarding the aid the French authorities indicate they paid to BAI in 1987 in accordance with the Commission's 'shipbuilding' decision (letter SG(88) D/01376 dated 5 February 1988), given that the aid was paid in compliance with the aforementioned decision.

- (226) As for the investment aid the French authorities indicate they granted in 1986, given that such aid was not prohibited at the time and that favourable decisions were taken on similar schemes during the 1990s, and in view of the time which has since elapsed, the Commission considers that the beneficiary was able to have legitimate confidence in the aid <sup>(92)</sup>.

### 5.6. Compatibility — restructuring plan and return to viability

- (227) In this context, the external factors (pound sterling/French franc parity, market development) and internal factors relating to the group's restructuring are analysed below.

#### 5.6.1. Parity between the pound sterling and the French franc

- (228) According to M & G's April 1998 diagnosis <sup>(93)</sup>, a fall of FRF 0,50 in the value of the pound automatically reduces BAI's results by at least FRF [...], quite aside from any impact on forecast traffic and passenger yield. In March 1999, around one year later, NERA noted that franc/sterling parity should remain at around 9 FRF for one pound sterling for the next few years at least. NERA based this on OECD and United Kingdom Treasury forecasts.

- (229) On the basis of this information, the Commission notes, firstly, that NERA based its findings on exchange rate

<sup>(92)</sup> Judgment of the Court of Justice, RSV, Case 223/85, ECR 1987, p. 4617.

<sup>(93)</sup> See M & G report, especially pp. 5 and 12 of the summary.

forecasts by recognised, reliable institutions. Secondly, given that a strong pound helps Brittany Ferries, the Commission recognises that a stronger exchange rate should help both BAI and the Brittany Ferries (economic) group return to viability.

#### 5.6.2. Market development

(230) As various experts have estimated that Brittany Ferries' market in the Channel does not have structural overcapacity, as confirmed notably by a rise in prices at the beginning of 2000, and moreover that some growth potential seems realistic both on that market and on the other routes Brittany Ferries operates, the Commission accepts the argument that Brittany Ferries' relevant market does not have structural overcapacity.

(231) The Commission also finds that the growth potential offered by this market should be an external factor conducive to the development of both the company and the Brittany Ferries (economic) group.

#### 5.6.3. General costs

(232) As described in section 2, the non-allocated costs are, firstly, clearly covered by the group's various revenue and, secondly, explained in part by BAI's excellent image<sup>(94)</sup>, which Dynamar<sup>(95)</sup> and NERA both recommend it should maintain.

(233) In addition, NERA considers that a company ought in principle to hold onto the asset of a strong brand which brings market benefits. In view of the satisfactory analytical findings regarding the group's profitability (see below), NERA concludes here that the Brittany Ferries group passes this market test.

(234) In addition, general costs have been reduced (by effectively reducing non-allocated costs and through reallocation to profit centres), as advocated by Dynamar, for instance<sup>(96)</sup>.

<sup>(94)</sup> In its business strategy analysis, Dynamar defines Brittany Ferries as being the 'strongest brand'.

<sup>(95)</sup> Dynamar report, p. 10.

<sup>(96)</sup> See letter from the French authorities dated 12 May 1999, which included NERA's comments. Regarding Dynamar's comments on this point referring to a comparison between BAI and a reference company, NERA stresses three factors in particular:

- Brittany Ferries has to carry out all its management operations by itself, while the reference company may enjoy certain (synergetic) advantages by having a management which, at least in part, fits into that of a larger group,
- Brittany Ferries is responsible for operations in a larger number of ports than the reference company,
- Brittany Ferries has a larger turnover than the reference company.

(235) Now that they have been reduced, reallocated and explained, and represent an acceptable proportion, the Commission considers the central costs to be justifiable and not liable to threaten the viability of individual routes.

#### 5.6.4. Analysis by profit centre

(236) Dynamar noted that one necessary element of the restructuring analysis would be an analysis of the company's profit centres. NERA considered this point and analysed the Brittany Ferries group from that angle (its profit centres basically being the routes it operates).

(237) To this end, NERA compared costs and revenue<sup>(97)</sup> by route for passenger and freight traffic, and found that, individually, all the routes made a positive net contribution to the group's profits. In addition, to examine the various routes' profitability in closer detail, NERA reallocated the port charges among the various routes BAI operates and found the positive net result to be maintained on all routes<sup>(98)</sup>.

(238) On the basis of this detailed analysis, and given the proportionality of the non-allocated costs, the Commission recognises the profitability of the various routes BAI operates. The viability (positive net contribution) of those routes explains the group's overall profit. However, the analysis of the group's profit development goes beyond the viability of the various routes, as can be seen from Table 7.

(239) Aside from the individual viability of each route, Brittany Ferries and NERA<sup>(99)</sup> maintain that the routes as a whole constitute the core of Brittany Ferries for a number of reasons: regarding the Irish and Spanish routes, closure of a route would result in all BAI's traffic to those destinations being lost.

(240) Compared with the other routes, the Plymouth/Roscoff route serves a relatively distinct market. While some traffic might divert to the central Channel routes, especially Cherbourg/Poole, a reduction in the

<sup>(97)</sup> Revenue: Ticket sales, revenue from restaurants, bars, duty-free and other sales, and entertainment activities (films, videos, etc.).

Costs: Travel agency commissions, port taxes, insurance, costs of preparing cabins, cleaning, food, drinks and other purchases, staff working in restaurants, bars and shops, loading of lorries, cost of fuel and oil, pilotage, seamen's wages, accommodating and feeding the crew, ships' rent, maintenance and amortisation of on-board equipment. See NERA, pp. 28—30.

<sup>(98)</sup> The routes are: Roscoff/Plymouth, St. Malo/Portsmouth, Caen/Portsmouth, Cherbourg/Poole, Plymouth/Santander and Roscoff/Cork, NERA, p. 33.

<sup>(99)</sup> Particularly section 5, pp. 27—41.

Plymouth/Roscoff route would result in users of that service choosing other travel destinations or travelling by air if the route were no longer operated.

- (241) NERA considers that Brittany Ferries' central Channel routes do not necessarily provide good substitute alternatives for one another, as they serve distinct geographical markets. If one of these routes were to close, passengers and freight would therefore divert to Brittany Ferries' main competitor, day trip and excursionist traffic would be lost and the reduction of one or more routes would prevent Brittany Ferries from increasing its high-season revenue on its other routes. This would mean the loss of high-yield sales at peak times.
- (242) In conclusion, in view of what has just been explained and the proportionality of the central costs (see above), the Commission can accept the argument that the profitability of the various individual routes BAI operates is assured and that these routes constitute a profitable ensemble for the group (see Table 7).

#### 5.6.5. Replacement of a ship

- (243) As indicated in section 2, the investment in the *Normandie 2* is necessary in order to balance out the service on the Caen/Portsmouth route, on which capacity is uneven from day to day. With the new ship in service it will be possible to substitute the *Duc de Normandie* for the *Quiberon* and so optimise the operation of the Roscoff/Plymouth route. Moreover, as indicated in section 2, even after the acquisition of the *Normandie 2*, Brittany Ferries' capacity will remain below

what it was before restructuring. BAI has indicated that the acquisition of the ship will be 20 % self-financed by the Brittany Ferries group.

- (244) On this point, the Commission concludes that the investment in this ship is justified by the need to balance and homogenise the fleet, and since another ship will be withdrawn at the same time BAI's capacity will remain at around 5 % below its capacity at the start of restructuring in 1995 and 1996.
- (245) The Court of First Instance of the European Communities has recognised the legitimacy of such investment <sup>(100)</sup>.
- (246) In view of the above, the Commission can accept this investment as part of the restructuring.

#### 5.6.6. The financial forecast — viability

- (247) The group's financial evolution includes the sums of FRF 70, 80 and 250 million. The return to viability forecast in the table below has been confirmed up to the end of 2000 by the French authorities' announcement <sup>(101)</sup> that BAI has indeed returned to 'better fortunes' and is starting to pay back (internally within the group) the sum of FRF 250 million to the SPCs in maximum tranches of FRF 50 million a year for the three SPCs, while continuing to pay them rent as normal.
- (248) With most of the restructuring measures already in place, the restructuring may be considered complete once the *Normandie 2* has been acquired and the ships reassigned <sup>(102)</sup>.

<sup>(100)</sup> Judgment of 25 June 1998, *Air France*, Joint Cases T-371/94 and T-394/94, point 102.

<sup>(101)</sup> Letter from the French authorities dated 4 December 2000.

<sup>(102)</sup> The *Normandie 2* is due to be acquired in 2002.

- (249) Regarding the Brittany Ferries (BAI-SPC) group's economic and financial evolution up to 2006, NERA <sup>(103)</sup> forecast the following data up to 2006 <sup>(104)</sup>:

Table 7

(in FRF million)

| BAI-SPC group                        |       |       |       |       |       |       |       |       |       |
|--------------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Year                                 | 1998  | 1999  | 2000  | 2001  | 2002  | 2003  | 2004  | 2005  | 2006  |
| Total balance                        | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Turnover                             | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Operating profit                     | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Retained profit for the year         | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Cumulated profit (with inflation)    | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Net cash position                    | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| EBIT/interest cover ratio            | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Debt/equity ratio                    | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Return on equity                     | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Operating return on capital employed | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |

- (250) According to NERA's forecast, the group's operating profit continue to improve significantly, varying between FRF [...] in 1998 and FRF [...] in 2006, though the planned replacement of ships will offset the trend temporarily in 2002.

costs, it may be considered that the impact of acquiring new ships will remain modest in 2002.

- (251) The progression of retained profit for the year will take it to a level of FRF [...] in 2006. The relatively modest impact may also be seen of the investments planned around 2002; this will be rapidly overcome.

- (253) The study establishes an EBIT/interest cover ratio which starts off low ([...]) in 1998 but then rises to rates deemed reasonable (between 2 and 4) between 2000 and 2004, and from 2005 improves further to rates deemed ample (above 4,0).

- (252) The net cash position goes from FRF [...] in 1998 to FRF [...] in 2006. As the NERA study allows for external financing amounting to 80 % of investment

- (254) The debt/equity ratio is initially high ([...] %), but then falls to levels of 40 % to 60 %, deemed acceptable, as the ship-related debts are repaid (even though those debts represent 80 % of the investment costs). The ratio rises by around 20 percentage points between 2001 and 2002, but stabilises immediately before resuming a downward trend. According to NERA, this ratio will be similar in other ferry companies.

<sup>(103)</sup> As indicated above, and further to M & G's work, NERA produced a financial model which pointed to the group's long-term financial viability. The positive development from the short-term viability suggested by M & G in April 1998 to the long-term viability suggested by NERA in March 1999 is due, *inter alia*, to the rise and stabilisation of French franc/pound sterling parity at over 9 francs to the pound in 1998 and 1999, NERA's analysis of the economic group as a whole and the different perspective offered by the passage of time. While M & G's analysis focused mainly on the period 1996-98, NERA produced a complementary study analysing the group's requirements and future options for the period 1998 to 2006, which led it to conclude that the group would be viable in the long term.

<sup>(104)</sup> Regarding the item 'return on equity': The 1998 figure includes a provision of FRF 150 million for possible repayment of aid. The figure would otherwise be 14,7 %. The provision is cancelled in 1999.

- (255) As for the firm's profitability, the operating return on capital employed develops positively to reach [...] % and is therefore commercially respectable.

- (256) Still regarding the firm's profitability, the company's return on equity is, at between [...] % and [...] %, also considered to be commercially respectable.

- (257) On the strength of this analysis NERA concludes that the Brittany Ferries group will be viable in the long term.

(258) To check the validity of NERA's forecasts for 1998 onwards, the Commission obtained confirmation from the French authorities that BAI has indeed returned to 'better fortunes' and is starting to pay back (internally within the group) the sum of FRF 250 million to the SPCs in maximum tranches of FRF 50 million a year for the three SPCs, while continuing to pay its normal rent.

(259) With the restructuring measures now essentially in place, and Sabemen's operation to be aligned with that of the other two SPCs so as to assist the group's viability, and taking account of the whole of the Brittany Ferries (economic) group, its capacity to finance ships in the years ahead and the likelihood of external factors developing positively (e.g. the evolution of Brittany Ferries' market and of macro-economic factors), the Commission can accept that the above forecasts up to 2006, as confirmed by Brittany Ferries' actual economic performance up to the end of 2000, have been produced realistically and may be considered reliable.

(260) The Commission therefore concludes that the long-term viability of the Brittany Ferries (economic) group appears to be realistic.

(261) In order that the Commission may monitor the application of the last remaining elements of restructuring, it wishes to be kept informed of the alignment of Sabemen's operation on that of Senacal and Senamanche in respect of the agreement linking it to BAI, and of the internal repayment of FRF 250 million between BAI and the SPCs, the acquisition of the *Normandie 2* and the subsequent reorganisation of ships, as planned.

#### 5.6.7. Viability in the light of the readjustments to be made

(262) The Commission believes the group's long-term viability would also be assured even if the aid of FRF 80 million could not be paid.

(263) Given that in 2002 to 2003 the group's net result will be positive at FRF [...] (FRF [...] cumulated since 1998) and FRF [...] (FRF [...] cumulated) and that the forecast net cash position will be FRF [...] and [...] respectively for those two years, the absence of FRF 80 million in aid would not seem likely to cause the group insuperable difficulties. It should be noted here that these results also reflect the investment in the *Coutances* and the *Duc de Normandie*. The 20 % self-financing of

these ships comes to around FRF [...]. Even without compensation of FRF 80 million, it should be possible to absorb that sum in 2002 to 2003 given the abovementioned results, and even more so from 2004 to 2005 onwards, given the entirely satisfactory results expected in those years: net results of FRF [...] (FRF [...] cumulated) and FRF [...] (FRF [...] cumulated) with a net cash position of FRF [...] and [...] respectively in those two years.

(264) In view of the above, it may be considered that the group's long-term viability would not be affected if the FRF 80 million tranche of additional aid could not be paid.

(265) This view has been confirmed both by the French authorities<sup>(105)</sup>, which confirm BAI's return to 'better fortunes', and by BAI at the beginning of 2001, referring to its viability (without the sum of FRF 80 million) in the light of the more positive course taken by external factors (exchange rate between the pound sterling and the French franc) compared with the forecasts of the restructuring plan.

### 5.7. Compatibility — prevention of undue distortion of competition

(266) Under the abovementioned Community guidelines on State aid for rescuing and restructuring firms in difficulty, another condition placed on restructuring aid is that measures (e.g. reducing the business's capacity) be taken to mitigate as far as possible the adverse consequences for competitors. Otherwise, the aid is 'contrary to the common interest' and cannot qualify for a derogation under Article 87(3)(c) of the Treaty. To determine both the extent to which the common interest is complied with and whether the undertaking needs to reduce its capacity, the Community guidelines require examination of three aspects: the capacity of the market, the risk of a monopoly and assisted areas.

#### 5.7.1. Market situation

(267) It should first of all be recalled that, as shown in the descriptive section above, BAI has already shed capacity (two out of nine ships, two out of eight routes, reduced frequencies, sale of assets, etc.). To know whether the

<sup>(105)</sup> Letter from the French authorities dated 4 December 2000.

Commission needs to ask BAI to reduce its capacity further, the issues need to be examined of any excess capacity in the market, the risk of monopoly and the regional development aspect <sup>(106)</sup>.

imminent price rise of 10 % in the central and western Channel and of 25 % in the strait.

(268) Firstly, it must be noted that, according to Dynamar, the Channel market <sup>(107)</sup> shows no substantial structural overcapacity <sup>(108)</sup>. This view is shared by NERA <sup>(109)</sup>, which states that cross-Channel passenger traffic (western/central Channel and strait) rose by 78 % between 1991 and 1998. This trend is confirmed, *inter alia*, by the start-up of Condor Ferries' operations in 1998 and by the opening of a fast link between Cherbourg and Portsmouth <sup>(110)</sup>.

(273) According to the Commission's information, ticket prices for cross-Channel maritime traffic indeed appear to have risen by around 20 % in late 1999 and early 2000. While this price rise is seen mainly in the strait, some impact on the central and western Channel sector also seems plausible given the indications of growth on the central and western Channel routes (see above).

(269) It should be recalled that, even if there were overcapacity in the central/western Channel sector (which is not the case), that situation would have minimal impact on prices in the strait, given the one-way substitutability explained in the descriptive section.

(274) In short, both NERA and Dynamar confirm that the passenger and freight markets are growing <sup>(113)</sup> and also that there is no sign of substantial structural overcapacity in the western/central Channel and strait transport market.

(270) As for freight, Brittany Ferries indicates that this is a growth market: between 1995 and 1998, the total amount of freight carried across the Channel rose by almost 33 % <sup>(111)</sup>. NERA confirms this trend, stating that between 1991 and 1999 the number of lorries carried rose by 112 %.

(275) As it may be concluded that the cross-Channel market, and particularly the central and western Channel sector, is not suffering structural overcapacity (see above), it should be concluded that the Commission cannot require any further capacity reduction.

(271) Secondly, according to NERA, in the peak season Brittany Ferries operates at almost full capacity in the central and western Channel market.

#### 5.7.2. Reduced capacity of the Brittany Ferries Group

(272) The apparent upward trend in prices on the cross-Channel market was identified, *inter alia*, by Dynamar in December 1998 <sup>(112)</sup>, which predicted an

(276) It should again be recalled at this point that Brittany Ferries has already shed capacity. As shown above, between the financial years 1995 and 1998, the company's passenger capacity was reduced by 12 % (– 1 375 passengers), its berth capacity by 9 % (– 539 berths) and its garage capacity by 17 % (– 1 480 lane metres). Between the financial years 1995 and 2003, once the *Quiberon* is replaced by the *Normandie 2* on the Caen/Portsmouth route in mid-2002, Brittany Ferries' overall capacity will remain below its pre-restructuring capacity, i.e. a reduction of 5 % in passenger capacity (– 554 passengers), 9 % in berth capacity (– 523 berths) and 4 % in garage capacity (– 367 lane metres) <sup>(114)</sup>.

<sup>(106)</sup> The guidelines state that 'where on an objective assessment of the demand and supply situation there is a structural excess of production capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the European Community by irreversibly reducing or closing capacity ...'.

Where, on the other hand, there is no structural excess of production in the relevant market, the Commission will not normally require a reduction in capacity in return for the aid. However, it must be satisfied that the aid will be used only for the purpose of restoring the firm's viability and that it will not allow production capacity to be expanded, except in so far as is essential for restoring viability, without thereby unduly distorting competition.

To ensure that the aid does not distort competition to an extent contrary to the common interest, the Commission may impose any conditions and obligations as may be necessary.

<sup>(107)</sup> That is, the western/central Channel and the strait, but not including the North Sea sector, which has no bearing on this dossier.

<sup>(108)</sup> Dynamar, p. 13.

<sup>(109)</sup> NERA, p. 15.

<sup>(110)</sup> According to the 'Comments from Brittany Ferries' dated 31 March 1999, p. 12, this rapid ferry can carry 900 passengers and 175 cars.

<sup>(111)</sup> 'Comments from Brittany Ferries' dated 31 March 1999, p. 14.

<sup>(112)</sup> Dynamar, pp. 11–12.

(277) In view of these measures, the Brittany Ferries indicates that the service it supplies, measured in terms of sailings and rotations, will remain constant in 2001 compared with 1998, and well below what it was in 1995 before restructuring, without the company being able to increase the number of sailings, enter new routes or assign additional ships to existing routes.

(278) This reminder strengthens the argument that no further capacity reduction can be asked of BAI.

<sup>(113)</sup> NERA, pp. 22–23.

<sup>(114)</sup> See correspondence from BAI dated 9.7.1999, p. 2.

### 5.7.3. Risk of monopoly

(279) Moreover, according to the Community guidelines on State aid for rescuing and restructuring firms in difficulty, even where there is structural overcapacity on the market, a relaxation of the principle of requiring a proportionate capacity reduction may be allowed if such a reduction is likely to cause a manifest deterioration in the structure of the market, for example by creating a monopoly or a tight oligopoly situation.

(280) Brittany Ferries competes chiefly with P & O on the routes it operates in the western and central Channel and on its route to Spain <sup>(115)</sup>. On the connections with Ireland, it competes with Irish Ferries.

(281) Given the small number of competitors in the various sectors of BAI's market, it should be borne in mind that the disappearance of Brittany Ferries could lead to a tight oligopoly situation, or even monopoly, in those sectors. For the central and western Channel and for the Spanish market it would be P & O which would be left as virtually the only operator on those markets, while on the Irish routes it is Irish Ferries which would be handed the entire market. This risk of monopoly, too, argues against asking BAI to reduce its capacity any further, especially as the market has no structural overcapacity, as shown above.

### 5.7.4. Assisted areas

(282) The Community guidelines on State aid for rescuing and restructuring firms in difficulty allow the Commission to show more flexibility in assisted areas with regard to the requirement for a reduction in capacity in the case of markets in structural overcapacity. If regional development needs so justify, it will require a smaller capacity reduction than in non-assisted areas.

(283) Given that, under the 1999 classification of eligibility for State aid, the regions of Brittany (Côtes-d'Armor, Finistère, Ille-et-Villaine and Morbihan) and Lower Normandy (Calvados, La Manche and Orne) are eligible for State aid under Article 87(3)(c), the Commission can show more flexibility with regard to the requirement for a reduction in capacity in the case of a market in overcapacity.

(284) In view of the conclusions reached in the two previous points (market situation, market structure), the Commission believes the regional argument confirms

that no capacity reduction other than that already carried out by BAI may be required of the group as part of its restructuring.

### 5.7.5. Conclusions on the prevention of undue distortion of competition

(285) Given that the market in question shows no structural overcapacity, that the disappearance of BAI would be liable to lead to a monopoly situation in the market and that the Brittany Ferries group has already reduced its capacity significantly, it may be considered that no further reduction in its capacity is required. Account may also be taken here of the fact that the group is located in an assisted area.

## 5.8. Compatibility — proportionality of the aid

(286) The cumulated measures taken during the restructuring phase will have cost the Brittany Ferries group FRF 1 392 million.

The total cumulated aid received during this period is FRF 581 million.

The intensity of the aid cumulated during restructuring is 42 %.

The intensity of the restructuring aid is 30 %.

(287) In view of the fact that the public aid was paid and used in order to finance practical and necessary restructuring measures, that these measures were implemented as part of a restructuring plan which has already returned the group to short-term financial viability and that the financial forecasts indicate a return to long-term viability, the Commission can approve the restructuring aid of FRF 70 million and around FRF 246 million.

(288) The restructuring aid of FRF 80 million is not deemed necessary for the restructuring of Brittany Ferries, on the one hand because the group's economic progress has been relatively rapid (sustained in particular by the positive trend in external factors) <sup>(116)</sup> and on the other because the group could use the sum to bring forward investments not considered to be part of the restructuring concept.

(289) The aid element of the final guarantee paid in 1992 (see above) does not fit into the restructuring framework. The Commission must therefore ask France to determine, with the help of the Commission

<sup>(115)</sup> According to Dynamar, Condor Ferries, which also operates in the Channel via the Channel Islands, does not affect this balance in any substantial manner, given that operator's capacity and frequency.

<sup>(116)</sup> BAI's lawyers have also indicated (letter dated ... that the sum of FRF 80 million was no longer necessary for the return to viability (see descriptive section above).

communication of 11 March 2000, the amount of aid relating to the FRF 10 million guarantee paid in 1992, which is not compatible with the Treaty.

context, the principle that restructuring aid may be granted only once during a given period. The subsidies granted prior to 1988 are deemed to be existing aid.

(290) The Commission concludes that, subtracting the non-payable aid sums, the restructuring aid element cumulated with the parallel aid granted during the restructuring period and approved in advance by the Commission reveal an aid intensity of 42 % during the restructuring period, which is considered acceptable. The more so as the 30 % intensity of the restructuring aid proper is justified by a restructuring leading to the group's long-term viability <sup>(117)</sup>.

(296) In analysing the restructuring, the Commission had to examine the group's financing system, including its practice before restructuring began in 1995, and has voiced no doubts on this point.

(297) The Commission is taking account of the fact that the disappearance of BAI would be liable to lead to a monopoly situation in the various market segments in which it currently operates,

### 5.9. Compatibility — full implementation of the restructuring plan, monitoring and annual report

HAS ADOPTED THIS DECISION:

(291) The Commission considers that, overall, the documents submitted to it relating to the restructuring and to Brittany Ferries' prospects for long-term viability constitute a coherent restructuring concept compatible with the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

#### Article 1

(292) According to the Commission's information, the bulk of the restructuring measures have already been put in place <sup>(118)</sup>. Nonetheless, the Commission needs to be informed of the course of future events, including the internal reimbursement of funds between BAI and the SPCs and the reorganisation of ships on the various routes following the introduction of the *Normandie 2* and the withdrawal from service of the *Quiberon*.

1. The aid of FRF 70 million implemented by France at central administration level and the public capital increase of around FRF 246 million carried out by French regional and local authorities in favour of the Bretagne Angletterre Irlande company ('BAI' or 'Brittany Ferries') were granted in violation of Article 88(3) of the EC Treaty. However, these aids are compatible under Article 87(3)(c) of the Treaty.

2. The notified restructuring aid of FRF 80 million constitutes restructuring aid incompatible with the Treaty.

3. The guarantee provided by the Conseil général de la Manche in 1992 was provided in violation of Article 88(3) of the EC Treaty. The aid element to be quantified with the French authorities with reference to the market rate constitutes State aid incompatible with the Treaty.

This aid element must be recovered with interest calculated on the basis of the reference rate applying at the time of the grant in accordance with the procedures of national law. This interest shall be calculated from the date on which the aid was made available to the beneficiary until that of its recovery.

France is nonetheless invited to quantify, with the help of the Commission communication of 11 March 2000 on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guaranties <sup>(119)</sup> and on the basis of objective criteria, the amount of aid relating to this guarantee.

4. The capital increases carried out prior to 1996 in the semi-public companies (SPCs) Sabemen, Senacal and Senamanche and the funds allocated to Brittany Ferries by Crédit Agricole Caisse Régionale du Finistère as from the

### 5.10. Conclusions and conditions

(293) In conclusion, the Commission considers the sum of FRF 80 million in restructuring aid to be incompatible with Article 87 of the Treaty.

(294) The Commission invites France, with the help of the Commission communication of 11 March 2000, to determine the amount of aid relating to the FRF 10 million guarantee paid in 1992.

(295) All the other aid granted by the French Government to support the BAI-SPC restructuring plan meets the criteria set by the Community guidelines on State aid for rescuing and restructuring firms in difficulty and by the Community guidelines on State aid to maritime transport. The Commission would point out, in this

<sup>(117)</sup> Nor does this intensity seem in any way disproportionate in the light of other cases in which the Commission approved aid of far higher intensity (notably 81 % in Case C 70/97).

<sup>(118)</sup> See in particular the '1999 to 2003 plan', p. 3.

<sup>(119)</sup> OJ C 71, 11.3.2000.

privatisation of Crédit Agricole in 1988 do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

5. The aid granted under the ACOMO scheme and schemes for the reimbursement of business tax, early cessation of activities (ESA) and the reimbursement of employers' contributions, and the investment aid measures up to and including 1997 have been approved separately by the Commission.

6. Aid granted up to 16 April 1989, i.e. ten years before Regulation (EC) No 659/1999 entered into force, is deemed to be existing aid in accordance with Article 15(3) of that Regulation.

#### Article 2

1. France shall ensure that Sabemen's operation is aligned on that of Senacal and Senamanche in respect of the agreement linking it to BAI and shall inform the Commission of the measures taken in this respect.

2. France shall inform the Commission each year regarding the internal reimbursement of the FRF 250 million between

BAI and the SPCs, the acquisition of the *Normandie 2* and the ensuing reorganisation of ships, as provided for in the restructuring concept.

#### Article 3

France shall inform the Commission, within two months from the date of notification of this Decision, of the measures taken to comply therewith.

#### Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 8 May 2001.

*For the Commission*

Loyola DE PALACIO

*Vice-President*



**CORRIGENDA**

**Corrigendum to Commission Decision 2001/839/EC of 8 November 2001 laying down a questionnaire to be used for annual reporting on ambient air quality assessment under Council Directives 96/62/EC and 1999/30/EC**

*(Official Journal of the European Communities L 319 of 4 December 2001)*

The Annex to the Decision is replaced by the following:

## ANNEX

## REPORTING QUESTIONNAIRE

**on Council Directive 96/62/EC on ambient air quality assessment and management and Council Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air**

MEMBER STATE: .....

CONTACT ADDRESS: .....

REFERENCE YEAR: .....

COMPILATION DATE: .....

The following forms distinguish between items that are legally required to report and items that are voluntary to report for the Member State. Voluntary items are printed in italic.

Many of the forms below contain an indefinite number of rows or columns to be filled in. In the form description, the number of empty rows or columns to be filled in is then limited to three and a dashed borderline indicates that the form should be extended as needed.

In addition to the forms, which are to be filled in by the Member State, some tables are also provided. The tables provide information such as fixed codes that are not to be changed by the Member State.

## LIST OF FORMS

|         |                                                                                                                                                                                                                |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Form 1  | Contact body and address                                                                                                                                                                                       |
| Form 2  | Delimitation of zones and agglomerations                                                                                                                                                                       |
| Form 3  | Stations used for assessment and measuring methods                                                                                                                                                             |
| Form 4  | Methods used to sample and measure PM <sub>10</sub> and PM <sub>2,5</sub> ; optional additional codes to be defined by the Member State                                                                        |
| Form 5  | List of zones and agglomerations where levels exceed or do not exceed limit values or limit values plus margin of tolerance                                                                                    |
| Form 6  | List of zones and agglomerations where levels exceed or do not exceed upper assessment thresholds or lower assessment thresholds, including information on the application of supplementary assessment methods |
| Form 7  | Individual exceedences of limit values and limit values plus the margin of tolerance                                                                                                                           |
| Form 8  | Reasons for individual exceedences: optional additional codes to be defined by the Member State                                                                                                                |
| Form 9  | Monitoring data on 10 minutes mean SO <sub>2</sub> levels                                                                                                                                                      |
| Form 10 | Monitoring data on 24hr mean PM <sub>2,5</sub> levels                                                                                                                                                          |
| Form 11 | Tabular results of and methods used for supplementary assessment                                                                                                                                               |
| Form 12 | List of references to supplementary assessment methods referred to in Form 11                                                                                                                                  |
| Form 13 | Exceedence of limit values for SO <sub>2</sub> due to natural sources                                                                                                                                          |
| Form 14 | Natural SO <sub>2</sub> sources: optional additional codes to be defined by Member State                                                                                                                       |
| Form 15 | Exceedence of limit values of PM <sub>10</sub> due to natural events                                                                                                                                           |
| Form 16 | Exceedence of limit values of PM <sub>10</sub> due to winter sanding                                                                                                                                           |
| Form 17 | Consultations on transboundary pollution                                                                                                                                                                       |
| Form 18 | Exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC                                                                                                                      |
| Form 19 | Reasons for exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC: optional additional codes to be defined by the Member State                                             |

## LIST OF TABLES

|         |                                                                                            |
|---------|--------------------------------------------------------------------------------------------|
| Table 1 | Methods used to sample and measure PM <sub>10</sub> and PM <sub>2,5</sub> : standard codes |
| Table 2 | Reasons for individual exceedences: standard codes                                         |
| Table 3 | Statistical parameters to be used in concentration maps                                    |
| Table 4 | Natural SO <sub>2</sub> sources: standard codes                                            |
| Table 5 | Natural events causing limit value exceedences for PM <sub>10</sub> : standard codes       |

**Form 1: Contact body and address**

|                                      |  |
|--------------------------------------|--|
| Name of the contact body             |  |
| Postal address                       |  |
| Name of the contact person           |  |
| Telephone of the contact person      |  |
| Fax of contact person                |  |
| E-mail address of contact person     |  |
| Comments for clarification if needed |  |

Note to Form 1:

The Member State is asked to fill in the contact body, and if possible, the contact person at national level, that the Commission may approach on details regarding this questionnaire if needed.

**Form 2: Delimitation of zones and agglomerations (96/62/EC Articles 5 and 11(1)(b))**

|                                                                               | Zones |  |  |
|-------------------------------------------------------------------------------|-------|--|--|
| Full zone name                                                                |       |  |  |
| Zone code                                                                     |       |  |  |
| Pollutant(s), possibly separate protection targets, to which the zone applies |       |  |  |
| Type (ag/nonag)                                                               |       |  |  |
| Area (km <sup>2</sup> )                                                       |       |  |  |
| Population                                                                    |       |  |  |
|                                                                               |       |  |  |
| Border coordinate pairs                                                       |       |  |  |
| Border coordinate pairs                                                       |       |  |  |
| Border coordinate pairs                                                       |       |  |  |

Notes to Form 2:

- (1) The Member State should give not only the zone name, but also a unique zone code.
- (2) The Member State should indicate the pollutant(s) to which the zone applies using the codes: 'S' for SO<sub>2</sub>, 'N' for NO<sub>2</sub>/NO<sub>x</sub>, 'P' for PM<sub>10</sub> and 'L' for lead, separated by a semicolon, or 'A' if the zone applies to all these pollutants. If zones have been separately defined for health, ecosystem and vegetation protection, the Member State should use the following codes: 'SH' for SO<sub>2</sub> health protection, 'SE' for SO<sub>2</sub> ecosystem protection, 'NH' for NO<sub>2</sub> health protection and 'NV' for NO<sub>x</sub> vegetation protection.

- (3) It should be indicated whether the zone is an agglomeration (code: 'ag') or not (code: 'nonag').
- (4) Optionally, the Member States may add the area and population size of the zone for further processing of the data at European level.
- (5) For further processing, the Member State is requested to fill in the zone borders in a standard format (polygons, using the geographical coordinates according to ISO 6709: geographical longitude and latitude). The Member State is requested to provide separately a map of the zones (as an electronic file or on paper) to facilitate the correct interpretation of the zone data. The Member State must provide at least either the zone borders in Form 2 or a map.

**Form 3: Stations used for assessment and measuring methods (1999/30/EC Annex IX)**

| Station-code | Local station-code | Zone code(s) | Use for Directive |                 |                 |      | Use for Directive/Measuring method code for PM <sub>10</sub> and PM <sub>2,5</sub> |                   | Correction factor or equation used |                   | Function of station |
|--------------|--------------------|--------------|-------------------|-----------------|-----------------|------|------------------------------------------------------------------------------------|-------------------|------------------------------------|-------------------|---------------------|
|              |                    |              | SO <sub>2</sub>   | NO <sub>2</sub> | NO <sub>x</sub> | Lead | PM <sub>10</sub>                                                                   | PM <sub>2,5</sub> | PM <sub>10</sub>                   | PM <sub>2,5</sub> |                     |
|              |                    |              |                   |                 |                 |      |                                                                                    |                   |                                    |                   |                     |
|              |                    |              |                   |                 |                 |      |                                                                                    |                   |                                    |                   |                     |
|              |                    |              |                   |                 |                 |      |                                                                                    |                   |                                    |                   |                     |

Notes to Form 3:

- (1) In Form 3 and other forms in this questionnaire, 'station code' refers to the code that is already in use for the exchange of data under the Exchange of Information Decision 97/101/EC. 'Local station code' is the code used within the Member State or region.
- (2) The Member State is requested to identify in the third column the zone(s) in which the station is located. If more than one zone is concerned, the codes should be separated by a semicolon.
- (3) The Member State is requested to use the columns headed by 'SO<sub>2</sub>', 'NO<sub>2</sub>', 'NO<sub>x</sub>' and 'Lead' for indicating whether the measurement is used for assessment under Directive 1999/30/EC, ticking with '+' if used and leaving the cell empty if not used. It should be noted that ticking NO<sub>x</sub> implies that the station is sited at a location where the limit value for vegetation applies. If the station is in the immediate vicinity of specific sources of lead as referred to in Annex IV to Directive 1999/30/EC, the Member State is requested to tick with 'SS' instead of '+'.
- (4) The Member State should use the columns headed by 'PM<sub>10</sub>' and 'PM<sub>2,5</sub>' for indicating whether the measurement is used for assessment under Directive 1999/30/EC and indicate at the same time which measurement method is used. If the measurement is used for assessment under the Directive, the Member State fills in the measuring method code (see Note 5); if the measurement is not used for assessment under the Directive, the cell is left empty. For PM<sub>2,5</sub> levels formal assessment under Article 6 of Directive 96/62/EC is not required.
- (5) The measurement method code for PM<sub>10</sub> and PM<sub>2,5</sub> can be indicated by one of the standard codes provided by this questionnaire (see Table 1) or a code defined by the Member State that refers to a separate list of methods described by the Member State (see Form 4). The description defined by the Member State may also be a reference to a separate document added to the questionnaire. If the measurement method has been changed during the year, the Member State is requested to fill in both method codes: first the method that was used for the longest time in the year, followed by the other one, separated by a semicolon.
- (6) When the measurement method for PM<sub>10</sub> or PM<sub>2,5</sub> is not the reference method, respectively the provisional reference method, set out in Directive 1999/30/EC, Annex IX, the Member State is requested to fill in the correction factor by which the measured concentrations have been multiplied to obtain the concentrations reported in this questionnaire or to fill in the corresponding correction equation. If a correction equation has been applied, a free format can be used in which the measured concentration should be denoted by 'CM' and the reported concentration by 'CR', preferably using the format CR = f(CM). If the results of the method have been demonstrated to be equivalent without the application of a correction, the Member State is requested to indicate this by entering the value '1' of the correction factor or equation.

- (7) 'Function of station' indicates whether the station is sited at a location where (a) the limit values for health, the SO<sub>2</sub> limit value for ecosystems and the NO<sub>x</sub> limit value for vegetation apply (code 'HEV'), (b) only the limit values for health and the SO<sub>2</sub> limit value for ecosystems apply (code 'HE'), (c) only the limit value for health and the NO<sub>x</sub> limit value for vegetation apply (code 'HV') or (d) only the limit values for health apply (code 'H').

**Table 1: Methods used to sample and measure PM<sub>10</sub> and PM<sub>2.5</sub>: standard codes**

| <i>Method code</i> | <i>Description</i>       |
|--------------------|--------------------------|
| M1                 | Beta-absorption          |
| M2                 | Gravimetry               |
| M3                 | Oscillating microbalance |

**Form 4: Methods used to sample and measure PM<sub>10</sub> and PM<sub>2.5</sub>: optional additional codes to be defined by the Member State (1999/30/EC Annex IX)**

| <i>Method code</i> | <i>Description</i> |
|--------------------|--------------------|
|                    |                    |
|                    |                    |
|                    |                    |

Form 5: List of zones and agglomerations where levels exceed or do not exceed limit values (LV) or limit values plus margin of tolerance (LV + MOT) (96/62/EC Articles 8, 9 and 11 and 1999/30/EC Annexes I, II, III and IV)

— Form 5a: List of zones in relation to limit value exceedences for SO<sub>2</sub>

[illegible]

— Form 5b: List of zones in relation to limit value exceedences for  $\text{NO}_2/\text{NO}_x$

| Zone code | LV for health<br>(1hr mean) |                  |      | LV for health<br>(annual mean) |                  |      |
|-----------|-----------------------------|------------------|------|--------------------------------|------------------|------|
|           | > LV + MOT                  | ≤ LV + MOT; > LV | ≤ LV | > LV + MOT                     | ≤ LV + MOT; > LV | ≤ LV |
|           |                             |                  |      |                                |                  |      |
|           |                             |                  |      |                                |                  |      |
|           |                             |                  |      |                                |                  |      |

— Form 5c: List of zones in relation to limit value exceedences for PM<sub>10</sub>

[illegible]

— **Form 5d: List of zones in relation to limit value exceedences for lead**

| Zone code | LV         |                  |      |    |
|-----------|------------|------------------|------|----|
|           | > LV + MOT | ≤ LV + MOT; > LV | ≤ LV | SS |
|           |            |                  |      |    |
|           |            |                  |      |    |
|           |            |                  |      |    |

## Notes to Form 5:

(1) The column headings have the following meaning:

> LV + MOT:           above the limit value plus the margin of tolerance;

≤ LV + MOT; > LV:   below or equal to the limit value plus the margin of tolerance but above the limit value;

≤ LV:                   below or equal to the limit value;

> LV:                  above the limit value;

SS:                    due to specific sources, see Note 7.

(2) '> LV + MOT' should be read as '> LV' when the margin of tolerance has decreased to 0 %. In that case the column headed by '≤ LV + MOT; > LV' should not be used.

(3) If the column heading describes the status of the zone, tick with '+'.

(4) If exceedence has been concluded from model calculations, tick with 'm' instead of '+'.

(5) For thresholds for ecosystems and vegetation, tick only when exceedence occurred in areas where these limit values apply.

(6) The winter mean is defined as the period from 1 October of the year preceding the reference year to 31 March of the reference year.

(7) If the exceedence status indicated in Form 5 is solely due to exceedence in an area in the immediate vicinity of specific sources designated according to Annex IV to Directive 1999/30/EC, the Member State is requested to indicate this by ticking column 'SS' by '+'.

**Form 6: List of zones and agglomerations where levels exceed or do not exceed upper assessment thresholds (UAT) or lower assessment thresholds (LAT), including information on the application of supplementary assessment methods (96/62/EC Article 6 and 1999/30/EC Article 7(3) and Annex V)**

— **Form 6a: List of zones in relation to threshold exceedences and supplementary assessment for SO<sub>2</sub>**

| Zone code | UAT and LAT related to health LV<br>(24hr mean) |              |       | UAT and LAT related to ecosystems LV<br>(winter mean) |              |       | SA |
|-----------|-------------------------------------------------|--------------|-------|-------------------------------------------------------|--------------|-------|----|
|           | > UAT                                           | ≤ UAT; > LAT | ≤ LAT | >UAT                                                  | ≤ UAT; > LAT | ≤ LAT |    |
|           |                                                 |              |       |                                                       |              |       |    |
|           |                                                 |              |       |                                                       |              |       |    |
|           |                                                 |              |       |                                                       |              |       |    |

— **Form 6b: List of zones in relation to threshold exceedences and supplementary assessment for NO<sub>2</sub>/NO<sub>x</sub>**

| Zone code | UAT and LAT related to health LV<br>(1hr mean) |                 |       | UAT and LAT related to health LV<br>(annual mean) |                 |       | UAT and LAT related to<br>vegetation LV |                 |       | SA |
|-----------|------------------------------------------------|-----------------|-------|---------------------------------------------------|-----------------|-------|-----------------------------------------|-----------------|-------|----|
|           | > UAT                                          | ≤ UAT;<br>> LAT | ≤ LAT | > UAT                                             | ≤ UAT;<br>> LAT | ≤ LAT | > UAT                                   | ≤ UAT;<br>> LAT | ≤ LAT |    |
|           |                                                |                 |       |                                                   |                 |       |                                         |                 |       |    |
|           |                                                |                 |       |                                                   |                 |       |                                         |                 |       |    |
|           |                                                |                 |       |                                                   |                 |       |                                         |                 |       |    |

— **Form 6c: List of zones in relation to threshold exceedences and supplementary assessment for PM<sub>10</sub>**

| Zone code | UAT and LAT (24hr mean) |              |       | UAT and LAT (annual mean) |              |       | SA |
|-----------|-------------------------|--------------|-------|---------------------------|--------------|-------|----|
|           | > UAT                   | ≤ UAT; > LAT | ≤ LAT | >UAT                      | ≤ UAT; > LAT | ≤ LAT |    |
|           |                         |              |       |                           |              |       |    |
|           |                         |              |       |                           |              |       |    |
|           |                         |              |       |                           |              |       |    |

— **Form 6d: List of zones in relation to threshold exceedences and supplementary assessment for lead**

| Zone code | UAT and LAT |             |       | SA |
|-----------|-------------|-------------|-------|----|
|           | > UAT       | ≤ UAT; >LAT | ≤ LAT |    |
|           |             |             |       |    |
|           |             |             |       |    |
|           |             |             |       |    |

Notes to Form 6:

(1) The column headings have the following meaning:

> UAT: above the upper assessment threshold;

≤ UAT; > LAT: below or equal to upper assessment threshold, but above the lower assessment threshold;

≤ LAT: below or equal to the lower assessment threshold;

SA: supplementary assessment, see Note 6.

(2) If the column heading describes the status of the zone, tick with '+’.

(3) If exceedence has been concluded from model calculations, tick with 'm' instead of '+’.

(4) For thresholds for ecosystems, tick only when exceedence occurred in areas where the limit values for ecosystems apply.

(5) Exceedence of UAT and LAT is judged on the basis of the reference year and the preceding four years in accordance with the specification in Annex V(II) to Directive 1999/30/EC.

(6) The Member State is requested to indicate in the column 'SA' whether information from fixed measuring stations has been supplemented by information from other sources as referred to in Article 7(3) of Directive 1999/30/EC.

**Form 7: Individual exceedences of limit values and limit values plus margin of tolerance (MOT) (96/62/EC Article 11(1)(a)(i) and (ii) and 1999/30/EC Annexes I, II, IV and V)**

— **Form 7a: Exceedence of SO<sub>2</sub> limit value plus MOT for health (1hr mean)**

| Zone code | Station code | Date | Hour | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|------|------|-------------------------------|----------------|
|           |              |      |      |                               |                |
|           |              |      |      |                               |                |
|           |              |      |      |                               |                |

— **Form 7b: Exceedence of SO<sub>2</sub> limit value for health (24hr mean)**

| Zone code | Station code | Date | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|------|-------------------------------|----------------|
|           |              |      |                               |                |
|           |              |      |                               |                |
|           |              |      |                               |                |

— **Form 7c: Exceedence of SO<sub>2</sub> limit value for ecosystems (annual mean)**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

— **Form 7d: Exceedence of SO<sub>2</sub> limit value for ecosystems (winter mean)**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

— **Form 7e: Exceedence of NO<sub>2</sub> limit value plus MOT for health (1hr mean)**

| Zone code | Station code | Date | Hour | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|------|------|-------------------------------|----------------|
|           |              |      |      |                               |                |
|           |              |      |      |                               |                |
|           |              |      |      |                               |                |

— **Form 7f: Exceedence of NO<sub>2</sub> limit value plus MOT for health (annual mean)**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

— **Form 7g: Exceedence of NO<sub>x</sub> limit value for vegetation**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

— **Form 7h: Exceedence of PM<sub>10</sub> limit value plus MOT (stage 1, 24hr mean)**

| Zone code | Station code | Date | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|------|-------------------------------|----------------|
|           |              |      |                               |                |
|           |              |      |                               |                |
|           |              |      |                               |                |

— **Form 7i: Exceedence of PM<sub>10</sub> limit value plus MOT (stage 1, annual mean)**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

— **Form 7j: Exceedence of lead limit value plus MOT**

| Zone code | Station code | Level<br>(µg/m <sup>3</sup> ) | Reason code(s) |
|-----------|--------------|-------------------------------|----------------|
|           |              |                               |                |
|           |              |                               |                |
|           |              |                               |                |

## Notes to Form 7:

- (1) Identifying the station by filling in the station code is not mandatory, but highly recommended.
- (2) The phrase 'limit value plus MOT' should be read as 'limit value' when the margin of tolerance has decreased to 0 %.
- (3) The date should be indicated as 'dd/mm/yy' and the hour as '1' for the hour between 00:00 h and 01:00 h etc.

- (4) All exceedences of the limit value plus the margin of tolerance at a station are reported if the total number of exceedences is above the allowed number. If the total number of exceedences at a station is lower than or equal to the allowed number, no exceedences are reported.
- (5) The reason of exceedence can be indicated by one or several standard codes provided by this questionnaire (see Table 2) or a code defined by the Member State that refers to a separate list of reasons described by the Member State (Form 8). If more than one reason is indicated, the codes should be separated by a semicolon. The description given by the Member State could also be a reference to a separate document added to the questionnaire.

**Table 2: Reasons for individual exceedences: standard codes**

| <i>Reason code</i> | <i>Description</i>                                                           |
|--------------------|------------------------------------------------------------------------------|
| S1                 | Heavily trafficked urban centre                                              |
| S2                 | Proximity to a major road                                                    |
| S3                 | Local industry including power production                                    |
| S4                 | Quarrying or mining activities                                               |
| S5                 | Domestic heating                                                             |
| S6                 | Accidental emission from industrial source                                   |
| S7                 | Accidental emission from non-industrial source                               |
| S8                 | Natural source(s) or natural event(s)                                        |
| S9                 | Winter sanding of roads                                                      |
| S10                | Transport of air pollution originating from sources outside the Member State |

**Form 8: Reasons for individual exceedences: optional additional codes to be defined by the Member State (96/62/EC Article 11(1)(a)(i) and (ii) and 1999/30/EC Annexes I, II, IV and V)**

| <i>Reason code</i> | <i>Description</i> |
|--------------------|--------------------|
|                    |                    |
|                    |                    |
|                    |                    |

**Form 9: Monitoring data on 10 minutes mean SO<sub>2</sub> levels (1999/30/EC Article 3(3))**

| Station code | The number of concentrations averaged over 10 minutes which have exceeded 500 µg/m <sup>3</sup> | The number of days within the calendar year on which such exceedences occurred | The number of the days referred to in the previous column, on which hourly concentrations of sulphur dioxide simultaneously exceeded 350 µg/m <sup>3</sup> | The maximum concentration averaged over 10 minutes recorded (µg/m <sup>3</sup> ) | Date on which the maximum concentration occurred (dd/mm/yy) |
|--------------|-------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|-------------------------------------------------------------|
|              |                                                                                                 |                                                                                |                                                                                                                                                            |                                                                                  |                                                             |
|              |                                                                                                 |                                                                                |                                                                                                                                                            |                                                                                  |                                                             |
|              |                                                                                                 |                                                                                |                                                                                                                                                            |                                                                                  |                                                             |

Note to Form 9:

Where it is not practicable for a Member State to record data on concentrations of sulphur dioxide averaged over 10 minutes this form does not have to be completed.

**Form 10: Monitoring data on 24hr mean PM<sub>2.5</sub> levels (1999/30/EC Article 5(2))**

| Station code | Arithmetic mean<br>( $\mu\text{g}/\text{m}^3$ ) | Median<br>( $\mu\text{g}/\text{m}^3$ ) | 98 percentile<br>( $\mu\text{g}/\text{m}^3$ ) | Maximum concentration<br>( $\mu\text{g}/\text{m}^3$ ) |
|--------------|-------------------------------------------------|----------------------------------------|-----------------------------------------------|-------------------------------------------------------|
|              |                                                 |                                        |                                               |                                                       |
|              |                                                 |                                        |                                               |                                                       |
|              |                                                 |                                        |                                               |                                                       |

Form 11: Tabular results of and methods used for supplementary assessment (1999/30/EC Article 7(3) and Annex VIII(II))

— Form 11a: Results of and methods used for supplementary assessment for SO<sub>2</sub>

[illegible]

— Form 11b: Results of and methods used for supplementary assessment for  $\text{NO}_2/\text{NO}_x$

[illegible]

— Form 11c.1: Results of and methods used for supplementary assessment for PM<sub>10</sub> (Stage 1)

[illegible]

— Form 11c.2: Results of and methods used for supplementary assessment for PM<sub>10</sub> (Stage 2)

[illegible]

— **Form 11d: Results of and methods used for supplementary assessment for lead**

| Zone code | Above LV        |        |             |        |                    |        |
|-----------|-----------------|--------|-------------|--------|--------------------|--------|
|           | Area            |        | Road length |        | Population exposed |        |
|           | km <sup>2</sup> | Method | km          | Method | Number             | Method |
|           |                 |        |             |        |                    |        |
|           |                 |        |             |        |                    |        |
|           |                 |        |             |        |                    |        |

## Notes to Form 11:

- (1) 'Method' is a code defined by the Member State that refers to a separate list of references (Form 12) on publications or reports in which the supplementary method is documented. Form 12 is part of the report to the Commission; the publications or reports referred to are not to be sent to the Commission.
- (2) Form 11 can be complemented by maps showing concentration distributions. It is recommended that the Member State, if possible, compiles maps showing concentration distributions within each zone and agglomeration. It is recommended to provide concentration iso-lines of the parameters in which the limit values are expressed (see Table 3) using iso-lines at intervals of 10 % of the limit value.

**Table 3: Statistical parameters to be used in concentration maps**

| Pollutant                              | Parameter                   |
|----------------------------------------|-----------------------------|
| SO <sub>2</sub>                        | 99,7 percentile of 1h mean  |
| SO <sub>2</sub>                        | 99,2 percentile of 24h mean |
| SO <sub>2</sub>                        | Annual mean                 |
| SO <sub>2</sub>                        | Winter mean                 |
| NO <sub>2</sub>                        | 99,8 percentile of 1h mean  |
| NO <sub>2</sub> /NO <sub>x</sub>       | Annual mean                 |
| PM <sub>10</sub> and PM <sub>2,5</sub> | 90,0 percentile of 24h mean |
| PM <sub>10</sub> and PM <sub>2,5</sub> | Annual mean                 |
| PM <sub>10</sub> and PM <sub>2,5</sub> | 98,1 percentile of 24h mean |
| Lead                                   | Annual mean                 |

**Form 12: List of references to supplementary assessment methods referred to in Form 11 (1999/30/EC Article 7(3) and Annex VIII(II))**

| Method | Full reference |
|--------|----------------|
|        |                |
|        |                |
|        |                |

**Form 13: Exceedence of limit values of SO<sub>2</sub> due to natural sources (1999/30/EC Article 3(4))****— Form 13a: SO<sub>2</sub> limit value for health (1hr mean)**

| Zone | Station code | Number of exceedences measured | Natural source code(s) | Estimated number of exceedences after subtraction of natural contribution | Reference to justification |
|------|--------------|--------------------------------|------------------------|---------------------------------------------------------------------------|----------------------------|
|      |              |                                |                        |                                                                           |                            |
|      |              |                                |                        |                                                                           |                            |
|      |              |                                |                        |                                                                           |                            |

**— Form 13b: SO<sub>2</sub> limit value for health (24hr mean)**

| Zone | Station code | Number of exceedences measured | Natural source code(s) | Estimated number of exceedences after subtraction of natural contribution | Reference to justification |
|------|--------------|--------------------------------|------------------------|---------------------------------------------------------------------------|----------------------------|
|      |              |                                |                        |                                                                           |                            |
|      |              |                                |                        |                                                                           |                            |
|      |              |                                |                        |                                                                           |                            |

**— Form 13c: SO<sub>2</sub> limit value for ecosystems (annual mean)**

| Zone | Station code | Annual mean concentration | Natural source code(s) | Estimated annual mean concentration after subtraction of natural contribution | Reference to justification |
|------|--------------|---------------------------|------------------------|-------------------------------------------------------------------------------|----------------------------|
|      |              |                           |                        |                                                                               |                            |
|      |              |                           |                        |                                                                               |                            |
|      |              |                           |                        |                                                                               |                            |

**— Form 13d: SO<sub>2</sub> limit value for ecosystems (winter mean)**

| Zone | Station code | Winter mean concentration | Natural source code(s) | Estimated annual mean concentration after subtraction of natural contribution | Reference to justification |
|------|--------------|---------------------------|------------------------|-------------------------------------------------------------------------------|----------------------------|
|      |              |                           |                        |                                                                               |                            |
|      |              |                           |                        |                                                                               |                            |
|      |              |                           |                        |                                                                               |                            |

**Note to Form 13:**

The natural source can be indicated by one or several standard codes provided by this questionnaire (see Table 4) or a code defined by the Member State that refers to a separate list of natural sources described by the Member State (Form 14).

**Table 4: Natural SO<sub>2</sub> sources: standard codes**

| <i>Natural source code</i> | <i>Description</i>                     |
|----------------------------|----------------------------------------|
| A1                         | Volcanism inside the Member State      |
| A2                         | Volcanism outside the Member State     |
| B                          | Coastal wetlands                       |
| C1                         | Natural fires inside the Member State  |
| C2                         | Natural fires outside the Member State |

**Form 14: Natural SO<sub>2</sub> sources: optional additional codes to be defined by Member State (1999/30/EC Article 3(4))**

| <i>Natural source code</i> | <i>Description</i> |
|----------------------------|--------------------|
|                            |                    |
|                            |                    |
|                            |                    |

**Form 15: Exceedence of limit values of PM<sub>10</sub> due to natural events (1999/30/EC Article 5(4))****— Form 15a: Contribution of natural events to exceedence of the PM<sub>10</sub> limit value (stage 1, 24hr mean)**

| <i>Zone</i> | <i>Station code</i> | <i>Number of exceedences measured</i> | <i>Natural event code(s)</i> | <i>Estimated number of exceedences after subtraction of natural contribution</i> | <i>Reference to justification</i> |
|-------------|---------------------|---------------------------------------|------------------------------|----------------------------------------------------------------------------------|-----------------------------------|
|             |                     |                                       |                              |                                                                                  |                                   |
|             |                     |                                       |                              |                                                                                  |                                   |
|             |                     |                                       |                              |                                                                                  |                                   |

**— Form 15b: Contribution of natural events to exceedence of the PM<sub>10</sub> limit value (stage 1, annual mean)**

| <i>Zone</i> | <i>Station code</i> | <i>Annual mean</i> | <i>Natural event code(s)</i> | <i>Estimated number of exceedences after subtraction of natural contribution</i> | <i>Reference to justification</i> |
|-------------|---------------------|--------------------|------------------------------|----------------------------------------------------------------------------------|-----------------------------------|
|             |                     |                    |                              |                                                                                  |                                   |
|             |                     |                    |                              |                                                                                  |                                   |
|             |                     |                    |                              |                                                                                  |                                   |

Note to Form 15:

The natural event can be indicated by one or several standard codes provided by this questionnaire (see Table 5).

**Table 5: Natural events causing limit value exceedences for PM<sub>10</sub>: standard codes**

| <i>Natural event code</i> | <i>Description</i>                                                       |
|---------------------------|--------------------------------------------------------------------------|
| A1                        | Volcanic eruption inside the Member State                                |
| A2                        | Volcanic eruption outside the Member State                               |
| B1                        | Seismic activity inside the Member State                                 |
| B2                        | Seismic activity outside the Member State                                |
| C1                        | Geothermal activity inside the Member State                              |
| C2                        | Geothermal activity outside the Member State                             |
| D1                        | Wild-land fire inside the Member State                                   |
| D2                        | Wild-land fire outside the Member State                                  |
| E1                        | High wind event inside the Member State                                  |
| E2                        | High wind event outside the Member State                                 |
| F1                        | Atmospheric resuspension inside the Member State                         |
| F2                        | Atmospheric resuspension outside the Member State                        |
| G1                        | Transport of natural particles from dry regions inside the Member State  |
| G2                        | Transport of natural particles from dry regions outside the Member State |

**Form 16: Exceedence of limit values of PM<sub>10</sub> due to winter sanding (1999/30/EC Article 5(5))****— Form 16a: Contribution of winter sanding to exceedence of the PM<sub>10</sub> limit value (stage 1, 24hr mean)**

| <i>Zone</i> | <i>Station code</i> | <i>Number of exceedences measured</i> | <i>Estimated number of exceedences after subtraction of winter sanding contribution</i> | <i>Reference to justification</i> |
|-------------|---------------------|---------------------------------------|-----------------------------------------------------------------------------------------|-----------------------------------|
|             |                     |                                       |                                                                                         |                                   |
|             |                     |                                       |                                                                                         |                                   |
|             |                     |                                       |                                                                                         |                                   |

**— Form 16b: Contribution of winter sanding to exceedence of the PM<sub>10</sub> limit value (stage 1, annual mean)**

| <i>Zone</i> | <i>Station code</i> | <i>Annual mean</i> | <i>Estimated annual mean concentration after subtraction of winter sanding contribution</i> | <i>Reference to justification</i> |
|-------------|---------------------|--------------------|---------------------------------------------------------------------------------------------|-----------------------------------|
|             |                     |                    |                                                                                             |                                   |
|             |                     |                    |                                                                                             |                                   |
|             |                     |                    |                                                                                             |                                   |

**Form 17: Consultations on transboundary pollution (96/62/EC Article 8(6))****— Form 17a: General**

|                                                                                                                                                                                                                     |          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Has the Member State consulted other Member States on significant air pollution originating in other Member States or conducted such consultations with non-EU countries? Please tick with '+' if yes or '-' if no: | (+ or -) |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|

**— Form 17b: Specification per country**

| If yes, please:                                                                 | EU Member States |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  | Non-EU countries |  |  |
|---------------------------------------------------------------------------------|------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|--|------------------|--|--|
|                                                                                 | AT               | BE | DE | DK | ES | FI | FR | GR | IE | IT | LU | NL | PT | SE | UK |  |                  |  |  |
| — tick the MS or country concerned                                              |                  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |                  |  |  |
| — tick if the agenda(s) of the consultations has/have been added to this report |                  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |                  |  |  |
| — tick if the minutes of the consultations have been added to this report       |                  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |                  |  |  |

Notes to Form 17b:

- (1) Tick only if yes, using '+'.  
 (2) The Member State may indicate consultations with non-EU countries using the following country codes: Bosnia & Herzegovina: BA; Croatia: HR; Cyprus: CY; Czech Republic: CZ; Estonia: EE; Former Yugoslav Republic of Macedonia: MK; Hungary: HU; Iceland: IS; Latvia: LV; Liechtenstein: LI; Lithuania: LT; Malta: MT; Norway: NO; Poland: PL; Romania: RO; Slovakia: SK; Slovenia: SI; Switzerland: CH.

**Form 18: Exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC to be reported under 1999/30/EC Article 9(6)**

| Pollutant | Limit value exceeded | Monitoring method used | Station code | Measured value ( $\mu\text{g}/\text{m}^3$ ) | Reason code(s) | Measures taken |
|-----------|----------------------|------------------------|--------------|---------------------------------------------|----------------|----------------|
|           |                      |                        |              |                                             |                |                |
|           |                      |                        |              |                                             |                |                |
|           |                      |                        |              |                                             |                |                |

Notes to Form 18:

- (1) The numerical value of the limit value exceeded should be indicated in the second column.  
 (2) For SO<sub>2</sub> and suspended particulates it should be indicated whether the black-smoke or the gravimetric method was used.

- (3) Identifying the station is not mandatory, but highly recommended.
- (4) The reason for exceedence can be indicated by one or several standard codes provided by this questionnaire (see Table 5) or a code defined by the Member State that refers to a separate list of reasons described by the Member State (Form 19). If more than one reason is indicated, the codes should be separated by a semicolon. The description given by the Member State could also be a reference to a separate document added to the questionnaire.

**Form 19: Reasons for exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC: optional additional codes to be defined by the Member State (1999/30/EC Article 9(6))**

| <i>Reason code</i> | <i>Description</i> |
|--------------------|--------------------|
|                    |                    |
|                    |                    |
|                    |                    |
|                    |                    |