

# Official Journal

## of the European Union

ISSN 1725-2555

L 61

Volume 47

27 February 2004

English edition

## Legislation

### Contents

#### I Acts whose publication is obligatory

.....

#### II Acts whose publication is not obligatory

#### Commission

2004/165/EC:

- ★ **Commission Decision of 27 November 2002 on the aid scheme implemented by Germany: Thuringia consolidation programme** (notified under document number C(2002) 4357) <sup>(1)</sup> ..... 1

2004/166/EC:

- ★ **Commission Decision of 9 July 2003 on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM)** (notified under document number C(2003) 2153) <sup>(1)</sup> ..... 13

2004/167/EC:

- ★ **Commission Decision of 17 September 2003 on the State aid implemented by Germany for Space Park Development GmbH & Co., KG** (notified under document number C(2003) 3241) <sup>(1)</sup> ..... 66

2004/168/EC:

- ★ **Commission Decision of 15 October 2003 on a proposal by Portugal to grant aid to Vila Galé — Cintra Internacional, Investimentos Turísticos, SA** (notified under document number C(2003) 3376) <sup>(1)</sup> ..... 76

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

Price: EUR 22

(Continued overleaf)

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.

2004/169/EC:

- ★ **Commission Decision of 26 November 2003 on the aid which Italy is planning to implement for Industria Farmaceutica Cesare Serono SpA for the development of new chemical synthesis processes for oral pharmaceutical forms of polypeptides and conjugated substances** (notified under document number C(2003) 3519) <sup>(1)</sup> ..... 82

2004/170/EC:

- ★ **Commission Decision of 21 October 2003 on the research and development aid to the site at Zamudio (Basque Country) which Spain is planning to implement for the company 'Industria de Turbo Propulsores, SA' (ITP)** (notified under document number C(2003) 3525) <sup>(1)</sup> ..... 87

---

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

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 27 November 2002

on the aid scheme implemented by Germany: Thuringia consolidation programme

(notified under document number C(2002) 4357)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/165/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to Article 88(2) of the EC Treaty,

Whereas:

initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid scheme.

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(3)</sup>. The Commission called on interested parties to submit their comments on the scheme but did not receive any comments from interested parties.

By letter dated 2 March 1999, Germany requested an extension of the deadline for submitting its comments, which the Commission granted by letter dated 11 March 1999. Germany's comments were sent by letters dated 29 March, 19 August and 26 August 1999.

# 1. PROCEDURE

- (1) The rules governing the Thuringia consolidation programme (hereinafter referred to as the rules) entered into force on 20 July 1993 <sup>(1)</sup>. The Thuringian authorities took the view that the rules complied with the *de minimis* provisions introduced in the Community's 1992 guidelines on state aid for small and medium-sized enterprises <sup>(2)</sup> (hereinafter referred to as the SME guidelines) and so did not notify them under Article 88(3) of the EC Treaty.

- (2) On 16 January 1996 the rules were replaced by the Thuringia loan programme for small and medium-sized enterprises.

- (3) By letter dated 26 January 1999 (ref. SG(99) D/580), the Commission informed Germany that it had decided to

- (5) Germany submitted its final comments by letter of 26 November 2001.

# 2. DESCRIPTION OF THE MEASURE

## 2.1. Title and legal basis

- (6) The aid is granted by the public-sector Thüringer Aufbaubank (Thuringia Reconstruction Bank), acting on behalf of the Thuringia Ministry for Economic Affairs and Transport on the basis of Sections 23, 44 and 44a of the Land Budget Order, in accordance with the rules on the Thuringia consolidation programme.

<sup>(1)</sup> Thüringer Staatsanzeiger No 33/1993, p. 1414.

<sup>(2)</sup> OJ C 213, 19.8.1992, p. 2.

<sup>(3)</sup> OJ C 108, 17.4.1999, p. 26.

## 2.2. Recipients

- (7) The rules are directed at small and medium-sized enterprises (SMEs) defined according to the 'turnover' and 'employees' criteria, but not the 'independence' criterion, set out in the 1992 SME guidelines <sup>(4)</sup>, including firms administered by the Treuhandanstalt. The eligibility for aid of the foodstuffs industry is expressly provided for under point 3 of the rules (Recipients); the other sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry) are not excluded. In exceptional cases (by decision of the relevant minister), aid may also be granted to firms which exceed the turnover and employee thresholds laid down in the SME guidelines.

## 2.3. Duration

- (8) The rules on the Thuringia consolidation programme entered into force on 20 July 1993 for an unlimited period and were replaced on 16 January 1996 by the Thuringia loan programme for small and medium-sized enterprises.

## 2.4. Objective

- (9) The aid is granted by the Thüringer Aufbaubank in the form of soft loans, which are paid to the recipient firm via its main bank at the latter's primary risk. The main bank may receive a guarantee of up to 60 % of the amount of the loan (the rules do not provide for a fee). The Thüringer Aufbaubank and the main bank may charge a processing fee of 0,1 % of the amount of the loan.
- (10) The rules are directed at firms with liquidity and profitability problems and are designed to allow the rescheduling of short-term indebtedness at subsidised rates. Rescheduling at the expense of the Thüringer Aufbaubank is ruled out.
- (11) Loans are granted on condition that the firm submit a viable overall consolidation plan which, taking account of the rescheduling loan, makes it likely that profitability can be restored on a long-term basis. The plan must indicate the firm's consolidation requirements and existing liquidity and profitability problems, together with the contributions which the recipient and its main bank will make.
- (12) The loans are granted for between three and twelve years at an interest rate of between 5 % and 8 % and

with a grace period of two or three years. The relevant minister can approve exceptions to these conditions.

## 2.5. Intensity

- (13) Point 5 of the rules (Nature, scope and amount of the payment) refers expressly to the aid's *de minimis* nature.
- (14) According to the wording of the rules, the amount of aid resulting from the interest-rate advantage is calculated on the basis of the difference between the effective interest rate and an accepted reference rate. No account is taken of the aid element resulting from the guarantee or the special-risk status of the recipient firms. There is no direct limit on the amount of the loan; however, the amount of aid granted to the firm (i.e. the aid element resulting from the soft loan only) may not exceed the *de minimis* threshold laid down in the SME guidelines.
- (15) According to a letter from Germany dated 7 December 1998, a total of 741 loans amounting to DEM 312,4 million were granted from 1993 to 1996; some 80 of these loans went to the foodstuffs industry.

## 2.6. Cumulation

- (16) Public financial aid already granted to a firm must be declared when it applies for a loan.

## 2.7. Grounds for initiating the procedure

- (17) The procedure was initiated on the grounds that the rules were also directed at firms in difficulty and, in applying the *de minimis* provisions, did not take account of the aid intensity resulting from the guarantee or the special difficulties of recipient firms. In as much as the rules were aimed at firms in difficulty and the *de minimis* amounts were exceeded, the Commission took the view that the relevant Community guidelines should be applied.
- (18) Furthermore, sensitive sectors were not excluded from the rules, even though the *de minimis* provisions do not apply to such sectors, for which special provisions exist.
- (19) For all these reasons, the rules and the cases in which they were applied where the *de minimis* threshold or the *de minimis* scope were exceeded constituted state aid

<sup>(4)</sup> OJ C 213, 19.8.1992, p. 2.

within the meaning of Article 87(1) of the EC Treaty (formerly Article 92(1)) that had been granted or implemented unlawfully.

(20) As is clear from the objectives and wording of the rules, the scheme was devised for firms in difficulty. Germany contested this interpretation, arguing that the loans were granted by the main banks at their primary risk and that — after deduction of the 60 % guarantee — the banks' risk would in any event be 40 %. According to Germany, this residual risk could not be covered by any other guarantee. It argued that a bank would not normally be prepared to grant a loan to a firm in difficulty without sufficient guarantees and bank security.

(21) This argument cannot be considered sound, for the following reasons:

(a) firms in difficulty are not excluded from the scheme. In identical circumstances in a similar case (Thuringia loan programme for SMEs), firms in difficulty were found to have received aid;

(b) the scheme allows rescheduling of the liabilities of firms in difficulty towards their main bank or other financial institutions. In the Commission's view, this rescheduling of the liabilities of firms in difficulty under the rules had, in some cases, considerably reduced the risks to which the banks had originally been exposed.

(22) The Commission therefore took the view that the rules were directed at firms in difficulty and had to be assessed on the bases of the applicable provisions.

(23) As regards the rescue of firms in difficulty (this possibility is not formally excluded from the rules, though it seems rather unlikely in reality), established practice has been to make it a precondition of compatibility with the common market that rescue aid be granted either in the form of public loans on market terms or in the form of a state guarantee on a private-sector loan. This condition was not met in the case in point since the loans in question were soft loans.

(24) In as much as it was possible for rescue aid to be granted, the Commission accordingly had doubts about the compatibility of the rules with the common market.

(25) In as much as the rules were concerned with restructuring firms in difficulty, the Commission's practice to date has been to require the following main conditions for compatibility:

(a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;

(b) limitation of the aid to the strict minimum required;

(c) a significant contribution from the recipient firm and its shareholders;

(d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;

(e) individual notification of aid to large firms;

(f) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible.

(26) The rules did not require individual notification of aid for large firms, did not prohibit repeated restructuring aid, did not include special rules for sensitive sectors and did not limit the aid amount to the minimum necessary to achieve the objective.

(27) As far as the granting of restructuring aid was concerned, the Commission accordingly had doubts about the compatibility of the rules with the common market.

### 3. COMMENTS FROM GERMANY

(28) Contrary to what was indicated in the decision initiating proceedings, Germany put the number of consolidation loans granted in the period from 1993 to 1995 at 485, amounting to a total of EUR 112,2 million. The figure of 741 mentioned in the decision initiating proceedings included, according to Germany, a further 248 loans granted in 1996 under the Thuringia loan programme for SMEs. This programme is the subject of proceedings in case C 87/98 (ex NN 137/98).

(29) Germany agreed with the Commission that the aid intensity had been calculated only on the basis of the aid element contained in the soft loan. The reason for this, it said, was that from 1993 to early 1996 the German authorities did not know that the aid element

associated with the guarantee should have been taken into account in the case of firms in difficulty.

(30) In so far as consolidation loans were granted in sensitive sectors, Germany considered the loans under the Thuringia consolidation programme to have been granted in accordance with the Community SME guidelines in force at the time. In Germany's view, the special aid rules contained in the 1996 Community guidelines for state aid in connection with investments in the processing and marketing of agricultural products<sup>(5)</sup> were applicable only as from 1998. They had become applicable in 1998 pursuant to Commission Decision 1999/183/EC of 20 May 1998 concerning state aid for the processing and marketing of German agricultural products which might be granted on the basis of existing regional aid schemes<sup>(6)</sup>, with the consequence that no special rules applied to the food and tobacco industry between 1993 and 1995 and this sensitive sector did not have to be taken into consideration in the granting of loans.

(31) Germany contested the Commission's view that the main bank's own risk could be reduced by the rescheduling of the liabilities of firms in difficulty. Instead, the 40 % co-liability on the part of the main bank constituted a genuine risk on its part. If such a loan were transferred to another, private bank at the main bank's primary risk, a rescheduling of the main bank's existing loan commitments by the Thüringer Aufbaubank was possible only without the latter's co-liability. The possibility of rescheduling the existing loan commitments of the firm's main bank with co-liability on the part of the Thüringer Aufbaubank was ruled out.

(32) Germany does acknowledge in its comments that the Thuringia consolidation programme was directed at both viable firms and firms in difficulty. However, provided that the aid intensity of a loan, taking account of any other *de minimis* aid, remained below the *de minimis* ceiling, it considered the rules to be compatible with the *de minimis* provisions.

(33) Germany provided the Commission in its letters of 26 August 1999 and 26 November 2001 with lists of all consolidation loans granted from 1993 to 1995. These individual lists show that three loans were granted to firms in difficulty in 1994, and nine in 1995. They also show that only two loans were granted in 1994, and two in 1995, to firms in the sensitive sector of agriculture, although, according to Germany's letter of

7 December 1998, some 80 loans were made to firms in the foodstuffs industry. It is not clear from the documents provided by Germany what criteria were used to define the sensitive sector of agriculture or firms in difficulty.

#### 4. ASSESSMENT OF THE MEASURE

##### 4.1. Existence of state aid

(34) Although any financial payment to a firm alters the conditions of competition to some extent, not all aid has a perceptible impact on trade and competition between Member States. Against this background, the notification requirement under Article 88(3) of the EC Treaty does not apply to aid that does not exceed an absolute maximum amount and, as *de minimis* aid, does not fall within the scope of Article 87(1) of the EC Treaty.

(35) A definition of what the Commission understood by *de minimis* aid was first set out in the 1992 SME guidelines<sup>(7)</sup>. The scope of the *de minimis* provisions is defined at point 3.2 of the guidelines as payments of EUR 50 000 to any one firm in respect of a given broad type of expenditure (e.g. investment and training) over a three-year period. Therefore, one-off payments of aid of up to EUR 50 000 in respect of a given type of expenditure and schemes under which the amount of aid that a given firm may receive in respect of a given type of expenditure over a three-year period was limited to that figure were no longer considered notifiable under Article 88(3) (formerly Article 93(3)) of the EC Treaty. However, there had to be an express condition in the grant decision or scheme that any further aid which the same firm might receive in respect of the same type of expenditure from other sources or under other schemes did not take the total aid received over the EUR 50 000 limit. It was made clear in point 3.2 that the *de minimis* facility was not available in sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry).

(36) The 1996 Commission notice on the *de minimis* rule for state aid<sup>(8)</sup> amended the *de minimis* provisions of the

<sup>(5)</sup> OJ C 29, 2.2.1996, p. 4.

<sup>(6)</sup> OJ L 60, 9.3.1999, p. 61.

<sup>(7)</sup> See footnote 2.

<sup>(8)</sup> OJ C 68, 6.3.1996, p. 9.

1992 SME guidelines. The ceiling for aid covered by the *de minimis* rule was set at EUR 100 000 over a three-year period beginning when the first *de minimis* aid was granted. This ceiling applied to all types of public assistance considered to be *de minimis* aid and did not affect the possibility of the recipient obtaining other aid under schemes approved by the Commission.

(37) The provision did not apply to the industries covered by the ECSC Treaty, to shipbuilding, to transport or to aid towards expenditure in connection with agriculture or fisheries.

(38) Article 1 of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid <sup>(9)</sup> extended the scope of the *de minimis* rule, albeit still to the exclusion of aid granted to the transport sector and to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty. Similarly, the Regulation does not apply to aid for export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to an export activity. Lastly, aid contingent upon the use of domestic over imported goods is also excluded from the scope of the Regulation.

(39) Article 2 of the Regulation stipulates that the total *de minimis* aid granted to any one enterprise must not exceed EUR 100 000 over any period of three years. This ceiling applies irrespective of the form of the aid or the objective pursued.

(40) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the rules under examination applied from 20 July 1993 to 16 January 1996, the question arises whether the Commission, for the purposes of this Decision, can apply the Regulation retroactively to financial assistance paid before it entered into force or whether the *de minimis* rule in the 1992 SME guidelines in force in the relevant period should be taken into account (*consecutio legis*).

(41) Commission Regulation (EC) No 69/2001 does not indicate whether it is applicable to the assessment of aid

granted before its entry into force. However, its wording does not rule out its application to previous cases, which in any event are subject to the control mechanism under Article 3. The Commission has reached the conclusion that, given the absence of any other express provision, Regulation (EC) No 69/2001 should apply to *de minimis* aid granted before its entry into force. For one thing, the Regulation, in so far as it exempts a particular category of measure from the notification requirement, is a procedural regulation and should thus apply immediately to all pending proceedings. For another, the immediate application of the Regulation is in line with the underlying objectives of procedural simplification and decentralisation. Only in respect of aid not caught by the Regulation and thus not eligible for exemption on this basis will the Commission take account of the provisions that were in force when the aid was granted. Since the Regulation is, in principle, more generous than its *de minimis* predecessors and since the latter apply in any event to cases where the aid concerned is not exempt under the Regulation, the general legal principles of legitimate expectation and legal certainty are suitably accounted for. From an economic standpoint, the Commission takes the view that a financial measure which cannot be classed as aid within the meaning of Article 87(1) of the EC Treaty under Regulation (EC) No 69/2001, in force today in an integrated market, cannot in the past have given rise to any aid in a less integrated market. It will therefore base its further assessment of the financial measures on Regulation (EC) No 69/2001, which does not rule out the possibility of the provisions in force at the time the measures were implemented being applied, provided that the measures concerned are not exempt under Regulation (EC) No 69/2001.

(42) The proceedings initiated thus cover both the rules at issue and the cases of application which do not fall within the scope of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions and the cases which do fall within the scope of the Regulation or of the other relevant *de minimis* provisions but in which cumulation with other aid has led to the *de minimis* ceiling being exceeded.

(43) Aid for the transport sector and for all activities relating to the manufacture, processing or marketing of the goods listed in Annex I to the EC Treaty are excluded from the scope of Regulation (EC) No 69/2001 and of the previous *de minimis* provisions.

<sup>(9)</sup> OJ L 10, 13.1.2001, p. 30.

- (44) The Commission therefore takes the view that all the consolidation loans granted to the foodstuffs industry fall outside the scope of Regulation (EC) No 69/2001 or of the other *de minimis* provisions in so far as they were granted for the manufacture of the goods listed in Annex I to the EC Treaty and must thus be classed in the sensitive agricultural sector.
- (45) Germany's argument that the special aid rules contained in the 1996 Community guidelines for state aid in connection with investments in the processing and marketing of agricultural products were applicable only as from 1998 is immaterial here since the special rules did not affect the scope of the *de minimis* provisions <sup>(10)</sup>.
- (46) In the Commission's view, the residual scope of Regulation (EC) No 69/2001 or the relevant previous *de minimis* provisions might be exceeded because failure to take account of the aid element contained in the guarantee might mean that, in granting consolidation loans, the ceilings laid down in the Regulation and the *de minimis* provisions might be exceeded. The rules do not offer any assurance that the *de minimis* ceiling of EUR 100 000 over a period of three years laid down in Article 2(2) of Regulation (EC) No 69/2001 or the previously applicable ceiling was complied with in every instance. There is in particular no guarantee that it was complied with where the rules were applied to firms in difficulty, involving as they do a high risk of default.
- (47) In the Commission's view, the beneficiaries under the rules were exclusively or at least largely firms in difficulty.
- (48) For the purpose of differentiating between firms in difficulty and other firms, the Commission included an explanation of what is meant by a firm in difficulty in point 2.1 of the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(11)</sup> (hereinafter referred to as the 1994 guidelines). This definition essentially confirmed the Commission's decision-making practice in the preceding years, as described in its Eighth Report on Competition Policy published in 1979 (recitals 227 to 229) <sup>(12)</sup>.
- (49) The definition of a firm in difficulty which the Commission will use here is given in the 1994 guidelines as a firm which is 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing. [...] The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value. In acute cases the company may already have become insolvent or gone into liquidation.'
- (50) According to the wording of point 1 of the rules (Objective of the aid), they are intended for firms which are experiencing liquidity and profitability problems as a result of their often difficult financial and earnings position. The Commission interprets this to mean that such firms can in any event include those in need of recovery which meet the definition of firms in difficulty.
- (51) Germany argues that, in the event of a guarantee being called in, the main bank's own liability was 40 % and that there was no possibility of this risk on the part of the main bank being covered by the liability of another public source. The main bank's own risk represented an appropriate incentive for the lender to carry out proper checks concerning the borrower's creditworthiness so as to reduce the risk of default.
- (52) This argument is not convincing as evidence that the consolidation programme was not applied to firms in difficulty. According to their wording, the specific purpose of the rules was to grant consolidation loans and guarantees to firms in financial difficulties. Although the likelihood of the recipient actually being a firm in difficulty was reduced by the risk which the

<sup>(10)</sup> These guidelines entered into force on their publication in the *Official Journal of the European Communities*. By Decision 1999/183/EC, the Commission found that national aid schemes in Germany were incompatible with the common market within the meaning of Article 87(1) of the EC Treaty in so far as they did not comply with the guidelines and appropriate measures for State aid (in connection with investments in the processing and marketing of agricultural products) which were communicated to Germany by letter SG(95) D/13086 of 20 October 1995.

<sup>(11)</sup> OJ C 368, 23.12.1994, p. 12.

<sup>(12)</sup> As regards non-notified aid, paragraph 101(b) of the 1999 Community guidelines on state aid for rescuing and restructuring firms in difficulty (Notice to Member States including proposals for appropriate measures; OJ C 288, 9.10.1999, p. 2) lays down that the Commission will examine for its compatibility with the common market any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the EC Treaty on the basis of the guidelines in force at the time the aid was granted. The Commission accordingly assessed the rules on the basis of the decision-making practice set out in its Eighth Report on Competition Policy (published in 1979) and on the basis of the 1994 guidelines.

main bank still ran, the granting of aid to firms in difficulty was by no means ruled out by the wording of the rules.

Commission, in order to allow it to give its opinion on the matter.

- (53) The Commission also takes the view that it could be advantageous for the main bank, in particular in the case of firms in difficulty, to participate in granting loans under the rules since the granting of a consolidation loan improved the overall liquidity of the recipient firm and reduced the risk of default on loans previously granted by the main bank. It may in fact make economic sense for a bank to reduce a high risk of default in respect of existing loans by ensuring that new funds are made available to the firm for its restructuring. This is particularly true where the associated risk is partly assumed by the State.
- (54) After all, the individual lists sent by Germany of aid granted or disbursed under the rules show that firms in difficulty were assisted. Germany also acknowledged in its comments that the Thuringia consolidation programme was directed at both viable firms and firms in difficulty.
- (55) The aid element of the guarantee should have been taken into account in the calculation of the loans' aid intensity, especially bearing in mind the risk of default in the case of firms in difficulty.
- (56) This assessment is not affected either by Germany's statement in its comments that the German authorities, between 1993 and early 1996, did not know that the aid element associated with the guarantee and the particular risks involved in the granting of loans to firms in difficulty should have been taken into account in calculating the aid intensity.
- (57) The Commission cannot accept this argument since back in 1989 it sent a letter to Member States pointing out that, in its view, all guarantees given by the State fell within the scope of Article 87(1) of the EC Treaty<sup>(13)</sup>. The German authorities should, in granting guarantees to firms facing liquidity difficulties, at least have had doubts as to whether the measures involved aid and they should have notified the measures contained in the scheme in good time to the Commission, in order to allow it to give its opinion on the matter.
- (58) Under the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees<sup>(14)</sup>, the cash grant equivalent of a loan guarantee in a given year can be:
- (a) calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted, or
  - (b) taken to be the difference between the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and any premium paid, i.e. (guaranteed sum × risk) – premium; or
  - (c) calculated by any other objectively justifiable and generally accepted method.
- (59) This confirmed the Commission's long-held view that, if at the time of the loan decision the probability of the borrower being unable to pay is evidently very high, the intensity of the aid can be equivalent to the sum actually secured by the guarantee.
- (60) Furthermore, the aid element of the guarantee can, even in the case of viable firms, result in the *de minimis* ceiling being exceeded.
- (61) In the Commission's view, the rules and their application involve aid within the meaning of Article 87(1) of the EC Treaty in so far as they do not fall within the scope of Regulation (EC) No 69/2001 or do fall within the scope of the Regulation but exceed the *de minimis* ceiling. The same applies in respect of the other *de minimis* provisions in force at the time the measures were implemented.
- (62) Where applied to firms in difficulty, the rules allowed recipient firms to receive from a private bank financial resources which, in view of their financial situation, they would not otherwise have received from private credit institutions on the basis of the loan terms normally applied by the latter. These financial resources made it possible for recipient firms to avoid being forced out of the market. If the firm had been forced out of the market, either existing overcapacities would

<sup>(13)</sup> Commission letter to Member States SG(89) D/4328 of 5 April 1989.

<sup>(14)</sup> OJ C 71, 11.3.2000, p. 15.

have been reduced or the market shares made available would have been acquired by competitors, which could in either case have improved their profitability. The consolidation loans do not preclude loans being granted to firms which produce goods or provide services that may be the subject of intra-Community trade. It must therefore be assumed that the financial measures concerned by the proceedings are liable to affect trade between Member States.

- (63) Even viable firms would not have obtained such finance from private banks on the terms offered and were therefore able to improve their market position vis-à-vis competitors within the common market as a result of the working capital loans provided. This applies in particular to viable firms operating in sensitive sectors. Community markets in sensitive sectors are faced with overcapacity. The financial advantage conferred on the specific firms by the consolidation loans led to their position being strengthened vis-à-vis other competitors, with the result that trade between Member States could be affected.

- (64) The rules thus might have distorted or threatened to distort competition.

- (65) The Commission accordingly concludes that the rules and their application constitute state aid within the meaning of Article 87(1) of the EC Treaty for firms involved in intra-Community trade.

- (66) On the basis of the arguments presented by Germany, the Commission takes the view that the private bank, as a lender, did not profit from the grant of the consolidation loan in a manner which distorts competition.

- (67) In the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees, the Commission assumes that, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased.

- (68) Although, according to the wording of point 1 of the rules, the firms' existing liquidity problems are to be resolved by means of a rescheduling of short-term indebtedness on the basis of a soft loan, Germany

indicated in its comments that a rescheduling of the main bank's existing loan commitments by the Thüringer Aufbaubank was possible only without the latter's co-liability. This means that no guarantee could be given *ex post* by the Thüringer Aufbaubank in respect of a loan or other financial obligation already entered into nor could one guaranteed loan be used to pay back another, non-guaranteed loan to the same credit institution.

- (69) Since the main bank's existing loan commitments could not be rescheduled with co-liability on the part of the Thüringer Aufbaubank, the rules do not appear to contain any element of aid to the lender. The mere fact that stabilisation of a firm in difficulty benefits all its creditors is an accepted consequence of aid and does not in itself represent aid within the meaning of Article 87(1) of the EC Treaty to those creditors.

#### 4.2. Lawfulness of the aid

- (70) The Commission regrets that, in granting the aid, Germany acted in breach of Article 88(3) of the EC Treaty.

#### 4.3. Compatibility of the aid with the common market in so far as the scope of application of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions was exceeded

- (71) The Commission assessed the rules on the assumption that they were directed both at viable firms and at firms in difficulty.

- (72) In as much as aid was granted to firms in difficulty, it constituted restructuring or rescue aid as defined in the Commission's Eighth Report on Competition Policy published in 1979 and in the 1994 guidelines <sup>(15)</sup>, confirmed by the guidelines adopted in 1999 <sup>(16)</sup>.

<sup>(15)</sup> Under point 2.2 of the 1994 guidelines, they applied only to the extent that they were consistent with the special rules in the sensitive sectors. At the time in question, there were special aid rules in agriculture, fisheries, steel, shipbuilding, textiles and clothing, synthetic fibres, the motor industry, transport and the coal industry. In the agricultural sector, as an alternative to these guidelines, special Commission rules for rescue and restructuring aid could still be applied to individual recipients at the discretion of the Member State concerned.

<sup>(16)</sup> See point 101 of the guidelines.

- (73) In so far as the aid was granted to viable firms, it constituted operating aid within the meaning of the Commission communication of 1979 on regional aid systems <sup>(17)</sup> and of the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid <sup>(18)</sup>. These communications were confirmed by the 1998 guidelines on national regional aid <sup>(19)</sup>.
- (74) The compatibility of the rules will be examined in the light of the relevant provisions applicable <sup>(20)</sup>.
- (75) In so far as the restructuring of firms in difficulty is involved, it should be noted that, in accordance with the Commission's practice and the 1994 guidelines, the following criteria had to be met as a precondition for compatibility of the aid with the common market:
- (a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;
  - (b) a significant contribution from the recipient firm and its shareholders;
  - (c) limitation of the aid to the strict minimum required;
  - (d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;
  - (e) individual notification of aid to large firms;
  - (f) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible.
- (76) Under the rules, aid was granted on condition that the firm submit a viable overall consolidation plan which, taking account of the rescheduling loan, made it likely that profitability could be restored on a long-term basis. The plan had to indicate the firm's consolidation requirements and existing liquidity and profitability problems, together with the contributions which the recipient and its main bank would make. To the extent that the plan satisfied these conditions, the rules met the first two criteria listed above.
- (77) The wording of the rules does not prohibit the repeated grant of restructuring aid or limit the amount of aid to the strict minimum required to achieve the objective; Germany did not indicate whether these criteria were taken into account in the granting of aid.
- (78) The rules did not provide for individual notification of aid for large firms or require compliance with the special rules for sensitive sectors.
- (79) The Commission therefore finds that, to the extent that the rules provide for restructuring aid to firms in difficulty, such aid is not compatible with the common market.
- (80) In so far as the rescue of firms in difficulty is involved, it must be noted that the established policy in this respect was to make it a precondition of compatibility with the common market that rescue aid be granted either in the form of public loans on market terms or in the form of a State guarantee on a private-sector loan. This condition was not met in the case in point, since the loans in question were soft loans.
- (81) To the extent that the provision of rescue aid under the rules is involved, this aid is incompatible with the common market.
- (82) In as much as loans were granted to economically viable firms, they constituted operating aid, which had to be assessed by the Commission in the light of the provisions on regional aid that applied to the rules.
- (83) Thuringia is an assisted area under Article 87(3)(a) (formerly Article 92(3)(a)) of the EC Treaty. The Commission communications on regional aid of 1979 and 1988 <sup>(21)</sup> allowed the Commission exceptionally to approve certain types of operating aid in assisted areas in view of the particular difficulties they faced, on the following conditions:

<sup>(17)</sup> OJ C 31, 3.2.1979, p. 9.

<sup>(18)</sup> OJ C 212, 12.8.1988, p. 2.

<sup>(19)</sup> OJ C 74, 10.3.1998, p. 9.

<sup>(20)</sup> OJ C 119, 22.5.2002, p. 22. (For the definitions applied, the Commission refers to the provisions specified. It examined the aid to viable firms in the light of its 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid. Its assessment is not affected by application of the 1998 guidelines on national regional aid.)

<sup>(21)</sup> See footnotes 16 and 17.

- (a) the aid had to be limited in time and designed to overcome the structural handicaps of firms located in Article 92(3)(a) regions;
- (b) it had to contribute to durable and balanced economic development and not give rise to sectoral overcapacity at Community level such that the resulting Community sectoral problem was more serious than the original regional problem; in this context a sectoral approach was required whereby the Community rules and guidelines applicable to certain sectors of industry (steel, shipbuilding, synthetic fibres, textiles and clothing) and agriculture, and to industrial firms involved in processing agricultural products were to be observed; under these Community rules and guidelines, operating aid could not be granted in the sectors concerned;
- (c) the aid had to be granted in accordance with the rules on aid to firms in difficulty;
- (d) in addition, in the course of the 1990s, the Commission developed a practice of requiring aid to be degressive.
- (84) According to the wording of the rules, they were not limited in time. On 16 January 1996 the rules were replaced by the 1996 Thuringia loan programme, which in turn came to an end on 1 June 1999<sup>(22)</sup>. The Commission concludes that the duration of the rules at issue in these proceedings came to an end on 31 May 1999.
- (85) The objective of the rules was to make it easier for already privatised firms or firms operating for the first time under the new conditions of the market economy in a region which seriously lags behind in development terms to participate fully in the single market. However, the Commission's practice required that aid should contribute to balanced economic development and not give rise to sectoral overcapacity. Sensitive sectors were thus excluded from receiving operating aid.
- (86) The rules do not provide for aid to be degressive. However, this does not mean that the measures in question are incompatible with the common market
- because, at the time they were applicable, this practice on the part of the Commission had not been fully developed and because, in many cases in eastern Germany in the early years following German unification, the Commission did not insist on aid being degressive because of the uncertain development situation.
- (87) In so far as the rules enabled aid to be granted to viable firms in non-sensitive sectors, the operating aid was consistent with the Commission's practice at the time and is therefore compatible with the common market.
- (88) However, the rules are incompatible with the common market in so far as aid to viable firms in the sensitive sectors is involved, since the Community rules and guidelines applicable to sensitive sectors prohibit the granting of operating aid to viable firms.
- (89) The Commission takes the view that the exemptions under Article 87(2) of the EC Treaty do not apply in this case as the rules do not pursue any of the aims listed there. Nor did Germany claim that those exemptions applied<sup>(23)</sup>.
- (90) The Commission concludes that, apart from the guidelines for assessing aid for rescuing and restructuring firms in difficulty, no special provisions concerning aid with horizontal objectives pursuant to Article 87(3)(c) of the EC Treaty are applicable to the rules since they do not pursue one of the special objectives and Germany has not argued that this is the case.
- (91) In the Commission's view, the aid is equally not intended to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Nor does it promote culture or heritage conservation. The Commission therefore concludes that neither Article 87(3)(b) nor Article 87(3)(d) of the EC Treaty applies to the rules.
- (92) Some of the individual cases covered by the rules may have been the subject of other formal investigation

<sup>(22)</sup> It was replaced by a new *de minimis* loan programme which appears *prima facie* to comply with the *de minimis* provisions applicable.

<sup>(23)</sup> As regards application of the exemption under Article 87(2)(c) of the EC Treaty, the Commission refers to the Court of Justice ruling of 19 September 2000 in Case C 156/98 *Germany v Commission* (not yet published) concerning Section 52(8) of the German Income Tax Law.

proceedings under Article 88(2) of the EC Treaty. This decision does not apply to them.

HAS ADOPTED THIS DECISION:

#### Article 1

The rules governing the Thuringia consolidation programme (hereinafter referred to as the rules) establish state aid within the meaning of Article 87(1) of the EC Treaty.

#### 5. CONCLUSION

(93) The aid scheme is unlawful. Aid that exceeded the scope of Regulation (EC) No 69/2001 or, where it was not caught by the Regulation, exceeded the scope of the other applicable *de minimis* provisions in force at the time the scheme was implemented was granted unlawfully.

The rules do not establish state aid if the payments fall within the scope of Regulation (EC) No 69/2001 or, where this is not the case, within the scope of the *de minimis* provisions in force at the time the rules were implemented and, in combination with other *de minimis* aid, do not exceed the relevant *de minimis* ceilings of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions.

(94) The aid scheme is incompatible with the common market, in that it allows rescue aid to be granted at subsidised interest rates outside its *de minimis* scope, allows restructuring aid to be granted without restricting it to the minimum necessary and without ruling out its repetition, does not require notification of restructuring aid to large firms in difficulty or of individual cases in the sensitive sectors, and does not rule out aid to viable firms in the sensitive sectors.

The rules do not establish aid within the meaning of Article 87(1) of the EC Treaty if the payments were for firms not involved in producing goods or providing services for intra-Community trade.

To the extent that the rules are caught by Article 87(1), they involve unlawful aid.

#### Article 2

(95) Accordingly, application of the rules beyond the scope of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions to firms in difficulty and in respect of operating aid to viable firms in the sensitive sectors was incompatible with the common market.

In so far as the rules establish operating aid for viable firms outside the sensitive sectors, they are compatible with the common market.

#### Article 3

(96) The rules are compatible with the common market in so far as they allow operating aid to viable firms outside the sensitive sectors.

In so far as the rules establish operating aid for firms in the sensitive sectors, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

#### Article 4

(97) It is the Commission's long-established practice to require recovery from the aid recipient of aid which, under Article 87 of the EC Treaty, has been unlawfully granted and is incompatible, provided that the aid is not covered by *de minimis* provisions. This practice was confirmed by Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(24)</sup>. Article 14 of the Regulation requires Member States to take all necessary measures to recover the aid from the beneficiary. To clarify the number of cases where recovery is required, the Commission considers that Germany should draw up a list of all firms not covered by the scope of Regulation (EC) No 69/2001,

In so far as the rules establish rescue and restructuring aid for firms in difficulty, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

#### Article 5

This Decision does not apply to those cases covered by the rules that have been the subject of other Commission proceedings or of a final Commission decision. Germany shall draw up a list of the cases concerned.

<sup>(24)</sup> OJ L 83, 27.3.1999, p. 1.

*Article 6*

Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 3 and 4 and unlawfully made available to them.

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 the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries 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 7*

Germany shall, in implementing this Decision, draw up a list of the firms concerned which fall outside the sectoral scope of Regulation (EC) No 69/2001 or which, if the aid element contained in the guarantee and other *de minimis* aid granted during the relevant period are included, received aid exceeding the ceiling laid down in that Regulation.

In implementing this Decision, Germany shall draw up a list of all firms in difficulty which were assisted under the rules and are not caught by Regulation (EC) No 69/2001 and shall indicate the criteria on which the classification is based.

In this connection, Germany shall also devise a method to identify the aid element in the guarantee.

In implementing this Decision, it shall draw up a list of firms which were assisted under the rules and are not caught by Regulation (EC) No 69/2001 but which were not involved in producing goods or providing services for intra-Community trade and shall indicate the criteria applied.

*Article 8*

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

*Article 9*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 November 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

**COMMISSION DECISION****of 9 July 2003****on aid which France intends to grant for the restructuring of the Société Nationale Maritime  
Corse-Méditerranée (SNCM)***(notified under document number C(2003) 2153)***(Only the French text is authentic)****(Text with EEA relevance)****(2004/166/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 invited the interested parties to submit their comments in accordance with the said Articles <sup>(1)</sup>, and having regard to those comments,

Whereas:

(4) By letter of 11 September 2002, registered as TREN A/65862, the French authorities asked for extra time to submit their comments to the decision of 19 August 2002. By letter of 17 September 2002, the Commission granted France an additional month to prepare its reply.

(5) By letter of 8 October 2002, sent on 15 October with annexes and registered as SG(2002) A/10050, the French authorities submitted to the Commission observations on the decision of 19 August 2002 opening the procedure, stressing the need for progress in implementing the restructuring plan.

**1. PROCEDURE****1.1. Procedural overview**

(1) By letter of 18 February 2002, the French Government notified a plan to grant aid for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM). This case was registered as N 118/2002. The notification was supplemented by letters from the French authorities dated 3 July 2002 <sup>(2)</sup>.

(2) On 19 August 2002, the Commission decided to initiate the formal investigation procedure provided for in Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty <sup>(3)</sup>; the case was registered as C 58/2002.

(3) By fax of 11 September 2002, the French authorities asked for the correction of a number of factual errors in the decision of 19 August 2002.

(6) By letter of 15 October 2002, registered as SG(2002) A/10252, the French authorities emphasised that it was a matter of urgency that the decision opening the formal investigation procedure be published in the *Official Journal of the European Communities*.

(7) By fax of 19 November 2002, the French authorities transmitted a copy of cash advance agreements between SNCM and the Compagnie Générale Maritime et Financière (CGMF) and proof of refunds of the advance by CGMF to SNCM through two bank transfers of 13 May and 14 June 2002.

(8) On 27 November 2002, the Commission adopted a decision amending the decision of 19 August 2002, which it transmitted to the Permanent Representation of France to the European Union by letter of 29 November 2002. Following this, the Commission's decision to initiate the formal investigation procedure in this case

<sup>(1)</sup> OJ C 308, 11.12.2002, p. 29.

<sup>(2)</sup> Registered as TREN A/61846.

<sup>(3)</sup> OJ L 83, 27.3.1999, p. 1.

could be published on 11 December 2002 in the *Official Journal of the European Communities* <sup>(4)</sup>. Interested parties were invited to submit their observations from that date on the plan to provide aid.

- (9) The French authorities, at their request, held a first working meeting with the Commission on 24 October 2002, followed by a second one on 3 December 2002.
- (10) The Commission has received observations from two companies, Corsica Ferries and the Stef-TFE group, and from various local authorities. By letters of 13 and 16 January and 5 and 21 February 2003, it transmitted its observations to France, asking it for any comments it might have.
- (11) By letter of 16 January 2003, the Commission sent a request for additional information in accordance with the provisions of Article 5 of Regulation (EC) No 659/1999.
- (12) By letter of 10 February 2003 <sup>(5)</sup>, the French authorities transmitted to the Commission arguments intended to show that the plan to provide aid fully complied with the Community guidelines on State aid for rescuing and restructuring firms <sup>(6)</sup> (hereinafter referred to as 'the guidelines') and a description of new commitments regarding the number of staff and level of wages, control of intermediate consumption, and SNCM's fares policy.
- (13) By letter of 13 February 2003 <sup>(7)</sup>, the French authorities transmitted to the Commission comments on the observations submitted by Corsica Ferries and Stef-TFE.
- (14) By letter of 21 February 2003, the French authorities replied to the additional questions contained in the Commission's letter of 10 February 2003.
- (15) By fax of 25 February 2003 <sup>(8)</sup>, the French authorities transmitted a copy of the shareholders' agreement linking SNCM and the Stef-TFE group, as requested by the Commission.
- (16) On 25 February 2003, at the request of the French authorities, a working meeting was held between the Commission and representatives of the French administration.
- (17) By electronic mail of 14 May 2003 <sup>(9)</sup>, the French authorities transmitted to the Commission the provisional version of SNCM's report of activities for 2002.
- (18) By fax of 27 May 2003 <sup>(10)</sup>, the French authorities transmitted to the Commission their comments on the documents which Corsica Ferries had submitted to the Commission on 4 February 2003 and which the Commission had forwarded to the French authorities by letter of 21 February 2003.
- (19) The aid in question is entitled 'Aid for the restructuring of SNCM', registered as C 58/2002 (ex-N 118/2002), following the Commission's decision of 19 August 2002 to initiate the formal investigation procedure with regard to the planned aid.
- (20) The recipient of the aid is the Société Nationale Maritime Corse-Méditerranée (SNCM) which comprises several subsidiaries in the maritime sector.
- (21) The main purpose of the restructuring aid is to enable SNCM to complete its restructuring process so as to ensure the group's long-term viability.

## 1.2. Title of the aid

## 1.3. Recipient of the aid

## 1.4. Purpose of the aid

## 2. DETAILED DESCRIPTION OF AID

- (22) The compatibility of the aid can be judged only with some knowledge about the beneficiary of the aid, its background, the competitive context in which it has developed, the causes of its financial difficulties and the details of the restructuring plan.

<sup>(4)</sup> OJ C 308, 11.12.2002, p. 29.

<sup>(5)</sup> Registered by the Commission as SG(2003) A/1546.

<sup>(6)</sup> OJ C 288, 9.10.1999, p. 2.

<sup>(7)</sup> Registered by the Commission as SG(2003) A/1691.

<sup>(8)</sup> Registered by the Commission as TREN A/21701.

<sup>(9)</sup> Registered by the Commission as TREN A/20745.

<sup>(10)</sup> Registered by the Commission as TREN A/21531.

## 2.1. SNCM and its main subsidiaries

Compagnie Générale Maritime (CGM) which was subsequently restructured <sup>(13)</sup>, recapitalised <sup>(14)</sup> and privatised <sup>(15)</sup>.

### 2.1.1. SNCM

(23) SNCM is a shipping company operating regular services to Corsica from Nice, Toulon <sup>(11)</sup> and Marseilles and to the Maghreb (Tunisia and Algeria) from France <sup>(12)</sup> and seasonal services to Sardinia, from April to September.

(24) SNCM came into being in 1969 with the merger of the Compagnie Générale Transatlantique and the Compagnie de Navigation Mixte, both established in 1850. At the time called Compagnie Générale Transméditerranéenne, it was renamed Société Nationale Maritime Corse-Méditerranée in 1976, after the Société Nationale des Chemins de Fer (SNCF) had acquired a share in its capital. The company had been chosen by the French Government to implement the principle of territorial continuity with Corsica, bringing maritime transport fares in line with SNCF fares for rail transport on the basis of an agreement concluded on 31 March 1976 for a period of 25 years. The French Government had already assigned responsibility to the Compagnie Générale Transatlantique for operating services to Corsica through an earlier agreement of 23 December 1948.

(25) In addition to operating public services, SNCM also operates regular crossings to Algeria and Tunisia and seasonally, from April to September, to Sardinia. Between 1990 and 2002, SNCM, through its subsidiary Corsica Marittima, also provided passenger transport services between Corsica and Italy.

#### 2.1.1.1. SNCM's shareholders

(26) Currently 80 % of SNCM's shares are held by CGMF, which took over the shares of the Compagnie Générale Transatlantique, and 20 % by SNCF. The French State has a direct 100 % share in CGMF. SNCM became a subsidiary of CGMF in 1992, taking over from the

(27) When it was established in 1977, the wording of CGMF's objective was such as to authorise all operations of maritime transport, outfitting and chartering of ships and the acquisition of shares and all commercial or industrial operations directly or indirectly connected with this objective. Today CGMF mainly plays the following roles on behalf of the State:

- it holds an 80 % share in SNCM (the remaining 20 % being owned by SNCF, held by the French State),
- it is the guarantor of social security obligations (including pensions and health insurance funds) for the personnel of its former subsidiary CGM <sup>(16)</sup>,
- it has assumed responsibility for a leasing agreement to finance a building which at the time was concluded by CGM.

#### 2.1.1.2. Activities of SNCM

(28) SNCM carries passengers, cars and lorries on the following links:

- between Marseilles and various ports on Corsica: Bastia and Ajaccio (daily, both ways), Porto-Vecchio, Balagna and Propriano (three times a week, including CMN's round trips) with additional crossings during the peak period,
- between Nice and Bastia: SNCM runs continuous services during the low season (two or three return trips each week), with more frequent services from the end of March to October,
- between Marseilles and Sardinia (Porto Torres),
- between Bastia and Sardinia (Porto Torres) with one of its own ships and a ship of the Compagnie Maritime de Navigation (CMN),

<sup>(13)</sup> The restructuring plan was adopted by the company in December 2002.

<sup>(14)</sup> The first instalment of aid to CGM was paid in 1993.

<sup>(15)</sup> It was privatised in 1996.

<sup>(16)</sup> For instance, in 1996, CGMF, which at the time had a 94 % share in CGM, took over responsibility for the measures ensuing from the social plans set up by CGM when it was privatised. See also Commission Decision 97/14/EC of 17 July 1996 on aid granted to the Compagnie Générale Maritime in the context of a restructuring plan (OJ L 5, 9.1.1997, p. 40).

<sup>(11)</sup> Services from Toulon are now sporadic.

<sup>(12)</sup> A service between Spain and the Maghreb is currently run on a trial basis.

- between Marseilles and Tunis: at least one round trip a week with one of its ships,
- between Marseilles and Algiers: several times a week in the high season with the *Île de Beauté*.

(c) two high-speed vessels operating mainly from Nice:

- the *Liamone* (capacity 1 116 passengers and 250 cars, power 65,0 MW, speed 42 knots) which also operates crossings from Toulon,

#### 2.1.1.3. The fleet

- the *Aliso* (capacity 530 passengers and 148 cars, power 26,0 MW, speed 37 knots).

(29) The SNCM fleet for Corsica currently comprises the following ships:

(a) five car ferries:

- the *Napoléon Bonaparte* (capacity 2 150 passengers and 708 cars, power 43 MW, speed 23,8 knots), large luxury car ferry,
- the new *Danielle Casanova*, delivered in May 2002 (capacity 2 204 passengers and 700 cars, power 37,8 MW, speed 23,8 knots), also a large luxury car ferry,
- the *Île de Beauté* (capacity 1 554 passengers and 520 cars, power 37,8 MW, speed 21,5 knots), taken into service in 1979 and rebuilt in 1989/1990,
- the *Méditerranée* (capacity 2 254 passengers and 800 cars, power 35,8 MW, speed 24,0 knots),
- the *Corse* (capacity 2 150 passengers and 600 cars, power 27,56 MW, speed 23,5 knots);

(b) four passenger cargo vessels (freight and passengers):

- the *Paglia Orba* (capacity 500 passengers, 2 000 linear metres for freight and 120 cars, power 19,7 MW, speed 19 knots),
- the *Monte d'Oro* (capacity 508 passengers, 1 615 metres for freight and 130 cars, power 14,8 MW, speed 19,5 knots),
- the *Monte Cinto* (capacity 111 passengers, 1 200 metres for freight, power 8,8 MW, speed 18,0 knots),
- since May 2003, the *Pascal Paoli* (capacity 594 passengers, 2 300 metres for freight and 130 cars, power 37,8 MW, speed 23 knots);

(30) In 2002 the fleet serving the Maghreb consisted of the car ferry *Méditerranée*, since 24 June 2002, which will be used between Marseilles and Tunis. The entry into service of this vessel marks a qualitative and quantitative improvement of shipping services for the Tunisian capital. This comfortable and fast ship has a total capacity of 2 250 passengers and 760 cars (compared with 1 600 passengers and 500 cars on the car ferry *Liberté*). It represents a significant increase in the number of places available for passengers while at the same time offering space for freight transport, a market which is likewise growing considerably.

#### 2.1.2. The public service delegation contract

(31) Regular shipping services between the ports of mainland France and Corsica have since 1948 been operated as a public service<sup>(17)</sup>. The SNCM and CMN were the concessionaires of the service between 1976 and the end of 2001 under a framework agreement initially concluded for 25 years<sup>(18)</sup>. The French Act of 30 July 1982 transferred the management of territorial continuity to Corsica's Assembly in a contractual framework with the French State. Subsequently, Act 91-428 of 13 May 1991 on the status of the Corsica territorial collectivity<sup>(19)</sup> granted full responsibility to the Assembly for services to the island. Since 1991, the Corsica territorial collectivity has replaced the French State in granting concessions for public service obligations<sup>(20)</sup>.

(32) Community legislation on maritime cabotage makes it incumbent on Member States to open up their national cabotage markets. With regard to public service, this imposes an obligation on Member States to comply with the principle of non-discrimination among all

<sup>(17)</sup> Shipping links between Italy and Corsica have always been exempt from all public service obligations or contracts.

<sup>(18)</sup> See recital 24.

<sup>(19)</sup> *Official Journal of the French Republic* 111 of 14 May 1991.

<sup>(20)</sup> Under the abovementioned French Act of 13 May 1991.

Community shipping companies. However, a transitional period is provided for in respect of existing public service contracts which can be maintained in force until they expire <sup>(21)</sup>. In accordance with the Community rules in force, the territorial collectivity of Corsica issued a European tender in order to select the operator which from 1 January 2002 should, under a five-year contract, implement the public service obligations for crossings to and from the island in return for financial compensation. The collectivity has taken the view that, given the development of competition from Toulon and Nice, only services operated from Marseilles should be subject to strict public service obligations.

of EUR 73,17 million in 2001, about EUR 41 million of which for passengers (733 400) and catering and EUR 32 million for freight and cars (762 000 linear metres).

### 2.1.3. SNCM's main subsidiaries

#### 2.1.3.1. Compagnie Méridionale de Navigation

- (33) SNCM and CMN were jointly awarded this contract for the period from 2002 to 2006 after Corsica Ferries eventually decided not to put in a bid. Moreover, obligations with regard to the frequency of services have been imposed on all operators of services to the island from Toulon and Nice for the benefit of particular categories of passengers receiving social welfare <sup>(22)</sup>.
- (34) From 1997 to 2001, the grant allocated to SNCM for 'territorial continuity' rose from EUR 80,1 million to EUR 86 million. At the time, it covered all links from the three ports of mainland France (Nice, Toulon and Marseilles).
- (35) The current contract provides for an obligation to run services at predetermined frequencies, obligatory service quality, maximum fares according to season, and mandatory reductions for particular categories of passengers. The contract lays down financial compensation, referred to as reference compensation, for every year from 2002 to 2006, in the case of SNCM decreasing from EUR 69,1 million to EUR 61,4 million. This compensation is adjusted by up to 4 % in line with the difference between actual revenue and the reference revenue also laid down in the contract. The reference compensation/reference revenue ratio should decrease from 88 % in 2002 to 75 % in 2006.
- (36) In 2002, the first year of the public service delegation contract, financial compensation amounted to EUR 72,1 million, a decrease compared with previous years, account being taken of the fact that only services from Marseilles to Corsica now benefit from this grant. By comparison, the grant in 2001 for the Marseilles-Corsica line amounted to EUR 64,79 million with a net revenue

- (37) The SNCM has a non-majority share in CMN, which operates three passenger cargo ships between Corsica and Marseilles, namely the *Girolata*, the *Kalliste* and the *Scandola*, under a public service delegation contract. It also serves Sardinia (Porto Torres) from Marseilles and Propriano.
- (38) CMN, set up in 1931, remained a family shipping line until the end of the 1970s when the Compagnie Générale Transatlantique acquired a 49 % share to enable a branch of the founding family to withdraw. In the meantime, CGM has taken over this share. Neither of these two large companies has intervened in the management of CMN which has remained fully in the hands of the Rousset and Rastit families.
- (39) Since 1956, CMN has through an agreement been linked with the Compagnie Générale Transatlantique, SNCM's predecessor for services to Corsica. In 1976, CMN was granted a concession for services to Corsica only for freight while SNCM obtained a concession for the carriage of freight and passengers to Corsica. From 1980, CMN has, through delegation from SNCM, also carried passengers after purchasing passenger cargo ships. As a quid pro quo, SNCM was CMN's general agent for passenger transport.
- (40) In 1992, CGM, faced with substantial cashflow difficulties, tried unsuccessfully to sell its share in CMN to a third party. As its attempt was not successful, CGM asked SNCM, which was its subsidiary until 1992, to take over the share it held in CMN. Two-tier shareholding was created in order to shift the majority interest to SNCM while enabling private shareholders to retain effective control of CMN through two holdings. The Rousset and Rastit families seized this opportunity to reduce their share for the benefit of the Société de Travaux Industriels et Maritimes d'Orbigny (STIM

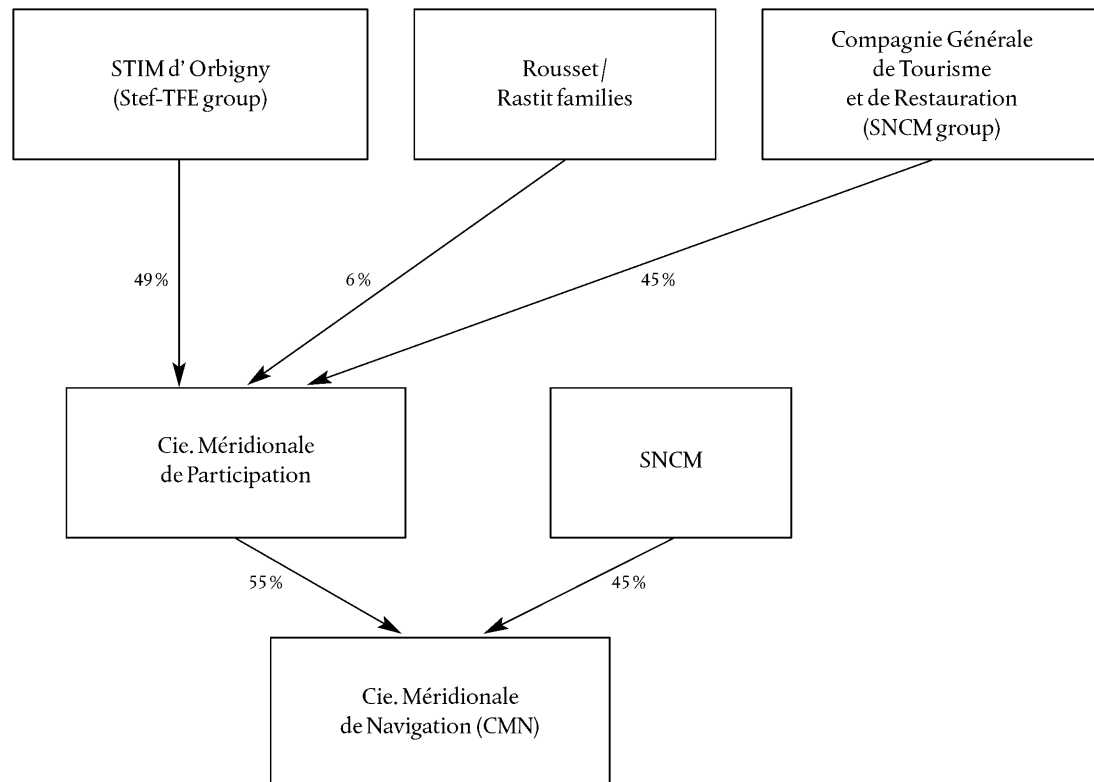
<sup>(21)</sup> See Article 4(3) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

<sup>(22)</sup> See recital 155 of this Decision.

d'Orbigny) which was subsequently incorporated in the Stef-TFE group. The merger between CGM and SNCM could have been contemplated at the time because of the very strong links between the two companies, but

the retention of private investors among CMN's shareholders and their wish to retain control of this company no doubt put a brake on moves towards a merger between the two companies.

- (41) Effective control of CMN has thus since 1992 been in the hands of the Stef-TFE group which owns 49 % of the Compagnie Méridionale de Participations (CMP) and acts in concert with the Rousset and Rastit families who hold 6 % of shares in CMP.



#### 2.1.3.2. Compagnie Générale de Tourisme et d'Hôtellerie

- (42) The Compagnie Générale de Tourisme et d'Hôtellerie (CGTH) is a holding company fully owned by SNCM which has the following subsidiaries and holdings:

- 45 % in CMP, the main shareholder (55 %) in CMN,
- 100 % in Comptoirs du Sud, which runs shops on board SNCM's ships,
- 50 % in Société civile immobilière Schuman (non-movable assets sold off or being sold off),
- 100 % in Société Méditerranéenne d'Investissements et de Participations (SMIP), whose only asset is the ship *Southern Trader* which operates under time charter.

#### 2.1.3.3. Sud-Cargos

- (43) Sud-Cargos is a French goods transport shipping company which is based in Marseilles and specialises in running services to the Maghreb. It is an equal subsidiary of two large transport groups, SNCM and Delmas. In 2001 it operated eight roll-on roll-off cargo vessels and container ships and had a EUR 67,3 million turnover, carrying 90 000 tonnes, 38 000 TEU and 18 000 trailers. Together with its subsidiaries, it has about 100 employees.

- (44) Sud-Cargos has built up its development strategy on the five following principles:

- proximity to customers by having their own facilities in the main ports of the Mediterranean,
- versatility, with a fleet of diversified ships carrying all types of goods,

- a global network with containers available in all commercial areas worldwide,
- overland transport and transshipment facilities to transport, overland or by sea, containers from anywhere in the world to the main French (Marseilles), Italian (Genoa) and Spanish (Valencia and Barcelona) loading ports,
- up-to-date cargo information.

#### 2.1.3.4. SARA

- (45) The Société Aubagnaise de Restauration et d'Approvisionnement (SARA) supplies SNCM's ships. In 2002, its turnover was EUR 8,58 million, entirely with SNCM, making a EUR 0,19 million profit.

#### 2.1.3.5. Ferrytour

- (46) The Ferrytour partnership is a tour operator that is 100 %-owned by SNCM. Its turnover in 2002 was EUR 11,2 million making a very modest profit of EUR 0,21 million. It organises trips by sea to Corsica, Sardinia and Tunisia but also flights to many destinations. In addition to its main line of business, it also organises mini-cruises and offers business travel services.

#### 2.1.3.6. Comptoirs du Sud

- (47) Comptoirs du Sud, a subsidiary set up in 1996 which is 100 %-owned by SNCM, manages all shops onboard its ships. The company has a turnover which fluctuates between EUR 2 and 4 million, with a net business result of between EUR 0,08 and 0,12 million. Over 72 % of sales are made on Maghreb routes.

#### 2.1.3.7. Sotramat

- (48) Société Transmondiale Mer Air Terre Voyages (Sotramat), a 100 % subsidiary of SNCM, are travel agents managing 17 agencies throughout France. In 2001 they sold a total of EUR 42,53 million in services, of which 40 % in SNCM tickets, representing 8,5 % of SNCM's sales. Sotramat made a EUR 0,58 million profit, with EUR 3,80 million in commission.

## 2.2. Relevant markets

- (49) SNCM mainly operates on two clearly different markets, in terms of both passenger transport and goods

transport: services to Corsica and services to Maghreb, from France and subsidiarily from Italy and Spain.

### 2.2.1. Services to Corsica

- (50) SNCM mainly operates services to Corsica and Maghreb from mainland France. On the basis of the market research study provided by the French authorities (hereafter referred to as 'market survey'), a quite accurate description can be given of the different markets in question.

#### 2.2.1.1. Market characteristics

- (51) Air travel makes up 43 % of overall passenger transport in 2001 (with about 2,4 million out of 6 million crossings in each direction). Transport by sea has in recent years shown an upward trend thanks to the improved supply of maritime transport services.

- (52) Passenger transport by sea between mainland Europe and Corsica has the following features:

- highly seasonal traffic: the months of July and August have traditionally accounted for 50 % of annual traffic. There are also strong fluctuations during school holiday periods and particular weekends. The seasonal variation is accentuated by asymmetry of traffic during peak periods between crossings in both directions at the beginning and the end of the week,

- a supply which for structural reasons has to exceed demand (occupancy which in terms of monthly average fluctuates from 20 % in winter — with 5 to 10 % in slack periods — but peaks of 100 % in summer and particular holiday weekends),

- SNCM's decline on the sea transport services market between Corsica and mainland Europe: 46 % market share in terms of number of passengers in 2001, decreasing in relation to its main competitor, Corsica Ferries, which has a 44 % share, the rest of the market being shared between Moby Lines (5 %), CMN (3 %) and Happy Lines (2 %),

- a slight 2,4 % increase a year, but sea links are becoming steadily more important compared with air traffic,

- structurally low occupancy averaged over a year: about 40 % for SNCM, 33 % for Corsica Ferries, but 66 % for CMN which in the period 1999-2001 only operated passenger cargo ships which by definition have a higher occupancy rate for passengers. The

average occupancy rate of ships has apparently always been low on account of the characteristic features of this market, even before Corsica Ferries started operating services between Corsica and mainland France, as shown in table 1.

TABLE 1

**Trend in average occupancy rate of SNCM ships**

(in %)

| Year                       | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|----------------------------|------|------|------|------|------|------|------|------|------|------|
| Average occupancy of ships | 38,1 | 40,1 | 35,2 | 34,9 | 38,2 | 41,5 | 41,8 | n.a. | n.a. | 43,4 |

- (53) The traffic trend between Marseilles and Corsica is the weakest of the three links to Corsica from mainland France, as shown in table 2.

TABLE 2

**Trend between the ports of mainland France and Corsica**

(in thousands)

| Passengers         | 2000  | 2001  | 2002  | %<br>1/2000 | %<br>2/2001 |
|--------------------|-------|-------|-------|-------------|-------------|
| Nice/Corsica       | 791   | 786   | 904   | - 0,6 %     | 15,0 %      |
| Toulon/Corsica     | 122   | 403   | 460   | 230,3 %     | 14,1 %      |
| Marseilles/Corsica | 827   | 840   | 914   | 1,6 %       | 8,8 %       |
| Total              | 1 740 | 2 029 | 2 278 | 16,6 %      | 12,3 %      |

36 %. This increase was connected with the fact that two high-speed ferries entered service on the Toulon-Corsica lines in 2001, increasing traffic from mainland France without any reduction in transport services run by this company from Italy.

- (56) In 2002 Corsica Ferries became the market leader in links to Corsica <sup>(24)</sup> and its activities are now more or less equally divided between Corsica and Sardinia: it carries 800 000 passengers a year between the French mainland and Corsica, 800 000 between Italy and Corsica and 800 000 between Sardinia and the Italian mainland. The company has about 1 000 seamen sailing under the Italian flag. The company's head office is in Bastia and it has an office in Savona. It has 11 ships and a 12th is on order.

- (57) SNCM's other competitors on sailings to Corsica are as follows:

**2.2.1.2. SNCM's competitors**

- (54) SNCM had to face a competitor for the first time in 1996 on services to Corsica from mainland France when Corsica Ferries started sailings between Nice and Bastia and Calvi in the high season <sup>(23)</sup>. Since 18 March 1999 these services have been run as weekly round trips. Since 1 April 2000 SNCM has had to face competition on services from Toulon to Bastia and Ajaccio.
- (55) SNCM's main competitor in passenger transport to Corsica is Corsica Ferries, which operates links to Corsica from Toulon and Nice in France and from Savona and Livorno in Italy. Its market share has steadily risen, reaching 44 % in 2001, a considerable increase compared with 2000 when it was still only

— CMN, which is a competitor but also a partner associated with SNCM under the public service concession. CMN operates links only from Marseilles. Its market share is 3 %,

— Moby Lines operates from Genoa, Livorno and Piombino. Its market share in sailings to Corsica dropped from 8 % in 2000 to 5 % in 2001 due to its ageing fleet,

— Happy Lines operates a car ferry with 1 100 places from Genoa, La Spezia and Livorno. Its market share is 2 %,

<sup>(23)</sup> The market was de facto open to operators flying the French flag.

<sup>(24)</sup> From Italy and the French mainland. SNCM remains the market leader on services between the French mainland and Corsica.

- TRIS, with two car ferries with 800 and 1 300 places, and Linee Lauro, with a car ferry with 670 places, focus on crossings to Sardinia and operate occasional links to Corsica. Their market shares are negligible.
- (58) CMN, for freight transport, and its Italian competitors, to optimise their services, operate triangular links between the European mainland, Corsica and Sardinia. However, the number of passengers carried on these sailings is very marginal between Corsica and Sardinia.
- (59) SNCM and CMN have a de facto monopoly for general cargo transport (unaccompanied). Under the public service delegation contract, the two firms operate frequent sailings from Marseilles to all Corsican ports.
- (60) For accompanied trailers<sup>(25)</sup> loaded onto ferries, accounting for 24 % overall general cargo transport measured in linear metres<sup>(26)</sup>, there is competition among all the passenger transport operators. SNCM and CMN also have the main share of the market in this accompanied transport. The other operators, in particular Corsica Ferries, have a 10 % share, i.e. 2 % of the overall market.
- (61) With regard to the demand for passenger transport by sea to Corsica, the market survey estimates that the growth will be sustained: [...] (\*) million passengers are expected in 2006 compared with 3,4 million in 2001. The increase in shipping at the expense of aviation will lead to a [...] % share for shipping. On the supply side, there should be continued qualitative improvement of supply by the main actors, with possible marginalisation of particular Italian operators because of their ageing fleet, except for Moby Lines which is beginning to renew its fleet.
- (62) SNCM's market share in passenger transport to Corsica was 46 % in 2001 as against 52 % in 2000. This market share steadily diminished in the 1990s to the benefit of Corsica Ferries, thanks to the entry into service of two mega-express ships of Corsica Ferries.
- (63) According to the market survey, no operator other than SNCM and CMN is capable, with regard to the carriage of unaccompanied general cargo, to meet the public service constraints and operate profitably outside the concession already allocated. The market survey considers that the SNCM-CMN partnership should therefore be continued in SNCM's long-term interest.
- (64) According to the market survey, continuation of the public service contract will enable SNCM and CMN, with regard to general cargo transport from Marseilles to Corsica, to capture most of the growth in traffic: [...] linear metres in 2006 as against 1 490 000 in 2000. Profitability of this activity will be ensured through efficient management of a range of ferries and passenger cargo ships operated by the two companies, with overall optimisation of passenger and freight transport. There is no price competition as prices are controlled in the framework of the public service concession.
- (65) The market survey estimates that, depending on the strength of Moby Lines' commercial policy on links between Italy and Corsica, Italy's share in overall transport will drop from [...] % in 2001 to [...] % in 2006 if Moby Lines is very active or from [...] % to [...] % if it makes no investment. SNCM will be in the top range with more frequent crossings and more varied destinations (secondary Corsican ports) than Corsica Ferries. SNCM should set itself an objective of retaining its market share of at least [...] %. Balance between supply and demand will improve for SNCM, with one ferry withdrawn in 2002, a new passenger cargo ship and modernisation of two others. For Corsica Ferries, the balance between supply and demand will be brought about by achieving ambitious forecasts of growth in activity in double figures which, according to the market survey, will a posteriori justify current supply. In price terms, the continuation of fierce competition from Corsica Ferries will oblige SNCM to improve its productivity.

### 2.2.1.3. Market trends

(\*) Business secret.

<sup>(25)</sup> The driver accompanies the vehicle combination on the crossing. In some cases, a driver loads the vehicle before departure and another driver unloads it upon arrival. This is entered as accompanied transport as against roll-on roll-off transport operations in which the trailer travels without a tractor.

<sup>(26)</sup> This unit corresponds to operators' billing.

### 2.2.2. Services to the Maghreb

- (66) The Maghreb comprises three micro-niche markets relatively closed off from one another on which, according to the market survey, SNCM appears to be the challenger.

the importance for SNCM of getting involved in operating services to Oran, a market segment in which it does not currently play a role. According to the survey, SNCM should be able to recover its initial market share of 35 % by 2006.

#### 2.2.2.1. Services to Algeria

- (67) The market survey indicates that air transport accounts for 92 % of overall passenger transport between the EU and Algeria. Unlike for Corsica, there is no specific growth in maritime passenger transport to Algeria.

#### 2.2.2.2. Services to Morocco

- (72) The overall market share of aviation is 77 %. This share, distinctly lower than that for Algeria, is connected with the importance of short-haul sea transport, virtually road transport, across the Strait of Gibraltar via southern Spain.

- (68) In maritime shipping, SNCM's sole competitor is the Entreprise Nationale de Transport Maritime de Voyageurs (ENTMV), an Algerian public undertaking with a virtual monopoly, with 89 % of the market. SNCM's market share in passenger transport to Algeria is 11 %, considerably reduced since 1990 when it was still 35 %. SNCM's position can be explained from the cessation of SNCM's services in 1995 <sup>(27)</sup>, administrative constraints since that year and the absence of a political will to reinstate this link.

- (73) This market is much more competitive, highly fragmented, with a 5 % growth rate a year for services between Morocco and Europe (95 % to Spain) with the following main market shares: Comarit 23 %, Transmediterranea 22 %, Comanav 20 %, Euroferrys 18 % and Ferrimaroc 17 %. Many Moroccan and Spanish companies are involved in this short-distance shipping link: Comanav, Comarit, Euroferrys, Ferry Maroc, Limadet and Transméditerranée. None of them have a market share of more than 23 %. Competition is fierce, in particular in terms of fares, with old ships already amortised.

- (69) It is not likely that any new competitors will arrive on the market in the short term. Even though SNCM continues to be a general agent for ENTMV in its country of origin and vice versa, ENTMV has developed its own network in France (and in other European countries) while SNCM is developing its network in Algeria. [...]

- (74) The only long-distance service is operated by Comanav, from Sète to Tangiers or Nador. Accordingly, it has 100 % of the market on these links, which however represent only 5 % of maritime transport overall.

- (70) In the light of economic and political trends in Algeria, this market should expand considerably: in 2006 maritime passenger transport should be between [...] and [...] passengers. However, according to the market survey ENTMV's fleet is old and not certain to be renewed. According to the authors of the market survey, the order of two new ships by ENTMV seems to have run into financial difficulties.

- (75) As emphasised in the market survey, SNCM is currently not involved in maritime passenger transport to Morocco. It seems important for SNCM to gain a foothold in the long-distance traffic market between France and Morocco. By seeking to capture a small part of this virtual road transport (which currently passes through southern Spain) rather than taking passengers away from Comanav, SNCM could help to double passenger transport by sea from France, which would nevertheless remain marginal compared with sailings across the Strait of Gibraltar.

- (71) In sailings to the Maghreb, SNCM strengthened its position with the entry into service in 2002 of the ferry *Île de Beauté*, withdrawn from the link with Corsica, which will do well in competition with ENTMV's ageing fleet. According to the market survey, the success of this link will be ensured by controlling operating costs which should enable SNCM to offer attractive fares to recover a part of the market. The market survey stresses

#### 2.2.2.3. Services to Tunisia

<sup>(27)</sup> Following the taking of hostages on the Algiers-Paris flight in December 1994.

- (76) Aviation retains a dominant position, with 96 % of the passenger transport market. The relative importance of

tourist traffic to Tunisia explains this share which is even higher than for Algeria as tourists almost exclusively go there by plane.

(77) Only two Member States run shipping services to Tunisia: France, from Marseilles and Toulon, with 47 %, and Italy from Livorno and Genoa with 39 % and from Sicily with 14 %.

(78) The principal actor on this market which is growing by 7 % a year is the Compagnie Tunisienne de Navigation (CTN) with a 58 % market share, followed by SNCM with 21 %. CTN has a relatively modern fleet and makes optimal use of it on links from France and Italy. The other competitors are: Linee Lauro, Tirrenia and Ustica Lines, the last two operating sailings from Sicily only.

(79) Competition on the sea links varies according to Member State. CTN's fares from Italy are 30 % lower than from France, although crossing time is the same. However, CTN and SNCM have identical fares from France.

(80) SNCM had a 21 % market share in 2000 in passenger transport by sea to Tunisia. This share has gone down, with the transport increase catered for by CTN. On links between France and Tunisia alone, SNCM's market share is 50 %. The best way for SNCM to increase its overall market share is to start running services to Tunisia from Italy, provided that its fares are competitive.

(81) According to the market survey, sea transport to Tunisia will continue to grow, reaching over [...] passengers in 2006. SNCM's services from Italy will enable it to also increase its market share: the market survey considers a [...] % market share a realistic target for SNCM for 2006.

cargo ship with between 200 and 500 places for passengers. On the Maghreb link, there are virtually no more ferries with less than 1 500 to 2 000 places. The supply benchmark for a regular service is therefore between 1 500 and 2 000 places a week.

(84) The substantial seasonal variation <sup>(28)</sup>, with monthly or daily <sup>(29)</sup> peak volumes that can reach 10 times those of the lowest off-peak months, oblige operators to run a fleet of sufficient capacity to absorb peak traffic. Half the turnover is in general achieved in July and August alone. Moreover, there is an imbalance according to travel direction, even during peak periods. For instance, early July crossings from the mainland to Corsica reach a peak and return sailings to the mainland run virtually empty, with the phenomenon reversing at the end of August. At some weekends in summer and at particular holiday weekends, the combined fleet of all shipping companies operating services to Corsica is insufficient to absorb peak passenger traffic.

(85) For services to Corsica, in particular to Corsica's secondary ports necessitated by the island's weak transport infrastructure, the public service constraints in fact create an excessive supply of places in relation to demand during the low season. Moreover, all operators practise 'exclusive' <sup>(30)</sup> sales for cabin places, which strongly reduces the apparent occupancy coefficients of ships.

(86) In 2001, moreover, Corsica Ferries embarked upon an aggressive policy to conquer a larger share of the market. Under this strategy, it offered overcapacity for one or two years to attract new customers.

(87) The market survey concludes that there is no structural excess capacity on links between mainland Europe and Corsica or to the Maghreb and that the apparent surplus of places is intrinsically linked with the nature and characteristics peculiar to this business.

### 2.2.3. Balancing supply and demand

(82) A quick look at the gross figures for supply and demand could lead one to conclude that there is excess capacity on all the links studied. According to the market survey, however, things are not as simple as they seem.

(83) It is not possible to fine-tune maritime transport supply to demand. To Corsica, the minimum unit is a passenger

### 2.3. The restructuring plan

(88) The restructuring plan has, on the one hand, an operational component covering the sale of four ships, the closure of two subsidiaries, staff cuts, reduction of

<sup>(28)</sup> On this subject, see recital 52.

<sup>(29)</sup> There are also substantial weekly variations in demand for sea transport (end-of-week peaks).

<sup>(30)</sup> Possibility for one to three persons to occupy a cabin intended for four.

services to Corsica and increase of services to the Maghreb and, on the other hand, a financial component covering the refund, through recapitalisation, of a part of the debts borne by SNCM. Apart from the initial notification, SNCM's restructuring plan <sup>(31)</sup> presented by the French authorities consists of a set of documents referred to in section 1.1 which were transmitted to the Commission both before and after the opening of the procedure. The content of this set of documents is described in more detail in the present section.

(89) Following the observations made by the Commission in its decision of 19 August 2002, the French authorities, in their letter of 31 January 2003, provided a description of improvements made to the restructuring plan on the following points:

- commitments and details concerning wage policy,
- a plan for reducing costs in intermediate purchases,
- a commitment that SNCM will not initiate a fares war with its competitors operating services to Corsica.

#### 2.3.1. *Analysis of factors that have led to the company's financial difficulties*

(90) The French authorities have mentioned four factors to explain the company's financial difficulties.

- Since 1996, SNCM has faced competition between Corsica and the French mainland, which is something the public company never had to face in the past and which has led to chronic operating deficits as a result of the rigidity of the public service agreements of the period.
- SNCM, constrained by its public service obligations between 1976 and 2001, has also had to cope with two external shocks: suspension of sealinks with Algeria in 1995 and the strong drop in services to Corsica in 1995 and 1996.

— SNCM has had to 'face heavy social demands and conflicts harming it economically and slowing down its growth'.

— Its growth has reportedly been disrupted by complicated proceedings before the French administrative courts in connection with the allocation of the public service delegation contract.

(91) The Commission notes that the French authorities have been unable to quantify the extent to which these factors have contributed to the company's operating losses, nor have they investigated through cost analysis whether there were any other causes explaining the main sources of the company's losses.

(92) In response to the argument adduced in the decision of 19 August 2002 that the ship acquisition policy may have had an impact on SNCM's accounts and have led to difficulties <sup>(32)</sup>, the French State transmitted the following observations to the Commission in its letter of 8 October 2002.

(93) According to the French authorities, by taking these steps to renew its fleet SNCM was only acting in line with a general trend towards modernisation of the Mediterranean fleet, thus ensuring that it could continue to operate its links on these markets without excessive risk of being marginalised. The French authorities emphasise that the fleets of other major Mediterranean shipping companies have improved in quality: Corsica Ferries, Grimaldi, Tirrenia, Moby Lines, Tramed and CTN in particular have acquired and continue to acquire medium- or high-capacity fast ships and car ferries that are increasingly well equipped.

(94) The French authorities argue that by renewing several of its ships SNCM has merely pursued the clear strategic objective required to offer a high-quality service from Marseilles in accordance with the distinctive features of this link and with the expectations of Corsica, the authority allocating the public service and a high-speed shuttle service from Nice.

(95) According to the French authorities, the commercial results obtained by these ships have been convincing. At Nice, SNCM's high-speed ships have, together with the 'Corsica Express' of Corsica Ferries, significantly

<sup>(31)</sup> This plan is referred to as the 'industrial project' by the company's management. It was adopted on 17 December 2001 by the SNCM management board.

<sup>(32)</sup> From the decision of 19 August 2002: the Commission's doubts are strengthened by the SNCM's ambitious programme for the purchase of ships to renew its fleet while the group's operating results remained relatively weak during the period 1997-2001.

increased traffic on the Nice-Corsica link: from 304 000 passengers in 1995 to 780 000 — of whom 550 000 on high-speed ships — in 2001. As for the *Napoléon Bonaparte*, its occupancy rates in summer bear out its excess, even after the arrival of Corsica Ferries at Toulon in 2002 <sup>(33)</sup>. The quality level offered by this ship has in fact enabled SNCM to consolidate and indeed improve its passenger revenue in this segment of an extremely competitive market marked by a downward trend in prices.

- (96) According to the French authorities, it was therefore the 'increase in competition and concomitant fleet renewal' that brought SNCM into financial difficulties, without the company having any alternative options.

### 2.3.2. Reduction of capacity

- (97) In its restructuring plan, SNCM makes provision for laying up and selling four of its vessels in 2002:

— the *Napoléon* <sup>(34)</sup>,

— the *Liberté*,

— the *Monte Rotondo*,

— the high-speed ship *Asco*.

- (98) All these ships have now been sold, except for the *Asco*. To these disposals should be added the disposal, currently in progress, of the *Southern Trader*, a ship leased by SMIP, one of SNCM's subsidiaries, under a time charter.

- (99) The expected proceeds from these disposals were EUR 40 million, representing a cash injection (net proceeds of disposal) of EUR 21 million, taking account of residual refunds. The *Monte Rotondo* and *Napoléon* were disposed of in 2002 for EUR [...] million net

proceeds and EUR [...] million appreciation. The *Liberté* and *Southern Trader* <sup>(35)</sup> have been or will be disposed of in 2003 for net proceeds and appreciation of EUR [...] million. The total net proceeds of the disposal of these four vessels was EUR 1,2 million in excess of the sum expected. The high-speed ship *Asco*, expected to yield EUR [...] million in net proceeds and EUR [...] million appreciation has not yet been disposed of.

- (100) These disposals have been partly offset by the entry into service in June 2002 of the car ferry *Danielle Casanova*, with lease financing, the passenger cargo vessel *Paglia Orba*, converted for its new duties in 2002 and delivered in 2003, and the passenger cargo vessel *Pascal Paoli*, ordered in January 2001, likewise lease-financed and delivered in May 2003.

- (101) At the same time, the company had in its restructuring plan intended to dispose of the movable assets present in its subsidiaries (Marseilles offices). These were disposed of for EUR 12 million in 2003, with EUR 5,1 million appreciation.

### 2.3.3. Reorganisation of services

- (102) The reduction, with effect from 2002, of the public service activity and the increase in competition have led SNCM to substantially limit the services it supplies.

- (103) The restructuring plan provides for a reduction in the number of crossings from 4 138 in 2001 (3 835 by SNCM and 303 by Corsica Marittima) to 3 410 in 2003, i.e. an overall decrease of 18 %, with the following changes to its services:

— adaptation of services operated between Marseilles and Corsica to the requirements of the new specifications laid down in the public service contract,

— withdrawal of the Toulon-Corsica <sup>(36)</sup> link, which can still be run with occasional crossings depending on the availability of the *Napoléon Bonaparte* and the *Danielle Casanova* during the transition period to deal with delays on rotations between Marseilles and Corsica,

<sup>(33)</sup> For instance, the following passenger and car occupancy rates (in percentages) were recorded in 2002:

| (in %)            |            |      |
|-------------------|------------|------|
| Weekend           | Passengers | Cars |
| From 28.6 to 30.6 | 78,7       | 72,2 |
| From 26.7 to 28.7 | 84,6       | 82,0 |
| From 2.8 to 4.8   | 102,8      | 96,7 |
| From 30.8 to 2.9  | 100,1      | 94,8 |

<sup>(34)</sup> Not to be confused with the *Napoléon Bonaparte* which is another vessel of the SNCM fleet.

<sup>(35)</sup> The *Southern Trader* is currently subject to an offer to sell.

<sup>(36)</sup> There were reportedly 83 crossings in 2002 compared with 187 in 2001.

- reduction of services between Nice and Corsica <sup>(37)</sup>,
  - closure of the Livorno-Bastia line with dedicated equipment <sup>(38)</sup>,
  - expansion of services to Algeria and Tunisia with the *Méditerranée*, the *Ile de Beauté* and the *Corse*,
  - suspension of services between Genoa and Tunis.
- (104) Overall, as shown in table 3, the restructuring plan seeks to reduce the number of crossings by 18 % and places by 28 % through:
- 20 % and 37 % reductions, respectively, on services to Corsica,
  - 23 % and 43 % increases, respectively, on services to the Maghreb.

TABLE 3

## Trend in SNCM services

|                    | Number of crossings |        | Places available |           | Linear metres available |           |
|--------------------|---------------------|--------|------------------|-----------|-------------------------|-----------|
|                    | 2001                | > 2003 | 2001             | > 2003    | 2001                    | > 2003    |
| Marseilles-Corsica | 1 881               | [...]  | 1 723 050        | [...]     | 1 469 000               | [...]     |
| Toulon-Corsica     | 187                 | [...]  | 303 650          | [...]     | 0                       | [...]     |
| Gulf of Genoa      | 1 768               | [...]  | 1 708 700        | [...]     | 0                       | [...]     |
| Subtotal Europe    | 3 836               | 3 067  | 3 735 400        | 2 357 500 | 1 469 000               | 2 154 000 |
| Maghreb            | 302                 | 372    | 444 000          | 635 000   | 0                       | 0         |
| Total              | 4 138               | 3 439  | 4 179 400        | 2 992 500 | 1 469 000               | 2 154 000 |

- (105) The redeployment of services to the Maghreb will generate EUR 9 million additional costs for the company, of which EUR 6 million for technical adaptations on the *Danielle Casanova* and the *Île de Beauté* and EUR 3 million for the costs of promoting the new services.
- reduction in size of the fleet (cutting [...] full-time jobs),
  - increase in crew productivity (cutting [...] jobs),
  - effects of changing over to 35-hour week (increase by [...] jobs),
  - developing new 'tourist' activities (increase by [...] jobs),
  - reduction of onshore personnel through natural wastage or early retirement and mobility leave (reduction by [...] jobs).

## 2.3.4. Closure of subsidiaries

- (106) Under its restructuring plan, SNCM intended to close two of its subsidiaries in January 2002 which had become redundant following the reorganisation of its services: the Compagnie Maritime Toulonnaise, which operated overland services to Toulon, and the Corsica Marittima company, which operated links between Corsica and Italy. The limited range of remaining activities of these companies are run by SNCM itself.

## 2.3.5. Reduction of staff costs

- (107) The restructuring plan seeks to reduce staff from 2 430 to 2 130 in 2003 on the basis of the following measures:
- (108) Staff is reduced through natural wastage and early retirement on the basis of age criteria (early cessation of work), mobility leave and non-replacement of temporary contracts. However, for SNCM they entail an estimated cost of EUR 20,4 million.

<sup>(37)</sup> There were reportedly 1 157 crossings in 2002 compared with 1 345 in 2001.

<sup>(38)</sup> Reportedly there were only 54 crossings with 9 400 passengers in 2002 compared with 290 with 64 000 passengers in 2001 under Corsica Marittima's flag.

(109) The figures supplied by the French authorities show the following expected trend in productivity:

TABLE 4

**Expected trend in productivity of SNCM**

|                                                    | 2001                    | 2004        |
|----------------------------------------------------|-------------------------|-------------|
| Passengers Corsica                                 | 1 376 000               | [...] [...] |
| Passengers Maghreb (coefficient 3) <sup>(39)</sup> | 495 000 (165 000 × 3)   | [...] [...] |
| Freight (coefficient 0,5)                          | 408 000 (816 000 × 0,5) | [...] [...] |
| Total TU                                           | 2 279 000               | 2 353 000   |
| Staff FTP                                          | 2 430                   | 2 130       |
| Productivity (TU/FTP)                              | 938                     | 1 105       |
| Productivity increase                              |                         | + 17,8 %    |

(110) Accordingly, staff productivity appears to be up by 17,8 % while the company has to remedy the adverse effects of an initial drop in activity in 2002 and 2003 and consequently weaker coverage of the fixed costs generated.

(111) Following the decision of 19 August 2002, the French authorities provided, by letter of 10 February 2003, additional details on management of staff expenditure:

— there has been no general increase in onboard personnel since 1999, with average wages having risen only between 0,8 and 1 % a year since 2000, and the average wage of onboard personnel of SNCM, i.e. EUR 33 345 a year, is also within the average of earnings recorded for three other French shipping companies,

— for onshore personnel, average earnings have increased from 1,7 to 2 % a year since 2000, basically as a result of progression in seniority and technical qualifications <sup>(40)</sup>, as general increases have been limited to 0,06 %, 0,75 % and 0,77 % for 2000, 2001 and 2003 respectively.

<sup>(39)</sup> Traffic units (TU) have been determined on the basis of their per capita contribution in terms of net revenue. The passenger (including his vehicle) on the Corsica line serves as the reference (1) for these traffic units. The unit revenue for Maghreb is three times that for Corsica (twice as far and without financial compensation) and the relative weight of time units is increased automatically.

<sup>(40)</sup> These salary increases result from the automatic effect of staff seniority progression or additional qualifications acquired by members of staff for which automatic salary increases are granted in accordance with industrial or company agreements.

(112) Overall, staff costs have dropped from EUR 116,9 million in 2001 to EUR 114,4 million in 2002. Staff numbers have followed the same trend, dropping from 2 423 to 2 392 full-time equivalents. The measures referred to in recitals 107 and 108 should make it possible to reduce costs from EUR 61,8 million in 2001 to EUR [...] million on average from 2003 to 2006. Onshore staff costs would move from EUR 50,3 million in 2001 to EUR [...] million over the same period.

### 2.3.6. Reduction in purchase cost of intermediate consumption

(113) In their letter of 10 February 2003, the French authorities enhanced the restructuring plan by making firmer commitments with regard to managing intermediate consumption. In this framework, SNCM has undertaken upon specific action with the help of specialised consultants.

— The first action, called 'Buy better', is intended to manage purchase costs through better control of the purchase operations, training for the staff involved, redefining needs and renegotiating with suppliers. The gain expected for the whole of 2003 is EUR 3 million over a total of EUR 73 million in purchases in 2001. At the end of September 2002 the gain for the whole year was EUR 1,6 million.

— The second action, called 'Consume less', is intended to limit consumption, in particular on board ships, with other factors (purchase performance, activity) remaining constant. It includes ships' crews performing particular maintenance duties previously

outsourced and monitoring of seventeen expenditure headings by consumption reduction monitoring committees involving the staff concerned. The gain expected for the whole year is EUR 2 million. It has been noted that at the end of September 2002 a gain of EUR 340 000 was attained through EUR 158 000 investment (return on investment in less than six months).

- (114) These actions, combined with fleet reduction, have already led to a reduction of maintenance expenditure from EUR 26,9 to 23 million between 2001 and 2002.

### 2.3.7. *Fares policy*

- (115) In their letter of 10 February 2003, the French authorities gave a formal commitment<sup>(41)</sup>, in accordance with the Commission's expectations indicated in its decision of 19 August 2002, that SNCM would not initiate a fares war, in other terms that it would not become a price leader to Corsica. The French authorities have made the following comments on this commitment.

- (116) The French authorities state that 'SNCM makes this commitment without reservations as it considers that a fares war would not be in line with:

- its strategic positioning,
- its interest, as it would lead to a drop in revenue,
- its usual practice and its *savoir faire*'.

- (117) According to the French authorities, the nautical resources which SNCM has built up reflect a policy of offering high-quality services, moving upmarket. These choices, largely dictated by the requirements of successive specifications of maritime public services between Corsica and mainland France and by the expectations of customers from the island, are not compatible with a low-fares policy.

- (118) Consequently, SNCM will continue to implement a business policy mainly focused on socio-professional categories of an above-average level and operating prices in line with the quality of its services. It would be inconsistent for SNCM to compete on the low-fares

market, given the expenditure required by the high quality of its services. Customer surveys have confirmed the importance of fares as a criterion in the customer's intermodal and intramodal choices. According to these surveys, 90 % of Corsica Ferries' customers chose this company because of its fares. SNCM has always been aware of the relative importance of this criterion and endeavoured to highlight other criteria involved in choosing a shipping company such as comfort, ease of access and availability.

- (119) According to the French authorities, SNCM's attitude in recent years has always been to try to respond to Corsica Ferries' fares attacks in order to safeguard its market share. SNCM's fares for the 2002 season transmitted to the Commission show that the average fare charged by SNCM is higher than that of Corsica Ferries.

- (120) According to the French authorities, the chronological sequence of decisions shows clearly that SNCM's fares policy has been confined to responding to the services offered by Corsica Ferries: launch of Corsica Ferries price offer on 15 January 2002 followed by the announcement of SNCM's price offer on 5 February 2002.

- (121) With regard to freight charges, the levels are, apart from a number of details, those required by the public service delegation specifications and apply equally to SNCM and its partner CMN.

- (122) According to the French authorities, price leadership status can be judged in the light of average unit revenue. When SNCM responded in 2002 to Corsica Ferries' fares attack by introducing special fares determined in accordance with the abovementioned method, its average unit revenue per passenger to Marseilles and Toulon increased from EUR 73,69 in 2001 to EUR 74,26 in 2002.

- (123) There is frontal competition between SNCM and Corsica Ferries in Nice, covering very similar products with high-speed vessels supplemented by day or night ferries. According to the French authorities, SNCM had no other choice in 2002 than to approximate its fares and charges to its competitor's and highlight the specific attractive services it could offer.

### 2.3.8. *Determining the amount of recapitalisation*

- (124) The French authorities intend to inject EUR 76 million into SNCM by raising the capital to be subscribed by CGMF, a company in which the French State has a 100 % share and which itself has an 80 % share in SNCM. This cash injection is intended to fund the

<sup>(41)</sup> On this subject, see also the comments of the French authorities on the observations of Corsica Ferries, in section 4.1.

operational restructuring measures and reduce the excessively high level of debt which the company could not settle with its own resources, even if account is taken of future financial compensation provided for in the public service delegation contract.

- (125) The French authorities have presented three methods to calculate SNCM's cash requirement and have adopted the lowest figure determined through these three methods.

#### 2.3.8.1. Method based on costs borne by SNCM

- (126) This first method consists of aggregating the costs of all restructuring measures. It leads to a EUR 90,9 million financing requirement based on the following:

- accumulated debts from 1991 to 2001, totalling EUR 41,7 million <sup>(42)</sup>,
- a drop in resources through exceptional depreciation in the same period, totalling EUR 24 million <sup>(43)</sup>,
- appreciation of disposal generated during restructuring, namely EUR 21 million, deducted from the financing requirement,
- the cumulative effect of restructuring costs, totalling EUR 46,2 million, broken down as follows:
  - the social plan of the restructuring programme: EUR 20,4 million,
  - laying-up costs of vessels being sold off: EUR 1,8 million,
  - costs of redeploying activities towards the Maghreb: EUR 9 million,
  - depreciation of the high-speed vessel *Liamone*: EUR 15 million.

#### 2.3.8.2. Method based on capital required to finance the existing fleet

- (127) The second method consists of determining which would be the amount of capital required by the banks for the entire fleet, given that for financing of the purchase of a ship the banks in general require capital corresponding to 20 to 25 % of the ship's value. On the basis of the total sum of EUR 843 million representing the past cost of ships acquired for the fleet, the French authorities have calculated a capital requirement of between EUR 157 and 196 million. After deducting existing capital at the end of 2001, this method leads to a recapitalisation requirement of EUR 101 to 140 million.

#### 2.3.8.3. Method based on a comparison with the level of capitalisation of other, similar shipping companies

- (128) This last method consists of calculating the financing requirement on the basis of the average capital/debt ratio recorded in 2000 for five European shipping companies. Even though the balance sheets of these companies show substantial disparities, the average adopted by the French authorities is 79 %. The French authorities maintain that the financial model leads to an average of 77 % for the period 2002 to 2007, before dividend, with capital reaching EUR 169 million in 2007. The French authorities point out that it is in fact such a level of capital that should be attained through this EUR 76 million recapitalisation in 2002 and, of course, the success of the measures provided for in the restructuring plan.

- (129) In their letter of 3 July 2002, the French authorities added two new firms to the panel of shipping companies, as a result of which the average capital/debt ratio was 83 % instead of 79 %.

- (130) Since the figure of EUR 76 million is the lowest produced by the three methods, it was adopted by the French authorities in determining the amount of recapitalisation.

<sup>(42)</sup> Namely: – EUR 29 million (FRF 190 million) from 1991 to 1999, a figure validated by the Commission in its Decision 2002/149/EC of 30 October 2001 on State aid paid by France to the Société nationale maritime Corse-Méditerranée (OJ L 50, 21.2.2002, p. 66), – EUR 6,1 million for 2000 and – EUR 6,6 million, before restructuring expenses, for 2001.

<sup>(43)</sup> This item drops from EUR 86 to 62 million on the balance sheet for the period, reflecting the lengthening of the amortisation period from 12 to 20 years, the reduced use made of this resource and the use of leasing for the latest units delivered.

## 2.4. Results expected from the restructuring aid

- (131) The French authorities have examined not only the results expected from the restructuring plan according

to various scenarios but also the consequences which a reduction of public service obligations would have beyond 2007.

#### 2.4.1. *Expected results of the restructuring plan*

- (132) The French authorities have studied the likely trends in SNCM's financial position according to three different scenarios summed up in table 5: a best-case, worse-case and intermediate scenario corresponding to the restructuring plan adopted.

##### 2.4.1.1. Best-case scenario

- (133) For services to Corsica, this scenario assumes an improvement of the island's attraction through investment and communication policies. In this way, Corsica would remain a favourite tourist destination. The shipping component increases compared with air transport (longer stay of families with car) and French sea transport benefits from the frequency and variety of services on offer.

- (134) The result is very good price and traffic volume performance generating higher net revenue than expected. However, the increase on the Nice-Corsica link is limited by the reduction of capacity undertaken by SNCM.

- (135) For services to the Maghreb, this scenario envisages no major disruptions of the growth trend in Maghreb markets. The qualitative and quantitative improvement of supply combined with a more expanding market enables SNCM to expect higher net revenue than forecast in the restructuring plan, mainly during the high season. Here, too, the capacity on offer during peak periods limits possibilities for growth.

- (136) In its restructuring plan, SNCM envisages the sale of half of its capacities on offer. In this case, SNCM could market two-thirds of all possible links thanks to its growing reputation on the key markets for mini-cruises and business travel and the beneficial effects of the entry into service of a new ship and a sizeable capacity

enabling SNCM to reach targets previously beyond its reach. The best-case scenario would improve:

- the current result which on average rises from EUR [...] million to EUR [...] million,
- the company's capital at the end of the period in question, rising from EUR [...] million to EUR [...] million.

##### 2.4.1.2. Worst-case scenario

- (137) This scenario assumes a downturn in the economic and social situation in France. Trade with Corsica and the Maghreb stagnates. Traffic is lower than expected.

- (138) In such a scenario, SNCM could market only one-third of all possible links. On top of this negative trend in traffic, there would from 2003 be a 9 % increase in the price of fuel. This scenario would lead to a deterioration:

- in the current results, on average dropping from EUR [...] million to EUR [...] million,
- in the company's capital at the end of the financial year, dropping from EUR [...] million to EUR [...] million. In this scenario, SNCM replaces the *Ile de Beauté* by a second-hand vessel and does not replace the *Corse*, lengthening the period in which it remains in service.

##### 2.4.1.3. Examination of the different scenarios

- (139) The best-case and worst-case scenarios may appear very similar, but the following points should be stressed:

- on the one hand, the assumptions regarding traffic make it possible to meet the objectives of the restructuring plan without altering either the programme of services or the fleet used. A greater decrease or increase in traffic would exceed these limits and necessitate other combinations of services and consequently a different composition of the fleet. If this led, in particular, to economic

disruption of the public service delegation, the safeguard clause laid down in the public service delegation contract might be activated, leading to a redefinition of the corresponding service;

- on the other hand, services to Corsica and to the Maghreb follow different criteria. Their trends may be convergent or divergent. For instance, the Corsican market may depend on the situation on the island. Serious disturbances there may immediately impact on the growth of trade with Algeria. The Tunisian market seems to be more stable but competition there is fierce. Overall, it is not very likely that all these markets will show a trend in the same direction. Accordingly, the assumptions on the whole seem to present a situation that is quite representative of possible developments.

- (140) The profit budgets of the best- and worst-case scenarios have been drawn up with supply remaining constant in order to highlight clearly the effects of economic trends.

Of course, staying within the general framework adopted, i.e. 11 ships and maintenance of the links operated, the company will fine-tune its supply to demand in order to retain its balance. This could be the case in particular in the worst-case scenario on the Nice/Corsica and Maghreb lines. A number of possible measures are given below by way of example:

- increased use in June and September of the small high-speed vessel replacing the *Liamone*: improvement of result by EUR [...] million,
- reduction in the number of vessels operated during particular weeks in winter: improvement of result by EUR [...] million,
- on crossings to Algeria, reduction of the number of trips during the low season (one every two weeks): improvement of result by EUR [...] million.

TABLE 5

**Hypotheses in the scenarios**

|                                                           |                    | Worst-case scenario | Scenario of restructuring plan | Best-case scenario |
|-----------------------------------------------------------|--------------------|---------------------|--------------------------------|--------------------|
| Shipping market from France                               | Corsica            | [...]               | [...]                          | [...]              |
|                                                           | Algeria            | [...]               | [...]                          | [...]              |
|                                                           | Tunisia            | [...]               | [...]                          | [...]              |
| SNCM passenger traffic                                    | Marseilles/Corsica | [...]               | [...]                          | [...]              |
|                                                           | Toulon/Corsica     | [...]               | [...]                          | [...]              |
|                                                           | Gulf of Genoa      | [...]               | [...]                          | [...]              |
|                                                           | Maghreb            | [...]               | [...]                          | [...]              |
| Average net revenue of SNCM in 2003/2006 (in million EUR) | Marseilles/Corsica | [...]               | [...]                          | [...]              |
|                                                           | Toulon/Corsica     | [...]               | [...]                          | [...]              |
|                                                           | Gulf of Genoa      | [...]               | [...]                          | [...]              |
|                                                           | Algeria            | [...]               | [...]                          | [...]              |
|                                                           | Tunisia            | [...]               | [...]                          | [...]              |
|                                                           | Tourism            | [...]               | [...]                          | [...]              |

- (141) The different scenarios lead to the following simulations which the French authorities have transmitted to the Commission. These simulations show that SNCM should become profitable again in each of the three scenarios.

TABLE 6

**Trend of the main financial indicators of SNCM**

|                          |                                                      | Worst-case scenario | Scenario of restructuring plan | Best-case scenario |
|--------------------------|------------------------------------------------------|---------------------|--------------------------------|--------------------|
| Average 2003/2006        | Passengers                                           | [...]               | [...]                          | [...]              |
|                          | Cars                                                 | [...]               | [...]                          | [...]              |
|                          | Freight (ml)                                         | [...]               | [...]                          | [...]              |
|                          | Gross operating margin (in thousand EUR)             | [...]               | [...]                          | [...]              |
|                          | Financial compensation (in thousand EUR)             | [...]               | [...]                          | [...]              |
|                          | Current result (in thousand EUR)                     | [...]               | [...]                          | [...]              |
| 2007<br>(in million EUR) | Company capital                                      | [...]               | [...]                          | [...]              |
|                          | Overall debt                                         | [...]               | [...]                          | [...]              |
|                          | Capital <sup>(a)</sup> /(cash loans + leasing) ratio | [...]               | [...]                          | [...]              |

<sup>(a)</sup> This ratio takes account of lease purchasing of particular vessels.

#### 2.4.1.4. Expected trend in SNCM's financial situation in the scenario adopted

- (142) In their restructuring plan, the French authorities have included a more detailed financial model for the period 2002 to 2007 based on the intermediate scenario adopted, with the following relatively conservative assumptions: forecast growth of gross internal product 1,5 %, borrowing rate 5,5 %, rate of investment income 4,5 % and rate of short-term debts 5 %. This model, presented in table 7, presents forecasts for the profit and loss accounts and balance sheets for the next six years between 2002 and 2007. It shows a return to profitability from 2003.

TABLE 7

**Financial model for 2002 to 2007**

(in million EUR)

|                                          | 2000<br>Realised | 2001<br>Realised | 2002<br>Plan | 2002<br>Realised | 2003<br>Plan | 2004<br>Plan | 2005<br>Plan | 2006<br>Plan | 2007<br>Plan |
|------------------------------------------|------------------|------------------|--------------|------------------|--------------|--------------|--------------|--------------|--------------|
| Turnover                                 | 204,9            | 204,1            | 178          | 205,8            | [...]        | [...]        | [...]        | [...]        | [...]        |
| Operating subsidies                      | 85,4             | 86,7             | 74,5         | 77,7             | [...]        | [...]        | [...]        | [...]        | [...]        |
| Current result                           | -14,7            | -5,1             | 1,2          | -5,8             | [...]        | [...]        | [...]        | [...]        | [...]        |
| Net result                               | -6,2             | -40,4            | 23           | 4,2              | [...]        | [...]        | [...]        | [...]        | [...]        |
| Capital                                  | 67,5             | 29,7             | 119          | 33,8             | [...]        | [...]        | [...]        | [...]        | [...]        |
| Net financial debt<br>(excl. leasing)    | 135,8            | 134,5            | 67,7         | 144,8            | [...]        | [...]        | [...]        | [...]        | [...]        |
| Financial ratios                         |                  |                  |              |                  |              |              |              |              |              |
| Current results/<br>turnover + subsidies | -5 %             | -2 %             | 0 %          | -2 %             | [...]        | [...]        | [...]        | [...]        | [...]        |
| Capital/debt on balance<br>sheet         | 50 %             | 22 %             | 176 %        | 23 %             | [...]        | [...]        | [...]        | [...]        | [...]        |

Figures for 2000 and 2001 taken from SNCM's annual report 2001.

2002 results taken from provisional accounts transmitted by SNCM on 15 May 2003.

- (143) In this scenario, turnover relating to activities to the Maghreb would rise from about EUR [...] million in 2001 to EUR [...] million from 2003 <sup>(44)</sup>. The current result of this network should be maintained at a level of EUR [...] to [...] million over the period 2002-2005.
- (144) The turnover for the Nice-Corsica network, where competition is strongest, is around EUR [...] million, to which must be added about EUR 5 million in public compensation from social assistance. Because of its high quality level and consequently the proportionately high purchase price of the main vessel used on this service, the high-speed vessel *Liamone*, proceeds from operating this link would not cover all the amortisation costs of the vessel (included in lease paid) and would produce a current result of EUR [...] to [...] million. The exceptional EUR 14,8 million depreciation on the vessel, included in the restructuring plan and in the 2001 annual accounts, will adjust its use value for the company and offset the future lease annuities by EUR 1,8 million, more or less balancing the Nice-Corsica services <sup>(45)</sup>. The company has indicated that the alternative solution to disposing of the *Liamone* would not, on closer examination, be favourable because of the market situation and losses associated with early termination of the lease.
- (145) For the company's traditional activity on the line between Marseilles (and, for the record, Toulon) and Corsica, expected turnover was EUR 84 million in 2002 and should vary between EUR [...] and [...] million during the following years. It should be noted that the overall turnover of services to Corsica is expected to drop by EUR 9 million, i.e. 8 %, in 2002 compared with 2001. The 2002 accounts confirm this expected drop (EUR 10 million less in passenger revenue). As a result, SNCM's market share diminishes by 4 percentage points (from 25,9 % to 21,8 %) from 2001 to 2002 to the benefit of its competitors (5,6 point increase to 16,8 %).
- (146) For services from Marseilles, which is now the only one covered by the public service delegation, the expected subsidy should have been limited to about EUR 69 million in 2002, dropping to EUR 61-63 million during the period covered by the plan, representing a notable decrease compared with the EUR 87 million obtained in 2001. However, the current result of the network
- dedicated to public service, which was negative in 2001 and 2002, should rise to EUR [...] million in 2003, then to about EUR [...] million in 2004 to 2005 and finally EUR [...] million in 2006.
- (147) In 2002, the current result attained by the company would reportedly be – EUR 5,8 million, in line with that of 2001 but lower than the figure indicated in the restructuring plan. Apart from variations in some headings of the profit and loss account, this current result could be explained from the absence of a refund of the maritime professional tax (EUR 2,4 million), for which there will be an abatement at source in 2003, and the partial refund of employers' Assedic contributions (unemployment insurance contributions) and family allowances, i.e. a EUR 3,5 million shortfall.
- (148) According to the French authorities, the EUR 76 million cash injection and the turnaround to profitability, expected from 2003, should make it possible to raise the company's capital from its current level of about EUR 30 million to EUR 120 million in the short term (2003) and then to EUR [...] million at the end of the period covered by the plan (2006 to 2007). This will lead to a reduction of indebtedness from its current level (EUR 145 million) to levels of EUR [...] million from 2003 to 2005. In the last years of the plan, an increase in indebtedness is forecast by the company because of the renewal (fully owned) of one or two vessels.

#### 2.4.2. Scenarios beyond the restructuring plan

- (149) It is important to know what will be the company's competitive position in 2006 at the end of the current public service delegation contract and how viable the company will be. The fact is, however, that it is difficult today to foresee the content of the future public service delegation contract after 2006.
- (150) For SNCM, compared with the current situation in which it operates four cargo passenger ships and two car ferries, a situation in which, for instance, a [...] would no longer be needed would generate revenue losses of EUR [...] million (and EUR [...] million in subsidy). Reducing labour costs, other operating costs and capital costs (amortisations and financial charges) would make it possible to limit the drop in results to about EUR [...] million, i.e. [...] of the profit planned

<sup>(44)</sup> This trend was confirmed from 2002 with an increase of over EUR 9 million in passenger revenue in this area. In spite of the stability of fares, unit revenue improved, showing a better spread of the different fares.

<sup>(45)</sup> Note: rentals, included in the current result, will remain at their previous level but there will be an annual carryover of amortisation of EUR 1,8 million at the level of the exceptional result in order to obtain this effect in net result.

for the end of the period. From a financial viewpoint, the costs of restructuring, which are estimated at EUR 20 million for 260 employees, would be more than compensated by the sale of the vessel concerned, e.g. the [...] whose disposal would generate EUR [...] million in cash and EUR [...] million depreciation before tax.

(151) The French authorities have also devised a more extreme scenario with only [...] cargo passenger ships, i.e. [...] of resources currently used on the Marseilles-Corsica line, which would continue to be covered by the public service delegation contract, plus one car ferry operated on a competitive basis with social assistance<sup>(46)</sup>. In this case, expected revenue losses would be EUR [...] million (and EUR [...] million in subsidy), i.e. [...] % of total revenue for the Marseilles-Corsica service. The reduction in labour costs, other operating costs and capital costs (amortisations and financial charges), however, would be insufficient to guarantee a positive result: with about EUR [...] million less than the plan, SNCM would suffer a limited loss of about EUR [...] million. Restructuring costs, estimated at EUR 34 million for 450 employees, however, would be compensated for by the sale of two vessels, e.g. the [...] and the [...] whose disposal would generate EUR [...] million in cash and EUR [...] million depreciation before tax.

(152) The French authorities did not want to study more austere scenarios, considering that any scenario leading to a reduction of more than 50 % of SNCM's activity would call into question the object of the company. However, the French authorities have stressed that this plan should make it possible to prevent an extreme situation by swiftly making the company competitive and thus enable it to acquire at least a part of a future public service obligation contract.

## 2.5. Other aid for SNCM

(153) SNCM has in the past received the following individual aid:

- operating grants to compensate for its public service obligations amounting to EUR 787 million for the period 1991 to 2001. This aid was approved by the Commission on 30 October 2001 for this period<sup>(47)</sup>,

- rescue aid in the form of a refundable advance of EUR 22,5 million which was approved by the Commission on 17 July 2002<sup>(48)</sup> and has in the meantime been fully refunded by SNCM.

(154) SNCM currently receives financial compensation for performing its public service obligation on lines between Marseilles and Corsica for the period 2002 to 2006 under its contract<sup>(49)</sup>, with a total sum which may reach up to EUR 321,5 million for the entire period.

(155) It has in the past received, and should in the future receive, funds under the following aid schemes which are open to all shipping companies:

- indirect aid under the individual social assistance scheme for shipping services to Corsica intended for particular categories of passengers, a scheme which was approved by the Commission in 2002<sup>(50)</sup>;
- the business tax refund scheme for shipping companies<sup>(51)</sup>.

## 2.6. Grounds for initiating the procedure

### 2.6.1. Doubts on the relevance of the restructuring plan

(156) In its decision of 19 August 2002, the Commission expressed doubts on the restructuring plan as it provided no analysis of the causes of the company's losses. In particular, the Commission raised questions concerning the following points:

- the connection between the company's losses and its public service obligation,

<sup>(48)</sup> Commission decision of 17 July 2002, case NN 27/2002, ex-N 849/2001, rescue aid for SNCM (not yet published in the Official Journal).

<sup>(49)</sup> On this subject, see section 2.1.2. See also Decision 2002/149/EC.

<sup>(50)</sup> Commission decision of 2 July 2002, case N 781/2001, on the scheme for individual social assistance for shipping services to Corsica.

<sup>(51)</sup> Commission decision of 7 December 2000, case N 593/2000, on the refund of the maritime component of business tax. This scheme has been amended twice.

<sup>(46)</sup> See recital 155.

<sup>(47)</sup> Abovementioned Decision 2002/149/EC.

- the impact of SNCM's policy of ship purchases on its profit and loss account,
- the measures planned to enhance the company's productivity.

72,8 million cashflow. Moreover, Corsica Ferries stresses that of the EUR 40,6 million losses recorded by SNCM in 2001, EUR 15 million relate to the depreciation of the high-speed vessel *Liamone*.

(157) The Commission also pointed to certain gaps in the restructuring plan:

- the absence of specific measures to reduce the amount of intermediate consumption,
- the absence of any indications concerning SNCM's future fares policy.

(161) Second, Corsica Ferries questions SNCM's capacity to become profitable on its non-subsidised lines. Moreover, Corsica Ferries notes that, contrary to what is announced in the restructuring plan<sup>(53)</sup>, services to Livorno are still operational. About the services from Nice and Toulon, Corsica Ferries expresses doubts on SNCM's capacity to make these lines profitable. With regard to services to the Maghreb, it notes that SNCM will have to face fierce competition from CTN and ENTV. On the subject of cost reduction, Corsica Ferries regrets that it does not have access to particular components of the restructuring plan. However, it asks the Commission to see that the questions which the latter raised in its decision of 19 August 2002 receive convincing answers from the French authorities.

#### 2.6.2. *Doubt about the relevance of the calculation of the amount of aid*

(158) The Commission also wondered not only about the relevance of the calculation method adopted by the French authorities to determine the amount of recapitalisation but also about particular hypotheses adopted for financial simulations. The method adopted by the French authorities to justify the amount of EUR 76 million for capitalisation is based on a financial simulation which does not clearly bring out all the underlying hypotheses and does not show how the capital/long-term indebtedness ratio leads on average to the reference ratio of 79 %.

(162) Third, Corsica Ferries stresses the need to ensure that the planned aid does not lead to undue distortion of competition. In its opinion, the aid should not serve to facilitate the struggle against competitors by allowing a more aggressive supply of services. Corsica Ferries considers the 79 % capital/debt ratio adopted by the French authorities<sup>(54)</sup> as exaggerated in relation to the ratios which it recorded itself on a panel of 10 shipping companies. These ratios vary from 23,69 % (for Moby Lines) via 49,7 % for CMN to 55,09 % (for Grimaldi).

### 3. COMMENTS FROM INTERESTED PARTIES

#### 3.1. Comments from Corsica Ferries

##### 3.1.1. *First letter with comments*

(159) By letter of 8 January 2003<sup>(52)</sup>, the law firm Scapel, Scapel-Grail and Bonnaud sent their observations to its client, Corsica Ferries.

(163) According to Corsica Ferries, the calculation leading to the amount of EUR 76 million is purely fictitious. It argues that EUR 76 million corresponds to the FRF 500 million which the company would lose from its territorial continuity grant for the new period 2002 to 2006.

(160) First, Corsica Ferries disputes that SNCM is a firm in difficulty within the meaning of the guidelines. It points out that the public service delegation contract allocates a public grant to the company of EUR 64,3 million on average a year, making a total of EUR 321,5 million over five years. It argues that Article 5 of the public service delegation contract guarantees for SNCM a EUR

(164) According to Corsica Ferries, SNCM could itself have had such an amount at its disposal by using its latent appreciation on the fleet or by selling off some of its shares.

(165) With regard to SNCM shares, Corsica Ferries notes that some of the subsidiaries are of no use to the shipping company's activities, mentioning the following specifically:

<sup>(52)</sup> Registered by the Commission on 15 January 2003 as DG TREN A/10962.

<sup>(53)</sup> The decision to initiate the procedure indicated that one of the measures laid down in the restructuring plan was 'the closure of the Bastia-Livorno line with dedicated equipment'.

<sup>(54)</sup> See recital 128 of this Decision.

— the 50 % share in the Sud-Cargos shipping company,

— the 13 % share in Amadeus, a firm specialised in air transport booking systems,

— the 59,25 % share in CMN,

— CGTH's real estate holdings.

(166) Corsica Ferries concludes that the plan to grant aid circumvents the cabotage regulation and renders the invitation to tender for Marseilles to Corsica services meaningless. It suggests that restructuring aid should not be granted until 2007 and only if SNCM loses the next tender in 2006, which would be the only scenario that would genuinely put the public shipping company in difficulty.

(167) A considerable number of documents (copies) <sup>(55)</sup> were enclosed with the letter of 8 January 2003.

<sup>(55)</sup> An article in the *Le Marin* newspaper of 7 June 2002 entitled 'SNCM: a record deficit in 2001' (item 2), timetables of the passenger cargo ship at Bastia for 2003 to 2006 (item 3), a list of SNCM subsidiaries compiled by Cofacerating (item 4), an article from the *La Tribune* daily of 21 December 2001 entitled 'State grants EUR 76 million to SNCM' (item 5), an article from the *La Provence* newspaper of 7 February 2002 entitled 'Faced with competition in its waters, SNCM goes international' (item 6), report of activities of the port of Nice of November 2002 (item 7), statistics on the 2002 season from the Corsica regional transport monitoring authority (item 8), an article entitled 'SNCM obliged to cut all fares' (item 9), an undated article entitled 'SNCM discusses its industrial plan' (item 10), a Fazi report of 16 September 2002 on SNCM's restructuring plan, an article from the *Le Marin* newspaper of 7 June 2002 entitled 'SNCM: record deficit in 2001' (item 11), an article from the *la Provence* daily of 7 December 2002 entitled 'SNCM agrees to talk on Corsica [with STC]' (item 12), an article from the *L'antenne* newspaper of 11 December 2002 entitled 'Details of SNCM/STC agreement' (item 13), an undated article from an unidentified newspaper entitled 'SNCM to receive EUR 76,2 million in exceptional State aid' (item 14), a story from *AOL Mail* of 21 December 2001 entitled 'SNCM social plan without layoffs' (item 15), a summary table showing the capital/debt ratio for 10 shipping companies (item 16), report with final comments from the *Chambre Régionale des Comptes* of May 2002 on the management of the *Office des Transports de Corse* (item 17), an article from the *La Provence* daily of Saturday 4 December 2002 entitled 'Head of Corsica Ferries attacks SNCM' (item 18), an article from the *La Provence* daily of Saturday 4 January 2003 entitled 'SNCM chairman goes on the attack on Corsica Ferries' (item 19).

### 3.1.2. *Second series of comments*

(168) By electronic mail of 16 January 2003, the Director-General of Corsica Ferries sent the Commission a copy of a press release from Agence France Presse and a press file concerning the press conference held by the SNCM chairman on 14 January 2003 on SNCM's new scale of fares for 2003.

### 3.1.3. *Meeting of Corsica Ferries and the Commission*

(169) At a meeting held on 4 February 2003 between the Commission and representatives of Corsica Ferries convened at the latter's request, Corsica Ferries transmitted transparencies showing graphs of SNCM's potential appreciations. By letter of 21 February 2003, these documents were sent to the French authorities for comment.

(170) The representatives of Corsica Ferries stated orally that the market of sailings between mainland France and Corsica was doing well, with a 17 % increase between 2000 and 2001 and 13 % increase between 2001 and 2002. They indicated that their company did not attack Decision 2002/149/EC on compensation for public service obligations, stressing that there was no need to go back on the past but that it would give close attention to the conditions which the Commission will impose in the present case.

(171) The representatives of Corsica Ferries welcomed the Commission's efforts to liberalise the cabotage market. According to them, the cabotage regulation has made it possible to put an end to agreements which benefitted the traditional operators. It has cleared the way for competition which has led the traditional operator to raise substantially the quality of its services to Corsica. According to the representatives, the inhabitants of Corsica had suffered for too long from poor quality service onboard SNCM's ships when they were the only firm operating crossings to Corsica.

(172) The representatives of Corsica Ferries expressed their concern that SNCM would use the aid to reduce its fares between Toulon/Nice and Corsica. They stated orally that while on paper SNCM's fares and those of Corsica Ferries were more or less the same, SNCM had nevertheless greatly increased the number of days of the low-fares period.

(173) At this meeting, the representatives of Corsica Ferries highlighted the three main structural causes why, in their opinion, SNCM had to bear higher costs than Corsica Ferries:

- purchase of vessels from a shipyard with price levels above market prices,
- more costly crews because they are better paid than required by French industrial agreements,
- excessive numbers of onshore personnel: at equal traffic levels, Corsica Ferries allegedly has three times fewer employees onshore than SNCM; it argues that many of SNCM's onshore activities should be outsourced in the same way as Corsica Ferries does.

(174) At the meeting, the representatives of Corsica Ferries further criticised the restructuring plan on three points:

- the plan does not envisage any real reduction in staff numbers: staff cuts are too cautious as most of the 300 posts cut correspond to natural wastage,
- SNCM shareholdings have not been included in the restructuring endeavour: large numbers of shares in various companies are dormant in SNCM's accounts, with a market value well above the book value recorded on SNCM's balance sheet,

- appreciations on vessels have not been taken into account. Because of speeded-up amortisation of vessels, the book value of vessels in the assets of shipping companies is often lower than their market value, thus distorting the picture which the balance sheet may present. Corsica Ferries evaluates SNCM's latent appreciations on old ships at EUR 148 million. The real value of the vessels has allegedly enabled SNCM to obtain mortgage loans or lease-back contracts for sums exceeding the EUR 76 million restructuring aid.

### 3.2. Comments from the Stef-TFE chairman

(175) By letter of 7 January 2003 <sup>(56)</sup>, the chairman of the Stef-TFE group, a company specialised in cooling logistics, transmitted his comments on SNCM's restructuring plan to the Commission. He emphasises that his group was the main shareholder in CMN as it controlled the company's board. He explains that the capital links between SNCM and CMN result from a redistribution of CGMF's shares in 1992 <sup>(57)</sup>. According to Stef-TFE, SNCM's shares in CMN should be analysed as purely financial assets.

(176) Moreover, the letter with comments stresses that the two companies, CMN and SNCM, are independent and in competition with each other on the links other than those from Marseilles, even though both are co-contractors under the public service delegation contract. According to Stef-TFE, co-contracting has been necessary because of the structure of the tender specifications which obliged the two companies to submit a joint bid as neither of them could meet all the requirements on their own.

(177) The letter indicates that the Stef-TFE group would undertake 'to buy back all or part, and preferably the whole, of SNCM's shares in CMN', whose value it estimates at EUR 15 to 17 million, if the Commission were to take the view, under conditions it could impose in its final decision, that 'such a transfer is necessary to ensure that the restructuring plan is properly balanced'.

(178) An overview of the past development of CMN's shareholding and the Stef-TFE group's annual report for 2001 are appended to the letter.

### 3.3. Comments from representatives of local authorities

(179) By letter of 18 December 2002 <sup>(58)</sup>, the mayor of the City of Marseilles stressed the economic importance of

<sup>(56)</sup> Registered by the Commission on 8 January 2003 as DG TREN A/10304.

<sup>(57)</sup> On this subject, see section 2.1.1.1.

<sup>(58)</sup> Registered by the Commission on 3 January 2003 as DG TREN A/10021.

SNCM for the regional economy, explaining that each year the company injects EUR 160 million into the economy and that it employs 1 800 workers in the Provence-Alpes-Côte d'Azur region.

- (180) By letter of 9 January 2003 <sup>(59)</sup>, the chairman of the general council of Bouches-du-Rhône emphasised the economic importance which the SNCM has for the regional economy, expressing the wish that the Commission would approve the planned aid and thus allow SNCM to successfully complete its restructuring. Also on 9 January 2003, a general councillor of Bouches-du-Rhône was received by the Commission at his request. At this meeting, he spoke on behalf of his authority and its chairman. He highlighted SNCM's economic weight in the economy of Marseilles. He argued that only SNCM was able to run reliable services to Corsica. He acknowledged that SNCM had perhaps not been properly managed in the past but that recently it had made considerable progress towards modernisation under the guidance of its chairman, even though he felt that further progress still had to be made. On behalf of the whole political staff of the Marseilles region, he expressed the wish that the Commission would give SNCM a last chance to adapt itself to a relatively new competitive framework. He also said that SNCM, like all French companies operating passenger transport services by sea, was weighed down by the existence of more favourable social and tax schemes in other Member States, in particular Italy <sup>(60)</sup> whose flag is flown by the vessels of Corsica Ferries, its main competitor.

- (181) By letter of 9 January 2003 <sup>(61)</sup>, the chairman of the Provence-Alpes-Côte d'Azur regional council emphasised that the procedure initiated by the Commission was designed to ascertain that the proposed restructuring plan would eventually guarantee the viability of a company which was in difficulty today. He recalled the measures provided for in the restructuring plan. He considered that the conditions for this plan to guarantee the viability of the company were met. According to this regional council, only SNCM is able to provide sufficient services to ensure territorial continuity with Corsica. Moreover, the chairman points out that SNCM's activity gives work to 2 000 people in the Provence-Alpes-Côte d'Azur region and that the continuation of this company is vital for the regional economy.

- (182) By letter of 9 January 2003 <sup>(62)</sup>, the chairman of the executive council of the Assembly of Corsica transmitted the proceedings of a debate in the Assembly of 18 December 2002. In this debate, the Assembly had delivered 'a favourable opinion' on the plan for the recapitalisation of SNCM.

### 3.4. Comments from the Corsica transport office

- (183) By letter of 10 January 2003 <sup>(63)</sup>, the Director-General of the Corsica transport office (OTC) emphasised, on behalf of its chairman, that the tender issued for the public service delegation contract had led to only one bid being submitted, namely that of the CMN and SNCM group. The OTC is, together with the territorial collectivity of Corsica, the awarding authority of the public service delegation contract.
- (184) First of all, the OTC notes that the disappearance of SNCM 'would immediately lead to a major reduction in services' as it is currently the only company capable of meeting the requirements of the contract with regard to passenger transport.
- (185) It is recalled in the letter that Corsica has long suffered from inadequate shipping services and that it was only in 1976, with the implementation of the principle of 'territorial continuity', that services were offered that were geared to actual needs. Wishing to maintain a reliable high-quality service, the territorial collectivity of Corsica has in its contract included financial mechanisms for compensation or correction linked with the efficiency and reliability of services.
- (186) Moreover, it is noted in the letter that the territorial collectivity of Corsica has taken account of the trend since 1996 in the supply of services from ports in mainland France to limit the public service obligations to services operated from Marseilles.
- (187) Finally, the letter highlights SNCM's importance for the economy of Corsica, emphasising that it is the shipping company established in Corsica 'which employs the largest number of Corsican residents (600 sailors and

<sup>(59)</sup> Registered by the Commission on 10 January 2003 as DG TREN A/10567.

<sup>(60)</sup> On this subject, see section 5.3.1.

<sup>(61)</sup> Registered by the Commission as DG TREN A/11872.

<sup>(62)</sup> Registered by the Commission on 16 January 2003 as TREN A/11084.

<sup>(63)</sup> Registered by the Commission on 16 January 2003 as TREN A/11085.

170 onshore personnel) and with most purchases in Corsica (according to the company's information between EUR 25 and 30 million annually). It adds that 'the Commission's rejection of the restructuring plan proposed by the French state would therefore have very grave consequences for the island's socioeconomic equilibrium'.

— comments from the City of Marseilles (letter of 16 January 2003),

— comments from the OTC (letters of 16 January and 21 February 2003).

(188) In a second letter dated 10 February 2003 <sup>(64)</sup>, the OTC pointed to the two areas in which it expected progress from SNCM as the authority awarding the public service delegation contract. First, the OTC expected an improvement of the internal social dialogue, pointing to an 'abnormally high' number of industrial conflicts which have affected shipping services to Corsica, even though the situation has improved in recent years. In this regard, the OTC has laid down explicit provisions in the public service delegation contract for financial penalties to be imposed if the company fails to carry out particular services as a result of a cause coming under its responsibility. OTC's second concern is improving customer information during periods of disruption. The OTC adds, however, that with regard to passenger information SNCM does not show worse performance than transport companies in general, although SNCM ought to continue its efforts in this area.

#### 4.1. Comments from France on the comments from Corsica Ferries

(190) The French authorities have indicated that some of the data submitted by Corsica Ferries concerning SNCM's services were inaccurate.

##### 4.1.1. SNCM's fares policy

(191) By fax of 27 May 2003, the French authorities sent the Commission details to refute Corsica Ferries' allegations about SNCM's fares policy.

(192) SNCM's services on the Nice-Corsica link show the following trend:

TABLE 8

#### Trend of services supplied by SNCM between 2002 and 2003

(in %)

| SNCM services              | 2003/2002<br>over 12 months |
|----------------------------|-----------------------------|
| Crossings                  | – 3,7                       |
| Passenger places available | – 1,8                       |
| Vehicle places available   | + 0,3                       |

(189) The Commission has sent the following documents to the French authorities for their comments in accordance with Article 6(2) of Regulation (EC) No 659/1999:

— comments from Corsica Ferries (letters of 13 and 16 January 2003),

— comments from Stef-TFE (letter of 16 January 2003),

— comments from the Provence-Alpes-Côte d'Azur region (letter of 5 February 2003),

— comments from the territorial collectivity of Corsica (letter of 16 January 2003),

— comments from the general council of Bouches-du-Rhône (letter of 16 January 2003),

(193) The French authorities also point out that SNCM's fares on the Nice-Corsica link have risen slightly compared with 2002. As part of the company's business policy, the length of periods in which fares remain valid has been adjusted to reduce divergence with fares offered by Corsica Ferries. According to the French authorities, the trend in SNCM fares reported by Corsica Ferries (from – 14 % to – 24 %) bears no relation to reality and, contrary to what has been alleged, Corsica Ferries' fares are well below SNCM's.

<sup>(64)</sup> Registered by the Commission on 11 February 2003 as TREN A/12979.

- (194) According to the French authorities, Corsica Ferries tries to show that SNCM has initiated an aggressive fares policy by fixing fares below its own. The French authorities argue that the conclusions from this analysis, which are based on very incomplete data, are wrong.

#### 4.1.1.1. Concerning promotional fares

- (195) Corsica Ferries' basic promotional fare is called the 'Jackpot', which is a fixed price for two passengers and one vehicle <sup>(65)</sup>. The French authorities emphasise that this fare does not appear in the documents submitted

by Corsica Ferries even though it represents a significant part of its sales. This fare may cover one to four passengers travelling in the same vehicle. The supplement charged to them is that of the basic fare to which these passengers are entitled. If the additional passengers are children or young people, which is often the case in vehicles with four or five persons, the supplement paid on top of the basic fare is EUR 2,5 in each direction during the 'orange' period <sup>(66)</sup>. If these passengers fall in a 'social' category <sup>(67)</sup>, the supplement is EUR 5.

- (196) This fares configuration, which is quite different from SNCM's, produces the following disparities:

TABLE 9

#### Comparison between SNCM's and Corsica Ferries' scales of fares in 2003

(in EUR <sup>(a)</sup>)

|                 |                                                                  | Blue | Green | White | Red |
|-----------------|------------------------------------------------------------------|------|-------|-------|-----|
| SNCM            | 2 passengers <sup>(b)</sup> + 1 vehicle                          | 100  | 135   | 170   | 215 |
|                 | 3 passengers <sup>(b)</sup> + 1 vehicle                          | 130  | 165   | 190   | 270 |
|                 | 4 passengers <sup>(b)</sup> + 1 vehicle                          | 150  | 180   | 200   | 330 |
| Corsica Ferries | 2 passengers + 1 vehicle                                         | 99   | 135   | 145   | 199 |
|                 | 3 passengers + 1 vehicle<br>(of which 1 social) <sup>(c)</sup>   | 109  | 151   | 163   | 233 |
|                 | 4 passengers + 1 vehicle<br>(of which 2 social) <sup>(c)</sup>   | 119  | 167   | 181   | 267 |
|                 | 3 passengers + 1 vehicle<br>(of which 1 child) <sup>(d)</sup>    | 104  | 143   | 154   | 216 |
|                 | 4 passengers + 1 vehicle<br>(of which 2 children) <sup>(d)</sup> | 109  | 151   | 163   | 233 |

<sup>(a)</sup> Prices excluding tax.

<sup>(b)</sup> All passenger types.

<sup>(c)</sup> Senior citizens, young persons (aged 12 to 25), residents, students, parents with children.

<sup>(d)</sup> Children aged 4 to 12.

- (197) The promotional fares of SNCM and Corsica Ferries vary according to the yield management method. Because of the relative lack of transparency of fares charging by computerised booking systems, the French authorities cannot provide the Commission with the number of places benefiting from Corsica Ferries' special fares. Finally, the French authorities wish to draw attention to the fact that SNCM does not offer the 'Plein Soleil' formula on all its crossings whereas Corsica Ferries does offer this type of product on all its sailings.

#### 4.1.1.2. Concerning the scale of fares

- (198) The French authorities note that SNCM's scale of fares for Nice-Corsica is systematically higher than or equal to that of Corsica Ferries.
- (199) As regards the 'colours' of fares (see table 10), it is correct that SNCM has lengthened the blue period between April and September, partly in order to close

<sup>(65)</sup> SNCM's equivalent promotional offer is called 'Plein Soleil'.

<sup>(66)</sup> See table 10 for details of fares periods.

<sup>(67)</sup> See recital 155 of this Decision.

the fares gap separating SNCM from Corsica Ferries. However, it applies only to sailings in the less busy direction.

- (200) The French authorities have supplied the following table 10, comparing the distribution of voyages per fares level between the two companies on the Nice/Corsica service in April to September 2003.

TABLE 10

**Comparison between the lengths of fares periods between SNCM and Corsica Ferries in 2003**

(in %)

|                | SNCM  |      |         | Corsica Ferries <sup>(a)</sup> |      |         |
|----------------|-------|------|---------|--------------------------------|------|---------|
|                |       | 2003 | Overall |                                | 2003 | Overall |
| Very expensive | Red   | 18   | 100     | (Blue)                         | 10   | 100     |
| Expensive      | White | 19   | 84      | (Green)                        | 17   | 90      |
| Average        | Green | 33   | 65      | (Yellow)                       | 24   | 73      |
| Not expensive  | Blue  | 32   | 32      | (Orange)                       | 49   | 49      |

<sup>(a)</sup> The colours used by Corsica Ferries differ from those used by SNCM, but the principle remains the same.

- (201) The public service delegation contract includes a safeguard clause to attenuate the possible effects of an inaccurate estimate of the additional costs of carrying out public service tasks. According to the French authorities, the contract does not remove all risks for SNCM and CMN, as Corsica Ferries has alleged, for the following reasons:

- fluctuation of revenue within a range of 2 % above or below the basic data do not give rise to any adjustment of compensation,
- adjustment of compensation for fluctuations in revenue outside this range is only partial,
- overall, adjustments are restricted to 1,66 % of financial compensation for the whole term of the contract.

- (202) The French authorities note that the public service contract in no way guarantees operating profits; on the

contrary, the contract provides for a maximum level of capital yield. The sole objective of the public service grant is in fact to offset the costs resulting from executing the public service task. Consequently, the grant cannot be construed as a 'cashflow guarantee'.

- (203) In their comments, the French authorities question the well-foundedness of Corsica Ferries' statement that CMN is among Europe's most profitable shipping companies. They argue that there is no justification for this claim today: the average net result of this company during the five financial years 1997/2001 is EUR 1,27 million for an average turnover prior to compensation of EUR 36,4 million. Moreover, the company's performance is largely linked with the Marseilles/Corsica public service delegation contract in which, as co-contractor of the public service delegation, it complements SNCM's main contribution with three vessels.

#### 4.1.2. Services to Corsica from Nice and Toulon

- (204) The French authorities have drawn attention to the following:

- SNCM has discontinued regular services between Corsica and Toulon; sporadic recourse to the port of Toulon is due to technical considerations connected with the services between Marseilles and Corsica (number of Toulon-Corsica sailings: 187 in 2001; 83 in 2002; nine in the first two months of 2003),
- SNCM's Nice-Corsica sailings have been greatly reduced, in particular during the low season, which combined with SNCM's general management savings justifies expectations that the accounts for the Nice-Corsica sector will be balanced, as indicated in the financial models.

- (205) According to the French authorities, the complete abolition of SNCM's services from Nice to Corsica would have the following consequences:

- disruption of the complementary relationship between Nice and Marseilles and accordingly an imbalance in SNCM's services, whereas Corsica Ferries sails to Corsica from four continental ports (Toulon, Nice, Savona and Livorno),

- disruption of the necessary complementary nature of night services (from Marseilles) and day services (from Nice) whereas Corsica Ferries supplies both of these services,
- establishment of a virtual monopoly of Corsica Ferries from Toulon to Livorno,
- simultaneous sale, difficult to implement under acceptable conditions, of three high-speed vessels.

#### 4.1.3. Services to the Maghreb

- (206) With regard to SNCM's activities in north Africa, the French authorities regard as unacceptable Corsica Ferries' unfounded, and also sometimes inaccurate, comments regarding the 'indifference' of SNCM in the face of its shrinking market share or SNCM's lack of consideration for its Algerian customers.
- (207) France points out that the drop in SNCM's services to Algeria basically results from decisions taken by the State which, after completely suspending maritime relations between France and Algeria at the beginning of 1995 (following the hijacking of Air France's Airbus in Marseilles), has allowed only a gradual recovery accompanied by security measures which though indispensable have placed an extra burden on this line.
- (208) Finally, it has noted that the level of activity to the Maghreb which SNCM indicates in its restructuring plan is particularly cautious and consistent with the conclusions of the market survey commissioned by SNCM.

#### 4.1.4. Cost reduction programme

- (209) The French authorities note that a part of the cost reduction programme has already been implemented:
- the number of vessels has been reduced and the programme for the disposal of assets is going ahead according to plan,
  - services have been redeployed,

- the action plan to reduce intermediate consumption is beginning to bear fruit,
- the employment component of the industrial plan is steadily being implemented.

(210) In 2001, SNCM earmarked EUR 21,3 million to finance restructuring measures, in particular the scheme to safeguard jobs:

- establishment and operation of a monitoring mechanism, training assistance of EUR [...] million,
- introduction of new technologies and changes to work areas to enhance the company's economic efficiency and enable job cuts of EUR [...] million,
- implementation of measures for people leaving the company (about 90 employees), mobility leave (about 30) and switching to part-time working (about 25) amounting to EUR [...] million,
- conducting procedures and negotiations and provision for litigation expenses, amounting to EUR [...] million.

(211) In conclusion, the French state is of the opinion that, contrary to the allegations of Corsica Ferries, the restructuring plan has been devised in such a way as to turn around SNCM as soon as possible and create the right conditions to ensure its medium- and long-term viability.

#### 4.1.5. Calculation method to determine the amount of recapitalisation

(212) With regard to determining the amount of aid, the French authorities have presented two comments in response to Corsica Ferries' observations.

(213) First of all, they confirm that a 0,79 capital/debt ratio is quite typical for the balance sheets of most shipping companies, except in special situations. As an indication, the French authorities specify that this ratio is (in 2001):

- 0,847 for Lota Maritime consolidated,
- 0,835 for Corsica Ferries France SA.

(214) The 0,497 ratio announced by Corsica Ferries for CMN in 2001 is incorrect because it fails to take account of liquid assets on the balance sheet. With the appropriate correction, CMN's ratio is 0,557 [...].

#### 4.2. Comments from France on Stef-TFE's observations

##### 4.2.1. Comments from France on Stef-TFE's letter of 7 January 2003

(215) In their letter of 13 February 2003, the French authorities presented various comments on Stef-TFE's observations.

##### 4.2.1.1. Partnership to carry out the public service delegation contract

(216) According to the French authorities, the decision of SNCM and CMN to enter into a joint venture in which they are jointly and not severally responsible has in no way 'been rendered obligatory by the overall character of the consultation', contrary to Stef-TFE's observations. According to the French authorities, the tender issued by the territorial collectivity of Corsica fully permitted bids per shipping line or groups of lines. It was therefore legitimate for SNCM, and for CMN, to submit a bid for parts of this tender, if necessary by looking for appropriate partnerships.

(217) The decision to set up a joint SNCM-CMN venture is the result of an analysis made by the two companies which showed that bidding in this form, in this traditional and natural partnership, gave them the best chances, in particular in terms of competitiveness, to win the tender in view of the fact that Corsica Ferries had for months made it clear that it would submit a bid and in view of the possibility of other European operators doing so too.

(218) CMN's entry into this joint venture therefore resulted from a well-considered decision on its part based on an evaluation of its own interest and not on an obligation arising out of the tender as such.

(219) The French authorities explain that, contrary to Stef-TFE's observations, the two companies, SNCM and CMN, are neither independent nor in direct competition. Such a situation would be in conflict with the very principle of the single public service delegation contract to which they are co-signatories.

(220) The French authorities indicate that this is not simply a question of 'coordinating timetables' but that there is a single timetable jointly committing the two companies on services to Ajaccio and Bastia throughout the year and in particular periods also on services to secondary ports. For instance, the 'basic' service to Bastia is alternately operated every two days by each of the two companies.

(221) Similarly, it is not simply 'coordination of the general scale of fares'; there is in fact a single scale of fares. The partnership agreement lays down the procedures to arrive at this identical scale and strictly demarcates the margin left to the companies in this respect. The agreement adheres to this spirit, witness the fares decision taken for 2002. With the procedure for working out the fares now completed, the situation is as follows:

— SNCM has gone along with CMN's proposal to fix, within the limits permitted by the public service contract, the level of freight charges,

— CMN has gone along with SNCM's proposal to fix, within the limits permitted by the public service contract, the level of passenger fares.

(222) This procedure has led to the establishment of a single scale of fares for the two companies. The special fares, offering reductions on basic passenger fares ranging from 20 to 50 %, are likewise jointly managed. For this purpose, CMN uses SNCM's 'package' products and its computerised booking system. Finally, CMN uses SNCM's embarkation checking system for passenger handling in Corsican ports and in Marseilles.

(223) On the subject of pooling resources, the French authorities emphasise that the two companies frequently pool their efforts in their relations with suppliers. For instance, work on enlarging and modernising two

vessels, SNCM's *Paglia Orba* and the CMN's *Kalliste*, was carried out in 2002 by the same shipyard, producing significant savings for both companies. These vessels had been built according to a single design but because of different timetables and workloads the companies had commissioned the vessels to two different shipyards.

(224) As noted by Stef-TFE, CMN's share of the passenger market increased substantially in 2002. Without disputing the quality of the services provided and efforts made by CMN, the French authorities consider that this increase occurred purely as a result of the contents of the new public service contract and not of any commercial conquest made by CMN on other operators. The increased use of cargo passenger ships with a capacity of 500 passengers and the reduced use of car ferries, both resulting from the public service obligations, have led to a redistribution of the places offered, which has been favourable to CMN. These data have obviously been incorporated in the joint bid submitted by the two companies.

(225) The French authorities maintain that SNCM's share in CMN's capital cannot be construed as a purely financial asset, as Stef-TFE appears to allege, on the following grounds:

- SNCM's cash position in 2002 in no way enabled it to contribute to covering CMN's cash needs <sup>(68)</sup>,
- SNCM already shared in the financing of specific cash needs of CMN in 1999, at the time covering 66 % of its needs, alongside Stef-TFE,
- SNCM did not receive from CMN a request for a counter-guarantee for the security paid under the tender,
- SNCM did not object to CMN's plan to offer 5 % of its shares to its employees. At CMN's extraordinary general meeting on 27 June 2000, SNCM first of all gave its backing to a joint fund for worker

participation to receive shares for employees as a new shareholder in CMN (even though the percentage of voting rights it held would have enabled it to oppose these plans). In a note to its Board, CMN's management subsequently proposed to transfer 2,25 % of the shares it held in SNCM for the benefit of CMN's employees. The French authorities indicate that they decided to postpone this operation when they heard that Stef-TFE was preparing to contact the Commission on this subject as part of the formal investigation procedure.

(226) The French authorities conclude that the description which Stef-TFE has given of relations between SNCM and CMN in executing the public service contract is not consistent with reality.

#### 4.2.1.2. Proposal for a transfer of SNCM's shares in CMN

(227) The French authorities state that the idea of a disinvolvement between the two companies lacks all industrial logic. The companies pursue the same activity, with identical tools, under the terms of a single public service contract. Moreover, the potential gain from closer cooperation between the two companies may be estimated to be within a range from EUR [...] to EUR [...] million per year.

(228) The question of relations between SNCM and CMN should also be examined from a strategic angle. The Commission has considered SNCM's position after 2006 when the current public service contract comes to an end. SNCM's position will depend partly on the level of Corsica-Marseilles public service for which it may then be responsible.

(229) The French authorities consider that the maintenance of a strong partnership between SNCM and CMN give them the best chances for success in being allocated public service activities from 2007. Such a partnership is an important factor for SNCM's viability and its maintenance seems essential.

<sup>(68)</sup> In this connection, the French authorities have provided the Commission with a copy of the letter from SNCM's chairman to CMN's chairman dated 23 May 2002.

- (230) The uniqueness<sup>(69)</sup> and size of the fleet of the two companies are two major assets, enabling them to offer high-quality services to all Corsican ports. CMN's three ships enable SNCM/CMN as a whole to cross a critical supply threshold, which in the eyes of the French authorities is decisive in ensuring competitiveness in the years to come.
- (231) For a competitor these three vessels could be an extra asset enabling it to compete effectively on all or part of the links between Corsica and the mainland. The adoption of measures to 'enhance the economic and financial independence of the operators' and pointing in a direction 'conducive to the pursuit of sound and well thought-out competition'<sup>(70)</sup> would undoubtedly create the conditions for a disruption of the partnership between the two companies, greatly reducing SNCM's chances to compete effectively for a new tender for services to Corsica.
- (232) An examination of the accounts of the Stef-TFE group (in which CMN is consolidated under the equity method, given the 49 % share of Stef-TFE in CMP) shows that a [...] hypothesis cannot be excluded.
- (233) In the recomposition of CMN's capital, SNCM made the main financial effort. The original approach was intended to establish an industrially effective SNCM-CMN configuration. By taking up the majority share, SNCM decided to occupy a position as a solid partner of CMN. For reasons of public image connected with the political context at the time, the SNCM majority shareholding was redistributed into two minority shareholdings (twice 45 %) at two levels of the adopted structure.
- (234) To this end, SNCM not only subscribed to CMP's capital and that of the Compagnie Méridionale Financière (CMF), set up to take full control of CMN, but also gave a 100 % guarantee for the bank loan which CMF had had to take up to complete the financing of the purchase.
- (235) SNCM's lack of effective control of CMN (apart from the minority blocking vote at two levels of the structure)
- was then compensated by permanent commitments by the shareholders with regard, in particular, to the conclusion of partnership agreements binding the companies<sup>(71)</sup>.
- (236) SNCM has always taken an interest in CMN's development and has always been involved in it, even to increase passenger capacity on CMN's passenger cargo vessels to the detriment of SNCM's own market share with a view to enhancing the quality of the overall service supplied by the two companies.
- (237) CMN's interesting position today, with regard to passengers and freight, has been largely established with the aid of SNCM's financial, strategic, legal (establishment of the joint venture) and functional (providing a sales network) resources. On the other hand, Stef-TFE, with an initial minimum capital input involving little risk, now controls the management of a company that is well established in its sector.
- (238) The French authorities have pointed out that SNCM's personnel is well informed about these matters and are fully aware of what is at stake. This convergence of views on a issue that is of strategic importance to SNCM will enhance the quality of social dialogue within the company and thereby strengthen its viability.
- (239) An examination of the financial aspects should not be confined to evaluating the cash injection resulting from the transfer but should also take into account the revenue which SNCM is likely to derive from its share in CMN.
- (240) CMN is a company with homogeneous and regular activities. It benefits from a public service compensation which gives it a good return on investment. SNCM's share in CMN should start having a positive impact on its social accounts. As a result of the clear improvement of CMN's financial position, SNCM could draw dividends from CMN from 2003, which could rapidly become substantial from the 2004 financial year and exceed EUR [...] million, even if account is taken of a weak distribution ratio of 30 %.

<sup>(69)</sup> In particular the cargo passenger ships for 500 passengers and 2 300 linear metres for freight.

<sup>(70)</sup> The terms quoted are taken (in translation) from Stef-TFE's letter of 7 January 2003.

<sup>(71)</sup> The French authorities enclosed a copy of the latest agreement with their letter of 13 February 2003.

(241) Subsidiarily, it should be noted that a discontinuation of the partnership would deprive SNCM of its activity as CMN's general agent (7,5 % of revenue and an average cash effect amounting to EUR 2 million).

(242) In conclusion, France's position is that SNCM's participation in CMN is strongly strategic in nature. In its opinion, the transfer of these shares would not only make no sense industrially but would also be tantamount to a major strategic error.

#### 4.2.2. *France's response concerning the nature of links between CMN and SNCM*

##### 4.2.2.1. Existence of a shareholders' pact

(243) On the basis of information supplied by Stef-TFE, the Commission suspected that there existed a shareholders' pact between Stef-TFE and SNCM for the control of CMN. Accordingly, by letter of 16 January 2003 the Commission asked the French authorities if there existed such a pact for CMP's shares, the control holding of CMN, and also, if the answer was in the affirmative, whether this shareholders' pact could be transmitted to it. In their fax dated 25 February 2003, the French authorities confirmed that such a document existed and transmitted a copy to the Commission, emphasising its confidential nature. This shareholders' pact, concluded on 7 March 1992 between the chairman of SNCM and the chairman of the Compagnie de Navigation d'Orbigny (CNO) as part of the implementation in 1992 of its shareholding structure, covers mutual commitments between SNCM and CMN and industrial cooperation between the two groups.

(244) At a more fundamental level, with a view to strengthening a complex configuration whose details did not reflect the reality of the strategic choices made, it was decided between the partners that 'shareholding ... [had] been conceived in a spirit of cooperation ...' [...] <sup>(72)</sup>.

(245) The French authorities also point out that CNO, which has become Société de Travaux Industriels et Maritimes d'Orbigny (STIM d'Orbigny), has no means of acquiring SNCM's shares in CMN without the latter's explicit agreement, [...].

(246) With regard to Stef-TFE chairman's suggestion to buy from SNCM the shares it holds in CMN, the French

authorities have stated that he had tried to benefit from SNCM's current situation in order to obtain a transfer of SNCM's shares in CMN, which is in no case provided for in the provisions of the shareholders' pact.

##### 4.2.2.2. Structure of SNCM's shareholding in CMN

(247) The French authorities have recalled that it is through CGTH, a holding company which is 100 % owned, that SNCM holds shares in CMN. CGTH owns 45 % of CMP, which is the main shareholder (55 %) in CMN.

##### 4.2.2.3. Control of CMN

(248) The French authorities have confirmed that through action supported by the founding families <sup>(73)</sup>, the Stef-TFE group <sup>(74)</sup> exercises effective control over CMP and consequently over CMN. However, they have stressed that SNCM has a minority blocking vote at two levels of the shareholding structure and rights derived from the shareholders' pact but that it does not intervene in the management of CMN, whose management comes under the Stef-TFE group.

(249) The French authorities have specified the exact composition of CMN's current board of management, whose composition is based on a two-thirds/one-third distribution of the number of managers, and this has been the case since the redistribution of CMN's shares in 1992. The board consists of five managers from Stef-TFE, one representative of the Rastit family, the chairman of CGMF, the chairman of SNCM and a retired officer of CMN. The management board is chaired by one of the managers from Stef-TFE.

##### 4.2.2.4. CMN's share offer

(250) In their reply of 25 February 2003, the French authorities indicated that SNCM had voluntarily cooperated in offering CMN's shares to its employees and also that it had wished to postpone the implementation of its proposals as soon as it had learned about the Stef-TFE group's intervention in the investigation procedure initiated against it as this intervention violated the basic principles of the shareholders' pact of 7 March 1992.

<sup>(72)</sup> [...].

<sup>(73)</sup> Who own 6 % of CMP's capital.

<sup>(74)</sup> Which owns 49 % of CMP's capital.

- (251) On this point, the French authorities replied that the upgrading of CMN was being studied by SNCM as part of the decision to offer CMN's shares to its employees.
- (252) The French authorities have drawn the Commission's attention to the fact that in his proposal to the Commission the chairman of Stef-TFE had given an estimate of the share held by SNCM whereas at the meeting of CMP's board on 3 February 2003 the chairman of CMP, who is also chairman of CMN, informed the managers of his decision to transfer 5 % of CMN's shares to a common investment fund reserved to employees at a price upgrading CMN to EUR 24 million.

#### 4.3. Comments from France on the observations submitted by the Provence-Alpes-Côte d'Azur region

- (253) While the French State on the whole agrees with the contents of the letter of 9 January 2003 from the chairman of the Provence-Alpes-Côte d'Azur region, it made the two following comments in its letter of 13 February 2003:
- contrary to what is alleged in point 2 of the said letter <sup>(75)</sup>, the supply of services between mainland France and Corsica is not 'in excess of demand',
  - SNCM's fares policy is consistent with the commitment it has given of not initiating a fares war and not being a 'price leader'.

### 5. ASSESSMENT OF THE AID

#### 5.1. Nature of the measure and the status of public service compensation of a part of the proposed financial injection

- (254) The injection of EUR 76 million into SNCM constitutes State aid within the meaning of Article 87 of the Treaty.

Recapitalisation of a company which is in such a precarious financial position and which after all has very limited prospects of becoming profitable cannot be treated on a par with the action of a well-informed private investor in a market economy. Incidentally, the Commission notes that the capital increase is not subscribed by SNCF, the second largest shareholder in SNCM.

- (255) Since 1 January 1999, the cabotage market has been completely open within the Community. Moreover, there is competition among Community operators on sea links between the Community and the Maghreb. Consequently, the aid for restructuring SNCM is therefore likely to create distortion of competition affecting trade between Member States.

- (256) It should be noted first of all that SNCM suffered substantial deficits between 1991 and 2001 on all services to Corsica that are subject to public service obligation. The Commission takes the view that the possible deficit in 2002 on the Marseilles-Corsica link could not be recognised as since 1 January 2002 the operating fares for services to Corsica from Marseilles and the amounts of financial compensation have been agreed between the public authorities and SNCM on a contractual basis, contrary to the practice followed for the 1991 and 1996 agreements.

- With regard to the period from 1991 to 1999, the Commission's approach is to include in its calculation the result before tax for 1991 to 1999 for services to Corsica, as determined in the expert report drawn up for the Commission <sup>(76)</sup> for services to Corsica, deducting the appreciation on disposal of vessels. This figure is – FRF 217,0 million, corresponding to – EUR 33,08 million <sup>(77)</sup>.

- For 2000 and 2001, which were the last two years of the 1996 agreement, the expert report at the time, because of a lack of available data, could not calculate the result obtained in respect of the Corsica services through analytical accounting. The Commission has nevertheless adopted the same approach as the abovementioned expert report and has recalculated, on the basis of the analytical profit-and-loss account supplied, the result before tax, removing provisions for restructuring already included in the restructuring costs as notified. Moreover, the Commission has been able to verify

<sup>(75)</sup> In its letter of 9 January 2003, the regional council of Provence-Alpes-Côte d'Azur quoted from the market survey which had been transmitted to the Commission as part of the notification and of which it clearly had a copy, stressing the following finding: 'The supply [of services between Corsica and mainland France] is in excess of demand. The rate of occupancy of vessels varies on average from 20 % in winter to 50 % in summer.'

<sup>(76)</sup> The report referred to was compiled by BDO Consultants in July 2001 at the Commission's request for its preparation of Decision 2002/149/EC. The table included in section 104 of that decision was taken over from the report.

<sup>(77)</sup> See the abovementioned Decision 2002/149/EC.

that according to the company's annual accounts there was no disposal of vessels during the two years in question.

(257) In this way, following the same approach and criteria as Decision 2002/149/EC, the Commission arrives at the following table 11:

TABLE 11  
Analytical profit-and-loss account for 1991 to 2001

(in million)

| Corsica network                                                          | 2001     |         | 2000    |        | 1991 to 1999 <sup>(78)</sup> |         | Total 1991 to 2001 |          |
|--------------------------------------------------------------------------|----------|---------|---------|--------|------------------------------|---------|--------------------|----------|
|                                                                          | FRF      | EUR     | FRF     | EUR    | FRF                          | EUR     | FRF                | EUR      |
| Result before tax                                                        | -302,575 | -46,127 | -40,256 | -6,137 | -399,080                     | -60,839 | -741,911           | -113,104 |
| Allocation to provision/depreciation <i>Liamone</i>                      | 96,895   | 14,771  | 0,000   | 0,000  | 0,000                        | 0,000   | 96,895             | 14,771   |
| Allocation to provision/Social plan                                      | 112,110  | 17,091  | 0,000   | 0,000  | 0,000                        | 0,000   | 112,110            | 17,091   |
| Correction appreciation on vessels                                       | 0,000    | 0,000   | 0,000   | 0,000  | 182,100                      | 27,761  | 182,100            | 27,761   |
| Result before tax and excluding appreciation and excluding restructuring | -93,571  | -14,265 | -40,256 | -6,137 | -216,980                     | -33,078 | -350,807           | -53,480  |

(258) In total, the aggregated corrected results of appreciations on vessels sold in this period and restructuring costs is EUR 53,48 million for the whole of the period 1991 to 2001 (1991 and 1996 agreements).

(259) Independently of the need to analyse the cash injection in the form of restructuring aid, this part of the cash injection is therefore justified as public service compensation under Article 86(2) of the Treaty and is therefore compatible with the common market in this regard.

(260) The French authorities have notified a plan for cash injection at a higher amount (EUR 76 million) as restructuring aid, and this is the reason why the procedure under Article 88(2) of the Treaty has been initiated. Accordingly, the cash injection should be investigated in its entirety.

## 5.2. Legal basis of the assessment

(261) Under Article 87(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form

whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'. However, under Article 87(2) and (3) of the Treaty, particular forms of State aid are compatible or may be considered to be compatible with the common market.

(262) The Community guidelines on State aid to maritime transport <sup>(79)</sup>, which give an interpretation of Article 87 of the Treaty with regard to maritime transport, refer to the guidelines on State aid for rescuing and restructuring firms in difficulty for an evaluation of restructuring aid for maritime companies. Under point 19 of these guidelines, 'the only basis whereby aid for rescuing or restructuring firms in difficulty can be deemed compatible is Article 87(3)(c). Under this provision, the Commission has the power to 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."' This compatibility is assessed on the basis of five main criteria, namely analysis of the presence of restructuring aid, restoration of viability through a restructuring plan, avoidance of distortions of competition, proportionality of aid, and implementation of the restructuring plan.

<sup>(78)</sup> Data taken from Decision 2002/149/EC.

<sup>(79)</sup> OJ C 205, 5.7.1997, p. 5.

### 5.3. Analysis of the causes of SNCM's financial difficulties

(263) The restructuring plan should normally describe the circumstances that led to the company's difficulties so as to enable an evaluation whether the proposed measures are appropriate. In this section, the Commission tries to establish the causes of SNCM's financial difficulties.

(264) One difficulty in this exercise is that SNCM had analytical accounting not per sea link but per vessel.

#### 5.3.1. Level of aid under the French flag compared with that under the Italian flag

(265) Because since 1999 the Cabotage Regulation has permitted the free choice of flag from among the flags of the Member States, SNCM which operates under the French flag faces competition from vessels flying the Italian flag. The main reason why Corsica Ferries, an undertaking under French law, opted for the Italian flag in 1999 was convenience of management<sup>(80)</sup> for its fleet as a whole since two thirds of its traffic is with Italy.

(266) As for the question whether SNCM has a lower level of aid than that which its competitors sailing under the Italian flag could benefit from, the Commission wishes to emphasise the following points concerning the different aid schemes:

- with regard to social charges, shipping firms under the French flag benefit from more substantial reductions in social charges in France<sup>(81)</sup> than their counterparts in Italy and the Italian scheme is also exclusively applicable to cabotage companies<sup>(82)</sup>,

<sup>(80)</sup> According to Corsica Ferries, the Italian flag is more flexible for taking on seamen from other Member States than the French flag.

<sup>(81)</sup> Commission decision of 30 April 2001, Case N 88/2001: France — Refund to shipping companies of contributions for child benefit and Assedic.

<sup>(82)</sup> Commission decision of 18 August 1999, Case N 396/99: Italy — Scheme for alleviating social charges in the maritime cabotage sector for the period 1999 to 2001 by 43 %. Scheme renewed twice for 2002 and 2003 with a reduction rate of 80 % and 25 % respectively (Commission decision of 6 September 2002, Case N 519/2002, and Commission decision of 11 March 2003, Case N 19/2003).

- with regard to company taxes, France, unlike Italy, has since the beginning of this year 2003 had a scheme of standard tax rates for shipping companies<sup>(83)</sup>.

(267) Even though it is very difficult to make comparisons between the social and tax burden in each case, the Commission refutes the argument propounded by the representative of the general council of Bouches-du-Rhône<sup>(84)</sup>, according to which the registration of Corsica Ferries under the Italian flag enabled it to benefit from a higher level of aid. The Commission has considered all aid schemes for shipping companies under the Italian flag as compatible with the common market. None of the relevant decisions have been contested before the Court of Justice of the European Communities. Furthermore, the Commission stresses that it has always exercised its control over derogating tax and social schemes benefiting Community shipping companies to bring these schemes closer together through the application of the Community guidelines on State aid for maritime transport.

(268) In conclusion, the Commission does not accept the argument that SNCM's main competitor receives more aid by flying another Community flag.

#### 5.3.2. Vessel purchase policy

(269) On the subject of the possible impact of the renewal of an apparently significant number of vessels over a relatively short period on the company's results, the Commission notes that SNCM has purchased<sup>(85)</sup> several ships since 1996:

- the high-speed *Aliso* and the *Napoléon Bonaparte*, delivered in 1996,
- the high-speed *Liamone*, delivered in 2000,
- the *Danielle Casanova*, delivered in 2002,
- the *Pascal Paoli*, delivered in 2003.

<sup>(83)</sup> Commission decision of 14 May 2003, Case N 732/2002, France — Scheme imposing a lump sum on the basis of tonnage for the benefit of maritime transport companies.

<sup>(84)</sup> See recital 180.

<sup>(85)</sup> Fully owned or leased.

(270) The Commission has wished to supplement the explanations provided by the French authorities concerning SNCM's vessel purchase policy to ascertain the rationality of the company's purchasing decisions. For this reason, the Commission has wished to quantify

the extent to which the immobilisation of vessels has impacted on the company's consolidated balance sheets, also covering vessels purchased on a leasing basis, including current immobilisations which very largely comprise vessels ordered but not yet delivered.

TABLE 12

**Net immobilisations of ships**

(in million EUR)

| Year                                               | 1996    | 1997    | 1998    | 1999    | 2000    | 2001    | 2002    |
|----------------------------------------------------|---------|---------|---------|---------|---------|---------|---------|
| Net immobilisations of ships<br>(including leased) | 342,809 | 307,840 | 274,520 | 238,921 | 267,396 | 218,536 | 326,414 |
| Current immobilisations                            | 0,331   | 0,734   | 7,249   | 51,781  | 19,986  | 108,437 | 1,440   |
| Total                                              | 343,140 | 308,575 | 281,769 | 290,702 | 287,382 | 326,973 | 327,854 |

(271) Studying table 12, the Commission observes that recent acquisitions of ships have not resulted in a significant increase in mobilisations in the company's consolidated assets. In all cases, immobilisations have remained at levels below that recorded in 1996. The Commission therefore concludes that SNCM has not excessively invested in fleet renewal in recent years.

involved. Similar difficulties make it impossible for SNCM to have recourse to lease-back operations to reduce its indebtedness. The Commission's experience in effectively seizing ships or aircraft shows that it is difficult to enforce this in practice if such assets are used for services of national or regional interest.

(272) The Commission notes that SNCM has financed four of its ships <sup>(86)</sup> on a lease basis in order to reduce its indebtedness on its social balance sheet and that three fully owned ships are still mortgaged <sup>(87)</sup>. With regard to the remaining ships <sup>(88)</sup>, SNCM has confirmed that the company has not found any bank prepared to accept them under mortgage guarantee. The level of the company's indebtedness and its weak cash flow, detailed below, which only just enables it to service its existing debt, are such that it is unlikely that any bank, acting as a private lender under market conditions, would be inclined to offer SNCM an additional loan. The risk that SNCM would not be able to pay back the instalments of the debt would be significant in view of the sums

(273) Finally, as regards the allegation that SNCM is obliged to purchase ships built in France, the Commission notes that the latest ships delivered new or renovated come from non-French shipyards.

### 5.3.3. Chronically negative trading accounts

(274) The Commission has investigated two aspects of the operating costs: wage bill and intermediate consumption.

<sup>(86)</sup> The *Liamone*, the *Aliso*, the *Pascal Paoli* and the *Danielle Casanova*.

<sup>(87)</sup> The *Méditerranée*, the *Paglia Orba*, the *Napoléon Bonaparte* and the *Asco* which is currently being sold off.

<sup>(88)</sup> The *Île de Beauté*, the *Monté d'Oro*, the *Monte Cinto* and the *Corse*.

TABLE 13

**Results and operating margin**

| Year                                                                               | 1997     | 1998     | 1999     | 2000     | 2001     | 2002     | Average  |
|------------------------------------------------------------------------------------|----------|----------|----------|----------|----------|----------|----------|
| Operating results in million EUR                                                   | - 5,8    | - 3,9    | - 8,6    | - 9,3    | - 1,2    | - 6,4    | - 2,99   |
| Operating margin<br>operating results/(turnover + territorial<br>continuity grant) | - 2,27 % | - 1,49 % | - 3,08 % | - 3,21 % | - 0,40 % | - 2,25 % | - 1,09 % |

## 5.3.3.1. Wage bill

(275) First of all, the Commission notes that according to a study it has commissioned <sup>(89)</sup>, the costs of passenger ship crews are higher under the French flag than under the Italian flag.

going from EUR 111,1 million to EUR 114,4 million. However, they point out that about a third of this amount relates to wages for onshore personnel. This proportion corresponds to the staff ratio (between 764 and 824 onshore as against 1 519 to 1 599 onboard personnel for the years from 1999 to 2002).

(276) The French authorities have indicated that staff expenditure remained stable between 1998 and 2002,

(277) The Commission itself has calculated in table 14 certain ratios in connection with the trend in SNCM's wage bill.

TABLE 14

**Trend in wage bill**

| Year                                          | 1997    | 1998    | 1999    | 2000     | 2001    | 2002    |
|-----------------------------------------------|---------|---------|---------|----------|---------|---------|
| Wage bill (in million EUR)                    | 73,681  | 77,027  | 77,751  | 81,014   | 83,489  | 83,536  |
| Increase over previous year                   |         | 4,54 %  | 0,94 %  | 4,20 %   | 3,06 %  | 0,06 %  |
| Average staff FTE                             | 2 344   | 2 377   | 2 283   | 2 386    | 2 423   | 2 392   |
| Wage bill/staff (in EUR)                      | 31 434  | 32 405  | 34 057  | 33 954   | 34 457  | 34 923  |
| Increase over previous year                   |         | 3,09 %  | 5,10 %  | - 0,30 % | 1,48 %  | 1,35 %  |
| Turnover before tax (in million EUR)          | 175,4   | 180,9   | 195,0   | 204,9    | 204,1   | 205,8   |
| Territorial continuity grant (in million EUR) | 80,1    | 80,4    | 84,4    | 85,4     | 86,7    | 77,7    |
| Revenue (turnover + grants) (in million EUR)  | 255,5   | 261,3   | 279,4   | 290,3    | 290,8   | 283,5   |
| Wage bill/revenue                             | 28,84 % | 29,48 % | 27,83 % | 27,91 %  | 28,71 % | 29,47 % |

<sup>(89)</sup> See Annex 7 to the Commission's report on the implementation of the Cabotage Regulation, COM(2002) 203 final, available on internet at the following address:  
[http://europa.eu.int/eur-lex/fr/com/rpt/2002/com2002\\_0203fr01.pdf](http://europa.eu.int/eur-lex/fr/com/rpt/2002/com2002_0203fr01.pdf).

(278) The figures show that the wage bill has remained stable in recent years. However, the ratio of wages in relation to turnover seems significant, which is no doubt proof that the other shipping companies have outsourced more secondary activities than SNCM, reflecting a management choice connected with the company's traditional involvement in public services that the Commission does not feel is open to criticism as a matter of principle.

#### 5.3.3.2. Intermediate purchases

(279) Reducing costs relating to intermediate consumption<sup>(90)</sup> is crucial for the success of the restructuring plan. The Commission notes that the benefits expected from the programme for purchase control entitled 'Achetons mieux' ('Buy better') will by themselves not suffice to rebalance the trading accounts. In the Commission's opinion, SNCM should continue its efforts and optimise its purchases during and beyond the restructuring period.

#### 5.3.3.3. Commission's opinion on the trading account

(280) The Commission considers that it is imperative for SNCM to achieve sustainable positive operating results as soon as possible. This has not yet been the case in 2002<sup>(91)</sup>, contrary to the forecasts of the restructuring plan. The Commission notes that the efforts already made by SNCM to raise its productivity have not yet produced fully effective results. SNCM should not expect that their problems will be solved only through revenue from future appreciation on ships sold or from investment income.

#### 5.3.4. Public service constraints

(281) The Commission notes that the financial compensation received under the five-year agreements of 1991 and 1996 have not enabled SNCM to completely make up its losses, as it has already highlighted in its Decision 2002/149/EC<sup>(92)</sup>.

<sup>(90)</sup> See section 2.3.6.

<sup>(91)</sup> SNCM had operating losses of EUR 6,3 million in 2002, the highest level in recent years apart from 2000.

<sup>(92)</sup> On this subject, see Decision 2002/149/EC.

(282) In particular, the arrival on the scene of a competitor in 1996, after the five-year agreement of 1996 had been signed, has had negative effects on SNCM's results<sup>(93)</sup>. SNCM lost passengers to its competitor from Nice and then also from Toulon, reducing its revenue. Account being taken of the fact that financial compensation for SNCM was relatively independent of revenue, the loss of a part of their custom to Corsica Ferries has automatically led to a deterioration of the public company's profits.

### 5.4. Verification of compliance with the guidelines

(283) In its analysis of this case, it has been the Commission's wish to find a balance between, on the one hand, the protection of competing interests in view of possible distortions of competition and, on the other hand, the risk of a monopoly emerging in services from mainland France to Corsica. The fact is that the disappearance of SNCM would lead not only to serious financial difficulties for its suppliers and subcontractors<sup>(94)</sup> but also a factual monopoly of Corsica Ferries on this route<sup>(95)</sup>.

(284) The Commission recalls that the guidelines stipulate that restructuring aid does not run counter to the Community interest if 'any distortions of competition will be offset by the benefits flowing from the firm's survival (in particular, where it is clear that ... the firm's disappearance would result in a monopoly or tight oligopolistic situation).'<sup>(96)</sup>

(285) In its analysis, moreover, the Commission has taken account of the following two points:

- on the one hand, SNCM has, over a relatively short period from 1996 to 2001, had to cope with a severe disruption of its traditional market. From its original monopoly position, though controlled through agreements by the State and subsequently by the territorial collectivity of Corsica, it has ended up in

<sup>(93)</sup> On this subject, see Decision 2002/149/EC.

<sup>(94)</sup> As mentioned in section 3.3, the representatives of the territorial collectivities have pointed out in their observations to the Commission that SNCM had a major impact on the regional economy as a whole.

<sup>(95)</sup> In this regard, the market survey provided by the French authorities emphasises that, 'maintaining the activities of two major operators on these links is imperative for sound economic reasons'.

<sup>(96)</sup> See point 28 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

a highly competitive environment. Finally, since the beginning of 2002 it has lost the operating grants for services from Toulon and Nice to Corsica,

- on the other hand, SNCM has inherited operating losses which were connected with the execution of the public service agreements of 1991 and 1996, as highlighted in Decision 2002/149/EC <sup>(97)</sup> in which the losses were indicated as amounting to FRF 217 million after inclusion of appreciation on particular vessels.

(286) It follows from these considerations that, given the context, the nature of the planned aid is not inherently contrary to the Community interest. However, a condition for granting the aid should be that it complies with the requirements of the guidelines and with all obligations which the Commission will see fit to impose to avert any potentially distorting effects of the aid.

(287) The Commission recalls that it has already authorised restructuring plans for shipping companies, specifically for Brittany Ferries, through Commission Decision 2002/15/EC <sup>(98)</sup>, and CGM, of which SNCM has not been a subsidiary since 1976, through Commission Decision 97/14/EC <sup>(99)</sup>.

#### 5.4.1. Status of firm in difficulty

(288) In order to be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the guidelines <sup>(100)</sup>.

(289) This criteria has been ascertained in the Commission's decision of 17 July 2002 <sup>(101)</sup> on rescue aid for SNCM and in its decision of 19 August 2002 initiating the formal investigation procedure against the recapitalisation plan on the basis of SNCM's annual accounts for 2001.

<sup>(97)</sup> See point 105 of Decision 2002/149/EC.

<sup>(98)</sup> Commission Decision 2002/15/EC of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company (BAI or Brittany Ferries) (OJ L 12, 15.1.2002, p. 33).

<sup>(99)</sup> Decision 97/14/EC, mentioned in footnote 16.

<sup>(100)</sup> See point 30 of the guidelines.

<sup>(101)</sup> Abovementioned decision.

(290) It is necessary to examine whether SNCM still meets this condition, this time in the light of its most recent annual report, i.e. that of 2002. The Commission wishes to point out first of all, as required by the guidelines <sup>(102)</sup>, that there is no Community definition of what constitutes a firm in difficulty. Nevertheless, the Commission has ascertained that SNCM meets the test provided for in point 5 of the guidelines under which it can be established beyond doubt that a firm is in difficulty. It has also verified that SNCM's position includes the signs commonly referred to to ascertain whether a firm is in difficulty, as listed in point 6 of the guidelines.

#### 5.4.1.1. Disappearance of the company's registered capital

(291) SNCM has a capital, with appraisal increments, of EUR 17,7 million, to be compared with a balance brought forward in 2002 of – EUR 69,9 million, of which EUR 40,4 million for the net results of 2001 alone, and reserves of EUR 21,5 million. The company's capital excluding regulated provisions <sup>(103)</sup>, still called net situation under French accounting terminology, still remains negative at – EUR 26,5 million in 2002, following – EUR 30,7 million in 2001. This level reflects the disappearance of more than half of the company's share capital, more than a quarter of which disappeared during the 12 last months following the notification, thus confirming the sufficient but non-obligatory condition described in point 5(a) of the guidelines <sup>(104)</sup>, serving as proof that the company actually is in difficulty.

<sup>(102)</sup> See point 4 of the guidelines: 'There is no Community definition of what constitutes "a firm in difficulty". However, for the purposes of these guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.'

<sup>(103)</sup> Regulated provisions are costs entered in the accounts pursuant to French tax rules, e.g. exceptional amortisation as defined in the footnote on page 109.

<sup>(104)</sup> See point 5(a) of the guidelines: 'In particular, a firm is, in any event and irrespective of its size regarded as being in difficulty for the purposes of these guidelines:

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

#### 5.4.1.2. Other signs showing that SNCM is in difficulty

(292) In accordance with the guidelines, 'the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing inventories, declining cash flow, mounting debt, rising interest and falling or nil net asset value.' <sup>(105)</sup>

(293) In this regard, the Commission has established the following facts in SNCM's accounts, including its annual accounts for 2002, even though at the time they were transmitted to the Commission they had not yet been formally approved by SNCM's general meeting of shareholders and they can therefore not be considered final:

- losses increased by –EUR 6,2 million in 2000 to –EUR 40,4 million in 2001. Between 2001 and 2002, the current result rose from –EUR 5,1 million in 2001 to –EUR 5,8 million in 2002, with net losses in 2002 reduced only through the sale of a number of ships,
- passenger turnover between 2000 and 2001 diminished by EUR 2,3 million while the passenger transport market between Corsica and mainland France rose by nearly 17 %,
- net financial debt, excluding leases, went from EUR 135,8 million in 2000 to EUR 144,8 million in 2002,
- financial charges (interest and similar charges) went from EUR 7,0 million in 2000 to EUR 9,268 million,
- capital diminished by EUR 36 million between 2000 and 2001.

(294) A large number of signs — which are not cumulative — provided in the guidelines have been positively

verified. The Commission also notes worrying signs in SNCM's financial situation:

- the company's capital remains very weak in relation to the company's size and financing requirement. While it was EUR 29,7 million at the end of 2001, it would be EUR 33,8 million at the end of 2002. This apparent progression does not result from its operational activity as the current 2002 result remains negative as indicated above. Instead, it is connected with the first results of the restructuring plan and the transfers under the plan which have generated exceptional appreciations exceeding EUR 5 million, and with the first year of transfer of the provision allocated in 2001 for the *Liamone*. It should further be pointed out that of these net figures EUR 60 million originate from the application of exceptional fiscal depreciation <sup>(106)</sup>. Accordingly, this part has in the past generated a fiscal advantage which will disappear in the future. It is therefore tantamount to a future tax debt <sup>(107)</sup> which, excluding reportedly deferred depreciation, amounts to EUR 20 million at the end of 2001 and still EUR 16,8 million at the end of 2002. Taking account of these data, net capital will be only about EUR 10 million at the end of 2001 and EUR 17 million at end 2002,
- the EUR 33,8 million capital at end 2002 should be compared with net fixed assets of EUR 285 million at end 2001 and EUR 283 million at end 2002, which means that virtually all of the company's long-term financing is ensured through debts. Financial debts, excluding leasing, accounted for EUR 134,5 million at the end of 2001 and EUR 144,8 million at end 2002. This very fragile financial position prevents the company from finding other resources on the market,
- analysis of the company's internal financing capacity (EUR 29 million in 2001 and EUR 24,7 million in 2002) reveals the same weaknesses: its level hardly covers refund commitments on existing debts (EUR 27,5 million in 2001 and EUR 21,3 million in 2002). Internal financing capacity can therefore provide no security to a new lender.

<sup>(106)</sup> Exceptional depreciation is the difference between straight-line depreciation, deducted from assets on the balance sheet, and diminishing balance depreciation authorised by tax law. If diminishing balance depreciation is not used to enter depreciation into the accounts, the difference between it and cumulated straight-line depreciation is entered under liabilities (exceptional depreciation), traditionally included in French accounting under capital. Total depreciation at the end of the accounting period remains the same and the system therefore does not make it possible to anticipate and generate a tax reduction in the first years.

<sup>(107)</sup> Outlined in the annexes to the 2001 annual accounts (p. 24) and the 2002 provisional accounts (note 2.18).

<sup>(105)</sup> See point 6 of the guidelines.

(295) Moreover, the French authorities have confirmed to the Commission that the banks are now refusing to lend money to the company because of its indebtedness, even though SNCM has proposed to put up its newest vessels, unencumbered by mortgage or other servitude, as a security for a bank loan.

(296) The current public service delegation contract in no way changes this analysis. While the contract will certainly enable SNCM, in combination with the success of the restructuring plan, to attain positive operating results, the fact remains that its acute lack of capital, its growing indebtedness and the cost of operational measures under the restructuring plan should after a certain lapse of time lead the company to cease payment.

(297) The Commission's conclusion is that SNCM is certainly a firm in difficulty as defined in the guidelines.

#### 5.4.2. Absence of restructuring aid over the past ten years

(298) The guidelines<sup>(108)</sup> provide that a company which in the past has already benefited from restructuring aid cannot normally receive such aid a second time during the 10 years following the end of the restructuring period. Among the forms of aid already allocated to SNCM, there is no restructuring aid<sup>(109)</sup>. This is in fact SNCM's first restructuring programme since its inception in 1976.

#### 5.4.3. Restoration of viability

(299) The restructuring plan, where duration must be as short as possible, should restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. The restructuring plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the market place on its own merits.

(300) Similarly, the effect of the measures and the success of the plan are not dependent on market trends, except for the increase of services to the Maghreb which corresponds in particular to a return to the position which SNCM had in the mid-1990s.

(301) Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring. With regard to services between Corsica and the Italian mainland, SNCM has learned a lesson from its past failures: it has decided to close down its Italian subsidiary, Corsica Marittima, which had been making a loss since its inception in 1990 until 1997.

(302) Restoration of profitability of services between Marseilles and Corsica is expected in the short term and services to the Maghreb are already profitable. Only services from Nice remain more uncertain but its relative importance is diminishing and the early depreciation of the *Liamone* in 2001 will make it possible to turn the company around to positive results on this link. Moreover, the Commission accepts the argument that a presence, even a reduced one, from Nice remains necessary for the company's position on the market as a whole. Redeployment to the Maghreb will help to reduce the company's dependence on its traditional routes and should also help it to restore viability because of the stronger margins on its Maghreb services.

(303) With regard to long-term viability, i.e. beyond the term of the current public service delegation contract, the Commission takes the view that implementation of the plan should make it possible for the company to face competition effectively when contracts are renewed. Finally, it notes that, even if there is a partial loss (a car ferry), this contract should enable the company to maintain positive results. If the loss of this contract should lead to a 40 % or higher drop in company revenue in its traditional market, as envisaged in another scenario, the Commission believes that this would bring about a situation which few restructuring plans, with or without public support, could remedy, and that it is premature to envisage it at this stage.

(304) The Commission should also determine the time-frame of the restructuring period, entailing a number of obligations incumbent on the aid recipient. Even though

<sup>(108)</sup> See point 48 of the guidelines.

<sup>(109)</sup> See section 2.5.

the restructuring plan comprises actions essentially covering 2002 and 2003, the fact remains that SNCM will not have 'sufficient' capital until 2005 to 2006. Accordingly, the Commission sets 31 December 2006 as the end of the restructuring period.

SNCM is no longer allocated the public service delegation contract for services between Corsica and Marseilles.

#### 5.4.4. Realistic assumptions

(305) The guidelines require that the restructuring plan should be based on 'realistic assumptions as to future operating conditions' <sup>(110)</sup>.

(306) The Commission considers that the market study is a serious one and provides a sound basis for scenarios of company development.

(307) The improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence if the market assumptions made are generally acknowledged. This means that the company's improvement should not only concern services to the Maghreb. It should above all be achieved through better control of production costs and enhanced productivity.

(308) The restructuring plan should normally take account, *inter alia*, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses.

(309) The restructuring plan should enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.

(310) The plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the market place on its own merits, even if after 2007

#### 5.4.5. Avoidance of undue distortions of competition

(311) Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid should be regarded as contrary to the common interest and therefore incompatible with the common market <sup>(111)</sup>.

(312) In accordance with the guidelines, this condition should in the case under discussion take the form of a limitation on the presence which the company can enjoy on its traditional market, i.e. services to Corsica, which is also the one where it faces competition from companies established in the Community, which is not the case for services to the Maghreb.

(313) The Commission is of the opinion that there is no excess capacity on maritime services to Corsica in view

<sup>(111)</sup> See point 39 of the guidelines: 'Compensatory measures can take different forms according to whether or not the firm is operating in a market where there is excess capacity. In assessing whether or not there is excess capacity on a given market, the Commission can take into account all the relevant data in its possession:

(i) where there is a Community-wide or EEA-wide structural excess of production capacity in a market served by the recipient, the restructuring plan must make a contribution, in proportion to the amount of aid received and its impact on that market, to the improvement of market conditions by irreversibly reducing production capacity. A capacity reduction is irreversible when the relevant assets are rendered permanently incapable of achieving the previous rate of output, or are permanently converted to another use. The sale of capacity to competitors is not sufficient in this case, except if the plant is sold for use in a geographic market in which its continued operation is unlikely to have significant effects on the competitive situation in the Community. The capacity reduction requirements must contribute to a reduction in the recipients firm's presence on its market or markets;

(ii) where, on the other hand, there is no Community-wide or EEA-wide structural excess of production capacity in a market served by the recipient, the Commission will nevertheless examine whether compensatory measures should be required. Where any such compensatory measures involve a reduction in the capacity of the firm concerned, the necessary reduction could be achieved through the hiving-off of assets or subsidiaries. The Commission will have to examine the compensatory measures proposed by the Member State concerned, whatever form they take, and determine whether they are sufficient in scope to mitigate the potentially distortive effects of the aid on competition. In examining the necessary compensatory measures, the Commission will take account of the state of the market, and in particular its level of growth and the extent to which demand is met.'

<sup>(110)</sup> See point 32 of the guidelines.

of the highly seasonal character of the significant growth in traffic <sup>(112)</sup>. The Commission also notes that the average occupancy rate on ships of SNCM's main competitor is lower than that of the public company. As there is no excess capacity on the market within the meaning of the guidelines, there is no need to contribute to its improvement. The sale of ships, rather than their demolition, therefore constitutes a reduction in capacity admissible in the light of the guidelines.

(314) The compulsory limitation or reduction of the company's presence on the relevant market(s) does represent a compensatory factor in favour of its competitors. This factor should be in proportion to the distortive effects which the aid will cause or is likely to cause.

(315) The restructuring plan significantly reduces the firm's presence on its market to the direct benefit of its competitors, because of the following elements:

- the closure of the Corsica Marittima subsidiary (82 000 passengers in 2000) which was responsible for services between Italy and Corsica, and thereby the withdrawal of the SNCM group from the market of services between Italy and Corsica,
- the virtual withdrawal of services between Toulon and Corsica, a market which in 2002 accounted for as many as 460 000 passengers,
- limitation of the total number of places on offer and the number of round trips made each year from 2003, specifically on services between Nice and Corsica <sup>(113)</sup>,
- the sale of four ships <sup>(114)</sup>.

(316) Throughout the Gulf of Genoa and from Toulon, SNCM is lowering its services on offer by more than one million places a year compared with 2001, i.e. a division by more than two, which is to the immediate benefit of its competitors even though it is these services that are showing the strongest growth <sup>(115)</sup>.

(317) However, the Commission believes that these measures, although of considerable scope, should be combined with conditions designed to limit possible distortions of competition. Specifically, care must be taken to ensure that the company devotes its surplus liquid assets to aggressive activities that are likely to cause distortions on the market <sup>(116)</sup>. Accordingly, it should be stipulated that during the restructuring period SNCM cannot finance any new investment other than the costs of redeploying its activities to the Maghreb incorporated in the restructuring plan. This condition, detailed below, regarding the absence of investment in new ships, even to replace existing ones, will prevent any adverse effects of the aid on the main competitors or at least keep such effects to the absolute minimum.

#### 5.4.6. Aid limited to the minimum

(318) The amount of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs, without thereby hampering its chances of restoring viability.

(319) In the case under investigation, the Commission notes first of all, in the light of point 40 of the guidelines, that the restructuring plan includes significant sales of essentially naval assets amounting to EUR 40 million in sales price and EUR 21 million in net product from associated debts. Additional disposals are also imposed by the Commission in section 5.5.2 in respect of assets, in the form of shareholding, which the Commission deems non-strategic for the company's activity. Nevertheless, these sales do not suffice to restore viability to SNCM whose financial situation remains characterised by significant liabilities at the end of this operation.

(320) In its decision of 19 August 2002, the Commission indicated that it had not been convinced of the relevance of the calculating method presented by the French authorities to determine the amount of aid. Notwithstanding the additional explanations supplied by France, the Commission has made its own evaluation.

<sup>(112)</sup> See table 1.

<sup>(113)</sup> See table 2.

<sup>(114)</sup> See section 2.3.2.

<sup>(115)</sup> See tables 1 and 2.

<sup>(116)</sup> In this regard, see section 5.4.1.

#### 5.4.6.1. Analysis of calculation methods proposed by France

(321) The Commission's views on the approach adopted by the French authorities <sup>(117)</sup>, i.e. based on the capital/debt ratio, are as follows:

- the panel of five companies used by the French authorities is not sufficiently representative of the maritime cabotage sector,
- the 79 % capital/debt ratio produced by this panel of companies is in fact in no way a reliable indicator of a company's health,
- the French authorities have not explained what exactly is covered by the amount of financial debts of these five companies and therefore cannot guarantee that these data are consistent with the amount of SNCM's indebtedness as indicated in the restructuring plan,
- the French authorities have not shown that the 79 % capital/debt ratio emerging from this panel of companies is properly taken into account for the period 2002 to 2007 in the financial model included in the restructuring plan.

(322) With regard to the other approaches proposed by France to show that the figure of EUR 76 million is not too high, the Commission questions the relevance of the method used.

(323) The first alternative method <sup>(118)</sup>, based on the capital necessary to finance the existing fleet, seems inappropriate in that the French authorities have included in this calculation the value of fleet acquisition and not its sales value in 2002. The fact is, however, that if a new company were to start up with the same fleet as SNCM's such as it exists today it would have to find capital proportionate to the purchase value of all the ships together and not their value when built. Moreover, such an approach fails to take account of other major assets such as the computer booking system and the buildings in which the company has its headquarters.

(324) In the Commission's opinion, the second alternative method <sup>(119)</sup>, based on SNCM's expenditure, seems more appropriate. However, the Commission should like to see a revision of the amount of EUR 41,7 million for previous losses, in particular to take account of the 2002 results and only losses connected with services to Corsica prior to 1999. The Commission's approach is set out in section 5.3.6.2.

#### 5.4.6.2. Commission's approach

(325) The Commission takes the view that the primary aim of restructuring aid should not be to increase the company's capital (simple financial restructuring) but to help the company to switch from its monopoly position under the 1976 agreement to a competitive position. This is why the Commission is reticent to base the level of aid on the method adopted by the French authorities, as it is difficult to specify the appropriate level for SNCM's capital. The Commission wishes to point out that by adding or removing certain companies from the panel chosen by the French authorities, the average capital/debt ratio may vary significantly.

(326) The Commission considers that the restructuring aid may cover the costs of the different actions provided for in the restructuring plan (operational restructuring), on the one hand, and the company's losses incurred in carrying out its public service agreements until the end of 2001 (financial restructuring), on the other. First, the Commission accepts that a part of the aid can be used to finance the costs of operational measures required by the change in the legal and competitive contexts in which the company operates. Second, since these actions alone do not enable the company to improve the level of its indebtedness rightaway, the Commission also accepts that the other part of the aid can be used to repay the debts resulting from undercompensation from which SNCM suffered under the 1991 and 1996 agreements. Accordingly, the Commission wishes:

- to authorise the financing from public funds only the costs inherent in operational measures under the restructuring plan,
- to draw a definitive line under the consequences of the inadequacy of financial compensation under the

<sup>(117)</sup> See section 2.3.8.3.

<sup>(118)</sup> See section 2.3.8.2.

<sup>(119)</sup> See section 2.3.8.1.

said agreements in view of the operating expenses and onshore costs recorded for this period on the sea links covered by the public service obligations.

(327) As has already been noted, the financial undercompensation for public service in the period 1991 to 2001 amounted to EUR 53,48 million.

(328) For costs linked with operational restructuring measures, the Commission adopts the figure of EUR 46,0 million<sup>(120)</sup>. The Commission notes that the company should make EUR 21 million in the net revenue from disposals<sup>(121)</sup> following implementation of the disposals provided for in the restructuring plan. Bearing these facts in mind, the Commission therefore reaches the conclusion that the sum of EUR 76 million is completely justified to restore the company's viability in the short term. SNCM is now unable to obtain a bank loan, even if it proposed its newest ships, unencumbered by mortgage or other servitudes, as a mortgage guarantee<sup>(122)</sup>. Finally, the Commission considers that the company is unable to find other sources of capital to finance its restructuring programme. Accordingly, the remainder of its requirement, amounting to EUR 76 million, should according to this calculation be provided in the form of restructuring aid and any revenue from the disposal of non-strategic shares.

the end of 2002, as detailed above, a EUR 76 million cash injection would raise the company's net position, all other things remaining equal, from about – EUR 26,5 million to + EUR 49,5 million. Similarly, the company's financial debt would change from EUR 144,8 million (situation at end 2002) – EUR 76 million (cash injection) + EUR 31,2 million (outflow for operational restructuring measures, excluding exceptional depreciation of the *Liamone*), to about EUR 100 million. Consequently, it would remain equal to double the net position, leading the Commission to conclude that this obviates the risk of surplus cash within the meaning of the guidelines. To the extent that there is such a risk, the conditions laid down in the present decision are intended to prevent any distortion of competition. Even if account is taken of the regulated provisions of EUR 60 million discussed above, of which the Commission considers that only part of these are company capital, the company's own resources of approximately EUR 110 million would remain counterbalanced by virtually equivalent debts. In the Commission's opinion, the presence of net fixed assets to be financed to the tune of EUR 283 million at the end of 2002 fully justifies this level of capital. A reduction of the aid, e.g. through new mortgage loans taken out by SNCM, would automatically lead to an increase in debt and would, because of disrupting this adequate balance according to the Commission's analysis, leave no scope for the company's financial restructuring.

#### 5.5. Necessity of the conditions imposed by the Commission

(329) The Commission therefore believes that the amount of recapitalisation of EUR 76 million notified by the French authorities in the last analysis seems consistent with the approach which it has adopted, subject, as will be indicated below<sup>(123)</sup>, to the taking into account of revenue from transfers of non-strategic shares that would supplement the disposals provided for in the restructuring plan.

(330) Finally, the Commission considers that the aid proposed does not exceed what is necessary to restore viability. On the basis of the financial situation as presented at

(331) In accordance with the guidelines<sup>(124)</sup>, the Commission may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest.

(332) In the case under review, the Commission decides to impose a number of conditions with the dual purpose of limiting the company's capacity and preventing it from adopting an aggressive fares policy that would be harmful to its competitors in services to Corsica.

<sup>(120)</sup> See section 2.3.8.1. The French authorities have announced EUR 46,2 million, taking into account, in addition to the costs of operational restructuring measures (EUR 31,2 million), an expected depreciation of the *Liamone* of EUR 15 million. This amount was reduced to EUR 14,8 million in the 2001 accounts, and the figure adopted is therefore EUR 46,0 million. See also section 2.4.1.4.

<sup>(121)</sup> See section 2.3.2.

<sup>(122)</sup> See section 5.3.1.2.

<sup>(123)</sup> See section 5.4.2.4.

<sup>(124)</sup> See point 42 of the guidelines, which stipulate that the Commission may require the Member State: '(i) to take certain measures itself (e.g. to open up certain markets to other Community operators); (ii) to impose certain obligations on the recipient firm (e.g. to refrain from acting as price leader on certain markets); (iii) to refrain from granting other types of aid to the recipient firm during the restructuring period.'

#### 5.5.1. Reduction of capacity

(333) However, the reduction of the fleet <sup>(125)</sup> provided for in the restructuring plan should be balanced in the light of the ship purchase policy which SNCM has pursued in recent years, acquiring two new ships in 2002/2003, a car ferry and a passenger cargo ship of average capacity.

(334) Moreover, the increase in the company's capital following recapitalisation could give its management room for manoeuvre to purchase, where appropriate, new ships and/or acquire new shares contrary to the very objective of restructuring which is to focus on internal efforts to turn the company around.

(335) Bearing this in mind, the Commission is obliged to impose additional conditions to ensure compliance with the condition concerning reduction of capacity.

(336) The Commission should guarantee that the fleet of the SNCM group does not exceed the current total number of ships following disposal of four ships. Moreover, the Commission should prohibit the company from renewing its ships during a particular period, except for reasons beyond the company's control, requiring a Commission decision.

(337) The Commission also deems it necessary, in accordance with the restructuring plan notified by the French authorities, to limit the number of round trips on the various sea links to Corsica.

(338) The Commission considers that it is not appropriate to impose more drastic conditions with regard to capacity reduction because of, first, the company's obligations under its public service delegation contract and, second, prospects for traffic increase to Corsica and North Africa and, finally, the risk of bringing about a situation in which its direct competitor has a monopoly position on links between mainland France and Corsica. In this

connection, it is recalled that the guidelines allow 'a relaxation of the need for compensatory measures ... if such a reduction or limitation is likely to cause a manifest deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a tight oligopolistic situation' <sup>(126)</sup>.

(339) In view of the expected duration of the restructuring plan <sup>(127)</sup>, the Commission deems it reasonable to fix the deadline for the constraints set out above at 31 December 2006, by which time there will be the hoped for restoration of 'normal' net results for a maritime company of SNCM's size and of a reasonable level of company capital. A possibly earlier turnaround, however, will not bring the end of the period in which these constraints will have to be maintained forward in time.

#### 5.5.2. The company's contribution to the restructuring effort

(340) In accordance with the guidelines, the company in difficulty should 'make a significant contribution to the restructuring plan from [its] own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions' <sup>(128)</sup>.

(341) The Commission notes SNCM's efforts in the form of the disposal of assets (EUR 40 million in sales price and EUR 21 million in net proceeds from disposal). However, it finds that SNCM holds an important portfolio of shares in various companies which are either not directly related to the company's object or are not intrinsically connected with the services which the shipping company provides. The fact is that none of these shares have been included in the programme for disposing of assets laid down in the restructuring plan. The Commission takes the view that the company should dispose of all non-strategic shares in an open and transparent procedure and that the restructuring plan proposed by France ought to have made provision for this disposal. Moreover, the Commission considers that the proceeds from this disposal should proportionately reduce the requirement for aid in view of the need to keep the amount of aid to a minimum.

<sup>(125)</sup> See section 2.3.2.

<sup>(126)</sup> See point 38 of the guidelines.

<sup>(127)</sup> See recital 304.

<sup>(128)</sup> See point 40 of the guidelines.

## 5.5.2.1. Determining non-strategic holdings

(342) To counterbalance its conditional approval of recapitalisation, the Commission decides to oblige the company to dispose of all its holdings in the following subsidiaries:

- Amadeus France, a company developing and marketing a computerised booking system, in which SNCM has a 13 % share <sup>(129)</sup>,
- the Compagnie Corse Méditerranée, an airline in which SNCM has a 7 % share <sup>(130)</sup>,
- the real estate company Schuman, in which CGTH has a 50 % share,
- Someca,
- SMIP; failing this, SNCM could sell SMIP's sole asset, the *Southern Trader* <sup>(131)</sup>, and close down this subsidiary.

(343) With regard to all of these holdings, the Commission notes that the French authorities have never in the course of the procedure indicated that they are of strategic importance for SNCM's survival.

(344) The Compagnie Corse Méditerranée (CCM), known under its business name CCM Airlines, is an aviation company operating air services to Corsica. It is a semi-public limited company with a capital of EUR 10 335 520. Its main shareholders are the territorial collectivity of Corsica (60,37 %), Air France (11,95 %), Crédit Agricole (7,55 %), the Caisse des Dépôts et Consignations (4,75 %), SNCM (6,78 %), TAT EA (2,52 %), TAT SA (1,68 %), the Caisse de Développement de la Corse du Sud (1,21 %), the Chambre de Commerce de Haute-Corse (0,84 %). Its board consists of 11 members: the Assembly of Corsica (seven members), Air France (one member), Crédit Agricole (one member), Caisse des Dépôts et Consignations (one member) and SNCM (one member). The Commission takes the view that there is no need for a shipping company such as SNCM to have any holdings in airlines and that SNCM's holding in CCM are not of strategic importance. It should therefore be disposed of as a condition for recapitalisation.

<sup>(129)</sup> According to the SNCM group's annual report of 2001.

<sup>(130)</sup> See footnote 129.

<sup>(131)</sup> According to information provided by the French authorities, a promise of sale has been made for this ship.

(345) The Schuman company covers various fixed assets. In the Commission's opinion, the holding in this company is not of strategic importance for SNCM's activities and should therefore be sold off.

(346) Someca is specialised in the transport of cement to Corsica on a bulk cargo ship. Bulk transport provides little synergy with ro-ro freight and the small volume of cement transported to Corsica does not justify keeping shares in such a highly specialised subsidiary. Accordingly, the Commission considers that this holding is not of strategic importance to SNCM and that it should therefore be disposed of.

(347) SMIP's sole activity is leasing the *Southern Trader*. This activity of leasing ships is far removed from SNCM's core activity. It is in no way of strategic importance to the group. SNCM should therefore either dispose of this subsidiary or sell off its sole asset, the *Southern Trader*, and close down this subsidiary.

## 5.5.2.2. The special case of CMN

(348) The case of CMN is more complex. On the one hand, SNCM and the French authorities maintain that SNCM's holding in CMN is of crucial importance and is therefore of strategic significance to ensure execution of the public service delegation contract. On the other hand, Corsica Ferries and Stef-TFE are of the opinion that this holding is not of strategic importance to SNCM.

(349) The Commission notes that even though SNCM and CMN are both competitors and partners, the two companies participate in carrying out the public service contract.

(350) Moreover, the two companies have developed synergies on services to Corsica which go beyond what is required by the public service delegation contract:

- a joint computerised booking system not only for Corsica but also for the Marseilles-Sardinia links,

- a joint passenger embarkation control system,
- coordination of timetables,
- CMN access to SNCM's network of agencies in Europe.

disposal cannot be contemplated without jeopardising the company's short-term viability because of the essential roles they play within the group.

#### 5.5.2.4. Taking account of the proceeds expected from the required disposals

(351) The Commission notes that cooperation between the two companies goes back a long way, to 1954. The Commission also notes that CMN's fleet clearly complements SNCM's in meeting the requirements of services to Corsica. The Commission also notes that the shareholders' pact binding the two companies provides for cooperation between them.

(357) The Commission wishes, where appropriate, to reduce the amount of aid in order to take account of the proceeds from the disposal of non-strategic holdings. However, it does not have the information necessary to determine the amount that would accrue from the required disposals, although a very rough estimate suggests that it will be around EUR 10 million, excluding the disposals already envisaged under the restructuring plan. The Commission therefore deems it necessary that a part of the aid, of the order of EUR 10 million, be frozen pending clarification of this amount and cannot be granted immediately.

(352) The Commission concludes from the above that SNCM's shareholding in CMN is of crucial importance to SNCM for its long-term development.

(353) Bearing these facts in mind, the Commission does not deem it appropriate to require in this decision that SNCM disposes of its holdings in CMN.

(358) Should it appear that the disposals have generated more than EUR 10 million for the company, the second tranche cannot be granted to SNCM. The Commission has discarded the option of further reducing the amount of the first tranche of aid approved, in order to encourage SNCM to sell off these holdings at the best possible price. However, should the required disposals other than those already provided for in the restructuring plan generate less than EUR 10 million, the remainder will be paid, account being taken of the proceeds from these disposals. The second payment can, where appropriate, be authorised by the Commission only if all other conditions of the present decision are complied with.

(354) The same applies to the Cofremar company, a joint subsidiary of SNCM and CMN, which compiles statistics on freight transport to Corsica.

#### 5.5.2.3. Other strategic holdings

(355) The Sud-Cargos company offers major synergies and genuine complementarity with SNCM on services to the Maghreb. Sud-Cargos is a partner of undeniable importance if SNCM is to develop ro-ro transport to the Maghreb. Sud-Cargos also contributes very specific knowledge of the market of services to North Africa. The two companies can draw benefit from pooling particular onshore structures in Marseilles and in the Maghreb to achieve economies of scale. Moreover, SNCM's business structure provides Sud-Cargos with a substantial part of the latter's turnover.

#### 5.5.3. Prevention of price leadership

(359) In the Commission's opinion, the information supplied by the French authorities enable it to discard the allegations that SNCM has been acting as the price leader <sup>(132)</sup> on services to Corsica.

(356) SNCM's other subsidiaries contribute significantly to its activities and can likewise not be severed from the SNCM group. The Commission takes the view that their

(360) Nevertheless, the Commission deems it of crucial importance to monitor throughout the restructuring

<sup>(132)</sup> On this subject, see sections 2.3.7 and 4.1.1.

period that SNCM does not pursue an aggressive fares policy. For this reason, the Commission decides to make the grant of restructuring aid conditional on the absence of any fares charged by SNCM below those of its competitors on services to Corsica.

#### 5.5.5. Full implementation of the restructuring plan and compliance with conditions imposed

(361) In order to avoid situations in which competitors would abnormally raise their fares for crossings, the Commission combines this rule with a safeguard clause to be applied if all the competitors advertise, for equivalent services and identical dates, prices above those of SNCM's fares in a reference year before the arrival of competitors on this market. If SNCM's competitors were to unfairly increase their fares, SNCM should be allowed to advertise the lowest fares to bring about a return to acceptable price levels. To this end, the Commission chooses 1996 as the reference year, as it was in this year that SNCM was for the first time facing competition on its links between the ports of mainland France and Corsica and because fares have dropped since. Consequently, it would not be normal for prices on the market to exceed those in force in 1996 at any time in the future. The reference prices should of course be reviewed in the light of inflation recorded in France.

(365) SNCM must fully implement the restructuring plan that has been accepted by the Commission and carry out all the obligations laid down in this decision. The Commission regards failure to comply with the plan or with all or some of the obligations laid down in the present decision as an abuse of the aid which will automatically lead to a formal investigation procedure and eventually to the risk that the Commission claims back the aid paid in its final decision.

#### 5.5.6. Verification and annual report

(362) The condition laid down in recital 361 will be checked if every day the lowest fares advertised by SNCM exceed the lowest promotional fares advertised by each of its competitors for the same destinations and services. The Commission will investigate any failure to comply with this condition.

(366) The Commission should be enabled to ascertain the smooth implementation of the restructuring plan through regular and detailed reports to be submitted to it by France.

(367) With regard to aid to large firms, the guidelines provide<sup>(133)</sup> that, 'the first of these reports will normally have to be submitted to the Commission not later than six months after approval of the aid. Reports will subsequently have to be sent to the Commission at least once a year, at a fixed date, until the objectives of the restructuring plan can be deemed to have been achieved. They must contain all the information the Commission needs in order to be able to monitor the implementation of the restructuring programme, the timetable for payments to the company and its financial position and the observance of any conditions or obligations laid down in the decision approving the aid.'

#### 5.5.4. Limitation of round trips to Corsica

(363) The Commission considers it important that the compensatory measures offered to SNCM's competitors can be maintained throughout the restructuring period. Accordingly, it decides to make aid conditional upon strict adherence to the commitment which the French authorities make in the restructuring plan with regard to the annual number of round trips on the various sealinks with Corsica.

(364) The annual number of round trips of ships on the various sealinks to Corsica will be limited until 31 December 2006 to the thresholds indicated in table 3, save for exceptional reasons beyond the company's control which would make it necessary to transfer particular round trips to other ports and save for a change in the public service obligations incumbent on the company.

## 6. CONCLUSION

(368) In conclusion, the Commission considers that the restructuring aid in the form of recapitalisation is compatible with the common market, provided that the conditions laid down in the present decision are complied with.

(369) The Commission asks that France:

- inform the Commission as soon as possible, and not later than 15 working days after the date on which

<sup>(133)</sup> See point 46 of the guidelines.

this decision is received, of the elements which it believes should be covered by the obligation of professional secrecy provided for in Article 25 of Regulation (EC) No 659/1999,

- inform the recipient of the aid of this decision as soon as possible, without divulging, where appropriate, any elements which it considers as covered by professional secrecy, the communication of which to the recipient of the aid could be harmful to particular interested parties, and indicate in the version transmitted, where appropriate, any other elements which it deems to be covered by professional secrecy and which it has divulged.

(370) The Commission, while reminding France that:

- the restructuring period for SNCM ends on 31 December 2006,
- under the guidelines <sup>(134)</sup>, any individual aid intended to encourage tangible investment during the restructuring period for the benefit of SNCM or one of its subsidiaries under an aid scheme approved by the Commission should be individually notified to the Commission,
- under the guidelines, further restructuring aid can normally not be considered, save in exceptional and unforeseeable circumstances for which the company is not responsible, during the 10 years following the end of the restructuring period, i.e. in this case 31 December 2006,
- any new plan for recapitalisation of SNCM must be notified to the Commission before the end of the restructuring period even if the French authorities consider that this new plan complies with the principle of a private investor in a market economy,

HAS DECIDED AS FOLLOWS:

#### Article 1

The restructuring aid which France plans to grant to the Société Nationale Maritime Corse-Méditerranée (SNCM) is compatible with the common market under the conditions laid down in Articles 2 to 5.

<sup>(134)</sup> See points 88 and 89 of the guidelines.

#### Article 2

From the date on which this Decision is notified and until 31 December 2006, SNCM shall refrain from acquiring new ships and signing contracts for building, ordering or chartering new or renovated ships.

From the date on which this Decision is notified and until 31 December 2006, SNCM can only operate the 11 ships which SNCM already possesses, namely: the *Napoléon Bonaparte*, *Danielle Casanova*, *Île de Beauté*, *Corse*, *Liamone*, *Aliso*, *Méditerranée*, *Pascal Paoli*, *Paglia Orba*, *Monte Cinto* and *Monte d'Oro*.

If for reasons beyond its control SNCM has to replace one of its ships before 31 December 2006, the Commission may authorise such a replacement on the basis of a duly reasoned notice served by France.

#### Article 3

The SNCM group shall dispose of all its direct and indirect holdings in the following companies:

- Amadeus France,
- Compagnie Corse Méditerranée,
- Société civile immobilière Schuman,
- Société Méditerranéenne d'Investissements et de Participations,
- Someca.

Instead of disposing of its holdings in Société Méditerranéenne d'Investissements et de Participations, SNCM may sell this company's sole asset, the *Southern Trader*, and close down this subsidiary.

The disposals may be made, at the choice of the French authorities, either through public auction or through a call for expressions of interest published in advance, providing for a minimum period of two months for any response.

France shall provide the Commission with proof of all these disposals. The low level of bids which SNCM might receive cannot be invoked as a reason for not going ahead with the disposals. If there are no bids and if France can show proof that all the necessary publicity has been made, the condition laid down in the first paragraph shall be deemed to have been complied with.

*Article 4*

In respect of all links to Corsica, SNCM shall, from the date on which this Decision is notified and until 31 December 2006, refrain from pursuing a fares policy in respect of published fares intended to offer lower fares than those of each of its competitors for equivalent destinations and services and identical dates.

The Commission reserves the right to initiate an investigation procedure whenever it finds that the conditions laid down in this Decision have not been complied with, and in particular the condition laid down in the first paragraph.

The condition laid down in the first paragraph is complied with if every day the lowest prices advertised by SNCM are higher than the lowest promotional prices advertised by each of its competitors for equivalent destinations and services.

The condition laid down in the first paragraph shall no longer apply if the prices of the said competitors exceed SNCM's fares that were in force in the reference year 1996, corrected for inflation.

Before 30 June each year, France shall inform the Commission of all the elements necessary to show that this condition has been duly complied with in the preceding calendar year in respect of all crossings to or from Corsica.

*Article 5*

In accordance with the commitments made by the French authorities in the restructuring plan, the annual number of round trips of ships on the various sea links to and from Corsica are until 31 December 2006 limited to the thresholds indicated in table 3 of this Decision, save for exceptional reasons for which SNCM is not responsible that would oblige it to transfer particular round trips to other ports, and save for any change made to the public service obligations incumbent on the company.

*Article 6*

France is authorised to recapitalise SNCM through a first payment of EUR 66 million from the date on which this Decision is notified.

Until the end of the restructuring period, i.e. until 31 December 2006, the Commission may decide, upon a request from the French authorities, to subsequently authorise a second payment to SNCM which will correspond to the difference between the EUR 10 million remaining and the proceeds from the disposals required in Article 3, in accordance with the conditions laid down in the said Article.

Such a decision can be taken only if the action required in Article 3 has been carried out, the proceeds from the disposals does not exceed EUR 10 million and the conditions laid down in Articles 2, 4 and 5 have been complied with, without prejudice to the Commission's right to initiate, where appropriate, the formal investigation procedure for failure to comply with any of these conditions. Failing this, the second instalment of aid shall not be paid.

*Article 7*

Within six months of the date on which this Decision is notified, France shall inform the Commission of the measures taken to comply with it.

*Article 8*

This Decision is addressed to the French Republic.

Done at Brussels, 9 July 2003.

*For the Commission*  
Loyola DE PALACIO  
Vice-President

**COMMISSION DECISION****of 17 September 2003****on the State aid implemented by Germany for Space Park Development GmbH & Co., KG***(notified under document number C(2003) 3241)***(Only the German text is authentic)****(Text with EEA relevance)***(2004/167/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provision cited above <sup>(1)</sup>,

Whereas:

by SWG Grundstücks GmbH & Co. KG to Space Park Development GmbH & Co. KG involve elements of incompatible State aid within the meaning of Article 87(1) of the EC Treaty. As regards the complainants' remaining allegations, the Commission concluded that there was no State aid or no reason to investigate further at that stage.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(2)</sup>. The Commission invited interested parties to submit comments in that respect.

(5) The Commission has received no comments from interested parties.

**I. PROCEDURE**

(1) Between 14 June 1999 and 19 September 2001, the Commission received several letters from several complainants concerning the construction of a leisure park in Bremen which was allegedly receiving considerable State aid, in particular from the Bremen regional administration, contrary to the provisions of the EC Treaty. By letter of 26 October 2001, the Commission sent the German authorities a request for information, seeking clarification on the complainants' allegations, to which the German authorities replied by letters of 31 January and 1 February 2002, in a meeting on 6 June 2002 and by letter of 20 June 2002. The case was registered under NN 78/2002.

(2) By letter dated 2 August 2002, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of part of the measures. As of then the case was registered as C 53/2002.

(3) In its decision to initiate the formal investigation procedure (the opening), the Commission could not exclude that the capital injection of Bremen to Köllmann AG and the partly interest-free loan granted

(6) Comments presented by Germany were received on 12 September 2002, 27 January 2003 and 16 April 2003. On 8 May 2003, the Commission decided to enjoin Germany pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(3)</sup> to supply all such documentation, information and data as are necessary to assess the compatibility of the measure in question. Additional information presented by Germany by letter of 16 June 2003 was received on 17 June 2003.

**II. DESCRIPTION OF THE PROJECT AND THE MEASURES AT STAKE**

(a) *The Space Park Bremen Project*

(7) Space Park Bremen is an investment project of about EUR 500 million on an area of 26 ha, including several activities in the leisure and entertainment sector, in

<sup>(1)</sup> OJ C 246, 12.10.2002, p. 14.

<sup>(2)</sup> See footnote 1.

<sup>(3)</sup> OJ L 83, 27.3.1999, p. 1.

particular a leisure-park-type 'Space Centre', restaurants, a multiplex-cinema and a discotheque, a hotel and a shopping centre (retail). The park is under construction since end 2000. The opening of the park was envisaged for spring 2003, but the date was postponed because of unexpected delays. The park area is situated on a derelict shipyard in the Gröpelingen district of Bremen, where also two other industrial areas are being developed.

- (8) The Space Park project was initiated by Köllmann AG, a company active in international real estate development. Bremen, DEGI Deutsche Gesellschaft für Immobilienfonds mbH, a subsidiary of the Dresdner Bank Group, and KanAM Euro Malls GmbH are the investors of the project. DEGI and KanAM are both active in international real estate development and invest in shopping and urban entertainment centres.

(b) *The measures at stake*

- (9) Bremen intended to purchase 2,96 million shares of Köllmann AG at a price of EUR 2,55 plus a premium of EUR 1,75/share. This represented a proportion of 7,98 % of the increased capital of Köllmann AG. The total price would have been EUR 12,782 million. In exchange, Bremen would have sent one of the six members of the board and participated at the distribution of 50 % of the profit of Köllmann AG. Germany claimed that KanAM would participate at the same conditions as Bremen in this operation. In exchange, Köllmann AG would have invested in the Space Park project.
- (10) The complainants claimed that Bremen had granted an interest-free loan to finance the Space Park project. According to the information provided by the German authorities before the opening, SWG Grundstücks GmbH & Co. KG (hereafter referred to as SWG) granted by contract of 18 January 1999 to a precursor company of Space Park KG a loan of DEM 26 million (EUR 13 million), which was disbursed on 23 February 1999. On 15 April 1999, an unrelated company, Space Park Development GmbH & Co. KG replaced the former debtor. This loan was at least a partly interest-free loan.

### III. COMMENTS PRESENTED BY GERMANY

- (11) During the formal investigation procedure Germany supplied additional information on the measure as regards the participation of Bremen in Köllmann AG and the grant of the partly interest-free loan by SWG to Space Park Development GmbH & Co., KG.

(a) *The intended participation of Bremen in Köllmann AG*

- (12) With respect to the intended participation of Bremen in Köllmann AG, the German authorities informed the Commission that the former investor Köllmann would be replaced and that therefore no participation of Bremen in Köllmann AG will take place. They further informed the Commission that, for the time being, no measure had been adopted by Germany — that is, regardless of whether or not the envisaged measure would or would not involve State aid, no grant has yet taken place.

(b) *The partly interest-free loan*

- (13) Following the information submitted by the German authorities, Space Park Development GmbH & Co., KG, a private project company that was owned and established by Köllmann AG for the purpose of the Space Park project, replaced, as from 15 April 1999, Space Park KG as borrower of the loan of DEM 26 million (EUR 13 million) granted by SWG. The former borrower Space Park KG was dispensed from all rights and obligations of the loan agreement. The loan was split into two tranches (hereafter: loan I and loan II) and had, besides a handling fee of DEM 25 000 and after some modifications on 5 July 1999 and 20 September 1999, the following conditions:

| (1) conditions for loan I  |                                                                                                                                       |
|----------------------------|---------------------------------------------------------------------------------------------------------------------------------------|
| Amount:                    | million DEM 1,47                                                                                                                      |
| Interests:                 | 3,8 % p.a. from 15.4.1999 to 30.6.1999<br>4,73 % p.a. from 1.7.1999 to 31.12.1999                                                     |
| Duration:                  | Until 31.12.1999                                                                                                                      |
| Securities:                | (1) Group guarantee from Köllmann AG<br>(2) Directly enforceable guarantee from Space Park KG<br>(3) Land charge given by Köllmann AG |
| (2) conditions for loan II |                                                                                                                                       |
| Amount:                    | million DEM 24,53                                                                                                                     |
| Interests:                 | no interests from 15.4.1999 to 31.12.1999<br>4,73 % p.a. from 1.1.2000 to 31.3.2000                                                   |
| Duration:                  | Until 31.3.2000                                                                                                                       |
| Securities:                | See above                                                                                                                             |

- (14) However, according to the information available, there is no indication for neither the payment of interests nor

the repayment of the loans on due date. On the contrary, according to the information available the Commission has to conclude that no interests had been paid and that the loans have still not yet been reimbursed. The Commission therefore considers that the loans have been prolonged for an open-ended period of time as from 1 January 2000 and as from 1 April 2000 and not yet been repaid.

(15) In their letter of 16 April 2003, the German authorities argued that the loan did not involve State aid in the meaning of Article 87(1) EC as its granting was not imputable to the State since it had been granted by SWG and not directly by the State. SWG was claimed to be an independently acting public undertaking without being under constant State control. In this context the German authorities referred to the so-called Stardust ruling <sup>(4)</sup> and stated that following the case-law of the ECJ, Article 87(1) EC presupposes that when the granted sums 'constantly remain under public control, and [are] therefore available to the competent national authorities, [it] is sufficient for them to be categorised as State resources' <sup>(5)</sup>. The German authorities continue to refer to the Stardust ruling, in particular to points 55 and 57, and argued that even if SWG would be under constant public control, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State and that a specific analysis has to be made by the Commission in each particular case.

(16) Despite this argument, Germany offered in previous letters to demand retroactively the borrower to pay the applicable reference rate as interest. This was finally accepted by the borrower, Space Park Development GmbH & Co., KG, by letter dated 13 June 2003 and confirmed by the German authorities by letter of 16 June 2003. The German authorities claimed therefore that since the loan was backed by guarantees and further securities, the loan would not have to be regarded as State aid in the meaning of Article 87(1) of the EC Treaty.

(17) Finally, the German authorities argued that in any case, although the loan was granted to Space Park Development GmbH & Co., KG, it should be taken into account that the enterprise belonged to the Köllmann-Group and therefore its situation should be seen in the context of the financial situation of Köllmann AG, which was one of the leading German project development companies at the time the loan was granted. The current financial difficulties of Köllmann AG could not be relevant to the issue since they were not predictable neither at the time the loan was granted nor at the time it was prolonged.

<sup>(4)</sup> Case C-482/99, France v. Commission (Stardust Marine), [2002] ECR I-04397.

<sup>(5)</sup> Case C-482/99 (Stardust Marine), referred to above, point 37.

#### IV. ASSESSMENT OF THE MEASURES

##### 1. Measures under scrutiny

(a) *The intended participation of Bremen in Köllmann AG*

(18) As regards the participation of Bremen in Köllmann AG the Commission notes that no participation has to-date taken place. Therefore, the participation of Bremen in Köllmann AG has not to be assessed in this decision. The measure is without object. Any future participation in that or any other company will need to be examined on its own merits.

(b) *The loan granted to Space Park KG*

(19) On 18 January 1999, SWG granted a loan of DEM 26 million (EUR 13 million) to Space Park KG at an interest rate of 3,8 %. The duration of the loan was limited to 15 April 1999. Any potential aid arising from the loan to Space Park KG would not exceed the *de minimis* — threshold of EUR 100 000 over a period of three years. This is why the opening did not have to involve a potential aid given to Space Park KG.

(c) *The loan granted to Space Park Development GmbH & Co. KG*

(20) On 15 April 1999, Space Park Development GmbH & Co. KG replaced the former debtor Space Park KG and thus became borrower of the loan of DEM 26 million (EUR 13 million) granted by SWG. As a result of the above, only this measure has to be assessed into detail.

##### 2. Presence of State aid in the meaning of Article 87(1) of the EC Treaty

(21) In order to appraise the measure under the State aid rules of the EC Treaty it has to be assessed whether it constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(22) By virtue of Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market. The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by an intermediary body acting by virtue of

powers conferred on it. A measure is thus deemed to be State aid if it meets four criteria: (a) it confers an advantage; (b) this advantage is conferred by means of State funding; (c) the measure distorts or threatens to distort competition, thereby affecting trade between Member States; and (d) the measure concerned is selective, favouring particular companies.

(23) The Commission must therefore analyse the loan, in respect of which it initiated the procedure provided for in Article 88(2) of the EC Treaty, in the light of the four criteria referred to in the foregoing recital.

(24) The measure confers an advantage to the borrower as the interest of the loan is clearly lower than the reference rate used by the Commission <sup>(6)</sup>.

(25) The Commission considers that any State aid granted for the development of a leisure park would be liable to distort or threaten to distort competition and thereby affect trade between Member States since:

- (a) large amusement parks, such as the one in question, constitute destination parks which, at least potentially, affect tourist flows;
- (b) such parks increase tourism facilities in the regions where they are set up;
- (c) the Commission has adopted several decisions on State aid for amusement parks (Eurodisney <sup>(7)</sup>, Parco Navi <sup>(8)</sup>, Terra Mítica Park (Benidorm, Alicante) <sup>(9)</sup>), etc.), as well as investments in tourism (hotels <sup>(10)</sup>, marinas <sup>(11)</sup>, etc.).

Irrespective of the other activities of Space Park Bremen (cinema, shopping centre, etc.) the measure is therefore liable to distort or threaten to distort competition and thereby affect trade between Member States. In addition, the measure also indirectly benefit to Köllmann AG which is an international real estate development company. For this reason, it therefore also affects trade between Member States.

(26) The measure concerns the company Space Park Development GmbH & Co. KG, at the time the loan was granted a wholly-owned subsidiary of Köllmann AG. The measure is therefore selective.

(27) The question is whether this advantage is conferred by means of State resources and if so imputable to the State.

*(a) Presence of State resources and imputability to the State*

(28) The German authorities have argued against the presence of State resources and the imputability of the granting of the loan to the State since the loan was granted by SWG, a public undertaking, and not directly by the Bremen authorities. The Commission doubts whether the rules developed by the Court in the so-called Stardust ruling <sup>(12)</sup> can be applied in this case rather than the rules developed in the so-called Air France ruling <sup>(13)</sup>, which seems to be much closer to the situation at stake. But even if the principles developed in the Stardust ruling would apply, the Commission assumes the presence of State resources and the imputability of the measure at stake to the State. Following the Stardust ruling, the imputability of a measure to the State although taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken <sup>(14)</sup>. In this context, Advocate General Jacobs stated that because of the difficulties of proof and the obvious danger of circumvention, a restrictive view should not be taken of the type of evidence to be adduced. Circumstantial evidence (perhaps even press reports) might be relied upon <sup>(15)</sup>. Since the German authorities did not supply all such documentation, information and data as necessary to assess this question although requested in the information injunction, the Commission has to assess this issue based on the information in its possession.

(29) As regards the ownership of SWG, the information submitted by the German authorities seems to be contradictory. By letter of 20 June 2002, during the Commission's preliminary assessment of the case, the German authorities stated with respect to potential aid elements in the context of the sale of land by the Land of Bremen that SWG is a company owned by the City of Bremen. This statement was taken for granted in the opening, where the Commission concluded that the sale

<sup>(6)</sup> See Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3) and the reference rates applicable for Germany as from 1 August 1997 (see [http://europa.eu.int/comm/competition/state\\_aid/others/reference\\_rates.html](http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html)).

<sup>(7)</sup> State aid N 640/99 France (OJ C 284, 7.10.2000, p. 4).

<sup>(8)</sup> State aid N 132/99 Italy (OJ C 162, 10.6.2000, p. 23).

<sup>(9)</sup> State aid C 42/2001 (ex NN 14/01) Spain (OJ C 300, 26.10.2001, p. 2).

<sup>(10)</sup> State aid N 785/99 Italy (OJ C 328, 18.11.2000, p. 32).

<sup>(11)</sup> State aid N 582/99 Italy (OJ C 40, 12.2.2000, p. 2).

<sup>(12)</sup> Case C-482/99 (Stardust Marine), referred to above.

<sup>(13)</sup> See case T-358/94 (Compagnie nationale Air France v. Commission), [1996] ECR II-2109, in particular points 55 to 61.

<sup>(14)</sup> Case C-482/99 (Stardust Marine), referred to above, point 55.

<sup>(15)</sup> See Opinion of Advocate General Jacobs in case C-482/1999 (Stardust Marine), referred to above, point 67.

of land by SWG did not involve State aid. By letter of 16 April 2003, the German authorities stated that SWG is a real estate company pursuant to private law which is owned by Bremer Investitions-Gesellschaft mbH and not integrated into the public administration of the City of Bremen, which is alleged not to be a shareholder of SWG. However, following the information available <sup>(16)</sup>, the Bremer Investitions-Gesellschaft mbH is the central service provider for regional and business development in the Land Bremen and concentrates, in particular in conjunction with its subsidiaries, namely the WfG Bremer Wirtschaftsförderung GmbH, Bremer Aufbau-Bank GmbH and the BIA Bremer Innovations-Agentur GmbH, the responsibility for all kind of economic incentive activities in Bremen, i.e. in particular the administration of aid schemes. The responsibility for the administration of these aid schemes was transferred in a contract governed by public law (öffentlich-rechtlicher Vertrag) by the Land Bremen to Bremer Investitions-Gesellschaft mbH on the basis of the so-called Beleihungsgesetz (Gesetz zur Übertragung von Aufgaben staatlicher Förderung auf juristische Personen des privaten Rechts vom 26. Mai 1998) <sup>(17)</sup>. Following its business reports 2000 and 2001 <sup>(18)</sup>, the company capital (Eigenkapital) of Bremer Investitions-Gesellschaft mbH, which amounts to EUR 92 million, is held by the Land Bremen (EUR 86,2 million), by the City of Bremen (EUR 4,464 million) and by the City of Bremerhaven (EUR 0,736 million). The Bremen Senator for Economic Affairs is the chairman of the supervisory board. In view of the above, the Commission concludes that SWG, the subsidiary of Bremer-Investitions-Gesellschaft mbH, is indirectly owned by Bremen and therefore considers that SWG is a public undertaking. Funds belonging to SWG are therefore State resources.

- (30) Although requested explicitly in the information injunction, the German authorities did not submit any decision, contract, agreement, law or other document demonstrating that Bremer Investitions-Gesellschaft mbH and/or SWG did not act — openly or covertly, regularly or on an ad hoc basis in the present case — as a relay or vehicle which the Bremen authorities used to intervene in support of Space Park Development GmbH & Co. KG. However, following the Commission's own investigations, an answer given by the Bremen authorities on 10 September 2002 to a parliamentary question asked in the regional parliament Bremische Bürgerschaft (Landtag) assumes the presence of State resources and the involvement of the Bremen authorities in the granting of the loan. The Bremen authorities answered the parliamentary question as follows <sup>(19)</sup>:

<sup>(16)</sup> See <http://www.big-bremen.de/>.

<sup>(17)</sup> Brem.GBl. 1998, p. 134 (corrigendum Brem.GB. 1998, p. 171). The constitutionality of the law in its wording of 17 October 2000 (Brem.GBl. 2000, p. 399) was confirmed by the Bremen Constitutional Court in 2002 (see ruling of 15 January 2002 in case ST 1/01).

<sup>(18)</sup> The business reports are published under <http://www.big-bremen.de/>.

<sup>(19)</sup> See Drucksache 15/1238 of the regional parliament Bremische Bürgerschaft (Landtag), available under <http://www.bremische-buergerschaft.de/>.

'(...) SWG had refinanced DEM 24,53 million of the loan with the purchase money paid for the so-called AG-Weser-area, which economically was entitled to the Free Hansa City of Bremen (FHB), and DEM 1,47 million of the loan with funds of the Bremer-Investitions-Gesellschaft mbH (BIG). When appraising the circumstances, in particular the securities, representatives from the Bremen Senator for Economic Affairs, the Bremen Senator for Finance, the Bremen Chancellery and BIG decided on 13 January 1999 to find the granting of the loan compatible with the board decision of November 1998 in terms of an efficient project realisation. A consultation of the board of BIG for its own part of the loan was not necessary, pursuant to the company agreement.

SWG initially granted the loan to Space-Park KG. On behalf of Köllmann AG's request, the loan was transferred by contracts of 15 June 1999 and 5 July 1999 to Space-Park Development GmbH (now: Space Park Development GmbH & Co. KG). Space Park KG is still jointly and severally liable vis-à-vis SWG. In this context the SWG-loan was split into two parts amounting to DEM 1,47 million and DEM 24,53 million and the following interests were agreed: As regards the part amounting to DEM 1,47 million, interests of 3,8 % p.a. until 30 June 1999 and 4,73 % p.a. afterwards were calculated. The part amounting to DEM 24,53 million was granted interest-free until 31 December 1999. As from 1 January 2000 the interests amounted to 4,73 % p.a. (...).'

The Commission therefore notes that at least DEM 24,53 million of the funds that refinanced the loan were economically entitled to the Free Hansa City of Bremen and therefore have to be regarded as State resources. In addition to that it is noted that the granting of the whole loan was depending on the approval of the Bremen authorities. Thus the loan has to be regarded as imputable to the State. Even if a part of the loan was financed through SWG using its own or BIG's funds, such fact is irrelevant in that regard. Following the case-law for those funds to be categorized as State resources, it is sufficient that, as in the present case, they constantly remain under public control and are therefore available to the competent national authorities <sup>(20)</sup>.

- (31) In this context the Commission also notes that the German authorities offered even before and also during the opening to modify the conditions of the loan retroactively. An appropriate letter by SWG addressed to the recipient was presented by letter of 27 January 2003. The agreement by the recipient, dated 13 June 2003, was presented by letter of 16 June 2003. The implementation of the commitment of the Bremen

<sup>(20)</sup> See case C-328/99 and C-399/00, Italy and SIM 2 Multimedia SpA vs. Commission, not yet published, point 33; see also case C-482/99 (Stardust), referred to above, point 37.

authorities by SWG can only be explained by the influence of the Bremen authorities on SWG in the context of the loan agreement at stake. The fact that the Bremen authorities succeeded to agree to modify the loan agreement retroactively therefore seems to be contradictory to the argumentation put forward by the German authorities as regards the non-imputability of the measure to the State.

- (32) Accordingly, the Commission concludes the involvement of State resources and the imputability of the granting of the loan to the Bremen authorities.

*(b) Conditions of the loan and its aid element*

- (33) In order to further decide whether the grant of a loan by a public authority contains elements of State aid, it has to be examined in particular whether the company could get the loan on the market at the same conditions <sup>(21)</sup>. The aid element corresponds to the residual balance between the interest rate corresponding to real market conditions and the actually paid rate <sup>(22)</sup>. For the determination of the market consideration within the framework of the granting of a loan and for the calculation of the aid equivalent, the Commission notice on the method for setting the reference and discount rates <sup>(23)</sup> is applicable. In this communication the Commission states the abstract parameters, which it uses for the calculation of the aid element of an aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes for loans.
- (34) For the evaluation of the aid equivalent, the Commission uses a reference rate, which is supposed to reflect the average level of interest rates charged, in the various Member States, on medium and long-term loans (five or ten years) backed by normal securities. The reference rate thus determined is a floor rate, which may be increased in situations involving a particular risk (e.g. undertaking in difficulty, or where the security normally required by banks is provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan.
- (35) In any case, the situation would have to be viewed from the point of view of the lender at the moment the loan is approved. If he chooses to lend on conditions which could not be considered as normal in banking terms, then there is an element of aid involved which has to be

quantified. Therefore, according to the case-law, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus refrain from any assessment based on a later situation <sup>(24)</sup>. This is why the Commission has to assess the conditions of the loan from the standpoint of 1999, when the loan was granted to Space Park Development GmbH & Co., KG, and of 2000, when the loan was prolonged for an open-ended period of time.

*(aa) The application of the reference rates*

- (36) In this context the Commission notes that the German authorities committed themselves to demand the applicable reference rates retroactively. It is also noted that the Commission's reference rate for Germany amounted to 4,73 % as from 1 January 1999, to 4,76 % as from 1 August 1999, to 5,61 % as from 1 November 1999, to 5,70 % as from 1 January 2000, to 6,33 % as from 1 January 2001, to 5,23 % as from 1 December 2001, to 5,06 % as from 1 January 2002 and to 4,80 % as from 1 January 2003.
- (bb) No indication to assume a particular risk when the loan was granted*
- (37) In addition to that, the Commission notes that according to the information available, the reference rate has not been increased in the present case since no situation involving a particular risk could be assumed at the times the loan (i.e. loan I and loan II) was granted, i.e. based on the data available to the Bremen authorities and SWG in 1999 and 2000:
- (38) The German authorities submitted information according to which the beneficiary did not have to be regarded as an enterprise in difficulties at the time the loan was granted and prolonged. Space Park Development GmbH & Co., KG itself was founded in 1997 by Köllmann AG in order to develop the Space Park project. Following the information available, Space Park Development GmbH & Co., KG was clearly not an undertaking in difficulties at the time the loan was granted.
- (39) However, it has to be taken into account that Space Park Development GmbH & Co., KG belonged to the Köllmann-Group, which has given an express written guarantee in relation to the loan, and therefore its situation has to be seen in the context of the financial

<sup>(21)</sup> Case 40/85, Belgium/Commission (Boch), [1986] ECR 2321 (2345) point 13.

<sup>(22)</sup> See Case T-16/96, Cityflyer Express, [1988] ECR I-757 (777) point 52.

<sup>(23)</sup> OJ C 273, 9.9.1997, p. 9.

<sup>(24)</sup> See for instance case C-482/99 (Stardust), referred to above, point 71.

situation of Köllmann AG. Köllmann AG seems to be in financial difficulties since 2002. Nevertheless, at the time the loan was granted, Köllmann AG was one of the leading German project development companies and had realised numerous large projects in- and outside Germany in 1997. At the time the loan was granted, Köllmann AG had a very high equity capital of DEM 150 million (EUR 75 million), which was far above the amount of the loan. At the end of 1997, the profit and loss account showed sales of almost DEM 308 million (EUR 154 million) and a balance sheet profit of about DEM 45 million (EUR 22,5 million). In addition to the financial situation of Köllmann AG, the granting of the loan was also based on appropriate financial forecasts. Köllmann AG made a financial plan according to which all obligations in the context of the Space Park Bremen project would be met by the cash flow originated from the operation of Space Park Development GmbH & Co. KG. It resulted in expected expenditures of about DEM 862 million (EUR 431 million) and expected financial revenues of about DEM 960 million (EUR 480 million) for the years 1999 to 2002. Thus a cash flow of DEM 100 million (EUR 50 million) was expected, far above the amount of the loan. In addition, a profit of DEM 200 million (EUR 100 million) was also expected.

- (40) These forecasts were carefully verified by SWG. In this context SWG relied on an expertise from FIDES Treuhandgesellschaft, which is an independent auditing company. FIDES had confirmed the plausibility of the financial forecasts.
- (41) The Commission therefore concludes that before granting the loan, SWG had verified the financial situation of both Space Park Development GmbH & Co. KG and its parent enterprise Köllmann AG and the financial plan of the Space Park Bremen project by itself as well as through the expertise of FIDES. Accordingly, following the information available, in 1999 and even in 2000, there was no indication for a borrower in the position of SWG to doubt the solvency of Space Park Development GmbH & Co., KG or its parent company Köllmann AG. The granting and the prolongation of the loan in the years 1999 and 2000 do not show an unjustified risk.
- (42) In addition, following the information available, the loan was backed by securities normally required by private banks. The loan was backed by the following securities: a group guarantee (Konzernbürgschaft) given by Köllmann AG, amounting to DEM 26 million (EUR 13 million), a land charge given by Köllmann AG with a value of DEM 11 million (EUR 5,5 million) and a directly enforceable guarantee given by Space Park KG, amounting to DEM 26 million (EUR 13 million). The Commission notes that Space Park KG was owned by the following share holders in 1999 and 2000: DEGI owned 90 %, KanAm EuroMalls GmbH owned 5 % and Köllmann AG owned 5 % of the shares of Space Park KG. As already mentioned, DEGI is a subsidiary of the Dresdner Bank AG. The company Space Park KG had

and still has original capital of DEM 290 million (about EUR 145 million) and was and still is the owner of the Space Park — properties.

- (43) It is therefore concluded that the loan given by SWG to Space Park Development GmbH & Co. KG was backed by securities which, following the information available, were valuable and which more than doubled the amount of the loan.
- (44) Eventually, it has to be mentioned that a loan amounting to DEM 26 million (EUR 13 million) in the context of an investment project of about EUR 500 million appears to be rather limited and does not seem to involve a particular risk.
- (45) Finally, as regards the prospects of the leisure park market from the standpoint of 1999 and 2000, the Commission reminds on several similar leisure park projects launched or realised during this period, like for instance Parco Navi <sup>(25)</sup>, Pompei Tech World <sup>(26)</sup> or Terra Mítica <sup>(27)</sup>. The Commission acknowledged for instance in the Pompei Tech World case that there is a large scope for an expansion of this particular market segment. Accordingly, the Commission cannot find a particular risk only because of the nature of the project.
- (46) The Commission concludes that, based on the information available, no particular risk can be assumed at the time the loan was granted in 1999 and even at the time of its prolongation in 2000. The reference rate as a floor rate has not to be increased.
- (cc) Risk assumed by SWG as regards the prolongation of the loan
- (47) According to the information at the disposal of the Commission, the loan was prolonged under the same conditions for an open-ended period of time. In principle, a private bank in a market economy does not prolong a loan for an open-ended period of time (without any schedule of reimbursement). In this sense also, such a prolongation bears an element of State aid within the meaning of Article 87(1) EC.

<sup>(25)</sup> State aid N 132/99 — Italy (OJ C 162, 10.6.2000, p. 33).

<sup>(26)</sup> State aid N 229/01 — Italy (OJ C 330, 24.11.2000, p. 2).

<sup>(27)</sup> State aid C 42/2001 (ex NN 14/01) — Spain (OJ L 91, 8.4.2003, p. 23).

- (48) Up to March 2002, i.e. up to the time the Bremen authorities and therefore SWG, according to the information available <sup>(28)</sup>, were definitely informed that the financial situation of Köllmann had worsened the Commission has no reason to believe that such a prolongation involved additional risks for SWG. It is common that huge projects such as the Space Park project are delayed and that prolongation of the financing is necessary. The financial forecasts had no reason to be changed and the loan was still backed by the same securities. Therefore, for this period also the reference rate as a floor rate has not to be increased.
- (49) On the opposite, as from April 2002, the Bremen authorities and therefore SWG were definitely informed that the financial situation of Köllmann had worsened. From this time, it is very disputable that a private bank would have prolonged such a loan at the same conditions. This is all the more so since from that time, the presence of Köllmann as a lead investor in the Space Park project started to be questioned. According to the sixth subparagraph first indent of the above-mentioned Commission notice, the premium (in addition to the floor reference rate) in case of an undertaking in difficulties may amount to 400 basis points or more if no private bank would have agreed to prolong the loan. Despite the information injunction, the German authorities did not provide the Commission with clear reasons for this prolongation. In the present circumstances therefore, given that the loan is still secured, the Commission assumes that an increase of the floor reference rate by 400 basis points is appropriate in order to reflect the risk increase of SWG.
- (50) The Commission also takes note of the commitment of Germany that the loan will be paid back at short notice. Should it not be the case, even considering the increase of the floor reference rate as mentioned above, the loan would entirely amount as operating aid to Space Park Development GmbH & Co. KG and its parent company Köllmann AG.

(dd) The use of compound interest

- (51) However, in order to remove all potential distortion of competition deriving from the potential aid, the Commission wishes to remind the German authorities on the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered <sup>(29)</sup>. By modifying the loan agreement retroactively, the beneficiary forfeited the unfair advantage which it enjoyed over its competitors on the market and the conditions of competition which existed prior to the payment of the loan were restored. The retroactive adjustment of the loan agreement is therefore comparable with the recovery of illegal aid and the principles as stipulated in the above-mentioned Communication have to be applied for the medium term non-interest bearing loan granted to Space Park Development GmbH & Co., KG <sup>(30)</sup>. In addition, it has to be mentioned that abuse could not be excluded in similar cases if the Commission would accept the application of the reference rate retroactively in the present case without the use of compound interest. Otherwise Member States could try to circumvent an expected negative decision that would order the use of the reference rate on the basis of compound interest by modifying the measure retroactively by using the applicable reference rate, but on the basis of simple interest. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages of the loan are fully neutralised. These compound interests have to be calculated on the interests to be paid, themselves calculated using the reference rate (as adjusted) as follows from the above.

### 3. Legality of the measure

- (52) The Commission regrets that Germany granted and prolonged the loan without prior notification under Article 88(3) of the EC Treaty or did not design the loan as non-aid from the beginning.

### 4. Compatibility of the measure with the EC Treaty

- (53) The Commission would not have to adopt a partly negative decision if the measure were compatible with

<sup>(28)</sup> The Commission did not receive any precise information from the German authorities as of when SWG definitely knew that the financial situation of Köllmann AG had worsened. However, the Bremen Senator for Economic Affairs explained in a debate on request in the local parliament Bremische Bürgerschaft (Stadtbürgerschaft) that Köllmann had informed the Bremen authorities in March 2002 that it was in financial difficulties (see record of the 38th session of the 15th Bremische Bürgerschaft (Stadtbürgerschaft) on 17 September 2002, Plenarprotokollnr.: PlPr 15/38, S. 1761, available under <http://bremische-buergerschaft.de/>). Since no exact date was mentioned, the Commission therefore considers that both the Bremen authorities and SWG, acting on behalf of the Bremen authorities as described above, were informed in March 2002 and had to take this information into account as from April 2002.

<sup>(29)</sup> OJ C 110, 8.5.2003, p. 21 (Corrigendum OJ C 150, 27.6.2003, p. 3).

<sup>(30)</sup> See in particular subparagraph 6 of the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21 and OJ C 150, 27.6.2003, p. 3), where the following is stated: '(...) it appears that the effects of an unlawful aid are to provide funding to the beneficiary on similar conditions to a medium term non-interest bearing loan. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised. (...)'

the EC Treaty. On this basis, an assessment must be made as to whether that measure can be considered compatible with the common market. It should be pointed out that the German authorities did not invoke any exemption clause of the Treaty with regard to possible State aid elements in connection with the loan at stake.

the loan must be abolished by terminating the loan or modifying it in an appropriate way. One means for Germany to eliminate the aid by modifying the loan would be to increase the interest rate by 400 basis points, and modify the loan so that it will be paid back at short notice.

(54) None of the exemption clauses of Article 87(2) of the EC Treaty are applicable. The aid is not of a social character, is not granted to individual consumers, does not make good the damage caused by natural disasters or exceptional occurrences, and does not compensate for economic disadvantages caused by the division of Germany.

(55) Given that the aid has no regional objective — it is designed neither to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment nor to facilitate the development of certain economic areas — neither Article 87(3)(a) nor (c) of the EC Treaty for regional aid is applicable. On the basis of the information provided by the German authorities, the granting of the aid was not linked to any conditions. A regional derogation is therefore not possible.

(56) There is no justification applicable for the aid at stake as regards a serious disturbance in the German economy nor the promotion of the execution of an important project of common European interest in the meaning of Article 87(3)(b) of the EC Treaty.

(57) Under Article 87(3)(c) of the EC Treaty, aid may be found compatible with the common market if it facilitates the development of certain economic activities. This might in principle also apply to the loan at stake. However, in the case at hand, no condition for the application of this exemption clause is met since the granting of the aid was not linked to any condition.

(58) The aid is not aimed either at promoting culture or heritage conservation in the meaning of Article 87(3)(d) of the EC Treaty.

(59) Accordingly, no exemption from the principle of the ban on State aid pursuant to Article 87(1) of the EC Treaty applies.

## V. CONCLUSION

(60) In view of the above, as regards the period of time after execution of this decision, the incompatible State aid in

(61) As regards the period of time up to execution of this decision, the Commission finds that the loan involves State aid, to be calculated on the basis of the difference between the interest rate actually charged and the relevant reference rate, where appropriate increased by 400 basis points. This illegal and incompatible State aid must be recovered by Germany from the beneficiary. The amount to be recovered must be subject to interest at the reference rate in force when the loan was granted, annually compounded.

(62) For the purpose of calculating the amount of aid involved in the loan, the relevant interest rate <sup>(31)</sup> will apply from the date of grant to the date of prolongation. Then the relevant interest rates will apply from the day the loans were prolonged, i.e. 1 January 2000 for loan I and 1 April 2000 for loan II, up to 31 March 2002 <sup>(32)</sup>. Finally, the relevant interest rates, increased by 400 basis points, will apply as from 1 April 2002 up to the date the illegal and incompatible aid is reimbursed <sup>(33)</sup>.

(63) These determinations are also essentially consistent with the conclusions accepted by Germany during the course of the administration procedure, and the undertakings given by it to that effect.

(64) As regards the participation of Bremen in Köllmann AG, the Commission concludes that the measure has become without object since the participation has not taken place.

<sup>(31)</sup> The applicable interest rate was 4,73 % for Germany on 15 April 1999.

<sup>(32)</sup> As the loan is open-ended the relevant reference rate has to be used for each period it is applicable:  
For loan I: 5,70 % from 1 January 2000 to 31 December 2000; 6,33 % from 1 January 2001 to 30 November 2001; 5,23 % from 1 December 2001 to 31 December 2001; 5,06 % from 1 January 2002 to 31 March 2002.  
For loan II: 5,70 % from 1 April 2000 to 31 December 2000; 6,33 % from 1 January 2001 to 30 November 2001; 5,23 % from 1 December 2001 to 31 December 2001; 5,06 % from 1 January 2002 to 31 March 2002.

<sup>(33)</sup> As the loan is open-ended the increased reference rate has to be used for each period it is applicable, i.e. for loan I and II: 9,06 % from 1 April 2002 to 31 December 2002; 8,80 % as from 1 January 2003. Any potential future modification of the relevant reference rate up to the date the loan is reimbursed has to be taken into account.

HAS ADOPTED THIS DECISION:

*Article 1*

The loan granted on 15 April 1999 by Germany, through SWG Grundstücks GmbH & Co. KG, to the beneficiary, Space Park Development GmbH & Co. KG, involves illegal and incompatible State aid, to be calculated on the basis of the difference between the interest rate actually charged, and the relevant applicable reference rate, increased from 1 April 2002 by 400 basis points.

*Article 2*

Germany shall immediately take all necessary steps to abolish forthwith the illegal and incompatible State aid contained in the loan. If the loan is to continue, Germany shall forthwith alter the measure, imposing an interest rate at the reference rate plus 400 basis points, and inserting a provision pursuant to which the loan is to be paid back at short notice.

*Article 3*

Germany shall immediately take all necessary steps to recover from the beneficiary the illegal and incompatible State aid. The

aid to be recovered shall be subject to interest at the reference rate in force when the loan was granted, annually compounded.

*Article 4*

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

*Article 5*

This Decision is addressed to Germany.

Done at Brussels, 17 September 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

---

**COMMISSION DECISION****of 15 October 2003****on a proposal by Portugal to grant aid to Vila Galé — Cintra Internacional, Investimentos Turísticos, SA**

(notified under document number C(2003) 3376)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2004/168/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup>,

Whereas:

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* of 22 October 2002 <sup>(2)</sup>. The Commission called on interested parties to submit their comments on the aid within one month of that date.

(5) The Commission received no comments from interested parties.

**II. DETAILED DESCRIPTION OF THE AID****The investment and the objective****I. PROCEDURE**

(1) By letter No 521 dated 21 February 2002 from their Permanent Representation, registered as received by the Commission on 27 February, the Portuguese authorities notified the Commission of the proposed aid for Vila Galé — Cintra Internacional, Investimentos Turísticos, SA. By letter No 1167 dated 22 April 2002 from their Permanent Representation, registered as received by the Commission on 25 April, they provided the Commission with further information.

(2) By letter No SG(2002) D/230500 dated 4 July 2002, the Commission informed the Portuguese Republic of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) By letters Nos 2183 dated 24 July 2002, 2278 dated 6 August 2002 and 2163 dated 7 July 2003 from their Permanent Representation (registered as received on 29 July 2002, 12 August 2002 and 10 July 2003 respectively), the Portuguese authorities presented their observations under the abovementioned procedure.

(6) The notified measure consists in the granting of aid to Vila Galé — Cintra Internacional — Investimentos Turísticos, SA (hereinafter Vila Galé Cintra) to finance in part the costs incurred by the enterprise in acquiring and refurbishing an unfinished building located in the State of Ceará (Brazil). The building was acquired on 29 September 2000 and was transformed into a five-star hotel that was opened in October 2001 and is now fully operational.

(7) The present measure consists of an individual application in respect of two schemes. One is measure N 667/1999 <sup>(3)</sup>, which covers the period 2000-2006 and is aimed at promoting modern and competitive entrepreneurial strategies. The individual application notified falls into one of the specific investment categories of this scheme, namely investments related to the internationalisation of economic agents. The second scheme is measure N 96/1999 <sup>(4)</sup> promoting

<sup>(2)</sup> See footnote 4.

<sup>(3)</sup> Approved by the Commission on 26 July 2000 (OJ C 266, 16.9.2000, p. 7).

<sup>(4)</sup> Approved by the Commission on 8 September 1999 (OJ C 375, 24.12.1999, p. 5).

<sup>(1)</sup> OJ C 253, 22.10.2002, p. 5.

internationalisation projects by Portuguese firms through the Tax Benefits Scheme.

terms of EUR 538 218 and a net aid intensity of 3,88 % <sup>(7)</sup>.

### Recipient

(8) The aid recipient does not meet the criterion of independence necessary to be considered an SME <sup>(5)</sup>. Vila Galé Cintra is owned as to more than 25 % by two enterprises which fall outside the definition of an SME.

(d) tax credit: the tax credit involves estimated aid in nge terms of EUR 373 166 <sup>(8)</sup>, corresponding to a net aid intensity of 2,69 %;

(e) total amount of aid: the total amount of aid from the soft loan and the tax credit in nge terms is EUR 911 384;

(f) total net intensity of the aid: 6,57 %.

(9) The two enterprises are, nevertheless, relatively small players. Their annual balance-sheet totals (1999 values) are EUR 36 million and EUR 51 million respectively. Their annual turnovers are EUR 6 million and EUR 31 million respectively. The Portuguese market shares of the three shareholders in Vila Galé Brazil in their sectors of activity are 3,9 %, 3,0 % and 3,6 % for Cintra (construction), Vila Galé (tourism) and FCR (risk capital in the tourism sector) respectively.

### III. THE ARTICLE 88(2) PROCEDURE

#### Grounds for initiating proceedings

(12) The grounds for deciding to initiate proceedings in this case were twofold. At the time the decision was taken, the Commission considered that the Portuguese authorities had not demonstrated that State aid would be needed to reduce or offset the underlying political or economic risks in Brazil. It also harboured doubts as to whether the aid would be necessary for the purposes of the planned investment. It could not, therefore, state unequivocally that the aid would facilitate certain economic activities and so could benefit from an exemption under Article 87(3)(c) of the EC Treaty.

### The aid measure

(10) The aid instruments to be used for the purposes of the present project are a non-repayable grant (which the Portuguese Authorities intend to make available under the *de minimis* Regulation <sup>(6)</sup>), a soft loan under scheme N 667/1999 (part-financed with Community funds from the ERDF) and a tax credit under scheme N 96/1999.

#### Comments from the Portuguese authorities

(11) The data relating to the measure are the following:

(a) eligible investment: EUR 13 869 076;

(b) eligible costs: acquisition of the building (EUR 3 691 104), external infrastructure works (EUR 448 918), civil engineering (EUR 5 726 200), equipment (EUR 3 653 695), and studies and projects (EUR 349 158);

(c) soft loan: the nominal amount of the loan is EUR 3 467 269, corresponding to an aid amount in nge

(13) By letters dated 24 July and 6 August 2002, the Portuguese authorities presented their observations. In essence, they contested the two arguments on the basis of which the Commission initiated proceedings, namely its doubts about the existence of significant risks and uncertainties on the Brazilian market that might justify the granting of state aid and about whether or not the necessity criterion was met.

(14) As regards the existence of significant risks and uncertainties on the Brazilian market, the Portuguese authorities informed the Commission that the company belonging to Grupo Cintra (one of the shareholders in

<sup>(5)</sup> Article 1(3) of the Annex to the Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ L 107, 30.4.1996) states that: Independent enterprises are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise, whichever may apply.

<sup>(6)</sup> Commission Regulation (EC) No 69/2001 of 12 January 2001 (OJ L 10, 13.1.2001).

<sup>(7)</sup> The calculation is based on the following:

1. duration of the loan: six years,
2. grace period: two years,
3. interest rate on the loan: 0 %,
4. reference interest rate for Portugal applicable at the time the investment took place: 6,33 %,
5. corporation tax rate currently in force in Portugal: 35,2 %.

<sup>(8)</sup> This is the net aid element of the tax credit as estimated by the Portuguese authorities.

Vila Galé Cintra) which is involved in the investment project under scrutiny has no business relationship with Grupo Cintra in the beer sector in Brazil, as stated in the decision initiating the formal investigation procedure. This investment project therefore represents the first foreign venture for the companies involved. Moreover, the fact that Portugal is one of the leading foreign investors in Brazil does not, on its own, preclude the existence of high market risk and uncertainty that are indeed features of the Brazilian market. This fact is related to the very pronounced exchange-rate volatility of the real, on the one hand, and to the instability of the Brazilian capital market brought about by the recent economic and financial crisis in Argentina, on the other. The proposed State aid is, therefore, intended to compensate for these risks and uncertainties through risk sharing, leverage and reduction of the financial costs linked to the investment project. The Portuguese authorities concluded that investments are made in Brazil by entrepreneurs who are determined to take on the additional risks inherent in the investments, notwithstanding the existing market conditions.

- (15) As regards fulfilment of the necessity criterion, the Portuguese authorities argued that the fact that the recipient had already completed its investment and opened the hotel before a decision on the granting of aid had been taken does not rule out the incentive effect of the aid. In fact, the application for State aid was made in July 2000, before the investment costs were incurred. What is more, the fact that the investment went ahead without any State support shows the determination of the recipient to undertake its first foreign venture in spite of the additional risks involved and its expectations in relation to obtaining the public support it applied for. It is the Portuguese authorities' opinion that the recipient should not be disadvantaged on the ground that vetting the application took longer than the period needed to carry out the investment.

#### Comments from interested parties

- (16) The Commission did not receive any comments from interested parties.

#### IV. ASSESSMENT OF THE AID

##### Existence of State aid

- (17) Under the notified measure, a specific Portuguese enterprise would receive funds for investing in the tourism sector in Brazil as part of an internationalisation strategy. This aid would strengthen the recipient's overall financial and strategic position. It

is obvious that strengthening a European enterprise which carries out business in the EEA is likely to affect trade in the Community. Such is the view expressed by the Court of Justice of the European Communities in its judgment in Case 142/87 Tubemeuse<sup>(9)</sup>. It cannot be excluded that the aid would give the recipient an advantage over its competitors operating in the European Union that had already invested or would be interested in investing in Brazil without receiving any aid for foreign direct investment. The measure is funded through state resources. Accordingly, the Commission considers that the measure would distort or threaten to distort competition and that it would amount to State aid within the meaning of Article 87(1) of the EC Treaty.

#### Possible exemption

- (18) Firstly, since the proposed aid measure involves Community funds from the ERDF which will be used to co-finance an investment carried out outside the European Union, the Commission has assessed this possibility in the light of Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds<sup>(10)</sup>.
- (19) Secondly, given the fact that there are no Community guidelines or framework for state aid in the tourism sector, the Commission has based its assessment directly on Article 87(3)(c) of the EC Treaty, which provides for an exemption for aid to facilitate the development of certain economic activities, without adversely affecting trading conditions to an extent contrary to the economic interest.
- (20) The Commission must, therefore, assess whether the aid will contribute to the development of tourism and/or other economic activities in the European Union without adversely affecting trading conditions between Member States. It must also assess whether the aid will have an incentive effect for the recipient to carry out the investment.

#### Possibility of allocating Community funds from the ERDF to an investment carried out outside the European Union

- (21) Article 160 of the EC Treaty states that 'the ERDF is intended to help to redress the main regional

<sup>(9)</sup> [1990] ECR, I-959, at 35.

<sup>(10)</sup> OJ L 193, 29.7.2000, p. 39.

imbalances in the Community'. Moreover, Article 3 of Regulation (EC) No 1260/1999 defines the geographical eligibility for the priority objectives, which concerns only the regions of the Community.

- (22) Regulation (EC) No 1685/2000, mentioned above, lays down the eligibility criteria for operations to receive Community funds from the ERDF depending on their location <sup>(11)</sup>. It is mentioned there that the possibility of accepting operations located outside the region to which the assistance relates for co-financing: '(...) shall be subject to prior approval by the Commission on a case-by-case basis following a request submitted by the Member State, taking into account in particular the proximity of the operation to the region, the level of benefit to the region which can be foreseen, and the amount of the expenditure in proportion to the total expenditure under the measure and under the assistance.' <sup>(12)</sup>.
- (23) Since the investment is located in an area distant from the assisted region, the Commission considers that the above-mentioned condition is not met.
- (24) The Commission therefore considers that the notified investment is not eligible for Community financial support under the ERDF. The remainder of this decision assumes that the total amount of aid indicated at point (e) in paragraph 11 will be fully covered by national funds.

#### Effect of the aid on trade between Member States

- (25) The amount of aid is relatively small. It represents a net grant equivalent of EUR 911 384, corresponding to a net aid intensity of 6,57 % of the eligible investment. A small amount of aid that covers a limited portion of the eligible investment is unlikely to affect trade between Member States significantly.
- (26) The recipient is a small player in the market. Its shareholders only narrowly exceed the thresholds laid down in the definition of an SME. They have market shares of less than 4 % on the respective markets in Portugal and their corresponding market shares in the EU are therefore negligible. Individual aid to an enterprise with a small market share is less likely to impose negative externalities than aid to an enterprise with a large market share. Given the recipient's small market share, the limited amount of aid would not be such as to affect the position of its competitors.

- (27) The tourism and hotel sector accounts for around 3,5 % of Brazilian GDP and there are some 10 000 hotels in Brazil, of which an estimated 5 % to 7 % belong to international companies <sup>(13)</sup>. Currently, the main European investors in Brazil are the French group Accor (108 hotels) and the Spanish group Sol Melia (23 hotels) <sup>(14)</sup>. Since the notified project was the first investment by Vila Galé in Brazil, its resulting share of the Brazilian market is insignificant compared with the European companies mentioned above. It can reasonably be concluded that the construction of another five-star hotel in Brazil will not significantly increase local supply or affect the relative position of the European companies already established on the market or their ability to attract tourists.

- (28) The share of the 'luxury' segment in the Brazilian hotel market is quite high. According to ABIH Nacional, around 53 % of the total number of hotel beds registered since 1964 was in four- or five-star hotels. This market is characterised by a very large number of players (mostly non-European), with none of them having a substantial market share. Consequently, the hotel sector in Brazil can be described as a competitive market with a very low degree of concentration. Aid granted to a company in such a market is less likely to distort competition than aid granted to a company in a highly concentrated market since the advantage conferred is more likely to be transferred to consumers than retained by the recipient.

- (29) The aid recipient is in a relatively unfavourable position compared with its main EU competitors. These have a much higher share of the Brazilian market, are recognised at international level and have been established in the market for several years. Their larger size confers on them greater bargaining power vis-à-vis international tourism operators, and this results in much higher occupancy rates and income, thereby reducing the relative weight of their commercial costs.
- (30) The investment in question requires a significant local content in Brazil and does not involve the relocation of activities from Portugal to Brazil. For that reason, the aid is not expected to have a negative impact on economic activity or on employment in Portugal.

<sup>(11)</sup> Rule 12, Annex I to Regulation (EC) No 1685/2000.

<sup>(12)</sup> Rule 12, point 3, Annex I to Regulation (EC) No 1685/2000.

<sup>(13)</sup> Source: ABIH Nacional — Brazilian Association of the Hotel Industry, 'Statistics on the national hotel industry', 22 February 2001.

<sup>(14)</sup> See footnote 17.

- (31) For the reasons set out in paragraphs 25 to 30, the Commission considers that the aid is unlikely to have a significant direct impact on trade between Member States. In this respect, it would also stress that it received no comments from interested parties.

### **Contribution of the aid to the development of the tourism sector in Portugal**

- (32) Tourism is one of the most important sectors of activity in the Portuguese economy. Currently, it accounts for around 8 % of GDP and employs directly and indirectly around 500 000 people. It is therefore one of the priority areas in Portugal for promoting cohesion. This cohesion effect has often been recognised by the EU institutions. The Council Resolution of 21 May 2002 on the future of European tourism <sup>(15)</sup> states that 'Tourism [...] contributes largely to the fulfilment of the targets established in the Lisbon and Cardiff Process and to the attainment of a true internal services market. It is conducive to a high level of employment and social welfare, sustainable growth, better quality of life and European integration and also to social and economic cohesion, making a considerable contribution to the objectives of convergence.' The same Resolution emphasises that 'tourism in Europe being comprised mostly by small and medium-sized enterprises (SMEs), it is essential to give tourism industry a better access to instruments within the framework of the EU to help them to increase their economic performance and to strengthen their competitiveness [...]'. The tourism sector is characterised by strong vertical and horizontal connections with other sectors of the economy. Its development therefore leads to development of the economy as a whole.

- (33) The aid will strengthen the long-term position of a Portuguese tourism enterprise, enabling it to broaden and diversify its product range and thereby to improve its business potential.

- (34) It is likely that strengthening the recipient's financial position will produce benefits mainly in the Portuguese tourism sector for the following reasons:

- (a) The recipient's parent company carries out most of its activities in Portugal, where it owns fourteen hotels throughout the country. This is its first foreign venture. Its investment strategy is concentrated mainly in Portugal, where it set up three new hotels in 2002 and is in the process of

constructing a further two. It thus seems likely that, if successful, this project will enhance the enterprise's investment capacity in the Portuguese tourism market.

- (b) The tourism sector in Portugal is dominated by SMEs, which account for 95 % of the market. Given their small economic size and turnover, Portuguese tourism companies have very limited experience of ventures abroad and tend to concentrate their activities in Portugal. It can, therefore, be reasonably assumed that the current project will have a demonstration effect among other Portuguese tourism market players as regards the profitability and sustainability of foreign investment projects.

- (c) Although the investment had a very limited impact in terms of direct job creation in Portugal, the implementation of the project benefited the Portuguese companies that coordinated the project, monitored its implementation and supplied material and equipment.

- (d) The Brazilian subsidiary pays the Portuguese parent company a management fee for the services it provides and, in so doing, increases its turnover and has a positive effects on the State's tax revenue.

- (e) The positive cash flows generated by the Brazilian company will, according to the Portuguese authorities, be transferred to Portugal, primarily in order to repay the outstanding debt contracted by Vila Galé Cintra to finance part of the construction and refurbishment of the hotel. Once this debt has been repaid in full, the income from Brazil may be reinvested in Portugal in line with the company's strategy.

- (35) For the reasons mentioned in recitals 32 to 34, the aid can be considered as having a positive impact on the tourism sector in Portugal and an equally positive effect on cohesion.

### **Incentive effect of the aid**

- (36) The present case concerns the first venture abroad by the recipient. Its shareholders too have no experience of foreign investment in the tourism sector. As mentioned previously, the companies involved in the investment are small players on the markets concerned. The cost of the investment is equivalent to 12 % of their combined annual balance-sheet total (1999 values). The project therefore entails a significant risk for the financial situation of the companies involved.

- (37) The Brazilian market presents some serious difficulties for potential investors. Firstly, there is the marked exchange-rate volatility of the national currency. Secondly, the recent economic and financial crisis in

<sup>(15)</sup> OJ C 135, 6.6.2002, p. 1.

Argentina has led to some instability on the Brazilian capital market. Thirdly, there are some bureaucratic difficulties mainly related to the transfer of financial funds to Brazil, which are controlled by the Central Bank.

- (38) Although the recipient is not an SME within the meaning of the Community definition, it encounters similar difficulties in carrying out this type of investment, given its lack of experience at international level, its small market share, the size of the investment compared with its financial position and the problems specific to the country that make it difficult for it to enter the market.
- (39) The Portuguese authorities have stated that the application for public support was made before the investment started, even though it has been carried out unaided. The aid schemes under which this individual application was submitted (N 667/1999 and N 96/1999) contain a clause which requires that an application for aid be submitted before work on the project is started. This requirement is in accordance with point 4.2 of the guidelines on national regional aid <sup>(16)</sup> and was met in the present case. The fact that the recipient applied for public financial assistance before embarking on the investment is proof that the required incentive effect exists.
- (40) For the reasons set out in recitals 36 to 39, and given that the investment represents the first foreign venture for a relatively small enterprise on a volatile foreign market (Brazil), the aid can be considered to have an incentive effect that will compensate the recipient for the additional financial risks incurred in investing in an unknown and risky market.

## V. CONCLUSIONS

- (41) The Commission has accordingly reached the conclusion that the proposed aid for Vila Galé — Cintra Internacional, Investimentos Turísticos, SA in respect of foreign direct investment contributes to the development of certain economic activities within the meaning of Article 87(3)(c) of the Treaty without adversely affecting trading conditions between Member States and thus is compatible with the common market provided that it is not co-financed by Community funds from the European Regional Development Fund.
- (42) The granting of aid by Portugal to Vila Galé — Cintra Internacional, Investimentos Turísticos, SA in the form

of a soft loan and a tax credit can therefore be authorised, provided that no Community funds are used.

- (43) The Commission does not intend to use this Decision to lay down its future policy on foreign direct investment. It normally considers investment aid granted to large enterprises with a view to financing foreign direct investment to be incompatible with the common market, unless it can be proved that a project will contribute to the development of certain economic activities without adversely affecting trading conditions within the Community,

HAS ADOPTED THIS DECISION:

### Article 1

The aid in the form of a soft loan and a tax credit which Portugal is planning to implement for Vila Galé — Cintra Internacional, Investimentos Turísticos, SA with a view to financing foreign direct investment in Brazil is, subject to the conditions set out in Article 2, compatible, pursuant to Article 87(1) of the Treaty, with the common market and, pursuant to Article 61(1) of the EEA Agreement, with the functioning of that Agreement.

### Article 2

The soft loan and the tax credit to be granted to Vila Galé — Cintra Internacional, Investimentos Turísticos, SA must be financed exclusively by national funds. The measures may not be co-financed by Community funds from the European Regional Development Fund.

### Article 3

Portugal 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 Portuguese Republic.

Done at Brussels, 15 October 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

<sup>(16)</sup> OJ C 74, 10.3.1998, p. 9.

**COMMISSION DECISION****of 26 November 2003**

**on the aid which Italy is planning to implement for Industria Farmaceutica Cesare Serono SpA for the development of new chemical synthesis processes for oral pharmaceutical forms of polypeptides and conjugated substances**

(notified under document number C(2003) 3519)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2004/169/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 <sup>(1)</sup>,

Having called on interested parties to submit their comments <sup>(2)</sup>,

Whereas:

initiate the procedure laid down in Article 88(2) of the EC Treaty (hereinafter 'the decision to initiate the procedure') in respect of the proposed measure.

- (5) The decision to initiate the procedure was published in the *Official Journal of the European Union*. The Commission called on interested parties to submit their comments within the prescribed period (one month), pursuant to Article 6(1) of Regulation (EC) No 659/1999.
- (6) The Commission received comments from IFS on 13 June 2003.
- (7) By letter D/53893 of 17 June 2003, the Commission forwarded IFS' comments to the Italian Government.
- (8) The Republic of Italy has not replied officially to the Commission letters of 7 February 2003 and 17 June 2003.

**1. PROCEDURE**

- (1) By letter registered as received by the Commission on 27 March 2002 (A/32355), the Italian authorities notified, pursuant to Article 88(3) of the EC Treaty, planned aid for the pharmaceutical company Cesare Serono SpA (IFS).
- (2) By letters D/52251 of 7 May 2002, D/54639 and D/54654 of 12 August 2002 and D/56044 of 25 October 2002, the Commission requested additional information regarding the notified aid.
- (3) On 8 August 2002 (letter A/36069), 23 August 2002 (letter A/36253), 7 October 2002 (letter A/37252), 21 October 2002 (letter A/37664) and 26 November 2002 (letter A/38716) the Italian authorities submitted the information requested.
- (4) By letter SG(2003) D/228432 dated 7 February 2003, the Commission informed Italy that it had decided to

**2. DETAILED DESCRIPTION OF THE AID MEASURE****2.1. Legal basis and object of the measure**

- (9) The legal basis for the aid is Legislative Decree No 297 of 27 July 1999 <sup>(3)</sup>. This is an existing scheme approved by the Commission on 26 July 2000 (letter SG(2000) D/430165, State aid N 173/2000) <sup>(4)</sup>.
- (10) The object of the aid consists in developing new chemical synthesis processes for oral pharmaceutical forms of polypeptides and conjugated substances ('sviluppo di forme farmaceutiche orali ottenute da nuove molecole di natura sintetica, polipeptidica e sostanze coniugate').

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

<sup>(2)</sup> OJ C 110, 8.5.2003, p. 2.

<sup>(3)</sup> And its implementing regulation: Ministerial Decree No 593 of 8 August 2000.

<sup>(4)</sup> OJ C 310, 28.10.2000, p. 17.

- (11) This project will enable IFS to strengthen its position in its traditional therapeutic sectors (neurology, fertility) while at the same time developing initiatives in therapeutic sectors which are new for the company (anti-inflammatory, anti-cancer, cardiology).
- (12) The project is subdivided into a number of detailed stages or 'steps' each of which is characterised by a specific scientific content:
- step 1: definition — at laboratory level — of the processes of chemical synthesis of small molecules, polypeptides and conjugated substances for the preparation of active ingredients destined for preclinical testing,
  - step 2: development of a production process for the fractions destined for clinical testing of Phase I,
  - step 3: experimental verification and validation of the semi-quantitative method and preparation of the pharmaceutical forms for both the stability test and clinical testing,
  - step 4: definition and development of analytical methods for the qualitative and quantitative definition of the reaction intermediaries, active ingredients, degradation products and contaminants, and of the oral pharmaceutical forms,
  - step 5: preclinical tests on laboratory animals, such as rodents and dogs (toxicology and pharmacokinetics),
  - step 6: clinical tests on healthy patients (Phase I): evaluation of the effectiveness, collateral effects and therapeutic properties.
- (13) More specifically, the products that will be studied throughout the above mentioned 'steps' fall within three groups of molecules:

#### A. Small molecules

From the screening of about 1 million molecules obtained in its foreign subsidiaries, IFS expects to obtain some 40 000 'hits'. These in turn will lead to the identification of three to five 'lead' compounds (proteins), or active ingredients for drug applications. A new laboratory in Guidonia Montecelio will, by following both GLP (good laboratory practice) and GMP (good management practice), develop new methods for the chemical synthesis of small molecules in order to obtain active ingredients and finished pharmaceutical forms in sufficient quantity ('kiloscale') for the subsequent preclinical and Phase I clinical testing, i.e. clinical tests on healthy patients. The target is to obtain around 12 such molecules per year by the end of the project's lifetime. Unlike large molecules, small molecules are capable of interfering with intracellular

events inside the cell, like a protein, and thus blocking the pathology. They are more adapted for the oral pharmaceutical form and are better resistant in the gastrointestinal ambient.

#### B. Polypeptides

Polypeptides are the 'active' part of the protein which liaises with the cell receptor. They replace the protein in this link. The project is designed to develop their chemical synthesis as an alternative to genetic manipulation.

#### C. Conjugated forms

By exploiting its excellence in the biotech field, IFS will be able to create synergies with the more 'classic' organic chemistry (mix of simple molecules with complex macromolecules). Conjugated forms combine active ingredients and inert chemical compounds so to minimise the production of antibodies. In this connection, the Italian authorities have presented a detailed training project for specific activities (R & D, analytical techniques, quality and security standards, and links with universities).

In order to carry out the R & D projects, the company needs to expand the Guidonia Montecelio site (Rome). The new building (4 500 m<sup>3</sup>) will house a staff of 40 (17 researchers, 13 technicians and 10 administrative personnel). This new laboratory will have the task of devising procedures for the chemical synthesis of new molecules, producing active ingredients in kiloscale quantities and defining their pharmaceutical forms.

## 2.2. Form of the aid

- (14) The proposed aid is provided in the form of an outright grant.

## 2.3. Aid intensity, recipient and eligible costs

- (15) The aid recipient (IFS) is part of the multinational group Serono SA, which has its headquarters in Geneva. Serono SA is the third-largest biotech company in the world, with a turnover of USD 1,38 billion (2001).
- (16) Eligible costs include personnel, overheads, equipment, consultancy, materials and buildings.

- (17) All costs related to preclinical and Phase I clinical testing are entered as consultancy costs, as they will be subcontracted to IFS sites other than Guidonia Montecelio (Colleretto Giacosa, Turin, and Bourne Hall, Cambridge).
- (18) The following table gives a breakdown of the proposed aid intensities per category of eligible costs. All amounts are expressed in EUR million.

| Categories of eligible costs                   | Proposed amount | Proposed aid intensity<br>(excluding regional<br>bonuses) | Maximum grant in view<br>of these intensities |
|------------------------------------------------|-----------------|-----------------------------------------------------------|-----------------------------------------------|
| 1. Personnel                                   | 10 585          | 50 %                                                      | 5 292                                         |
| 2. Buildings, equipment and instruments        | 26 905          | 50 %                                                      | 13 452,5                                      |
| 3. Consultancy<br>(A) Preclinical tests        | 12 000          | 50 %                                                      | 6 000                                         |
| 3. Consultancy<br>(B) Clinical tests (Phase I) | 8 000           | 25 %                                                      | 2 000                                         |
| 4. Other operating expenses                    | 6 351           | 50 %                                                      | 3 175,5                                       |
| 5. Overheads                                   | 7 500           | 50 %                                                      | 3 750                                         |
| 6. Training                                    | 1 455           | 50 %                                                      | 727                                           |
| Total                                          | 72 766          |                                                           | 34 397                                        |

- (19) The Italian authorities have proposed the maximum intensities allowed for industrial development and precompetitive R & D activities.
- (20) Training is considered to be general training within the meaning of Article 2 of Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid <sup>(5)</sup>, as the qualifications and skills acquired in the new laboratory are transferable to other R & D fields. The allowed intensity is 50 % in line with Article 4(3) of the Regulation.
- (21) The R & D project will cost EUR 72 991 000. It is expected to last seven years (two years for the expansion of the laboratory and then five years for the R & D activities).
- (22) In its decision to initiate the procedure, the Commission approved the aid measure as notified by the Italian Government, except for one aspect.
- (23) Its doubts originated with the preclinical testing 'step' (see point 12, fifth indent, and the above table at 3(A)) since its classification as industrial research and, indirectly, the granting of an aid intensity of 50 % gge were not sufficiently justified. The classification of such tests as research, the eligible costs and the incentive effect of the aid were not questioned in the decision initiating the procedure.
- (24) Preclinical tests precede the Phase I clinical tests. They consist in testing active principles on various animal species increasingly closely related to man.
- (25) On the one hand, the preclinical test protocols are based on a series of experiments on a number of different animal species the results of which are collected and critically analysed to check whether Phase I tests can be launched. This could be viewed as planned research and critical investigation, which would then qualify as industrial research.
- (26) On the other hand, preclinical tests, like Phase I clinical tests, are based on 'prototype' versions of the product, albeit very crude ones. In this respect, they could, like Phase I clinical tests, be regarded as precompetitive

#### 2.4. Budget and duration

### 3. GROUNDS FOR INITIATING THE PROCEDURE

<sup>(5)</sup> OJ L 10, 13.1.2001, p. 20.

development activities (since they precede Phase I tests and are conducted with less mature products, they are clearly not closer to the market than Phase I tests are).

775 million, without stating whether it ranks as industrial research or precompetitive development.

- (27) Accordingly, the Commission was unable to rule out the possibility that at least some of the preclinical test activities could be classified as closer-to-market precompetitive development. Therefore, it could not authorise *prima facie* the 50 % aid intensity (in gge) proposed by the Italian authorities, rather than the 25 % intensity (in gge) provided for by the R & D framework for precompetitive development.

## 5. ASSESSMENT

### 5.1. Legality of the aid

- (32) The Italian authorities have fulfilled their obligation pursuant to Article 88(3) of the Treaty by notifying the scheme to the Commission before it came to effect.

## 4. COMMENTS FROM INTERESTED PARTIES

- (28) On 13 June 2003 IFS submitted comments pursuant to Article 6(1) of Regulation (EC) No 659/1999. It argues that preclinical testing is industrial research within the meaning of the R & D framework. The central argument is that activities carried out under this 'step' do not necessarily reach the subsequent 'step', since the chemical synthesis of an active principle is hardly ever optimised and its expected toxicological effects are not yet known, as is evidenced by the following:

— Around 60 to 70 % of the molecules are eliminated as they do not survive one or more stages of the toxicological preclinical tests,

— Around 20 to 30 % of the total are sent to the medicinal chemistry (discovery) laboratory to be subjected to a 'lead optimisation' process during which the chemical structure of the protein is modified in order to minimize the undesirable toxic effects of the product,

— A mere 10 % of the molecules reach the subsequent 'step', namely Phase I clinical testing.

- (29) Furthermore, tests conducted on laboratory animals have very little in common with applications on healthy human patients in Phase I.

- (30) Therefore, IFS considers that preclinical studies indeed constitute 'critical investigation aimed at the acquisition of new knowledge, the objective being that such knowledge may be useful in developing new products, processes or services'.

- (31) On top of this, IFS proposes a more precise quantification of consultancy costs (preclinical and Phase I clinical testing). The total investment costs should be amended accordingly. On the other hand, IFS proposes to add a new cost item 'University' amounting to EUR

### 5.2. Existence of aid within the meaning of Article 87(1) of the Treaty

- (33) Article 87(1) states 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, insofar as it affects trade between Member States, be incompatible with the common market.'

- (34) The measure favours through State resources (outright grant) an undertaking which is a large multinational (IFS, head of the multinational group Serono SA). The measure is therefore *selective* in scope. Having regard to the economic activity carried out by the recipient enterprise, the aid potentially has a distortionary effect on the conditions of competition that may affect trade between Member States within the meaning of Article 87(1).

### 5.3. Assessment of the aid in the light of Article 87(2) and (3) of the Treaty

- (35) Article 87(3)(c) of the Treaty states that '[...] may be considered to be compatible with the common market [...] 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'.

- (36) The doubts expressed by the Commission concern R & D aid and the assessment must therefore be made in the light of the Community framework for State aid for research and development <sup>(6)</sup>.

- (37) The second indent in Annex I to the framework defines industrial research as 'planned research of critical

<sup>(6)</sup> OJ C 45, 17.2.1996, p. 6.

investigation aimed at the acquisition of new knowledge, the objective being that such knowledge may be useful in developing new products, processes or services or in bringing about a significant improvement in existing products, processes or services.'

- (38) The third indent in Annex I to the framework defines precompetitive development activity as 'the shaping of the results of industrial research into a plan, arrangement of design for new, altered or improved products, processes or services, whether they are intended to be sold or used, including the creation of an initial prototype which could not be used commercially. This may also include the conceptual formulation and design of other products, processes or services and initial demonstration projects or pilot projects, provided that such projects cannot be converted or used for industrial applications or commercial exploitation. It does not include the routine or periodic changes made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements.'
- (39) On the basis of the evidence provided by IFS and in view of the very high rate of unsuccessful tests (60 to 70 %) during the development phase of preclinical testing, the Commission is of the opinion that such an activity cannot be considered as technical certification or prototype validation, i.e. the conceptual formulation of other products or processes or initial demonstration projects or pilot projects within the meaning of the third indent in Annex I to the framework.
- (40) By contrast, the Commission considers that the preclinical testing carried out by the company is aimed more at acquiring new knowledge which might prove essential only at a later stage of development. The success rate of 10 % appears to be in line with the average in the sector and proves that the results obtained in this drug development phase are still a very long way from both the production of a particular drug and its marketing. The Commission has also taken into account the high costs of these tests.
- (41) In the present case, preclinical testing may, therefore, be considered as industrial research within the meaning of the R & D framework.

- (42) With regard to the recalculation of eligible costs (new quantification of consultancy costs and addition of a new cost item), the Commission cannot take these factors into consideration in the present decision. It notes that the Italian authorities have not notified any change to the measures and that they are the only ones allowed to do so pursuant to Article 88(3) of the Treaty.

## 6. CONCLUSION

- (43) In the light of the foregoing observations, the Commission takes the view that the preclinical testing 'step' of the measures notified as N 213/2002, complies with the provisions laid down in the Community framework for State aid for research and development, and in particular the second indent (industrial research), and may consequently benefit from a derogation under Article 87(3)(c) of the Treaty to the extent of 50 % gge according to point 5.3 of the Framework,

HAS ADOPTED THIS DECISION:

### *Article 1*

The preclinical testing 'step' of the project notified by the Republic of Italy for the development of new chemical synthesis processes for oral pharmaceutical forms of polypeptides and conjugated substances constitutes industrial research within the meaning of the Community framework for State aid for research and development and may, therefore, be funded to the extent of 50 % gross grant equivalent.

The aid not exceeding this intensity is, therefore, compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

### *Article 2*

This Decision is addressed to the Republic of Italy.

Done at Brussels, 26 November 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

**COMMISSION DECISION****of 21 October 2003****on the research and development aid to the site at Zamudio (Basque Country) which Spain is planning to implement for the company 'Industria de Turbo Propulsores, SA' (ITP)***(notified under document number C(2003) 3525)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

(2004/170/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 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>, and in particular Article 7 thereof,

Having called on interested parties to submit their comments pursuant to those provisions <sup>(2)</sup>, <sup>(3)</sup> and having regard to their comments,

Whereas:

(4) By letter of 21 August 2001, registered on 24 August, the Spanish authorities submitted their comments to the Commission.

(5) By letter of 17 October 2001, registered on 18 October, the Federation of Turbine and Heavy Energy Plant Manufacturers (Sytemel) submitted comments on the planned aid to the Commission.

(6) By letter of 29 October 2001, registered on 30 October, the Pratt & Whitney company submitted its comments to the Commission.

(7) By letter of 15 November 2001, the Commission forwarded to the Spanish authorities a copy of the comments submitted by Sytemel and Pratt & Whitney.

**1. PROCEDURE**

(1) By letter of 15 December 2000, registered on 18 December, the Spanish authorities, acting in accordance with Article 88(3) of the Treaty, notified a plan to grant research and development aid to the site at Zamudio (Basque Country). Further information was sent by letter of 17 April 2001, registered on 19 April.

(2) By letter of 20 June 2001, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the planned aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(4)</sup>. The Commission called on interested parties to submit their comments on the aid.

(8) By letter of 27 November 2001, registered on 28 November, the Spanish authorities requested the Commission to provide a Spanish translation of those comments. The Commission satisfied that request by letter of 21 December 2001.

(9) By letter of 28 January 2002, the Spanish authorities sent the Commission their response to the comments submitted by Sytemel and Pratt & Whitney.

(10) By letter of 13 December 2002, the Commission asked the Spanish authorities for further information. The Spanish authorities provided that information by letters of 16 January 2003, registered on 20 January, of 27 January 2003, registered on 29 January, and of 5 February 2003, registered on 6 February.

(11) By letter of 23 April 2003, the Commission informed Spain that it had decided to extend the procedure laid down in Article 88(2) of the Treaty in respect of the planned aid.

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

<sup>(2)</sup> OJ C 274, 29.9.2001, p. 2.

<sup>(3)</sup> OJ C 147, 24.6.2003, p. 6.

<sup>(4)</sup> See footnote 2.

- (12) By letter of 16 June 2003, registered on 16 June, the Spanish authorities submitted their comments to the Commission on the extension of the procedure.
- (13) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* <sup>(5)</sup>. The Commission called on interested parties to submit their comments.
- (14) By letter of 24 June 2003, registered on 26 June, the Spanish authorities forwarded to the Commission the comments submitted by the aid recipient.

## 2. DESCRIPTION

- (15) The case concerns aid which the Basque Government plans to grant to the company Industria de Turbo Propulsores SA (ITP).
- (16) ITP specialises in the design, development, manufacture and maintenance of gas turbines. It is owned by Rolls-Royce (46,7 %) and by the consortium Turbo 2000 (53,3 %), the latter being itself owned 50/50 by Sener and SEPI. The number of employees and the company's turnover exceed the thresholds laid down in Annex I to Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises <sup>(6)</sup> for a company to be considered an SME.
- (17) The aid concerns:
- a research and development (R & D) project to be carried out on the site at Zamudio (Basque Country), involving the development of two new types of low-pressure turbines,
  - a tangible investment project for the Zamudio site which would increase ITP's production capacities and enable it to become Rolls-Royce's main supplier of low-pressure turbines for the engine models in service.
- (18) The administration granting the aid is the Basque Government (regional administration).

### (A) The R & D project

- (19) The R & D project concerns the development of two new low-pressure turbines, of high and low thrust respectively.
- the high-thrust turbine is to be incorporated into the Rolls-Royce Trent 500 engine, which powers the Airbus A340-500 and A340-600 aircraft,

the project comprises the whole cycle of development of the turbine. This involves four stages: preparation of the project, preliminary design, conceptual design and realisation of the concept. The last stage is divided into seven steps: detailed design, component trials, engine trials, aerodynamic validation trials, manufacture of prototypes, certification and post-certification activities,

- the low-thrust turbine is to be incorporated into the Allied Signal Aero Engines <sup>(7)</sup> AS900 engine which powers the Bombardier Continental and the BAE Systems 146 RJX regional jet.

The project comprises seven main tasks: general activities, design of the low-pressure turbine, manufacturing support, manufacture of development components, manufacture of tools, component trials and improvement of the aeromechanic parameters of the turbine. The programme also includes three additional tasks: integrated logistic support activities, design of axial compressors, and activities linked to the study of the external behaviour of the engine.

- (20) According to the Spanish authorities, all the activities covered by the aid constitute 'precompetitive development activities' within the meaning of Annex I to the Community framework for state aid for research and development <sup>(8)</sup> (hereinafter referred to as the R & D framework).
- (21) The duration of the project is four years, from 1999 to 2002.
- (22) The aid is provided by the Basque Government in the form of an interest-free loan totalling ESP 4 000 million (EUR 24,04 million) out of total eligible costs amounting to ESP 10 422 million (EUR 62,64 million). The loan is to be paid and reimbursed according to the arrangements set out in the following table:

(ESP million)

| Year | Costs | Payment | Reimbursement |
|------|-------|---------|---------------|
| 1999 | 1 935 | 0       |               |
| 2000 | 4 064 | 2 000   |               |
| 2001 | 2 762 | 1 000   |               |
| 2002 | 1 661 | 1 000   |               |

<sup>(5)</sup> See footnote 3.

<sup>(6)</sup> OJ L 10, 13.1.2001, p. 33.

<sup>(7)</sup> This company recently merged with the Honeywell group.

<sup>(8)</sup> OJ C 45, 17.2.1996, p. 5.

(ESP million)

| Year  | Costs  | Payment | Reimbursement |
|-------|--------|---------|---------------|
| 2003  |        |         | 0             |
| 2004  |        |         | 0             |
| 2005  |        |         | 0             |
| 2006  |        |         | 0             |
| 2007  |        |         | 100           |
| 2008  |        |         | 100           |
| 2009  |        |         | 200           |
| 2010  |        |         | 200           |
| 2011  |        |         | 200           |
| 2012  |        |         | 750           |
| 2013  |        |         | 2 450         |
| Total | 10 422 | 4 000   | 4 000         |

**(B) The investment project**

(23) According to information provided by the Spanish authorities, the project is not part of any current regional aid scheme approved by the Commission. It is ad hoc regional aid.

(24) The project should allow the Zamudio site to become competitive in a high-technology market where the indirect costs are high. ITP plans to manufacture various components on the Zamudio site for the following engine models: EJ-200, Trent 700 and 800, Allison 601 K, Atar 9K50 Plus, BR715, TF50 A, LM 2500, F414, M138(FLA), MTR390 (attack helicopter), Trent 900, Trent Industrial, Trent 500 and AS900.

(25) The Spanish authorities consider that this project will have positive effects on the whole of the Basque economy, such as industrial diversification, economic impetus, creation of jobs and added value, access to advanced technologies and their incorporation into the technological and industrial fabric, workforce skilling, and a multiplier effect on industry as a whole. They also refer in particular to the creation of some 1 000 indirect jobs in the Basque Country, and a subcontracting ratio which could reach 30 % in 2002.

(26) The duration of the project is three years (2000 to 2002).

(27) The total amount of the investment is ESP 8 852 million (EUR 53,2 million), broken down as follows:

(ESP million)

|           | Years |       |       | Total |
|-----------|-------|-------|-------|-------|
|           | 2000  | 2001  | 2002  |       |
| Buildings | 1 070 | 880   |       | 1 950 |
| Tools     | 275   | 467   | 320   | 1 062 |
| Machines  | 1 420 | 1 500 | 2 920 | 5 840 |
| Total     | 2 765 | 2 847 | 3 240 | 8 852 |

With a reference and discount rate of 5,7 %, the total amount of the investment, discounted to 31 December 2000, is ESP 8 358 million (EUR 50,23 million).

(28) The aid is in the form of a non-repayable grant. According to the Spanish authorities, the aid is conditional on net job creation by ITP<sup>(9)</sup>, and maintenance of the investments over a minimum period of five years. The overall amount of the grant is ESP 1 170 million (EUR 7,03 million), to be paid according to the following timetable:

(ESP million)

| Year  | 2000 | 2001 | 2002 | Total |
|-------|------|------|------|-------|
| Grant | 343  | 369  | 458  | 1 170 |

With a reference and discount rate of 5,7 %, and a tax rate of 32,5 %, this gives a total amount discounted to 31 December 2000 of ESP 1 102 million, i.e. an aid intensity of 13,18 % gge (gross grant equivalent) and 9,80 % nge (net grant equivalent).

**(C) Background**

(29) In addition, in reply to a question from the Commission, the Spanish authorities indicated that the recipient firm had, on 27 January 1998, received investment aid in the form of a tax credit amounting to ESP 737 272 004 (EUR 4 431 094). The investment project, which covered the period 1997-2001, involved the following costs: buildings (ESP 1 150 million), machinery (ESP 5 400 million), technical installations (ESP 600 million), other installations (ESP 173 million) and IT systems (ESP 675 million), i.e. a total of ESP 7 998 million. The aid, with an intensity of 9,22 %, was granted by the Vizcaya Provincial Council under Provincial Law (Norma Foral) No 7/1996 of 26 December 1996. However, by Decision 2003/27/EC of

<sup>(9)</sup> ITP plans to create 272 new jobs between 2000 and 2003.

11 July 2001 on the State aid scheme implemented by Spain for firms in Vizcaya in the form of a tax credit amounting to 45 % of investments <sup>(10)</sup>, the Commission found that the aid provided for by the Provincial Law (45 % tax credit for investment in firms in Vizcaya) was unlawful and incompatible with the common market and had to be repaid.

- (30) By letter of 5 February 2003, registered on 6 February, the Spanish authorities indicated that this aid to ITP had not yet been repaid.

### 3. DESCRIPTION OF THE GROUNDS FOR INITIATING THE PROCEDURE

- (31) In its decision of 20 June 2001, the Commission raised a number of doubts concerning the following aspects of the aid under examination:

- the classification of certain R & D tasks as precompetitive development activities. For the low-pressure high-thrust turbine project, the doubts concerned in particular the engine testing, certification and post-certification activities. For the low-pressure low-thrust turbine project, the doubts concerned in particular manufacturing support, tools manufacturing and integrated logistic support activities,
- the admissibility of additional overheads and other operating expenses as eligible R & D costs,
- the incentive effect of the R & D component of the aid,
- the justification of the project in terms of regional development, in view of the fact that it was an ad hoc aid measure,
- the justification for including the expenditure on tools among the eligible costs of the investment project.

### 4. DESCRIPTION OF THE GROUNDS FOR EXTENDING THE PROCEDURE

- (32) The Commission took the view that the circumstance referred to in recital 29 above, of which it was informed after its decision of 20 June 2001, was a new fact in that the information was not known to it when it adopted that decision.

- (33) The Commission deemed that information to be of key importance if it was to be able to reach a decision on all the other issues already mentioned.

- (34) In accordance with the principle established by the Court of Justice of the European Communities in its judgment of 15 May 1997 in Case C-355/95 P *Textilwerke Deggendorf GmbH v Commission and Federal Republic of Germany* <sup>(11)</sup>, the fact that old aid that was unlawful and incompatible had not been repaid by the recipient firm could affect the compatibility of the new aid on account of the cumulative affect of the aid measures in question.

- (35) Since the Spanish authorities had informed the Commission that the recipient of the aid examined under the present procedure had not reimbursed the aid in the form of a tax credit amounting to ESP 737 272 004 granted by the Vizcaya Provincial Council, which had been declared unlawful and incompatible by Decision 2003/27/EC, the Commission had doubts as to the compatibility of the new R & D and investment aid.

- (36) In view of those doubts, the Commission extended the procedure in order to examine this question, which was not covered by its decision of 20 June 2001.

### 5. COMMENTS BY THE SPANISH AUTHORITIES

#### *Classification of certain R & D tasks as precompetitive development activities*

- (37) With regard to the high-thrust turbine project, the Commission did not rule out the possibility that the engine testing, certification and post-certification activities could relate to marketable products and might therefore not constitute precompetitive development activities. The Spanish authorities pointed out that the engine trials for this project comprised the following tests: extensometry, measurement of the metal temperatures, measurement of the air temperatures, thermal paints, efficiency tests, cycle tests, type tests and fan blade off tests. Only the last two were certification tests. According to the Spanish authorities, they were also crucial to the objective of developing the capacity of ITP's R & D department for designing complete models. The fan blade off test was not carried out earlier during the development phase in view of its high cost. It therefore provided the first opportunity (not without risk) for calibrating non-linear calculation tools developed for this loading case. The other activities formed part of the development process and constituted

<sup>(10)</sup> OJ L 17, 22.1.2003, p. 1.

<sup>(11)</sup> [1997] ECR I-2549.

the initial verification and calibration of the design tools developed by ITP. The Spanish authorities furthermore took the view that components subjected to the tests could not be used commercially, given the ageing that accumulated during the resistance test (type test) and the destructive nature of the fan blade off test. Be that as it may, the Spanish authorities stated that this aspect could be checked by the monitoring committee provided for under the programme.

(38) The certification and post-certification activities for the high-thrust turbine project involved analysis of the data and documents generated by prior tests, a task that should not be confused with a drafting activity aimed at fulfilling conditions laid down by the certification authority. The Spanish authorities took the view that the certification process imposed technical constraints which in this case were more stringent than those demanded by the customer. Those constraints were imposed from the beginning of the design and determined it. According to the Spanish authorities, they could not therefore be regarded as a mere administrative requirement without innovative value. In any event, the Spanish authorities drew the Commission's attention to the fact that ITP's involvement in this activity was an excellent learning opportunity for the company, which it could put to good use with a view to launching other competitive projects in the near future. These activities contributed to the development of a new business area for the firm, which took the form of the creation of an airworthiness department and the submission to the JAA (Joint Aviation Authority) of an application for DOA (Design Organisation Approval).

(39) In the case of the low-thrust turbine project, the Commission's doubts concerned in particular manufacturing support, tools manufacturing and integrated logistic support activities. With regard to tools manufacturing, the Spanish authorities stressed that the first objective of the project was to produce an engine that was significantly cheaper than any other existing option, which made it necessary to modify aerodynamic criteria, mechanical criteria, qualification conditions, etc. The activities corresponding to this task constituted the engineering design and manufacturing engineering departments' contribution to the review of the design and manufacturing concepts. Those activities involved, in particular, a high degree of innovation with regard to design and manufacturing methods and high-level technical discussions on the quality and capacity conditions of the process.

(40) With regard to the tools manufacturing activities, the Commission did not rule out the possibility that at least

part of the tooling might be used for the series production of engines. The Spanish authorities acknowledged that one of the usual principles in a development programme was indeed to recover as many of the tools as possible for the production programme. However, in the present case, they claimed, the approach was different in that the project was based on extremely low purchase prices, which introduced huge risks with regard to the possibility of future manufacture. The time to market was furthermore reduced in order to be able to capture the three possible customers before competing projects. Lastly, the reduction of costs required from the outset made it necessary to introduce concepts that were unusual in this type of small engine, such as the reduction of the number of vanes, and therefore had to be verified at a very early stage in the project. It was therefore necessary to finalise the tooling very early on, even before the concepts had been demonstrated. The Spanish authorities also pointed out that, as a result of regional policy commitments, the cast components, which used to be produced in the United States, were to be transferred to Vizcaya, which meant that ITP had in any event to bear the cost of a new set of tools.

(41) As regards integrated logistic support activities for the AS900 project, the Commission took the view that these corresponded to marketable versions, to which they contributed no new feature, modification or improvement, and therefore did not form part of precompetitive development. The Spanish authorities explained that these activities related to the following aspects: (a) the illustration of technical manuals; (b) the drafting of technical manuals; and (c) reliability, maintenance, etc. The last-named activities, although carried out by the logistic support group, were design/development tasks, carried out at the same time as development of the turbine, which determined the product design itself. They did therefore constitute precompetitive development activities. As far as activities (a) and (b) were concerned, the Spanish authorities argued that the Commission's view could be justified if ITP were habitually engaged in activities of this type. However, in the present case, these were new activities for the company which introduced an innovation in the development of its methods, involving the development of tools necessary for the establishment of a new department. In particular, this included the development of systems and tools for producing and illustrating technical publications, which had to be drawn up in a manner that was compatible with those used for the aircraft as a whole and incorporate the latest available technological advances. A far from negligible share of the work therefore consisted in developing the successive prototypes and the final version of the systems for producing technical publications, a task which, according to the Spanish authorities, formed part of precompetitive development.

*Admissibility of additional overheads and other operating expenses as eligible costs*

- (42) The Spanish authorities understood that the Commission's doubts related to the costs under the heading 'contribution to development of the programme'. They could not understand why the Commission had classed these costs as additional overheads, since, in their view, they were in fact direct costs arising from the research activity. The Spanish authorities stressed that ITP was not an original engine manufacturer (OEM) and therefore could not, even if it so wished, assume responsibility for the engines as a whole and, in particular, for the process of incorporating its turbines into those engines. Consequently, the tasks involved in incorporating the turbine into the engine, and especially the tests on the turbine, had to be carried out under the responsibility of the OEM, with ITP's participation. The Spanish authorities also stressed that the intensity of the aid towards these eligible costs was 8 % and that the repayable advance requested for these costs accounted for 30 % of the total amount of the repayable advances requested for the entire project, which was in line with the conditions for intangible technology transfer costs associated with investment projects.

*Incentive effect of the R & D component of the aid*

- (43) The Spanish authorities pointed out that ITP was active in two areas: engine maintenance and the development and production of engine components. At the time when it applied for the aid, the company was specialised above all in the static components, which are simpler and less integrated. Its production infrastructure was therefore tailored to the production of parts of this type. After analysing its position in this market, ITP had decided to change its strategy in order to become a supplier of complete modules. Such a decision entailed an obvious risk, not only on account of the scale of the

necessary investments but also because the company had to penetrate two different sectors (both high- and low-thrust low-pressure turbines) with two different partners (Rolls Royce and Allied Signal). The Spanish authorities also stressed that contacts between the company and the Basque Government dated back to August 1998 and that the latter's willingness to support the project was a factor in the decisions taken by ITP.

- (44) The Spanish authorities also pointed to a further three factors that made such a change of strategy particularly risky: first, the risk of having to invest a very large proportion of the resources generated <sup>(12)</sup>; second, the fact that, without the aid, the production of parts for the Trent 500 project would have been located at Rolls Royce's existing plant in Derby and not on the Zamudio site; and, third, the fact that the AS900 programme was in competition with the range of engines produced by Rolls Royce North America (formerly Allison), which logically caused some of the shareholders to be reluctant to take risks under a competing project.
- (45) The Spanish authorities then provided certain indicators which, in their view, demonstrated that the aid did have an incentive effect. ITP enjoyed significant growth over the period 1997-1999, the time when it framed its strategy for involvement in low-pressure turbines. This growth, which was in the region of 0,60 %, was similar to that enjoyed by the US firm General Electric. Furthermore, ITP accounted for only 1,46 % of turnover in the engine subsector and 0,25 % in the European aerospace sector, whereas its participation in the Fifth Framework Programme was in the region of 6 % for the engine subsector and 1,80 % for the aerospace sector, or 4.1 times greater than what could normally be expected on the basis of its turnover.
- (46) The company's R & D expenditure increased substantially in relation to its turnover from 1999 (the first year of the project) onwards, as shown by the following table:

(ESP million)

|                | 1993   | 1994   | 1995   | 1996   | 1997   | 1998   | 1999   | 2000   |
|----------------|--------|--------|--------|--------|--------|--------|--------|--------|
| Turnover       | 14 108 | 14 145 | 16 051 | 14 702 | 19 263 | 25 333 | 31 493 | 36 952 |
| R & D          | 238    | 914    | 1 850  | 3 705  | 4 373  | 4 750  | 8 061  | 12 438 |
| R & D/turnover | 0,02   | 0,06   | 0,12   | 0,25   | 0,23   | 0,19   | 0,26   | 0,34   |

<sup>(12)</sup> The resources generated in 1997 and 1998 (prior to the project) were ESP 4 534 million and ESP 6 566 million respectively, while the necessary investments amounted to ESP 1 935 million in 1999 and ESP 6 829 million in 2000, or ESP 19 274 million over the four years of the project's duration.

The workforce also increased significantly, since the company employed 300 technicians after 12 years of activity.

(47) On the assessment of the technological risk inherent in the project, account had to be taken, according to the Spanish authorities, of the fact that it was usual for OEMs to publish incomplete information concealing possible delays or development problems in order to preserve their image, which could lead the Commission to believe that this project did not involve any risks.

(48) Concerning the technological barriers which the project had to overcome, the Spanish authorities referred to the information they had already provided in their letter of 17 April 2001. The value of the project's technological objectives should not be underrated, they claimed, since a good number of them had not yet been achieved. As regards the TRENT 500 engine, they pointed out that what was certified in December 2000 was a basic version of the engine, using technology that imposed heavy loads. A new version of the engine was therefore developed which improved efficiency by 1 %, and the company was currently working on a version that was to achieve a 2 % improvement in efficiency. Certification of the AS900 engine was delayed by one year as a result of technical problems.

(49) Lastly, the Spanish authorities pointed out that OEMs frequently created major barriers to the transfer of technology to the companies to which they subcontracted, given the risk the latter could introduce into the programme. This limited, in practice, the number of firms that could receive subcontracts for low-pressure turbine modules or take part in risk-sharing programmes. It was therefore unlikely that any other company in Spain would have sufficient prior know-how to be able to enter this sector. Consequently, it was difficult to imagine other firms in Spain or Europe that could receive similar aid. The Spanish authorities also stressed that it was usual for the aircraft industry to receive state aid; they claimed, however, that the intensity of the aid planned for this project was lower than the average levels of aid in Europe and the United States.

*Justification of the project in terms of regional development*

(50) The Spanish authorities pointed out, firstly, that although the project did not form part of a Commission-approved aid scheme, that did not mean that there was no overall system for examining, analysing and evaluating projects of this nature. The project was classed as a strategic programme and had been evaluated by the Basque Government under the Interinstitutional Economic Development Plan 2000 to

2004 and the Interinstitutional Agreement on the introduction of the Plan concluded between the Basque Government and the Vizcaya, Guipúzcoa and Álava Provincial Councils. The Plan provided the framework for the economic development activities of all the Basque institutions. The Spanish authorities explained that they had decided at the time not to notify the Commission of the Plan as such but to make individual notifications.

(51) As regards the effects of the project on regional development, the Spanish authorities explained that industry in the region had traditionally been concentrated in sectors such as mining, steelmaking, shipbuilding and capital goods. The successive crises in those sectors had deeply affected the region and prompted it to adopt an industrial policy aimed at facilitating structural change. The Economic Development Plan 2000 to 2004 therefore put forward a model of competitiveness geared to the creation of businesses in the region with higher demand potential in order to serve as an engine for development, promote economic activity in what were regarded as strategic, priority sectors, develop the innovative capacity of businesses and facilitate the internationalisation of firms in the region. The policy was not based on a sectoral approach but had a regional development focus. The Interinstitutional Agreement provided for the possibility of supporting specific projects pursuing these objectives in accordance with a number of qualitative and quantitative criteria enabling their potential contribution to regional development to be gauged irrespective of the sector concerned. The Spanish authorities took the view that the project presented by ITP was fully in line with those objectives.

(52) The Spanish authorities also took the view that the project presented by ITP could give a major boost to the development of the region: using a mathematical model developed by the University of Deusto (Faculty of Economics and Business Studies) on the basis of input-output tables, they claimed that the project could have a total economic impact of ESP 101 792 million for a level of activity of ESP 39 096 million. In terms of gross value added, the impact would be ESP 52 100 million for a gross value added by activity of ESP 28 400 million and an additional activity of ESP 16 821 million. As far as employment was concerned, the total effect would be 5 239 jobs overall for a workforce of 1 424 in the company.

(53) Lastly, the project would according to the Spanish authorities involve a volume of investment to be

subcontracted in the region amounting to ESP 1 450 million and a level of subcontracting in the region amounting to 30 %. It was also hoped to increase the number of local suppliers by 40 %. The Spanish authorities also stated that the project would help to consolidate an industrial group that was specialising in products with high value added and substantial technological content, develop the competitiveness of firms operating as subcontractors in the aircraft industry and boost aerospace research in the Basque Country. There was also a long-standing tradition of cooperation between ITP and the Bilbao Engineering School or the Mondragón Polytechnic University with a view to developing a skills base capable of meeting the needs of the sector. Lastly, the Spanish authorities hoped that the Zamudio site would become a centre of attraction for advanced industries.

*Justification for including the expenditure on tools among the eligible costs of the investment project*

- (54) The Spanish authorities explained that expenditure under the heading 'tools' related to production tooling associated with the manufacturing process at the Zamudio site and comprised mechanical apparatus (clamps, jigs, templates, stiffeners, i.e. components for handling parts and for the interaction between parts and tools), sheetmetal working and welding tools (cutting and finishing tools, tools for assembling welded components, etc. These were extremely costly, given the number of adjustments and mechanisms involved) and inspection and verification tools (standard components, templates and gauges for facilitating the inspection of the first and series-produced components). The tooling was to be designed for the machinery to be installed at Zamudio and related to new investments. The relevant expenditure was broken down as shown in the following table:

(ESP million)

|                                | 2000 | 2001 | 2002 | Total |
|--------------------------------|------|------|------|-------|
| Mechanical apparatus           | 150  | 327  | 215  | 692   |
| Sheetmetal working and welding | 85   | 97   | 93   | 275   |
| Verification                   | 25   | 43   | 27   | 95    |
| Total tools                    | 260  | 467  | 335  | 1 062 |

*Issue raised in the decision to extend the procedure*

- (55) The Spanish authorities provided proof that the aid described in recital 29 had been reimbursed in full by the recipient since the decision to extend the procedure,

including compound interest calculated using the interest rates recommended by the Commission.

## 6. COMMENTS BY INTERESTED PARTIES

### Comments submitted by Sytemel

- (56) The Federation of Turbine and Heavy Energy Plant Manufacturers (Sytemel), a French trade association, wished to draw the Commission's attention to the following regional issue: since the French department of Pyrénées-Atlantiques was already home to a number of industrial manufacturing or subcontracting centres for the Turbomeca group (which produced combustion turbines for aircraft applications and also naval or terrestrial uses), the distortion of competition caused by possible support from the Basque Government would aggravate the already adverse effect of geographic proximity of the sites on the mobility of researchers and technicians. Publicly assisting a new R & D centre for combustion turbines and abnormally affecting the natural conditions of competition between manufacturers were both unfavourable factors for trans-Pyrenean attractiveness and proper regional planning in Europe.

### Comments submitted by Pratt & Whitney

- (57) First, Pratt & Whitney argued that the intensity of the aid for this project should be considered in conjunction with state aid previously granted to Rolls-Royce for the Trent 500 engine and related development activities, since Rolls-Royce was the only private industrial partner in ITP. Account had to be taken in this connection of the fact that the Trent 500 was a derivative rather than a new engine and incorporated technologies taken from the Trent 700, Trent 800 and Trent 8104 engines, which meant that the costs and technological risks involved were reduced. Pratt & Whitney therefore took the view that the cost of developing the Trent 500 should be only 30 to 40 % of the cost of a completely new engine, a fact that should be taken into account when determining the eligible costs. The Trent 500 had furthermore already received state aid granted by the United Kingdom in 1998, which, according to Pratt & Whitney, must have been based on the assumption that Rolls-Royce would bear all the development costs. Transferring a share of the risks to other partners, such as ITP, would result in an effective increase in the intensity of the aid already granted and a 'double-dipping' of state aid since those partners would obtain further state aid for themselves. There could even be 'triple-dipping' of aid in that the request for additional aid presented by Rolls-Royce in 2001 for the Trent 600 and Trent 900 engines included, according to Pratt & Whitney, engine programmes and technologies that were already assisted by the 1997 aid grant. Pratt &

Whitney also pointed out that Rolls-Royce's contribution to R & D activities from its own funds was unusually low compared with the levels of company-funded R & D by Pratt & Whitney and other competitors.

- (58) Pratt & Whitney considered that the aid for the high-thrust turbine had no incentive effect since the request for aid was retroactive as the precompetitive development costs had already been incurred. The Trent 500 programme was long past the launch phase and the engine had already been certified by the competent authorities. Pratt & Whitney shared the doubts raised by the Commission based on the fact that the project had already reached a high level of maturity. The company pointed out that the period for which the aid was requested (1999–2002) postdated the formal announcement by Airbus in June 1997 that it had selected the Trent 500 as the sole engine for the A340-500/600. The engine was first tested in May 1999 and certified in December 2000. Orders for A340-500/600 powered by the Trent 500 engine had so far totalled 88 aircraft, most of which had been placed before 1999.

- (59) Pratt & Whitney shared the doubts raised by the Commission as to whether engine testing, certification and post-certification activities could be classed as precompetitive development activities within the meaning of the R & D framework. The company explained that, according to its own experience, large aero-engine development projects had four distinct phases:

- the concept phase, during which market requirements, business strategy and technology readiness were continuously re-evaluated. Conceptual design studies were conducted with airframe manufacturers to determine the requirements for thrust, performance, weight, noise, emissions, installation constraints and so on. Technologies were proven through analysis and rig or engine testing in order to minimise technical risk. This phase could continue for long periods of time. It could be regarded as 'precompetitive', but the costs were relatively low, about 4 % of the total programme cost,
- the launch phase, during which the production design of a specific new engine model or derivative was developed. Some rig and component testing could be carried out, and long lead-time tooling and parts were ordered using the expected production

configuration. By the end of this phase, the engine configuration and technology were largely fixed. The engine manufacturer entered into business agreements with customers, specifying the certification and delivery schedule, price, performance and technical requirements for the engine. This phase lasted around one year and accounted for some 9 % of the total programme development cost. Pratt & Whitney considered that this phase too could be regarded as precompetitive development within the meaning of the R & D framework, since it was uncertain until the end of the phase whether the engine would ever be manufactured and sold. However, by the end of the launch phase, if the programme was to proceed, it was because the engine manufacturer had obtained a sufficient number of orders, and subsequent phases could not therefore be deemed to constitute precompetitive activities,

- the engine validation and certification phase, which was intended to establish that the product met specifications and was sufficiently safe and reliable for entry into service. New and unproven technologies were generally not added to the engine design during this phase since this would prove difficult, risky and costly. The phase could itself be divided into two parts: before and after production of the first engine to test (FETT), the initial prototype of the commercial production engine. During the production of the FETT, detailed design drawings of all engine components were completed. The FETT was typically fabricated by hand, using non-production processes and temporary tooling. The engine validation and certification phase prior to FETT lasted about one year after the end of the launch phase and accounted for around 9 % of the total programme cost. Once the FETT had been produced it had to successfully undergo all the tests required to ensure that the engine met all the minimum standards for safety and performance. All the engines used for these tests were produced in accordance with the design of the model to be certified. This period lasted about two years and accounted for around 55 % of total costs. A large proportion of these costs were incurred in producing the engines used for the tests. Five such engines could be enough for certifying a derivative engine, while as many as ten or more engines were normally necessary for a new engine design. These engines were usually manufactured using commercial production methods. They were tested under extreme conditions, which meant that it was practically impossible to refurbish and sell them to the airlines. They were therefore generally used for other development activities or in post-certification engine improvement programmes. Pratt & Whitney consequently shared the Commission's view that the costs incurred during this certification phase related

to a product that could be used commercially — and which indeed was already sold commercially after the end of the launch phase,

- the flight test and airframe certification phase, the final phase in which the engines were installed in the aircraft in accordance with the certified configuration. The aircraft had to successfully undergo a set of flight tests with the certified engines in order to demonstrate that the engine and airframe combination met the prescribed airworthiness, performance and operability requirements. After completing the flight test programme, flight test engines were typically refurbished and sold commercially. Along with the Commission, Pratt & Whitney took the view that the activities carried out during this phase could not be regarded as precompetitive development activities within the meaning of the R & D framework.

- (60) Lastly, with regard to the eligibility of costs, Pratt & Whitney shared the Commission's doubts in the case of the low-thrust turbine project as to whether manufacturing support, tools manufacturing and integrated logistic support activities could be regarded as precompetitive development activities within the meaning of the R & D framework: manufacturing support formed part of the firm's commercial policy and did not constitute a research and development activity; tools manufacturing was aimed at building the machines necessary to make prototypes, which could at least in part be subsequently re-used to manufacture standard engines; and integrated logistic support consisted in producing manufacturing instructions, manuals and technical procedures for engine maintenance that related to the commercial versions of the engines, to which they brought no innovation, modification or improvement. The same doubts applied also to the high-thrust turbine project.

#### Comments submitted by the recipient

- (61) The aid recipient submitted comments only on the decision to extend the procedure. These comments concurred with those made in that connection by the Spanish authorities, which demonstrated that the unlawful and incompatible aid mentioned in recital 29 had been reimbursed in full by ITP since the decision to extend the procedure, including compound interest calculated using the interest rates recommended by the Commission.

#### 7. RESPONSE BY THE SPANISH AUTHORITIES TO THE COMMENTS SUBMITTED BY INTERESTED PARTIES

##### Response to the comments submitted by Sytemel

- (62) According to the Spanish authorities, and contrary to what was claimed by Sytemel, the project would not

affect the network of plants and subcontractors that usually worked for Turbomeca or trigger any movement of researchers towards the Basque Country. ITP, as a supplier of subsystems and a risk partner in engine programmes, was not in competition with small or medium-sized workshops. On the contrary, it created work for manufacturers of this type since it did not have the facilities for producing all the components that went to make up a turbine. ITP planned to continue subcontracting 15 % of production. In these circumstances, the geographic proximity of the manufacturers represented by Sytemel constituted an advantage in comparison with other potential suppliers located in the United Kingdom, Germany or central or southern Spain. It could thus be argued that suppliers of subsystems created work rather than taking it away, and this was confirmed by certain facts: ITP had not received a single subcontracting order from industries in that region, but had placed increasing volumes of manufacturing orders in the south of France. For example, ITP had in a single year ordered turbine discs worth EUR 17,2 million from a French company, while the hoped-for grant amounted to EUR 7 million. Furthermore, this type of component was traditionally supplied by a Japanese company.

- (63) Unlike Sytemel, the Spanish authorities considered that geographic proximity was an advantage and that the mobility of researchers and technicians should be encouraged, as indeed the European Union had done in the Sixth Framework Programme, in order to develop European industry. In this connection, ITP and the Basque Government were taking part in the Interreg initiative with a view to developing technological and commercial links between the Basque Country and the Aquitaine region.

#### Response to the comments submitted by Pratt & Whitney

- (64) The Spanish authorities considered that Pratt & Whitney's arguments concerning the aid intensity, in other words the link with aid received by Rolls-Royce for the Trent 500 project, were based on the incorrect assumption that Rolls-Royce was the only private shareholder in ITP and that the remaining shares belonged to the State or to regional or local authorities. But ITP was mainly privately owned, its only public shareholder being SEPI, which held 26,65 % of the capital. The remainder was split between the private companies Sener (26,65 %) and Rolls-Royce (46,7 %). Given its private company status, the state aid received by ITP in Spain was therefore separate from the aid granted by the United Kingdom to a British firm. The planned R & D aid to ITP corresponded to investments in capital, engineering and actual development equipment, for which no other state aid had been received. The conditions for ITP's entry into the project as a risk partner were furthermore market conditions,

without any premium or special treatment by Rolls-Royce. There was no duplication of work or any overlap with aid granted in the United Kingdom. With regard to Pratt & Whitney's opinion that the Trent 500 was a derivative engine, the Spanish authorities pointed out that even a new engine was based on additional knowledge in relation to previous ones. That principle, which applied to all manufacturers, enabled each of them to reduce development costs significantly. In any event, the aid had to be assessed in relation to the actual development costs and not the costs that would have been incurred if the engine had been completely new. The Spanish authorities stressed that the aid was an incentive aimed at enabling ITP to enter a new area of activity and that ITP therefore did not have the experience acquired by other firms. As regards the level of innovation incorporated into the turbine, the Spanish authorities claimed that the design and the technology used were completely new in comparison with other low-pressure turbines produced by Rolls-Royce or any other manufacturer. They repeated that the aid to ITP was designed to cover costs that the company had genuinely incurred and had not been reduced in any way by state aid granted in the United Kingdom. Lastly, they took the view that it was not for them to comment on the accounting criteria used by Rolls-Royce and stressed that Rolls-Royce and ITP were two completely different companies.

plans and showed the extent to which the technological risk existed and could have an economic impact on a small firm like ITP. The Spanish authorities stressed that the time-lag with respect to the established schedule due to the design of the second configuration caused the precompetitive development activities to be delayed and that, although the project was already at an advanced stage when it was notified to the Commission, it should not be deduced therefrom that the aid was any less necessary. Lastly, they argued that the existence of orders or declarations of intent to purchase engines did not relieve the manufacturer of the risk of failing to meet the technical specifications, since orders not only did not provide any advance funding but always included heavy penalties in the event of non-compliance.

(65) Concerning the incentive effect of the aid, the Spanish authorities considered that Pratt & Whitney had arrived at the conclusion that there was no technical or commercial risk on the ground that the Trent 500 engine was certified in December 2000 and that the R & D activities had therefore been completed before certification of the engine was first announced. The Spanish authorities took the view, on the other hand, that many of those activities overlapped, particularly if account was taken of the different levels: engine, system and subsystem. Many announcements were furthermore made artificially in order to protect the customer's programme and preserve the commercial image of the project. The Spanish authorities stated that the turbine standard certified in December 2000 did not fulfil the requisite conditions and that the engine was in fact certified with a basic low-pressure turbine standard in order to avoid delaying the development programme for the aircraft it was to power. Between that standard and the subsequent one, modifications were developed and tested that were in advance of the state of the art. Those modifications were partly the result of parallel R & D

(66) As regards the precompetitive development activities, the Spanish authorities took the view that the model for engine design projects put forward by Pratt & Whitney was not necessarily the only one possible and that other OEMs were perfectly capable of adopting other models that might not coincide with the one described. In any event, according to the Spanish authorities, some major differences could be observed between the methods adopted by an OEM such as Pratt & Whitney and those of a firm like ITP. The proportion of precompetitive development tasks was, for one thing, much larger in the case of a supplier of subsystems than in that of an OEM since the former was involved not in engine marketing, certification or sales but in technical activities. The availability of existing technology (precedents) also differed as between a firm traditionally present in the market, like Pratt & Whitney, and a medium-sized firm that had been in the market for only 12 years, like ITP. For example, an OEM could regard a low-pressure turbine as a by-product of the high-pressure turbine, whereas ITP, a supplier of low-pressure turbines, could not refer to high-pressure turbine or any other previous turbine technology, and the net technological content of these activities was therefore proportionately higher in the case of ITP than for an OEM. Lastly, the Spanish authorities were convinced that the activities in respect of which the Commission had raised doubts did constitute precompetitive development activities for ITP, since they corresponded to the initial development of certain methodologies and processes.

(67) Lastly, as far as the eligibility of costs was concerned, the Spanish authorities took the view that the Commission had all the information it needed in order to reach a decision on this issue and, in particular, on the specific content of each of the tasks. Since such information was not available to Pratt & Whitney when it submitted its comments on the certification and post-certification activities, those comments were groundless.

## 8. ASSESSMENT

(68) The measures planned by the Spanish authorities confer an advantage on the recipient firm by relieving it of some of the costs incurred through the investments and research activities which it should normally bear itself. This advantage is also selective with respect to other firms that might wish to carry out such investments or similar research projects. It could also affect intra-Community trade if only because the projects in question are aimed at developing and manufacturing products to be supplied to Rolls-Royce and therefore exported to the United Kingdom, and also because ITP subcontracts for a number of European firms. Lastly, the interest-free loans are granted direct by the Basque Government, and consequently the advantages must be deemed to be conferred by means of state resources. The measures in question therefore constitute state aid within the meaning of Article 87(1) of the Treaty.

(69) As stated in recital 26 of this Decision, the Commission raised doubts concerning this project. The questions arising will be examined below, the planned aid for research and development and the planned aid for investment being dealt with separately.

## A. Aid for research and development

*Classification of the R & D tasks as precompetitive development activities*

(70) The Commission notes firstly that the assessment of state aid for research and development in the light of the Community rules is based on the analysis of eligible costs relating to specific investments. The fact that other investments, even linked to the same project, have received state aid cannot therefore make the project in question incompatible with the Treaty. This principle therefore applies all the more in the case of investments under a different project. The Commission therefore has to dismiss the arguments put forward by Pratt & Whitney concerning the aid received by Rolls-Royce in the context of the latter's investments linked to the Trent 500 project and the Trent 600 and Trent 900 projects.

(71) In its Decision on State aid to Rolls-Royce for the development of the Trent 600 and Trent 900 engines <sup>(13)</sup>, the Commission classified the different phases of aero-engine development in line with the stages of R & D defined in Annex I to the R & D framework.

(72) According to that classification, activities prior to engine certification constitute R & D activities in line with the R & D framework, as they are situated at least as far

away from the market as precompetitive development activities.

(73) On the other hand, the Commission found in that Decision that engine certification, let alone activities subsequent to such certification, were too close to the market for them to constitute R & D activities in line with the R & D framework.

(74) The Commission considers that it must adopt the same approach towards the project under examination in the present Decision as it took when it assessed the abovementioned United Kingdom project. It cannot follow the approach advocated by Pratt & Whitney, since that would mean restricting the scope of research and development exclusively to very early work carried out even before an initial prototype, albeit commercially unusable, was built. Such an approach would clearly run counter to the logic of the R & D framework, which expressly provides for the construction of such prototypes to be included among research and development activities.

(75) Account should also be taken in this particular case of the fact that the work undertaken by ITP is aimed at developing engine subassemblies and not the entire engine. The certification activities to be taken into account in order to draw the line between ITP's work corresponding to R & D within the meaning of the R & D framework and work falling outside that definition should therefore be the activities aimed at certifying the engine with the turbines developed by ITP as part of the present project and not any previous certifications of the engine with other turbines. This distinction is particularly important in the case of the Trent 500 engine, which, owing to the schedule imposed by the aircraft manufacturer, was the subject of an initial certification by Rolls-Royce that was completed in December 2000, but using a different turbine that did not display the same set of characteristics as the one developed by ITP under the present project. That initial certification, which had nothing to do with this project, could not therefore be used to draw the conclusion, put forward by Pratt & Whitney, that any activity carried out under the present project after December 2000 does not constitute R & D within the meaning of the R & D framework.

<sup>(13)</sup> Commission Decision of 30 October 2001 on State aid case No 120/01, OJ C 67, 16.3.2002, p. 33.

- (76) In view of the foregoing, the Commission takes the view that the costs linked to the certification and post-certification activities for the high-thrust turbine cannot be regarded as R & D within the meaning of the R & D framework. The amount of those costs, namely ESP 682 560 989 (EUR 4 102 274), should therefore be deducted from the total eligible costs notified by the Spanish authorities.
- (77) With regard to the engine testing costs linked to the high-thrust turbine, the Commission takes note of the Spanish authorities' statement that only some of those tests (the fan blade off tests and type tests) formed part of the certification process. For the reasons already mentioned, these certification tests do not constitute R & D activities within the meaning of the R & D framework. On the other hand, the Commission takes the view that the other testing activities should be regarded as preceding the engine certification with ITP's new turbine, even where they took place after the engine was certified in December 2000 with another, less powerful, turbine. These last-named activities are therefore included in the precompetitive development phase.
- (78) The Spanish authorities pointed out that the above-mentioned certification tests accounted for 15,6 % of the total engine testing costs linked to the high-thrust turbine. The Commission therefore considers that 15,6 % of the total cost of the task should be deducted from the amount of the costs eligible for aid. An amount of ESP 29 577 643 (EUR 177 765) should therefore be deducted from the total eligible costs notified by the Spanish authorities.
- (79) In the case of the low-thrust turbine project, the Commission raised doubts concerning the inclusion among eligible costs of the costs relating to manufacturing support, tools manufacturing and integrated logistic support. It considered that these activities were aimed at manufacturing or maintaining engines in their final, marketable state.
- (80) As regards manufacturing support, the Spanish authorities claimed that this activity involved a high degree of innovation in terms of design and manufacture and important technical discussions concerning the quality and capacity requirements of the production process. The Commission does not call these considerations into question, but takes the view that they do not enable it to withdraw its reservations as to whether or not such activities qualify as R & D.
- (81) First, the fact that the activities involve a high degree of innovation is not sufficient for them to be classified as R & D activities within the meaning of the R & D framework. Point 2.3 of the framework makes it very clear that although certain activities may be regarded as innovative they do not fall within the scope of the framework.
- (82) Second, the existence of important technical discussions as part of this task does not in any way alter the fact that the task corresponds to the production process for the commercial engine, as demonstrated precisely by the fact that the quality aspects of the process are taken into account. The definition of precompetitive development activities given in the third indent of Annex I to the R & D framework explicitly excludes activities whose results may be converted or used for industrial applications or commercial exploitation.
- (83) The Commission therefore takes the view that the manufacturing support activities relating to the low-thrust turbine do not constitute research and development activities within the meaning of the R & D framework and that the costs associated with those activities cannot be included in the costs eligible for aid in line with the framework. The amount of those costs, namely ESP 58 795 002 (EUR 353 365), should accordingly be deducted from the total eligible costs notified by the Spanish authorities.
- (84) With regard to the tools manufacturing activities, the Commission takes note of the Spanish authorities' statement that, unlike usual practice in projects of this type, the tooling for the development activities would not be able to be re-used for the industrialisation of the final product. Neither could it be converted for that purpose given the need to keep the cost of the final production process low, which precludes the use of the type of tooling used in a research and development context.
- (85) The Commission therefore concludes that the tool manufacturing activities for the low-thrust turbine may be regarded as precompetitive development activities within the meaning of the R & D framework and that the corresponding costs may be included in the eligible costs of the project under that heading.
- (86) As regards integrated logistic support activities, the Spanish authorities stated that the drafting of technical manuals was a new activity for the company which therefore required it to engage in a substantial process of innovation and methods and tools development; they claimed that the other activities in this task, which related to engine reliability and maintenance, constituted design/development activities that were carried out at the same time as the engine design work.

- (87) The Commission takes the view that the fact that the company is drawing up technical manuals of this type for the first time and has to develop a set of tools for the purpose does not make it possible to conclude that the drafting of those manuals constitutes an R & D activity within the meaning of the R & D framework. In particular, the purpose of such technical manuals can clearly be only to describe the final version of the engine. Whatever the degree of refinement and innovation incorporated into such manuals, they will have a direct commercial application since they will be used by the buyers of the engines.
- (88) As for the activities relating to engine reliability and maintenance, the Commission considers that the fact that they are carried out partly in parallel with engine development and use the results of that development as input data makes it possible to conclude only that they relate to that engine in particular, and not that they form part of the research process. In any event, the Commission points out that these again are activities which by definition are either entirely, in the case of maintenance, or to a very considerable extent, in the case of reliability, directed towards the final stage of the product as placed on the market.
- (89) Since all the integrated logistic support activities are to a considerable extent directed towards the final product placed on the market, the Commission therefore takes the view that the costs associated with those activities cannot be included in the costs eligible for aid in line with the R & D framework. The amount of those costs, namely ESP 60 285 198 (EUR 362 321), should accordingly be deducted from the total eligible costs notified by the Spanish authorities.
- (90) In view of the foregoing, the total amount of eligible costs should be reduced to ESP 9 590 857 185, i.e. EUR 57 642 213.
- (93) In the case in point, ITP's participation includes costs, such as the assistance provided by the company in the tests for integrating its subassemblies into the complete engines, which the Commission deems eligible in line with Annex II to the R & D framework where they relate to activities carried out either directly by the aid recipient itself or by subcontractors.
- (94) The Commission takes the view that the fact that the aircraft industry adopts specific methods for cooperation between companies, such as risk partnership, cannot have any bearing on the nature of eligible costs in line with Annex II to the R & D framework.
- (95) Accordingly, the Commission finds that its doubts concerning the admissibility of additional overheads and other operating expenses as eligible costs can be withdrawn.

*Incentive effect of the R & D component of the aid*

- Admissibility of additional overheads and other operating expenses as eligible costs*
- (91) The Commission notes that the costs described in the notification as a 'contribution to development of the programmes' should not be included as additional overheads and other operating expenses in line with the fourth and fifth indents of Annex II to the R & D framework.
- (92) These costs in fact correspond to ITP's participation as a subcontractor in the integration of the components it manufactures into complete engines. It is common practice for subcontractors to contribute in this way to the costs of integrating their components into the overall system during the research and development phase. Their contribution often takes the form of cooperation through a risk partnership in which the subcontractor must, in addition to paying an entry fee for joining the programme, take responsibility for part of the development and industrialisation of the engine (usually its own subassembly and the integration of that subassembly into the system).
- (96) The Commission notes, firstly, that the technological risk associated with the project is relatively limited, at least in comparison with the high average level of technological risk in the aircraft industry. In particular, examination of the information supplied by the Spanish authorities reveals that ITP's engineers received substantial technical assistance from the United Kingdom company Rolls-Royce, the industry leader in Europe, which is itself involved in very high-technology engine development projects.
- (97) The Spanish authorities have nevertheless provided data demonstrating that the aid had a significant quantitative effect on the company's R & D activities. In particular, between 1998 (before the project began) and 2000 (at the peak of its implementation), the firm's R & D spending grew from EUR 152 million to EUR 222 million. In relative terms, the proportion of its total turnover allocated to R & D thus rose from 19 % to 34 % during that period. Furthermore, between 1998 and 2001, the company hired some 50 engineers and technicians.
- (98) The Commission cannot take account in its analysis of the data supplied by Pratt & Whitney on this topic,

since they relate to Rolls-Royce and not to the company receiving the aid.

(99) Neither can the figures for Trent 500 engine sales and orders submitted by Pratt & Whitney be taken into consideration in assessing the incentive effect, since they do not distinguish between engines incorporating different types of low-thrust turbine and consequently do not specify whether any of those sales incorporate the new high-thrust turbine developed by ITP under the project covered by this Decision.

(100) The Commission also notes, as mentioned earlier, that the aid enabled significant cross-border cooperation to take place between the recipient and the United Kingdom company Rolls-Royce, with special reference to the latter's Trent 500 engine, in the development of which ITP took part as a risk partner.

(101) The Commission notes, finally, that the company submitted an application for aid to the regional authorities before it launched the programme.

(102) In view of the foregoing, the Commission finds that, in this case and particularly in view of the sector concerned, the aid can be deemed to have an incentive effect in line with section 6 of the R & D framework.

#### *Conclusion on the R & D component of the aid*

(103) In view of the foregoing, the Commission finds that some of the activities notified by the Spanish authorities may receive aid that is compatible with the R & D framework. Those activities give rise to eligible costs amounting to ESP 9 590 857 185, or EUR 57 642 213, corresponding to precompetitive development activities in line with Annex I to the framework.

(104) The maximum allowable intensity of the aid is 25 %, pursuant to point 5.5 of the R & D framework, to which an extra five percentage points may be added pursuant to the second paragraph of point 5.10.2 of the framework since the Zamudio site is located in an area eligible for regional aid under Article 87(3)(c) of the Treaty.

(105) The Commission therefore considers that the R & D component of the aid may be authorised under the R & D framework, provided that its gross grant equivalent does not exceed 30 % of EUR 57 642 213, i.e. EUR 17 292 664. The Spanish authorities have furthermore expressed their agreement on this point.

(106) The Commission notes that the gross grant equivalent of the aid must be calculated using the reference and discount rate published by it, plus a premium of 400 basis points, since the loan granted by the State is not backed by any security <sup>(14)</sup>. For the calculation of the gross grant equivalent of the aid, the Spanish authorities may refer to Annex I to the guidelines on national regional aid <sup>(15)</sup>.

(107) Lastly, as regards the claim made by Sytemel that the distortion of competition caused by possible support from the Basque Government would aggravate the already adverse effect of geographic proximity of the sites on the mobility of researchers and technicians, the Commission considers that increased mobility of researchers is, on the contrary, a positive development that should be encouraged in the Community.

#### **B. Aid for investment**

##### *Justification of the project in terms of regional development*

(108) As the Commission noted in the decision to initiate the formal investigation procedure, the planned investment aid does not form part of an approved aid scheme and must therefore be regarded as ad hoc aid. The Spanish authorities have not disputed that conclusion. The Commission accordingly has to verify, in accordance with the second paragraph of section 2 of the guidelines on national regional aid, whether the benefits for the region outweigh the distortion of competition that can result from the ad hoc aid. The Commission notes, furthermore, that the whole of the Basque Country is eligible for regional aid under Article 87(3)(c) of the Treaty and that, in accordance with Spain's regional aid map, the ceiling for regional aid in the Basque Country is 20 % nge.

(109) The Commission takes note of the fact that, although the aid is not to be granted under a Commission-approved aid scheme, it is in line with the Interinstitutional Economic Development Plan

<sup>(14)</sup> See, in this connection, the Commission notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997, p. 3, and in particular the first indent of the sixth paragraph thereof.

<sup>(15)</sup> OJ C 74, 10.3.1998, p. 9.

2000—2004 and the Interinstitutional Agreement on the introduction of the Plan concluded between the Basque Government and the Vizcaya, Guipúzcoa and Álava Provincial Councils, which, as explained by the Spanish authorities, provides the framework for the economic development activities of all the Basque institutions. The Plan comprises a programme on the basis of which the project in question was selected. The Commission has established that the aid to be granted under that programme is the subject of annual competitive tendering procedures and is granted after publication of a call for applications and selection in accordance with objective criteria. This investment aid must therefore be regarded as an individual aid measure benefiting a specific company but granted in a given overall legislative context of regional development.

- (110) The Commission also takes the view that this investment aid can effectively contribute to the economic development of the region. According to the data supplied by the Spanish authorities, the project will have a significant effect in terms of gross value added and job creation; in particular, it involves a relatively high level of subcontracting in the region (30 % in 2002).
- (111) The Commission considers, furthermore, that the aid may be regarded as proportionate, since its intensity is well below the relevant regional aid ceiling. It also notes that the aid recipient is to contribute more than 25 % to the financing of the project, that the application for aid was submitted before work started on the project and that the aid is conditional on maintenance of the investments for a minimum period of five years. The conditions laid down in the first and third paragraphs of point 4.2 and in point 4.10 of the regional aid guidelines are therefore met. The aid is also conditional on net job creation by ITP<sup>(16)</sup>.
- (112) Lastly, as regards the comments submitted by Sytemel in the course of the procedure, the Commission takes the view that the aim of regional aid is precisely to offset the handicaps or development lags from which the regions concerned are suffering, and that it already takes account of the scale of these handicaps when drawing up the national regional aid maps. In the case of the project under consideration, account has to be taken of the fact that the aid intensity is much lower than the ceiling allowed by Spain's regional aid map and that the fears expressed by Sytemel concerning the effects of the project on the operations of companies located in

France are unfounded since, as pointed out by the Spanish authorities, ITP has increased its orders from French firms. The Commission accordingly finds that the investment aid to ITP does not affect trading conditions to an extent that is contrary to the common interest.

- (113) The Commission therefore concludes that the doubts it raised in its decision to initiate the formal investigation procedure concerning the justification of the project in terms of regional development can be withdrawn.

*Justification for including the expenditure on tools among the eligible costs of the investment project*

- (114) The Commission notes, in the light of the explanations provided by the Spanish authorities, that expenditure on tools for this project relates to ancillary items associated with the production process, to be designed for the machinery to be installed at the Zamudio site. The Spanish authorities also pointed out that these items form part of the company's fixed assets and are entered as such in its balance sheet. These items may therefore be regarded as belonging to the category of 'plant/machinery' referred to in point 4.5 of the regional aid guidelines.
- (115) The Commission accordingly concludes that the doubts it raised in its decision to initiate the formal investigation procedure concerning the justification for including the expenditure on tools among the eligible costs of the investment project can be withdrawn.

*Conclusion on the investment component of the aid*

- (116) In view of the foregoing, the Commission finds that the investment project complies with the guidelines on national regional aid.

### **C. Issue raised in the decision to extend the procedure**

- (117) The Commission notes that the Spanish authorities have provided proof that the unlawful and incompatible aid referred to in the decision to extend the procedure has been reimbursed in full since that decision.

<sup>(16)</sup> ITP plans to create 272 new jobs between 2000 and 2003. See decision of 20 June 2001.

(118) The amount repaid includes compound interest calculated using the interest rates recommended by the Commission in accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered <sup>(17)</sup>.

(119) The Commission accordingly finds that the extension of the procedure no longer serves any purpose.

## 9. CONCLUSION

(120) In view of the foregoing, the Commission concludes that the investment aid planned by the Basque Government may be granted unconditionally. The aid for research and development planned by the Basque Government may be granted provided that certain conditions are fulfilled,

HAS ADOPTED THIS DECISION:

### *Article 1*

The state aid which Spain is planning to implement for the company Industria de Turbo Propulsores SA (ITP), in the form of a grant of EUR 7 030 000, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Implementation of the aid is accordingly authorised.

### *Article 2*

The state aid which Spain is planning to implement for ITP, in the form of an interest-free loan totalling EUR 24 040 000, is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty subject to the conditions set out in Article 3.

### *Article 3*

The gross grant equivalent of the aid, calculated using the reference and discount rate published by the Commission, plus 400 basis points, shall not exceed EUR 17 292 664.

### *Article 4*

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with Article 3.

### *Article 5*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 21 October 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*

---

<sup>(17)</sup> OJ C 110, 8.5.2003, p. 21.