

Official Journal

of the European Union

L 150

English edition

Legislation

Volume 48

10 June 2005

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 June 2004

concerning a series of tax measures which Belgium is planning to implement for maritime transport

(notified under document number C(2004) 2040)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2005/417/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

1.1. Procedural overview

(1) By letter of 14 June 2002 from its Permanent Representation, the Belgian Government gave notification, in accordance with Article 88(3) of the Treaty, of a series of tax measures for the merchant navy contained in a draft programme act. All these measures have been registered in the register of notified aid under N 433/2002. Before the Commission could take a decision, the measures in question were included in the programme act of 2 August 2002.

(2) On 19 March 2003 the Commission decided ⁽²⁾ 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 EC Treaty ⁽³⁾ against particular aspects of the programme act of 2 August 2002 (with the dossier now registered under the new number C 20/2003) and to approve the remainder of the provisions of the programme act for the maritime transport sector.

(3) By Royal Decree of 7 May 2003 the Belgian authorities implemented all the provisions of the programme act for the maritime sector (Articles 115 to 127 of the said programme act), specifying in the preamble to the Royal Decree that the decree provided 'no legal basis to taxpayers for claiming vis-à-vis the tax administration or before the national courts the application of the fiscal aid measures whose compatibility is being investigated by the Commission' in accordance with the Commission's decision of 19 March 2003.

(4) By letter of 7 May 2003 the Belgian authorities submitted their comments on the Commission's decision of 19 March 2003.

⁽¹⁾ OJ C 145, 21.6.2003, p. 4.

⁽²⁾ See note 1.

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

- (5) By letter of 26 June 2003 the Commission put a number of additional questions to the Belgian authorities. After the Commission had sent a reminder on 18 August 2003, the Belgian authorities replied by letter of 12 September 2003.
- (6) On 17 January 2004 new Community guidelines on State aid to maritime transport were published in the *Official Journal of the European Union* ⁽⁴⁾. They entered into force on the same day.
- (11) Under the tonnage-based flat-rate taxation scheme ⁽⁵⁾ the tax base used to calculate corporation tax for shipping companies that have opted for this scheme is replaced by a flat-rate amount determined on the basis of the tonnage of the fleet concerned. The present scheme does not impose any conditions as regards the flag flown by the ships.
- a flat-rate taxation scheme based on tonnage for persons managing ships on behalf of third parties that provide services on behalf of shipowners.

1.2. Title of the aid

- (7) This decision concerns the tax measures for maritime transport contained in the programme act of 2 August 2002, Title V — Finance, Chapter I — Maritime navigation.
- (12) A similar mechanism, leading to an even more favourable flat-rate amount, is laid down for persons managing ships for third parties, but it is subject to the condition that three quarters of the fleet thus managed flies the Belgian flag.

1.3. Recipient of the aid

- (8) The beneficiaries of the various aid schemes are undertakings established in Belgium that are engaged in maritime transport, exploitation of maritime resources and towage.
- (13) Ships may be eligible under the flat-rate taxation scheme if they are used for the following eligible activities:

2.1. Flat-rate taxation scheme

1.4. Purpose of the aid

- (9) The main purpose of the planned tax measures is to bring ships back under the Belgian flag since the entire Belgian merchant has been flagged out.
- operating a ship for the carriage of goods or passengers by international maritime transport and for the exploration or exploitation of natural maritime resources,
- profits accruing from operating a ship, with clearance certificate, for towage, assistance and other activities at sea,

2. DETAILED DESCRIPTION OF AID

- (10) The programme act provides for a series of tax measures for maritime transport in Belgium:
- a flat-rate taxation scheme based on shipping company tonnage,
- a package of measures designed to benefit shipping companies that did not opt for flat-rate taxation based on tonnage, including accelerated depreciation of ships, relief from tax on capital gains resulting from the sale of ships subject to reinvestment conditions, and tax deductions for the purchase of ships,
- abolition of registration duties payable for the registration of mortgages on ships,
- (14) By letter of 5 September 2002 the Belgian authorities pointed out that activities of the fishery sector could not be eligible.
- (15) The amount of corporation tax for shipping companies ⁽⁶⁾ that have opted for this scheme is fixed at a flat rate on the basis of the net tonnage of their eligible ships. The tax base for corporation tax is equal to the sum of the amounts obtained for each eligible ship ⁽⁷⁾ in accordance with the following scale determined per tranche of 100 net tonnes

⁽⁵⁾ Called Tonnage Tax in English.

⁽⁶⁾ See section 2.8 of the Commission's decision of 19 March 2003.

⁽⁷⁾ See note 6.

⁽⁴⁾ OJ C 13, 17.1.2004, p. 3.

(NT) and per 24-hour period started, whether or not the ship is operational:

	(EUR per 100 NT)
up to 1 000 net tonnes	1,00
between 1 001 and 10 000 net tonnes	0,60
between 10 001 and 20 000 net tonnes	0,40
between 20 001 and 40 000 net tonnes	0,20
40 001 net tonnes and over	0,05

(16) Once shipping companies have opted for this flat-rate taxation scheme, they remain subject to it for a period of 10 years. At the end of this period, the scheme is tacitly renewed for another 10-year period except if the company concerned has served prior notice of its wish to leave the scheme.

(17) Moreover, the scheme makes provision for additional tax relief for the newest ships. Article 119(2) of the programme act provides that taxable profits determined on a flat-rate basis in accordance with the above rates are reduced to:

- 50 % of the flat rate per day for ships that are less than five years old, to be counted from the date of delivery;
- 75 % of the flat rate per day for ships that are at least five years old but less than 10 years old, to be counted from the date of delivery.

(18) The age of a ship is determined on the basis of the date of delivery as fixed by the registrar of maritime and inland waterway ships' mortgages or the competent registration authority.

(19) Under Article 120(2) of the programme act, losses sustained in previous financial years may not be deducted from the tax base determined on a flat-rate basis. Any part of losses from maritime navigation not taken into account by the time when the tax base for maritime activities is for the first time determined in relation to tonnage may again be deducted from future profits upon expiry of the period in which the tax base has thus been determined. By way of derogation, however, business losses incurred in the same period by another division of the company may be deducted from the tax base determined on a flat-rate basis provided that, and to the extent that, such losses could not be deducted from the profits of any other division of that company not subject to flat-rate taxation.

2.2. Tax measures for shipping companies that have not opted for the flat-rate taxation scheme

(20) For all tax periods in which a shipping company has not been subject to flat-rate taxation, it may benefit from three types of tax concessions which derogate from the Belgian Income Tax Code 1992.

2.2.1. Accelerated depreciation ⁽⁸⁾

(21) Ships acquired new or second-hand which become the property of a Belgian taxpayer for the first time, parts of such ships and expenses incurred for major repairs and alterations carried out when acquiring second-hand ships may be depreciated as follows:

- 20 % for the accounting year when the ship is taken into service;

⁽⁸⁾ Provided for in Article 121 of the programme act of 2 August 2002: 'Article 121

(1) Subject to the derogations mentioned in this section, depreciation on new or second-hand ships shall be determined in accordance with Articles 61 to 64 of the Income Tax Code 1992.

(2) The following depreciation percentages are allowed for new ships, co-ownership shares in new ships and shares in new ships: 20 % for the accounting year of entry into service, 15 % for each of the following two accounting years, and subsequently 10 % per accounting year until full depreciation.

(3) Depreciation shortfalls during the first three accounting years, counting from that in which the ship was taken into service, are recovered during the tax periods following the one in which the shortfall occurred, even if outside the normal depreciation period in accordance with paragraph 2, provided that total annual depreciation per ship does not in any case exceed 20 % of the investment or purchase value.

(4) Ships that are depreciated in accordance with the scheme provided for in this Article cannot benefit under the optional degressive depreciation scheme provided for in Article 64 of the Income Tax Code 1992.

(5) Ships, co-ownership shares in ships and shares in ships that were not acquired when the ship was new may benefit from depreciation as provided for in paragraphs 1 to 4 if these ships come into the possession of a Belgian taxpayer for the first time. Ships that are not acquired new and which, in accordance with paragraph 1, cannot benefit from depreciation as provided for in paragraphs 1 to 4 may be depreciated linearly over the period of normal usage. Depreciations as provided for in paragraphs 1 to 4 shall also apply to expenses incurred for major repairs and alterations made upon acquiring second-hand ships.

(6) The provisions of this Article do not apply in the period during which profits from maritime navigation are determined on the basis of tonnage.

(7) In the event of disposal after the end of the period in which profits from maritime navigation are determined on the basis of tonnage, the net tax value shall, for calculating the gains referred to in Article 122, be established on the basis of the normal depreciation rules for tax purposes, including for the period in which profits from maritime navigation are determined on the basis of tonnage.'

- 15 % for each of the next two accounting years;
 - 10 % for each subsequent accounting year until full depreciation.
- (22) Depreciation shortfalls during the first three accounting years, counting from that in which the ship is taken into service, may be recovered during taxable periods following that in which the shortfall occurred, even beyond the depreciation period, provided that the total annual amount of depreciation per ship in no case exceeds 20 % of the investment value.
- (23) Ships thus depreciated may not benefit from the digressive depreciation scheme provided for in Article 64 of the Belgian Income Tax Code 1992.
- (24) Ships that are not acquired new and do not become the property of a Belgian taxpayer for the first time may nevertheless be depreciated linearly over the normal length of use.
- (25) The special depreciation scheme provided for in the programme act lays down in legislation an administrative measure which has already been applied in Belgium for several decades. This measure has been recorded in legislation to enhance its legal certainty and ensure continuity of the system.
- (26) Article 122 ⁽⁹⁾ provides that gains realised on the sale of ships are exempt from taxation provided that the ships sold have remained fixed assets of the company for more than five years at the time of sale and consequently that an amount at least equal to the sales value is re-invested within five years in the purchase of ships, co-ownership of ships, shares in ships or shares in shipping companies which have their headquarters in the Community and exclusively engage in eligible activities ⁽¹⁰⁾.
- (27) If there is no re-investment in accordance with the conditions described, the gains realised are considered as profits in the taxable period during which the re-investment period expired.
- (28) The investment taken into account for re-investment should be retained as an asset for at least five years. However, the said investment may be replaced within three months if it is sold. If the investment taken into account for re-investment has been replaced in this way, the same rules on gains shall apply for the disposal of the asset acquired as a replacement.
- (29) In the event of a sale after the end of the period in which the tax base is determined in relation to tonnage, for the calculation of gains, the net tax value shall be established on the basis of the normal rules on depreciation, including for the period in which profits from shipping are determined in relation to tonnage.

2.2.2. *Exemption for gains on the sale of ships*

- (26) Article 122 ⁽⁹⁾ provides that gains realised on the sale of ships are exempt from taxation provided that the ships sold have remained fixed assets of the company for more

⁽⁹⁾ Article 122 of the programme act of 2 August 2002 reads as follows: 'Article 122

(1) Subject to the derogations provided for in this section, the provisions laid down in Article 190 of the Income Tax Code 1992 apply to gains realised on ships by resident companies or Belgian branches of non-resident companies which engage exclusively in the activities described in Article 115(2).

(2) When an amount equal to the sales value is re-invested in the way and within the periods indicated below, the gains realised on the sale of ships are exempt provided that the ships sold were fixed assets for more than five years prior to their sale.

(3) The re-investment must be in ships, co-ownership of ships, shares in ships or shares in a shipping company/shipping operator which has its registered office in the European Union.

(4) The re-investment must be made at the latest at the cessation of the professional activities and within a period of five years from the first day of the taxable period in which the gains were realised or the first day of the penultimate taxable period preceding that in which the gains were realised.

(5) In order to justify application of the tax scheme referred to in paragraph 1, the taxpayer must enclose a statement in conformity with the model laid down by the Minister of Finance or his representative with his income tax declaration for the tax year relating to the taxable period in which the gains were realised and each subsequent tax year until the re-investment has been effected in accordance with paragraphs 2 to 4.

(6) If there is no re-investment in the manner and within the period provided for in paragraphs 1 to 4, the gains realised shall be regarded as profits in the taxable period in which the re-investment deadline has expired.

(7) The investment taken into account as re-investment must be retained as part of the assets for at least five years but can, where appropriate, be replaced within three months in the event of sale. If the investment taken into account as re-investment has been replaced in this manner, the provisions of this Article apply in respect of the sale of the asset acquired as replacement.

(8) The provisions of this Article do not apply to the period in which profits from maritime navigation are determined in relation to tonnage.'

⁽¹⁰⁾ See section 2.8.2 of the Commission's decision of 19 March 2003.

2.2.3. Tax deductions for purchase of ships ⁽¹¹⁾

- (30) Resident companies or Belgian branches of non-resident companies which exclusively engage in eligible activities ⁽¹²⁾ may benefit from an investment deduction of 30 % of the purchase price when buying new or second-hand ships which become the property of a Belgian taxpayer for the first time.

- (31) A tax deduction not granted because of a lack of profit or because of insufficient profits in the corresponding accounting year shall be successively carried forward to the profits of subsequent taxable periods. In accordance with the provisions applicable to losses carried forward on joining the flat-rate taxation scheme, any part of the investment deduction not applied by the time when profits from maritime shipping are determined in relation to tonnage for the first time may again be deducted from the profit after expiry of the period in which the tax base has thus been determined.

2.2.4. Reduction of registration duties for mortgages on ships

- (32) The Belgian Code on registration, mortgage and court registry duties is amended so that the raising of mortgages on a ship is no longer subject to the payment of proportional registration duties, irrespective of whether the ship is or is not subsequently subject to the flat-rate taxation scheme. This reduction of registration duties concerns mortgages on vessels for maritime shipping and those for inland waterway navigation.

- (33) Under the current Belgian scheme, the charges made for registering a mortgage (in addition to a number of very limited fixed duties) are, on the one hand, a 0,052 % fee payable to the registrar of mortgages and, on the other hand, a 0,5 % registration duty payable on the amount of the mortgage. According to the Belgian authorities, this latter duty is a disincentive for registering ships under the Belgian flag. Under the new scheme, the registration duty payable on registering a mortgage is changed to the general fixed duty of €25 provided for in Article 11(2) and (3) of the Belgian Code on registration, mortgage and court registry duties.

- (34) The transfer of a mortgage on a vessel following debt transfer against payment, contractual subrogation or any other agreement against payment is also subject to 0.5 % registration duty in accordance with Article 92(2) ⁽¹³⁾ of the said Code. In accordance with Article 93 of the Code, this registration duty is paid from the amount of the sums guaranteed by the mortgage, excluding interests or arrears over the three years guaranteed by Article 87 of the Mortgages Act of 16 December 1951.

2.2.5. Tonnage-based flat-rate taxation scheme applicable to persons managing ships on behalf of third parties ⁽¹⁴⁾.

- (35) Under Article 124 of the programme act, persons managing ships on behalf of third parties are also covered by a flat-rate taxation scheme but with a scale of rates ten times more advantageous than that provided for in the scheme applicable to shipping companies because the same rates apply in this case to the ships being managed not per 100 NT tranche but per 1 000 NT tranche:

	(EUR per 1 000 NT)
Up to 1 000 net tonnes	1,00
Between 1 001 and 10 000 net tonnes	0,60
Between 10 001 and 20 000 net tonnes	0,40
Between 20 001 and 40 000 net tonnes	0,20
40 001 net tonnes and over	0,05

⁽¹¹⁾ Article 123 of the programme act of 2 August 2002 reads as follows: 'Article 123

(1) By derogation from Articles 68 and 201 of the Income Tax Code 1992, resident companies or Belgian branches of non-resident companies which engage exclusively in the activities provided for in Article 115 relating to ships acquired new or second-hand ships which become the property of a Belgian taxpayer for the first time may benefit from an investment deduction of 30 % of the purchase price of these ships.

(2) The provisions of this Article are not applicable during the period in which profits from maritime navigation are determined in relation to tonnage.

(3) If in a taxable period there is no or insufficient profits to be able to apply the investment deduction, the exemption not granted for that taxable period shall be successively carried forward to the profits of the following taxable periods.

(4) Any part of the investment deduction not applied by the time when the profits for maritime navigation are determined in relation to tonnage for the first time may again be deducted from the profits after expiry of the period in which the profits were thus determined.'

⁽¹²⁾ See section 2.8.2 of the Commission's decision of 19 March 2003.

- (36) However, coverage by the scheme is subject to the condition that at least 75 % of the ships managed are registered under the Belgian flag.

⁽¹³⁾ Amended by Article 17 of Royal Decree No 12 of 18 April 1967 and by Article 64 of the Act of 22 December 1998.

⁽¹⁴⁾ Article 124 of the programme act of 2 August 2002.

- (37) Those managing ships on behalf of third parties are in general service companies which prepare the ships, fit them out as required and provide crews on behalf of the shipowner. Article 115(4) of the programme act defines the person managing a ship on behalf of third parties as the 'taxpayer [who] ensures the technical management and/or equipment of a ship on behalf of third parties'. These managers acting on behalf of third parties are not transport undertakings as such. The Belgian authorities confirmed in their letter of 5 December 2002 that management of ships on behalf of third parties constitutes provision of services for the benefit of shipowners and that persons managing ships on behalf of third parties do not sell transport services either for goods or for passengers.

2.3. Other aid for maritime transport

- (38) Maritime transport in Belgium also benefits from three other aid schemes:
- the scheme for exemption from the payment of employers' social security contributions and partial exemption from the payment of employed persons' contributions (approved by the Commission by decisions of 24 February 1998 ⁽¹⁵⁾ and 23 June 1999 ⁽¹⁶⁾);
 - the scheme for exemption from the advance payment on earnings (approved by the Commission by decision of 27 June 2000 ⁽¹⁷⁾).

2.4. Reasons for initiating the procedure

- (39) In its decision of 19 March 2003, the Commission approved the aid measures provided for in the programme act with the exception of seven specific points of the latter, in respect of which the Commission voiced doubts as to their compatibility with the common market. Four of these seven points concern the flat-rate taxation scheme and three concern the other aid measures provided for by the programme act.

2.4.1. Flat-rate taxation scheme for shipowners

2.4.1.1. Rates for ships over 40 000 tonnes

- (40) While the Community guidelines allow such a rate in principle, the Commission has considered whether introducing a EUR 0,05 rate per tranche of 100 tonnes above

40 000 tonnes could lead to a distortion of intra-Community competition as none of the flat-rate taxation schemes previously approved by the Commission make provision for such advantageous rates for ships exceeding this tonnage.

- (41) The following table shows, for the flat-rate taxation schemes already approved by the Commission, the rates for the determination of the tax base which is itself subject to the corporation tax rate.

Table 1:

Rates for determining the tax base in flat-rate taxation schemes of particular Member States

Rates in euros per tranche of 100 tonnes and per day								
	NL	DE	DK	UK	ES	IE	FI	FR
0-1 000 NT	0,91	0,92	0,94	0,97	0,9	1	1,38	0,93
up to 10 000 NT	0,67	0,69	0,67	0,73	0,7	0,75	1,03	0,71
up to 25 000 NT	0,46	0,46	0,4	0,48	0,4	0,5	0,69	0,47
above 25 000 NT	0,23	0,23	0,27	0,24	0,2	0,25	0,57	0,24

Source: Commission

- (42) Accordingly, by letter of 30 October 2002 the Commission asked Belgium to provide all the information and arguments that may justify the EUR 0,05 rate for ships over 40 000 tonnes, bearing in mind that the rates which the Commission had previously accepted for recent flat-rate taxation schemes in other Member States range from EUR 0,20 to EUR 0,25 for the highest tonnages.
- (43) In their letter of 5 December 2002, the Belgian authorities provided the following information to justify the introduction of a specific rate for ships over 40 000 tonnes. According to the figures provided by the Belgian authorities, the total number of ships over 40 000 net tonnes worldwide was 1 257 in November 2002, of a total world fleet of 28 155. Even though this type of ship represents only 4,5 % of the world fleet in terms of number of vessels, it accounts for 34,17 % in terms of carrying capacity ⁽¹⁸⁾.
- (44) Only 143 of these ships, i.e. 0,5 % of the world's fleet in number of vessels and 3,5 % in capacity, are registered in a Member State, as shown in the following table supplied by the Belgian authorities.

⁽¹⁵⁾ Letter SG(98) D/1660. Case NN 98/97.

⁽¹⁶⁾ Letter SG(99) D/4583. Case NN 35/99.

⁽¹⁷⁾ Letter SG(2000) D/105460. Case N 142/2000.

⁽¹⁸⁾ 253 430 610 NT of the world fleet's total of 741 600 000 NT.

Table 2:

Number of ships over 40 000 tonnes in the Member States

Country	Number of ships	Comments
Greece	108	of a Greek fleet of 3 261 ships, of which 2 476 (75 %) fly a foreign flag according to UNCTAD (36 ships > 60 000 NT of which 17 > 100 000 NT)
Spain	7	6 oil tankers < 48 933 NT + 1 oil tanker of 60 120 NT
Italy	6	2 oil tankers of 45 740 NT + 4 bulk carriers or ore carriers < 47 584 NT + 1 bulk carrier 56 579 NT
Britain	6	4 container ships < 48 880 NT + 1 oil tanker of 41 316 NT + 1 oil tanker of 105 889 NT
France	4	1 bulk carrier of 56 709 NT + 2 oil tankers < 100 000 NT + 1 oil tanker of 108 708 NT
Germany	4	4 container ships < 42 233 NT
Netherlands	4	2 container ships 46 660 NT + 2 container ships of 48 880 NT
Luxembourg	3	3 oil tankers between 84 545 NT and 95 323 NT
Portugal	1	1 bulk carrier of 49 344 NT

Source: Belgian authorities.

(45) According to the Belgian authorities, the above figures bear out the view that the other flat-rate taxation schemes, although they have a digressive rate based on ships' tonnage, do not sufficiently take account of large ships. Tankers (53 % of ships over 40 000 tonnes) and bulk carriers (41.7 % of ships over 40 000 tonnes), in particular, occupy an important position in the fleet of Belgian shipowners. In support of these data, the Belgian authorities claim that the largest ships of Belgian owners will continue to fly flags of convenience if no attractive rate were introduced for ships over 40 000 tonnes.

(46) In its decision of 19 March 2003, however, the Commission expressed its concern that the introduction of such a low rate would encourage some non-Belgian shipowners to transfer their ships from a Community register to the Belgian register. Consequently, the Commission considers that this rate may thus lead to a distortion of competition within the Community. This is why the Commission has initiated the investigation procedure in respect of the introduction of the EUR 0,05 rate per tranche of 100 net tonnes applicable to ships over 40 000 tonnes.

2.4.1.2. Ancillary activities without a direct link with transport

(47) The Commission has so far refused to accept that tonnage-based flat-rate taxation schemes could also cover activities not directly connected with maritime transport. In their

letter of 5 December 2002, the Belgian authorities provided a list of eligible activities, for some of which the Commission has had strong doubts as to whether they have a direct link with transport, namely:

- ancillary and temporary activities carried out by the company in order to make full use of the personnel and assets assigned to the company's principal activity, to the extent that these activities are minimal compared with that principal activity,
- sale of products not intended for consumption on board such as luxury goods and provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,
- advertising and marketing,
- revenue from short-term investment of operating capital, excluding, however, revenue from financial fixed assets,
- ship brokerage activities for its own ships,
- disposal of operating assets such as immovable property which serves management purposes and operating resources used to load and unload ships operated.

(48) The Commission considers that such ancillary activities are not directly connected with maritime transport and do not directly contribute to providing a transport service.

(49) In this case, the Commission therefore expressed doubts in its decision of 19 March 2003 as to whether the extension of the flat-rate taxation scheme to the abovementioned activities is compatible with the common market.

2.4.1.3. Deduction from the flat-rate tax of losses suffered by other divisions not subject to the flat-rate taxation scheme

(50) According to the information currently available to the Commission, the flat-rate taxation schemes approved by the Commission in the other Member States have not introduced mechanisms similar to the one provided for in Article 120(1) of the programme act ⁽¹⁹⁾. Article 120(1) provides for the possibility for companies simultaneously engaged in eligible and non-eligible activities to deduct from the tax determined at a flat-rate on the basis of tonnage any losses incurred by other company divisions to the extent that such losses could not be deducted from the profits of any other division for the relevant accounting year.

(51) The Commission has taken the view that this rule was in conflict with the general principle that eligible activities should be strictly separated from non-eligible activities for the determination of tax, a principle which has been observed in the other flat-rate taxation schemes already approved.

(52) Consequently, the Commission has expressed its doubt on the advantage that would thus be granted to shipping companies subject to Belgian tax and has sought the views of the other Member States and of any other interested party on the possible consequences which this provision might have for competition. This is why the Commission has also initiated the formal investigation procedure in respect of the provisions of Article 120(1) of the programme act.

2.4.1.4. Deduction for newer ships

(53) None of the flat-rate taxation schemes previously approved by the Commission provides for a deduction according to the ship's age for the purpose of determining the tax base.

(54) In its decision of 19 March 2003, the Commission considered whether this additional advantage would really be an incentive for registering the newest ships under the Belgian flag as such ships are in general more likely to meet the safety conditions required under the Belgian flag than older ships. The Commission notes that it is in fact more likely that older ships are registered under flags of convenience. Moreover, this provision would lead to a distinctly lower flat-rate tax for ships less than 10 years old than would have been the case for these ships in other Member States that have introduced a flat-rate taxation scheme approved by the Commission.

(55) For this reason, the Commission has initiated the formal investigation procedure with regard to the deductions provided for in Article 119(2) of the programme act for ships less than 10 years old.

2.4.2. Measures outside the flat-rate taxation scheme for shipowners

2.4.2.1. Accelerated depreciation of ships not intended for maritime transport

(56) Contrary to the requirements of the Community guidelines, the accelerated depreciation scheme does not make provision for links with eligible activities. In its decision of 19 March 2003, the Commission therefore expressed doubts about the compatibility of this depreciation scheme as regards its application to ships other than those intended for maritime transport and those carrying out eligible activities.

2.4.2.2. Reduction of registration duty for mortgages on ships

(57) The reduction of the duty payable on the registration of mortgages applies only to mortgages on ships for maritime shipping or inland navigation and not to mortgages on other types of investment such as immovable property. In its first analysis, the Commission took the view that this reduction seemed to be selective in that it applies only to a part of the types of assets on which a mortgage can be taken and promotes, even at a low level, activities for which ships are used. Accordingly, the Commission expressed doubts on whether such a reduction constitutes State aid or a general measure.

(58) Should it appear that the measure is aid within the meaning of the Treaty, the Commission would have strong doubts as to its compatibility with the common market since this measure would not only be conducive to maritime activities overall, including those not coming under maritime transport but also activities appertaining to inland navigation, which are not subject to the aforementioned Community guidelines but to Council Regulation

⁽¹⁹⁾ 'Article 120

(1) Business losses incurred during a taxable period by another division of the company may be deducted from the profits determined at a flat rate for the same taxable period in accordance with Article 119 to the extent that these losses could not be deducted from the profits of any of the company's other divisions.'

(EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ⁽²⁰⁾. The said regulation does not allow the grant of such aid.

- (59) In its decision of 19 March 2003 the Commission therefore expressed doubts that the reduction of registration duty for ships other than those intended for maritime transport activities is compatible with the common market.

2.4.2.3. Flat-rate taxation scheme applicable to persons managing ships on behalf of third parties

- (60) Firstly, with regard to the scheme applicable to persons managing ships on behalf of third parties, the Commission noted in its decision of 19 March 2003 that their activity could not be treated as an activity of maritime transport, at least with regard to the way this sector is organised in Belgium. Only maritime shipping companies are covered by the Community guidelines ⁽²¹⁾. It would appear that Belgium would be the first Member State wishing to apply a flat-rate taxation scheme to subcontractors of maritime transport companies.

- (61) Secondly, the Commission has noted that the same ship could at the same time qualify for the flat-rate taxation scheme via its owner and its manager, with the latter, as pointed out above, benefiting from rates that are 10 times lower than those applicable to the former for the flat-rate determination of the tax base.

- (62) Thirdly, Belgium has not provided any information showing that the scheme applicable to persons managing ships on behalf of third parties could enhance the competitiveness of ships flying a Community flag. In particular, it has not been shown that this scheme could indirectly be favourable to Belgian shipowners through a reduction of the price of services which the managers perform on their behalf.

- (63) Fourthly, even if the manager is in Belgium and the activities he performs are therefore pursued from Belgian territory, it is not certain that all of his on-shore activities relating to the management of ships are pursued from within the territory of the Community. A part of these services, such as business and strategic management, which are not provided by the managers on behalf of third parties, could be performed from a third country.

- (64) Fifthly, before the procedure was initiated Belgium had not furnished any economic arguments to justify the fact that the tax base for persons managing ships on behalf of third parties is ten times lower than that applicable to shipowners.

- (65) Finally, the Commission wondered whether persons managing ships on behalf of third parties work exclusively for Belgian or Community shipowners. The proposed scheme only requires that three quarters of the ships managed be registered in the Belgian register. If it is possible for managers to offer their services to shipowners not subject to tax in the Community for up to one quarter of their managed fleet, this may well be tantamount to an economic advantage being granted to non-Community maritime transport companies.

- (66) For all of the above reasons, the Commission expressed doubts, in its decision of 19 March 2003, on the compatibility of the scheme applicable to persons managing ships on behalf of third parties ⁽²²⁾.

⁽²²⁾ 'Article 124

(1) At the taxpayer's request, the taxable profits from the management of ships on behalf of third parties shall, by derogation from Articles 183, 185, 189 to 207, 233(1) and 235 to 240 of the Income Tax Code 1992, be determined at a flat rate on the basis of the tonnage of the ships covered by the management.

(2) The request referred to in paragraph (1) shall be submitted by the taxpayer to the tax office which shall take a decision within three months of the date on which it received the request. This deadline may be extended by common agreement between the taxpayer and the tax office. The tax office shall decide on the request by an appealable decision.

(3) If the request referred to in paragraph (1) is accepted, the scheme for determining profits from maritime shipping on the basis of tonnage shall, in accordance with this Article, take effect from the taxable period following that in which the request was submitted. The taxpayer may waive coverage under the said scheme not later than three months after the expiry of the taxable period closed during the 10th calendar year, or a multiple thereof, after that in which the request was submitted.

(4) Per ship, per day and per 1 000 net tonnes, the profits for the taxable period from the management of ships on behalf of third parties shall be determined in accordance with the amounts specified in the following table:

EUR 1,00 for the tranche up to 1 000 net tonnes;

EUR 0,60 for the tranche between 1 000 net tonnes and 10 000 net tonnes;

EUR 0,40 for the tranche between 10 000 net tonnes and 20 000 net tonnes;

EUR 0,20 for the tranche between 20 000 net tonnes and 40 000 net tonnes;

EUR 0,05 for the tranche above 40 000 net tonnes.

(5) Any non-allocated part of the losses incurred in managing ships on behalf of third parties remaining at the time when the profits are determined for the first time on the basis of tonnage may again be deducted from the profits after the expiry of the period in which the profits have thus been determined.

(6) The scheme provided for in this Article is reserved for taxpayers managing ships on behalf of third parties provided that at least 75 % of the number of ships managed on behalf of third parties are registered in the Belgian register of ships. Companies wishing to make use of the scheme provided for in this Article may not pursue any activity other than the management of ships.'

⁽²⁰⁾ OJ L 130, 15.6.1970, p. 1. Regulation last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

⁽²¹⁾ In section 3.1 entitled 'Fiscal treatment of shipowning companies', the Community guidelines refer to fiscal schemes for 'shipowning companies' and 'shipowners'.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from the Union Royale des Armateurs Belges

- (67) By letter of 26 August 2003 the *Union Royale des Armateurs Belges* (hereinafter referred to as the Union Royale), a non-profit-making association of Belgian shipowners, transmitted to the Commission its comments on all the points covered by the formal investigation procedure.
- (68) The Union Royale first of all emphasises that the low rate applicable to the tranche above 40 000 tonnes is designed to bring ships above this tonnage back under a Community flag, recalling that these ships represent only 4,5 % of the world fleet (1 257 units of a total number of 28 155 units worldwide) but account for 34,17 % of worldwide carrying capacity (253 430 610 of a total of 741 600 000 tonnes deadweight).
- (69) With regard to the tax deduction for newer ships (50 % for ships less than five years old and 25 % for those between five and ten years old), the Union Royale stresses that it is primarily intended to promote young fleets with safer and more environmentally friendly ships. It adds that these reductions may also contribute to maintaining attractive and high-quality jobs in the maritime sector and on shore and maintaining maritime know-how in Europe.
- (70) According to the Union Royale, prohibiting the possibility for a maritime shipping company to deduct losses incurred in its other divisions from the flat-rate tax would lead to discrimination among Belgian companies as companies that do not have a maritime division may offset the losses of the year incurred in particular divisions against profits from other divisions whereas such losses cannot be deducted from profits based on tonnage.
- (71) With regard to the list of ancillary activities on which the Commission has expressed doubts, the Union Royale points out that the Belgian Government took its cue from the OECD's commentary and tonnage tax schemes in the Netherlands and the United Kingdom. It emphasises in particular that ship brokerage activities performed for a company's own ships are perfectly consistent with the spirit of the Community guidelines.
- (72) With regard to the scheme for accelerated depreciation of ships, the Union Royale notes that it was in fact the Union Royale itself which had asked the Belgian Government to confirm through legislation a tax scheme which, it argues, already existed before the entry into force of the Treaty in order to enhance legal certainty with regard to this scheme.

- (73) With regard to the reduction of registration duties for registering mortgages on ships other than those intended for maritime transport activities, the Union Royale points out that this tax does not exist in most of the other Member States. It argues that not accepting this reduction would be detrimental to the competitive position of owners of Belgian ships. The Union Royale further stresses that the measure would help to improve the competitive position of the inland shipping sector.

- (74) With regard to the management of ships on behalf of third parties, the Union Royale emphasises that the proposed scheme requires that at least 75 % of the ships managed fly the Belgian flag. It also points out that it is normal that the managers should be entitled to flat-rate taxation different from that applicable to shipowners as the managers do not pursue the same profession and do not run the same risks as shipowners.

3.2. Comments from the Zentralverband der Deutschen Seehafenbetriebe

- (75) By letter of 3 July 2003, the *Zentralverband der Deutschen Seehafenbetriebe* (Federation of German sea port companies, hereinafter referred to as the Federation) transmitted its comments to the Commission. It takes the view that aid to maritime transport should not lead to distortion of intra-Community competition in the towage sector. The Federation points out that the competitiveness of Europe's ports depends to a large extent on towage costs. It maintains that it is desirable to foster competition among towage companies in the same port and between ports as this contributes to maintaining the competitiveness of the various ports. Nevertheless, however desirable this competition may be, it must take place under similar conditions of competition.
- (76) The Federation regrets that the flat-rate taxation scheme also applies to Belgian towage companies. In general, the Federation takes the view that schemes to alleviate wage costs for towage companies are not compatible with the Community guidelines. Finally, it asks that all aid schemes for the towage sector be declared incompatible with the common market.

3.3. Comments from the Handelskammer Hamburg

- (77) By letter of 18 July 2003, the *Handelskammer Hamburg* (Hamburg Chamber of Commerce) transmitted its comments to the Commission as the representative of the Hamburg economy and its companies.

- (78) The *Handelskammer Hamburg* is concerned that the Belgian tonnage-based flat-rate taxation scheme distorts competition not only between towage companies but also between the ports of northern Europe. In its opinion, the Community guidelines should not be applicable to inland shipping, nor to activities in and around sea ports. Consequently, it asks that the formal investigation procedure be extended to the application of the scheme to the towage sector.

3.4. Comments from Bugsier

- (79) By letter of 2 June 2003, the Bugsier company (*Bugsier Rederei- und Bergungs-Gesellschaft mbH*) transmitted to the Commission its comments as an interested party, asking that all its letters sent to the Commission between 2000 and 2003 be taken into account. In particular, it considers that the conditions laid down in the programme act in respect of towage, in particular the criteria 'at sea with a clearance certificate', are insufficient to prevent unfair competition within the Community in the port towage sector, asking the Commission to extend the formal investigation procedure also to this aspect of the programme act.

4. COMMENTS FROM BELGIUM

- (80) Pursuant to Article 6(2) of Regulation (EC) No 659/1999, the Commission has sent the following documents to the Belgian authorities for its comments:

- the comments from the *Zentralverband der Deutschen Seehafenbetriebe* by letter of 7 August 2003,
- the comments from the *Handelskammer Hamburg* by letter of 7 August 2003;
- the comments from *Bugsier Rederei- und Bergungs-Gesellschaft mbH* by letter of 7 August 2003,
- the comments from the *Union Royale des Armateurs Belges* by letter of 17 September 2003.

- (81) The Commission has not received any observations from the Belgian authorities on the comments transmitted.

- (82) By letter of 7 May 2003, the Belgian authorities transmitted to the Commission their observations on the Commission's decision of 19 March 2003 to initiate the formal investigation procedure with regard to certain aspects of the planned fiscal measures for maritime transport.

4.1. Flat-rate taxation scheme for shipowners

4.1.1. Low rate beyond 40 000 tonnes for the flat-taxation scheme ⁽²³⁾

- (83) In its decision of 19 March 2003, the Commission considered whether the introduction of a EUR 0,05 rate per tonne of 100 tonnes above 40 000 tonnes could, even though not prohibited by the Community guidelines on aid to maritime transport ⁽²⁴⁾, lead to a distortion of intra-Community competition. None of the flat-rate taxation schemes previously approved by the Commission have laid down measures that are equally favourable for ships over 40 000 tonnes. Moreover, the Commission has endeavoured to keep the tax rates of the schemes previously approved within a relatively narrow range, as shown in Table 1, to ensure a high degree of convergence among the various taxation schemes throughout the Community.

- (84) Belgium emphasises that this rate is as such not contrary to the Community guidelines. The Belgian authorities also note that the purpose of this measure is not to distort intra-Community competition but to promote the return under the Belgian flag of ships over 40 000 tonnes.

- (85) The Belgian authorities recall that ships of more than 40 000 tonnes represent only 4,5 % of the world fleet, namely 1 257 units. Only 143 of them are registered in the Community, or 11,38 %. Most of these (108 ships or 75,52 % of the 'European' fleet over 40 000 tonnes) are registered in Greece. Taking account of the small number of ships involved, the Belgian authorities assume that the other Member States have hitherto not introduced specific measures for this type of ship.

- (86) Nevertheless, Belgium has wished to attract large-capacity ships to its flag by granting a rate that is, among other things, adapted to their specific features. The Belgian authorities point out that even after the introduction of the flat-rate taxation scheme as planned by Belgium, the tax burden would still be tantamount to 2 or even 2,5 times the amount of tax levied in third countries with flags of convenience or in countries such as Malta and Cyprus. As regards these two countries, the Belgian authorities maintain that it is much more their accession to the European Union that will bring about a distortion of competition rather than the introduction in Belgium of a specific rate for high-tonnage ships.

⁽²³⁾ Article 119(1) of the programme act.

⁽²⁴⁾ Former version (OJ C 205, 5.7.1997, p. 5).

- (87) According to the Belgian authorities, the fact that other Member States have not shown a specific interest in high-capacity ships, probably because of the small number or total absence of such ships in these Member States, should not prevent Belgium from pursuing a different policy in this respect.
- (88) Finally, the Belgian authorities refer to the Community guidelines which provide in the second paragraph of section 3.1 that 'the creation of conditions allowing fairer competition with flags of convenience seems the best way forward'.
- 4.1.2. *Application of the flat-rate taxation scheme to profits from particular activities without a direct link with transport activities*
- (89) In compiling the list of eligible activities included in the reply which it sent to the Commission on 5 December 2002, Belgium referred to the following:
- the OECD commentary on the model convention with respect to taxes on income and on capital, and in particular the comments concerning Article 8 on shipping and air transport,
 - the tonnage tax schemes established by the Netherlands and the United Kingdom, approved by the Commission by decisions of 20 March 1996 and 2 August 2000.
- (90) As the list of eligible activities is based on certain existing schemes, the Belgian authorities consider that the Commission ought to treat them in the same way as it has done for the other Member States.
- (91) Specifically, the Belgian authorities note that for the connected and temporary activities which a company pursues in order to make full use of the personnel and assets assigned to the company's principal activity, if these activities are minimal compared with that principal activity, the text has been modelled on the tonnage-based flat-rate taxation scheme of the United Kingdom ⁽²⁵⁾.
- (92) With regard to the sale of products not intended for consumption on board such as luxury articles and the provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers, the Belgian authorities argue that the description of the measure has likewise been modelled on the tonnage-based flat-rate taxation scheme of the United Kingdom.
- (93) With regard to advertising and marketing, the Belgian authorities emphasise that points 7 and 8 of the commentary on the OECD model tax convention includes advertising and commercial propaganda among the additional activities connected with the direct operation of ships ⁽²⁶⁾.
- (94) With regard to revenue from short-term investment of operating capital, ship brokerage ⁽²⁷⁾ for the company's own ships and the disposal of operating assets such as immovable property for management purposes and operating facilities for loading and unloading ships, the Belgian authorities have based their arguments on the explanatory memorandum ⁽²⁸⁾ pertaining to the Dutch tonnage-based flat-rate taxation scheme ⁽²⁹⁾.
- 4.1.3. *Provisions allowing losses of other divisions that could not be deducted from the profits of any other division of the company to be deducted from the tonnage-based flat-rate tax*
- (95) Belgian fiscal law on corporation tax provides that companies are taxable on their total profits. This means that profits and losses in a particular tax year can be offset among all the divisions and/or branches of the company.

⁽²⁶⁾ '7. Shipping [...] enterprises [...] often engage in additional activities more or less closely connected with the direct operation of ships [...]. Although it would be out of the question to list here all the auxiliary activities which could properly be brought under the provision, nevertheless a few examples may usefully be given.

8. The provision applies, inter alia, to the following activities:
[...]
(c) advertising and commercial propaganda;
[...]

⁽²⁷⁾ In Dutch also called 'cargadoor'.

⁽²⁸⁾ Lower House of the Dutch Parliament, Parliamentary Year 1995 to 1996, 24 482, No 3. Unofficial translation made by the Belgian administration of the passage in the Dutch explanatory memorandum [and here translated into English from the Dutch original]: 'For the purposes of this article, profits from maritime shipping includes profits made in activities directly connected with the operation of the abovementioned ships. These activities include loading and unloading under the shipowner's own management and ship brokerage activities carried out under his own management. Such directly connected activities come under the scheme only to the extent that they are performed for the ships operated by the taxpayer. Moreover, directly connected activities also include the disposal of assets used by the taxpayer in the course of operation. This concerns not only ships operated by the taxpayer but, for instance, also buildings in which management takes place and the company's assets used for loading and unloading ships.'

⁽²⁵⁾ Commission Decision of 2 August 2000, Case N 790/1999.

⁽²⁹⁾ Commission Decision of 20 March 1996, Case N 738/1995.

(96) The Belgian authorities recall that the flat-rate scheme does not determine the tonnage-based flat-rate tax but the taxable profits accruing from maritime shipping.

(97) Moreover, the Belgian authorities take the view that the position adopted by the Commission would lead to discrimination between Belgian companies as companies which do not have a maritime division may offset the year's losses incurred in some divisions against profits from other divisions whereas such losses cannot be deducted from profits determined on the basis of tonnage.

4.1.4. *50 % tax deduction for ships less than five years old and 25 % for ships between five and ten years old*

(98) The Belgian authorities stress that the Community guidelines do not lay down any rule on the applicable rates which Member States may introduce in flat-rate taxation schemes nor on the possibility of introducing incentives for new ships. In the opinion of the Belgian authorities, the fact that the other schemes recently approved do not provide for such a deduction cannot prevent Belgium from introducing such an incentive.

(99) In its decision of 19 March 2003, the Commission states that it knows from experience that there is a greater tendency to register older ships under flags of convenience. The Belgian authorities maintain that these arguments are contrary to reality and are without foundation and they refer to an extract from the *Review of Maritime Transport of 2002* ⁽³⁰⁾ which they enclosed with their letter of 7 May 2003.

4.2. Tax measures outside the flat-rate taxation scheme for shipowners

4.2.1. *Scheme for accelerated depreciation*

(100) According to the Belgian authorities, the accelerated depreciation scheme was set up in 1951 and has already undergone several amendments, most recently in 1996. The scheme therefore dates back to before the signing of the Treaty. The scheme was transposed into legislation through the programme act of 2 August 2002 to enhance its legal certainty.

(101) The Belgian authorities have provided the Commission with documentary proof showing that the scheme existed before the entry into force of the Treaty of 1 January 1958. The Belgian authorities enclosed with their letter of 7 May 2003 an internal instruction from the Ministry of Finance dated 24 August 1951 laying down the procedure for implementing the specific depreciation scheme for ships and a letter from the Ministry of Finance to the general shipowners' association dated 13 January 1967 indicating that the said scheme was still applicable.

4.2.2. *Reduction of registration duties on mortgages on ships not intended for maritime transport*

(102) In general, tax incentives may be accepted provided that they are confined to maritime transport activities. The Belgian authorities take the view that the reduction of the registration duty for ships used in maritime transport is compatible with section 3.1 of the Community guidelines if it should appear that the measure constitutes aid within the meaning of the Treaty.

(103) The Belgian authorities have indicated that the main reason for introducing this measure was the absence of similar taxes for registering mortgages on ships in the Netherlands and the Grand Duchy of Luxembourg. According to the Belgian authorities, the absence of such a tax in two of Belgium's neighbouring countries places the Belgian fleet in an unfavourable competitive position.

4.2.3. *Scheme applicable to managers acting on behalf of third parties* ⁽³¹⁾

(104) In response to the observations made by the Commission in the decision of 19 March 2003, the Belgian authorities indicate, referring to the explanatory memorandum to the draft for the programme act, that the flat-rate taxation scheme was established in order to make the technical management of ships more competitive and to make it possible to make crews available on the basis of a management contract. According to the Belgian authorities, there is a huge market for such activities in which Belgium has so far played only a very small part.

(105) According to the Belgian authorities, the Community guidelines explicitly mention the relocation of ancillary activities (such as management of ships) to third countries (section 1.2, fifth paragraph), involving even higher losses of jobs, at sea and on shore. The programme act provides that at least 75 % of ships managed must be registered in the Belgian register of ships. The Belgian authorities point out that such a condition does not exist under the flat-rate

⁽³⁰⁾ Report of the UNCTAD Secretariat: UNCTAD/RMT/2002 UNITED NATIONS PUBLICATION Sales No E.02.II.D.23 ISBN 92-1-112571-5 ISSN 0566-7682.

⁽³¹⁾ Article 124 of the programme act.

taxation scheme for maritime transport companies. In order to benefit under the scheme, managers may not pursue activities other than ship management.

- (106) Moreover, the Belgian authorities recognise that for the determination of the flat-rate tax the same ship may be taken into account twice, once for the shipowner and once for the manager. As these are two different legal personalities who pursue different activities, the Belgian authorities deem it normal that in this case income is determined and taxed separately. According to the Belgian authorities, the fact that different rates are applied is justified because different activities give entitlement to different remuneration.

5. EVALUATION OF THE AID

5.1. Existence of aid within the meaning of the EC Treaty

- (107) 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 is incompatible with the common market insofar as it affects trade between Member States.
- (108) Through tonnage-based flat-rate taxation, the Belgian authorities intend to grant advantages to certain undertakings through state resources. These subsidies threaten to distort competition and could affect trade between Member States. For the above reasons, the various measures in question which are the subject of the formal investigation procedure constitute State aid within the meaning of Article 87(1) of the Treaty.
- (109) The scheme for accelerated depreciation of ships, offering depreciation rules that are even more generous than those provided for in Articles 61 to 64 of the Belgian Income Tax Code 1992, is specific in that it applies only to a limited category of assets. The measure is in effect State aid within the meaning of Article 87(1) of the Treaty.
- (110) Next, it should be ascertained whether the registration charge levied on the establishment of a mortgage on ships constitutes aid. The Belgian authorities have not supplied any information to show that this registration duty is a unique case in the Community and that none of the other Member States have an equivalent tax on the registration of a mortgage on a ship.

- (111) The Commission notes that this registration duty is paid for mortgages taken out on immovable property and that the scheme in question is not confined to ships, whether used for maritime transport or inland navigation. The Commission points out that under the rules governing the tax scheme for mortgage registration, it is logical that registration duties are levied in proportion to the amount of mortgage, irrespective of the type of assets to which the mortgage relates.

- (112) The Commission therefore takes the view that the abolition or substantial reduction of this tax for only a part of the sectors of activity concerned constitutes State aid within the meaning of Article 87(1) of the Treaty as the scheme continues to apply without change to the other activities for which mortgages have to be registered. Moreover, the measure applies only to one category of assets while categories of assets other than ships do not qualify for such reduction. Consequently, this measure cannot be treated as a general measure.

- (113) Finally, the flat-rate taxation scheme for persons managing ships on behalf of third parties is specific, like that for shipowners. It is therefore aid within the meaning of Article 87(1) of the Treaty.

- (114) Moreover, the Commission notes that it was already established in the decision of 19 March 2003 that it is tantamount to aid within the meaning of Article 87(1) of the Treaty. In fact, the Belgian authorities have not disputed this evaluation in the comments they submitted on the said decision.

- (115) As a general rule, the Commission considers that the aid subject to the formal investigation procedure is unlawful as there is no longer any legal or administrative impediment to its implementation following the promulgation of the Royal Decree of 7 May 2003, even though no advantages have as yet been granted in practice. The Commission regrets that Belgium has implemented these measures without the Commission's prior approval.

5.2. Legal basis

- (116) Under Article 87(3)(c), aid to facilitate the development of certain economic activities or of certain economic areas may be regarded as compatible with the common market if such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission considers Article 87(3)(c) as the appropriate legal basis applicable in the case under scrutiny.

(117) Aid for the maritime sector should be examined in particular in the light of the Community guidelines on State aid for maritime transport. These guidelines describe schemes for State aid that may be introduced to promote the interests of maritime transport in the Community in the pursuit of general objectives such as:

- safeguarding employment in the Community (at sea and on shore),
- improving safety,
- maintaining maritime know-how in the Community and improving maritime skills.

(118) As the measures examined in the formal investigation procedure have been implemented, the text that should be examined is that which was in force on the date of entry into force of various measures. Consequently, for all the measures examined, the Commission used the Community guidelines in force, i.e. those published on 17 January 2004 ⁽³²⁾, to investigate whether the various planned fiscal measures are compatible. Be that as it may, the new guidelines do not differ greatly from the former with regard to aid measures relating to corporation tax ⁽³³⁾, except as regards the treatment of persons managing ships on behalf of third parties. Where sectors other than maritime transport could be affected by the measures investigated, the Commission referred to Community texts applicable to State aid in these sectors.

5.3. Analysis of measures under the flat-rate taxation scheme

(119) First of all, the Commission takes cognisance of the comments made by various interested parties on the need to extend the formal investigation procedure to the application of the tax measures to the dredging sector. The Commission points out that this aspect of the programme act cannot be covered by this decision as the decision to initiate the informal investigation procedure did not relate to this aspect. This is because the Commission considered in its decision to initiate the procedure that the conditions laid down by the programme act were sufficient to

exclude all towage activities not covered by the definition of maritime transport from benefiting from the tax concessions. This view has been called into question by various interested parties even though they were not invited in the decision of 19 March 2003 to comment on this aspect of the programme act. The Commission intends to deal with this aspect of the programme act in another decision on the basis of a more thorough examination of the impact of the programme act on the Belgian towage sector.

(120) In light of the observations submitted by the various interested parties and comments from the Belgian authorities, the Commission will consecutively consider the seven points in respect of which it initiated the formal investigation procedure on 19 March 2003.

5.3.1. Rates for ships over 40 000 tonnes

(121) First of all, the Commission notes that the Belgian authorities have given a commitment not to apply the EUR 0,05 rate so long as the Commission has not ruled on its compatibility with the common market following the outcome of the formal investigation procedure. This measure has therefore not been implemented.

(122) Furthermore, the Commission notes that none of the tonnage-based flat-rate taxation schemes previously approved by the Commission made provision for specific treatment for very large ships and that the Community guidelines leave a degree of discretion with regard to the acceptable level of rates under the flat-rate taxation scheme. Moreover, the Commission does not have sufficient experience with these schemes to know whether the rates have been sufficiently attractive to encourage shipowners to bring large-tonnage ships such as those covered by the EUR 0,05 rate back from the flag of a third country to a Community flag.

(123) The Commission considers incompatible with the common market the plan of the Belgian authorities to apply the special EUR 0,05 rate for ships over 40 000 tonnes also to ships already flying the flag of a Member State. The aim of the guidelines is above all to strengthen the Community fleet and thereby create employment in the Community as well as ensuring that ships are subject to Community rules with regard to safety. It is obvious that this objective is already met by a ship which already flies the flag of one of the Member States.

(124) Care should be taken to prevent shipowners from nevertheless trying to benefit from the EUR 0,05 rate when reflagging a ship from a Community flag to the Belgian flag

⁽³²⁾ See note 4.

⁽³³⁾ See section 3.1 of the Community guidelines.

by letting them sail temporarily under the flag of a third country. In order to ensure that the introduction of the EUR 0,05 rate does not lead to reflagging within the Community, the Commission deems it necessary to impose on ships coming from registers of third countries a minimum period of five years during which a ship reflagged to the Belgian flag must have been previously registered under a non-Community flag. Such a condition would make it possible to attain the objective laid down in the Community guidelines to transfer ships controlled by Community ship-owners and registered under the flag of a third country to Community ships' registers without running the risk of adversely affecting intra-Community trade.

- (125) Accordingly, the Commission considers the introduction of a EUR 0,05 rate per tranche of 100 tonnes above 40 000 tonnes, such as provided for in Article 119(1) of the programme act of 2 August 2002, as compatible with the common market provided that the ships concerned are new or else have been registered for at least the last five years under a non-Community flag. If this condition is not met, the Commission considers the measure incompatible with the common market. If no such guarantees can be given, there is a significant risk that the aforementioned rate of EUR 0,05 leads to distortion of competition in intra-Community trade.

5.3.2. *Extension of the flat-rate taxation scheme to profits from particular activities*

- (126) First of all, the Commission notes that the activities in respect of which the formal investigation procedure was instituted come from a list provided by the Belgian authorities in their reply to the Commission of 5 December 2002. As the Belgian authorities pointed out in their letter of 7 May 2003, Belgium took as the basis for this indicative list the OECD model tax convention on income and on capital and the tonnage tax schemes established by the Netherlands and the United Kingdom.
- (127) The Commission notes that the list of activities in respect of which the procedure was instituted includes income-generating activities – for which the question whether these activities are eligible or not is completely relevant – and activities which only generate costs for shipowners, for which this question does not appear to be relevant. The latter activities are in fact intrinsically linked with maritime transport activities and it is therefore logical to include the costs they generate in the accounts on the basis of which the profits that are subject to the flat-rate taxation scheme are calculated so as to ensure that such costs are not deducted from profits calculated for any ineligible activities.

5.3.2.1. Ancillary and temporary activities

- (128) With regard to ancillary and temporary activities 'carried out by the company in order to make full use of the personnel and assets assigned to the company's principal activity, to the extent that these activities are minimal compared with that principal activity', the Commission notes that the Belgian authorities have not furnished any arguments to show that such activities were indispensable or intrinsically linked with maritime transport activities. Nor have they specified within what limits and under what conditions certain activities which because of their particular nature are not eligible could be covered by the flat-rate taxation scheme.
- (129) The Commission therefore takes the view that because such activities cannot fall within one of the categories of eligible activities they are ineligible activities. The Commission recalls the approach it has consistently adopted in its recent decisions with regard to ineligible activities in order to prevent abuse in the application of schemes for maritime transport.
- (130) Finally, the Commission believes that the absence of clear limits and rules for covering these ancillary and temporary activities may be a significant potential source of deviations from the scheme's original objective.
- (131) For all the above reasons, the Commission considers that covering these activities by the flat-rate taxation scheme is not compatible with the common market.

5.3.2.2. Sale of products and services not intended for consumption on board

- (132) It is necessary to ascertain whether the sale of products not intended for consumption on board, such as luxury articles, or the provision of services without a direct link with maritime transport, such as gambling, gaming tables and casinos and excursions for passengers, may be regarded as eligible.
- (133) In order to maintain a level playing field in competition within the Community in accordance with the objectives of the Community guidelines, the Commission has in its earlier decisions consistently pursued a policy of not including in flat-rate taxation schemes the sale of articles or

the provision of services that are not directly linked with maritime passenger transport. It is the Commission's view that the sale of luxury articles and gambling, gaming tables and casinos on board eligible ships could not be intrinsically linked with maritime passenger transport and that these activities could therefore not be eligible. In accordance with this principle, such activities have been explicitly excluded from the Irish ⁽³⁴⁾, Finnish ⁽³⁵⁾ and French ⁽³⁶⁾ flat-rate taxation schemes.

- (134) The Commission is of the opinion that the Belgian authorities cannot invoke implementing provisions pertaining to a taxation scheme of a Member State if these provisions have not been notified to the Commission and have not been mentioned in the Commission's decision approving the relevant scheme. In other words, a Member State could not invoke the existence of illegal aid, whether alleged or real, in another Member State to justify the compatibility of similar aid within its own territory.
- (135) In view of the above considerations, the Commission considers that including the sale of products and services not intended for on-board consumption in the flat-rate taxation scheme is not compatible with the common market.

5.3.2.3. Advertising and marketing

- (136) A distinction should be made between advertising and marketing activities involving costs for the shipowner (service provided by a third party) and those generating income (service provided by the shipowner).
- (137) Advertising and marketing should be covered by the flat-rate taxation scheme if they entail costs connected with maritime transport (expenditure on advertising and marketing for the shipping company's own activities). This is because in this case advertising and marketing are eligible activities in that they do not generate income for the shipping company.
- (138) If advertising and marketing generate income for the shipping company, it should be verified whether they are intrinsically linked with maritime transport. For instance, the Commission is of the opinion, in light of the Community guidelines, that only activities directly linked with

maritime transport can be eligible under flat-rate taxation schemes and that 'activities that have nothing to do with maritime shipping' cannot be eligible. The sale of advertising space on board passenger ships is a normal activity of a company engaged in maritime passenger transport. In this specific case, including this activity in the flat-rate taxation scheme may be considered compatible with the common market. However, if advertising and marketing are ancillary activities for the shipping company that are not directly linked with its maritime transport services, the Commission takes the view that they cannot be considered eligible.

5.3.2.4. Short-term investment revenue from operating capital

- (139) As in every business, revenue from short-term investment of operating capital within a shipping company results from normal financial management. Moreover, this revenue may be of particular importance for shipping companies whose activities are affected by strong seasonal variation.
- (140) The short-term investment of ordinary cash resources is a normal activity directly linked with the shipping company's principal activity. Accordingly, the Commission is of the opinion that such revenue is eligible to the extent that it corresponds to the financial products of the shipping company's normal working capital in connection with the pursuit of eligible activities. If the financial products hail from exceptional assets of the shipping company or if they relate to long-term investment or originate from resources generated by ineligible activities, the Commission is of the opinion that the latter cannot be eligible under the flat-rate taxation scheme.
- (141) The Commission therefore considers that including short-term investment revenue from operating capital is compatible with the common market if such revenue relates to financial products from the shipping company's normal working capital from eligible activities.

5.3.2.5. Ship brokerage for the company's own ships

- (142) Ship brokerage activities consist of looking for cargo in a port on behalf of a shipowner and looking after the latter's interests. Ship brokerage activities on a company's own behalf consist of looking for additional cargo in a port to supplement the cargo of its own ships.

⁽³⁴⁾ Commission decision of 11 December 2002, case N 504/02. See in particular point 29.

⁽³⁵⁾ Commission decision of 16 October 2002, case N 195/02. See in particular section 2.8.2.

⁽³⁶⁾ Commission decision of 13 May 2003, case N 737/02. See in particular point 26.

(143) The Belgian authorities have argued that they have taken as a basis the explanatory memorandum to the Dutch law establishing a tonnage-based flat-rate taxation scheme ⁽³⁷⁾. As indicated above, the Commission cannot take this argument into account to show that this activity is eligible.

(144) However, the Commission notes that this activity does not generate revenue for the shipping company insofar as it is a normal activity for a shipowner looking for as much cargo as possible for his ships. This activity does not generate any turnover-increasing added value among the shipowner's existing customers and cannot give rise to specific remuneration from new clients supplying additional cargo. It is a normal activity of a shipowner seeking to use his assets to make a profit.

(145) For the above reasons, the Commission considers that the inclusion in the flat-rate taxation scheme of ship brokerage activities on the shipowner's own behalf is compatible with the common market.

5.3.2.6. Disposal of operating assets

(146) Disposal of operating assets such as operating equipment used for the company's own purposes in loading and unloading ships operated may be regarded as an activity directly linked with maritime transport for the same reason that capital gains on ships are normally covered by a flat-rate taxation scheme, if they are re-invested *pro rata temporis* under the flat-rate taxation scheme.

(147) However, this does not apply in respect of capital gains on office buildings which because of their very nature are not intended to be used for maritime transport. The fact is that such assets can be used by any other type of company. If the disposal does not concern property which by virtue of its nature is intended to be used in maritime transport activities, capital gains from such sale cannot be included in the flat-rate taxation scheme.

(148) The inclusion of capital gains which solely relate to property which by its nature is intended for use in maritime transport activities is therefore compatible with the common market.

5.3.2.7. Conclusions on the eligibility of the various activities examined

(149) In conclusion, the Commission considers the inclusion in the flat-rate taxation scheme of the following activities as incompatible with the common market:

- ancillary and temporary activities,
- the sale of products not intended for consumption on board such as luxury articles and the provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,
- income from investment that does not correspond to revenue from the company's ordinary cash resources,
- advertising and marketing that does not relate to the sale of advertising space on board eligible ships,
- ship brokerage activities on behalf of ships of third parties,
- disposal of operating assets if by virtue of their nature they are not intended for maritime transport.

(150) However, the Commission considers inclusion in the flat-rate taxation scheme of the following activities as compatible with the common market:

- income from short-term investment of operating capital if it corresponds to revenue from the company's ordinary cash resources,
- advertising and marketing relating to the sale of advertising space on board eligible ships,
- ship brokerage activities for one's own ships,
- disposal of operating assets if they are by their nature intended for maritime transport.

5.3.3. Deduction of losses of other divisions from the flat-rate tax

(151) The Commission recalls that in its earlier decisions it called for the introduction of measures to prevent abuse (also referred to as ring-fencing measures) so as to prevent ineligible activities from benefiting from measures initially intended for maritime transport. Such limiting measures are of essential importance to ensure that protective mechanisms of the Community's maritime transport sector do not lose their credibility and thereby their justification in light of Community law when they are extended to activities not subject to the international competitive pressures which the maritime transport sector is subject to.

⁽³⁷⁾ See, in particular, the Commission's decision of 20 March 1996, case N 738/1995.

- (152) The Commission therefore considers it crucial to maintain a strict separation of accounts between eligible and ineligible activities for the determination of the taxation applicable to each. The Commission has ascertained that this principle is applied in the other flat-rate taxation schemes it has approved.
- (153) The Belgian authorities have not been able to show that to calculate profits it was necessary to remove the barriers between the maritime divisions, both with regard to the maritime sector and the other sectors concerned.
- (154) In fact, the Commission fails to understand the argument adduced by the *Union Royale des Armateurs Belges* that companies which have not made the separation would be penalised ⁽³⁸⁾. In their letter of 5 September 2002, the Belgian authorities gave a commitment that a company simultaneously engaged in eligible and ineligible activities would keep separate accounts. The Commission regards this commitment as a guarantee of compliance with the principle of strict separation in the accounts between eligible and ineligible activities. Consequently, the situation described by the *Union Royale* could not arise.
- (155) The Commission deems it necessary to maintain a strict separation between the accounts for eligible and ineligible activities and therefore considers the provisions of Article 120(2) of the programme act, under which any losses suffered by other divisions that are normally taxed may be deducted from tax determined on a flat-rate basis as incompatible with the common market.
- (158) In its previous decisions, the Commission has striven for convergence of flat-rate taxation schemes towards common features and towards very similar tax levels, as shown in the above Table 1. The fact that the Community guidelines do not indicate whether positive discrimination benefiting the newest ships can or cannot be taken into consideration does not remove the Commission's scope for discretion in determining which measures may lead to distortion to an extent contrary to the common interest. In the Commission's opinion, the introduction of reductions for ships between zero and 10 years old may disrupt the current balance among Member States with a flat-rate taxation scheme. Consequently, the Commission considers that it is in the common interest not to authorise particular flat-rate taxation schemes which deviate too much from the characteristics of schemes previously approved and benefit new ships in particular.
- (159) Moreover, the Commission considers that there is no need to make provision for additional advantages for the newest ships in order to contribute to the objectives of the Community guidelines.
- (160) In view of the above, the Commission considers that the reductions provided for in Article 119(2) of the programme act are not compatible with the common market.

5.4. Analysis of measures not covered by the flat-rate taxation scheme for maritime transport

5.3.4. Deductions for ships more than 10 years old

- (156) The Commission notes that the Belgian authorities intend to favour newer ships in order to foster the development of a safer and more environmentally friendly fleet. Nevertheless, it notes that none of the tonnage-based flat-rate taxation schemes implemented by other Member States and approved by the Commission comprise specific rates varying according to the ship's age.
- (157) Moreover, the Commission notes that while the nominal rates fixed by Belgium make the level of taxation comparable with schemes of other Member States which the Commission has previously approved, this is no longer the case if 25 % or 50 % reductions are applied to the newest ships. If these reductions were implemented, this would make the tax level in Belgium very attractive in comparison with schemes already in force in other Member States.
- 5.4.1. *Scheme for accelerated depreciation of ships not intended for maritime transport*
- (161) The Commission recalls, first of all, that the measure is in fact aid within the meaning of Article 87(1) of the Treaty as it derogates from Articles 61 to 64 of the Belgian Income Tax Code 1992 governing accelerated depreciation and because it lays down depreciation rules that are even more generous than those provided for in the said Articles.
- (162) The Commission notes that the Community guidelines do not prohibit accelerated depreciation for maritime transport. However, the scheme in question is 'existing aid' within the meaning of Article 1(b) of Regulation (EC) No 659/1999.

⁽³⁸⁾ See section 3.1, point 70.

(163) Outside maritime transport the various Community rules applicable to the various sectors to which this reduction of registration tax may apply, such as fisheries ⁽³⁹⁾ and inland shipping ⁽⁴⁰⁾, do not permit the grant of such aid.

(164) The Commission considers that the Decision of 19 March 2003 initiating the formal investigation procedure also serves as an invitation to Belgium to submit its comments under Article 17(2) of Regulation (EC) No 659/1999.

(165) Taking account of the unjustified advantage which this scheme gives ships not engaged in eligible activities, the Commission deems it necessary to make proposals for appropriate measures in this case, in accordance with Article 18 of Regulation (EC) No 659/1999. By the present decision, the Commission therefore proposes that Belgium take the following appropriate measures: before 30 June 2005, Belgium should abolish the special option scheme applicable to depreciations, as provided for by Article 121 of the programme act, in respect of all ships not engaged in eligible activities. Before 31 December 2004, Belgium should inform the Commission of its decision to abide by the said appropriate measures.

5.4.2. *Reduction of registration duty on mortgages on ships not intended for maritime transport*

(166) As in the case of the measure just examined, the Commission notes that outside maritime transport the various Community rules applicable to the various sectors to which this reduction registration tax may apply, such as fisheries ⁽⁴¹⁾ and inland shipping, do not permit the grant of such aid.

(167) While such investment aid may be accepted in the framework of the Community guidelines, as the Commission noted in its decision of 19 March 2003, this does not apply in respect of ships which by their nature are not intended to be used in maritime transport (tugs, dredgers, vessels for inland shipping, etc.). Accordingly, the Commission considers that the reduction of or the exemption from the payment of registration duty on mortgages on ships not intended for maritime transport is State aid incompatible with the common market.

5.4.3. *Flat-rate taxation scheme for persons managing ships on behalf of third parties*

(168) The Commission notes that no interested party apart from the *Union Royale des Armateurs Belges* has submitted comments on the scheme for ship managers, even though it was covered by the formal investigation procedure initiated on 19 March 2003.

(169) The Commission wonders whether persons managing ships on behalf of third parties engage in a maritime transport activity. In Belgium, ship management on behalf of third parties consists of providing a crew for a ship and, where appropriate, fitting the ship out with the equipment necessary for the planned maritime transport activities. The person managing a ship on behalf of third parties provides a service to the shipping company or the shipowner: he does not conclude any transport contract with a shipper. His activity can therefore not be treated as a transport service.

(170) The new Community guidelines published on 17 January 2004 on aid to maritime transport provide that ship management companies may receive aid for the ships for which they are responsible for crew management and overall technical management ⁽⁴²⁾. Such companies may be eligible only if they assume full responsibility for the operation of the ship and all the duties and responsibilities imposed by the ISM code ⁽⁴³⁾. The Commission can therefore authorise only aid for ship managers meeting the conditions laid down by the new Community guidelines.

(171) With regard to the level of taxation for persons managing ships on behalf of third parties, the Commission notes, on the basis of figures supplied by the Belgian authorities, that at equal fleet tonnage a manager has a much lower turnover than a shipowner if only because of the capitals

⁽³⁹⁾ See the guidelines for the examination of State aid to fisheries and aquaculture (OJ C 19, 20.1.2001, p. 7).

⁽⁴⁰⁾ See footnote 20.

⁽⁴¹⁾ See footnote 39.

⁽⁴²⁾ See in particular section 3.1 of the Community guidelines: 'It is also of interest to stipulate that whereas Community-based shipping companies are the natural recipients of the above tax schemes, certain ship management companies established in the Community may also qualify under the same provisions. Ship management companies are entities providing different kinds of services to shipowners, such as technical survey, crew recruiting and training, crew management and vessel operation. In some cases ship managers are assigned both technical and crewing management of vessels. In this case they act as classic "shipowners" as far as transport operations are concerned. Moreover, as in the case of the shipping industry, this sector is experiencing strong and increasing competition at an international level. For these reasons, it seems appropriate to extend the possibility of tax relief to that category of ship managers.'

⁽⁴³⁾ 'ISM Code' means the international management code for the safe operation of ships and for pollution prevention as adopted by the International Maritime Organisation (IMO) by Resolution A.741(18).

costs incurred by the shipowner which the manager does not have to bear. According to the example provided by the Belgian authorities, there is a 1:100 ratio between a ship manager's and a shipowner's turnover for a ship of the *Very Large Crude Carrier* (VLCC) type. This example also shows that if the manager were subject to the flat-rate taxation scheme at the same rates as those applicable to the shipowner, his flat-rate tax would be significantly higher than that which he would have had to pay under the normal corporation tax scheme. The Commission is of the opinion that if this claim can be substantiated in a more detailed study on the relation between the respective turnovers of these two professions in respect of equivalentships, it could in fact be logical to apply lower tax rates to managers than to shipowners. In the absence of such a study, the Commission takes the view that on the basis of the information currently at its disposal it cannot accept a 1:10 ratio in the taxation rates on the basis of tonnage between shipowners and ship managers.

(172) In view of the above and of the information available, the Commission believes that a flat-rate taxation scheme for persons managing ships on behalf of third parties, with taxation based on the tonnage of the fleet managed, is compatible with the common market if the rates relating to tonnage are the same as those applicable to shipping transport companies and if the managers in question are at the same time responsible for crew management and technical management of ships, in accordance with the requirements of the Community guidelines published on 17 January 2004 on aid to maritime transport.

6. CONCLUSIONS

(173) In conclusion, the Commission considers with regard to the flat-rate taxation scheme for shipowners as provided for in the programme act of 2 August 2002 that:

- (a) the introduction of the EUR 0,05 rate per tonne of 100 tonnes above 40 000 tonnes (Article 119(1) of the programme act) is compatible with the common market, provided that the ships concerned are new or else have been registered at least for the past five years under a non-Community flag;
- (b) inclusion in the flat-rate taxation scheme of revenue from the following activities (Article 115(2) of the programme act) is incompatible with the common market:

- ancillary and temporary activities,

- the sale of products not intended for consumption on board such as luxury articles, and the provision of services not directly connected with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,
- short-term investment of operating capital if it does not correspond to revenue from the company's normal cash resources accruing from eligible activities ⁽⁴⁴⁾,
- advertising and marketing provided that they do not relate to the sale of advertising space on board eligible ships,
- ship brokerage activities for ships of third parties,
- disposal of operating assets if by their nature they are not intended for maritime transport.

(c) inclusion in the flat-rate taxation scheme of revenue from the following activities (Article 115(2) of the programme act) is compatible with the common market:

- short-term investment of operating capital if it corresponds to revenue from the company's normal cash resources accruing from eligible activities ⁽⁴⁵⁾,
- advertising and marketing provided that they relate to the sale of advertising space on board eligible ships,
- ship brokerage activities for the company's own ships,
- disposal of operating assets if by their nature they are intended for maritime transport.

(d) deduction, from taxation determined on a flat-rate basis in relation to tonnage, of the losses of other divisions which for the relevant accounting year could not be deducted from profits of any of the company's other divisions (Article 120(1) of the programme act) is incompatible with the common market;

⁽⁴⁴⁾ Eligible activities are described in section 2.8.2, points 66 to 75, of the decision of 19 March 2003 and in point 173(c) of the present decision.

⁽⁴⁵⁾ See footnote 44.

- (e) the reduced rates used to calculate the flat-rate tax on ships less than ten years old (Article 119(2) of the programme act) are incompatible with the common market.

(174) With regard to the tax measures outside the flat-rate taxation scheme for shipowners, the Commission considers that the following are incompatible with the common market:

- the special depreciation mechanism provided for in Article 121 of the programme act for all ships not used for eligible activities,
- reductions, for ships not intended for maritime shipping, of the registration tax on mortgages on ships not intended for maritime transport.

(175) On the basis of the information at its disposal alone, the Commission cannot consider as compatible with the common market the flat-rate taxation scheme for persons managing ships on behalf of third parties as provided for in Article 124 of the programme act. This position can, where appropriate, be reviewed in a future Commission decision on the basis of a new notification and more complete and relevant information.

(176) However, the Commission considers as compatible with the common market the flat-rate taxation scheme for persons managing ships on behalf of third parties provided that the tonnage-related rates are the same as those applicable to maritime shipping companies and that the managers in question are simultaneously responsible for the management of crews and the technical management of ships in accordance with the requirements of the Community guidelines published on 17 January 2004 on aid for maritime transport.

(177) This decision is immediately enforceable, including with regard to the recovery of any individual aid illegally granted, without prejudice to the possibility that this aid may, where appropriate, not be qualified as State aid because the four criteria laid down in Article 87(1) of the Treaty are not all met or because the aid may be regarded as aid compatible with the common market by virtue of its own characteristics,

HAS DECIDED AS FOLLOWS:

Article 1

The fiscal measures laid down in the Belgian programme act of 2 August 2002 in respect of which a formal investigation procedure has been initiated by Commission decision of 19 March 2003 constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The introduction in the flat-rate taxation scheme for shipowners of a rate reduced to EUR 0,05 per 100 tonnes for the tranche above 40 000 tonnes is compatible with the common market, provided that the ships over 40 000 tonnes to which this reduced rate is applied are new or have been registered under the flag of a third country during the five years preceding their entry into the flat-rate taxation scheme.

Article 3

1. Revenue accruing from the following activities is not eligible under the flat-rate taxation scheme for shipowners:

- (a) ancillary and temporary activities;
- (b) the sale of products not intended for consumption on board, such as luxury articles, and the provision of services not directly connected with maritime transport such as gambling, gaming tables and casinos and excursions for passengers;
- (c) revenue from short-term investment of operating capital if it does not correspond to income from the company's ordinary cash resources accruing from eligible activities;
- (d) advertising and marketing if these do not correspond to the sale of advertising space on board eligible ships;
- (e) ship brokerage activities on behalf of ships of third parties;
- (f) disposal of operating assets if by their nature they are not intended for maritime transport.

Their inclusion in the flat-rate taxation scheme for shipowners is incompatible with the common market.

2. Revenue accruing from the following activities is eligible under the flat-rate taxation scheme for shipowners:

- (a) revenue from short-term investment of operating capital if it corresponds to income from the company's normal cash resources accruing from eligible activities;
- (b) advertising and marketing if these correspond to the sale of advertising space on board eligible ships;
- (c) ship brokerage activities on behalf of the company's own ships;
- (d) disposal of operating assets if by their nature they are intended for maritime transport.

Their inclusion in the flat-rate taxation scheme for shipowners is compatible with the common market provided that the conditions set out in this paragraph are complied with.

Article 4

Deduction of losses of other divisions of a company liable for taxation that are not subject to the flat-rate tax from the tonnage-based flat-rate tax for ship owners is incompatible with the common market.

Article 5

Reductions of tax rates of flat-rate taxation for shipowners in respect of ships less than 10 years old are incompatible with the common market.

Article 6

Application of the scheme for the accelerated depreciation of ships to ships that by their nature are not intended for maritime transport is incompatible with the common market.

As appropriate measures, it is proposed that Belgium abolish the special option scheme applicable to the depreciation of ships not intended by their nature for maritime transport before 30 June 2005.

Before 31 December 2004 Belgium shall inform the Commission of its decision to adopt the said appropriate measures.

Article 7

Reduction of or exemption from the payment of the registration duty on mortgages on ships which by their nature are not intended for maritime transport is incompatible with the common market.

Article 8

The tonnage-based flat-rate taxation scheme for persons managing ships on behalf of third parties is compatible with the common market provided that the latter are simultaneously responsible for the management of crews and the technical management of ships, in accordance with the provisions of the Community guidelines in force on aid for maritime transport and provided that the tonnage-related rates are the same as those applicable to maritime transport companies.

Article 9

Within two months of the notification of this decision, Belgium shall inform the Commission of the measures taken to ensure that the programme act of 2 August 2002 is in conformity with the present decision and, where appropriate, recover incompatible aid granted illegally under the said programme act. Interest shall be calculated in accordance with Commission Regulation (EC) No 794/2004 ⁽⁴⁶⁾, in particular Articles 9, 10 and 11 thereof.

Article 10

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 30 June 2004.

*For the Commission,
Loyola DE PALACIO
Vice-President*

⁽⁴⁷⁾ OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION**of 7 July 2004****on the aid measures implemented by France for Alstom***(notified under document number C(2004) 2532)***(Only the French version is authentic)****(Text with EEA relevance)**

(2005/418/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

(4) France's replies to the Commission's letters were received on 4 September 2003. On 10 September 2003, France requested an extension of the deadline to reply to the questions asked by the Commission on 28 August 2003 concerning the associated measures. The Commission refused this request by letter dated 15 September 2003.

(5) Several working meetings were held between France and the Commission in September 2003 in connection with which working documents were submitted to the Commission by France.

(6) On 17 September 2003, the Commission decided to initiate the formal investigation procedure under Article 88(2) of the Treaty in respect of the notified package of measures and the associated measures.

I. PROCEDURE

(1) Following press reports published in the summer of 2003, the Commission asked France to provide information on the bid made by the public-sector nuclear group Areva for Alstom's Transmission and Distribution (T&D) unit and further information on a package of measures for the Alstom group which was then in considerable financial difficulty.

(2) By letters dated 8 and 14 August 2003, France informed the Commission that it had concluded an agreement on 2 August 2003 with the Alstom group and 32 banks under which Alstom, which was on the verge of bankruptcy, was to be granted a package of support measures as part of a rescue and restructuring plan.

(3) By letter dated 27 August 2003, the Commission informed France that it was considering imposing a suspension injunction in respect of some of the planned aid measures. By letter dated 28 August 2003, the Commission requested additional information on a series of associated measures not included in the package reported by France.

(7) The Commission also determined that the conditions were met for it to order France not to implement its acquisition of a holding in the capital of the Alstom group and its underwriting of a subordinated loan. The Commission decided to authorise the Commission Member with special responsibility for competition matters, in agreement with the President of the Commission, to adopt and notify to France an injunction to suspend some of the aid measures, by 22 September 2003, unless France undertook publicly not to participate in financing measures that would automatically and irreversibly result in a holding in the Alstom group's equity, without the Commission's prior approval under the rules applicable to state aid.

(8) On 19 September 2003, France sent the Commission a new draft agreement, still being negotiated, between Alstom, its creditor banks and the state which was to replace the agreement of 2 August 2003. By letter dated 22 September 2003, the Commission took note of this and informed France that, since the conditions set by the Commission on 17 September 2003 had been met, there was no longer any need to pursue the suspension injunction that had been imposed.

⁽¹⁾ OJ C 269, 8.11.2003, pp. 2 and 15.

- (9) A final agreement was notified to the Commission on 26 September 2003. It was stated that the details of the amended plan would be sent to the Commission subsequently.
- (10) On 15 October 2003, the Commission decided to extend the initiation of the formal investigation procedure under Article 88(2) of the Treaty to include the new measures communicated ⁽²⁾.
- (11) The Commission's decisions of 17 September and 15 October 2003 were published jointly in the *Official Journal of the European Union* ⁽³⁾. The Commission called on interested parties to submit their comments on the measures.
- (12) By letter dated 31 October 2003, the Commission sent France a request for additional information. On 11 November 2003, the Commission wrote to France pointing out delays in the submission of the documents needed for the Commission to assess the case.
- (13) By letters dated 24 and 25 November 2003, France sent the Commission initial information on the sale of Alstom's T&D activities and on the associated measures.
- (14) Following a reminder sent on 2 December 2003, the Commission received, on 5 December 2003, a letter containing further information supplementing the communications of 8 August, 14 August and 26 September 2003 and France's reply to the additional questions put by the Commission on 31 October 2003.
- (15) By letter dated 3 December 2003, the Commission asked France to provide further details on the associated measures.
- (16) Between 3 and 8 December 2003, the Commission received 46 sets of comments from interested third parties. These were sent to France, for its response, by letters dated 22 December 2003 and 12 and 16 January 2004.
- (17) By letter dated 24 December 2003, France requested a further deadline of 20 working days to reply to the additional questions put by the Commission on 3 December 2003. The Commission acceded to this request by letter dated 13 January 2004.
- (18) By letter dated 12 January 2004, the Commission informed France that the independent expert appointed by the Commission, following the call for tenders which it had organised for assistance in its analysis of Alstom's restructuring plan, was the company BearingPoint France SAS.
- (19) By letter dated 22 January 2004, France requested a further extension of the deadline by about one month to enable it to reply to the comments submitted by third parties. The Commission agreed to such extension by letter dated 27 January 2004.
- (20) On 30 January 2004, the Commission sent France a request for additional information concerning in particular the scope of the sale of Alstom's T&B unit, to which it received a reply by letter dated 16 February 2004.
- (21) On 11 February 2004, France replied to the Commission's letter of 3 December 2003 concerning the associated measures. Since the information was still partially incomplete, the Commission requested further details from France by letter dated 19 February 2004. By letter dated 9 March 2004, France provided the information requested.
- (22) By letter dated 10 March 2004, the Commission reminded France that it was still waiting for its reply setting out its reactions to third party comments, which it had undertaken to provide by 1 March at the latest. France's reply, accompanied by information concerning certain amendments to the initial restructuring plan, was sent to the Commission by letter dated 15 March 2004.
- (23) In April and May 2004, several working meetings were held between France and the Commission, the aim being to discuss an adjustment to the financial package initially proposed by France and compensatory measures necessary for approval of the aid. Following these discussions, France sent the Commission two letters, dated 21 and 26 May 2004, in which it gave a number of undertakings concerning the measures and communicated the adjustments made to the measures initially envisaged. Further information was sent by France to the Commission by letters dated 7, 9, 10, 18 and 25 June 2004.

II. DESCRIPTION

1. The Alstom group

- (24) Alstom is a limited liability company incorporated under French law listed on the Paris, London and New York stock exchanges. In the financial year 2002/2003, the group had a turnover of EUR 21,4 billion, a negative operating result of EUR 507 million and a net loss of EUR 1,38 billion. On 31 March 2003, Alstom employed some 110 000 persons in 70 countries, including 62 000 in Europe.

⁽²⁾ Commission decision of 15 October 2003, communicated to France by letter dated 15 October 2003.

⁽³⁾ See footnote 1.

- (25) Before the current restructuring, Alstom was engaged in the design, manufacture and maintenance of products and systems in four areas: power generation (referred to below as the Power sector), transmission and distribution (referred to below as the T&D sector), rail transport (referred to below as the Transport sector) and shipbuilding (referred to below as the Marine sector):
- in the financial year 2002/2003, the Power sector had a turnover of EUR 10,9 billion and employed 46 000 persons worldwide;
 - in 2002/2003 prior to its sale, the T&D sector, most of which was sold to the French Areva group on 25 September 2003, had a turnover of EUR 3,6 billion with a workforce of 28 000;
 - in the financial year 2002/2003, the Transport sector had a turnover of EUR 5 billion and employed 28 500 persons;
 - the Marine sector had a turnover of EUR 1,5 billion in the financial year 2002/2003 and employed 4 500 persons.
- (26) In the financial year 2003/2004, Alstom's turnover was EUR 16,7 billion, which was 10 % down on the financial year 2002/2003 on a comparable basis. Notwithstanding a positive operating result of EUR 300 million (operating margin of 1,8 %), Alstom's net loss increased to EUR 1,86 billion, of which EUR 655 million were due to restructuring costs and EUR 460 million to financing costs.
- (27) Changes in the operating results by sector are shown in Table 1.

Table 1

Corporate data

	(turnover and operating resulting in EUR million)			
	2000/2001	2001/2002	2002/2003	2003/2004
Annual turnover	24 550	23 453	21 351	16 688
Operating result	1 151	941	(507)	300
of which Power	448	572	(690)	178
T&D	275	226	227	136
Transport	266	101	(24)	64
Marine	80	47	24	(19)
Corporate	(41)	(35)	(44)	(59)
Employees	143 014	118 995	109 671	78 811

2. Alstom's difficulties before the restructuring plan

- (28) France explains that Alstom's difficulties were triggered by a combination of several factors. The group suffered firstly from the general downturn in the economy following the events of 11 September 2001. France also points out that the liberalisation of certain markets (in particular electricity and, to a lesser extent, transport) was a further factor creating difficulties for the group.
- (29) The group also suffered from the effects of serious technical problems with the GT24 and GT26 heavy-duty gas turbines bought from the Swedish group ABB. Alstom also had problems with trains sold in the United Kingdom. Lastly, the group suffered from a lack of orders for cruise ships in 2001/2002 and 2002/2003 and losses caused by the insolvency of *Renaissance Cruises*.
- (30) As from the spring of 2003, after having announced its difficulties and the amount of its losses, the Alstom group faced a serious crisis of confidence. The level of orders fell, as customers no longer felt sure that the company could meet its obligations in the years ahead. Suppliers imposed stricter terms of payment, and financial institutions decided to reduce the amount of bonding for orders received by Alstom.
- (31) Furthermore, in the aftermath of the events of 11 September 2001, several insurance companies reduced their exposure vis-à-vis their clients and imposed stricter conditions on Alstom for the granting of bonds. However, in order to stay in business on its markets, Alstom depends on obtaining bonds which cover the proper performance of its long-term contracts. Without such bonding, Alstom cannot take on new orders.

3. The restructuring plan

Industrial reorganisation

(32) In March 2002, an initial plan to restore Alstom's activities (Restore value) was decided on, but only partly implemented. A second plan, incorporating the initial plans, but going far beyond them, was drawn up in March 2003, then amended and strengthened in January 2004. This second plan is considered by France to be the restructuring plan that will cover the period between the financial year 2002/2003 and the financial year 2005/2006. It provides for three groups of measures: divestitures designed to focus the group's activities on core business; industrial reorganisation; financial restructuring.

Divestitures

(33) As regards the first group of measures designed to focus the group's activities on core business, Alstom sold off some business activities resulting in an EUR 4,3 billion reduction in the group's turnover (20 % less than 2002/2003) and a 30 000 (27 %) reduction in its workforce.

The divestitures were as follows:

- the industrial turbines business was sold to Siemens in April 2003; this brought in EUR 950 million net. This business generated a turnover of EUR 1,25 billion in 2002/2003 (some 6 % of Alstom's turnover) with a workforce of 6 000 employees ⁽⁴⁾;
- the T&D unit, excepting the Power Conversion segment, was sold to Areva in September 2003, bringing in EUR 920 million net; the business sold generated a turnover of EUR 3 billion in 2002/2003 (some 14 % of Alstom's turnover) with a workforce of 24 000 employees ⁽⁵⁾;
- real estate was sold for a total of EUR 415 million (EUR 267 million before March 2003 and EUR 148 million between March and August 2003); other sales totalling EUR 50 million were still under discussion in December 2003.

⁽⁴⁾ Sale authorised by a Commission Decision of 10 July 2003 declaring a concentration to be compatible with the common market (Case No IV/M.3148 - Siemens/Alstom Gas and Steam Turbines) according to Council Regulation (EEC) No 4064/89 (OJ C 207, 3.9.2003, p. 25).

⁽⁵⁾ Sale authorised by a Commission Decision of 19 December 2003 declaring a concentration to be compatible with the common market (Case No IV/M.3296 - Areva/Alstom T&D) according to Council Regulation (EEC) No 4064/89 (OJ C 16, 22.1.2004, p. 34). Following this transaction, Areva proposed also purchasing Alstom's T&D business in India (which did not form part of the previous transaction) for a total amount of EUR 22,31 million.

(34) The second group of measures involves industrial reorganisation of Alstom's core business into three divisions with an estimated total turnover of EUR 16 billion in 2005/2006:

- the Power sector, comprising the Power Turbo-Systems subsector (gas and steam turbines) with an estimated EUR 3,6 billion turnover, the Power Service subsector with an estimated EUR 3,1 billion turnover and the Power Environment subsector (boilers and hydro) with an estimated EUR 3,1 billion turnover;
- the Transport sector with an estimated EUR 5,5 billion turnover;
- the Marine sector with an estimated EUR 1 billion turnover.

The total turnover also includes the Power Conversion sector (EUR 0,5 billion turnover), the Corporate sector (EUR 0,2 billion) and a negative adjustment at the aggregated level (corporate buffer) of EUR 1 billion.

(35) In each of these sectors, restructuring will be carried out as follows:

- operational reorganisation of the Power Environment and Power Turbo-Systems subsectors, comprising the resizing or closing of certain sites, mainly in order to reduce the workforce and rationalise geographical siting;
- withdrawal from the Industrial Steam Turbines (IST) business (Power Turbo-Systems subsector) and the closure of the French site at La Courneuve;
- industrial reorganisation of the Transport sector, comprising the resizing or closure of certain sites and workforce cutbacks;
- a reduction in activity in the Marine sector, following the closure of the Saint-Malo shipyards, decided on at the beginning of 2003. At the main site, Saint-Nazaire, the workforce is to be reduced through early retirements.

(36) Table 2 sets out the impact of these measures on each segment of activity in the relevant three financial years (2003 to 2006). In the following years, the expected savings brought about by the restructuring measures should amount to EUR [...] ⁽⁶⁾ a year.

⁽⁶⁾ Parts of this text have been deleted so as not to divulge confidential information; they are indicated by a series of dots between square brackets. In order to make the Decision easier to follow, such parts are replaced by reference to a footnote, indicated by an asterisk, giving a non-confidential approximation of the figure. Here, read 'of the order of 500'.

Table 2

Reorganisation of activities over three years

	Workforce reductions (persons)	Restructuring costs (EUR million)	Expected savings (EUR million)
Power Environment	[...]	[...]	[...]
Power Turbo-Systems	[...]	[...]	[...]
Power Conversion	[...]	[...]	[...]
T&D		[...]	
Power Services + IST	[...]	[...]	[...]
Transport	[...]	[...]	[...]
Marine	[...]	[...]	[...]
Corporate	[...]	[...]	[...]
Total	[...]	[...] (*)	[...]

(*) Read 'of the order of 950'.

Financial restructuring

- (37) The third set of measures, financial restructuring, provides for a financial package comprising measures to be taken by Alstom, the state and banks.
- (38) An initial package was agreed upon on 2 August 2003. Following the initiation of the formal investigation procedure by the Commission, France forwarded a substantially amended agreement on 26 September 2003 that no longer contained measures involving state participation in the Alstom group's equity on an automatic and irreversible basis without prior Commission approval, as required by Community state aid rules. The new agreement, whose terms are described below, superseded the agreement of 2 August 2003.
- (39) The agreement comprises firstly (measure 1) a commitment by the state to subscribe to an issue of fixed-term subordinated bonds reimbursable with shares (*Titres Subordonnés à Durée Déterminée Remboursables en Actions* — TSDDRA) reserved for the state amounting to EUR 300 million. The bonds have a parity of 1 TSDDRA to 1 share and a subscription price of EUR 1,25. They have a term of twenty years and bear interest at a fixed rate of 2 % a year pending the Commission's decision. The bonds are subordinated debts, junior-ranking to other subordinated debts including bonds mandatorily reimbursable with shares (*obligations remboursables en actions* — ORA), fixed-term subordinated loans (*prêts subordonnés à durée déterminée* — PSDD) and fixed-term subordinated bonds (*titres subordonnés à durée déterminée* — TSDD) ⁽⁷⁾.
- (40) Conversion is subject to the following conditionality clause: 'the TSDDRA issued by the company and subscribed by the state will be reimbursed with ordinary shares of the company at the rate of one ordinary share of EUR 1,25 in nominal value per TSDDRA, subject only to the obtaining of a decision by the European Commission declaring that the states' subscription to the TSDDRA issued by Alstom and their reimbursement with shares constitute state aid compatible with the common market, or do not constitute state aid. Such reimbursement with shares will take place automatically and by right on the first working day after the state receives the Commission's decision'.
- (41) The state has undertaken not to sell the TSDDRA or the shares that might result from their reimbursement before the company has fully recovered.
- (42) The banks have undertaken irrevocably to subscribe to a capital increase, approved at the general assembly of 18 November 2003 and reserved to them, of EUR 300 million for an issue price of EUR 1,25 per share.
- (43) The agreement also provides for the granting of short-term liquidity facilities totalling EUR 1,5 billion (measure 2). The state, directly or through the intermediary of the Caisse des Dépôts and Consignations (CDC), has undertaken to renew the Treasury notes subscribed for EUR 300 million until the expiry of a period of twelve months as from the last issue prior to 8 February 2004 and to subscribe to additional Treasury notes up to the value of EUR 900 million. The state's commitment in respect of liquidity thus amounts to EUR 1,2 billion.

(7) These debts are described in recitals 47, 48 and 49.

- (44) The additional EUR 900 million were subscribed in full, then reimbursed by Alstom: on 23 December 2003, the company paid back EUR 800 million thanks to revenue from the long-term financing (TSDDRA, TSDD and PSDD) described in recitals 39, 47 and 48 and EUR 100 million in January 2004 with the proceeds of the sale of the T&D unit to Areva.
- (45) The banks, for their part, are contributing Treasury notes to the value of EUR 300 million and undertake to renew this contribution until the end of a period of twelve months as from the last issue before 8 February 2004.
- (46) The agreement also provides (measure 3) for the provision by the banks of a syndicated bonding guarantee facility worth EUR 3.5 billion, of which 65 %, or EUR 2,275 billion, is counter-guaranteed by the state. This bonding guarantee facility was to operate until the EUR 3,5 billion had been used up. The period covered by the commercial contracts thus covered may not exceed seven years. The counter-guarantee was put in place through the Caisse Française de Développement Industriel (CFDI), which belongs to the Banques Populaires group. It should be noted that, in its references to this measure, France regards the counter-guarantee as being granted by the state.
- (47) The fourth measure is a fixed-term subordinated loan (*Prêt Subordonné à Durée Déterminée* - PSDD) of EUR 1,5 billion for a period of five years, EUR 300 million of which was to be provided by the state and EUR 1,2 billion by the banks (measure 4). In its comments submitted on 5 December 2003, France stated that the loan had finally been granted by the CFDI. The state confined itself to giving a guarantee to the CFDI for the amount of the loan. The PSDD is remunerated at Euribor + 450 base points, of which 300 base points are payable at the end of each interest period and 150 base points capitalised and paid upon reimbursement. This loan constitutes a subordinated debt, though it will be prior-ranking over the TSDDRA, TSDD and ORA.
- (48) France has given an irrevocable commitment to subscribe to a state-reserved issue of fixed-term subordinated bonds (*Titres Subordonnés à Durée Déterminée* - TSDD) for an amount of EUR 200 million and for a period of 15 years (measure 5, formerly measure 4bis). They will be remunerated at the reference rate plus 500 base points a year, of which 350 base points a year will be payable annually in arrears and 150 base points a year capitalised and paid upon reimbursement. They are subordinated to the mandatorily convertible bonds, fixed-term subordinated loans and/or unsecured liabilities.
- (49) In addition to the measures already described, the banks have guaranteed the placing of an issue originally set at EUR 1 billion in mandatorily convertible bonds (ORA), with preferential subscription rights for existing shareholders. The mandatorily convertible bonds, whose amount was finally set at EUR 900 million, will be reimbursable with shares after five years from the date on which the operation is launched. The conditions for this issue are as follows: a coupon of 2 % capitalised at the end of 2004, a parity of one ORA to one share, an issue price of EUR 1.40, plus an issue premium of 10 to 20 %. These debts are subordinated to the PSDD, but prior-ranking in relation to the TSDDRA and TSDD.
- (50) Table 3 gives an overview of the measures comprised in the financial package designed to underpin Alstom, as communicated by France on 26 September 2003, superseding the agreement of 2 August 2003.

Table 3

Description of the financial package, version at end of September 2003

(EUR billion)		
Measure	Banks/Investors	State commitments ⁽¹⁾
Capital increase I	0,30	—
TSDDRA (measure 1)	—	0,30
Short-term liquidity (measure 2)	0,30	1,20
Bonding facility of EUR 3.5 billion (measure 3)	3,5	Counter-guarantees of 65 %, i.e. 2,275
PSDD (measure 4)	1,20	Guarantee for the CFDI in respect of 0,30
TSDD (measure 5)	—	0,20
ORA	0,90	—

⁽¹⁾ Terminology used by France and included in the agreements of August and September 2003 and May 2004

- (51) In May 2004, France informed the Commission of changes to the above financial package that were to be implemented by the state and the banks in the summer of 2004. The new package includes two changes to the existing measures and one new measure.
- (52) Firstly, the state counter-guarantee on the syndicated bonding facility (measure 3) will be released and repositioned within a guarantee mechanism that will cover a new syndicated bonding facility programme totalling EUR 8 billion, provided by the banks. This new bonding facility comprises the following guarantee mechanism: losses will be covered primarily by a EUR 700 million cash collateral provided by the company. Losses will be covered secondarily by a EUR 1,3 billion guarantee to which the state and the banks will contribute *pari passu* EUR 1,25 billion and EUR 50 million respectively. Losses over and above EUR 2 billion will not be covered by any guarantee and will be borne in full by the banks providing the bonds. The period covered by this syndicated bonding facility is two years from the time at which it starts to run, which is expected to be the summer of 2004. During that period, on the one hand, the writing-off of existing bonds through the completion and delivery of products by Alstom will bring about a reduction in the total outstanding amount of the bonding facility. On the other, during the period, the facility will be topped up by other bonds, up to the ceiling of EUR 8 billion. Once the period during which bonds can be provided is over and topping up no longer permitted, the total amount of the facility will decrease as bonds are amortised. In parallel, the guarantees to banks will be amortised in such a way that they are at any given time at least equal to 25 % of the total amount of the bonding facility. The second-rank guarantee of EUR 1,3 billion will be amortised on a priority basis, and the first-rank loss guarantee of EUR 700 million will be amortised subsequently. Consequently, the risk of the state being called upon should fall to zero as from the end of 2008/beginning of 2009, as against the end of 2011/beginning of 2012 under the previous mechanism in which the state's counter-guarantee did not enjoy any priority amortisation. It should be noted that the total amount of EUR 8 billion will not represent only a provision of new bonds. All of the bonds provided by the banks after September 2003 and thus no longer enjoying the state's counter-guarantee of 65 %, and, subject to certain conditions and to a limited extent, the bonds provided before September 2003, can be brought within this new syndicated bonding line of EUR 8 billion and thus benefit from the corresponding guarantee mechanism.
- (53) Secondly, France undertakes to convert into capital during the summer of 2004 its claims on Alstom consisting of the EUR 300 million PSDD (measure 4) held by the CFDI and the EUR 200 million TSDD (measure 5). The banks will also have the possibility of converting part of their claims on Alstom into capital.
- (54) An additional capital increase will take place in the summer of 2004 amounting to EUR 1 to 1,2 billion (measure 6). The state will participate in this in proportion to its participation in the capital, resulting from the conversion of the TSDDRA, i.e. at a percentage which should be between 17 and 18,5 %. Consequently, the amount subscribed to the state will be comprised between EUR 170 and 222 million. The balance will be placed on the market underwritten by a syndicate of banks. This capital increase will in particular be used to obtain the EUR 700 million needed to provide the collateral covering the initial losses of the new syndicated bonding facility.
- (55) Table 4 provides an overview of the measures comprised in the new package which is the subject of this Decision.

Table 4

Description of the financial package, version at end of May 2004

(EUR billion)		
Measure	Banks/Investors	State commitments
Capital increase I	0,30	—
TSDDRA (measure 1)	—	0,30
Short-term liquidity (measure 2)	0,30	120
Bonding facility of EUR 8 billion (measure 3)	8	Second-loss guarantee, 1,25
PSDD to be converted into capital (measure 4)	1,20	0,30
TSDD to be converted into capital (measure 5)	—	0,20
ORA	0,90	—
Capital increase II (measure 6)	0,83/0,99	0,17/0,22

Financial outlook

- (56) France considers that the restructuring plan will enable Alstom to become viable again in the long term. The estimates are contained in the three-year treasury plan, version

W10. That version is the most recent one available containing all the forecasts for each financial year from 2003/2004 to 2005/2006. The main figures in that plan are set out in Table 5.

Table 5

Extract from Alstom's three-year refinancing plan – version W10, September 2003

(EUR billion)

Financial year	2002/2003	2003/2004	2004/2005	2005/2006
Orders received	19,123	[↘] (*)	[↗]	[↗]
Industrial turbines	[...]	[...]	[...]	[...]
Power — environment	[...]	[...]	[...]	[...]
Power — turbo-systems	[...]	[...]	[...]	[...]
Power — services	[...]	[...]	[...]	[...]
T&D (power conversion included)	[...]	[...]	[...]	[...]
Transport	[...]	[...]	[...]	[...]
Marine	[...]	[...]	[...]	[...]
Corporate and others	[...]	[...]	[...]	[...]
Buffer	[...]	[...]	[...]	[...]
Sales	21,351	[↘]	[↘]	[↗]
Industrial turbines	[...]	[...]	[...]	[...]
Power — environment	[...]	[...]	[...]	[...]
Power — turbo-systems	[...]	[...]	[...]	[...]
Power — services	[...]	[...]	[...]	[...]
T&D (power conversion included)	[...]	[...]	[...]	[...]
Transport	[...]	[...]	[...]	[...]
Marine	[...]	[...]	[...]	[...]
Corporate and others	[...]	[...]	[...]	[...]
Buffer	[...]	[...]	[...]	[...]
Operating income	(0,507)	[↗]	[↗]	[↗]
Operating margin	– 2,4 %			
EBIT	(1,062)	[↗]	[↗]	[↗]
Free cash flow	(0,265)	[↘]	[↗]	[↘]
Total gross debt	6,688	[↘]	[↘]	[↘]
Economic debt	4,918	[↘]	[↘]	[↘]
Equity	0847	[↗]	[↘]	[↗]
Debt/equity	581 %	[↘]	[↗]	[↘]

(*) Confidential information with indication of trends

- (57) Following the changes to the financial package which were announced in May 2004, France submitted a new version of the financial forecasts. The main figures in that version are set out in Table 6. Two values are indicated: the first reflects the situation where the banks convert the maximum amount of claims provided for in the financial package announced in May 2004 (i.e. EUR 700 million); the

second reflects the situation where the banks do not convert any of their claims. The forecasts do not take account of the divestitures which the company will have to carry out.

Table 6

New forecasts incorporating the effects of the new financing measures

Financial year	(EUR billion)		
	2004/2005	2005/2006	2006/2007
Total gross debt	[...]	[↘]	[↘]
Economic debt	[...]	[↘]	[↘]
Equity	[...]	[↘]	[↗]
Debt/equity	[...]	[↘]	[↘]

4. Other measures

- (58) Apart from the measures referred to above, the agreement of 2 August 2003 referred to a measure which the Commission had learned of through press reports and on which France had been asked to provide information by letter dated 10 July 2003 (measure 7, former measure 5): according to the press, the nuclear group Areva had made a bid for Alstom's T&D business, allegedly for an amount in excess of EUR 1 billion. According to France, the French state gave its agreement ⁽⁸⁾ to the Areva board of directors' proposal to make a bid for Alstom's T&D unit in the course of the supervisory board (*conseil de surveillance*) meeting on 1 July 2003. It should be noted that this measure is expressly mentioned in the restructuring plan and in the agreement of 2 August 2003.

- (59) Furthermore, the Commission learned of a series of measures not notified by France on which France was asked to provide information by letters dated 28 August and 3 December 2003:

- measure 8 (former measure 6): according to a complainant, France is reported to have also given guarantees for the construction of electricity plants (for example, in Bahrain and/or other countries);
- measure 9 (former measure 7): according to press reports, the public utilities company Gaz de France (GdF) had signed a letter of intent to buy one or two LNG (liquefied natural gas) tankers from Alstom, conferring an advantage on Alstom; the total value of the relevant contracts is EUR [...] million (two LNG tankers worth EUR [...] million and EUR [...] million respectively);

- measure 10 (former measure 8): according to press reports, SeaFrance, a cross-channel operator owned by the French national railways (Société Nationale des Chemins de fer Français - SNCF), had ordered a car ferry from Alstom worth EUR [...] million, conferring a further advantage on Alstom.

III. JUSTIFICATION OF THE PROCEDURAL OPTIONS

- (60) The formal investigation procedure was initiated in order to check whether the measures that came to the Commission's attention in the summer of 2003 were aid that was compatible with the common market. Although the measures derived from state resources and allowed Alstom to remain in business on the relevant markets, threatening to distort competition and to affect trade between Member States, France disputed that some of the measures were aid (notably measure 1). Furthermore, the information communicated by France regarding measures 7 to 10 was insufficient, the rest of the measures being considered to be rescue and restructuring aid. All of the aid measures were liable not to meet the criteria laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty ⁽⁹⁾ (hereinafter referred to as the guidelines), in particular the measures described as rescue aid by France, since a restructuring plan had already been implemented.
- (61) Subsequently, France made changes to the initial aid measures after having concluded a new agreement with the banks. These measures were communicated to the Commission on 26 September 2003. The formal investigation procedure was accordingly extended to cover the new measures that partly replaced those provided for in the agreement of 2 August 2003 and increased their amount.

⁽⁸⁾ [...]

⁽⁹⁾ OJ C 288, 9.10.1999, p. 2.

(62) Following the new financial package introduced in May 2004, the Commission took the view that it was not necessary or appropriate to carry out a second extension of the investigation procedure. It was noted, firstly, that the changes did not result in any increase in the total amount of aid, but, on the contrary, reduced the total. The state guarantee on the bonding facility (measure 3), which replaces the former state counter-guarantee, represents a EUR 1 billion reduction in the state's exposure. Furthermore, the guarantee mechanism set up now provides that losses will be covered on a priority basis by collateral of EUR 700 million provided by the company, with the state intervening only under the second-rank guarantee. Whatever the level of losses, the amount covered by the state is lower than under the previous package. As will be explained in part VI 3, the contract bonds must be regarded as state aid of up to 100 % of their amount. Consequently, the extension of the state's commitment under the guarantee is more than offset by a real and significant reduction in the aid as a result of the setting-up of the new mechanism. Similarly, the conversion of the state's debt (measures 4 and 5) into capital under the amended arrangements does not entail any increase in the amount of aid included in it. As will be explained in part VI 3, the loans are regarded here as representing aid equivalent to 100 % of the relevant amount as from the time they are granted. Lastly, the state's participation in the new capital increase (measure 6) will be slight compared to that of the private contribution. It will take place in proportion to the capital subscribed by the state and under the same terms and conditions as for the other participants. Furthermore, from the point of view of the state's total exposure, its participation in the capital increase is more than offset by the reduction in the guarantee covering the bonding facility.

(63) It was also noted that the changes in the new financial package introduced in May 2004 included a very significant increase in the private contribution to restructuring and, consequently, a considerable improvement in Alstom's financial situation. The change to the state guarantee covering the bonding facility means that the banks now have a EUR 6 billion exposure. In addition, more than 80 % of the new capital increase will be guaranteed by the banks. Lastly, there is a very substantial contribution from the company itself, which will finance the EUR 700 million collateral, which is a first-rank guarantee on the new bonding facility.

(64) Lastly, it should be noted that the changes to the financial package are accompanied by commitments given by France, described in recitals 96 to 103, which are such, on the one hand, as to offset the distortions of competition that may arise from the aid by limiting the period covered by state assistance and, on the other, ensure the company's long-term viability.

(65) The Commission accordingly considers that the adjustments made in May 2004 are such as reduce the state's assistance and increase the contribution of private-sector partners, thus limiting the distortions of competition arising from the measures as a whole, while at the same time making a decisive contribution to ensuring the company's viability in the long term. The adjustments do not therefore increase the Commission's doubts as to the compatibility of the aid as a whole or create any new doubts as to any given measures in particular. On the contrary, the adjustments help to remove some of the doubts identified in the decisions to initiate and extend the formal investigation procedure. Lastly, any further extension of the procedure, which is not legally necessary, would be inappropriate in view of the delays which it would inevitably entail in adopting a final decision, which is of prime importance with a view to implementing the restructuring plan.

IV. COMMENTS FROM INTERESTED PARTIES

(66) Following publication of the decisions to initiate and extend the procedure, on 17 September and 15 October 2003 respectively, the Commission received a large number of comments, within the deadlines set, from interested parties, customers, suppliers, subcontractors, competitors and employees' representatives of Alstom (20 sets of comments for the electricity sector, 19 for the rail transport sector and 5 from employees' organisations covering the two sectors).

(67) Most of the customers, suppliers, subcontractors and employees' representatives expressed serious concern as to Alstom's survival. Some of the comments suggest that if Alstom were not to survive, its disappearance would be a genuine loss to the fabric of the European economy. They point in particular to the technological achievements of the company and its involvement in research and development. Many of the comments also suggest that Alstom's disappearance would have a harmful impact on the relevant markets, which are already highly concentrated. Alstom's disappearance would increase such concentration and narrow the supply side of the market. Many customers expressed their concern at a possible disruption in their supplies. They also feared that high-tech equipment maintenance and after-sales service could no longer be properly ensured. Lastly, employees' and some subcontractors' representatives pointed to the harmful social impact which the failure of the company would inevitably have on direct and indirect employment.

(68) The Marine sector elicited comments from the mayors of Nantes and Saint-Nazaire, who expressed their serious concern at the social consequences of the proceedings.

- (69) The comments of Alstom's main competitors are set out in greater detail in recitals 70 to 75.
- (70) According to Siemens, the difficulties which Alstom had had to face are due primarily to the serious technical problems with the GT24/GT26 heavy-duty gas turbines. These difficulties are also linked to the 'modest cash flow' generated by Alstom's activities as a whole due to the following factors:
- (a) insufficient integration of the many acquisitions carried out;
 - (b) over-intensive price competition intended to improve capacity utilisation and available cash through deposits received;
 - (c) inadequate project and risk management capacity.
- (71) Siemens therefore considers that the restructuring plan will not enable Alstom to restore its long-term viability. It believes that Alstom will be unable to cope with the technical shortcomings of the GT24/GT26 turbines and that Alstom's margins are too small on railway equipment orders; it also notes the unfavourable outlook on the ship-building market. It also fears, particularly as regards the Power markets, which in its view are marked by low demand and overcapacity, that the restructuring plan will be insufficient to enable Alstom to continue in business.
- (72) In conclusion, Siemens states that the markets on which Alstom is active are sufficiently competitive (partly due to regular calls for tender) and that the disappearance of Alstom would not change this situation. It also argues that, if the restructuring plan is approved by the Commission, such approval should be subject to Alstom's abandoning any business that is structurally in deficit and on the disposal of further assets and subsidiaries.
- (73) Another competitor, which did not want its identity to be revealed, is mainly concerned at the granting of the state's counter-guarantee covering 75 % of the EUR 3,5 billion bonding facility. In its view, the counter-guarantee is such as to cause serious distortions of competition. The competitor argues that the practice of contract bonding is typical of the long-term contracts concluded in the industries in which Alstom operates. However, the guarantee granted by the state allows Alstom access to a particularly large amount of contract bonds, giving it a disproportionate advantage. Consequently, this competitor's concern is two-fold: on the one hand, Alstom, which thus has the backing of much larger guarantees than its competitors, could, given the overall decline in the supply of contract bonds since 2002, tender for a larger number of contracts; on the other, Alstom would enjoy lower costs in obtaining guarantees, which is a key aspect given the low profit margins in the sector. This competitor, like Siemens, considers that there is over-capacity in the rail transport market. It suggests measures to allow third parties access to intellectual property rights for the high-speed train (TGV) and/or signalling.
- (74) General Electrics (GE) provided information on the markets on which it is in competition with Alstom, without commenting directly on the restructuring plan.
- (75) Lastly, another competitor is critical of the terms and conditions under which the T&D unit was sold to Areva. It is particularly concerned at the arrival of the Areva group on this new market. This competitor considers that the sale was not in line with commercial practices. In its view, Alstom was able to reduce the sale price to Areva because of the aid granted by France.

V. COMMENTS FROM FRANCE

- (76) In its reply to the initiation and extension of the formal investigation procedure, France provided information on the nine measures in respect of which the Commission had expressed doubts as to their compatibility with the common market in its decision to initiate the procedure. The information is summarised below.
- (77) As regards measures 1, 2, 3 and 4, France argues that state assistance was necessary in order to prevent Alstom from going bankrupt and to ensure its long-term viability. To back up this assertion, France provided additional information on Alstom's situation prior to the assistance, on its restructuring plan and on the measures taken by the company, by its creditors and shareholders and by France. This information is set out in part II of this Decision, notably the aspects relating to restructuring.
- (78) In its replies to the initiation and extension of the formal investigation procedure, France also included calculation of the aid given to the company and an assessment of its nature. It should be noted that the calculations do not relate to the measures as amended in May 2004, but to those implemented or planned in August and September 2003.

- (79) France estimates that the TSDDRA in measure 1 constitute restructuring aid as regards their nominal amount of EUR 300 million. As far as the EUR 1,2 billion in liquidity provided by the state (measure 2) are concerned, France considers that EUR 300 million were granted initially as rescue aid. Since the repayment term is now longer, this amount must also be considered to form part of the restructuring aid. On the other hand, the EUR 900 million by which measure 2 was increased under the agreement of September 2003 must be regarded in full as being rescue aid. These EUR 900 million were repaid to France between December 2003 and January 2004. This was aid in the form of liquidity, intended to prevent Alstom from immediately going out of business, and was repaid within six months of having been granted, required under the guidelines.
- (80) France provided calculations for the former counter-guarantee covering the bonding facility of EUR 3,5 billion, taking the view that the aid should be calculated by multiplying the maximum amount of state exposure by the 'real' risk of the counter-guarantee being mobilised, and subtracted from this the costs paid by Alstom. The real risk of the counter guarantee being mobilised derived from two factors: the risk that Alstom might not be able to honour its contracts (execution risk), and the risk that it might not be able to repay the guarantee (repayment risk). France arrived at an amount of between EUR 0 and EUR 43 million. Furthermore, France asserts that the aid represented by the counter-guarantee should be regarded as rescue aid throughout the bond issue period. Conversely, the maintenance of the counter-guarantee throughout the period during which the contracts to which the bonds relate were being executed should be deemed to be restructuring aid. It should be noted that France did not provide any evaluation of the new syndicated bonding facility of EUR 8 billion which replaced that of the summer of 2003.
- (81) As regards the EUR 300 million in aid under the PSDD (measure 4), France puts the amount of state aid included in the guarantee to the CFDI at EUR 140 million, which is equivalent to 50 % of the amount of the loan granted by the CFDI, minus EUR 10 million in associated costs and expenses.
- (82) France reaffirmed that the restructuring plan will enable Alstom to become viable again in the long term. France also states that the divestitures carried out by Alstom and the industrial and operational restructuring measures described in part II.3 are sufficient to offset any undue distortion of competition.
- (83) Furthermore, France maintains that the aid measures to assist Alstom represent the minimum necessary to ensure both its short-term survival (provision of liquidity and counter-guarantee) and its long-term viability (long-term financial and industrial restructuring).
- (84) As far as the economic and social consequences of any insolvency of Alstom are concerned, France maintains that they would be measured in terms of the number of job losses that would result. While acknowledging that some of Alstom's activities would be taken over by other operators, France states that [...] ⁽¹⁰⁾ would simply come to a halt, which, on top of the necessary restructuring operations in the sectors likely to remain in business (20 % according to the estimates), would mean the loss of 53 600 jobs.
- (85) France also foresees other problems, stemming from the fact that 75 % of Alstom's activities are carried out by sub-contractors, which, it argues, would result in 112 800 additional job losses. This figure would be further increased by some 50 000 (indirect) job losses in the worst-hit regions. In France's view, the total number of job losses to be expected in the event of insolvency would thus total 216 400.
- (86) France further states that any failure of Alstom would indirectly result in [...].
- (87) As far as production capacity on the markets on which Alstom operates is concerned, France states that such capacity is very flexible and can easily be adjusted to demand in the medium term, even if cyclical fluctuations in demand may result in short-term overcapacity. This is currently the case with the Power Turbo-Systems subsector. However, France believes that overcapacity can be reabsorbed in the medium term through workforce adjustments. Nor is capacity considered to be a problem in the Transport sector, where production can easily be adapted to demand. Lastly, in the Marine sector, and in particular in the cruise ship segment, the current crisis is regarded as temporary, given the favourable long-term growth prospects.
- (88) On the question of the sale of Alstom's T&D sector to Areva (measure 7), France provided additional information intended to show that this operation did not involve any state aid. According to France, the agreed price was

⁽¹⁰⁾ Read 'some sections'.

EUR 950 million, minus the consolidated net debt of the assets transferred. The operation was carried out in January 2004 at a price [...] of EUR 920 million. France stated that Areva's bid was lower than those made by other potential buyers, but that it was accepted by Alstom as being the most favourable, mainly because Areva was able to pay the price within a limited period, without recourse having to be made to new loans or a capital increase. Furthermore, in contrast to the other potential buyers, Areva had not requested that Alstom would remain a shareholder in respect of part of the activity transferred. France also stated that Areva's bid price proved to be in line with the value established in a series of valuations carried out by Alstom and Areva. The last such valuation, dating from July 2003, indicated a price lying within a range of EUR 1 billion to EUR 1,5 billion.

- (89) As far as measures 8, 9 and 10 are concerned, in its reply of 11 February 2004, France denied having provided guarantees for any of the said transactions. However, France admitted having provided [...] 'to' GdF and to [...] the SNCF special back-up conditions for the purchase of the ships. Following a request from the Commission, France sent a copy of the letters in which these special back-up conditions were set out. In the letters, the state confirmed that if the transactions could not be carried out successfully, it would introduce a compensation procedure.

On the comments from interested parties

- (90) France notes that the comments sent by interested parties to the Commission come both from Alstom's competitors and from its employees' unions, suppliers, customers or indeed sub-contractors. It notes the unusual number of opinions that argue in favour of the measures and points out that the third parties express considerable concern at the risk which Alstom's failure would pose for direct and indirect employment, for the continuation of current contracts, notably in terms of technology transfer, and for sub-contractors. Other opinions are regarded as being neutral by France.
- (91) France observes that only two of the many interested third parties, one being Siemens, have expressed opposition to the proposed measures. France disputes the claims made by Siemens, which considers in particular that Alstom's Transport sector might be showing signs of weakness. It states that the decline in the operating margin of that sector was due solely to Alstom's *ad hoc* difficulties and that the profitability outlook up to 2005/2006 is wholly favourable. Furthermore, Siemens takes the view that there is overcapacity in the rail sector as a whole, whereas the other interested third party takes the view that such overcapacity applies only to the rolling stock segment. In both cases, France disputes the assessment and notes in particular that the site closures which it has undertaken relate only to specific local overcapacity. In addition, France points out that Alstom is continuing its restructuring efforts.
- (92) As regards the Power sector, France stresses the advanced technology which Alstom possesses. It explains that the decline in margins pointed to by Siemens between 1999 and 2003 is linked to major, but *ad hoc*, technical problems with the GT24 and GT26 gas turbines, problems which have now been solved. France also points out that the Power Turbo-Systems subsector does not present any structural problem, contrary to what Siemens claims. It also points out that considerable capacity reductions have been undertaken in that sector following the selling-off of the Industrial Turbines business to Siemens and the T&D business to Areva and that it is pursuing its restructuring efforts.
- (93) One of the third parties points out the major importance of contract bonds in the transport sector and is sharply critical of the bank guarantees obtained by Alstom as a result of the counter-guarantee granted by the state. France points out in this respect that the guarantees were used in line with the historical needs of the group and that Alstom's bonding practice has not changed since the aid was granted. It states that the third party's proposal regarding the granting of guarantees by sector is not feasible given the financial structure of groups such as Alstom, GE and Siemens.
- (94) France also disputes Siemens's comments doubting the effectiveness of Alstom's restructuring plan and doubting the group's chances of becoming viable again. It is also critical of Siemens's comments on the undue distortions of competition that might result from the measures and is therefore against any additional divestiture suggested by Siemens to offset such effects. Lastly, France is opposed to any request for the opening-up of intellectual property rights called for by the other third party regarding the TGV and/or signalling.

- (95) A third interested party expressed an unfavourable opinion, but only as regards the T&D branch, which, in its opinion, is faced with structural overcapacity. It is also critical of the conditions under which the T&D branch was sold to Areva. France points out, firstly, that Alstom is no longer active in the relevant branch and, secondly, that it has provided evidence that the sale to Areva did not involve any elements of state aid.

Commitments given by France and the company

- (96) In France's letter of 26 May 2004 to the Commission, France undertook that Alstom would conclude one or more industrial partnerships, within a period of four years. The partnerships will relate to significant parts of Alstom's business. The partnerships will not, without prior Commission approval, relate to undertakings controlled *de jure* or *de facto*, individually or jointly, by the state.
- (97) France also undertakes that a joint venture, in which Alstom will retain joint control and will hold a maximum of 50 % of the capital, will be set up with a partner to cover Alstom's 'Hydro Power' business ⁽¹¹⁾ (in 2002/2003, turnover of EUR 879 million and workforce of 4 680). This transaction will be completed within a period of [...].
- (98) France also undertakes to withdrawn from Alstom's capital within 12 months of Alstom obtaining an investment grade rating. Such withdrawal will at all events be carried out within four years of adoption of this Decision. [...].
- (99) France undertakes that Alstom will divest itself of some of its activities in the energy and transport fields. The divestitures include the freight locomotive business in Valencia (in 2002/2003, turnover of EUR 92 million and workforce of 380), all of the Transport sector's activities in Australia and New Zealand (in 2003/2004, turnover of EUR 227 million and workforce of 2 172), and industrial

boiler activities ⁽¹²⁾ (in 2003/2004, turnover of EUR 442 million). Each of these divestitures will be carried out within a period of [...]. France undertakes that Alstom will set up or stabilise a dedicated management to ensure the proper administration of each of the activities sold off and establish a single trustee responsible for monitoring the proper implementation of the commitment on these three divestitures. France also undertakes that Alstom will dispose of further activities representing EUR 800 million in turnover (base 2002/2003) within the group's business, excluding Marine. These divestitures can be carried out [...]. They must be carried out within a period of [...]. Lastly, France undertakes that Alstom will dispose of [...] within a period of [...].

- (100) France also undertakes to send the Commission annually, for four years, a report checked by an expert appointed by Alstom and approved by the Commission. The expert's task will be to check that the margins achieved on average, annually, by subsector, on the contracts signed by the company in the Transport sector are compatible with the business plan and, in the event of any discrepancy, do not indicate any predatory pricing. Furthermore France undertakes that Alstom will not make any acquisitions in the Transport sector, within the European Economic Area, involving an amount in excess of EUR 200 million (company value) over the next four years.
- (101) As far as the structural measures for opening up the French rolling-stock market are concerned, France undertakes to:
- (a) forward to the Commission, on request, opinions drawn up by Réseau Ferré de France (the French railway infrastructure manager) on the issuing of safety certificates and the technical files on which they are based;
 - (b) forward to the Commission the new draft 'rolling-stock' decree and, if necessary, explanatory details showing in particular the cases in which the decree is not mandatory. The decree will enter into force by 1 January 2005;
 - (c) abolish the legal requirement that the SNCF be consulted on the issuing of safety certificates, to enter into force on 1 January 2005;
 - (d) inform the Commission of contracts directly concluded by the SNCF and the Régie Autonome des Transports Parisiens (RATP) with Alstom;

⁽¹¹⁾ According to Alstom's 2003 annual report, the Hydro Power segment comprises the following products and services: hydraulic turbines and pumps up to 800 MW; hydro generators up to 800 MW; generator motors, salient pole generators, gates and valves; turnkey contracting including control systems covering the complete range of plants from 2 MW to 800 MW; refurbishment of hydropower plants; and water pumping stations and hydro-mechanical equipment for water transportation.

⁽¹²⁾ According to the information provided by France and available on Alstom's website, the industrial boilers business includes the following products: field erected boilers up to 300 ton/hour steam output; Fines Circulating Fluidised bed boiler FI CIRCTM up to 70 MWe output; package boilers for process steam up to 270 ton/hour; fossil fuelled plants up to 100 MWe output; biomass fuelled plants up to 100 MWe output; thermal waste treatment plants.

- (e) send the Commission, on request, reports analysing tenders submitted to the administrative board of the SNCF for contracts concluded by invitation to tender;

- (f) transpose early, by 1 November 2004, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽¹³⁾;

- (g) adopt so as to enter into force by 1 November 2004, pre-contract referral arrangements in line with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ⁽¹⁴⁾.

- (102) In addition, France undertakes to implement additional measures to restructure the Marine sector, in particular those required to bring the profitability threshold for shipbuilding down from 4.5 orders for ships (cruise ship equivalents) a year (average of the last five years) to [...].

- (103) Lastly, France [...] undertakes to withdraw [...] ⁽¹⁵⁾ already sent to the Commission for the purposes of authorising additional state aid for Alstom.

VI. ASSESSMENT

1. Market analysis ⁽¹⁶⁾

- (104) Alstom is an engineering group which designs, manufactures and provides maintenance for products and systems in three main sectors: power generation, rail transport and shipbuilding ⁽¹⁷⁾. The Commission based its assessment of the markets on its own analyses, industry reports and the report of its consultant BearingPoint France SAS. The figures referred to derive from that assessment and are approximate.

Power generation

- (105) The world market for power generation infrastructures and maintenance services is currently worth around EUR 150 billion a year. North America and Asia are the largest markets, each accounting for nearly 30 %. Four players offer a wide range of products and have significant market shares at world level: GE, Alstom, Siemens and Mitsubishi HI. Toshiba is also significant in terms of sales, but focuses mainly on steam turbines. GE is increasingly the market leader with an average yearly market share of 23 % in the overall power generation markets in the period from 1992 to 2002. GE is strongest in North America (more than 50 % market share) and in gas turbines (more than 50 % market share). During the same period, Alstom was in second place with an overall market share of 14 %.

- (106) The power generation market is currently experiencing a downturn after a substantial increase in orders between 1998 and 2001 with orders increasing from 136 to 219 GW/year during that period but returning to 1998 levels by 2002 (138 GW/year). Demand is expected to remain subdued in the medium term (on average, around [...] GW/year up to 2005). In the longer term, however, demand is forecast to be approximately [...] GW/year between 2005 and 2010. The power services sector has the most potential for growth, with projected yearly increases of [...] % (the value of the services sector accounts for around one third of the overall power generation market, i.e. approximately EUR [...] billion).

- (107) Alstom operates in the construction and services market in the following segments: gas turbines of more than 50 MW (large gas turbines), steam turbines of more than 70 MW (large steam turbines), hydro turbines and generators, boilers, turnkey plants and services. The Commission assessed market shares in each sector, for the same period 1992 to 2002. In the large gas turbines sector (which represents 28 % of the overall power generation market measured in terms of MW), GE is the clear market leader with a share of [...] %; Siemens follows with [...] % and Alstom is next with [...] %. The large steam turbines sector (32 % of the market) is more fragmented; Chinese players have a market share of [...] %, Alstom has [...] %, GE [...] % and Mitsubishi HI, Siemens and Toshiba follow with [...] %, [...] % and [...] % respectively. In the case of hydro turbines (9 % of the market), Alstom and GE each have a market share of [...] % and Siemens has a market share of [...] %; in the case of hydro generators (also accounting for 9 % of the market), Alstom leads with a market share of [...] % and GE follows with [...] %, the remainder being split between Chinese players ([...] %), VA Tech hydro ([...] %) and Siemens ([...] %). In the boilers sector (22 % of the market), Chinese players dominate with a market share of [...] % (demand being 80 % Asian); the other leading names are Mitsubishi HI ([...] %), Alstom ([...] %), Babcock & Wilcox ([...] %), Foster Wheeler ([...] %) and IHI ([...] %).

⁽¹³⁾ OJ L 134, 30.4.2004, p. 1.

⁽¹⁴⁾ OJ L 76, 23.3.1992, p. 14. Directive last amended by the Act of Accession of 2003.

⁽¹⁵⁾ Read 'the notifications'.

⁽¹⁶⁾ The market breakdown is provided for information purposes for the requirements of this Decision; it does not necessarily coincide with the relevant product market definition as assessed in merger cases.

⁽¹⁷⁾ The Commission's market analysis does not cover the industrial turbine sector or the transmission and distribution (T&D) sector, which have already been sold.

Rail transport

(108) The Commission estimates that the world market in rail transport equipment and services is worth some EUR 30 billion a year, which is in line with the estimate submitted by the French authorities. [...] of the market is for rolling stock (EUR [...] billion), [...] is for infrastructure (EUR [...] billion), [...] % signalling (EUR [...] billion) and [...] % services (EUR [...] billion). The rolling stock sector may be split into the following segments, their percentage in terms of average sales of the European market between 2000 and 2002 being shown in brackets:

- electrical/diesel multiple units (EMUs/DMUs): [...] %,
- high-speed trains and very high-speed trains (HSTs/VHSTs): [...] %,
- metros: [...] %,
- trams and light rail vehicles (LRVs): [...] %,
- locomotives: [...] %,
- passenger coaches: [...] %.

(109) The key players in terms of sales are Bombardier, Alstom and Siemens, and, to a lesser extent, GE and Ansaldo. These companies together represented some [...] % of the world rail transport market in 2002: Bombardier [...] %, Alstom [...] %, Siemens [...] %, GE [...] % and Ansaldo [...] %. Smaller players also active on the European markets include CAF, Talgo and Vossloh. Alstom and Bombardier have in recent times been the worldwide leaders in the major rolling stock segments. They have shared this leadership with Siemens on the European market. Alstom and Siemens are specifically well positioned on high-technology products.

(110) Europe is the largest market, with a share of [...] %. France, Germany and the United Kingdom are the largest European markets, amounting to [...] %, [...] % and [...] % respectively of average sales per year between 2000 and 2002, followed by the Italian and Spanish markets, which each represented [...] % of the European market over that period. Local presence (companies with local production facilities) is a significant factor with national or local players dominating the markets (market share in France [...] %, Germany [...] %, United Kingdom [...] %, Spain [...] % and Italy [...] % between 2000 and 2002). There is, however, a general trend towards the Europeanisation of the market.

The industry is considered to have overcapacity of approximately [...] %, though demand is expected to grow in the years ahead by [...] % a year. High-speed trains, signalling and services are the sectors that are likely to offer the best growth prospects.

(111) The French market is dominated by Alstom and, to a lesser extent, by Bombardier. The Commission estimates the market to be worth EUR 1,8 billion, based on average sales between 2000 and 2002 ⁽¹⁸⁾, within which EMUs/DMUs represent EUR [...] million, HSTs EUR [...] million, metros EUR [...] million, LRVs EUR [...] million and locomotives EUR [...] million. Alstom's market share over that period was [...] % in the HSTs sector, [...] % in LRVs and [...] % in locomotives ⁽¹⁹⁾. It is only in EMUs/DMUs (Alstom [...] %, Bombardier [...] %) and metros (Alstom [...] %, Bombardier [...] % and Siemens [...] %) that Alstom is present with other competitors. Alstom has approximately [...] % market share overall in France. Despite being dominant in HSTs in Germany, Siemens's overall market share in Germany is [...] % (behind Bombardier with [...] %).

Marine

(112) The overall shipbuilding market is dominated by Japan and South Korea, with China rising strongly. European shipyards, including Alstom, have focused on high-technology and high value-added segments, mainly cruise ships and liquefied natural gas (LNG) carriers. European shipyards have a [...] % cumulated share in the cruise ships market, split between four companies. On average, between 1994 and 2003, Alstom held [...] % of the world market for cruise ships, Fincantieri [...] %, Aker Kvaerner [...] % and Meyer [...] %. For both cruise ships and LNG carriers, the relevant market is worldwide.

(113) The cruise ship market is somewhat depressed at the moment, with very few orders on the books for delivery by 2007. Longer-term prospects are, however, good, thanks to the growth of the tourism industry. The underlying growth rate of the cruise industry is estimated to be [...] % a year up to 2010. The LNG carrier market is witnessing a rapid growth phase, and long-term prospects are also positive.

⁽¹⁸⁾ It should be borne in mind that the large contracts that are commonplace in this industry can radically change these figures.

⁽¹⁹⁾ This market share will have reduced significantly after a EUR 800 million contract for SNCF was won in early 2004 by a consortium of Alstom and Siemens.

2. Existence of aid

(114) Article 87(1) of the Treaty states that 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'. The Commission will accordingly examine the relevant measures to see whether they constitute state aid.

(115) As stated above, Alstom's main business areas are power generation, transport and shipbuilding. The relevant products and services are the subject of trade and competition between Member States. The points set out in point 1 demonstrate amply that any aid to Alstom affects trade between Member States and distorts competition in the common market.

(116) Furthermore, all the measures taken are financed by the state or by bodies controlled by the state, and/or whose conduct in the present context is quite clearly attributable to the state, such as the CDC ⁽²⁰⁾ and the CFDI. They are *ad hoc* measures to assist Alstom and are therefore selective.

(a) Measures 1 to 6

(117) In its decisions to initiate and extend the formal investigation procedure, the Commission concluded that the state measures covered by the 2 August 2003 agreement, as amended by the September 2003 agreement, constituted state aid within the meaning of Article 87(1) of the Treaty. The Commission would point out that initially France disagreed only with former measure 1 relating to the state's participation in the increase being regarded as aid and accepted that the rest of the measures in the 2 August 2003 agreement should be described as aid.

(118) It should be noted that former measure 1 has been replaced by the TSDDRA (present measure 1) and that France no longer disputes the term state aid being used to apply to this new measure 1 or, indeed, to any other of the measures covered by the September 2003 agreement. On the contrary, by the letter dated 4 September 2003, France stressed that it was absolutely essential for the state to participate in the operation in support of Alstom and

that the financial measures made available to the firm formed an overall integral package. It was thus made clear that the state's involvement was essential to prevent Alstom's failure and that it formed a key element of the 2 August 2003 agreement, as is confirmed by the amended version of the agreement, submitted by France on 26 September 2003. Without the participation of the state, the banks would not have undertaken to support the firm. France considers that the measures deriving from the September 2003 agreement do constitute aid, but that they are compatible with the common market.

(119) The Commission's preliminary position is thus confirmed as regards the measures covered by the decisions to initiate and extend the procedure. It cannot therefore be affected by the changes to some of the measures communicated by the French authorities in May 2004.

(120) The TSDDRA (measure 1) were subscribed to by the state in a context that cannot be that of a private investor operating in a market economy. They thus confer an advantage on Alstom through state resources. Similarly, the short-term facilities (measure 2) were granted in a context that cannot be that of a private market economy investor. It should be noted as regards this latter measure that the part underwritten by the CDC was underwritten at the request of the state and is therefore attributable to it, a fact which France has never disputed.

(121) The state's EUR 1,25 billion second-loss guarantee on the contract bonds granted by the banks (new measure 3), like the previous counter-guarantee (previous measure 3), is also an exceptional measure that cannot be regarded as being the normal behaviour of a financial institution, especially in view of Alstom's situation. They thus also confer an advantage financed through state resources, in this instance through the intermediary of the CFDI, and attributable to the state. It should be noted that France does not differentiate between measures granted directly by it and those granted through the intermediary of the CFDI. The agreement protocol of 27 May 2004, transmitted by letter dated 7 June 2004, establishes that 'the state will provide its counter-guarantee (to the new bonding mechanism) directly or through the intermediary of the CFDI'. The protocol also indicates that the new guarantee in measure 3 'will be issued by the CFDI, by the state or by any other entity operating under the guarantee of the state'. This shows clearly that, in this instance, the resources of the CFDI are state resources and that its actions are attributable to the state and must therefore, in the case in point, be regarded as constituting state aid.

⁽²⁰⁾ See the appropriate measures addressed to France in Case E 50/2001, CDC IXIS.

(122) The PSDD underwritten by the CFDI and guaranteed by the state (measure 4) and the TSDD directly granted by the state (measure 5) cannot similarly be regarded as reflecting the normal behaviour of market economy investors/creditors. No normal investor/creditor would have taken such action, unless perhaps already a creditor or shareholder of Alstom. It must once again be noted that the granting of the PSDD was, at the time of the August and September 2003 agreements, one of the commitments given by the state. This commitment took the form of a guarantee to the CFDI for the whole of the loan. As to the state's commitment to convert its claims into shares, directly or through the intermediary of the CFDI, it was given irrevocably and for all of the long-term claims held, whereas conversion will be optional for other creditors. This measure is thus aimed here once again at consolidating Alstom's financial structure, whatever its situation at the time of conversion, and confers on the state a role which is not similar to that of the other creditors and which involves an additional risk.

(123) With regard to measure 6, France did not specify the nature of the state's participation in the new capital increase. The Commission considers that this participation by the state in a new capital increase contains aid elements. As the Commission indicated in the document entitled 'Application of Articles 92 [87] and 93 [88] of the EEC [EC] Treaty to public authorities' holdings' ⁽²¹⁾, in certain circumstances, there exists a presumption of aid. This is the case where 'the authorities' intervention takes the form of acquisition of a holding combined with other types of intervention which need to be notified pursuant to Article 93(3)' or where 'the holding is taken in an industry experiencing particular difficulties'. In the case in point, the Commission notes that the capital injection was granted in parallel with other measures which are deemed to be state aid within the meaning of Article 87(1) of the Treaty and that Alstom is a firm in difficulty. Lastly, the capital injection must be viewed in parallel with other support measures taken by the state ⁽²²⁾. All form part of the same operation intended to support Alstom in the restructuring it is carrying out.

(124) In conclusion, the Commission considers that measures 1 to 6 all form part of a package clearly designed to assist the Alstom group, which would otherwise be confronted with serious risks of insolvency. Furthermore, it is clear

that the measures would not have been taken by a private market-economy investor and that they are such as to affect trade between Member States and are liable to distort competition in the common market. Consequently, the Commission considers that measures 1 to 6 all contain elements of state aid within the meaning of Article 87(1) of the Treaty.

(b) *Measures 7 to 10*

(125) As far as measure 7 is concerned, the Commission sent a supplementary request for information to France by letter dated 10 July 2003 in order to establish whether the acquisition price for Alstom's T&D division paid by the Areva nuclear group, amounting to EUR 920 million net, contained elements of state aid. The Commission considers that the clear and consistent information provided in the letters sent by France to the Commission on 4 September 2003 and 16 February 2004 removes any doubts that this measure might contain aid elements. In the absence of any evidence that might indicate that Alstom received an advantage from Areva, which would be attributable to the state, the Commission considers that there is nothing to suggest that the transaction contained state aid elements. Areva's conduct in this operation was that of a private market-economy investor. Even if this were not the case, the Commission considers that any aid element would be extremely small and would not in any way alter its overall assessment of the measures in support of Alstom.

(126) As regards the other measures (measures 8, 9 and 10), a distinction must be drawn between measure 8 and measures 9 and 10.

(127) With regard to measure 8, 'Bahrain', the decision to initiate the procedure referred to guarantees for the construction of an electric power plant in Bahrain. France denies having provided any guarantee whatsoever in connection with this purely commercial transaction. The Commission has examined the letter sent by France to the Bahrain authorities: it considers that the extremely general nature of the letter meant that it did not have any binding character that could have conferred an advantage on Alstom. Measure 8 does not therefore constitute aid within the meaning of Article 87(1) of the Treaty. Even if it did, the Commission considers that any aid element, which would be extremely difficult to quantify, would not in any way alter its overall assessment of the measures in support of Alstom.

⁽²¹⁾ Bulletin EC 9-1984.

⁽²²⁾ See judgment of the Court of First Instance of 15 September 1998 in Case T-11/95 BP Chemicals Ltd v Commission [1998] ECR II-3235.

(128) As regards measure 9, 'acquisition by GdF of an LNG carrier', and measure 10, 'acquisition by SeaFrance of a new ship', France indicates firstly that the orders were won by Alstom on its own merits and without any assistance from the state. However, France acknowledges having provided [... 'to'] GdF and [... 'to'] SNCF, the parent company of SeaFrance, special back-up conditions for the relevant purchases. Having analysed the letters referred to in recital 89, the Commission considers that the special back-up conditions must be deemed to be equivalent to state guarantees. In the case of GdF (measure 9), France states that it undertakes to '[...]' ⁽²³⁾ if the transaction could not be carried out successfully. In the case of SeaFrance (measure 10), France states that it '[...]' ⁽²⁴⁾ that would be required to enable SeaFrance to carry out the transaction successfully.

(129) It is clear from these 'comfort letters' that the state conferred a key advantage on Alstom by granting its customers a guarantee of compensation in connection with Alstom's carrying-out of the orders for the ships. This advantage was without any doubt a major factor for Alstom at a time when its financial situation was such that a prudent operator would certainly have been reluctant to order ships from it. It is also revealing that these 'comfort letters' replaced the contract bonds usually used for this type of transaction, which in other cases required state backing (see former and new measure 3), as France subsequently informed the Commission.

(130) Consequently, these measures must be regarded as being equivalent to guarantees in so far as they have a similar effect to that of the syndicated bonding facility. They must be regarded as forming an integral part of the entire package of aid which France provided for Alstom in order to support its restructuring efforts under the plan being implemented since March 2003. These guarantees were provided for Alstom in June 2003, at a time when the firm's difficulties were well-known. Consequently, the guarantees must be regarded as constituting the first aid measures in support of Alstom.

(131) Lastly, the Commission maintains the analysis which it set out in its provisional assessment as regards the banks' placement guarantee for the first capital increase and the bank's issuing of the ORA and therefore confirms that the relevant elements do not contain any state aid.

3. Amount of aid

(132) In its reply to the initiation and extension of the formal investigation procedure, France stated that the amount of aid granted by the state under measures 3 and 4 was less than the amount of the facilities covered. France accepts that the rest of the measures can be considered to be aid that can be valued at up to 100 % of its nominal value. It should be noted that France's comments relate only to the aid package before it was adjusted in May 2004. France does not therefore comment on the quantification of the aid included in the guarantee covering the new bonding facility that replaces the counter-guarantee (measure 3) or on that included in the new proposed capital increase (measure 6).

(133) Aid granted by the state, notably where it takes the form of underwriting of company stock (equity or quasi-equity), short or long-term loans or guarantees, must be quantified *ex ante*, i.e. at the time when it is granted. This is the only way of taking the risk assumed by the state into account, whereas *ex post* quantification is based on the materialisation of the risk. It is on the basis of these principles that quantification of the aid for Alstom must be established.

(134) The TSDDRA (measure 1) and the TSDD (measure 5) were quasi-equity. No investor in the same position as the state would have underwritten such securities. The risk was so great (in the event of default, the state would have had no hope of obtaining any repayment) that the Commission had regarded the amount of aid as being equal to the nominal amount of the securities. France accepted this assessment. This assessment is not fundamentally altered by the conversion of the securities into capital.

(135) The short-term liquidity (measure 2) was also made available at a time when no other bank was ready to do so. In the case of the EUR 300 million which the state undertook to renew up to February 2005 and which are therefore equivalent to a medium-term loan, the aid may amount to up to 100 % of the nominal amount. By contrast, EUR 900 million in Treasury notes were lent for the short term (and indeed repaid rapidly). Of that amount, EUR 800 million were intended to cover financing requirements pending the long-term financing granted by the state (TSDDRA, TSDD and PSDD), the full amount of which the Commission considers to be aid. Consequently, it can reasonably be considered that this aid was given by the state as from the time of the subscription of the

⁽²³⁾ Quotation from French Government letters that enabled the Commission to conclude that a guarantee existed.

⁽²⁴⁾ *Ibidem*.

EUR 800 million in Treasury notes. What is involved, therefore, is the same amount of aid which has simply changed form and which must be counted only once. In Table 7, the Commission therefore applies a weighting of 0 % to the EUR 800 million in short-term loans and a weighting of 100 % to the long-term financing used for their repayment. Finally, the aid included in the balance of EUR 100 million remains to be quantified. Compared to a medium and long-term loan, account must be taken of the lower risk of non-repayment for the creditor given the short duration and the fact that the loan was intended to establish longer-term financing solutions. The amount of aid is therefore only a fraction of the nominal amount thus lent.

(136) With regard to the syndicated bonding facility (measure 3), as described in Part IV, France only communicated calculations relating to the former counter-guarantee of EUR 2,275 billion. However, that counter-guarantee was abolished and replaced by a new guarantee of EUR 1,25 billion. As already explained, France bases its calculations on an estimate of the technical risk of 5 %, calculated on the basis of historical data that allow the amount of aid for the abolished counter-guarantee to be put at between EUR 0 and EUR 43 million.

(137) As pointed out in recital 133, the existence and the amount of aid must be determined *ex ante*, i.e. at the time when it was granted and not, as France claims, after the bonding facility produced its effects. The amount of aid cannot be estimated in relation to the risk for contracts effectively covered *a posteriori*. At the time when the guarantee was granted, France included no limit on the use of the facility. The counter-guarantee could thus cover any contract in any of Alstom's spheres of activity, provided that the contract did not exceed a duration of seven years. *Ex ante*, the aid contained in the counter-guarantee could amount to up to 100 % of the amount covered, in line with the Commission notice on the application of Article 87 and 88 of the EC Treaty to state aid in the form of guarantees⁽²⁵⁾ (hereinafter referred to as the 'notice on state aid in the form of guarantees'), point 3.2 of which states that 'where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by that guarantee'. Such risk could not be taken on by any private operator. In its reply to the initiation and extension of the formal investigation procedure, France stated that 'the banks no longer being able to provide this bonding mechanism on their

own in view of the commitments already entered into, the state provided support for this flow of bonds that is essential to Alstom's proper operation'. France thus acknowledges that, without the state counter-guarantee, Alstom would not have had access to a new bonding facility. Consequently, the Commission notes that the counter-guarantee operated *de facto* as a guarantee: it could be called immediately by the banks in the event that one of the projects which they had guaranteed could not be carried out or completed in time by Alstom.

(138) Consequently, the Commission considers that the potential risk for the state amounted to 100 % of the amount of the bonding facility covered by the counter-guarantee, i.e. EUR 2,275 billion. However, following the changes announced in May 2004, the state counter-guarantee covering the bonding facility will be abolished. It is therefore necessary initially to quantify the amount of aid resulting from the state's granting of the counter-guarantee during a period of some twelve months. On the basis of the information available, and in line with customary calculation methods, the aid corresponding to the counter-guarantee granted by the state during that limited period of time may be estimated at a maximum of EUR 411 million. This calculation starts from the assumption that the contracts covered are for three years (industry average), that the risk of the guarantee being called is spread evenly throughout the three-year period, that the bonds are issued in a linear fashion over 12 months (September 2003 to August 2004) for a total amount of EUR 3,5 billion and that, as from September 2004, the state counter-guarantee covering the bonds issued is abolished. The amount of aid is considered to be 100 % of the counter-guaranteed amount multiplied by the duration of the guarantee (number of months during which the guarantee applied over three years, i.e. 36 months). It will be recalled that the counter-guarantee was 65 % per bond. ⁽²⁶⁾

(139) As stated in recital 52, the abolished counter-guarantee will be replaced by a new second-rank guarantee amounting to EUR 1,25 billion, which will be incorporated into the new bonding facility, representing a maximum outstanding amount of EUR 8 billion (measure 3). Under this new arrangement, the potential risk for the state will be EUR 1,25 billion, as from the time that the EUR 700 million collateral becomes insufficient to cover potential losses. The new counter-guarantee must be treated as aid of up to a maximum of 100 % of its amount. This adjustment consequently means a EUR 1 billion reduction in the state's potential risk. As already indicated in part III, the reduction in the amount of the state's exposure was a key factor in deciding not to extend the formal investigation procedure once again.

⁽²⁶⁾ The formula used to estimate the aid is:

$$\frac{3\,500}{12} \times \sum_{i=1}^{12} \frac{i}{36} \times 0.65 = 410.76$$

⁽²⁵⁾ OJ C 71, 11.3.2000 p. 14.

- (140) Furthermore, the Commission considers that the amount of aid would not be substantially affected by subtracting the costs borne by Alstom in order to benefit from the guarantee. In the light of this assessment and the fact that the data provided by France did not contain figures allowing precise calculation of the amounts paid by Alstom to the state, the maximum amount of aid included in the guarantees has not been reduced.
- (141) As regards the guarantee given by the state to the CFDI for providing Alstom with the PSDD in measure 4, the same reasoning applies. Without the state guarantee amounting to 100 % of the PSDD, the CFDI would never have granted the loan. Consequently, in line with the notice on state aid in the form of guarantees, the Commission estimates that 100 % of the guarantee may constitute state aid. This analysis is borne out by the fact that France announced that Alstom's debts to the state would be converted into capital during the summer of 2004, including the PSDD. The conversion of the debt into capital shows that the PSDD is financed through state resources and attributable to the state and that it must be regarded as aid that may amount to up to 100 % of the relevant amount.
- (142) In view of the considerations set out in this part, the Commission considers that the state's participation in the new capital increase (measure 6) cannot be considered to represent the conduct of a normal market-economy investor, but constitutes aid. The aid included in such participation in the capital may amount to up to 100 % of the amount underwritten.
- (143) As regards the guarantees given to GdF and SNCF (measures 9 and 10), France recognises that their purpose was to replace contract bonds. In line with the estimate of the aid comprised in the guarantee in respect of the bonding facility, the Commission considers that the maximum amount of aid may be as high as 100 % of the amount covered. However, given the difficulty of assessing the scope and probability of the various risks that might arise from contracts not being carried out or not being carried out properly, and the proportion of such risks that might actually be covered by the state guarantee, the Commission is unable to quantify reliably the amount of aid inherent in the guarantees.
- (144) In view of the above, the Commission considers that Table 7 provides a realistic estimate of the maximum amount of aid resulting from the package of measures in support of Alstom, with the sole exception of measures 9 and 10. It should be added that the ensuing compatibility assessment takes account of each of the measures considered in its own right, with all its particularities, and not just of this overall assessment.

Table 7

Maximum amount of aid

(EUR billion)	
Measure	Maximum amount of aid
EUR 1.2 billion in short-term liquidity (measure 2)	
of which — EUR 300 million renewed	0,3
— EUR 900 million repaid (EUR 800 million repaid thanks to the following three measures)	0,1
TSDDRA (measure 1)	0,3
PSDD to be converted into capital (measure 4)	0,3
TSDD to be converted into capital (measure 5)	0,2
Capital increase II (measure 6)	0,17/0,22
Guarantee covering the bonding facility (measure 3)	
of which — 12 months counter-guarantee for 65 % of EUR 3,5 billion in bonds	0,411
— second-loss guarantee covering the EUR 8 billion in bonds	1,25
Total	3,03/3,08

4. Compatibility of the aid with the common market

(a) Rescue aid

- (145) In view of the above, the measures taken by the State must be assessed as *ad hoc* state aid in the present context. Article 87(2) and (3) of the Treaty provides for derogations from the general incompatibility rule set out in Article 87(1).
- (146) The derogations provided for in Article 87(2) of the Treaty are not applicable in this instance, since the aid measures do not have a social character and are not granted to individual consumers, they are not intended to make good the damage caused by natural disasters or exceptional occurrences, and they are not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.
- (147) Other derogations are provided for in Article 87(3) of the Treaty. Since the aid is not regional in purpose and since the derogation in Article 87(3)(b) is clearly not applicable, only the derogations provided for in Article 87(3)(c) apply. That provision authorises state aid intended to facilitate the development of certain economic activities, where the aid does not adversely affect trading conditions to an extent contrary to the common interest. The aid was granted in order to restore the long-term viability of a firm in difficulty. It must therefore be assessed on the basis of the guidelines. Following examination, the Commission considers that no other Community guidelines could apply in this instance. Nor has France invoked any other derogation provided for in the Treaty and has relied solely on the guidelines in order to justify the compatibility of the measures notified in August 2003.
- (148) In order to qualify for rescue and restructuring aid, the firm must be a firm in difficulty. Section 2.1 of the guidelines defines this concept. Point 6 states that the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (149) The company went from a net profit in the financial year 2000-2001 to a loss of well in excess of EUR 1 billion in the financial year 2002-2003. At the same time, equity fell by more than half, falling from EUR 2 billion to under EUR 800 million. Alstom can therefore be deemed to be a firm in financial difficulty within the meaning of point 5 of the guidelines, a fact which is disputed neither by France nor by any other party in these proceedings.
- (150) France considers that part of measures 2 and 3 can be deemed to be rescue aid. In support of this argument, it points out that the aid covers the firm's short-term liquidity requirements.
- (151) With regard to measure 2, France estimates that EUR 900 million under the financial package covered by the September 2003 agreement must be regarded as rescue aid within the meaning of the guidelines. This aid in the form of short-term liquidity, whose purpose was to prevent Alstom from going out of business immediately, was repaid within six months of disbursement.
- (152) As regards measure 3, France considers that the State counter-guarantee covering the syndicated bonding facility must be deemed to be rescue aid provided during the period when the bonds were issued by the banks and counter-guarantees provided by the State, since the measures implemented during that initial period made it possible to keep Alstom in business. According to France, the counter-guarantee should accordingly be regarded as rescue aid granted during the first year of implementation of the measures designed to rescue the firm. It should be noted that France does not evaluate the part of the aid that should be deemed to be rescue aid, nor does it evaluate the part that should be deemed to be restructuring aid. As far as the subsequent period is concerned, the aid should be regarded as restructuring aid. It must be noted that no evaluation was provided for the repositioning of the counter-guarantee in the new syndicated facility amounting to EUR 800 billion.
- (153) However, it should be borne in mind that, in its decisions to initiate and extend the formal investigation procedure, the Commission took the view that Alstom seemed to be undergoing restructuring at the time when the relevant measures were granted. Consequently, part of the aid measures cannot be deemed to be rescue aid, which, under the guidelines, cannot be granted once a restructuring or liquidation plan has been implemented, since rescue aid must necessarily precede any such plan. Furthermore, the conditions governing the authorisation of rescue aid, set out in point 23 of the guidelines, do not appear to be met in this instance. The Commission accordingly took the view, provisionally, that the aid should be examined in the light of the criteria governing the authorisation of restructuring aid.

- (154) The doubts which the Commission expressed when initiating and extending the procedure remain relevant. It still appears artificial to divide the aid package into rescue aid and restructuring aid, since no rescue period preceded the drawing up of the restructuring plan. Any such analysis would run counter to the objective pursued in granting rescue aid, which is to maintain the *status quo* until such time as the firm's future can be assessed.
- (155) The aid, whether covering liquidity requirements or structural measures, forms part of the ongoing restructuring. The Commission cannot agree to aid being arbitrarily deemed to be rescue aid when it is granted during the first six months or indeed during the first year of a restructuring operation. In this context, it does not matter that the aid covers the liquidity requirements of a firm undergoing restructuring, since restructuring aid often covers the liquidity requirements of firms being restructured, in the same way as it covers, for example, investment or costs linked to capacity reductions.
- (156) In addition, the Commission considers that the amount of aid in respect of measure 2 was to a very large extent taken from the amounts deriving from the structural measures that replaced it and that, for this reason too, it is appropriate to examine it under the heading of restructuring. With regard to the counter-guarantee (former measure 3), it does not fulfil any of the criteria for the authorisation of rescue aid set out in the guidelines. It did not in particular consist of liquidity support, since it did not constitute a loan guarantee as stipulated in point 23 of the guidelines. Furthermore, the counter-guarantee was to extend well beyond the six months provided for in the guidelines, since it was to cover projects lasting up to seven years.
- (157) In view of the above, the Commission considers it appropriate to assess these measures as being included in the package of restructuring aid.

(b) *Restructuring aid*

- (158) The guidelines set out four criteria all of which must be met if restructuring aid is to be authorised: a plan that will restore long-term viability, the avoidance of distortions of competition, aid limited to the minimum and full implementation of the restructuring plan.

Restoration of viability

- (159) The grant of aid is conditional on implementation of the restructuring plan which must be endorsed by the Commission in the case of all individual aid measures. A restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State commits itself.
- (160) With the help of its external consultant, the Commission assessed the restructuring plan presented by France in order to determine whether it is sufficient to restore the long-term viability of the firm. The Commission based its analysis on the information presented in August and December 2003 and subsequently in February 2004. The Commission's assessment examines firstly whether the operational restructuring is adequate, then looks at market prospects and their impact on the restructuring plan, and lastly considers the firm's financial situation once the restructuring plan has been implemented.

Operational restructuring

- (161) In analysing the restructuring measure, account must be taken of the specific character of the sectors in which Alstom operates. In particular, in the case of the Power and Transport sectors, the necessary investment in fixed assets is relatively low compared with working capital requirements. What matters most are project performance and engineering capacity, whereas physical production capacity is a major constraint only in the case of a limited number of products⁽²⁷⁾. Consequently, companies are generally able to broaden their supply in periods of high demand. Conversely, it is not always possible to cut surplus labour in periods of low demand, particularly in countries where social security legislation is more constrictive. Another specific feature of Alstom's activities is the need to manufacture different products⁽²⁸⁾ on the same production line depending on orders, so as to optimise production capacity utilisation (utilisation runs).

⁽²⁷⁾ Rolling stock bogies are an example of a market where it is necessary to have sufficient physical production capacity. Furthermore, local plant presence may be an important factor on the railway equipment market.

⁽²⁸⁾ For example, in the railway equipment sector, high-speed trains and metros are production substitutes. In shipbuilding, this is the case, for example, with cruise ships and LNG carriers.

- (162) Production capacity is measured mainly in terms of the space available for production (roofed area) and the manpower available, whereas installed plant and equipment are not generally a major constraint, unlike in other industries. In addition, it is difficult to measure production capacity by product, since, as has just been mentioned, different products may be manufactured at different times on one and the same production line.
- (163) Consequently, Alstom's internal restructuring measures were analysed by examining whether they allow the firm to reorganise efficiently its manpower use and rationalise its geographical presence.
- (164) The Commission considers that, as far as the Power Generation and Transport sectors are concerned, the restructuring measures are sufficient to ensure industrial recovery. The planned manpower reductions are considered to be in proportion to the scale of the excess capacity that exists in these industries. The estimates of the cost of these restructuring measures and the resulting savings seem realistic. Furthermore, the early implementation of the restructuring plan indicates that the process is well advanced, so that the risk of any slippage in achieving the objectives set for March 2006 is reduced.
- (165) In the Power Turbo-Systems sector, the [...] % reduction in manpower from [...] to [...] employees), is in line with the excess capacity indicated by Alstom's latest capacity utilisation rates as estimated by France ([...] % in August 2003) and by the Commission's expert ([...] % in 2002 and [...] % in 2003). This manpower reduction, combined with the cutting back and selective closure of plants and the operational reorganisation, will help to ensure that Alstom is competitive. In the Power Environment sector, the [...] % reduction in manpower (from [...] to [...]) [...] ⁽²⁹⁾ deemed necessary by the Commission's external expert. It is also greater than the excess capacity indicated by the capacity utilisation rate estimated by France (around [...] % in the first half of the year 2003-2004). This large reduction in manpower may be attributed to the closure of production sites, [...]. In the Power Services sector, the reduction in manpower amounts to [...] % (from [...] to [...]). No site closure is anticipated ⁽³⁰⁾, but that may be justified by the need for a local presence in this sector.
- (166) Lastly, restructuring is to be carried out in the Power Conversion sector (the T&D segment not sold to Areva), in the form of a [...] % reduction in the workforce (from [...] to [...] employees) and reorganisation of industrial structure.
- (167) In the Transport sector, there is to be a [...] % reduction in the workforce (from [...] to [...]). This workforce reduction is in line with the overcapacity estimates made by the external consultant (between [...] % and [...] %). However, the reduction is not consistent with Alstom's current capacity utilisation rate (more than [...] %) as stated by France. This inconsistency can, however, be explained in part by the fact that more than [...] % of the workforce reduction (combined with production site closures) affects the United Kingdom. Alstom Transport recently encountered considerable difficulties in the United Kingdom, and the market outlook there is much less positive than in other countries. Other workforce reductions may have been planned in anticipation of the improvement in productivity resulting from industrial optimisation.
- (168) In contrast with its assessment of the Transport and Power sectors, the Commission considers that the measures to be taken under the restructuring plan in the Marine sector are not sufficient to offset excess capacity in Alstom's shipyards. The workforce reduction to be carried out under the restructuring plan is [...] % (from [...] to [...] employees). Production will be concentrated on the Saint-Nazaire shipyards, which are the main shipbuilding site, while other less important sites will be closed. Notwithstanding these measures, the Commission doubts that these restructuring measures will be sufficient to raise capacity utilisation rates at Alstom's shipyards to an acceptable level in 2006. The reasons for this analysis are set out in recitals 169 and 170.
- (169) Although Alstom's Marine sector has the technical capacity to produce different types of vessel (cruise ships, LNG vessels, carriers, yachts, scientific and military vessels, etc.), it seems that future orders will probably be focused on demand for cruise ships. The restructuring plan itself anticipates that new orders will come mainly from that market, while other types of vessel are not expected to figure prominently amongst orders received. Current production capacity at the Saint-Nazaire shipyards is estimated at between five and six cruise ships a year. Some medium-term indicators suggest that, if Alstom maintains its current market share, it will receive orders for a maximum of three cruise ships a year for the period 2004 to 2006. Even if production of other types of vessels were able to offset any lower level of orders for cruise ships than this maximum, this would probably not have any significant impact that would raise the total level of orders to more than three vessels (cruise ship equivalent) a year.

⁽²⁹⁾ Read 'is in line with the minimum reduction'.

⁽³⁰⁾ Except for the La Courneuve site in France. That site formed part of the Industrial Turbines business which was sold to Siemens.

- (170) In this context, the Commission welcomed France's recent commitment that it would take the necessary measures as soon as possible, [...], in order to reduce Alstom's profitability threshold for shipbuilding from 4,5 ship order (cruise ship equivalents) a year (average for the last five years) to [...]. The Commission considers that this additional measure [...] is vital to ensure the long-term viability of this sector and that it must be implemented.

Operational performance

- (171) The Commission assessed in detail the forecasts resulting from the restructuring plan, both for orders and for operating revenue per sector. It checked that these aspects are in line with the forecasts established for each of the relevant markets. The Commission considers that the forecasts for orders are in general realistic and that the forecasts for market shares and industrial growth are sufficiently prudent. Two sectors, however, form an exception: Power Turbo-Systems and Marine.
- (172) Alstom's Power Turbo-Systems business has suffered very heavy losses due to the serious dysfunctional problems in 2000 with the GT24/GT26 heavy-duty gas turbines, which are the main model in the range marketed by Alstom in this sector. Work to improve the performance of the turbines has been carried out and commercial agreements concluded with dissatisfied customers. France states that the turbines are at present problem-free and that an order for three turbines has just been placed by a Spanish firm, a factor which suggests that Alstom's clientele has regained confidence in the quality and performance of the advanced turbines marketed by the group.
- (173) The Commission considers that there are sufficient positive factors confirming the renewed recovery in this sector. It is established that Alstom has indeed carried out the necessary work to achieve the required performance specifications and that the disputes with dissatisfied customers are in the process of being resolved; the Commission also notes that the provisions set aside in the accounts to cover any residual risks are sufficient. At all events, the order for three turbines placed in December 2003 and mentioned by France demonstrates that the sector can recover its competitiveness.
- (174) However, despite these encouraging signs, the Commission believes that France is overestimating Alstom's capacity to win back market shares in the years ahead. While Alstom's market share should be in line with its average performance in the period 1992 to 2002, the Commission calculates a sensitivity factor (orders at risk) of around [...] % of expected orders. The Commission regards EUR [...] worth of orders as being at risk, each year, in 2004/2005 and 2005/2006, out of EUR [...] worth of expected orders.
- (175) In the Marine sector, the Commission considers that the order forecasts under the restructuring plan are too optimistic, even assuming a long-term recovery in the cruise ship market and even allowing for the possibility for Chantiers de l'Atlantique to produce other types of high-tech vessels such as LNG carriers. The Commission regards EUR [...] worth of orders as being at risk, each year, in 2004/2005 and 2005/2006, out of EUR [...] worth of expected orders.
- (176) On the basis of these factors, the Commission considers that a total of EUR [...] in orders is at risk. This amount is only partly offset by the EUR [...] corporate buffer applicable to the anticipated orders. The restructuring plan therefore appears to be overoptimistic, and the Commission estimates that EUR [...] worth of orders at risk are not covered by the corporate buffer.
- (177) The Commission analysed the company's forecasts in terms of operating profit. It considers that the objectives embodied in the restructuring plan should be achievable. Expectations in terms of operating result are sufficiently prudent to offset the overoptimistic forecasts in terms of orders. The Commission therefore considers that the overoptimism on orders should not have the effect of jeopardising Alstom's operational profitability objective for 2006.
- (178) Having analysed the other basic elements of the restructuring plan intended to demonstrate the soundness of Alstom's operational profitability forecasts for 2006, the Commission considers that the forecasts are realistic. An initial aspect essential to improving profitability is the economy measures undertaken as part of the restructuring measures described in part II.3. The economy measures designed to rationalise costs appear realistic, and the pace at which they are to be implemented may be regarded as a positive indicator demonstrating that restructuring and a return to viability can be achieved within the deadlines set.
- (179) Secondly, the Commission notes that the substantial losses caused by the major dysfunctional problems that occurred with the GT24/GT26 heavy-duty gas turbines were exceptional. Furthermore, agreements have been reached to end the litigation procedures with certain customers. This type of difficulty, which is by its nature one-off, should not arise again in future.

(180) A third major factor is the forecast of continuing high profitability in areas which are already doing well and, in particular, in the Power Services division (operating margin of [...] % expected for 2006). These forecasts seem reasonable on the basis of the features of the relevant business sectors and their growth.

(181) In the light of these factors, the Commission concludes that the objective of 6 % operating margin at group level provided for in the restructuring plan for 2006 is achievable.

Return to long-term viability

(182) The Commission examined whether the measures provided for by the restructuring plan will enable Alstom to restore its long-term viability. As already indicated, the Commission considers that, at industrial level, the measures are in general sufficient to achieve the profitability objectives provided for in the plan. In addition, there are positive signs indicating that the exceptional technical problems which resulted in very heavy specific losses in recent years have been solved.

(183) However, the Commission continued to have doubts as to the effectiveness of the measures provided for in the restructuring plan to restore Alstom's long-term financial soundness after March 2006. The Commission was not therefore able to conclude that, at the end of the restructuring, the firm would be capable of acting on the market through its own resources, as required under the guidelines. The Commission's doubts stemmed from the following analytical factors.

(184) Firstly, an operating margin of 6 % in 2005/2006, corresponding to an operating profit of EUR [...], did not seem to be a sufficient basis to ensure the firm's long-term viability. Under the restructuring plan, net profits in 2005/2006 were to be EUR [...], or [...] % of sales.

(185) Moreover, the Commission estimated that the level of economic debt compared to equity remained too high in 2006: EUR [...] in relation to EUR [...]. This gave a debt/equity ratio (gearing ratio) of [...]. Consequently, Alstom would have had to earmark a very large percentage of its revenue to pay for the interest on its debt: financial charges would have been EUR [...], while earnings before interest, taxes, depreciation and amortisation (EBITDA) would have had to total EUR [...], i.e. an interest cover ratio of [...]. Such a level clearly indicated a precarious financial situation that would be difficult to sustain in the long term.

(186) In addition, the Commission considered that Alstom might lack the short-term financing capacity to meet liquidity requirements during the restructuring period. In its assessment of Alstom's liquidity plan, the consultant considered that the headroom (credit lines available minus credit lines already used) should be kept above EUR [...], a level which the Commission considers sufficient, but only if there are no unforeseen difficulties. At all events, under the liquidity plan, the level of headroom was to be below the reference level of EUR [...] during the first and second quarters of the year 2005/2006.

(187) Lastly, the Commission considered that it was necessary for Alstom to increase its equity in the medium term. Under the plan, the level of equity in 2006 was to be EUR [...], or [...] % of sales, while during the period 1998/2000 equity amounted to 12 % of sales. A sounder financial balance sheet than that anticipated for 2006 was deemed necessary for the firm to be able to attract investors and thus finance itself independently on the markets.

(188) In conclusion, the Commission considered that Alstom's restructuring plan remained unsatisfactory in financial terms, mainly because of the very high level of debt and very low level of equity.

(189) However, in May 2004, France informed the Commission that the firm was going to carry out a capital increase in cash and to convert part of its debt into capital. The two transactions will mean that equity will be between EUR [...] and EUR [...] and that debt will be between EUR [...] and EUR [...] in March 2006, depending on the degree of participation of banks in the conversion of claims into capital, corresponding to a sales percentage of [...] % to [...] %. The ratio between debt and equity (gearing ratio) will be between [...] and [...] in 2006, which represents a sufficient improvement over the level in the forecasts made on the basis of the previous financial plan. Furthermore, the reduction in debt will mean a decrease in financial charges: in 2006, financial charges will be between EUR [...] and EUR [...]. On the basis of an EBITDA of EUR [...], the interest cover ratio should be between [...] and [...], which indicates a sustainable financial situation.

(190) In conclusion, the new capital increase and the consequent reduction in debt largely allow the Commission's doubts as to the firm's medium-term viability to be removed.

(191) In addition, the Commission notes France's commitment, referred to in part V, to conclude one or more industrial partnerships within a period of four years.

- (192) The Commission estimates that, in order to consolidate Alstom's long-term viability prospects, it is necessary for the firm to form one or more partnerships. The partner(s) chosen should have sufficient financial strength and make a financial and industrial contribution to the partnership set up. The relevant industrial activities should, however, be such that the partnership(s) can be approved by the Commission under the competition rules laid down in the Treaty. The partnership(s) should be long-term. They should involve structural and strategic agreements not limited to carrying out a specific project together, for example in response to a particular invitation to tender. In order to have a significant impact on Alstom's industrial and financial development, the partnership(s) should relate to a significant part of Alstom's activities in its core business sectors of transport and energy, in areas not involved in joint ventures (see recitals 206 and 207). In conclusion, the partnerships should enable Alstom to make use of its technological and industrial assets by overcoming the financial constraints to which it is subject as regards the activities concerned ⁽³¹⁾.
- (193) It should also be noted that the partnerships will be established, in principle and unless otherwise specifically authorised by the Commission, with firms that are not controlled by the French public authorities, *de jure* or *de facto*, individually or jointly. Otherwise, the partnerships might perpetuate the state's involvement in the Alstom group, which would be in flagrant contradiction with the other commitment given by France, namely to put an end to the participation of the public authorities in Alstom's capital and hence to the state aid which such participation entails.
- (194) In conclusion, the Commission considers that the commitment given on partnerships must be fulfilled if all the doubts regarding the long-term viability of the firm are to be removed.
- (195) If it is to be authorised by the Commission, restructuring aid must meet a second condition, which is that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid has to be regarded as 'contrary to the common interest' and therefore incompatible with the common market. This condition usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period.
- (196) As already stated, up to 2003 Alstom carried out activities in the following areas: power generation, transmission and distribution, rail transport and shipbuilding. Consequently, measures to offset the adverse effects of the aid on competitors should be taken in each of these sectors. The restructuring plan provides for the refocusing of Alstom around its core activities. It is important in this context that the restructuring plan, as notified to the Commission by France on 5 December 2003 and 15 March 2004, be fully implemented, including as regards the assets to be sold off.
- (197) In the power generation sector, it should be noted that the company has already sold off the industrial turbines division, including small gas turbines (< 50 MW) and steam turbines (< 100 MW) to Siemens, and the T&D division to Areva. These divestitures accounted for 20 % of Alstom's total turnover in 2002/2003. In addition, the commitments given by France described in part V provide for the selling off of further assets in the power generation sector, including industrial boilers, and the setting up of a joint venture covering hydro-power.
- (198) As regards Alstom's second core business division, rail transport, France undertakes to sell off in particular the Valencia freight locomotive plant and its Transport business in Australia and New Zealand.

Prevention of undue distortions of competition

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- (198) As regards Alstom's second core business division, rail transport, France undertakes to sell off in particular the Valencia freight locomotive plant and its Transport business in Australia and New Zealand.
- (199) As regards these latter two business divisions and industrial boilers, Alstom must continue to run them in accordance with the principles of good management, providing them with the means for normal development and not taking any measure that would reduce their value, for example through the transfer of intangible assets (patents, licences, commercial agreements, etc.), staff, customers or sales capacity to the parent company or any other part of the Alstom group. For this purpose, France undertakes, for each of the business divisions being sold off, that Alstom will set up or stabilise a dedicated management to ensure that they are managed properly. A trustee appointed by France and approved by the Commission will monitor the proper handling of the management and sale of these business divisions.

⁽³¹⁾ See in particular point 34 of the guidelines.

- (200) As regards the EUR 800 million (on the basis of 2002/2003 turnover) in additional divestitures that will have to be carried out from among the non-Marine business divisions, such divestitures must meet the following two conditions. First, the business sold off may not be the subject under this Decision of any previous or future sell-off or be included in the joint venture referred to in recital 207. Second, the sell-off must cover a viable business activity which comprises fixed assets and staff and whose 2002/2003 turnover is representative of the level of business at the time of the sell-off [...].
- (201) On the basis of turnover which is already reduced by 20 % through the sale of industrial turbines and the T&D business, the additional sell-offs represent an additional reduction of some 10 %. Such sell-offs must be in addition to significant reductions in business activity (notably total or partial closures of production sites) and to the staff reductions mentioned previously (see Table 2), as provided for in the restructuring plan.
- (202) In this context, the Commission considers that the compensatory measures carried out or to be carried out by Alstom will avoid undue distortions of competition within the meaning of points 35 to 39 of the guidelines. The compensatory measures combine both site closures and sell-offs. The fact that, in the relevant sectors, market presence and production capacity are not highly dependent on installed production lines is the reason why, in this instance, the Commission has focused on sell-offs rather than on reducing the size of physical production plant.
- (203) This conclusion is borne out by the specific conditions or obligations applicable to authorisation of the aid and imposed or accepted pursuant to point 42 of the guidelines.
- (204) In the transport area, France undertakes to begin a series of structural measures designed to increase effectively the opening-up of the French market for rolling stock, so as to increase competition on that market to the benefit of the consumer. This commitment, which is a substantial commitment on markets which, on the basis of the information available, tend to give preference to national undertakings, is in line with point 42(i) of the guidelines.
- (205) Still in the Transport sector, limitations will be applied to Alstom's pricing and acquisitions policy so as to avoid distortions of competition.
- (206) The Commission notes that France has given a commitment that the firm will conclude one or more industrial partnerships involving significant parts of Alstom's business within a period of four years. In addition to improving the company's viability, this commitment regarding partnerships is also considered to be a compensatory measure for competitors. It obliges Alstom to find partners in major business activities and to involve them in such activities. The Commission considers that the partnerships requirement is mainly necessary in the transport and energy sectors, where distortions of competition due to the aid are most sensitive.
- (207) The joint venture that will be set up in hydro-power, on the basis of the commitment entered into by France, meets the same considerations. The Commission considers that the concept of 'joint control' must be understood within the meaning of Council Regulation (EEC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC regulation on concentrations) ⁽³²⁾.
- (208) These last three aspects (limitations on pricing and acquisitions policy, industrial partnerships and the setting-up of a joint venture), whose substance has been set out in detail, are in line with point 42(ii) of the guidelines.
- (209) Lastly, the undertaking given by the French authorities to withdraw the notification of innovation aid and not to present notifications for restructuring aid, both of which relate to the Marine sector, is in line with point 42(iii) of the guidelines. In this context, the Commission considers that it is also necessary to require that no additional aid be granted to Alstom until the end of the restructuring process and, at all events, until the date on which the scope for issuing new bonds under the EUR 8 billion syndicated facility expires, i.e. 30 June 2006. This condition does not apply to aid covered by Article 87(2) of the Treaty, aid granted under research projects jointly financed by the European Union or aid granted under the temporary defensive mechanism (see recital 218).

⁽³²⁾ OJ L 24, 29.1.2004, p. 1.

- (210) Given Alstom's position on the French market, particularly in the rolling stock sector, the Commission notes with satisfaction the undertakings given by France as regards structural measures to open up this market. Taken as a whole, the measures will allow other firms to overcome certain obstacles which currently substantially restrict competition on this market.
- (211) Consequently, the Commission considers that sufficient measures have been taken to limit the adverse impact of the aid on competition, competitors and consumers.

Aid in proportion to the costs and advantages of restructuring

- (212) A third condition must be met if the aid is to be authorised, which is that the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid beneficiaries must make a significant contribution to the restructuring plan from their own resources. In any event, it must be demonstrated to the Commission that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity.
- (213) The Commission notes that the costs of reorganising Alstom's activities, as described in the plan assessed by PricewaterhouseCoopers (PwC), amount to EUR [...] ⁽³³⁾. To this amount must be added the capital requirements needed to re-establish a sufficiently sound financial structure. Equity almost totally disappeared from the balance sheet, following the exceptional losses of the last two years. Lastly, account must also be taken of the firm's very substantial bonding and liquidity requirements.
- (214) The Commission notes that the state is providing EUR 300 million through the TSDDRA (measure 1), EUR 1,2 billion in short-term liquidity (measure 2), EUR 1,25 billion through a second-rank guarantee (measure 3), EUR 300 million through a guarantee for a PSDD, convertible into capital, (measure 4), EUR 200 million through a TSDD, also convertible into capital (measure 5) and is participating in a new capital increase amounting to EUR 180 to 22 million. Lastly, through guarantees in the Marine sector, the state has accepted responsibility for an unspecified amount and has already granted guarantees (former measure 3) valued at some EUR 411 million. All in all, the state's quantified overall exposure during the relevant period has amounted to a maximum of EUR 3,470 billion. However, it should be noted that, since the firm has already repaid EUR 900 million (measure 2), as has already been indicated, the potential risk for the state amounts to EUR 2,570 billion. As already explained, the value of the aid has been put at a maximum of between EUR 3,03 and 3,08 billion (see Table 7), plus an indeterminate amount stemming from measures 9 and 10.
- (215) The contribution made by the firm itself to covering costs and capital requirements is significant. Very substantial divestitures have been and will be carried out. The revenue from these divestitures has allowed and will allow part of these capital requirements to be covered. The proceeds will make it possible to limit the firm's indebtedness and future financial charges. Furthermore, in addition to the EUR 900 million repayment already referred to, which is not included in Table 8 so as to avoid double counting, the firm will make a very significant contribution by financing itself the EUR 700 million cash collateral, which is an essential element in obtaining the new bonding facility.
- (216) Apart from Alstom's contribution, a substantial private contribution will be made by banks and investors. The banks have provided a guarantee on the first capital increase amounting to EUR 300 million, short-term liquidity amounting to EUR 300 million (measure 2), a syndicated bonding facility on which their real exposure will amount to EUR 6,05 billion (measure 3), a PSDD amounting to EUR 1,2 billion, ORA bonds worth EUR 900 million and a guarantee on the placing of the new capital increase amounting to EUR 800 million to EUR 1 billion, of which EUR 700 million will be used to finance the cash collateral. Alstom and the private sector have invested in the restructuring of the company an amount of between EUR 10,3 and 10,4 billion (or between EUR 9,6 and 9,7 billion if the cash collateral financed by the capital increase is not taken into account). The private contribution may therefore be considered to be substantial here.

⁽³³⁾ See Table 2.

Table 8

Description of the private contribution, excluding the proceeds of divestitures

(EUR billion)	
Measures	Amount
Bank/Investors	
Capital increase I	0,3
ORA	0,9
Renewed short-term liquidities (measure 2)	0,3
PSDD with possible conversion into capital (measure 4)	1,20
Bonds amounting to EUR 8 billion (measure 3)	6,05
Capital increase II (measure 6)	0,83-0,98
Alstom	
Financing of the collateral covering initial losses (measure 6)	0,7
Total	10,3-10,4

(217) In addition, the Commission must check that the aid will be limited to the minimum needed to enable restructuring to be undertaken. It must be noted, firstly, that part of the aid has already been repaid, notably the EUR 900 million in measure 2. Secondly, France has undertaken to withdraw from the firm's capital within the twelve months following Alstom's obtaining an investment grade rating and, at all events, within four years. [...]. Since France is not participating in the company's capital as a private investor but for the purpose of providing aid, France's undertaking is necessary in order to ensure that this state aid in the form of a capital participation is limited to the minimum period necessary. Consequently, the Commission considers it essential that this withdrawal from the capital should be effective.

(218) The Commission also wishes to ensure that no additional aid is provided that would alter the proportionality of the aid measures as a whole which are the subject of this Decision. For this reason, no further aid may be paid to the company for two years from the date of this Decision, which corresponds approximately to the restructuring period and the period during which new bonds may be issued under the new syndicated bonding facility ⁽³⁴⁾. The Commission believes that the aid granted by France will enable Alstom both to carry out its restructuring and

to pursue all its business activities during this two-year period, without having recourse to any new additional aid. This condition does not apply to aid that is fully compatible with the Treaty under Article 87(2) of the Treaty, aid granted for research projects jointly financed by the European Union, or to aid granted under the temporary defensive mechanism pursuant to Council Regulation (EC) No 1177/2202 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding ⁽³⁵⁾ whose specific purpose is to assist Community shipyards in those segments that have suffered adverse effects from unfair Korean competition, which may be the case with Alstom group companies. In this context, it must also be ensured that no aid is granted by one of Alstom's future partners. For this reason too, France has undertaken to obtain the Commission's prior agreement in the event of a partnership with an undertaking controlled by the state, *de jure* or *de facto*, individually or jointly.

(219) Lastly, point 40 of the guidelines stipulates that the aid must not provide the company with surplus cash which could be used for aggressive, market-distorting activities or to finance new investment that is not essential for restoring the firm's viability.

⁽³⁴⁾ Clearly, in the case of rescue and restructuring aid, the prescription period is 10 years.

⁽³⁵⁾ OJ L 172, 2.7.2002, p. 1. Regulation as amended by Council Regulation (EC) No 502/2004 (OJ L 81, 19.3.2004, p. 6).

(220) Two measures have been taken in order to ensure that these provisions are complied with. Firstly, France has undertaken to monitor annual average margins, by subsector, for four years so as to remove any possibility of predatory pricing. Secondly, France has undertaken that corporate acquisitions within the European Economic Area will be substantially restricted during the same period, without ruling out entirely acquisition transactions that are modest in scale. These measures apply solely to the Transport sector. Alstom's Transport sector has suffered few exceptional losses, and margins have remained satisfactory. The bulk of the aid is therefore intended for the restructuring of other divisions within the company. These two measures are intended to ensure that the aid will not be used by Alstom in the Transport sector to finance predatory pricing policies or a major external growth policy to the detriment of competitors. In view of the above, the Commission considers that, despite its volume, the aid is limited to the strict minimum needed to restore the long-term viability of the firm and notes that the private contribution is very significant, as required by the guidelines.

Full implementation of the plan

(221) The plan for restructuring Alstom's four divisions (Power, Transport, Marine and Power Conversion), together with all the commitments given by France, must be implemented in full. The Commission notes France's undertaking in this respect and will need to be kept informed on progress in implementing the plan and the relevant commitments. This information must take the form of reports on the state of progress of restructuring. It will be supplemented by notification of PwC's reports validating the business plan and liquidity plan.

(222) Specific information will also have to be provided to the Commission to ensure that certain commitments are fulfilled,

VII. CONCLUSION

(223) The Commission finds that France has illegally implemented a large part of the aid which is the subject of this Decision in breach of Article 88(3) of the Treaty. However, the aid can be declared compatible with the common market provided that all the conditions imposed are fulfilled,

HAS ADOPTED THIS DECISION:

Article 1

The aid measures implemented by France for Alstom are compatible with the common market, subject to the obligations and conditions set out in Article 2.

Article 2

1. The plan for restructuring Alstom, as communicated to the Commission by France on 5 December 2003 and 15 March 2004, must be fully implemented, including as regards the assets that have still to be disposed of.

2. France shall withdraw from Alstom's capital within twelve months of the company obtaining an investment grade rating by one of the two main rating agencies. Such withdrawal shall at all events be carried out within four years of the adoption of this Decision. [...]

3. Alstom shall conclude one or more industrial partnerships, within four years of the adoption of this Decision. The partnerships shall relate to significant parts of Alstom's business. Unless otherwise agreed in advance by the Commission, such partnerships shall not involve undertakings controlled by the state, *de jure* or *de facto*, individually or jointly.

4. In the case of Alstom's 'Hydro Power' business, a joint venture shall be set up [...] with joint control in which Alstom shall hold a maximum of 50 % of the capital.

5. The following assets of Alstom shall be sold to a buyer which is independent of Alstom: the Valencia freight locomotive plant, transport activities in Australia and New Zealand, and industrial boilers [...].

In the month following notification of this Decision, France shall submit for approval to the Commission:

(a) appropriate provisions for the establishment or stabilisation by Alstom of dedicated management to ensure that each of the business activities referred to in the first subparagraph is properly run, providing them with the means for normal development and not taking any measure that would intentionally diminish their value, for example the transfer of intangible assets (patents, licences, commercial agreements, etc.), staff, customers or sales capacity to the parent company or any other part of the Alstom group;

- (b) an appropriate trusteeship and the appointment of an independent trustee who will be obliged to maintain the necessary confidentiality and ensure the proper carrying out of the management and sale of the assets referred to in the first subparagraph. Once appointed, the trustee shall begin his work immediately. If the trustee identifies irregularities, he shall notify them immediately to the Commission.
6. Business activities worth EUR 800 million in turnover (base 2002/2003) within the Alstom group, excluding the Marine sector, shall be divested within a period of [...]. To be eligible, the business activities divested must cover a viable business comprising fixed assets and workforce, whose 2002/2003 turnover is representative of the level of business at the time of the divestiture, and they must not be the subject within the framework of this Decision of a past or future divestiture or be included in the joint venture provided for in paragraph 4.
7. [...] and [...] shall be divested within a period of [...].
8. France shall submit to the Commission, every year for four years, a report validated by an expert appointed by Alstom and approved by the Commission. The report will check that the margins achieved on average each year, by subsector, on the contracts concluded by the company in the Transport sector are compatible with the business plan and, if not, do not indicate predatory pricing.
9. Alstom's corporate acquisitions in the Transport sector within the European Economic Area shall not exceed a total of EUR 200 million (company value) for a period of four years.
10. France shall implement the following structural measures to open up the French rolling stock market.:
- (a) it shall send the Commission, on request, the reports of Réseau Ferré de France and the Société Nationale des Chemins de fer Français (SNCF) on the issuing of safety certificates and the technical files on which they are based;
- (b) it shall send the Commission the new draft 'rolling stock' decree and inform the Commission, as regards each of the contracts and framework agreements referred to in point (f), whether and for what reasons the standards provided for in the decree are mandatory; the decree will enter into force by 1 January 2005;
- (c) it shall withdraw the legal obligation to consult the SNCF on the issuing of safety certificates and replace it by the obligation to consult [...];
- (d) it shall inform the Commission on the contracts and framework agreements concluded by private contract by the SNCF and the Régie Autonome des Transports Parisiens (RATP) with Alstom, where their amount is greater than EUR 473 000, in the form of a list sent to the Commission, once a year, indicating for each of the contracts or framework agreements the reasons why the negotiated procedure was used without prior invitation to tender;
- (e) it shall apply on 1 November 2004 the measures necessary for implementing Directive 2004/17/EC;
- (f) it shall communicate to the Commission once a year a list of the contracts and framework agreements amounting to more than EUR 473 000 awarded to Alstom by the SNCF and the RATP following an invitation to tender and shall indicate for each contract or framework agreement how the technical specifications were formulated, as required by Article 34(3) of Directive 2004/17/EC;
- (g) it shall send the Commission, on request, reports analysing the tenders submitted to the SNCF administrative board for the contracts and framework agreements awarded to Alstom by the SNCF and the RATP after having been put out to competition;
- (h) it shall adopt, to enter into force by 1 November 2004, pre-contract referral arrangements in accordance with Directive 92/13/EEC.
11. France shall implement such additional measures to restructure Alstom's Marine sector as are necessary to bring the profitability threshold down from 4.5 ship orders (cruise ship equivalents) a year (average for the last five years) to [...].
12. No aid other than that referred to in Article 87(2) of the Treaty, or aid granted under research projects jointly financed by the European Union, or aid covered by Regulation (EC) No 1177/2002 shall be granted to Alstom until the restructuring process has been completed and, at all events, for two years following the adoption of this Decision. No other restructuring aid shall be granted in breach of the principle that such aid should be granted once only.
13. For the purposes of monitoring compliance with the conditions set out in paragraphs 1 to 12, France shall provide the Commission with the following information:
- (a) Alstom's obtention of an investment grade rating pursuant to paragraph 2 in the month following such obtention;
- (b) every three months, the steps taken in relation to industrial partnerships pursuant to paragraph 3 and the results of such steps;

- (c) every three months, the steps taken to set up a joint venture covering hydro power activities pursuant to paragraph 4; in the month following the conclusion of the agreement setting up the joint venture, France shall forward to the Commission supporting documents enabling the Commission to establish that the joint venture is one having joint control within the meaning of Regulation (EC) No 139/2004;
- (d) in the month following their completion, each of the transactions specified in paragraphs 4 and 5;
- (e) the adoption of the measures provided for in paragraph 10(c), (e) and (h);
- (f) every three months, the measures taken in relation to additional restructuring of the Marine sector pursuant to paragraph 11;
- (g) annual reports on the state of progress of Alstom's restructuring, supplemented by reports validating the business plan and liquidity plan.

Article 3

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

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 7 July 2004

For the Commission

Mario MONTI

Member of the Commission
