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II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 19 January 2005

on the Rivesaltes plan and CIVDN parafiscal charges operated by France

(notified under document number C(2005) 50)

(Only the French text is authentic)

(2007/253/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given interested parties notice to submit their comments pursuant to that Article ⁽¹⁾, and having regard to those comments,

Whereas:

- (3) By letter dated 21 January 2003, the Commission informed France of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on the other Member States and interested parties to submit their comments on the aid in question.
- (5) The French authorities sent their comments by letter of 16 and 18 June 2003. The Commission received comments from the complainant which it sent to the French authorities by letter of 6 August 2004. The French authorities replied by letter of 10 September 2004.

I. PROCEDURE

- (1) Following a complaint, the Commission questioned the French authorities about the measures subject to this Decision by letters of 19 July 1999, 16 December 1999, 24 August 2000 and 9 December 2000. France replied to the Commission by letters of 19 August 1999, 24 February 2000 and 25 January 2001. The Commission met the French authorities on 26 January 2000 and a delegation of the inter-branch committee for natural sweet wines (CIVDN) on 31 March 2000.
- (2) Since the measures were applied without prior authorisation from the Commission, they were entered in the register of non-notified aid under the number NN 139/2002.

II. DESCRIPTION

1. THE 'RIVESALTES PLAN'

- (6) In 1996, the CIVDN decided to set up a wine conversion project aiming to replace part of the production of natural sweet wines in the Eastern Pyrenees region by grubbing up and replanting with quality wine varieties, in order to remedy the structural crisis facing this product, demonstrated by regular collapses in outlets. The purpose of the aid was to finance improvements to the quality of the vine population in the region. The scheme was fully wound up on 1 August 2002.

⁽¹⁾ OJ C 82, 5.4.2003, p. 2.

⁽²⁾ See footnote on page 1.

(7) Producers in the region had access to two types of aid designed to implement this conversion project (known as the 'Rivesaltes Plan'):

- a 'set-aside premium' per hectare financed by an inter-branch contribution;
- and area aid financed from State and local authorities' funds to cover part of the conversion costs proper.

1.1. THE 'SET-ASIDE PREMIUM'

(8) By decision 96-1 of 5 July 1996, the CIVDN for registered designation of origin (AOC) introduced an inter-branch contribution to finance the conversion plan for 'Rivesaltes' and 'Grand Roussillon'.

(9) The purpose of the contribution, amounting to FRF 50/ hectolitre ⁽³⁾ produced in the Eastern Pyrenees Region where the natural sweet wines concerned are made, was to finance the payment of a 'set-aside premium' for any plot which, having produced 'Rivesaltes' or 'Grand Roussillon' wine in 1995, would produce table wine or 'vin de pays' from the 1996 to the 2000 harvests inclusive. The capital generated from levying the contribution was assigned to a special fund.

(10) The 'set-aside premium' was in effect granted to producers undertaking not to claim the registered designations of origin (AOC) 'Rivesaltes' or 'Grand Roussillon' for five years. This premium was also designed to compensate for the loss of revenue caused by the impact on pricing of no longer using these two designations. The premium did not imply stopping or reducing production, but merely compensating for producing without the registered designation of origin. The aim was therefore to rapidly reduce the potential for marketing AOC wines.

(11) The premium amounted to FRF 5 000 a year per hectare 'set aside'. All plots benefiting from aid ceased to receive the premium in the year they were converted.

(12) The Commission was not informed of the overall amount of aid paid under this scheme. No information was provided on the amount of revenue that the inter-branch contribution generated nor on the number of hectares for which aid was received.

1.2. CONVERSION AID

(13) According to the French authorities, the conversion plan for the AOC Rivesaltes vineyard as adopted in 1996 covered 3 250 hectares: 1 250 hectares for production of 'Muscat de Rivesaltes'; 1 000 hectares for production of 'Côtes du Roussillon' and 'Côtes du Roussillon Villages' (Syrah,

Mourvèdre, Roussanne, Marsanne and Vermentino) and 1 000 hectares for the production of varietal 'vins de pays' (Chardonnay, Cabernet, Merlot...).

(14) To support this plan, the French authorities had agreed to provide FRF 111 million in financial assistance, distributed as follows: FRF 85 million via the *Office national interprofessionnel des vins* [National Inter-branch Wine Office] and FRF 26 million by local authorities (Languedoc-Roussillon and the Eastern Pyrenees General Council).

(15) This assistance would cover aid amounting to FRF 25 000/ ha for conversion to AOC Muscat de Rivesaltes, and FRF 40 000/ha for conversion to AOC Côtes du Roussillon Villages and 'vin de pays'.

(16) According to the French authorities, the real costs of conversion in the region could be estimated at FRF 110 000/ha. The French authorities confirmed that the conversion plans had mostly been implemented (2 350 ha out of the 3 250 ha planned).

(17) According to the French authorities, the total cost of the conversion plan implemented came to FRF 258,5 million (EUR 39,4 million). The public authorities contributed FRF 75,250 million (EUR 11,01 million) of the FRF 111 million (EUR 16,9 million) initially provided for. According to the information provided by the French authorities, as a proportion of the total funding, 29,11 % of the conversion costs actually incurred was covered by public bodies.

(18) The French authorities pointed out that they send an annual report to the Statistical Office of the European Communities, in accordance with Article 9 of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine ⁽⁴⁾, including a statement of the area under vines, broken down by department and by type of grape produced (wine grapes, including quality wine produced in certain regions (quality wine psr), table grapes) and a statement of grubbed-up areas and vine planting submitted in the same format with a breakdown by department and by type of grape produced. The French authorities enclosed a copy of the tables sent for the 1997/98 marketing year.

2. INTER-BRANCH CONTRIBUTIONS FOR PUBLICITY AND PROMOTION AND FOR OPERATING CERTAIN AOCS.

(19) By Decision 97-3 of 29 December 1997, the CIVDN introduced an inter-branch contribution starting on 1 January 1998 to finance advertising campaigns and for operating the following AOCS: 'Rivesaltes', 'Grand Roussillon', 'Muscat de Rivesaltes' and 'Banyuls'.

⁽³⁾ 1 FRF = EUR 0,15 approximately.

⁽⁴⁾ OJ L 84, 27.3.1987, p. 1. Regulation repealed by Regulation (EC) No 1493/1999 (OJ L 179, 14.7.1999, p. 1).

- (20) The amount per hectolitre excluding tax was set as follows: 'Banyuls and Banyuls Grand Cru': FRF 25/hl; 'Grand Roussillon': FRF 30/hl; 'Muscat de Rivesaltes': FRF 50/hl and 'Rivesaltes': FRF 30/hl.
- (21) These contributions were allocated as follows: 'Rivesaltes': FRF 25/hl for advertising and FRF 5/hl for operations; 'Grand Roussillon': FRF 45/hl for advertising and FRF 5/hl for operations; 'Banyuls': FRF 20/hl for advertising and FRF 5/hl for operations.
- (22) By Decision 98-1 of 10 July 1998, the CIVDN introduced an inter-branch contribution starting on 1 September 1998 to finance advertising campaigns and for operating the following AOCs: 'Rivesaltes', 'Grand Roussillon' and 'Maury'.
- (23) The amount of contributions per hectolitre excluding tax were set as follows: 'Grand Roussillon': FRF 25/hl; 'Maury': FRF 5/hl; 'Rivesaltes': FRF 35/hl.
- (24) These contributions were allocated as follows: 'Rivesaltes': FRF 30/hl for advertising and FRF 5/hl for operations; 'Grand Roussillon': FRF 20/hl for advertising and FRF 5/hl for operations; 'Maury': FRF 5/hl for operations.
- (25) The previous two contributions were repealed by Decision 99-1 of 17 December 1999, by which the CIVDN introduced an inter-branch contribution to finance publicity and promotion initiatives and for operating the following AOCs: 'Banyuls', 'Banyuls Grand Cru', 'Muscat de Rivesaltes', 'Rivesaltes', 'Grand Roussillon', and 'Maury'.
- (26) The amounts per hectolitre excluding tax were set as follows: 'Grand Roussillon': FRF 25/hl; 'Rivesaltes': FRF 35/hl; 'Banyuls' and 'Banyuls Grand Cru': FRF 25/hl; 'Muscat de Rivesaltes': FRF 55/hl; 'Maury': FRF 0/hl.
- (27) These contributions were allocated as follows: 'Rivesaltes': FRF 30/hl for advertising and FRF 5/hl for operations; 'Grand Roussillon': FRF 20/hl for advertising and FRF 5/hl for operations; 'Muscat de Rivesaltes': FRF 50/hl for advertising and FRF 5/hl for operations; 'Banyuls and Banyuls Grand Cru': FRF 20/hl for advertising and FRF 5/hl for operations.
- (28) This contribution was continued, with slight modifications, by Decision 00-1. At the time the examination procedure was initiated, the Commission did not have any information on the duration of this scheme or as to whether it would be continued.

3. POINTS RAISED BY THE COMMISSION IN THE CONTEXT OF INITIATING AN EXAMINATION PROCEDURE

- (29) Dealing first with the nature of the contributions in this case, the Commission noted that they were directly

approved by the French Government under the procedure provided for in Law 200 of 2 April 1943 creating an inter-branch committee for natural sweet wines and liqueur wines with registered designations. The Government's approval is thus a precondition for such contributions to be adopted. Law No 200 stipulates, in particular, that contributions are to be compulsory for all members of the branches concerned as soon as they have been approved by the Government or, in the case in point, its Commissioner. It follows that this type of contribution requires an official act in order to take full effect. Consequently, the Commission considered at this stage of the examination procedure that this was a case of parafiscal charges, i.e. public resources.

- (30) With regard to the 'set-aside premium' provided for in the French aid scheme, no provision was made for such premiums under the common market organisation (CMO) and, more specifically, Council Regulation (EEC) No 456/80 of 18 February 1980 on the granting of temporary and permanent abandonment premiums in respect of certain areas under vines and of premiums for the renunciation of replanting⁽⁵⁾. That Regulation provided only for a premium for temporary or permanent cessation of production, payable when a producer decided to contribute to reducing the Community's wine-growing potential by, in particular, grubbing up vines. Since potential was not reduced and no abandonment initiatives were financed by the premium, the scheme did not appear, at the time the examination procedure was initiated, to fall within the scope of the former common organisation of the market in wine under Regulation (EEC) No 822/87.
- (31) The purpose of the aid would appear to have been to give financial support to producers who, as business operators, had freely decided to undertake a purely commercial venture, for charges which seem to be expenditure connected with the exercise of economic activity. According to the consistent practice of the Commission and according to the case law of the European Court of Justice⁽⁶⁾, operating aid is aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities. This concept is reiterated in point 3.5 of the Community guidelines on State aid in the agriculture sector⁽⁷⁾ (hereinafter 'agriculture guidelines'), according to which such aids, by their very nature, are likely to interfere with CMO mechanisms.
- (32) The Commission noted here that the aid was granted per hectare and per year, and is therefore closely connected with the quantity of wine produced. The Commission explained that under no circumstances can it approve aid

⁽⁵⁾ OJ L 57, 29. 2.1980, p. 16. Regulation repealed by Regulation (EC) No 1493/1999.

⁽⁶⁾ Judgment of the Court of First Instance of the European Communities of 8 June 1995, case T-459/93, *Siemens SA v. Commission*, Rec. p. II-01675.

⁽⁷⁾ OJ C 28, 1.2.2000, p. 2.

which would be incompatible with the rules governing a CMO or which would disturb the smooth operation of the market organisation concerned. When the examination procedure was initiated, it considered that the 'set-aside premium' seemed to constitute operating aid likely to interfere with the mechanisms of the wine CMO and that it could therefore be incompatible with the applicable market and competition rules.

(33) Regarding the conversion costs, Article 14 of Regulation (EEC) No 822/87 stipulated that all national aid for planting vineyards would be prohibited from 1 September 1988, except where such planting met criteria relating, in particular, to reducing production or improving quality without resulting in an increase in production. Accordingly, only varieties that would bring about an improvement in quality and that did not have high productivity in the wine-growing area concerned would be allowed.

(34) Commission Regulation (EEC) No 2741/89 of 11 September 1989 laying down criteria to apply under Article 14 of Council Regulation (EEC) No 822/87 on national aid for the planting of wine-growing areas ⁽⁸⁾ laid down the criteria for examining draft national aid schemes for the planting of wine-growing areas permitted under Articles 87, 88 and 89 of the Treaty. Article 2 of Regulation (EEC) No 2741/89 stipulates that draft national aid must satisfactorily demonstrate compliance with the objective of reducing production quantity or improving quality without leading to increased production.

(35) Article 5 of Regulation (EEC) No 2741/89 stipulates that the amount of aid granted per hectare of vineyard planted may not exceed 30 % of the actual cost of grubbing-up and planting. The French authorities conclude that, since the total cost of the conversion carried out amounted to FRF 258 500 000 and the public authorities contributed FRF 75 250 000, taking all financing together, the public authorities contributed 29,11 % of the costs of the conversion scheme actually carried out. But Article 5 of Regulation (EEC) No 2741/89 stipulated that the relevant factor for calculating the conversion costs was the aid actually granted per hectare of vines planted. At the stage of the examination procedure, this logic seemed to exclude overall calculations relating to the conversion exercise as a whole and, consequently, calculations based on the average per hectare of the total costs. Moreover, the French authorities calculated this average in relation to differentiated conversion schemes.

(36) The Commission considered at that stage that in view of the costs per hectare put forward by the French authorities (FRF 110 000/ha), the aid granted in this case should have been

capped at FRF 33 000/ha and 30 % of the real costs incurred by the individual producers. It follows that any aid granted in excess of that ceiling or of 30 % of the real costs incurred by individual producers might be incompatible with the applicable rules.

(37) By virtue of the powers conferred on it under Article 10 of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁹⁾, the Commission asked the French authorities to send it all the necessary information on the two conversion measures carried out. In particular, this was to include information concerning the number of wine-growers who had received national aid for planting areas under vines; the area concerned, broken down by soil type; the part of that area which was planted after grubbing; the part of that area recognised as suitable for producing quality wine psr; the intended use of the planted areas (wine grapes, table grapes, grapes for drying, nursery or parent vine for root-stocks, etc.); the varieties used; proof that the French authorities granted prior authorisation for the use of the aforesaid varieties; the development of production potential and all relevant information about the level of aid.

(38) As for aid for advertising used by certain AOCs, the French authorities have pointed out that the rules governing the parafiscal charges intended to finance the CIVDN were regularly notified and had already been examined and approved by the Commission. Indeed, in the context of State aid No N 184/97 ⁽¹⁰⁾ (Aid and parafiscal charges for the benefit of the CIVDN), the Commission most recently approved State aid financed by a parafiscal charge to cover, among other things, advertising and operating measures for the benefit of the CIVDN. However, according to the information received, the contributions in the case in hand are levied by the CIVDN in addition to the parafiscal charges intended for the communication and advertising measures already authorised by the Commission. Consequently, when the examination procedure was initiated, the Commission considered that the authorisation given previously did not tacitly authorise subsequent amendments or any other measure on top of the previously authorised aid.

(39) The Commission has asked the French authorities to send it the necessary information about these aid schemes, including any schemes not mentioned or notified which may currently be in force, so as to allow it to assess their compatibility with, in particular, the negative and positive criteria applicable to advertising and the maximum amount of aid which may be authorised. This information should also make it possible to measure the repercussions of any

⁽⁸⁾ OJ L 264, 12.9.1989, p. 5. Regulation repealed by Regulation (EC) No 1227/2000 (OJ L 143, 16.6.2000, p. 1).

⁽⁹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

⁽¹⁰⁾ Commission letter SG(97)D/3741 of 16.5.1997.

accumulation of aid involving the previously authorised scheme and the non-notified schemes concerned by this Decision.

into liquidation. These aid schemes are held not to comply with EU rules in that they do not have an aim of general interest.

- (40) The Commission has also noted that the mechanisms of the parafiscal charges in this case are very similar to those of the charge already authorised by the Commission. It is also clear from the texts introducing these charges that they affect only the wine production in a specific region. At the stage of the examination procedure, it could therefore be concluded that no imported products were or had been subject to the parafiscal charges concerned in this case.

- (46) According to the complainant, during 2001 and 2002, the CIVDN continued to demand that merchants pay parafiscal charges even though the body that replaced it afterwards, the CIVR, had also begun to invoice contributions in contradiction with national law.

III. THIRD PARTY COMMENTS

IV. COMMENTS FROM FRANCE

- (41) The complainant submitted the following comments and requested their identity to be treated as confidential. After having examined the grounds given for so doing, the Commission considers it right to respect the complainant's request.

- (47) By letter of 16 June 2003, the French authorities submitted their comments concerning the Commission's decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the aid measure notified.

- (42) According to the complainant, the set-aside premium and the conversion aid are but two elements of a single aid scheme designed to reduce the quantity of a certain product placed on the market. Aid allocated for setting aside plots and aid allocated under the conversion scheme must be taken together for assessment of compliance with Community law.

- (48) The French authorities confirmed at the outset that the measures in question had not been continued beyond the five-year period set initially, which began in the 1996/97 marketing year. In any event, the Commission was informed by letters dated 14 December 2000 and 6 December 2001 that the CIVDN had been wound up. The CIVR, which replaced the CIVDN, did not implement any of the same type of measures.

1. THE 'RIVESALTES PLAN'

1.1. THE 'SET-ASIDE PREMIUM'

- (43) The complainant is of the opinion that the autonomous financial management of the Rivesaltes Plan provided for in CIVDN Decision No 96-1 of 5 July 1996 was breached since the set-aside premium was financed by funds that were not exclusively generated by the inter-branch contribution introduced in 1996. Thus the complainant believes that the set-aside premium was financed by the CIVDN's own resources to the tune of over FRF 11 million. Moreover, the complainant believes that part of the funding obtained through advertising contributions was used to finance the plan, in particular the set-aside premium.

- (49) The French authorities explained that the aim of the measure was not to reduce the wine-growing potential since the commitment made by beneficiaries was essentially to agree to market table wine or 'vin de pays', rather than AOC wine produced from set-aside plots. As such, this premium could not be treated, as the Commission deems, as a mere operating aid unduly constituting liquidity relief.

- (44) According to the complainant, the General Council of the Eastern Pyrenees paid the CIVDN FRF 2 million at the beginning of the 2000 financial year to fund the set-aside premium. In addition, the General Council is alleged to have claimed in the March 2003 edition of its magazine '*L'accent Catalan*' to have directly paid wine-growers aid per hectare amounting to EUR761 and then EUR 1 293 under the Rivesaltes Plan on top of the aid paid as a set-aside premium and the conversion aid. The complainant believes that that this aid was not notified to the Commission.

- (50) In fact, the purpose of the premium was to reward beneficiaries for undertaking not to market AOC production from the set-aside plots. It did therefore not constitute a supplement to beneficiaries' revenue but rather compensated them for a loss in income.

- (45) The complainant deems that the capital generated by parafiscal charges for advertising in favour of the CIVDN was used to finance advertising campaigns for their own products, i.e. for certain enterprises, rather than to finance advertising campaigns for the various categories of AOCs in general. It is alleged that these practices are still applied today by the inter-branch wine committee of Roussillon (CIVR), the body that replaced the CIVDN when it went

- (51) Thus, when the measure was implemented, one hectare under AOC Rivesaltes vine would generate, on the basis of the maximum authorised yield of 40 hl, a production of between 25 hl of natural sweet wine at FRF 1 140/hl and 15 hl of table wine or 'vin de pays' at FRF 350/hl, giving a turnover of between FRF 32 250 and FRF 33 000/ha. After the land is set aside, one hectare under vine could produce 50 hl of table wine or 'vin de pays' (average area yield), i.e. a turnover of between FRF 12 500 and FRF 17 500/ha.

- (52) The average difference after set-aside (loss of revenue for producers) would therefore be about FRF 15 000/ha, from which, in the interests of completeness, the cost of alcohol to produce natural sweet wine should be deducted, i.e. FRF 2 000 for 25 hl, which makes the net difference total FRF 13 000/ha.

- (53) Even if account is taken of the fact that the difference as of 1999 was less, due to the fall in the production price of natural sweet wines (FRF 900/ha), it was still FRF 6 500/ha [FRF 26 000 (turnover/ha AOC) — FRF 17 500 (turnover/ha for table wine or 'vin de pays') — FRF 2 000 (cost of alcohol to make natural sweet wines)].
- (54) Under these conditions, the French authorities considered that the set-aside premium could in no way constitute operating aid that would grant beneficiaries undue income supplements or liquidity relief.
- (55) Moreover, the French authorities underline that the set-aside premium did not jeopardise the wine CMO mechanisms by potential market disturbances. Thus no wine was distilled under the compulsory distillation scheme in the Eastern Pyrenees between the 1996/97 and 1999/2000 marketing years. Besides, the amount sent for preventative distillation for the marketing years in question reflects normal market conditions in table wine and 'vin de pays'.
- (56) Alternatively, the French authorities insist that the measure shows solidarity as it is not financed by the State but by an inter-branch contribution paid by the producers themselves.

1.2. CONVERSION AID

- (57) According to the French authorities, this measure constitutes an exceptional addition to national aid to renew vineyards, which was established to implement Regulation (EEC) No 2741/89.
- (58) The French authorities pointed out that aid to improve the vine population was first notified in 1993 (aid No N 769/93), the subject of document (FR/XXX/05.00/017) in successive lists of national aid. Regarding the annual report, the French authorities explained that the communication required under Article 8 of Regulation (EEC) No 2741/89 could be made in the context of the annual communication sent by Member States under Article 9 of Regulation (EEC) No 822/87. However Article 9 of Regulation (EEC) No 822/87 states that 'by 1 September of each year, the Member States shall forward a communication to the Commission concerning the development of wine-growing potential, which shall include a statement of the areas under vines on their territory' and 'by 1 December of each year ... a report on the development of wine-growing potential'.
- (59) The French authorities pointed out they send an annual report to the Statistical Office of the European Communities, in accordance with Article 9 of Regulation (EEC)

No 822/87, including a statement of the area under vines, broken down by department and by type of grape produced (wine grapes, including quality wine psr, table grapes) and a statement of grubbed-up areas and vine planting submitted in the same format with a breakdown by department and by type of grape produced. The French authorities enclosed a copy of the tables sent for the 1997/98 marketing year. Under these circumstances, the French authorities considered that they could not be accused of failing to meet their obligations under Regulation (EEC) No 822/87.

- (60) In order to make an accurate and thorough assessment of the Rivesaltes Plan conversion aid, the French authorities deemed it necessary to take into account the fact that area under Muscat de Rivesaltes was excluded from the supplement to renewal aid under the plan. These areas only benefited from renewal aid at rates corresponding to national levels. Nonetheless, the FRF 85 million that the French authorities noted in their previous letters included FRF 31 million of national aid to renew vines in the area under Muscat.
- (61) In the end, the conversion aid in the context of the Rivesaltes Plan for the area under varietal 'vin de pays' and Côtes du Roussillon villages was assessed as follows:
- a) in the geographical area concerned by the Rivesaltes Plan and for vineyards with area under varietal 'vin de pays' and Côtes du Roussillon villages, 2 357 ha (875 producers) received national aid to renew vines, which totalled FRF 57,280 million.
 - b) out of these 2 357 ha, 875 producers received 'exceptional' supplements to the national aid under the Rivesaltes Plan for 1 238 ha. The total amount of this supplement was FRF 8,006 million, on top of the FRF 28,613 million of national conversion aid received for these 1 238 ha.
 - c) for these 875 producers, the supplement provided for in the Plan was paid on the following basis: 662 received FRF 5 000/ha for 990 ha, totalling FRF 4,950 million; 80 received FRF 10 000/ha for 133 ha, totalling FRF 1,330 million; and 133 received FRF 15 000/ha for 115 ha, totalling FRF 1,726 million.
- (62) In total, under this Plan, FRF 36,623 million was paid for the renewal of vines over an area of 1 238 ha to 875 producers.
- (63) 221 cases exceeded FRF 33 000/ha for an area of 166 ha, corresponding to FRF 0,883 million.

(64) The French authorities sent a list of the varieties used in conversion schemes and the different decrees setting the level of aid for each year.

2. INITIATIVES FOR PROMOTION AND PUBLICITY AND FOR OPERATING AOCs

(65) The French authorities first specified that these initiatives were not continued after 31 December 2000.

(66) The advertising initiatives funded by receipts from the compulsory voluntary contribution (CVO) were of the same nature as those funded by revenue from the parafiscal charges, which were notified to and approved by the Commission (aid Nos N 230/90 ⁽¹¹⁾ and N 184/97).

(67) The credit generated by collecting CVO therefore enabled the initiatives funded by the parafiscal charge to be consolidated. In fact it appeared necessary to step up advertising of this wine to develop outlets for it, given the market situation which had serious impacts on the local wine economy.

(68) In this respect, the French authorities noted that authorisation to finance promotion aid could be given for up to 100 %. The French authorities pointed out that the publicity aid concerned initiatives to advertise AOC products and was financed by parafiscal charges and voluntary contributions.

(69) In reply to the Commission's request, the French authorities sent examples of the promotion and publicity material used.

3. COMMENTS ON THE OBSERVATIONS MADE BY THIRD PARTIES

(70) In their letter dated 10 September 2004, the French authorities replied to the observations made by third parties. They explained that there was a perception that the aid had been diverted from its initial objective and used for the sole profit of an enterprise in competition with the third parties concerned. The French authorities took exception to these allegations, which directly challenged the probity of the various administrations concerned and therefore invited the Commission to dismiss these arguments.

V. ASSESSMENT

1. ARTICLE 87(1) OF THE TREATY.

(71) 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'.

(72) Article 76 of Regulation (EEC) No 822/87, applicable when the aid was granted, provided that, unless otherwise provided in the same Regulation, Articles 92, 93 and 94 of the Treaty (now Articles 87, 88 and 89) were applicable to the production and sale of wine products.

1.1. EXISTENCE OF A SELECTIVE ADVANTAGE FINANCED BY STATE RESOURCES

(73) Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid.

(74) The Commission notes that the type of contributions in this case required the adoption of an act by a public authority for their full impact to be felt and that the resources they generated served as a tool to implement a State-supported policy. In addition, there is no proof that the beneficiaries of aid are always those liable to the corresponding charges. For these reasons, the contributions do not meet the criteria for derogations from Article 87(1) of the Treaty, as proposed by Court of Justice case law ⁽¹²⁾. Consequently, the Commission considers that this is a case of parafiscal charges, i.e. public resources.

(75) Moreover, according to ECJ case law, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect are also considered to be aid ⁽¹³⁾.

(76) The existence and type of the aid must be established for the potential beneficiaries of the Rivesaltes Plan and of the inter-branch contributions for publicity and promotion and for operating and financing certain AOCs. In the case in point, the support given did favour certain undertakings since the aid was only granted to AOC producers operating in certain specific regions.

1.2. EFFECTS ON TRADE

(77) Lastly, in order to establish whether the aid falls within Article 87(1) of the Treaty, an assessment must be made on whether it is likely to affect trade between Member States.

⁽¹²⁾ EU CoJ Judgment of 15 July 2004 in Case C-345/02, Pearle, not yet published in ECR.

⁽¹³⁾ Court Judgment of 22 May 2003, Case C-355/00, Freskot, ECR p. I-5263.

⁽¹¹⁾ Commission letter SG(90)D/25148 of 22.8.1990.

(78) The Court has ruled that when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid ⁽¹⁴⁾.

(79) The fact that there is trade between Member States in the wine sector is demonstrated by the existence of a common market organisation for the sector.

(80) The following table shows, as an example, the level of trade in wine products between France and the other Member States over the last two years of the afore-mentioned conversion scheme in France.

	Wine	
	EU as at 30/04/2004	France
Usable production	168 076 000 hl	54 271 000 hl
Exports to other MS as at 30/04/2004	—	15 500 000 hl
Imports from other MS as at 30/04/2004	—	5 700 000 hl

(81) The aid granted is therefore likely to affect trade between the Member States and to distort or potentially distort competition since it favours the production of certain national wines to the detriment of production in other Member States. The wine sector is extremely open to competition at Community level and is consequently very sensitive to any measure favouring production in a particular country.

1.3. CONCLUSIONS REGARDING THE NATURE OF THE 'AID' UNDER ARTICLE 87(1) OF THE TREATY

(82) In the light of the above explanations, the Commission considers that the measures in favour of producers of AOC wines operating in certain specific regions constitute a financial advantage financed by public resources allocated to them which is not available to other operators, which distorts or has the potential to distort competition by favouring certain undertakings and productions, thereby is likely to affect trade between Member States. It is therefore aid within the meaning of Article 87(1) of the Treaty.

2. ASSESSMENT OF THE COMPATIBILITY OF THE AID

(83) However, Article 87 of the Treaty provides scope for derogations to the general principle that State aid is incompatible with the Treaty, whilst it is clear that some are not applicable to the case in point, notably the derogations under Article 87(2). These were not cited by the French authorities.

(84) The derogations provided for in Article 87(3) of the Treaty must be interpreted strictly when considering regional or sectoral aid programmes or any individual case of application of general aid schemes. In particular, they may be allowed only where the Commission is able to establish that the aid is necessary to achieve one of the aims in question. Allowing such derogations to apply to aid not meeting that condition would be tantamount to allowing trade between Member States to be affected and permitting distortion of competition that has no justification in the light of the Community interest and, by the same token, undue advantages for the operators of certain Member States.

(85) The Commission considers that the aid measures in question are not intended to encourage economic development in a region where the standard of living is abnormally low or where there is serious underemployment within the meaning of Article 87(3)(a) of the Treaty. Nor are they intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b). Nor again are they intended to promote either culture or heritage conservation within the meaning of Article 87(3)(d).

(86) Article 87(3)(c) of the Treaty provides that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In order to be covered by this derogation, aid must contribute to the development of the sector in question.

2.1. UNLAWFULNESS OF AID

(87) The Commission notes that the French authorities did not notify it of the measures introducing the aid in question, as required by Article 88(3) of the Treaty. Article 1(f) of Regulation (EC) No 659/1999 defines unlawful aid as new

⁽¹⁴⁾ Court Judgement of 17 September 1980 in Case 730/79, Philip Morris/Commission, ECR p. 2671, Ground 11.

aid put into effect in contravention of Article 93(3) of the Treaty. The obligation to notify State aid is enshrined in Article 1(c) of Regulation (EC) No 659/1999 ⁽¹⁵⁾.

- (88) Since the measures implemented by France contain elements of State aid, it constitutes new aid, not notified to the Commission, and therefore unlawful under the Treaty.

2.2. IDENTIFYING THE GUIDELINES APPLICABLE TO THE NON-NOTIFIED MEASURES

- (89) In accordance with Point 23.3 of the agriculture guidelines and the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽¹⁶⁾, all unlawful aid under Article 1(f) of Regulation (EC) No 659/1999 must be assessed in accordance with the texts in force at the time when the aid was granted.
- (90) The agriculture guidelines have applied since 1 January 2000. Any aid granted after this date must be assessed in the light of these guidelines. However, any aid granted before this date must, where necessary, be assessed in the light of the measures and practice applicable before 1 January 2000.
- (91) Point 3.2 of the agriculture guidelines states that, even if Articles 87, 88 and 89 of the Treaty are fully applicable to the sectors covered by the CMOs, their application remains, however, subject to the provisions set out in the Regulations concerned. In other words, recourse by a Member State to Articles 87, 88 and 89 of the Treaty cannot override the provisions of the Regulation governing the market organisation concerned ⁽¹⁷⁾. The Commission must also assess whether aid runs counter to smooth operation of the market concerned and therefore is incompatible with the single market.
- (92) The aid provided for in the Rivesaltes Plan was granted between 1 January 1997 and 31 July 2000, i.e. before the entry into force on 1 August 2000 of Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine. Since the measures concerned fall within the scope of the common organisation of the market in wine, they must be examined in the light of the legislation in force at that time, i.e. Regulation (EEC) No 822/87.
- (93) As for the advertising aid introduced for certain AOCs, which, according to the French authorities, was discontinued after 31 December 2000, the compatibility of the aid granted must be assessed in the light of the guidelines for State aid for advertising products listed in Annex I to the EC Treaty and of certain non-Annex I products ⁽¹⁸⁾, point 70 of which states that unlawful aid within the meaning of

Article 1(f) of Regulation (EC) No 659/1999 is to be assessed in accordance with the rules and guidelines applicable at the time when the aid is granted.

- (94) Regarding State aid financed by parafiscal charges, the measures financed by this aid and the methods of financing the aid itself must be assessed by the Commission.

2.3. ANALYSIS IN THE LIGHT OF THE APPLICABLE RULES

2.3.1. *The aid measures*

2.3.1.1. *The 'set-aside premium'*

- (95) The set-aside premium was financed by an inter-branch contribution, which was a compulsory charge levied by public authorities for the wine conversion project. The purpose of the premium was to compensate producers for the loss of income deriving from their commitment not to claim the registered designation of origin (AOC) 'Rivesaltes' and to refocus their production on table wine and 'vin de pays'.
- (96) However, the set-aside premiums as provided by the French aid scheme were not provided for in the market organisation nor, specifically, by Regulation (EEC) No 456/80. That Regulation provided only for a premium for temporary or permanent cessation of production, payable when a producer decided to contribute to reducing the Community's wine-growing potential by, in particular, grubbing up vines.
- (97) The Commission states that the purpose of the French measure was not to reduce wine production but solely to cease using the Rivesaltes AOC. Since potential was not reduced and the premium did not finance any abandonment, the measure does not fall within the scope of the previous organisation of the market in wine.
- (98) Although Regulation (EEC) No 456/80 appears not to apply because no production was abandoned, the measure must be assessed in the light of other horizontal measures regarding State aid. Article 17 of Regulation (EEC) No 456/80 stated that the provisions of this Regulation did not prevent aid from being granted under national rules that is designed to achieve the same objectives as those pursued by this Regulation, provided they are assessed within the meaning of Articles 92, 93 and 94 of the Treaty (now Articles 87, 88 and 89).
- (99) The measure in question does not provide for abandonment of production. It cannot therefore be treated as a measure designed to achieve the same objectives as those pursued by Regulation (EEC) No 456/80, in other words, to reduce wine-growing potential.

⁽¹⁵⁾ 'New aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.

⁽¹⁶⁾ OJ C 119, 22.5.2002, p. 22.

⁽¹⁷⁾ Court Judgment of 26 June 1979, Case 177/78, Pigs and Bacon Commission v. McCarren, ECR. p. 2161.

⁽¹⁸⁾ OJ C 252, 12.9.2001, p. 5.

(100) The French authorities themselves explained that the aim of the measure was not to reduce the wine-growing potential since the commitment made by beneficiaries was essentially to agree to marketing table wine or 'vin de pays', rather than AOC wine, produced from set-aside plots.

(101) The French authorities specified that the purpose of the premium was to reward beneficiaries for undertaking not to market AOC production from the set-aside plots. Thus, in their opinion, it did not constitute a supplement to beneficiaries' revenue but rather compensated them for a loss in income. As such, this premium could not be treated as a mere operating aid which unduly constitutes liquidity relief.

(102) However, in contrast to the French authorities' recommendation, the Commission is of the opinion that the purpose of the national aid is to give financial support to producers who, as business operators, had freely decided to undertake a purely commercial venture, the costs of which constitute expenditure in connection with economic activity. In fact, State compensation to economic operators for a loss of voluntarily sustained income constitutes public aid with the impact of mitigating the economic effects of their decision.

(103) According to the consistent practice of the Commission before the agriculture guidelines were adopted on 1 January 2000 and according to the Court of Justice case law ⁽¹⁹⁾, operating aid is aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities. The Court notes that it is consistent practice that operating aid can in no cases be declared as compatible with the single market under Article 87(3)(c) of the Treaty since by its very nature this aid has the potential to alter trading conditions to an extent that is contrary to common interest.

(104) This principle is reiterated in point 3.5 of the agriculture guidelines, which state that unilateral state aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector, and in particular aids which are granted solely on the basis of price, quantity, unit of production or unit of the means of production are considered to be comparable to operating aids which are incompatible with the common market. Point 3.5 adds that by their very nature, such aids are likely to interfere with the mechanisms of the CMOs.

(105) The Commission notes that the aid was granted per hectare per year on the basis of continued production and that it was therefore closely linked to the quantity of wine produced.

(106) It considers that the set-aside premium constitutes operating aid likely to interfere with the mechanisms of the common organisation of the market in wine and that it is therefore incompatible with the applicable market and competition rules.

2.3.1.2. Conversion aid

(107) Article 14 of Regulation (EEC) No 822/87 stipulated that all national aid for planting vineyards would be prohibited from 1 September 1988, except where such planting met criteria relating, in particular, to reducing production or improving quality without resulting in an increase in production.

(108) Commission Regulation (EEC) No 2741/89 laid down the criteria for examining draft national aid schemes for the planting of wine-growing areas permitted under Articles 92, 93 and 94 of the Treaty (now Articles 87, 88 and 89).

(109) Article 2 of that Regulation stipulates that draft national aid must satisfactorily demonstrate compliance with the objective set out in the second subparagraph of Article 14 (2) of Regulation (EEC) No 822/87 of reducing production quantity or improving quality without leading to increased production.

(110) Article 3 of that Regulation states that planting must involve varieties which, in the terrain concerned, are not considered high-productivity varieties, are recognized as improving quality and are specifically authorised by the national authorities under the draft aid measure concerned.

(111) The French authorities pointed out that they send an annual report to the Statistical Office of the European Communities, in accordance with Article 9 of Regulation (EEC) No 822/87, with a statement of the area under vines, broken down by department and by type of grape produced (wine grapes, including quality wine psr, table grapes) and a statement of grubbed-up areas and vine planting submitted in the same format with a breakdown by department and by type of grape produced. The French authorities enclosed a copy of the tables sent for the 1997/98 marketing year.

(112) The Commission did receive from the French authorities information on the varieties used in the conversion projects enabling it to ascertain compliance with the conditions referred to in points 107 to 110. This information had allowed the Commission previously to conclude that the vine varieties met the requirements of Community legislation applicable at the time the aid was granted.

⁽¹⁹⁾ Court Judgment on the afore-cited Siemens case.

(113) Article 5 of Regulation (EEC) No 2741/89 stipulated that the amount of aid granted per hectare of vineyard planted may not exceed 30 % of the actual cost of grubbing-up and planting. The costs to be taken into account in allocating the aid may be determined on a flat-rate basis in each region, particularly in the light of geomorphological characteristics.

(114) According to the information provided by the French authorities, as a proportion of the total funding, 29,11 % of the conversion costs actually incurred was covered by public bodies. Thus the French authorities concluded that the total amount of the aid did not exceed the 30 % ceiling set by EU legislation.

(115) Article 5 of Regulation (EEC) No 2741/89 stipulated that the relevant factor for calculating the conversion costs was the aid actually granted per hectare of vines planted. This logic excludes overall calculations relating to the conversion exercise as a whole and, consequently, calculations based on the average per hectare of the total costs.

(116) The Commission considers that, in view of the costs per hectare put forward by the French authorities (FRF 110 000/ha), the aid granted in this case should have been capped at FRF 33 000/ha and 30 % of the real costs incurred by the individual producers.

(117) The new information provided by the French authorities shows that, in total, under this Plan, FRF 36,623 million was paid for the renovation of vines over an area of 1 238 ha to 875 producers. 221 cases exceeded FRF 33 000/ha for an area of 166 ha, corresponding to FRF 0 883 million.

(118) The Commission concludes that individual cases that exceed the ceiling of 30 % of actual costs and/or the ceiling of FRF 33 000/ha constitute State aid that is incompatible with the applicable rules.

2.3.1.3. Aid for publicity and promotion and for operating the AOCs concerned

(119) The Commission most recently approved State aid No N 184/97, valid until the end of 2002, financed by a parafiscal charge to cover, among other things, advertising and operating measures for the benefit of the CIVDN. The initial measure was approved by the Commission in 1990 under State aid No N 230/90. The Commission had then concluded that the aid granted for collective promotion to improve and to consolidate the product image of natural sweet wine and to develop sales was in accordance with the

rules governing national aid for the promotion of agricultural products and certain products that are not listed in Annex II to the EEC Treaty, except for fishery products ⁽²⁰⁾, applicable to this type of aid. Moreover, the Commission considered that the CIVDN's administrative expenses were not to be counted as aid.

(120) The Commission deems that the authorisation given for State aid N 184/97 does not constitute a tacit authorisation for further modifications, or other measures, such as the case in point, on top of the previously authorised aid.

(121) However the French authorities confirmed that the advertising initiatives funded by CVO receipts were of the same nature as those financed through the parafiscal charge that had been notified to and approved by the Commission. According to the French authorities, it therefore constituted exclusively an increase in the overall budget for the measure.

(122) Since the same conditions had been applied when these aid schemes were granted, the Commission, in referring to its Decision on State aid N 184/97, is therefore in a position to conclude that advertising and operating aid for the AOCs financed by the new contributions are compatible with the applicable competition rules.

(123) The Commission takes note of the comments from third parties, according to which the measures financed breached the applicable competition rules on advertising aid for agricultural products since it was paid to specific undertakings. However the supporting documents submitted show instead that these advertising campaigns could be treated as technical assistance schemes where the beneficiaries were wine producers.

2.3.2. Financing the aid

(124) In accordance with the case law of the Court of Justice ⁽²¹⁾, the Commission normally considers that the financing of State aid by means of compulsory charges may influence the aid by having a protective effect which goes beyond the aid as such. The levies in question are compulsory charges. According to the same case law, the Commission considers that aid may not be financed by parafiscal charges that also apply to products imported from other Member States.

(125) The Commission already concluded, notably in State aid N 184/97, that the scheme introduced by the French authorities did not affect imported products.

⁽²⁰⁾ OJ C 302, 12.11.1987, p. 6.

⁽²¹⁾ Court Judgment of 25.6.1970, Case 47/69, France v. the Commission, ECR. p. 487.

(126) The documents introducing para-fiscal charges in the case in point show that they impact only on the production of natural sweet AOC wine in the Eastern Pyrenees Region. The set-aside premium was financed by a contribution that only affected regional production of the wine concerned, therefore excluding all imported products.

(127) It can therefore be concluded that no imported products are or have been subject to the para-fiscal charges concerned in this case.

VI. CONCLUSION

(128) The State aid operated by France in the form of 'set-aside premiums' granted to French wine producers that undertake not to claim the registered designations of origin (AOC) 'Rivesaltes' or 'Grand Roussillon' from the 1996 harvest to the 2000 harvest inclusive is incompatible with the single market.

(129) The State aid operated by France in the form of the conversion plan for the AOC Rivesaltes vineyard from the 1996 harvest to the 2000 harvest inclusive, that was granted to individual cases exceeding 30 % of the actual costs and/or exceeding the EUR 5 030,82/ha (FRF 33 000/ha) ceiling is incompatible with the single market.

(130) The State aid operated by France between 1 January 1998 and 31 December 2000 in the form of advertising and operating aid to the 'Rivesaltes', 'Grand Roussillon', 'Muscat de Rivesaltes' and 'Banyuls' AOCs is compatible with the single market under Article 87(3)(c) of the Treaty.

(131) The measures in question were not notified to the Commission in accordance with Article 88(3) of the Treaty and therefore constitute unlawful aid under Article 1(f) of Regulation (EC) No 659/1999.

(132) The Commission regrets that France operated the above aid measures in contravention of Article 88(3) of the Treaty.

(133) It should be remembered that, in the case of aid measures implemented without awaiting the Commission's final decision, given the binding nature of the rules of procedure laid down in Article 88(3) of the Treaty, which the Court of Justice recognised as having direct effect in its judgments of 19 June 1973 in Case 77/72, *Carminio Capolongo v. Azienda Agricola Maya* ⁽²²⁾; 11 December 1973 in Case 120/73, *Gebrüder Lorenz GmbH v. Federal Republic of Germany* ⁽²³⁾ and 22 March 1977 in Case 78/76, *Steinike & Weinlig v. Federal Republic of Germany* ⁽²⁴⁾, the unlawfulness of the aid concerned cannot be regularised

ex post facto (judgment of 21 November 1991 in case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v. French Republic*) ⁽²⁵⁾.

(134) The Court of Justice recalled that where an aid measure, of which the method of financing is an integral part, has been implemented in breach of the obligation to notify, national courts must in principle order the reimbursement of charges or contributions levied specifically for the purpose of financing that aid. It also noted that it is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the prohibition on putting aid into effect, referred to in the last sentence of Article 88(3) of the Treaty and directly applicable. Such breaches cited by interested individuals and ascertained by national courts must result in the courts drawing the necessary consequences, in accordance with national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted ⁽²⁶⁾.

(135) Where an unlawful aid is incompatible with the common market, Article 14(1) of Regulation (EC) No 659/1999 provides that the Commission must decide that the Member State concerned take all necessary measures to recover the aid from the beneficiary. Such reimbursement is necessary to re-establish the situation applying previously, and involves cancelling all the financial advantages from which beneficiaries of the unlawfully granted aid have unduly benefited since the date the aid was granted.

(136) Article 14(2) of Regulation (EC) No 659/1999 stipulates that recovery includes interest at an appropriate rate fixed by the Commission. Such interest is payable from the date on which the unlawful aid was made available to the beneficiary.

(137) The aid must be reimbursed in accordance with the procedures laid down by French law. The amounts include interest from the date on which aid was granted until the date of its effective recovery. It is to be calculated at the Commission's reference rate, laid down by the method for setting the reference and discount rates ⁽²⁷⁾.

(138) The Commission does not have data on the overall amount of aid granted under the 'set-aside premium' since it does not know the amount of receipts taken nor the number of hectares for which aid was received. Whilst specifying that they do not in any way alter the Commission's conclusions, the Commission notes the comments made by third parties, according to which the 'set-aside premium' was the

⁽²⁵⁾ ECR p.I-5505.

⁽²⁶⁾ Court Judgment of 21 October 2003, joint cases C-261/01 and C-262/01, *Van Calster e.a.*, not yet published in the ECR.

⁽²⁷⁾ Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

⁽²²⁾ ECR p. 611.

⁽²³⁾ ECR p. 1471.

⁽²⁴⁾ ECR p. 595.

subject of additional public aid and financing undeclared by the French authorities. According to the information available to the Commission, the amount of public aid to finance the 'conversion aid' totalled EUR 11,01 million.

- (139) This Decision will not prejudice the conclusions the Commission may draw, if necessary, for the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid operated by France in the form of 'set-aside premiums' granted to French wine producers undertaking not to claim the registered designations of origin (AOC) 'Rivesaltes' or 'Grand Roussillon' from the 1996 harvest to the 2000 harvest inclusive is incompatible with the single market.

2. The State aid operated by France in the form of the conversion plan for the AOC Rivesaltes vineyards from the 1996 harvest to the 2000 harvest inclusive, that was granted in individual cases to exceed 30 % of the actual costs and/or the EUR 5 030,82/ha (FRF 33 000/ha) ceiling is incompatible with the single market.

3. The State aid operated by France between 1 January 1998 and 31 December 2000 in the form of advertising and operating aid to the 'Rivesaltes', 'Grand Roussillon', 'Muscat de Rivesaltes' and 'Banyuls' AOCs is compatible with the single market under Article 87(3)(c) of the Treaty.

Article 2

1. France shall take all necessary measures to recover the incompatible aid referred to in Article 1(1) and (2) from the beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. It is to be calculated at the Commission's reference rate, laid down by the method for setting the reference and discount rates.

2. For the purpose of the recovery of incompatible aid referred to in Article 1(1), France shall inform the Commission of the overall amount of aid granted under this measure and its financing, including the overall amount of receipts from the inter-branch contribution introduced for this purpose, and the number of hectares for which the 'set-aside premium' was received.

Article 3

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

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 19 January 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

COMMISSION DECISION**of 7 April 2006****on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for
FRUCONA Košice, a.s.***(notified under document number C(2006) 2082)***(Only the Slovak version is authentic)****(Text with EEA relevance)****(2007/254/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

- (3) By letter of 5 July 2005, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

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

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.

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

- (5) The Slovak authorities submitted their observations by letter of 10 October 2005, registered as received on 17 October 2005. The Commission received comments from one interested party (the beneficiary) by letter of 24 October 2005, registered as received on 25 October. It forwarded them to Slovakia, which was given the opportunity to react; Slovakia's comments were received by letter dated 16 December 2005, registered as received on 20 December. A meeting with the beneficiary at which he was given the opportunity to explain his submission took place on 28 March 2006. Slovakia submitted additional information by letter dated 5 May 2006, registered as received on 8 May.

Whereas:

I. PROCEDURE

- (1) By letter of 15 October 2004, registered as received on 25 October, the Commission was sent a complaint concerning alleged unlawful state aid in favour of FRUCONA Košice, a.s.. The complainant sent additional information on 3 February 2005. A meeting with the complainant took place on 24 May 2005.

II. DETAILED DESCRIPTION OF THE AID**1. Relevant undertaking**

- (2) On the basis of the information provided by the complainant, the Commission asked Slovakia by letter of 6 December 2004 to inform it about the disputed measure. Slovakia responded by letter of 4 January 2005, registered as received on 17 January, informing the Commission about possible unlawful aid granted to FRUCONA Košice a.s. and asking it to approve the aid as rescue aid to a company in financial difficulties. Slovakia submitted additional information by letter of 24 January 2005, registered as received on 28 January. The Commission asked for further information by letter of 9 February 2005, to which it received answers by letter of 4 March 2005, registered as received on 10 March. A meeting with the Slovak authorities took place on 12 May 2005.

- (6) The recipient of the financial support is FRUCONA Košice a.s. (hereinafter referred to as 'the beneficiary'), which, at the time of the decisive events, was active in the production of spirit and spirit-based beverages, non-alcoholic beverages, canned fruit and vegetables, and vinegar. Currently, the beneficiary no longer produces spirit and spirit-based beverages. Nevertheless, it is active on the wholesale market for spirit and spirit-based beverages. The company is situated in a region eligible for regional aid under Article 87(3)(a) of the EC Treaty.

⁽¹⁾ OJ C 233, 22.9.2005, p. 47.

⁽²⁾ See footnote 1.

- (7) At the time of the decisive events, the beneficiary employed about 200 persons. In his comments on the decision to open the formal investigation, the beneficiary provided the Commission with data on its turnover (including excise duties and VAT), which are shown in the following table.

Table 1

Turnover in different segments of production, including excise duties and VAT [SKK]

	2002	2003	2004
Vinegar	[...] (*)	[...]	[...]
Fruit and vegetable production	[...]	[...]	[...]
Cabbage	[...]	[...]	[...]
Carbonated non-alcoholic beverages	[...]	[...]	[...]
Non-carbonated non-alcoholic beverages	[...]	[...]	[...]
Juices 100 %	[...]	[...]	[...]
Spirit-based beverages	[...]	[...]	[...]
Apple wine	[...]	[...]	[...]
Syrup	[...]	[...]	[...]
Other products/services	[...]	[...]	[...]
Total	895 019 980	978 343 230	880 314 960 ⁽³⁾

- (8) These data differ considerably from the data obtained by the Commission from the Slovak authorities and given in the decision to open the formal investigation ⁽⁴⁾. In their reaction to the beneficiary's comments after the opening of the formal investigation, the Slovak authorities did not dispute the accuracy of the above figures. According to the Slovak authorities, the beneficiary fulfils the criteria of a medium-sized enterprise.

situation of indebted companies ⁽⁵⁾. Under the bankruptcy procedure, the company ceases to exist and either its assets are sold to a new owner or the company is liquidated. In contrast, under the arrangement procedure, the indebted company continues its business without change of ownership.

2. Applicable national legislation

- (9) The disputed measure is a write-off of a tax debt by the Košice IV tax office ('tax office') under what is known as an arrangement with creditors. This procedure is governed by Act 328/91 on Bankruptcy and Arrangement with Creditors ('Bankruptcy Act').
- (10) Arrangement with creditors ('arrangement' or 'arrangement procedure') is a court-supervised procedure which, like the bankruptcy procedure, aims at settling the financial

- (11) The arrangement procedure is initiated by the indebted company. The aim is to reach an agreement with the creditors ('agreement') whereby the indebted company pays off part of its debt and the remainder is written off. This agreement has to be approved by the supervising court.

- (12) Creditors whose receivables are secured, for example by means of a mortgage, act as separate creditors. For the arrangement proposal to be accepted, all the separate creditors have to vote in favour, whereas for other creditors a qualified majority suffices. Separate creditors vote individually and have a right to veto the proposal.

(*) Confidential information

⁽³⁾ In EUR, the turnover was said to have been EUR 23,6 million in 2002, EU-25,7 million in 2003 and EUR 23 million in 2004. The exchange rate used in this Decision is EUR 1 = SKK 38.

⁽⁴⁾ The total turnover was said to have been SKK 334 million (EUR 8,8 million) in 2002, SKK 360 million (9,5 million) in 2003 and SKK 720 million (EUR 19 million) in 2004.

⁽⁵⁾ A company becomes indebted when it has several creditors and is not able to settle its obligations within thirty days from maturity.

- (13) Separate creditors have a privileged position also in the bankruptcy procedure. The proceeds from the sale of the secured assets in the bankruptcy procedure are meant to be used exclusively to satisfy the claims of the separate creditors. If the claims of the separate creditors cannot all be met from this sale, the outstanding amounts are incorporated into the second group with the claims of the other creditors. In the second group, the creditors are satisfied proportionally.
- (14) Pursuant to the Bankruptcy Act, the company applying for an arrangement with creditors has to submit to the supervising court a list of measures for its reorganisation and for the ongoing financing of its activity after the arrangement.
- (15) Under Act 511/92 on the Administration of Taxes and Fees and Changes to the System of Local Financial Authorities ('Tax Administration Act'), a company has the possibility of asking the tax authorities for deferral of payment of taxes. Interest is charged on the deferred amount and the deferred debt has to be secured.
- (16) The Tax Administration Act also governs the tax execution procedure, the aim of which is to satisfy the State's tax claims through sale of real estate, movable assets or the firm as a whole.
- (17) Between November 2002 and November 2003 the beneficiary benefited from the possibility offered by the Tax Administration Act to have its obligation to pay excise duty on spirit deferred⁽⁶⁾. In total, the deferred debt amounted to SKK 477 015 759 (EU-12,6 million). Before agreeing to defer these payments, the tax office secured each of its receivables against the beneficiary's assets, as stipulated in the Act. The Slovak authorities submit that the value of these securities based on the beneficiary's accounts was SKK 397 476 726 (EU-10,5 million). The beneficiary, however, claims that the value of these securities, as estimated by experts at the end of 2003, was SKK 193 940 000 (EUR 5 million). This is, according to the beneficiary, the value of the secured assets (movables, real estate and receivables) expressed in so-called expert prices.
- (18) As of 1 January 2004, the amended Tax Administration Act limited the possibility to request a tax deferral to only once a year. The beneficiary used this opportunity for the December 2003 excise duty payable in January 2004. However, it was not able to pay or have deferred the January 2004 excise duty payable on 25 February 2004. As a result, the beneficiary became an indebted company within the meaning of the Bankruptcy Act. It also lost its licence for the production and processing of spirit.
- (19) On 8 March 2004 the beneficiary applied to the competent regional court for the arrangement procedure. Having determined that all the necessary legal requirements were met, the regional court decided by a decision of 29 April 2004 to allow the arrangement procedure to go ahead. At the hearing on 9 July 2004 the creditors voted in favour of the arrangement proposed by the beneficiary. The arrangement was confirmed on 14 July 2004 by a decision of the supervising regional court.
- (20) In August 2004 the tax office appealed against this confirmatory decision of the court. By a decision of 25 October 2004, the Supreme Court decided that the appeal was not admissible and declared the decision of the regional court approving the arrangement to be valid and enforceable as of 23 July 2004. The public prosecutor subsequently appealed against the decision of the regional court under the extraordinary further appeal procedure. The procedure is still pending before the Supreme Court.
- (21) The creditors, including the tax office, agreed with the beneficiary on the following arrangement: 35 % of the debt would be repaid by the beneficiary within one month from the validity of the agreement and the remaining 65 % of the debt would be forgone by the creditors. All the creditors were therefore treated on identical terms. The actual amounts per creditor are shown in the following table.

Table 2

The state of the debts of the beneficiary before and after the arrangement procedure [SKK]

Creditor		Debt before the arrangement	Debt after the arrangement (*)	Amount written off
Public	Tax office	640 793 831	224 277 841	416 515 990

⁽⁶⁾ The excise duty is payable on a monthly basis.

Creditor		Debt before the arrangement	Debt after the arrangement (*)	Amount written off
Private	Tetra Pak a.s.	[...]	[...]	[...]
	MTM-obaly s.r.o.	[...]	[...]	[...]
	Merkant družstvo	[...]	[...]	[...]
	Vetropack s.r.o.	[...]	[...]	[...]
TOTAL		644 591 439 ⁽⁷⁾	225 607 029	418 984 410

(*) The amount that the beneficiary is obliged to pay back to its creditors.

(7) In EUR, the total debt before arrangement was EUR 16,96 million and the total debt remaining after the arrangement EUR 5,93 million.

- (22) The claims of the tax office included in the arrangement procedure amounted to SKK 640 793 831 (EUR 16,86 million) and comprised unpaid excise duties for the period May 2003–March 2004, VAT for the period January–April 2004 and added penalties and interest. The claims forgone by the tax office amounted to SKK 416 515 990 (EUR 11 million). The arrangement provided the tax office with SKK 224 277 841 (EUR 5,86 million).
- (23) In the arrangement procedure the tax office acted as a separate creditor and, as such, voted separately in favour of the arrangement. The privileged position of the tax office was due to the fact that some of its receivables included in the arrangement procedure were secured in connection with the deferral of the beneficiary's tax debt in 2002 and 2003 (see paragraph 17). All the other creditors voted in favour of the proposed arrangement. Their receivables were common trade receivables not secured in any manner.
- (24) In its arrangement proposal, in accordance with the requirements of the Bankruptcy Act, the beneficiary spelt out reorganisation measures relating to production, distribution and the workforce (including redundancies).
- (25) On the organisational and workforce fronts, the beneficiary planned the following measures: creation of a universal production group for all the production activities, reorganisation of its transport facilities by exclusion of vehicles with the lowest residual value and reorganisation of commercial activities. These measures were to be accompanied by the redundancy of 50 employees in March–May 2004. Over the same period, a further 50 employees were to work on 60 % remuneration.
- (26) In the production and technical area, the beneficiary stated that, since the company had lost its licence for the production of spirit, the related production facilities would be rented out as of April 2004. The beneficiary planned to reduce or cease production of some unprofitable non-alcoholic beverages and stated that any introduction of a new product in this category would be preceded by an analysis of its profitability.
- (27) The beneficiary also mentions the following measures: the cost restructuring that should result from lower production costs following the abandonment of the production of spirit and from the abolition of part of the company's own transport and the sale of old equipment for scrap.
- (28) The beneficiary also planned to sell an administrative building, a shop and a recreational facility and mentioned the possibility of selling or letting out the vinegar production facility. In their comments on the decision to open the formal investigation procedure, the Slovak authorities confirmed that the sale of the administrative building, shop and recreational facility had not taken place.
- (29) The beneficiary planned an intensive sale of its stocks of ready-to-sell products ⁽⁸⁾.
- (30) According to this proposal, the beneficiary was to finance the arrangement through its own resources (sale of stocks) of SKK [less than 150] million and through external financing in the form of a loan from a commercial bank of SKK 100 million. From the information submitted by the beneficiary in response to the opening of the formal investigation, the outstanding debt was eventually covered by the revenue from the issue of new shares (SKK 21 million; EUR 0,56 million), the revenue from the sale of stock (SKK [less than 150] million; EUR [less than 3,9] million) and a supplier loan from Old Herold s.r.o. (SKK [70–130] million; EUR [1,8–3,4] million). The maturity of the invoices of Old Herold s.r.o. was 40 days, which, according to the beneficiary, was a long period considering the beneficiary's precarious financial situation. This prolonged maturity permitted the beneficiary to accumulate the necessary cash.
- ⁽⁸⁾ In view of the loss of the licence for the production of spirits and derived beverages and according to the information provided by the complainant, this sale probably concerned mainly spirits.

- (31) The Slovak authorities informed the Commission after the opening of the formal investigation that the outstanding debt of the beneficiary towards the tax office amounting to SKK 224 277 841 was paid on 17 December 2004. They confirmed that they had suspended the debt write-off agreed in the arrangement procedure pending the procedure before the European Commission.

III. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE EC TREATY

- (32) In its decision to initiate the formal investigation, the Commission raised doubts that the disputed write-off did not involve state aid. Specifically, it considered that the behaviour of the tax office in the arrangement procedure did not meet the market economy creditor test. In particular, it found that the tax office was in a situation legally different from the other creditors, as it possessed secured claims and had the possibility to initiate the tax execution procedure. It doubted that the arrangement procedure led to the best possible outcome for the State, when compared with the bankruptcy procedure or the tax execution procedure.
- (33) The Commission then raised doubts as to the compatibility of the disputed aid with the common market. It first raised doubts that the aid could be considered to be compatible as rescue aid, as the Slovak authorities had claimed. Rescue aid can only be liquidity support in the form of loan guarantees or loans. The disputed measure, however, is a debt write-off, which corresponds to a non-refundable grant. In addition, the measure was not granted with the prospect that the beneficiary would present a restructuring plan or a liquidation plan or reimburse the aid in full within six months of authorisation of the rescue measure.
- (34) The Commission then considered the compatibility of the disputed measure as restructuring aid and raised doubts as to whether two of the main conditions were fulfilled: the existence of a restructuring plan ensuring the return to long-term viability within a reasonable time-frame and the limitation of the aid to the minimum necessary.

IV. COMMENTS FROM INTERESTED PARTIES

- (35) In addition to the facts described in Part II above, the beneficiary submitted the following comments.
- (36) The beneficiary argues that the reason for its financial difficulties at the beginning of 2004 was the change of the Tax Administration Act, which restricted the possibility to request the deferral of taxes to once a year. This was an important change for the beneficiary, which had, in his own words, been relying on this possibility in previous years.
- (37) On the merits of the case itself, the beneficiary first submitted that the Commission did not have jurisdiction to

review the contested measure because the measure was put into effect before the date of accession and was not applicable after accession. The measure is claimed to have been put into effect before accession because the arrangement procedure was initiated on 8 March 2004 and, as the beneficiary submits, approved by the court on 29 April 2004, i.e. before the accession of the Slovak Republic to the European Union. Furthermore, the tax authorities are said to have signalled their agreement to the proposed arrangement in the negotiations preceding the initiation of the arrangement procedure. A meeting with the Tax Directorate of the Slovak Republic took place in December 2003, and on 3 February 2004 the local tax office sent the beneficiary a letter in which it allegedly confirmed the possibility of proceeding by way of an arrangement.

- (38) The beneficiary further submitted that, even if the Commission found itself competent to act, the contested measure did not constitute state aid because the market economy creditor principle was met.
- (39) First, the beneficiary submits that the comparison of the arrangement procedure with the tax execution procedure is misleading because the initiation of the former excludes or suspends the latter. The tax execution procedure was not, therefore, an option for the tax office. In addition, according to the beneficiary, had it not voluntarily initiated the arrangement procedure, after some weeks or months it would have had a legal obligation to launch the bankruptcy procedure or an arrangement procedure pursuant to the insolvency legislation.
- (40) Second, the beneficiary submits that the decision of the State to avoid bankruptcy and instead to seek a solution through the arrangement procedure met the market economy creditor test. By way of evidence, it submits statements from two auditors and one bankruptcy receiver that the tax office would receive more and would receive it more quickly under the arrangement procedure than under the bankruptcy procedure. It also submits further material and statistics to demonstrate that the bankruptcy procedure in Slovakia lasts on average 3-7 years and brings only a very limited return from the sale of assets ⁽⁹⁾.
- (41) The beneficiary bases his analysis mainly on a report by the auditing company EKORDA dated 7 July 2004, which the tax office allegedly had at its disposal before the creditors' vote on 9 July 2004. No evidence, however, was submitted showing that this was indeed the case.
- (42) According to the report by EKORDA, the revenue from the sale of assets in the case of bankruptcy would be, at best, SKK 204 million (EUR 5,3 million), and, after deduction of various fees of SKK 45 million, only SKK 159 million (EUR 4,2 million). The beneficiary himself corrected the amount of the fees to be deducted (SKK 36 million) and arrived at

⁽⁹⁾ The beneficiary gives an example of a company owning similar assets and operating in the same sector and some more general statistical averages for the use of the bankruptcy procedure in Slovakia.

the figure of SKK 168 million (EUR 4,4 million). Even though the tax office as the only separate creditor and by far the largest creditor would receive most of this revenue, it would still be less than what the tax office received after the arrangement.

(43) To arrive at this result, EKORDA used as the basis the book value as at 31 March 2004 of fixed assets, stocks, cash and short-term receivables after adjustment, reflecting their unrecoverability and low value. It adjusted the nominal value of the beneficiary's assets by a so-called liquidation factor for each component of the assets in the event of sale under bankruptcy proceedings (45 % for fixed assets, 20 % for stocks and short-term receivables, and 100 % for cash).

(44) EKORDA mentions the future tax revenue accruing from the operation of the beneficiary⁽¹⁰⁾ as well as the employment trend in the region and the trend in the food-processing industry in Slovakia as very important factors affecting the decision to keep the beneficiary in business.

(45) The beneficiary also mentions two other reports. The auditor Marta Kochová concluded that the maximum revenue from the sale of the assets, which, however, were not evaluated, would be SKK 100 million (EUR 2,6 million) or, after deduction of fees of SKK 22 million, only SKK 78 million (EUR 2 million). No further information on this report was provided. The receiver Mrs Holovačová is said to state that, in her opinion, the arrangement procedure is generally more advantageous for creditors than bankruptcy. One consideration is the fact that the creditor has an interest in the continuity of the economic activity of the debtor (future revenues from trade or from taxes).

(46) Third, the beneficiary submits that long-term considerations should be taken into account, such as future tax revenue. It is asserted that the case law excluding social-political considerations from the market economy creditor test⁽¹¹⁾ does not apply when the calculation of future tax revenue is considered by the public authority. According to the beneficiary, the situation of the public authority here is analogous to the situation of a market economy creditor who is a supplier interested in the survival of a client. The beneficiary then refers to the case law on the market economy investor principle.

(47) The beneficiary concludes that the market economy creditor test was met and the disputed measure does not constitute state aid.

(48) Should the Commission nevertheless conclude otherwise, the beneficiary argues that the disputed measure is compatible as restructuring aid. It submits that the tax

office had verified the capacity of its business plan to restore long-term viability before agreeing to the arrangement. The absence of a formal restructuring plan is, according to the beneficiary, irrelevant in a situation where the Commission is assessing the case *ex post* because the Commission is now able to see whether the beneficiary in fact became viable. However, the beneficiary considers that, in the case of an *ex ante* assessment, a detailed restructuring plan is necessary. It then briefly describes the restructuring measures undertaken: increase of own capital, lay-offs, sale of stocks. It considers that the halting of the production of spirit and spirit-based beverages and the renting out of the production assets to the company Old Herold s.r.o. was indeed a restructuring measure. Even though the halting of production was originally imposed on it by the loss of the licence, the beneficiary did not apply for a new licence after the arrangement.

(49) According to the beneficiary, the requirement that its contribution to the restructuring should be significant was also met.

(50) Finally, the beneficiary submits that the fact that it is active in an assisted region and is one of the largest regional employers should be taken into account when applying the guidelines applicable to restructuring aid.

V. COMMENTS FROM THE SLOVAK REPUBLIC

(51) In their reply to the opening of the formal investigation, the Slovak authorities made some comments on the factual issues, which have already been mentioned in Part II above.

(52) The Slovak authorities confirmed that the tax office, at the time of the vote in the arrangement procedure, did not take into account the state aid aspect. The tax office did not consider the arrangement as a form of state aid and therefore the beneficiary was not requested to provide a restructuring plan, which differs from the business plan submitted to the court pursuant to the insolvency legislation.

(53) In their response to the comments submitted by the beneficiary, the Slovak authorities submitted the following observations.

(54) The Slovak authorities would not find relevant in the present case the beneficiary's observations on the average length of the bankruptcy procedure and the average return from the sale of assets in a bankruptcy procedure. According to them, given the low number of creditors and the existence of assets with a positive liquidation value which exceeded the amount paid to the State after the arrangement, the bankruptcy procedure would have been

⁽¹⁰⁾ From the 2004 figures used by EKORDA in its report it transpires that 98 % is VAT and excise duties.

⁽¹¹⁾ The beneficiary refers to C 278-280/92 *Spain v Commission* [1994] ECR I-4103.

completed in a shorter-than-average period and the yield of the tax office would have been higher than in the case of the arrangement. The Slovak tax authorities carried out an on-the-spot inspection at the company on 21 June 2004 and found that, as at 17 June 2004, the beneficiary had cash amounting to SKK 161,3 million, receivables of SKK 62,8 million, stocks of spirit and spirit-based beverages with a value of SKK 84 million and fixed assets with a book value of SKK 200 million.

(60) Finally, according to the Slovak authorities, the beneficiary had not drawn up a viable restructuring plan and the measures proposed in the context of the arrangement procedure could not be considered to be restructuring measures.

VI. ASSESSMENT

1. Competence of the Commission

(55) The Slovak authorities consider that the tax execution procedure was a genuine alternative for the tax office. They confirm that the tax office had the possibility of initiating this procedure prior to the arrangement procedure, as it could have done even if the court had refused to confirm the arrangement (because the tax office as separate creditor would not have voted in its favour).

(61) As some of the relevant events in the present case took place before the accession of the Slovak Republic to the European Union on 1 May 2004, the Commission first has to determine whether it is competent to act with regard to the disputed measure.

(56) The Slovak authorities do not agree with the assertion of the beneficiary that his financial difficulties were due to the change in the Tax Administration Act. According to them the financial difficulties of the beneficiary were due to the financial strategy of using indirect taxes for the running of its own business. Instead, the beneficiary should have simply collected the taxes from its clients and transferred them to the state budget.

(62) Measures that were put into effect before accession and are no longer applicable after accession cannot be examined by the Commission either under the so-called interim mechanism procedure, governed by Annex IV, point 3 of the Accession Treaty, or under the procedures laid down in Article 88 of the EC Treaty. Neither the Accession Treaty nor the EC Treaty requires or empowers the Commission to review these measures.

(57) The Slovak authorities do not agree that the meeting with the Tax Directorate of the Slovak Republic in December 2003 is evidence of preliminary agreement with the arrangement on the part of the tax office. They submitted a letter of 6 July 2004 that had been sent by the Tax Directorate of the Slovak Republic to the subordinate tax office, instructing it not to agree with the arrangement proposed by the beneficiary because it was unfavourable for the State. This letter then referred to another, more general, letter of 15 January 2004 from the Minister of Finance to the subordinate Tax Directorate, instructing it not to agree to proposals for arrangements with creditors that would involve the tax authorities writing off tax receivables. Moreover, the Slovak authorities interpreted the letter of 3 February 2004, referred to by the beneficiary (see paragraph 37), as explicitly disagreeing with the 35 % arrangement.

(63) However, measures put into effect after accession clearly do fall within the field of competence of the Commission under the EC Treaty. In order to determine the moment when a certain measure was put into effect, the relevant criterion is the legally binding act by which the competent national authority undertakes to grant aid ⁽¹²⁾.

(58) The Slovak authorities submit that the beneficiary had not paid excise duties within the prescribed deferment period (January 2001 to March 2004) and had had its tax obligations regularly deferred.

(64) The beneficiary claimed in the present case that the disputed measure was put into effect before accession and is not applicable thereafter (see paragraph 37).

(59) According to the Slovak authorities, significant differences in the estimates of the two auditors' reports raise doubts as to the credibility of both reports. They have, in particular, doubts regarding the liquidation factor assigned to current assets by EKORDA. This factor should be higher than 20 %.

(65) The Commission cannot accept the arguments put forward by the beneficiary. The proposal to initiate the arrangement procedure is not an act of the granting authority, but an act of the beneficiary. The decision of the court to commence the arrangement procedure is likewise not an act of the granting authority. This decision only permitted the beneficiary and his creditors to proceed with negotiations on the arrangement, but clearly did not constitute the granting event. There is no evidence that the Tax Directorate would have expressed its agreement with the disputed measure at the meeting in December 2003. On the contrary, the Slovak authorities denied any such preliminary agreement. The letter of 3 February 2004 is explicit in refusing to accept the proposal to settle at the level of 35 %.

(66) The decision of the competent authority to write off some of its claims was taken on 9 July 2004, when the tax office agreed to the arrangement proposed by the beneficiary.

⁽¹²⁾ Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, paragraph 74.

(67) Accordingly, the question of whether the measure is applicable after accession no longer arises.

(68) The Commission therefore concludes that it is competent to assess the disputed measure pursuant to Article 88 of the EC Treaty.

2. State aid within the meaning of Article 87(1) of the EC Treaty

(69) Article 87(1) of the EC Treaty states that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.

(70) Writing off a debt towards a public authority such as a tax office is a form of using state resources. Since it benefits an individual undertaking, the measure is selective.

(71) Until the events that triggered the insolvency procedure, the beneficiary operated in the market for the production of spirit and spirit-based beverages, non-alcoholic beverages and canned fruit and vegetables. In 2003 it was the third-largest producer of spirit and spirit-based beverages in Slovakia. Since the loss of its licence for the production of spirit and spirit-based beverages in March 2004, it has been active on the wholesale market for spirit and spirit-based beverages produced by another company, Old Herold, s.r.o., using the production facilities it rents from the beneficiary. In all segments in which the beneficiary was active prior to the arrangement procedure and in which it is active at present there is trade between Member States.

(72) In the decision to open the formal investigation procedure, the Commission raised doubts as to whether the measure

distorted or threatened to distort competition by conferring on the beneficiary an advantage that it would normally not be able to obtain on the market. In other words, the Commission had doubts as to whether the State had behaved as a market economy creditor in relation to the beneficiary.

(73) It was established that the arrangement contained the same debt arrangement conditions for both the private creditors and the tax office. The creditors were to be paid 35 % of the debt within a prescribed period, a requirement with which the beneficiary complied. The remaining 65 % was written off.

(74) However, prior to the arrangement, the tax office was in a legally and economically more advantageous position than the creditors before the arrangement. It therefore needs to be examined in detail whether the tax office used all the means at its disposal to obtain the highest possible repayment of its receivables, as a market economy creditor would do.

(75) In order to determine whether the market economy creditor test was met, the Commission has to determine whether the tax office was better off accepting the conditions of the arrangement as proposed by the beneficiary compared with the possible outcome of a bankruptcy procedure or a tax execution procedure.

(76) In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledges that, at the time of the arrangement, the question of state aid was simply not considered. Contrary to this, the beneficiary argues that the measure is free of aid and submits documents described above, in particular reports from two auditors.

(77) On the basis of the information submitted by both the beneficiary and the Slovak authorities, the Commission established the following facts on the financial situation of the beneficiary in the year in question to the extent relevant for the application of the market economy creditor test. The figures as at 31 March 2004 provided by the beneficiary and the figures as at 17 June 2004 provided by the Slovak authorities cannot be verified by the Commission in the beneficiary's accounts. The Commission, however, has no reason to doubt any of these data.

Table 3

Financial situation of the beneficiary 2003-04 [SKK million]

	31. 12. 2003 ⁽¹³⁾	31. 3. 2004 ⁽¹⁴⁾	28. 4. 2004 ⁽¹⁵⁾	17. 6. 2004 ⁽¹⁶⁾	31. 12. 2004 ⁽¹⁷⁾
Non-current assets ⁽¹⁸⁾	208	205	204	200	200
Stocks	119	209	176	84	52

	31. 12. 2003 ⁽¹³⁾	31. 3. 2004 ⁽¹⁴⁾	28. 4. 2004 ⁽¹⁵⁾	17. 6. 2004 ⁽¹⁶⁾	31. 12. 2004 ⁽¹⁷⁾
Cash	3	50	94	161	27
Short-term commercial receivables	128	98 ⁽¹⁹⁾	80	63 ⁽²⁰⁾	97

⁽¹³⁾ Balance sheet 1 January — 31 December 2003, provided by the beneficiary. All the values are book values.

⁽¹⁴⁾ Source: EKORDA report of 7 July 2004, taking into account the book value, except for the receivables, which are adjusted to their liquidation value.

⁽¹⁵⁾ Source: Balance sheet 1 January — 28 April 2004, provided by the beneficiary. All the values are book values.

⁽¹⁶⁾ Information provided by the Slovak authorities and obtained during the on-the-spot check by the tax office at the beneficiary's premises on 21 June 2004 (see paragraph 54 above).

⁽¹⁷⁾ Source: Annual report 2004, provided by the beneficiary. All the values are book values.

⁽¹⁸⁾ Land, buildings, machinery, intangible assets, financial assets.

⁽¹⁹⁾ According to EKORDA, the book value of short-term receivables of SKK 166 million has to be adjusted to the liquidation value of SKK 98 million (see paragraph 86).

⁽²⁰⁾ It is not clear whether this figure represents the book value or the liquidation value of the short-term receivables. To err on the side of caution, the Commission took it to be the book value.

(78) The Commission will first examine the evidence submitted by the beneficiary in support of its opinion that the bankruptcy procedure would leave the tax office worse off than the arrangement procedure. As neither the Slovak authorities nor the beneficiary submitted any calculation with regard to the tax execution procedure, the Commission will examine what the tax office could have obtained via this procedure. Finally, it will examine circumstantial

evidence submitted by both the Slovak authorities and the beneficiary.

2.1. Comparison of the arrangement procedure and bankruptcy

(79) The Commission does not consider the EKORDA report a reliable basis for comparing the proposed arrangement with a potential bankruptcy procedure. The Slovak authorities share these doubts.

(80) At the outset, the Commission notes that, in issuing its report on 7 July 2004 (just two days before the creditors' meeting), EKORDA used for its calculations the status of the beneficiary's assets as at 31 March 2004. It is clear from Table 3 that the level of the various assets changed considerably after 31 March 2004. In particular, a considerable portion of the stocks was sold, which led to an increase in cash. These changes are of great importance when applying EKORDA's liquidation factors, ranging from 20 % for stocks and short-time receivables to 100 % for cash. Assuming that the liquidation factors estimated by EKORDA are correct and applying the methodology used by EKORDA, the following table shows how the outcome of EKORDA's calculation would have been different if based on figures from 28 April 2004 and 17 June 2004, i.e. still before the creditors' meeting on 9 July 2004. These figures also show that the liquidation factors proposed by EKORDA are not realistic.

Table 4

Comparison of the probable yield from the sale of the beneficiary's assets in a bankruptcy procedure [SKK million]

		Situation on:					
		31.3.2004		28.4.2004		17.6.2004	
	Liquidation factor [%]	Book value	Yield	Book value	Yield	Book value	Yield
Non-current assets	45	205	92	204	92	200	90
Stocks	20	209	42	176	35	84	17
Short-term receivables	20	98 ⁽²¹⁾	20	86 ⁽²²⁾	17	37 ⁽²³⁾	7

		Situation on:					
		31.3.2004		28.4.2004		17.6.2004	
	Liquidation factor [%]	Book value	Yield	Book value	Yield	Book value	Yield
Cash	100	50	50	94	94	161	161
Total			204		238		275

⁽²¹⁾ This is the book value (SKK 166 million) adjusted by EKORDA to reflect the liquidation value of the receivables.

⁽²²⁾ This is an approximation of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 147 million) by the same ratio as EKORDA used in its analysis (see footnote 19).

⁽²³⁾ This is an approximation of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 63 million; see also footnote 20) by the same ratio as EKORDA used in its analysis (see footnote 19). The Commission, however, notes that, judging from the information provided by the Slovak authorities, the receivables of SKK 63 million were enforceable receivables. It is therefore very doubtful whether any adjustment of their book value is actually necessary. If SKK 63 million were the liquidation value of these receivables, the total yield in a bankruptcy procedure as at 17 June 2004 would have been SKK 331 million (EUR 8,7 million).

(81) It must be noted that the business plan submitted by the beneficiary to the court forecast the sale of stocks at [less than SKK 150] million over the period March-May 2004. EKORDA must have therefore been aware that the assets of the beneficiary would be subject to significant changes after 31 March 2004 and did not take this into account.

(82) If EKORDA had taken into account the book value of the beneficiary's assets from 28 April 2004, it would have arrived at the conclusion that the yield obtained in bankruptcy would have been higher (SKK 238 million; EU-6,3 million) than what the beneficiary proposed in the arrangement (SKK 225 million; EUR 5,93 million ⁽²⁴⁾). This conclusion would have been even stronger if the analysis had been made in June 2004 (SKK 275 million; EUR 7,2 million), still well in time for the tax office to exercise its right of veto and reject the proposal, with the effect of terminating the arrangement procedure. Again, it is noted that these results were obtained using EKORDA's assumptions and methodology.

(83) The Commission, however, is unable to accept the methodology used by EKORDA and does not find the assumptions of its analysis credible. This conclusion is reinforced by the doubts of the Slovak authorities as described in paragraphs 55 and 60.

(84) To start with, in its report EKORDA does not explain how it determined the three liquidation factors. The Slovak authorities stated that the liquidation factor for the stocks should be higher than 20 %.

(85) The Commission observes that in 2004 the beneficiary was able to generate SKK [less than 150] million from the sale of its stocks (see paragraph 30). This is more than [40-50] % of the book value of stocks on which EKORDA based its assessment. This strongly suggests that the liquidation factor of 20 % was too low. The changes in the balance sheet in 2004 with regard to stocks supports this

conclusion. In addition, the beneficiary itself in its business plan estimated the yield from the sale of stocks over the period March-May 2004 to be SKK [less than 110] million (see paragraph 30). EKORDA ignored this estimate. Finally, from the nature of the beneficiary's activities it can be assumed that the stocks comprised final products that could have been easily sold direct to distributors or consumers, rather than semi-finished products requiring further processing.

(86) Furthermore, EKORDA used double adjusting with regard to the short-term commercial receivables. First, it adjusted their book value by 40 % (the book value being SKK 166 million and the value that EKORDA used in its calculations being SKK 98 million) and then applied the low liquidation factor of 20 %. This methodology is questionable. It is acceptable to adjust the book value of receivables to reflect their actual value at a given time. However, EKORDA does not provide any clarification as to why the yield in the bankruptcy/liquidation would be only one fifth (SKK 20 million) of what the beneficiary itself believed it would be able to obtain from its debtors (SKK 98 million).

(87) Furthermore, the liquidation factor of 45 % for non-current assets seems to be too low. According to the beneficiary, the value of its assets pledged in favour of the tax office was SKK 194 million ⁽²⁵⁾. This value is, according to the beneficiary, expressed in prices estimated by independent experts at around the end of 2003/beginning of 2004. In the Commission's view, such an 'expert price' should normally reflect the general price of the asset, expressing the price at which the asset could be sold at the time. EKORDA does not provide any clarification as to why the yield from the bankruptcy sale of the non-current assets would generate only 45 % of their book value of SKK 205 million ⁽²⁶⁾ whereas the beneficiary himself valued these assets much higher.

⁽²⁵⁾ This figure is disputed by the Slovak authorities, as will be explained below.

⁽²⁶⁾ Including both pledged and non-pledged non-current assets.

⁽²⁴⁾ Including both the tax office and the private creditors.

(88) As to the argument of the beneficiary that it would be difficult to find a buyer because most of the pledged machinery was confined to the production of spirit and spirit-based beverages, non-alcoholic beverages or canned products, the Commission has the following two comments to make. First, it is noted that the 'expert price' of the pledged real estate was SKK 105 million, which in itself is higher than the total yield forecast by EKORDA (SKK 92 million). Second, the actual developments in the company show that some of these production assets quickly found a user, Old Herold, s.r.o., once the beneficiary had lost its licence to produce spirit and spirit-based beverages. It seems therefore that there was an imminent interest from a competitor for these production assets.

(89) In addition, the credibility of EKORDA's report is also affected by the manner of calculating the various fees involved in a bankruptcy procedure that were to be subtracted from the total yield from the sale of the assets. Whereas EKORDA deducted SKK 45 million in fees, the beneficiary in its submission gave the figure of SKK 36 million and the estimate of the auditor Ms Kochová is SKK 22 million at most. Such discrepancies raise doubts as to the accuracy of EKORDA's assumptions regarding the level of the fees and, therefore, also the level of the yield that could have been obtained in a bankruptcy procedure. It is noted, nevertheless, that, considering the beneficiary's situation on 17 June 2004, even with fees of SKK 36 million, the yield in bankruptcy would have been higher than with the proposed arrangement.

(90) Finally, the Commission notes that the Slovak authorities do not support the beneficiary's claim that the tax office would have had EKORDA's report at its disposal prior to the creditors' meeting on 9 July 2004.

(91) As to the report by Ms Kochová, the Commission cannot assess it because it does not have a copy of it. From the information submitted it is not clear when and for what purpose this report was drawn up or on what assumptions and data it was based. The Commission, however, observes that the conclusions of this auditor are significantly different from the conclusions of EKORDA. The report of the receiver Ms Holovačová states only that, in general, the arrangement procedure is more advantageous for creditors than bankruptcy. The Commission cannot accept either of these two reports as evidence in support of or against the beneficiary's assertion that the market economy creditor test was met.

(92) On the basis of the evidence available, the Commission therefore concludes that the sale of the assets in a bankruptcy procedure would, in all probability, have led to a higher yield for the beneficiary's creditors. Considering that the tax office would be satisfied in the first group as a separate creditor and, in addition, obtain most of the yield

distributed in the second group (owing to the size of its claims when compared to other creditors), the Commission concludes that almost the entire yield obtained in the bankruptcy would accrue to the tax office.

2.2. Comparison of the arrangement procedure and tax execution

(93) The tax office, unlike the private creditors, was entitled to initiate on its own initiative the tax execution through the sale of real estate, machinery or the firm as a whole. The Commission finds irrelevant the argument of the beneficiary that the arrangement procedure shelters the company from the tax execution procedure. As confirmed by the Slovak authorities, the tax execution procedure was indeed an option for the tax office, either prior to the launch of the arrangement procedure or after the tax office's veto on the proposed arrangement. This possibility therefore needs to be considered when applying the market economy creditor test. The beneficiary does not compare the proposed arrangement with the possible outcome of tax execution.

(94) In its analysis the Commission relies on the data provided by both the beneficiary and the Slovak authorities. In this context it is noted that the Slovak authorities confirmed that the pledge in favour of the tax office equalled SKK 397 million, as stated in the decision to open the formal investigation procedure. This value is said to have been obtained from the beneficiary's accounts. The beneficiary, for its part, submits that the value of the pledged assets expressed in 'expert prices' is SKK 194 million (see paragraph 17). While the Commission does not need to determine which figure is correct, the following conclusions can nevertheless be made.

(95) First, the pledge was the countervalue of the deferred tax debt of the beneficiary, required by the Tax Administration Act. If the value of the beneficiary's assets actually amounted to only half of the pledge, as suggested by the expert opinion submitted by the beneficiary, then the securities required by the State for those deferrals were insufficient. In these circumstances, the tax deferrals permitted by the tax office between November 2002 and November 2003 for a total amount of SKK 477 million therefore in all probability did not meet the market economy creditor test. As these tax deferrals were put in effect before the date of accession and are not applicable thereafter, the Commission is not competent to assess the compatibility of those measures with the common market. For the purpose of this case, it is also unnecessary for the Commission to determine whether those measures constituted state aid. However, if the earlier deferrals already constituted state aid, the market economy creditor principle can no longer be referred to when the deferred debts are later (partly) written off.

- (96) Second, even if the lower figure submitted by the beneficiary were used in the calculation of the proceeds from a tax execution procedure, a market economy creditor would, had he had the possibility, have favoured this procedure over the arrangement procedure.
- (97) In a tax execution procedure the tax authority can sell the debtor's assets (receivables and other current assets, movable assets, real estate) directly. At the time when the tax office voted in favour of the arrangement, the beneficiary had stocks worth SKK 84 million, enforceable receivables of SKK 63 million and cash of SKK 161 million (see paragraph 54). It should be noted that the value of the current assets alone (SKK 308 million; EUR 8,1 million) would exceed the yield obtained under the arrangement (SKK 225 million; EUR 5,93 million). Even if the receivables were wholly deducted ⁽²⁷⁾, the value of the current assets alone (SKK 245; EU-6,4 million) would still exceed the yield obtained under the arrangement. In addition, the beneficiary had other assets, the value of which was at least SKK 194 million.
- (98) Furthermore, tax execution would not involve administrative fees as in the case of bankruptcy proceedings. It is a procedure that is initiated and controlled by the tax authority itself, so it can be assumed that it would be conducted in a speedy manner.
- (99) The Commission therefore concludes that tax execution against the beneficiary's assets would have led to a higher return than the arrangement.
- (102) In addition, the Commission notes that the tax office itself had appealed against this arrangement as early as 2 August 2004, i.e. not even one month after the arrangement was agreed upon.
- (103) The beneficiary submitted that the tax office had signalled its agreement to the arrangement even prior to the beneficiary launching the procedure. The Commission considers that the evidence submitted by the beneficiary indicates quite the opposite. In his letter of 3 February 2004 to the beneficiary, the director of the tax office writes that, although in principle he is not against the use of the arrangement procedure, he does not agree with the beneficiary's proposal for an arrangement featuring 35 % repayment of the debt.
- (104) On the basis of this evidence, the Commission cannot but conclude that the Slovak authorities were opposed to the arrangement proposed by the beneficiary and were opposed to it before the launching of the arrangement procedure on 8 March 2004, before the creditors' vote on 9 July 2004 and also after the court approved the arrangement.
- (105) The beneficiary submitted that long-term effects, such as the continuity of the tax revenue for the State, should be taken into account (see paragraph 46).

2.3 Other evidence

- (100) The Commission takes particular note of the letter submitted by the Slovak authorities from the director of the Tax Director to his subordinate, the director of the tax office in question (see paragraph 57). The letter is clear proof that the Tax Directorate (which had had prior direct contacts with the beneficiary) opposed the proposed arrangement and gave the local tax office a clear instruction not to vote in favour of the arrangement. The reason mentioned in the letter was that the proposed arrangement was 'not advantageous' for the State.
- (101) It was also shown by the Slovak authorities that there was a clear policy instruction given by the Ministry of Finance at the beginning of 2004 to tax offices to the effect that they should not accept arrangements that propose writing off tax offices' receivables ⁽²⁸⁾. This instruction was given in connection with the amendment of the Tax Administration Act as of 1 January 2004, in an effort to strengthen discipline in tax collection.
- (106) First, it needs to be stressed that the market economy creditor test differs from the market economy investor test. Whereas a market economy investor is in a position to decide whether to enter into a relationship with the company in question and will be driven by the long-term strategic prospect of obtaining an appropriate return from his investment ⁽²⁹⁾, a 'market economy creditor', who is already in a commercial or public law relationship with the insolvent company, will aim to obtain the repayment of sums already due to him ⁽³⁰⁾ on conditions as advantageous as possible in terms of the degree of repayment and the time-frame. The motivations of the hypothetical market economy creditor and the market economy investor will therefore be different. Accordingly, the case law has defined separate tests for the two situations.
- (107) Second, as to the analogy with the creditor-supplier, it is important to note that the nature of his receivables and the nature of those of the State are fundamentally different. Because the relations of the supplier to the insolvent firm have an exclusively contractual basis, he might genuinely suffer from the loss of a business partner. If the insolvent company is liquidated or sold off, the supplier would need to find a new client or contract with the new owner. The

⁽²⁷⁾ It is not entirely clear whether SKK 63 million is the book value or the liquidation value of the short-term receivables on 17 June 2004 (see footnotes 20 and 23). Nor is it clear whether the book value does not in fact also correspond to the liquidation value.

⁽²⁸⁾ It can be deduced from the letter that the Ministry agreed with arrangements consisting in deferrals of payment of not more than two months for VAT and excise duties and of six months for other taxes.

⁽²⁹⁾ Case T-152/99 *Hamsa*, p. 126.

⁽³⁰⁾ See, for example, Case C-342/96 *Spain v Commission* ('Tubacex'), p. 46.

risk is higher when his dependency on the insolvent firm is considerable. Such a creditor will indeed consider the future. In contrast, the relations of the State with the insolvent firm are based on public law and therefore are not dependent on the will of the parties. Any new owner taking over the assets of the liquidated firm would automatically be obliged to pay taxes. Moreover, the State is never dependent on one taxpayer. Finally and most importantly, the State is not profit-driven when levying taxes and does not act in a commercial manner or with commercial considerations when doing so. The above analogy is therefore not well founded.

- (108) The Commission concludes that the situation of the State in the present case cannot be compared to the situation of a hypothetical market economy investor or to the situation of a hypothetical dependent market economy creditor. The loss of future taxes cannot therefore be taken into account when applying the market economy creditor principle.
- (109) Finally, from the overview of taxes submitted by the beneficiary it is noted that a large majority of the taxes paid by the beneficiary since 1995 have been indirect taxes (excise duties and VAT). As these taxes are paid by final consumers, the liquidation of the beneficiary would have no impact on their collection as long as consumers continued to purchase the taxed products (in this case, mainly spirit and spirit-based beverages) from other producers. The beneficiary's argument regarding considerable future tax loss is therefore not credible.

2.4 Conclusion

- (110) On the basis of the above evidence, the Commission concludes that in the present case the market economy creditor test was not met and that the State conferred on the beneficiary an advantage that it would not have been able to obtain from the market.
- (111) The Commission therefore concludes that the disputed measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty.
- (112) The state aid granted to the beneficiary is equal to the amount of debt written off by the tax office in the arrangement procedure, viz. SKK 416 515 990.

3. Compatibility of aid: Derogation under Article 87(3) of the EC Treaty

- (113) The primary objective of the measure is to assist a company in difficulty. In such cases, it is possible to apply the exemption of Article 87(3)(c) of the EC Treaty, which allows state aid that facilitates the development of certain

economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest and where the relevant conditions are met.

- (114) In view of the beneficiary's production portfolio, the Commission assessed whether the special rules applicable to agriculture apply in the present case. Basing itself on the information on the beneficiary's turnover submitted by the Slovak authorities, the Commission in its decision to open the formal investigation arrived at the conclusion that most of beneficiary's products are not products falling under Annex I to the EC Treaty and that, therefore, the general state aid rules apply.
- (115) In its comments on the decision to open the formal investigation, the beneficiary disputed the turnover data previously provided by the Slovak authorities (see Table 1) but not the Commission's decision to base its assessment on the general state aid rules. Without wishing to determine whether the figures provided by the beneficiary are accurate ⁽³¹⁾, the Commission verified whether its above conclusion would hold up against the new data. It concludes that most of the beneficiary's turnover is generated by products not falling under Annex I to the EC Treaty. The general, and not the sector-specific, state aid rules thus apply.
- (116) Rescue and restructuring aid to ailing companies is currently governed by the Community guidelines on state aid for rescuing and restructuring firms in difficulty ⁽³²⁾ ('new guidelines'), which replaced the previous text adopted in 1999 ⁽³³⁾ ('1999 guidelines').
- (117) The transitional provisions of the new guidelines stipulate that they will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some or all of the aid is granted after 1 October 2004, the date of publication of the new guidelines in the *Official Journal of the European Union* (point 104). Should, however, the aid be unlawfully granted before 1 October 2004, the examination is to be conducted on the basis of the guidelines applicable at the time the aid was granted (point 104).
- (118) The Commission notes that the tax office's approval of the arrangement was issued on 9 July 2004 and took effect as of 23 July 2004. This means that the aid was unlawfully granted before 1 October 2004. The 1999 guidelines, which were applicable at the time the aid was granted, therefore apply.

⁽³¹⁾ These figures do not seem to be supported by the annual accounts submitted by the beneficiary.

⁽³²⁾ OJ C 244, 1.10.2004, p. 2.

⁽³³⁾ OJ C 288, 9.10.1999, p. 2.

(119) The Commission concludes that the beneficiary is a medium-sized company within the meaning of Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises ⁽³⁴⁾.

3.1 Eligibility of the firm

(120) According to point 5(c) of the 1999 guidelines, a firm is regarded as being in difficulty where it fulfils the criteria under domestic law for being the subject of collective insolvency proceedings.

(121) The beneficiary was party to the arrangement procedure, which is applicable to insolvent companies as defined in the Bankruptcy Act. It is therefore eligible for rescue and restructuring aid.

3.2 Rescue aid

(122) The disputed measure was initially described by the Slovak authorities as rescue aid. Pursuant to the 1999 guidelines, the Commission raised doubts as to the compatibility of the aid as rescue aid on the grounds described in Part III above.

(123) Neither the Slovak authorities nor the beneficiary commented on these doubts. No new facts have been presented to the Commission in this respect.

(124) Since the above doubts have not been allayed, the Commission concludes that the aid is not compatible as rescue aid within the meaning of the 1999 guidelines.

3.3 Restructuring aid

(125) The Commission raised doubts as to whether the aid was compatible as restructuring aid within the meaning of the 1999 guidelines on the grounds described in Part III above.

(126) The Commission notes that the Slovak authorities, with whom lies the burden of proof to show that the state aid is compatible with the common market, have not submitted any new facts in support of this conclusion. It took due note of the comments submitted by the beneficiary.

3.3.1 Return to long-term viability

(127) According to the 1999 guidelines, the granting of restructuring aid must be linked to and conditional on implementation of a feasible and coherent restructuring plan to restore the firm's long-term viability. The Member State commits itself to the plan, which must be endorsed by the Commission. Failure by the company to implement the plan is regarded as misuse of aid.

(128) The restructuring plan must be such as to enable the beneficiary to restore its long-term viability within a reasonable timescale and on the basis of realistic assumptions as to the future operating conditions. The plan should describe the circumstances that led to the beneficiary's difficulties and identify appropriate measures to address these difficulties. Restructuring operations cannot be limited to financial aid designed to make good debts and past losses without tackling the reasons for difficulties.

(129) For companies situated in assisted areas and for small and medium-sized companies, the 1999 guidelines stipulate that the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the content of monitoring reports. Nonetheless, these factors do not exempt such companies from the requirement to draw up a restructuring plan or the Member States from the obligation to make the granting of the restructuring aid conditional upon implementation of a restructuring plan.

(130) After the opening of the formal investigation, the Slovak authorities confirmed that the business plan that the beneficiary was obliged to produce as a condition for the launching of the arrangement procedure was considered only by the competent court, i.e. not by the granting authority, and that neither the court nor the tax office monitored the implementation of the plan.

(131) Contrary to this confirmation, the beneficiary submitted that the tax office had studied the ability of the business plan to restore long-term viability prior to its approval of the arrangement, but it did not produce any evidence to support this claim.

(132) The beneficiary further argued that the absence of a formal restructuring plan is irrelevant in the case of *ex post* assessment of aid by the Commission, as the Commission is then in a position to assess whether the beneficiary actually became viable. According to the beneficiary, a formal restructuring plan can be required only in the case of *ex ante* assessment, the only sort of assessment to which the 1999 guidelines apply.

(133) This line of argument is not correct. The 1999 guidelines apply to the compatibility assessment of both notified and unlawful aid. Whenever the assessment takes place, the condition that the restructuring aid be subject to the establishment of a viable restructuring plan is valid. The Commission has to conduct its assessment on the basis of the information available at the time the aid was granted.

⁽³⁴⁾ OJ L 10, 13.1.2001, p. 33. Commission Regulation (EC) No 70/2001 was amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22).

- (134) It may be concluded that the tax office as the granting authority did not have any opportunity to evaluate a restructuring plan and to make the writing-off of its receivables subject to implementation of a restructuring plan that would be duly monitored. It follows that the first formal condition, which is fully applicable also to *ex post* assessment, was not met.
- (135) As to the substance of the business plan, the Slovak authorities have not submitted any information that would allay the Commission's doubt as to whether the plan represents a genuine restructuring plan as required by the 1999 guidelines.
- (136) The Commission cannot but stand by the conclusion it gave in the decision to open the formal investigation. The business plan submitted is merely a plan dealing with the beneficiary's acute problem of mounting debt to the State. The plan does not analyse in any way the circumstances that led to the beneficiary's difficulties or the financial situation of the company at that time or its financial prospects. Since this analysis was missing, the beneficiary did not propose any concrete steps addressing the individual reasons that led to the difficulties. The only measure described in detail is the proposed financial restructuring through the arrangement with the creditors.
- (137) The plan does not mention at all the increase in the beneficiary's own capital, mentioned by the beneficiary as one of the restructuring measures. There is nothing in the file to show that the capital increase by Hydree Slovakia should be considered as a measure ensuring that the beneficiary would not in the long term repeat its strategy of financing its production through VAT and excise duty debt, which is what eventually led to its difficulties. The Slovak authorities themselves confirmed that the capital increase does not in any way decrease the risk of the financial problems being repeated. These doubts are all the stronger when it is considered that the capital increase amounted to SKK 21 million, while the restructured debt was SKK 644 million.
- (138) The capital increase in itself is no proof of the market's belief in the beneficiary's return to long-term viability. The Commission notes that the beneficiary did not manage to obtain any loan from a private bank, despite its active efforts.
- (139) The Commission further notes that the renting out of the production facilities to the beneficiary's competitor Old Herold s.r.o. was clearly motivated by the fact that the beneficiary had lost its licence to produce spirit and spirit-based products and not by the fact that the production would have been loss-making and thus in need of restructuring. It is true that the beneficiary itself could have requested a new licence after the arrangement was finalised but did not do so. The Commission, however, observes that the beneficiary continues to sell the products produced by Old Herold using the beneficiary's facilities and does so under its own brand name and even plans to increase these sales, as stated in the annual report for the period 29 April-30 December 2004. The letting of these production assets therefore cannot be considered as a restructuring measure because, on the basis of all the evidence available, there was no need for restructuring of this part of production.
- (140) As to the remaining measures proposed in the business plan, the Commission's doubts have not been allayed. These measures are simply activities in the normal run of business rather than rationalisation measures (sale of old equipment or vehicles). The two proposed structural measures (abandonment of the production of non-profitable non-alcoholic products and the sale of some real estate) were described very vaguely without any indication of the precise products or a timetable. The Slovak authorities confirmed that as of 10 October 2005 the real estate intended for sale (an administrative building, a shop and a recreational facility) had not been sold, i.e. that this planned measure had not been implemented as announced.
- (141) The combination of the absence of a formal restructuring plan and of a genuine analysis of the difficulties, the measures necessary to address these difficulties and the market conditions and prospects leads the Commission to the conclusion that the business plan submitted by the beneficiary is not a genuine restructuring plan as required by the 1999 guidelines⁽³⁵⁾. The Commission's doubts that the beneficiary would restore long-term viability have therefore not been allayed.
- ### 3.3.2 Aid limited to the strict minimum
- (142) Although its conclusion that, in the absence of a genuine restructuring plan, its doubts as to the long-term viability persist is in itself sufficient to conclude that the aid is not compatible with the common market, the Commission will also analyse the other central criterion of the 1999 guidelines, i.e. that the aid is limited to the strict minimum necessary.
- (143) Pursuant to point 40 of the 1999 guidelines, the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in light of the existing financial resources of the beneficiary. The beneficiary is expected to make a significant contribution to the restructuring from its own resources.
- (144) The costs of restructuring amounted to SKK 644 591 440 (EUR 16,96 million), the total amount of debt restructured through the arrangement. The beneficiary paid 35 % of this amount, i.e. SKK 225 607 028 (EUR 5,93 million).

⁽³⁵⁾ See also judgment of the Court of 22 March 2001 in Case C 17/1999 *French Republic v Commission*.

- (145) The Slovak authorities did not provide any further explanation in respect of the doubts expressed by the Commission in this connection. The beneficiary explained how he financed payment of the debt remaining after the arrangement (see paragraph 30). According to the beneficiary, its own contribution amounted to SKK [less than 300] million (EUR [less than 7,9] million).
- (146) First, the Commission notes that the resources available to the beneficiary exceeded the amount of debt remaining after the arrangement. This suggests that the aid was not limited to the minimum necessary.
- (147) More importantly, the Commission considers that the credit provided by Old Herold does not qualify as an own contribution by the beneficiary within the meaning of the 1999 guidelines. Payables constitute a permanent source of financing of the operation of the firm. They are short-term loans, which, however, have to be paid back. It is only if suppliers agree to a payment maturity longer than is normal that additional resources are available to the company for restructuring; such deferral constitutes a sign that the market believes in the feasibility of the return to viability.
- (148) The beneficiary did not in any way demonstrate that the deferral of payment by Old Herold went considerably beyond what is normal commercial practice between the beneficiary and its suppliers. The maturity of 40 days seems to be standard practice, especially in view of the fact that it was granted to the beneficiary after the arrangement. The beneficiary was therefore no longer in financial difficulties. The very purpose of the arrangement was precisely to help the beneficiary out of its financial problems.
- (149) The Commission therefore concludes that this prolonged maturity cannot be considered as a contribution to restructuring from external resources.
- (150) Without this deferral, the own contribution of the beneficiary within the meaning of the 1999 guidelines amounts to SKK [less than 170] million (EUR [less than 4,5] million) and thus corresponds to [less than 27] % of the restructuring costs.
- (151) Unlike the new guidelines, the 1999 guidelines did not contain any thresholds indicating when the own contribution of the beneficiary is considered to be significant.
- (152) Considering the practice of the Commission in applying the 1999 guidelines and the trend in Commission policy in this respect towards the introduction of thresholds under the 2004 guidelines⁽³⁶⁾, the Commission considers the contribution of [less than 27] % to be rather low. Such a contribution might be accepted under the 1999 guidelines only if all the other conditions for approving the aid were fulfilled, and the Commission would have to take into account such criteria as whether the company is active in

an assisted area and to what extent the sources of financing reflect the belief of the market, other than the beneficiary itself and its shareholders, in the long-term viability of the company or other specific features of the case.

- (153) In the light of the above, the Commission cannot accept in the present case that the contribution of the beneficiary is significant. It concludes that its doubts as to whether the own contribution of the beneficiary was significant and whether the aid is limited to the minimum necessary have not been allayed.

3.4 Compatibility of aid: conclusion

- (154) The Commission concludes that the aid is not compatible with the common market as rescue or restructuring aid. In addition, no other derogation laid down in the EC Treaty is applicable to the present case.

VII. CONCLUSION

- (155) The Commission finds that the Slovak Republic has unlawfully granted the write-off of tax debt in favour of FRUCONA Košice a.s. in breach of Article 88(3) of the EC Treaty. This aid is not compatible with the common market under any derogation laid down in the EC Treaty.
- (156) Even though the implementation of the write-off by the tax office has been suspended pending the present procedure before it, the Commission finds that the advantage for the beneficiary was created at the point at which the tax office decided to forgo part of its claims and thus put the aid at the disposal of the beneficiary. This moment was the entry into force of the creditors' agreement on 23 July 2004. The advantage over the beneficiary's competitors resided in the fact that the tax office had not enforced its tax claims.
- (157) To restore the status *ex ante*, the state aid must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which the Slovak Republic has implemented for FRUCONA Košice, a.s., amounting to SKK 416 515 990, is incompatible with the common market.

Article 2

1. The Slovak Republic shall take all necessary measures to recover from the beneficiary the unlawfully granted aid referred to in Article 1.
2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision.
3. The sum to be recovered shall bear interest throughout the period running from the date on which it was put at the disposal of FRUCONA Košice, a.s. until its actual recovery.

⁽³⁶⁾ The threshold for medium-sized enterprises under the 2004 guidelines is at least 40 %.

4. The interest shall be calculated in accordance with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁷⁾. The interest rate shall be applied on a compound basis throughout the entire period referred to in paragraph 3.

Article 3

The Slovak Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to

comply with it. It shall provide this information using the questionnaire attached in Annex I to this Decision.

Article 4

This Decision is addressed to the Slovak Republic.

Done at Brussels, 7 June 2006.

For the Commission

Neelie KROES

Member of the Commission

⁽³⁷⁾ OJ L 140, 30.4.2004, p. 1.

ANNEX I

**Information regarding the implementation of the Commission Decision on state aid measure C 25/2005
(ex NN 21/2005) implemented by the Slovak Republic for FRUCONA Košice a.s.**

1. Calculation of the amount to be recovered

- 1.1. Please provide the following details on the amount of unlawful state aid that has been put at the disposal of the beneficiary:

Date(s) ^(°)	Amount of aid ^(*)	Currency

^(°) Date or dates on which aid or individual instalments of aid were put at the disposal of the beneficiary.

^(*) Amount of aid put at the disposal of the beneficiary, in gross aid equivalent.

Comments:

- 1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. Recovery measures planned and already taken

- 2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Where relevant, please indicate the legal basis for the measures taken or planned.
- 2.2. What is the timetable for the recovery process? By what date will the recovery of the aid be completed?

3. Recovery already effected

- 3.1. Please provide the following details on the amounts of aid that have been recovered from the beneficiary:

Date(s) ^(°)	Amount of aid repaid	Currency

^(°) Date or dates on which the aid was repaid.

- 3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.

COMMISSION DECISION

of 20 December 2006

on State aid No C 5/2006 (ex N 230/2005) which Germany is planning to implement for Rolandwerft

(notified under document number C(2006) 5854)

(Only the German version is authentic)

(Text with EEA relevance)

(2007/255/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 and having regard to their comments,

Whereas:

(3) The comments were transmitted to Germany by letter of 17 July 2006. Germany replied to these comments by letter of 11 August 2006, addressed to the Commission and registered as received on the same day.

(4) Germany's response to the initiation of the formal investigation procedure was submitted by letter of 6 April 2006, registered as received on the same day. Annexes were submitted by letter of 11 April 2006, registered as received on 12 April. The Commission requested further information on 17 August 2006 which Germany submitted by letter of 14 September 2006, registered as received on 15 September. Germany submitted further information by letter of 20 November 2006, registered as received on the same day. A meeting with representatives of Germany and the shipyard took place on 22 November 2006. Following the meeting, Germany submitted further information by letter of 24 November 2006, registered as received on the same day.

I. PROCEDURE

(1) By letter of 19 October 2005, registered as received on the same day, Germany, acting in accordance with Article 88(3) of the EC Treaty and with the Framework on state aid to shipbuilding⁽¹⁾ (hereinafter the shipbuilding framework), notified its intention of granting regional aid to the company Detlef Hegemann Rolandwerft GmbH & Co. KG (Rolandwerft). The Commission requested further information by letter of 16 November 2005, to which Germany replied by letter of 23 December 2005, registered as received on the same day. By letter of 18 January 2006, registered as received on the same day, Germany modified the notified aid.

(2) By letter of 22 February 2006, the Commission informed Germany of its decision to initiate in respect of the aid the procedure laid down in Article 88(2) of the EC Treaty. The Commission decision was published in the *Official Journal of the European Union*. The Commission invited Germany and the other interested parties to submit comments. By letter of 28 June 2006, registered as received on the same day, the 'Verband für Schiffbau und Meerestechnik' (German Shipbuilding and Ocean Industries Association) submitted comments. By letter of 30 June 2006, registered as received on 7 July, the beneficiary also submitted comments.

II. DESCRIPTION

1. The beneficiary

(5) The beneficiary of the aid, Rolandwerft, is a shipyard located in Berne, in the district of Wesermarsch, Lower Saxony (Germany), an assisted area pursuant to Article 87(3)(c) of the EC Treaty. The yard is located on the shores of the river Weser, which runs into the North Sea. Rolandwerft belongs to the Hegemann group. It is a large undertaking that does not rank as a small or medium-sized enterprise under the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises⁽²⁾.

(6) Rolandwerft produces sea-going vessels. Its central area of business is the construction of feeder ships, i.e. the smallest sub-category of container ships. In addition, the yard builds specialised ship types such as roro/lolo-vessels or car carriers. In 1999, responding to a change in market demand, it began to produce larger ships measuring up to [...] (*) m in length, with a weight of [...] tonnes and a cargo capacity of up to 850 TEU. In order to be able to produce these larger ships, Rolandwerft had to carry out an

⁽¹⁾ OJ C 317, 30.12.2003, p. 11.

⁽²⁾ OJ L 124, 20.5.2003, p. 36.

(*) Business secret.

investment programme for the adaptation of the yard, including expansion of the ship lift. An extension of the fitting-out quay was also planned but had to be postponed for financial reasons. Rolandwerft is also active in the field of ship repair. The repair activities are carried out either on land or in the water.

shipbuilding work currently take place outside of hall 1. After the investment, almost all of the work will be carried out indoors.

Hall 3

- (7) The ships are produced first in sections in hall 3 and in larger modules on the outside work area. The sections and modules are transferred via the outside work area to hall 1, where they are assembled into ships. The ships are transported to the ship lift and lowered into the water. Further fitting-out takes place on a quay which can take ships of up to 140m in length. It is performed using a 50t quay crane and an 8t construction crane, both operating on the crane track.
- (8) Since the early 1990s, Rolandwerft has been able to fit out two ships simultaneously (except at times of low demand). The original quay allowed both ships, which were shorter at the time, to be berthed directly at the quay. In 1999, when Rolandwerft began building larger ships, the quay was too short. For financial reasons, Rolandwerft did not extend the quay immediately but, as a transitional solution, berthed the second ship alongside the ship berthed at the quay (parallel berth). For each ship fitted out on the parallel berth, Rolandwerft had to rent an additional auto crane on some [...] occasions for [...] each and a smaller swimming crane on [...] occasions for [...] each.
- (9) However, the fitting-out or repair of a ship at the parallel berth was complicated, expensive and not profitable. Moreover, it increased the risks of accidents.
- (13) Hall 3 is where the sections are constructed. It originally had an entrance door that was only 17,4 metres wide, whereas the ships built by Rolandwerft are normally 22,2 m wide. Therefore, the sections had to be produced not in the position necessary for assembly but sideways, in order to be able to pass through the entrance door. This meant that the sections had to be turned through 90° using auto cranes to permit subsequent assembly; this was a time-consuming and expensive process. In addition, the narrow entrance limited the depth of the sections, which obliged Rolandwerft to construct more sections than were actually needed. To remedy this, it was necessary to widen the entrance. This part of the project was carried out in 2004.
- (14) Another part of the project which was carried out in 2004 is the extension of the hall in a north-westerly direction. In this part of the hall, sections are welded together into modules. With the extension, the section welding can be carried out indoors, i.e. independently of the weather conditions. The crane tracks were lengthened into the new part of the section-construction hall.
- (15) The single sections are constructed on keel blocks, which are also used to transport the sections. Germany explained that, owing to the fact that Rolandwerft has built larger ships since the investments made in 1999, the old keel block system is no longer adequate. Furthermore, to be welded together, the sections must be accurately lined up. Before the investment, the positioning of the sections was done using an auto crane, a time-consuming and cost-intensive process. And so in 2004 the yard invested in modern hydraulic keel blocks, which significantly facilitate the lining-up of the sections.
- (16) In an additional investment project started in August 2005, Rolandwerft extended hall 3 in a south-easterly direction, also with a view to the work being carried out indoors.

2. The investment projects

- (10) The objective of the aid is to promote investments in five different areas of the yard's activity, namely halls 1 and 3, quay 1, automatic welding machines and the construction of an additional quay. Most of the investments have already been carried out. The aid application was submitted before the investments were started.
- (11) According to the information submitted by Germany, the investments will lead to the creation of 35 jobs at Rolandwerft. The yard previously subcontracted some of the works to a steel company in [...] which produces bow sections for Rolandwerft. The investments will enable Rolandwerft to integrate bow-section construction into its own shipbuilding process.

Hall 1

- (12) Hall 1 is to be extended by 55m. The Commission was informed that, at the moment, a significant part of the

Extension of the crane track on quay 1

- (17) The investment project also provides for a 96m extension of the crane track on the original quay, which is 200m long. Before the extension, only about half of the ship could be equipped using the crane. For the other half, Rolandwerft had to use [...] auto cranes. The crane track was extended so that the ship could be fitted out over its full length using the rail crane. This investment was also carried out in 2004.

Purchase of automatic welding machines

- (18) Another investment carried out in 2004 was the purchase of modern and faster automatic welding machines.

Construction of additional quay and purchase of new crane

- (19) The investment programme for 2005-06 includes the construction of an additional fitting-out quay, with the original quay being extended by about 180m. The construction of this quay requires, among other things, excavation of the ground on the riverside, filling-up of the ground on the land side and a link to the road network. The crane track has to be extended by a further 150m, an additional 35-tonne crane has to be purchased and installed, and the media connection has to be installed. The works were started in August 2005.

- (20) This investment is the result of the decision to build larger ships as of 1999. At the time, the yard invested in a further fitting-out of the ship lift to adapt its facilities. According to the beneficiary, the investments in the quay were postponed for two main reasons. First, the financial means available were needed more urgently for Peene-Werft, which was also owned by the Hegemann group and underwent a significant restructuring programme at the time. On account of the downturn on the market that lasted a few years, no additional means were available to complete the investment measures at Rolandwerft. Second, since the fitting-out and repair of two ships in parallel was technically quite feasible (even if not particularly efficient), it was the investment which could best be postponed.

- (21) A further benefit arising from the investment is that the new quay will enable the yard to participate in shipbuilding and repair tenders for navy vessels in the future. Given the risks inherent in handling two ships berthed in parallel, Rolandwerft was barred from carrying out shipbuilding or ship-repair activities for the German navy. Because of the risks and despite the fact that Rolandwerft belonged to a group of yards which could, in theory, bid for the award of such contracts, the German navy refused to award contracts to it.

- (22) Total project costs amount to EUR 13 million. They can be broken down as follows:

(EUR)		
1	Extension of hall 1	[...]
	Hall 3	
2	Prolongation in north-westerly direction, lengthening of crane tracks, widening of entrance door	[...]

3	Modernisation of keel block system in hall 3	[...]
4	Extension in south-easterly direction of hall 3	[...]
5	Lengthening of crane tracks on quay	[...]
6	Purchase of automatic welding machines	[...]
	Construction of additional quay and purchase of new crane	
7	Construction of additional quay	[...]
8	Purchase of new crane	[...]
Total		13 000 000

3. The planned aid

- (23) Germany intends to grant Rolandwerft state aid amounting to EUR 1,56 million. Eligible costs are equal to the total project costs of EUR 13 million and the aid intensity is thus 12 %. The aid will be granted under an approved regional aid scheme ⁽³⁾. The aid application was submitted before the start of the investment projects.
- (24) The granting authority is the Land of Lower Saxony, acting through NBank in Hannover.

III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (25) The Commission initiated the formal investigation procedure as it had doubts as to whether the aid was compatible with the shipbuilding framework. It doubted that the investments in the new fitting-out quay could be considered as investments in existing installations.
- (26) In addition, the Commission had misgivings as to whether the investments of Rolandwerft might lead to an increase in the yard's shipbuilding capacity that would be incompatible with the shipbuilding framework and the common market.

IV. COMMENTS FROM INTERESTED PARTIES

- (27) The Commission received comments from the beneficiary Rolandwerft and from the German Shipbuilding and Ocean Industries Association.

4.1. Comments from the beneficiary Rolandwerft

- (28) According to the beneficiary, the investment project will not lead to an increase in the yard's shipbuilding capacity. The beneficiary points out that every increase in productivity will lead to an increase in the capacity of the existing installations. This does not, however, necessarily mean that the capacity of the yard as a whole will also increase. In the

⁽³⁾ Joint Federal Government/Länder scheme for improving regional economic structures — 34th General Plan.

case of Rolandwerft, the investments will indeed lead to a productivity increase but will not result in a capacity increase of the yard as a whole. Instead, the productivity increase will be absorbed by a higher level of internal production activities formerly outsourced. The volume of production measured in compensated gross tons (CGT) will, therefore, not increase.

the parallel berth involves an increased risk and that the navy refuses, therefore, to award contracts to Rolandwerft. The planned investment measure constitutes a modification of the existing quay aimed at increasing its productivity. The beneficiary provides information on how many weeks per year the parallel berth was used and will be used.

- (29) The beneficiary submitted an overview of the ships built in recent years and of the yard's order book. In 2004 Rolandwerft built [...] ships with a total of around [...] CGT. In 2006 the building of [...] ships with a capacity of [...] CGT is planned. For 2007 and 2008 an annual output of [...] CGT is envisaged.
- (30) The beneficiary explains that, in the past, the yard occasionally bought sections or entire hulls from third companies. However, the output of Rolandwerft could not be increased further even by buying hulls and sections from outside because the fitting-out of a ship always took a certain amount of time and the existing installations did not allow for an efficient fitting-out of a larger number of ships. For example, it was possible to build only one ship at a time in each of the existing shipbuilding halls. The assembling of a ship in hall 1 took around [...] weeks.
- (31) The beneficiary provided information on the production flow at the yard. It pointed out that the yard was already being fully utilised and that there was no possibility of producing more ships on completion of the investment project. The installations at the yard limited total capacity to between some [...] — [...] CGT, which could be achieved before the implementation of the investment project by subcontracting some of the work.
- (32) The beneficiary explains that the investment project will allow the yard to participate in tenders for the construction, repair and conversion of navy ships. This has not yet been possible since the works would have had to be carried out at the parallel berth. Consequently, output in CGT would decline from its current level as navy vessels are not regarded as commercial vessels. The beneficiary concludes that, even if the Commission does not share Germany's opinion that the shipbuilding framework does not prohibit investment aid for projects resulting in a capacity increase, this is irrelevant when assessing the compatibility of the aid to Rolandwerft as the capacity will not increase.
- (33) The beneficiary also argues that the investments relate solely to existing installations. In particular, the investment in extending the quay so that two ships can be fitted out directly from the quay does not constitute a new installation. The yard already has two fitting-out berths that are in parallel. The beneficiary stresses that the use of

- (34) The beneficiary also explains that the lengthening of the crane track and the installation of a crane linked to the quay extension will replace the inefficient and expensive auto and swimming cranes which would at present be used for fitting-out ships in the parallel berth. Fitting out the second ship directly from the quay after completion of the investment project will lead to greater cost effectiveness and productivity.

4.2. **Comments from the German Shipbuilding and Ocean Industries Association**

- (35) The German Shipbuilding and Ocean Industries Association (the 'Association') takes the view that the Commission's concern about a potential increase in capacity cannot be justified on the basis of the shipbuilding framework or by the current market situation and that in particular the planned aid will not lead to distortions of competition.
- (36) The Association argues that the stance of EU policy on state aid to shipbuilding has changed over the years. The shipbuilding framework does not contain any provisions that prohibit the granting of investment aid designed to increase capacity. The Association assumes that such provisions were no longer regarded as being appropriate. It also points out that sector-specific rules contained in the shipbuilding framework had, as far as possible, been removed. The capacity issue is mentioned only in the context of closure aid. Other types of aid, such as restructuring aid, are covered by the general state aid rules.
- (37) The Association also claims that a restrictive interpretation of the rules would be at variance with the LeaderSHIP 2015 initiative, which is one of the measures for implementing the Lisbon Strategy. The competitiveness and productivity of European industry are to be increased through investments into research, development and innovation, which also entails investment in modern production equipment. If state aid for investment could not go hand-in-hand with capacity increases, this would run counter to the objectives of LeaderSHIP 2015, and in particular the objective of safeguarding and strengthening presence in selected market segments. One of these market segments is that for small and medium-sized container vessels, where Europe is still exceptionally well positioned vis-à-vis Korea and China.

- (38) The Association takes the view that the planned investments do not distort competition. There is no overcapacity as the world shipbuilding market is experiencing an upswing. Demand remains healthy, although a slight weakening is expected in 2008-09. With world trade growing steadily, sea transport is also expanding. This is the case in particular with the transport of industrial goods by container ships. As a result, the demand for larger vessels of 5 000 TEU to 8 000 TEU that cannot enter smaller ports is rising. This is leading to an increased demand for smaller feeder ships for the subsequent distribution of the containers. Rolandwerft can build ships of up to 900 TEU.
- (39) According to the Association, feeder ships are an important segment in the portfolio of German yards. Nevertheless, the main competitors are Chinese yards, which are the clear market leaders, with 42,5 % of worldwide orders, followed by Germany with 26,8 %.
- (40) Again according to the Association, there are very few European competitors for ships of up to 900 TEU. These are located predominantly in Germany and the Netherlands. The Association considers that this segment has good growth potential. Since Chinese yards offer their vessels at low prices, German and European yards will retain their market position only if they can guarantee high quality and steadily increase productivity.
- (41) The Association also points out that China and Vietnam will further increase their shipbuilding capacities and hence their market shares. This demonstrates that competition in shipbuilding is worldwide rather than being confined to Europe.
- (44) In addition, Germany points out that the market share of the European shipbuilding industry has decreased over the last few decades and that Japan, Korea and China have increased their market shares with the help of state subsidies. Such subsidisation is mentioned in paragraph 3 (c) of the shipbuilding framework as one of the factors which has to be taken into account. European shipyards thus have to make every effort to increase productivity.
- (45) According to Germany, every increase in productivity automatically leads to an increase in the output of the installation. An increase of productivity as defined for the purposes of the shipbuilding framework cannot, therefore, mean that the same amount is produced but with less input. Germany goes on to stress that the purpose of regional aid should be to contribute to regional development and job creation. And so, with this in mind, a productivity increase should not result in job reduction.
- (46) As regards the market situation, Germany observes that freight transport is increasing and that a trend towards larger vessels is discernible in the container ship segment. There are already vessels with a capacity of TEU 5 000 and recent forecasts point to vessels with a capacity of TEU 8 000. As such larger vessels could enter only a few ports, smaller vessels would still be needed for subsequent distribution. There will, therefore, still be a strong demand for feeder ships of 850 TEU, such as the ones built by Rolandwerft.
- (47) Germany also provides further details of the investments and photographs illustrating the measures and the situation at the yard.

V. COMMENTS FROM GERMANY

- (42) In its comments on the initiation of the formal investigation procedure, Germany argues that paragraph 26 of the shipbuilding framework does not contain any provisions relating to capacity. In particular, the paragraph does not stipulate that investment aid for projects resulting in a capacity on the back of a productivity increase would be inadmissible. Germany also stresses that increased productivity in the shipbuilding industry is one of the main objectives of Community policy in this sector. It mentions that the LeaderSHIP 2015 initiative is aimed at improving the competitive situation of European yards and at reducing the disadvantages faced by the European shipbuilding industry following the subsidisation of shipbuilding in Asia. According to Germany, this objective can be achieved only by raising productivity.
- (43) Germany also takes the view that it cannot be deduced from paragraph 3 of the shipbuilding framework that the impact of an investment project on capacities has to be taken into account in assessing compatibility with the common market. In addition, the shipbuilding sector is no longer characterised by the factors mentioned in paragraph 3 of the shipbuilding framework but, above all by a healthy order book, high prices and capacity shortages.
- (48) The extension of hall 1 will allow the yard to build a ship in its entirety in the hall, something which is currently not possible. Covering existing work areas will make for greater productivity and efficiency.
- (49) Germany goes on to explain that, at present, a ship berthed at quay 1 occupies only two thirds of the quay. The southern part of the unused quay will be extended. This does not lead to the construction of a new installation for the purposes of the shipbuilding framework. Once the quay has been extended, it will be equipped with a crane as a replacement for the existing auto crane.
- (50) Germany points out that the parallel berth was used [...] a year in the period 2003-05 (including deliveries). It emphasises once again that the parallel berth will be moved to the new quay. The new quay will be used for approximately the same period of time per year as the parallel berth in recent years. Germany also explains that the fitting-out of a ship in the second berth involved an increased risk as the swimming crane needed would have to be located in the middle of the river Weser. As a result, no ships will, in future, be fitted out at the second berth on quay 1.

- (51) According to Germany, the extension of the fitting-out quay to allow two ships to be fitted out at the quay does not constitute the construction of a new installation. It is simply a minor extension of the existing quay. Even before the investment, the quay is longer than a feeder ship and so the yard would, in any case, be able to fit out two shorter ships at the same time.
- (52) Germany argues that Rolandwerft thus already has two fitting-out slots although one of them is located in the second 'row'. As the second ship cannot be reached by the crane installed on the quay, auto cranes or swimming cranes have to be used. Fitting-out a ship directly from the quay once it has been extended will make the work much more efficient. Germany also points out that the German navy refused to award contracts to Rolandwerft because it fitted out ships in the second row.
- (53) Germany argues that the relocation of the second berth to an extended existing quay does not rank as the construction of a new installation but is instead a measure for increasing the productivity of the two berths by locating them in a row instead of in parallel. The new crane to be installed on the new quay will replace the auto cranes and swimming cranes used at the moment. Using the new crane will enhance productivity.
- (54) Germany stresses that the measure is necessary because fitting out a ship in the second row is time-consuming and inefficient. Moreover, the measure will enable Rolandwerft to participate in tenders for ship repair and ship conversion issued by the German navy.
- (55) Germany moreover explains that Rolandwerft originally built smaller feeder ships that could both be berthed at the quay at the same time. However, market demand has increasingly shifted towards larger and longer feeder ships and two such ships could no longer be berthed at the quay at the same time. For fitting-out and repair work, therefore, the yard started to berth a second ship in parallel to the ship berthed directly at the quay. The extension of the quay is thus simply an adaptation of the fitting-out facilities to the needs of longer ships.
- (56) Germany explains that, in the past, Rolandwerft has occasionally collaborated with Peene-Werft and fitted out prefabricated hulls from that yard. Lately, however, it has delivered only ships which were built in their entirety at its yard. As regards repair work, Germany points out that these activities cannot be extended if the current level of new building is maintained. Part of the repair work is carried out on land, requiring use of the outside work area, which is already being used for new building.
- (57) Germany goes on to explain that the new crane will not only be used at the new quay but will also make for optimal utilisation of the lifting process at the original quay by increasing the maximum lifting capacity.
- (58) Germany points out that the Association agrees with its assessment. It considers that the Association's comments are important as it represents the political and economic interests of the German maritime industry, German yards and their suppliers. Moreover, the Association, as the representative of various interest groups, possesses up-to-date market information. If it concludes that the planned aid for Rolandwerft will not harm the shipbuilding industry in Germany, the Commission should take this into account. Germany also makes the point that the Commission did not receive any negative comments regarding the aid.
- (59) As regards the comments from the beneficiary itself, Germany stresses that the position taken by Rolandwerft is that the investment project will not lead to a capacity increase. Germany reiterates its view that this issue is not relevant for the assessment of the compatibility of the aid.

VI. ASSESSMENT

6.1. Existence of State aid within the meaning of Article 87(1) of the EC Treaty

- (60) According to Article 87 of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Pursuant to the established case law of the Court of Justice and the Court of First Instance of the European Communities, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.
- (61) The grant is provided by the Land of Lower Saxony and is thus imputable to the State. It confers on Rolandwerft an advantage that the company would not have obtained on the market. Rolandwerft manufactures sea-going vessels. As these products are traded, the measure threatens to distort competition and affects trade between Member States. Consequently, the grant constitutes state aid within the meaning of Article 87(1) of the EC Treaty and has to be assessed accordingly.

6.2. Exemptions under Article 87(2) and (3) of the EC Treaty

- (62) Article 87(2) and (3) of the EC Treaty provide for exemptions to the general prohibition of state aid laid down in Article 87(1).
- (63) For the assessment of aid to shipbuilding, the Commission has issued the shipbuilding framework. This framework lays down a set of special rules which apply to aid for the industry where and in as far as the specificities of the sector

require special treatment. According to the shipbuilding framework, 'shipbuilding' means the building in the Community of self-propelled seagoing commercial vessels and 'ship repair' the repair or reconditioning in the Community of such vessels. The activities of Rolandwerft are caught by these definitions and so the aid to Rolandwerft has to be assessed in the light of the shipbuilding framework. Rolandwerft does not build Community fishing vessels. According to the Guidelines for the examination of state aid to fisheries and aquaculture,⁽⁴⁾ no aid may be granted to shipyards for the construction of Community fishing vessels.

(64) Point 26 of the shipbuilding framework lays down that 'Regional aid to shipbuilding, ship repair or ship conversion may be deemed compatible with the common market only if [the aid is] granted for investment in upgrading or modernising existing yards, not linked to a financial restructuring of the yard(s) concerned, with the objective of improving the productivity of existing installations';

(65) The aid intensity may not exceed 12,5 % or the applicable ceiling for regional aid under Article 87(3)(c) of the EC Treaty, whichever is the lower. In the present case, the ceiling of 12,5 % is applicable. Moreover, the aid must be limited to eligible expenditure as defined in the applicable guidelines on national regional aid.⁽⁵⁾

Investments in the extension of halls 1 and 3, in the lengthening of the crane track on quay 1 and in the welding machines

(66) These investment measures are designed to rationalise the production process at Rolandwerft by upgrading equipment and by covering the work area located outside. They can therefore be considered as investment in the modernisation or upgrading of an existing yard.

(67) Part of the project concerns the extension of hall 1 and the extension of hall 3 in a north-westerly as well as a south-easterly direction. The Commission considers that these extensions concern existing installations. The project does not *de facto* lead to the construction of an additional hall. The extension aims merely to provide cover for shipbuilding activities currently taking place outdoors.

(68) The remaining investments in hall 3 aimed at lengthening the crane track, widening the entrance door and upgrading the keel block system also constitute investments in existing installations. Moreover, the Commission considers that the lengthening of the crane track on quay 1 and the investments in the upgrading of the welding machines are investments in existing installations. It had already taken

this view in its decision to initiate the formal investigation procedure.

(69) The Commission assumes that the investments have the objective of improving the productivity of the existing installations. The hall extensions will improve productivity by allowing work to be carried out regardless of the weather. The widening of the entrance door of hall 3 will lead to a significant reduction in costs as the sections will no longer need to be turned through 90° and it will be possible to build longer sections. The same applies to (i) the lengthening of the crane track in hall 3 and on quay 1, which will dispense with the need for [...] auto cranes, (ii) the acquisition of a hydraulic keel block system, as a result of which manual positioning of sections using auto cranes will no longer be necessary, and (iii) the purchase of automatic welding machines, which will reduce the time and costs associated with manual welding.

(70) While there will be a clear effect on productivity, the impact on capacity will be limited as no new installations are to be set up in the yard and any increase in capacity would simply be the result of the productivity increases of the existing installations. Moreover, the beneficiary pointed out that the productivity increase will not lead to any increase in the capacity of the yard measured in CGT because it will be absorbed by increased performance of activities formerly outsourced. The Commission therefore considers that there is no disproportionate capacity increase.

(71) The Commission thus comes to the conclusion that measures 1 to 6 in the table in paragraph 22 can be considered as investments in the modernisation or upgrading of an existing yard with the objective of improving the productivity of existing installations. The related costs of EUR 8 360 000 can accordingly be considered as eligible costs.

Construction of additional new quay and purchase of new crane

Modernisation

(72) Measures 7 and 8 in the table in paragraph 22 concern the construction of an additional quay and the purchase of a new crane. The Commission considers that, for two reasons, these investments rank as measures to upgrade or modernise Rolandwerft. First, before the investments, Rolandwerft used to fit out and repair two ships at the same time by berthing one ship in parallel to the ship berthed directly at the quay. This process was inefficient and costly. The investments will enable Rolandwerft to berth two ships directly at the quay and will improve the fitting-out of the two ships. Second, the investments are the last in a series of

⁽⁴⁾ OJ C 229, 14.9.2004, p. 5.

⁽⁵⁾ OJ C 74, 10.3.1998, p. 74.

investments started in 1999 with a view to enabling the yard to build larger ships. The yard had adapted its production because demand had shifted from much smaller feeder ships to the feeder ships currently built by Rolandwerft. The Commission considers that an adaptation of production to market demand can be considered as modernisation.

Aim of improving the productivity of existing installations

- (73) The investments are also aimed at improving the productivity of existing installations. The fitting-out at the original quay will become more efficient because the ships are no longer berthed alongside one another and there is no longer any need to cross over the ship berthed at the quayside. And so, although it can be assumed that the new quay is not merely a relocated existing installation, the Commission considers that the construction of the new fitting-out quay will lead to a productivity increase at the original quay.
- (74) In addition, the second crane to be installed at the extended quay will also lead to a productivity increase at the original quay. The combined lifting capacity of both cranes now amounts to 85 tonnes, compared with the previous figure of 50 tonnes, and permits the lifting of heavy loads for which a rented swimming crane was needed previously. After the investment, a swimming crane will be needed only for lifting the ship's engine. All other lifting activities can be carried out with the two cranes on the extended quay. Second, the original crane will often be used for activities on a smaller outdoor work area located behind the quay. After the investment, the second crane can be used when the first crane is needed for activities on the outdoor work area. Fitting-out will not, therefore, have to be disrupted at such times.
- (75) The Commission therefore finds that the aim of the investment is to improve the productivity of the existing installations at the yard.

Effect on capacity

- (76) Further, the Commission finds that the investment will not lead to an undue increase in capacity.
- (77) The Commission would first emphasise that Rolandwerft has been fitting out two ships at a time for more than fifteen years. Fitting-out in a second row was intended as a transitional solution until the necessary investment in the quay was undertaken. According to the information submitted by Germany, the transitional period was so long because of the specific situation on the market and the special conditions at the yard. The Hegemann group, as the owner of the yard, had decided to invest the available funds as a matter of priority in Peene-Werft. After the completion

of the Peene-Werft restructuring project in 2005 and as a consequence of the market upturn, the Hegemann group was able to finalise its modernisation project for Rolandwerft. Given that the yard has regularly fitted out two ships at a time over the past 15 years (with interruptions at times of low demand), the Commission sees no reason to conclude that, before the investment, Rolandwerft had the capacity to fit out only one ship.

- (78) From a technical point of view, Rolandwerft will not be able to increase its new building and repair work because of the bottlenecks at preceding stages, namely in the halls and the outside work area. Both operations are already working to their limits, thereby preventing an increase in potential output. With regards to the yard's repair work, Germany explained that about 50 % of each repair job must be carried out on land, i.e. on the outside work area, but that the capacity there was already absorbed by new building activities. Additional repair work is therefore possible only in place of — and not in addition to — new building. The same arguments hold for ship conversion. As the investment does not affect the bottlenecks, the capacity for new building and ship repair/conversion cannot increase. Furthermore, the specific bottlenecks cannot be easily removed because this could be achieved only by duplicating the entire production process.
- (79) The Commission also examined whether the new quay would increase the yard's capacity for fitting out pre-fabricated hulls. But here too, the halls are the bottleneck. While the new ships built by Rolandwerft are pre-fitted out in the yard's halls, this is not the case with prefabricated hulls, which are usually empty and require a significant amount of fitting-out. For this, technical equipment normally used in the halls for the new building would be needed at the quayside. When the halls and their equipment are being fully utilised, the equipment cannot be used at the same time for fitting out the hulls. As a consequence, Rolandwerft cannot expand its fitting-out of hulls built elsewhere while at the same time maintaining its high level of new building and repair work.
- (80) Germany also explained that, at present, the fitting-out of hulls is neither being carried out nor planned. At times of peak demand, such activities are highly unlikely because the order books of potential hull suppliers are full for years ahead and Rolandwerft would not, therefore, be able to obtain prefabricated hulls of the required high quality on the market. This is borne out by the actual activities of Rolandwerft in recent years, when Rolandwerft did not, in addition, fit out prefabricated hulls although, in theory, it could have done at the parallel berth. Germany made the point that, after a market downturn when hulls would potentially be available on the market as yards would have

free capacity, it could be assumed that the order books of Rolandwerft too would be slimmer. In such a case, Rolandwerft would, for reasons of profitability, rather use its own capacities to build the hulls than to fit out prefabricated hulls. Even if it did fit out prefabricated hulls, this would be in the place of — and not in addition to — new building.

- (81) The Commission notes that, hypothetically, even if a slight increase in capacity for fitting out prefabricated hulls did result from the investment, such an increase could be at most minimal for the technical reasons given above. Since the productivity increase achieved, mainly in the form of lower crane-rental costs, would be significant, a marginal capacity increase resulting from the occasional fitting-out of hulls could not be regarded as disproportionate.
- (82) The Commission further notes that, in support of its statement that no capacity increase was being sought, Rolandwerft has offered to undertake not to step up use of the new quay for a period of five years. This commitment, submitted by Germany, provides that the yard limit its activities at the new quay in the field of new building, fitting-out of prefabricated hulls, and ship repair and conversion to [...] a year for a period of five years after the completion of the investment in the new quay. The use of the new quay for only [...] is in line with the yard's planning for the next few years as submitted to the Commission. Rolandwerft has also undertaken not to build in the second row during that period. The Commission notes that these commitments cannot be regarded as proof that the investments will not lead to any capacity increase, but it welcomes them as further evidence that the technical, practical and economic reasons submitted by the beneficiary are well founded and that the aim of the investment is not to increase capacity but to improve productivity.
- (83) The Commission therefore takes the view that the investments in the new quay and the purchase of the new

crane constitute upgrading or modernisation of an existing yard with the aim of increasing the productivity of the existing installations. They will not lead to a disproportionate capacity increase. The Commission therefore considers that the construction of the new quay and the purchase of the new crane fulfil the conditions for the granting of regional investment aid laid down in the shipbuilding framework. The investments amounting to EUR 4 640 000 are thus eligible for regional aid.

VII. CONCLUSION

- (84) The Commission comes to the conclusion that the planned regional aid for Rolandwerft, amounting to 12 % of EUR 13 000 000, i.e. EUR 1 560 000, fulfils the conditions for regional aid laid down in the shipbuilding framework. The planned aid therefore fulfils the necessary conditions to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Germany is planning to implement for Rolandwerft, amounting to 12 % of EUR 13 000 000, i.e. EUR 1 560 000, is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 December 2006.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 20 December 2006

on the aid scheme implemented by France under Article 39 CA of the General Tax Code — State aid C 46/2004 (ex NN 65/2004)

(notified under document number C(2006) 6629)

(Only the French version is authentic)

(Text with EEA relevance)

(2007/256/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:

I. PROCEDURE

(1) By letter dated 9 February 2004 (D/51178), the Commission sent a request for information to the French authorities concerning the tax-oriented leasing provisions in favour of certain undertakings approved by the Minister for the Budget introduced by Article 77 of Law No 98-546 of 2 July 1998 on various economic and financial measures ⁽²⁾. By letter dated 18 March 2004, the French authorities requested an extension of the period they had been allowed for furnishing the information requested. The Commission received the said information from the French authorities by letter dated 3 May 2004 (A/33117). By letter dated 6 July 2004 (D/54933), the Commission asked the French authorities to produce further information, which it received on 2 August 2004 (A/36007).

(2) By letter dated 14 December 2004 (D/205909), the Commission notified the French authorities of its decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty. The decision was published in the *Official Journal of the European Union* ⁽³⁾. In it, the Commission invited France and interested parties to submit their comments within a certain time limit.

(3) By letters dated 6 January 2005 (A/30266) and 4 February 2005, the French authorities requested an extension of the time limit, which was granted by letters dated 11 January 2005 (D/50220) and 16 February 2005 (D/51190).

(4) The Commission received the French authorities' comments on 15 March 2005 (A/32251). It also received, within the deadline, comments from 16 interested parties, which were forwarded to the French authorities on 9 June 2005 (D/54454).

(5) By letter dated 7 July 2005 (A/35587), the French authorities asked the Commission to extend the time limit granted to it for commenting on the interested parties' comments. The Commission granted the request and the French authorities finally submitted their comments by letter dated 20 July 2005 (A/35981).

(6) By e-mail dated 2 March 2006 (A/31655), the French authorities sent the Commission further comments on the scheme at issue.

II. DETAILED DESCRIPTION OF THE SCHEME

(7) Pursuant to the first paragraph of Article 39 C of the General Tax Code, the depreciation of assets leased out or otherwise made available is spread over the normal period of use.

(8) Article 77 of Law No 98-546 introduces two provisions into the General Tax Code aimed at combating tax avoidance by partnerships and economic interest groupings (EIGs) ⁽⁴⁾ when they carry out movable asset financing operations.

⁽¹⁾ OJ C 89, 13.4.2005, p. 15.

⁽²⁾ *Official Journal of the French Republic* No 152 of 3 July 1998, p. 10127.

⁽³⁾ OJ C 89, 13.4.2005, p. 15.

⁽⁴⁾ See Articles L 251-1 to L 251-23 of the Commercial Code and Article 239 *quater* of the General Tax Code. Pursuant to these articles, an EIG is a grouping, endowed with legal personality, of two or more natural or legal persons. Its object is to facilitate or develop the economic activity of its members, and to improve or increase the earnings from that activity. Its activities must be related to the economic activity of its members and may be only ancillary thereto. An EIG is in principle not subject to corporation tax. Each member of the grouping is, however, personally liable to income tax or corporation tax for that part of the profits which accrues to it. Conversely, the EIG's members are jointly and severally liable from their own assets for the grouping's debts.

- (9) The second paragraph of Article 39 C of the General Tax Code provides that the tax-deductible depreciation of an asset leased out by an EIG may not exceed the amount of any leasing charges collected by it, less any other charges relating to the asset.
- (10) Since the declining depreciation and the financial charges are, by definition, concentrated on the first few years of the asset's use, the EIG's results show an exceptional loss during that period and become positive only during a later period when the amount of the leasing charges collected exceeds total costs (depreciation and financial charges included). Because EIGs are governed by the law on partnerships, they can deduct the losses thus posted during the first few years of the operation from the taxable profits earned by their members from their current activities. The ceiling on depreciation provided for in the second paragraph of Article 39 C of the General Tax Code is intended, therefore, to combat abusive recourse to this type of financing for the purpose of tax avoidance.
- (11) An exception to this limitation, introducing a depreciation system favourable to certain undertakings, has nevertheless been inserted in the General Tax Code. Article 39 CA of the General Tax Code thus stipulates that the ceiling laid down in the second paragraph of Article 39 C of the Code shall not be applicable to the financing by EIGs of depreciable movable assets according to the declining balance method over a period of at least eight years ⁽⁵⁾ provided that the operation has been approved in advance by the Minister for the Budget.
- (12) Such approval is subject to a number of criteria. These are essentially as follows:
- the acquisition price of the asset must correspond to the market price
 - the investment must be of significant economic and social interest, particularly in relation to employment
 - the user of the asset must show that the asset is necessary to his business and that the financing arrangements adopted are not of a purely tax-related nature
 - two thirds at least of the tax advantage accruing from the approval must be passed on to the user of the asset.
- (13) As a rule, the EIG — which is generally made up of financial institutions — acquires the asset to be financed at the market price and leases it out to its user. The leasing
- charges paid by the user and the price of the end-of-contract purchase option enable the EIG to cover its own financing costs, including capital and interest.
- (14) Apart from the removal of the depreciation ceiling ⁽⁶⁾, the grant of ministerial approval makes it possible to increase by one point the declining depreciation coefficient normally applicable to the asset concerned. Moreover, the resale of the asset by the EIG to its user once two thirds of the normal period of use of the asset has elapsed is exempt from transfer capital gains tax.
- (15) As to the criterion relating to the existence of a significant economic and social interest ⁽⁷⁾, the French authorities have indicated that there are no guidelines for assessing such an interest and that the examination is carried out in the light, firstly, of the indirect fallout from the investment in the labour market area, the conditions of competition and the development of the activity in the economic area concerned, including the contribution to the growth or establishment of a production, management or decision-making centre, and, secondly, of the investment's contribution to improving safety and protection of the environment.
- (16) Article 39 CA of the General Tax Code provides that the passing-on to the user of the asset of two thirds at least of the tax advantage which the EIG derives from the grant of approval ⁽⁸⁾ must take the form of a reduction in the amount of the leasing charge or of the purchase option. Moreover, the exact amount of the advantage to be passed on by the EIG to the user must be determined at the time of grant of the approval.
- (17) At the Commission's request, the French authorities furnished a breakdown by area of activity of all applicants for approval and of the actual beneficiaries of the scheme at issue:

Area of activity	Applications for approval submitted	Approval decisions granted
Maritime investment	142	110
Aeronautical investment	32	18
Railway investment	5	2
Industrial investment	7	3
Space investment	3	0

- (18) The French authorities pointed out in this connection that, of the 56 applications which did not form the subject matter of an approval decision, 21 were withdrawn, 13 led to no further action being taken and 22 were rejected.

⁽⁶⁾ Pursuant to Article 39 CA of the General Tax Code, losses from groupings' financial years the results of which are affected by depreciation charges entered in the accounts on the score of the first 12 months of the asset's depreciation are deductible to the tune of no more than one quarter of the profits taxable at the normal rate of corporation tax which each member of the EIG earns from the rest of its activities.

⁽⁷⁾ See recital 12.

⁽⁸⁾ See recital 12.

⁽⁵⁾ The eligible assets must be acquired new, with the exception of ships, which may be acquired second hand.

According to the French authorities, of the 22 applications that were rejected 15 concerned the financing of an asset in the maritime transport sector and the remaining 7 the financing of an asset in the air transport sector.

- (19) The French authorities also pointed out that approval procedures under Article 39 CA of the General Tax Code have been suspended since 14 December 2004, the date on which the decision to initiate the formal investigation procedure was notified to them.

III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (20) In its decision of 14 December 2004 the Commission found that an advantage seemed to be granted under Article 39 CA of the General Tax Code to investors belonging to tax EIGs and to the users of assets financed by EIGs. As far as the selectivity of the measure in question was concerned, the Commission noted, firstly, that the Minister for the Budget seemed to enjoy a discretionary power when it came to assessing the approval grant criteria and that this enabled him to select the beneficiaries of the scheme at issue according to subjective standards. Secondly, it appeared that the tax arrangements provided for in Article 39 CA of the General Tax Code constituted an aid measure for the benefit mainly of the transport sector. The Commission thus took the view that the measure at issue did not appear to be justified by the nature or general scheme of the French tax system. In its opinion, the advantages in question also involved the use of state resources, distorted competition and affected intra-Community trade.
- (21) As to the compatibility of the scheme at issue with the common market, the Commission considered at that stage that none of the exceptions provided for in Article 87(2) and (3) of the Treaty were applicable in the present context. Nor did the scheme appear to satisfy the conditions of the Community guidelines and frameworks in the field of state aid. It was therefore *prima facie* incompatible with the common market.
- (22) The Commission accordingly decided to initiate the formal investigation procedure in order to allay its doubts both as to the state aid nature of the scheme at issue and as to the scheme's compatibility with the common market.

IV. COMMENTS FROM THE FRENCH AUTHORITIES

- (23) As part of their comments, the French authorities maintained, firstly that the scheme provided for in Article 39 CA of the General Tax Code did not constitute state aid. It was simply a technical procedure for implementing the ordinary law which made it possible to place the method of financing concerned under the supervision of the authorities, and not a departure from the ordinary law. The ceiling on deductible depreciation provided for in the second paragraph of Article 39 C of the General Tax Code sought, by introducing a presumption of

tax avoidance, to prevent recourse to that financing mechanism for tax optimisation purposes. The scheme provided for in Article 39 CA of the General Tax Code was also designed to combat tax avoidance. However, the heavy capital goods concerned by that provision were characterised by a relatively long return on investment, and in those circumstances recourse to leasing was motivated not only by a desire for tax optimisation but also by economic necessity.

- (24) The French authorities stated that, viewed as a whole, the approval grant criteria made it possible to carry out prior monitoring of capital goods financing operations involving leasing with a purchase option and to deny the benefit of the tax scheme at issue to all financing operations primarily motivated by tax optimisation considerations.
- (25) This was especially the case with the criterion that the investment be of significant economic and social interest, particularly in relation to employment, the satisfaction of which required that the approval application be backed up by commitments to hire staff. The jobs created had to be maintained for the minimum period of use of the asset, i.e., the duration of the leasing contract or of the 'making available', namely at least eight years. They also had to lead to a net increase in the number of employees of the company seeking approval and be directly related to the investment.
- (26) The French authorities pointed out that some applications for approval had been rejected on the ground that the financing proposal submitted lacked significant economic and social interest. Two types of situation were characterised by such lack of interest. Firstly, the lack or insufficiency, both quantitative and qualitative, of new hirings capable of strengthening or making possible the establishment of a management or decision-making centre. And, secondly, the state of affairs whereby the applicant's financial position enabled him to have recourse to other means of financing which were not in the nature of an incentive.
- (27) The criterion relating to the passing-on to the user of most of the tax advantage accruing to the EIG's members under Article 39 CA of the General Tax Code also made it possible, according to the French authorities, to combat tax optimisation by excluding from the benefit of that provision operations which were designed only to generate increased cash flow.
- (28) The French authorities pointed out, further, that the monitoring arrangement thus introduced was not discretionary in character. They referred in this connection to the decision by the French Constitutional Council to the effect that an approval such as that provided for in Article 39 CA of the General Tax Code was not so much a discretionary measure as one which conferred on the Minister for the Budget sole power to ensure that the operation in question satisfied the conditions laid down by law ⁽⁹⁾.

⁽⁹⁾ Constitutional Council Decision No 87-237 DC of 30 December 1987.

- (29) At all events, so the French authorities claimed, the tax advantage attaching to the deduction of the amount of depreciation did not lead to any loss of tax revenue, being more akin to a different breakdown, over time, of the taxable base. Moreover, the determination of the exact share of the advantage retained by the investors belonging to the EIG was in the nature of an exercise in remuneration the amount of which was a function of market conditions and the outcome of a classic commercial negotiation.
- (30) In answer to the Commission's allegation of selectivity of the tax scheme at issue, the French authorities put forward several arguments.
- (31) First of all, they contended, the scheme was a general measure potentially applicable both to the industrial sector and to the transport sector. Examples of its application were: pulping machinery, hydrocarbon storage tanks, printing presses and refrigerating units, all of which were industrial assets which could be depreciated according to the declining balance method over a period of at least eight years. The French authorities pointed out, moreover, that certain means of transport, such as lorries and buses, were excluded from the measure's scope owing to their shorter depreciation period. The depreciation period in question applied, therefore, to all assets whose return on investment required a fairly long time.
- (32) Secondly, the concentration of the benefit of the scheme at issue on transport equipment was due, in reality, to matters outside the French public authorities' control, namely, changes in industrial companies' financial circumstances and the attractiveness of transport equipment to investors. Such equipment comprised assets highly attractive in the eyes of investors who, in order to limit their risks, opted for assets which were easily negotiable should the operator encounter difficulties.
- (33) Thirdly, the scheme at issue did not favour French companies in so far as nationality was not a factor in becoming a member of an EIG. A foreign investor, in particular a financial institution, could thus benefit from the scheme and from the resulting increased cash flow irrespective of its tax domicile.
- (34) At all events, even supposing that the scheme provided for in Article 39 CA of the General Tax Code were a departure from the ordinary law, it was of unlimited scope and duration and was based on objective, horizontal tax avoidance combating criteria. Just like the aid scheme in Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility⁽¹⁰⁾, it could not, therefore, be classified as state aid.
- (35) With regard to the exemption from capital gains tax on the transfer of title in an asset, the French authorities stated that the advantage which the members of an EIG derived from such exemption also had to be passed on to the tune of at least two thirds to the user of the asset. They maintained that this exemption, which was conditional, was justified by the nature and overall structure of the French tax system. It was necessary, in the event of an early transfer of title, in order to ensure the maintenance of the tax advantage resulting from the deduction of the depreciation under conditions of ordinary law. The French authorities pointed out, moreover, that the exemption would be included in the ordinary law as from 1 January 2007. From that date onwards, any capital gains on the transfer of equity interests held for more than two years would be exempted, apart from a share of the costs and charges equal to 5 % of the net total of the transfer capital gains taken into account in determining the taxable amount. In view of the date of conclusion of the contracts for the making available of assets between EIGs and users, the date on which the early transfer of title in those assets would be possible would be after 1 January 2007 inasmuch as such transfer could not take place until after the contracts had been two-thirds implemented. EIG members would benefit, therefore, from the exemption under the ordinary law.
- (36) The French authorities pointed out that the exemption from transfer capital gains tax was not automatic. One of the conditions for such exemption was that the actual user of the asset had to show that, in view of the asset's cost, he was unable to purchase it directly without endangering his financial equilibrium. According to the report of 25 March 1998 by the rapporteur of the National Assembly's Finance Committee, that condition was to be viewed in the context of the implementation of alternatives to the tax deduction for subscription of co-ownership shares in ships (*quirats*) (hereinafter called 'the co-ownership shares scheme'), which was abolished by the 1998 Finance Act.
- (37) With regard to the compatibility of the tax scheme at issue with the common market, the French authorities maintained that, even if the scheme were to constitute state aid, it was in keeping with Article 87(3) of the Treaty as it facilitated the development of certain activities without adversely affecting trading conditions to an extent contrary to the common interest. Article 39 CA of the General Tax Code did not place domestic economic operators at an advantage over operators from other Member States and was no more advantageous than schemes in force in other Member States.
- (38) The French authorities drew attention to the specific situation of maritime transport services, the operators of which were the main users of the scheme at issue. They pointed out that the scheme was a measure having an effect equivalent to the co-ownership shares scheme — a scheme for financing vessels registered in France — which had previously been notified to and approved by the Commis-

⁽¹⁰⁾ OJ L 146, 20.6.1996, p. 42.

sion under Article 87(3) of the Treaty⁽¹¹⁾. The co-ownership shares scheme had, they said, been abolished in 1998 owing to its excessive budgetary cost. They pointed out that it was against a background both of stagnating numbers of commercial vessels registered in France and of the desire to reduce tax expenditure that the legislature had decided to adapt the tax-oriented leasing arrangements. The entry into force of Article 39 CA of the General Tax Code had led, not to an expansion of the French shipping sector, but to a consolidation and rejuvenation of the fleet under the French flag. During the same period, other Member States' fleets had grown in terms both of numbers of units and of tonnage. The scheme's entry into force had therefore not affected the development of other Member States' shipping sectors.

(39) In addition, the scheme provided for in Article 39 CA of the General Tax Code fitted in perfectly with the Community guidelines on State aid to maritime transport (hereinafter called 'the 1997 Community guidelines') and with Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport (hereinafter called 'the 2004 Community guidelines')⁽¹²⁾. In particular, it helped to enhance the competitiveness of the Community fleets in the world market for maritime transport, to safeguard Community employment both on board and on shore, to maintain maritime know-how in the Community and to develop maritime skills (point 2.2. of the above-mentioned Community guidelines). Furthermore, it made an effective contribution to improving safety and protecting the environment by enabling the renewal of the fleet. As regards, more particularly, the safeguarding of the employment of seafarers and of high-quality jobs on shore, the French authorities pointed out that the *quid pro quos* required for purposes of the grant of approval included the need to possess, in the territory of the Union, a strategic decision-making centre for managing maritime activities and ships. Not only jobs related to the direct management of maritime transport, but also those related to ancillary activities such as insurance, brokerage and finance thus benefited indirectly from the tax scheme at issue.

(40) The French authorities pointed out, however, that neither the 1997 Community guidelines⁽¹³⁾ nor those of 2004⁽¹⁴⁾ established a strict relationship between the aid needed to maintain and develop maritime transport and the level of employment created. It was stated, moreover, in the 2004 Community guidelines (point 3.1) that 'at this stage, there is no evidence of schemes distorting competition in trade between Member States to an extent contrary to the common interest' and that 'such measures have been shown to safeguard high quality employment ...'.

(41) Lastly, as regards the application in the present case of the principle of legitimate expectation, the French authorities referred to Commission Decision 2002/15/EC of 8 May 2001 concerning State aid implemented by France in

favour of the Bretagne Angleterre Irlande company (hereinafter called 'BAI' or 'Brittany Ferries')⁽¹⁵⁾, in which the scheme at issue was examined.

(42) The French authorities also referred to their letter to the Commission dated 17 March 1998 (A/32232) mentioning the introduction of the second paragraph of Article 39 C and Article 39 CA of the General Tax Code. They considered that, notwithstanding that letter and the various cases examined by the Commission⁽¹⁶⁾ in which mention was made of Article 39 of the General Tax Code, no proceedings had been initiated in respect of that scheme in the six years following its entry into force.

(43) In these circumstances, the Commission's silence had — so the French authorities maintained — created a legitimate expectation in the compatibility of Article 39 CA of the General Tax Code with the common market, and this precluded any request for recovery from the undertakings concerned.

V. COMMENTS FROM INTERESTED THIRD PARTIES

(44) Sixteen interested parties sent their comments to the Commission pursuant to Article 88(2) of the Treaty within the time limit allowed. A list of these interested parties is attached to this Decision.

(45) As regards, firstly, the question whether the scheme at issue could be classified as aid, most of the interested parties were opposed to the Commission's position on this score.

(46) Thus, according to, among others, Caisse Nationale des Caisses d'Épargne et de Prévoyance (hereinafter called 'CNCE'), Calyon Corporate and Investment Bank (hereinafter called 'Calyon') and BNP Paribas (hereinafter called 'BNP'), the arrangements provided for in Article 39 CA of the General Tax Code did not constitute state aid but created a means of monitoring the application of the ordinary law as it related to the depreciation of certain assets. The combination of the second paragraph of Article 39 C and Article 39 CA of the General Tax Code was aimed at combating excessive tax revenue losses, as witnessed the parliamentary work prior to the adoption of Law No 98-546 (report by the Finance Committee to the National Assembly of 25 March 1998).

(47) Société Générale (hereinafter called 'SG'), BNP and Brittany Ferries argued, for their part, that Article 39 CA of the General Tax Code did not provide for any ring-fencing derogating from the ordinary law, but instead represented a

⁽¹¹⁾ Commission Decision of 3 May 1996, state aid No N 85/96 — France — tax measure relating to the maritime transport sector, SG (96) D/4527.

⁽¹²⁾ OJ C 205, 5.7.1997, p. 5, and OJ C 13, 17.1.2004, p. 3, respectively.

⁽¹³⁾ See footnote 12.

⁽¹⁴⁾ See footnote 12.

⁽¹⁵⁾ OJ L 12, 15.1.2002, p. 33.

⁽¹⁶⁾ Letter from the Commission D/7119, dated 18 May 2000, to the French authorities concerning possible aid measures in favour of the ferry company Sea France, and those authorities' reply to the Commission dated 10 July 2000. Letter from the Commission D (2003) 288, dated 15 January 2003, to the French authorities concerning possible aid measures in favour of the ferry company BAI, and those authorities' reply to the Commission dated 2 April 2003.

return to the ordinary law on depreciation. The scheme was thus a general one. According to SG, the economic advantage resulting from the tax deferment under Article 39 CA of the General Tax Code had to be compared to the ordinary law on depreciation and not to the derogatory restrictive regime provided for in the second paragraph of Article 39 C of the General Tax Code. Moreover, the scheme at issue was open to all economic operators in France, and Article 39 CA of the General Tax Code referred to no asset or economic sector in particular. The granting of the advantages resulting from the application of that article was thus reserved neither for the French commercial sea fleet nor for French financial institutions.

(48) The identity of the members of an EIG was not, it was contended, a criterion for the grant of approval and the scheme at issue contained no restriction as to an EIG's members, who were a source of revenue raising. According to these interested parties it could not therefore reasonably be supposed that the combined provisions of Articles 39 C and 39 CA of the General Tax Code conferred a selective tax advantage on the members of EIGs.

(49) The approval provided for in Article 39 CA of the General Tax Code was not, it was further contended, granted in a discretionary manner. On the contrary, argued *Gaz de France* and BNP, the grant of ministerial approval was subject to objective, non-discriminatory conditions. BNP pointed out in this connection that, according to the case law of the Court of Justice⁽¹⁷⁾, it was for the Commission to demonstrate the discretionary character of the treatment of economic operators in the case of individual measures, inasmuch as the existence of a margin of discretion granted to the authorities could lead to a finding of the selectiveness of a measure only where what was involved was an individual measure and not the general scheme on which that measure was based. It pointed out further that the tax authorities could not impose conditions which were not provided for by law. In the present case, the law stated explicitly what were the applicable criteria for assessing the existence of a 'significant economic and social interest'. BNP, CNCE and Calyon referred in this context to the Constitutional Council decision⁽¹⁸⁾ mentioned by the French authorities. At all events, any decision not to grant approval could be appealed against on grounds of *ultra vires* before the administrative courts, which would give judgment in the light of the grounds for such refusal.

(50) In the opinion of, among others, Calyon and BNP, the selectivity of the scheme at issue was due to market practices and the specificities of transport assets (certain guarantees of long-term value added and liquidity) and not to the wording of Article 39 CA of the General Tax Code. Transport assets, so they maintained, had special features

which made them suitable for long-term financing. Moreover, even had it been the case that Article 39 CA of the General Tax Code did not require prior approval by the Minister for the Budget, the beneficiaries under the scheme would have been the same as they were then.

(51) Furthermore, in BNP's opinion, the criteria governing the application of Article 39 CA of the General Tax Code were justified by the nature and overall structure of the French tax system, certain business sectors being in need of considerable investment.

(52) CNCE maintained, further, that financial advantages similar to those resulting from the application of Article 39 CA of the General Tax Code could be obtained by applying the provisions of the ordinary law. The specificities of Article 39 CA of the General Tax Code did not give rise to any real differentiation as compared with the ordinary law on depreciation from the point of view of the quantum of the tax consequences. In CNCE's view, those specificities were, firstly, the benefit of the one-point increase in the declining depreciation coefficient and, secondly, the possibility of benefiting from exemption from transfer capital gains tax. BNP acknowledged, however, that the State calculated the budgetary cost of applying Article 39 CA by taking as point of reference the second paragraph of Article 39 C of the General Tax Code.

(53) As far as the one-point increase in the depreciation coefficient was concerned, the advantage was, it was claimed, offset by the fact that any losses posted were deductible, under Article 39 CA of the General Tax Code, only to the tune of one quarter of the profits subject to ordinary corporation tax which each member of the EIG earned from its activities. That tax advantage was intended, moreover, to offset the specific constraints or restrictions imposed for purposes of the grant of approval. BNP pointed out in this connection that the benefit derived by an EIG from the one-point increase in the depreciation coefficient was hedged with conditions and relatively modest. It could not, at all events, confer any competitive advantage. Air France pointed out for its part that a financing operation performed under the scheme at issue generated, compared with a financing operation involving a direct loan, a saving of between 6 and 10 % of an aircraft's price. It added that the saving to the lessee was altogether comparable to the potential financial gain to be had by having recourse to other tax schemes.

(54) As far as the exemption from transfer capital gains tax was concerned, CNCE pointed out that the possibility of requesting it resulted from the overall structure of the French tax system and could not therefore be classified as state aid. Its economic rationality rendered it necessary or functional in relation to the system's effectiveness. The exemption from transfer capital gains tax was justified by the need to maintain the cash flow advantage resulting from the first component of Article 39 CA of the General Tax Code. According to Calyon, in the specific case of ships, the exemption made it possible to place the shipowner in a situation comparable to that which he would have been in had he purchased the ship directly and had he had sufficient financial capacity to deduct the depreciation for tax purposes. According to BNP, the exemption from capital

⁽¹⁷⁾ Judgments of the Court of Justice in Cases C-241/94 *France v Commission* [1996] ECR I-4551 and C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* [1998] ECR I-7907, and judgment of the Court of First Instance in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava v Commission* [2002] ECR II-1385.

⁽¹⁸⁾ See footnote 9.

gains tax was designed so as not to negate the advantage linked to the tax deferment in the event of early exercise of the purchase option by the user. SG indicated, for its part, that the exemption from transfer capital gains tax was intended only to offset specific constraints related to the tax arrangements at issue such as, for example, the prohibition on transferring the lessor's shares unless there was an explicit request to that effect made originally by the user. The increased operating charges for the user compensated for that exemption.

- (55) According to Brittany Ferries, the exemption from capital gains tax provided for by Article 39 CA of the General Tax Code was no more favourable than that resulting from the ordinary law provisions (subject to a 5 % share of the costs and charges) applicable from 2007 onwards.
- (56) Air France pointed out that the savings resulting from the tax arrangements at issue were comparable to those achieved using other means of financing with tax levers existing in the world. Moreover, the operations financed under Article 39 CA of the General Tax Code were subject to *quid pro quos* liable to temper that provision's advantages. Air France pointed out, furthermore, that, in some cases, the EIG could contractually pass on the tax-related risks and ancillary costs to the lessee, which had the effect of reducing appreciably the potential saving to the user.
- (57) Lastly, a number of interested parties, including Compagnie Méridionale de Navigation, maintained that the scheme at issue introduced, for shipowners, numerous constraints in the form of *quid pro quos* demanded by the State for approval grant purposes. The advantages flowing from the tax scheme thus offset the extra cost of managing vessels under the French flag, which was basically due to the cost of French crewing, one of the highest in Europe. Fouquet Sacop pointed out in this connection that the scheme had induced it to opt for rapid growth under the French flag, the constraints and extra costs related to that flag being offset by the tax scheme at issue. CMA CGM, Broström Tankers, Pétro Marine and Louis Dreyfus Armateurs stated that, without the benefit of the scheme, they would have been unable to invest in French-flagged vessels and, in so doing, to take part in the development of the Community fleet. Bourbon Maritime indicated for its part that the arrangements provided for in Article 39 CA of the General Tax Code made it possible to maintain high-quality jobs linked to the direct management of maritime transport and its ancillary activities and that they contributed effectively to the improvement of safety and the protection of the environment.
- (58) As regards, secondly, the requirement in Article 87(1) of the Treaty as to an effect on trade between Member States, several interested parties pointed out that the members of an EIG and the users of the assets concerned could be foreign operators or their French subsidiaries. Moreover, the

scheme at issue was no more favourable than those existing in other Member States. SG stated in this connection that those of its clients concerned by the approvals who were French were in a minority.

- (59) As regards, thirdly, the compatibility of the scheme at issue with the common market, CNCE stated that the approvals granted to maritime operators were in keeping with the spirit of the 1997 and 2004 Community guidelines⁽¹⁹⁾. The measure at issue was thus compatible with the common market pursuant to Article 87(3)(c) of the Treaty, as interpreted in the light of the principles set out in the said Community guidelines.
- (60) Brittany Ferries maintained that the scheme provided for in Article 39 CA of the General Tax Code was compatible with the common market pursuant to Article 87(3)(c) of the Treaty inasmuch as the measure sought only to compensate for 'market failures' in relation to the financing of investments in heavy capital goods. It was also stressed by the majority of interested parties that the other Member States had reacted accordingly by introducing similar measures.
- (61) As regards, fourthly, the application in the present case of the principle of legitimate expectation, the majority of interested parties — being beneficiaries under the scheme — maintained that they had always been convinced that the measure at issue did not constitute state aid within the meaning of Article 87(1) of the Treaty. The application in the present case of the above-mentioned principle therefore precluded any recovery.
- (62) SG pointed out in this respect that, under the scheme preceding the one at issue, any partnership losses generated by depreciation could be fully offset against the tax liability of the partnership members. The Commission had never considered that ordinary law scheme to be state aid.
- (63) It was also maintained that the Commission had refrained from acting for six years. According to Calyon, the Commission appeared to have learned of several asset financing operations under Article 39 CA of the General Tax Code without ever having raised the question of their validity in the light of Article 87 of the Treaty⁽²⁰⁾. CNCE maintained in this connection that the period which had elapsed between the date on which the Commission learned of the aid and the date on which the formal investigation procedure was initiated was excessively long, and Calyon described that period as unreasonable. What is more, the Commission had already exceptionally established the

⁽¹⁹⁾ See footnote 12.

⁽²⁰⁾ Article 39 CA of the General Tax Code had, it was asserted, been mentioned by the French authorities in their letters of 10 July 2000 and 2 April 2003 (referred to above in footnote 16) in reply to letters D/7719 of 18 May 2000 and D (2003) 288 of 15 January 2003 from the Commission. The Commission had, it was further asserted, also had occasion to analyse the scheme at issue in Cases C 03/03 (ex NN 42/02) — Aid to rescue and restructure the Air Lib company (OJ C 88, 11.4.2003, p. 2) and C 58/03 (ex NN 70/03) — Aid in favour of Alstom (OJ C 269, 8.11.2003, p. 2).

existence of a legitimate expectation on the part of beneficiaries which precluded any reimbursement of aid once a period of about three years had elapsed between the Commission's learning of the measure and its adopting its final decision ⁽²¹⁾.

- (64) Some interested parties also stressed that the Commission had previously approved the co-ownership shares scheme — a scheme which was more favourable from a tax point of view than the scheme at issue here — and that that circumstance had given rise to their legitimate expectation in the lawfulness of the scheme at issue. Moreover, according to CNCE, the creation of a legitimate expectation on the part of beneficiaries did not require the Commission to have ruled on an identical scheme. The acceptance of a merely similar scheme could, it argued, give rise to such an expectation. And the Commission had in fact accepted a similar scheme in its Decision of 8 May 2001 ⁽²²⁾. CNCE and SG also referred to several similar schemes approved by the Commission ⁽²³⁾ and to the judgment of the Court of Justice in *RSV v Commission* ⁽²⁴⁾.
- (65) More specifically, Brittany Ferries considered that the Commission Decision of 8 May 2001 ⁽²⁵⁾ had given rise to a legitimate expectation on its part that the scheme at issue did not comprise any state aid.
- (66) CNCE stressed also that France had adopted Law No 98-546 some three months after informing the Commission about it in accordance with Article 88(3) of the Treaty. The Commission had not replied within two months of that notification, and so the measure in question was covered by the existing aid arrangements within the meaning of the *Lorenz* case law ⁽²⁶⁾.
- (67) Two interested parties who asked not to be named submitted comments to the Commission as part of the formal investigation procedure.
- (68) In the comments which it transmitted to the Commission within the period allowed, the first of these parties maintained that the scheme at issue was unlawful. It asked the Commission to extend the scope of the present administrative procedure to include the co-ownership shares scheme. It considered, like the Commission in its

decision initiating the formal investigation procedure, firstly, that the scheme at issue was selective in that it favoured French shipowners, and, secondly, that it affected trade between Member States *inter alia* in the cross-Channel market. It pointed out in this connection that, as was clear from the Finance Committee report of 25 March 1998, the scheme at issue in this case, replacing as it did the co-ownership shares scheme, had been introduced to keep the French shipping industry happy.

- (69) Moreover, by favouring French operators, the tax arrangements at issue helped to increase overcapacity in the cross-Channel market by enabling cash-strapped companies to acquire new ships. The distortion of competition resulting from the scheme's application was illustrated by the acquisitions of ships, through this tax mechanism, by Seafrance and Brittany Ferries. The latter had, it was claimed, seen their capacity increase considerably following these new ship acquisitions.
- (70) The second interested party who requested that its identity be withheld referred in its comments to the preferential competitive position enjoyed by French operators — foremost among which was Brittany Ferries — owing to their ships being financed through the scheme at issue. It mentioned in this connection the continued presence of Brittany Ferries on the cross-Channel routes and on the France/Ireland route despite the unfavourable competitive conditions prevailing there — conditions which had led, moreover, to the withdrawal of P&O from the market.

VI. COMMENTS FROM THE FRENCH AUTHORITIES ON THE COMMENTS FROM INTERESTED THIRD PARTIES

- (71) According to the French authorities, the comments from most of the interested third parties confirmed their position regarding the assessment of the scheme at issue, which was that:

— Article 39 CA of the General Tax Code was a general measure which was used particularly but not exclusively for the financing of commercial ships

— the scheme at issue produced effects comparable either to domestic law measures or to provisions existing in other Member States

— approval was not discretionary and its grant depended on the fulfilment of objective criteria

— the tax scheme at issue was of major importance to the Community economy, particularly in terms of the localisation and maintenance of jobs

⁽²¹⁾ See Commission Decision 92/329/EEC of 25 July 1990 on aid granted by the Italian Government to a manufacturer of ophthalmic products (*Industrie ottiche riunite — IOR*) (OJ L 183, 3.7.1992, p. 30).

⁽²²⁾ See recital 41 and footnote 15 above.

⁽²³⁾ See Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws (OJ L 60, 1.3.2001, p. 57, end of paragraph 25). See also Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres (OJ L 23, 28.1.2004, p. 1); Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities (OJ L 180, 18.7.2003, p. 52, in particular paragraphs 39 *et seq.*); Commission Decision 2003/601/EC of 17 February 2003 on aid scheme Ireland — Foreign Income (OJ L 204, 13.8.2003, p. 51, in particular paragraphs 59 *et seq.*).

⁽²⁴⁾ Judgment of the Court of Justice in Case 223/85 [1987] ECR 4617.

⁽²⁵⁾ See footnote 15.

⁽²⁶⁾ Judgment of the Court of Justice in Case 120/73 *Gebrüder Lorenz GmbH v Federal Republic of Germany and Others* [1973] ECR 1471.

— lastly, the majority of interested third parties referred to their legitimate expectation as to the compatibility of the arrangements in question with the Community rules.

- (72) The comments submitted by the two interested parties whose identity had been kept confidential were, in the French authorities' opinion, based on inaccurate or imprecise data.
- (73) As to the argument that Brittany Ferries' eligibility under the tax EIG scheme had led indirectly to the withdrawal of P&O from the western and central English Channel, the French authorities replied that only two vessels operated by Brittany Ferries had qualified under the scheme and that the financing of its *Mont St Michel* ferry by the mechanism had been approved by the Commission's decision of 8 May 2001 ⁽²⁷⁾.
- (74) According to the French authorities, an in-depth investigation was carried out by the British competition authorities when the above-mentioned operator withdrew from the market. No distortion of competition was found to be at the root of the operator's withdrawal. Moreover, the falling turnover of some operators was due to the steadily increasing competition from low-cost airlines and not to the commissioning of new vessels by other shipowners.
- (75) As for the call by one of those interested parties for the Commission to extend the scope of its investigation to include the co-ownership shares scheme, the French authorities pointed out that that scheme had been declared compatible with the Treaty rules in the Commission's decision of 3 May 1996.
- (76) Lastly, in the French authorities' opinion, the increase in cross-Channel capacity was not attributable to companies which had benefited under the tax EIG scheme. Account should be taken instead of new entrants on the routes on which the incumbent operators had previously operated. The French authorities also pointed out that Eurotunnel had doubled its freight-handling capacity between 2000 et 2003 and that P&O had bought out Stena Line's share of their joint venture and had modernised its fleet.

VII. ASSESSMENT OF THE AID

- (77) Following the initiation of the formal investigation procedure under Article 88(2) of the Treaty and bearing in mind the arguments put forward in that context by the French authorities and by interested parties, the Commission takes the view that the tax scheme provided for in Article 39 CA of the General Tax Code constitutes state aid within the meaning of Article 87(1) of the Treaty.

1. Existence of state aid

- (78) Pursuant to Article 87(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form

whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

- (79) The classification of a national measure as state aid presupposes that the following cumulative conditions are met: (1) the measure confers an advantage through state resources; (2) the advantage is selective; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States ⁽²⁸⁾.
- (80) The reasons why it is considered that the scheme provided for in Article 39 CA of the General Tax Code, as described above, satisfies these cumulative conditions need to be explained.
- The existence of an advantage conferred through state resources*
- (81) Pursuant to the first paragraph of Article 39 C of the General Tax Code, the depreciation of assets leased out or otherwise made available is spread over the normal period of use.
- (82) The second paragraph of Article 39 C and Article 39 CA of the General Tax Code concern the depreciation rules applicable to the financing, notably by EIGs, of assets leased out or otherwise made available. According to the French authorities, these two provisions were introduced with a view to combating abusive recourse to this method of financing.
- (83) The French authorities and a number of interested parties claim that the scheme provided for in Article 39 CA of the General Tax Code corresponds to a return to the ordinary law in relation to the deduction of depreciation, that is to say, to the provisions of the second paragraph of Article 39 (1) and the first paragraph of Article 39 C of the said Code, and therefore does not constitute state aid. The second paragraph of Article 39 C of the General Tax Code constitutes, in their view, an exception to the provisions contained in those articles.

- (84) According to settled case law, the application of Article 87 (1) of the Treaty only requires it to be determined whether under a particular statutory scheme a state measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme ⁽²⁹⁾.
- (85) Consequently, in order to identify what constitutes an advantage as contemplated in the case law on state aid, it is imperative to determine the reference point or the common system applicable, under a particular statutory scheme, against which that advantage is to be compared ⁽³⁰⁾. In this respect, the Court of Justice has ruled, moreover, that the

⁽²⁸⁾ See, for example, the judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.

⁽²⁹⁾ Judgment of the Court of First Instance in Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, paragraph 79, and the case law cited therein.

⁽³⁰⁾ *Salzgitter v Commission*, cited above in footnote 29, paragraph 81. See also the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, paragraph 16).

⁽²⁷⁾ See footnote 15.

determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only when compared with 'normal' taxation, i.e. the rate of taxation in force in the geographical area constituting the reference framework ⁽³¹⁾.

(86) In the present case, in order to determine the reference point under the scheme of depreciation of assets leased out or otherwise made available, account need be taken only of the provisions on the financing of such assets by partnerships such as EIGs. Otherwise, the factual and legal situations taken into consideration for the purpose of determining the advantage would not be comparable, either from the point of view of the members of the EIG or from that of the users of the assets in question.

(87) Hence the reference point applicable in the present case for determining the deductible depreciation is the limitation in principle of such depreciation to assets financed by EIGs, as provided for in the second paragraph of Article 39 C of the General Tax Code ⁽³²⁾. The criterion cannot be the first paragraph of Article 39 C of the General Tax Code inasmuch as that provision is not applicable to financing operations by EIGs, that is to say, by structures grouping together several legal entities — as a rule financial institutions — which thus share between them the risks inherent in an operation, as opposed to a financing operation carried out by a single financial institution bearing on its own the risks involved. It should be pointed out further in this connection that, unlike financing methods which do not entail recourse to an EIG, a financing operation using as an intermediary such a tax-transparent structure makes it possible to achieve tax optimisation, any losses posted by an EIG during the first few years of its activity being deductible from the taxable profits earned by its members from their current activities.

(88) The Commission considers, therefore, that the French authorities and certain interested parties are not justified in maintaining that the scheme provided for in Article 39 CA of the General Tax Code constitutes a return to the ordinary law on depreciation, and that the second paragraph of Article 39 C of the said Code constitutes the reference point against which the tax advantage resulting from the application of Article 39 CA is to be assessed. It is relevant to note, moreover, that Article 39 CA of the General Tax Code provides expressly that the tax advantage in question is to be calculated from the balance of the positive or negative discounted values relating respectively to the tax reductions or additional tax contributions, compared with those which would result from the application of the provisions of the second paragraph of that article.

⁽³¹⁾ Judgment of 6 September 2006 in Case C-88/03 *Portugal v Commission*, not yet reported, paragraph 56.

⁽³²⁾ Pursuant to this article, the tax-deductible depreciation of an asset may not exceed, for one and the same financial year, the amount of any leasing charges collected, less any other charges relating to the asset.

(89) It should be pointed out that only members of EIGs ⁽³³⁾ which finance movable assets the depreciation period of which is at least eight years qualify for the tax advantages resulting from the application of Article 39 CA of the General Tax Code, namely, (1) exemption from the ceiling in principle on deductible depreciation, (2) the one-point increase in the depreciation coefficient, and (3) possible exemption from transfer capital gains tax.

(90) As regards, firstly, the removal of the ceiling on deductible depreciation pursuant to Article 39 CA of the General Tax Code, it should be noted that each member of an EIG is able, during the period of depreciation of the asset when the EIG is posting a loss, to deduct the EIG's losses, in proportion to its rights, from its own taxable profits. No account is taken, in this context, of the ceiling on depreciation laid down in the second paragraph of Article 39 C of the General Tax Code.

(91) Consequently, the application of the exception provided for in Article 39 CA of the General Tax Code makes possible, during the loss-making period, a reduction, by each of the EIG's members, of the base which would normally be taxable under the second paragraph of Article 39 C of the General Tax Code. The fact that the amount of the depreciation is not limited to the amount of the leasing charges collected, less any other charges relating to the leased asset, makes it possible to increase the amount of the depreciation during the first few loss-making financial years. The fact that, pursuant to Article 39 CA of the General Tax Code, such losses are only deductible to the tune of one quarter of the profits taxable at the normal rate of corporation tax which each member of the EIG earns from the rest of its activities may limit that advantage, but it cannot call into question its existence.

(92) The French authorities maintain in this respect that the tax savings thus obtained during the first few years of the financing operation are neutralised by the additional tax payable once the EIG starts to make a profit, the leasing charges payable being greater than the annual depreciation expense. The Commission considers, however, that the advantage gained lies in the delayed payment of tax and corresponds to the balance of the discounted values of the taxes paid throughout the depreciation period taking into account the interest rates applied.

(93) Senate Report No 413 ⁽³⁴⁾ confirms this analysis when it states that '[t]he tax savings thus obtained by the members during the first few years of operation are offset by the additional tax payable thereafter when the financing structure earns profits'. However, this time-lag makes it possible, so the report says, to achieve an increase in cash flow equal to the difference between the discounted values of the tax savings for the first few years and the additional

⁽³³⁾ The EIG proper, being a fiscally transparent structure, is not liable to tax and cannot therefore be deemed to benefit from the scheme provided for in Article 39 CA of the General Tax Code.

⁽³⁴⁾ Senate Report No 413 on the draft law laying down various economic and financial provisions, produced on behalf of the Nation's Committee on Finance, Budgetary Control and Economic Accounts by Mr Alain Lambert, Rapporteur-General, and Mr Philippe Marini (Ordinary Session of 1997-98).

tax contributions in subsequent years. The Commission would also point out that it is stated in Tax Instruction No 120 of 17 June 1999⁽³⁵⁾ that the tax advantage resulting from the application of Article 39 CA of the General Tax Code makes it possible to achieve tax savings.

asset to the user and provided certain conditions are met, from exemption from capital gains tax⁽³⁸⁾.

- (94) It would appear, therefore, that the scheme introduced by Article 39 CA of the General Tax Code seeks to enable the members of an EIG to enjoy an advantage in the form of a tax deferment.
- (95) No support can be given to the argument that users for whom an EIG does not receive approval pursuant to Article 39 CA of the General Tax Code have recourse to other methods of financing in order to circumvent the tax-deductible depreciation ceiling provided for in the second paragraph of Article 39 C of the Code and are therefore not placed at a disadvantage compared with those for whom the EIG does receive approval. It should be pointed out first of all that, in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies⁽³⁶⁾. Secondly, such an argument means having to take into account individual situations which are factually and legally distinct⁽³⁷⁾ and, what is more, hypothetical.
- (96) Lastly, it cannot be ruled out that users who cannot benefit from the provisions of Article 39 CA of the General Tax Code may be unable to have recourse to an alternative method of financing. This might be the case where a bank decided, in the light of the financial situation of the undertaking concerned, not to assume alone the risks inherent in the financing operation (leasing in its own right) or where, for reasons to do with the user's balance sheet structure or financing capacity, other financing methods proved impossible (direct investment with recourse to debt or equity). At all events, even if such users were actually able to have recourse to an alternative financing method and thereby circumvented their depreciation ceiling, the fact remains that the most advantageous solution initially chosen would have to be abandoned in favour of a necessarily less favourable second choice and that they would not benefit from the tax treatment specific to leasing out by an EIG (in the form of the obligation laid down in Article 39 CA of the General Tax Code to pass on part of the tax advantage to the user).
- (97) Besides the removal of the ceiling on the amount of deductible depreciation, the members of an EIG benefit from a one-point increase in the declining depreciation coefficient and, in the event of early transfer of title in the
- (98) The increased coefficient and the possible exemption from transfer capital gains tax are advantages from which the members of an EIG benefit under Article 39 CA of the General Tax Code, but from which they would not benefit under the reference tax framework, namely the second paragraph of Article 39 C of the Code. At all events, the application of Article 39 CA of the General Tax Code as far as these two advantages are concerned cannot constitute a return to the ordinary law on depreciation, as claimed by the French authorities, since the first paragraph of Article 39 C of the Code makes no provision whatsoever for such tax advantages.
- (99) In these circumstances, the argument to the effect that, from 2007, the exemption from transfer capital gains tax will come under the ordinary law is irrelevant inasmuch as the existence of that advantage must be assessed in the light of the legal framework in force and not in that of a future legal situation⁽³⁹⁾. Nor is it claimed by the parties that an amendment of the applicable legal framework would make the advantage granted earlier disappear.
- (100) With regard to the state origin of the advantages resulting from the application of the scheme at issue, it will be recalled that the concept of aid is more general than that of subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect⁽⁴⁰⁾. It follows from this that a measure by which the public authorities grant to certain undertakings exemption from, a reduction in or a deferral of payment of the tax normally due, which, although not involving a transfer of state resources, places beneficiaries in a more favourable
- ⁽³⁵⁾ Tax Instruction 4D-3-99 No 120 of 29 June 1999, paragraph 47 (annexed by the French authorities to their comments of 3 May 2004).
- ⁽³⁶⁾ See, for example, Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 24.
- ⁽³⁷⁾ See recitals 86 and 87.
- ⁽³⁸⁾ Senate Report No 413 (cited above in footnote 34) makes clear that the exemption from transfer capital gains tax has the effect of multiplying by two the tax advantage resulting from the first part of the provision (removal of the ceiling on the amount of tax deductible depreciation and increase in the depreciation coefficient).
- ⁽³⁹⁾ The legality of Commission decisions falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and cannot depend on retrospective considerations (see *inter alia* the judgment of the Court of First Instance in Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405, paragraph 81).
- ⁽⁴⁰⁾ See *inter alia* the judgments of the Court of Justice in Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; C-501/00 *Spain v Commission* [2004] ECR I-6717, paragraph 90, and the case law cited therein; C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 77; and C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze*, cited above in footnote 28, paragraph 131, and the case law cited therein.

financial situation than other taxpayers constitutes state aid within the meaning of Article 87(1) of the Treaty ⁽⁴¹⁾. In the present case, therefore, although the measures resulting from Article 39 CA of the General Tax Code do not involve any transfer of state resources, it cannot be denied that they entail a loss of tax resources and hence constitute state financing.

advantages accruing exclusively to certain undertakings or certain sectors of activity ⁽⁴²⁾.

The selective character of the scheme

(101) In these circumstances, the Commission considers that the members of an EIG benefit from advantages in the form of tax savings (removal of the depreciation ceiling and increase in the depreciation coefficient) and, in the event of early transfer of title in the asset carried out under certain conditions, of a tax exemption, both of which represent a cost to the budget of the French State.

(106) As a general rule, a tax measure which is likely to be found to be state aid differs from a general tax provision in that the number of recipients tends to be limited in law or in fact. Hence what matters, for a measure to be found to be state aid, is that the recipient undertakings belong to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question ⁽⁴³⁾.

(102) In conclusion, as far as the members of EIGs are concerned, given that they must pass on two thirds at least of the overall tax advantage resulting from the application of Article 39 CA of the General Tax Code to the user of the asset in question, the Commission considers that the advantage from which they benefit amounts, at most, to one third of that overall advantage. The Commission would reiterate in this connection that the members of EIGs are mainly financial institutions.

(107) In the present case, Article 39 CA of the General Tax Code applies only to movable assets depreciable according to the declining balance method over a period of at least eight years and acquired new, with the exception of ships, which may be acquired second hand. Senate Report No 413 ⁽⁴⁴⁾ states that 'the ... measure is designed specifically to encourage heavy investment through highly favourable tax leveraging'.

(103) As far as the users of the assets in question are concerned, the passing-on of part of the overall tax advantage accruing to the members of an EIG takes the form, under the provision at issue, of a reduction in the amount of their leasing charges or in the amount of the purchase option. This advantage passed on to users thus reduces the charges normally borne by their budgets as part of leasing operations. Since the advantage passed on accounts for at least two thirds of the advantage accorded to the members of the EIG through state resources, it must be considered that users benefit, through this measure, from an advantage granted through state resources within the meaning of Article 87 of the Treaty which amounts to at least two thirds of the overall advantage.

(108) The reduction in taxation resulting from the application of this measure therefore benefits, in law, exclusively the members of the EIGs financing such assets ⁽⁴⁵⁾ and — by reason of the obligation to pass on two thirds at least of the overall tax advantage accruing to an EIG's members — the users of such assets. Investors belonging to an EIG who do not finance assets covered by Article 39 CA of the General Tax Code and the users of assets with a depreciation period of less than eight years cannot, by contrast, claim the benefit of the tax advantage.

(104) The French authorities and certain interested parties maintain, however, that the tax scheme provided for in Article 39 CA of the General Tax Code is a general measure under French tax law. It must therefore be examined whether the overall advantage accruing to the members of an EIG and to users is of a selective character.

(109) Even if the users of assets which are not eligible under Article 39 CA of the General Tax Code may be advised to try to have recourse to a form of financing other than a tax EIG, they are nevertheless deprived of this method of financing.

The general character of the tax scheme at issue

(105) It should be noted first of all that the specificity of a state measure, namely its selective character, is one of the defining features of state aid within the meaning of Article 87(1) of the Treaty. In that regard, it is necessary to determine whether or not the tax scheme at issue entails

⁽⁴²⁾ See the judgments of the Court of Justice in *France v Commission*, cited above in footnote 17, paragraph 24, and *Ecotrade v Altiforni e Ferriere di Servola*, cited above in footnote 17, paragraphs 40 and 41, and the judgment of the Court of First Instance in Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 39. See also the Commission Notice on the application of the State aid rules to measures relating to direct business taxation, cited above in footnote 30, paragraph 18.

⁽⁴³⁾ See the judgment in *Salzgitter*, cited above in footnote 29, paragraph 38.

⁽⁴⁴⁾ See footnote 34.

⁽⁴⁵⁾ See, by analogy, in the case of a tax measure benefiting only companies carrying on a certain type of operation, the judgment of the Court of Justice in Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraphs 45-47.

⁽⁴¹⁾ See, for example, the judgment of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14.

- (110) In view, moreover, of the depreciation period of the assets in question provided for in Article 39 CA of the General Tax Code, that provision benefits, in fact, mainly undertakings operating in the — particularly maritime and air — transport sector, and EIGs financing assets in that sector.
- (111) In that respect, the information furnished by the French authorities shows that, of the 189 applications for approval lodged under Article 39 CA of the General Tax Code, 182 concerned the transport sector. And, according to that information, the maritime transport sector alone accounted for 75 % of the applications for approval lodged and 82 % of the approvals granted (see the table in recital 17 above).
- (112) The introduction of this scheme derogating from the ceiling on the depreciation of assets financed by EIGs was primarily motivated by the desire on the part of the legislature to promote the transport sector, and, more particularly, maritime transport.
- (113) That this is the case can be seen from the following.
- (114) Firstly, of all the assets that are eligible under Article 39 CA of the General Tax Code, ships alone are expressly referred to in Tax Instruction No 120 ⁽⁴⁶⁾. It is thus stipulated that the only second-hand assets capable of benefiting under the tax scheme provided for in Article 39 CA of the General Tax Code are ships. As far as the approval grant procedure is concerned, it is also stipulated that approval applications for ships must be submitted before they are ordered inasmuch as they start to depreciate as soon as they are laid down ⁽⁴⁷⁾.
- (115) Secondly, as is clear from the preparatory work prior to the adoption of Law No 98-546 and, more particularly, from Senate Report No 413 ⁽⁴⁸⁾, the previously existing tax arrangements applied to all economic sectors whereas Article 39 CA of the General Tax Code applies 'only to heavy capital goods (aircraft, high-speed trains, ships, etc.)'. As regards, more specifically, the maritime sector, the said report criticises the fact that, compared with the co-ownership shares scheme, the scheme at issue is not favourable enough to boost investment in the sector. It also states that the introduction, in Article 39 CA of the General Tax Code, of a provision on exemption from capital gains tax in the event of early transfer of title in an asset to the user was motivated by the fact that the scheme at issue was less favourable to maritime investment. The French authorities likewise pointed out in this connection in their comments of 3 May 2004 that it was with a view to ending the stagnation in the number of commercial vessels registered in France and to reducing tax expenditure that provision had been made for the possibility of EIGs benefiting, subject to certain criteria, not only from depreciation-related tax deferment, but also from exemption from capital gains tax on the asset transfer.
- (116) Thirdly, General Report No 66 on the 1999 Finance Bill ⁽⁴⁹⁾ states that 'Law No 98-546 ... made possible the creation of a new tax arrangement in favour of maritime investment'. It also states that, although the preferential scheme of financing by leasing introduced by Article 39 CA of the General Tax Code does not apply only to ships, in reality it was designed mainly with them in mind.
- (117) In the light of all the above considerations, the Commission takes the view that the scheme provided for in Article 39 CA of the General Tax Code is selective in character in that it favours certain economic operators active in the transport sector and in the financial sector. Since the scheme does not apply to all economic operators, it cannot be considered to be a general tax policy measure.
- (118) This assessment cannot be called into question by the arguments raised by the French authorities.
- (119) Firstly, the French authorities' argument based on the multiplicity of sectors potentially concerned by the tax measure at issue cannot be accepted. Apart from the fact that certain assets only are concerned by the tax scheme, the very marginal number of approval applications for financing assets in sectors other than transport ⁽⁵⁰⁾ does not leave any doubt as to the scheme's specificity. It has been ruled in any event that the fact that the number of undertakings able to claim entitlement under a measure is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective character ⁽⁵¹⁾.
- (120) Secondly, contrary to what the French authorities claim, the argument that there are equivalent tax measures in the other Member States is irrelevant for purposes of justifying the existence of the scheme provided for in Article 39 CA of the General Tax Code. Comparison of the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aim and functioning of the provisions on the monitoring of state aid. In the absence of Community-level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States ⁽⁵²⁾. It has also been ruled that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their

⁽⁴⁶⁾ See footnote 35.

⁽⁴⁷⁾ See paragraph 70 of Tax Instruction No 120, referred to above in footnote 35.

⁽⁴⁸⁾ See footnote 34.

⁽⁴⁹⁾ Report No 66 — 1998-99 session, Rapporteur-General: Mr P. Marini, Senator/Volume III.

⁽⁵⁰⁾ It is clear from the information supplied by the French authorities that fewer than 4 % of approval applications and fewer than 3 % of approvals granted concerned a sector other than transport (see the table in recital 17).

⁽⁵¹⁾ See the judgment of the Court of Justice in Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 48, and the case law cited therein.

⁽⁵²⁾ See the judgment in *Salzgitter*, cited above in footnote 29, paragraph 81.

character as aid ⁽⁵³⁾. Similarly, the fact that competitors in other Member States benefit from comparable tax measures, even illegal ones, is irrelevant for purposes of classifying the scheme at issue as aid ⁽⁵⁴⁾.

(121) Thirdly, France and some interested parties claim that the non-selective character of the scheme at issue is established by the lack of discretionary power on the part of the French authorities when it comes to granting approval.

(122) The Commission would point out that, according to the case law, even interventions which, *prima facie*, apply to undertakings in general may be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. That is the case, in particular, where the administration called upon to apply a general rule has a discretionary power so far as concerns the application of the measure at issue ⁽⁵⁵⁾.

(123) In the present case, it should be pointed out straight away that, inasmuch as the tax measure at issue can benefit only the users of certain assets and the members of the EIGs financing them and in fact benefits mainly the transport and financial sectors, the condition of specificity is already fulfilled. Other financing schemes, concerning assets in sectors other than transport and/or having a depreciation period of less than eight years, might include safeguards of such a character as to rule out any attempt at tax optimisation. Consequently, in view of the limited scope of this tax measure, it is not necessary, in order to establish the selective character of the measure, to determine whether the competent national authorities have a discretionary power in the measure's application ⁽⁵⁶⁾.

(124) When questioned about the scope of the examination they carry out to establish whether the investment in question is of significant economic and social interest ⁽⁵⁷⁾ both in general and from an employment standpoint in particular,

the French authorities stated that that interest was determined in the light of six criteria, including that of 'the impact of the investment on the economic environment of the area in which it is to be carried out and in which the user operates'. In the Commission's opinion, the assessment of that criterion necessarily involves giving the national authorities a margin of discretion.

(125) Despite the legitimacy of such a goal, there is no link between this criterion as to the existence of an economic interest on the part of the investment and the objective sought by the legislature in making the carrying out of the investment subject to the prior grant of ministerial approval. The criteria governing the grant of approval are said to be intended to help establish that recourse to the method of financing via an EIG does not pursue any tax optimisation goal. The criterion as to the economic interest of the investment is, however, not likely to prevent such optimisation. Irrespective of the period of depreciation of the assets concerned, such financing operations may well not pursue any tax optimisation goal, but this does not necessarily mean that they are deprived of any significant economic and social interest primarily in terms of employment.

(126) Reference may be made once more here to Senate Report No 413 ⁽⁵⁸⁾, which states that the criterion as to the existence of a significant economic and social interest is 'a means to promote goods manufactured in France or financing operations for the benefit of a French user'. More generally, the report also states that the approval procedure leaves the authorities too wide a margin of discretion.

(127) The unsuitability of the criterion as to the economic interest of the investment in the light of the objective pursued therefore increases, in the Commission's opinion, the margin of discretion enjoyed by the national authorities in its application.

(128) Still concerning the margin of discretion enjoyed by the French authorities for approval granting purposes, it should be noted that the Constitutional Council decision of 30 December 1987 ⁽⁵⁹⁾, which was referred to by the French authorities and some interested parties, is irrelevant in the present context. What was involved in that instance was a tax measure which provided that a new legal person resulting from the merger of two companies could take over for a limited period all or part of the losses of the merged companies and that, in the event of the partial contribution of capital to a company in the group, any losses not yet deducted before the merger could be set off, with the approval of the Minister for the Budget and within the limits of that approval, against any future profits. The Constitutional Council was asked to rule on the conformity of that approval procedure with Article 34 of the

⁽⁵³⁾ See, *inter alia*, the judgments of the Court of Justice in Cases C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 67, and the case law cited therein, and C-172/03 *Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 54.

⁽⁵⁴⁾ See the judgment of the Court of Justice in Case 78/76 *Steinike & Weinlig v Federal Republic of Germany* [1977] ECR 595, paragraph 24, and the judgment of the Court of First Instance in Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, paragraph 54.

⁽⁵⁵⁾ See the judgments of the Court of Justice in Case C-295/97 *Piaggio SpA v International Factors Italia SpA and Others* [1999] ECR I-3735, paragraph 39, and the case law cited therein, and in *Diputación Foral de Álava v Commission*, cited above in footnote 17, paragraph 31.

⁽⁵⁶⁾ See the judgment in *Spain v Commission*, cited above in footnote 40, paragraphs 120 and 121, and the case law cited therein.

⁽⁵⁷⁾ According to the French authorities, of the 22 decisions not to grant approval, 7 were based on the lack of any significant economic and social spin-offs.

⁽⁵⁸⁾ See footnote 34.

⁽⁵⁹⁾ See footnote 9.

Constitution, which entrusts to the legislature the task of determining the scope of a tax advantage. It held that the measure in question did not allow the legislature to subdelegate its taxation powers to the Minister and that the latter had conferred on him only the power to ensure, in keeping with the legislature's objective of preventing tax avoidance, that the conditions laid down by law were met. On that occasion, what the Constitutional Council was being called on to do was to rule on compliance with the respective powers of the legislative and regulatory authorities in tax matters and not at all on whether the Minister had a discretionary power when adopting the individual measures needed to implement the law.

(129) In any event, the Commission considers that the conditions of Article 87(1) of the Treaty cannot be called into question by decisions of national courts.

(130) Fourthly, in response to the argument that the national authorities did not have arbitrary power since their decisions could be appealed against before the national courts with a view to reviewing the grounds for withholding approval, it should be pointed out that, in order to preclude characterisation as a general measure, it is not necessary to determine whether the conduct of the tax administration is arbitrary. It need only be established that the administration has a discretionary power enabling it to vary the conditions for granting the tax concession in question according to the characteristics of the investment project submitted for its assessment⁽⁶⁰⁾. It has been ruled, moreover, that debt remissions granted in the course of judicial proceedings and in accordance with the applicable national law were selective in character as they did not flow automatically from the application of the law, but from the discretionary decisions made by the public bodies in question. In making this ruling, the Court again made it clear that Article 87(1) of the Treaty does not distinguish between measures of state intervention by reference to their causes or aims but defines them in relation to their effects⁽⁶¹⁾. In the present case, *a fortiori*, the fact that decisions withholding approval may be appealed against before a national court cannot call into question the existence of a margin of discretion on the part of the national authorities in applying the ministerial approval grant criteria.

(131) Lastly, the Commission considers that the French authorities' argument centred on the absence of a distinction based on the nationality of the members of an EIG and of users likewise does not call into question the selective character of the scheme provided for in Article 39 CA of

the General Tax Code⁽⁶²⁾, especially since Senate Report No 413⁽⁶³⁾ states that the condition as to the existence of a significant economic and social interest of the investment is 'a means to promote goods manufactured in France or financing operations for the benefit of a French user'.

(132) In the light of the above, the Commission considers that the scheme provided for in Article 39 CA of the General Tax Code is selective in character.

The relevance of the exception based on the nature and overall structure of the tax system

(133) The French authorities claim that the combined provisions of the second paragraph of Article 39 C and Article 39 CA of the General Tax Code are a means of *ex ante* control by the tax authorities aimed at combating tax avoidance through the abuse of movable asset financing operations by tax-transparent structures such as EIGs. They consider that the scheme provided for in Article 39 CA of the General Tax Code is thus justified by the nature and overall structure of the tax system. They state in this connection that the scheme provided for in Article 39 CA of the General Tax Code is 'based on objective, horizontal tax avoidance combating criteria'.

(134) It is true that the definition of state aid does not include national measures introducing a differentiation between undertakings when that differentiation arises from the nature and overall structure of the system of charges of which they form part. This justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with the internal logic of the tax system in general. However, tax differentiations cannot be simply dictated by the general aims and objectives pursued by the State in adopting the measures in question⁽⁶⁴⁾.

(135) In the present case, the Commission considers that, by limiting the amount of deductible depreciation, the second paragraph of Article 39 C of the General Tax Code does in fact seek to combat abusive recourse to tax-transparent structures with a view to achieving a tax saving as part of operations to finance assets leased out or otherwise made available. That objective is clearly necessary and rational for purposes of ensuring the effectiveness of the scheme of tax-

⁽⁶⁰⁾ Judgments of the Court of First Instance in *Diputación Foral de Álava v Commission*, cited above in footnote 17, paragraph 35, and in Case T-36/99 *Lenzing v Commission* [2004] ECR II-3597, paragraph 132.

⁽⁶¹⁾ Judgment of the Court of First Instance in Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 158.

⁽⁶²⁾ Judgment in *CETM v Commission*, cited above in footnote 42, paragraph 49.

⁽⁶³⁾ See footnote 34.

⁽⁶⁴⁾ Judgment in *Spain v Commission*, cited above in footnote 51, paragraphs 52 and 53, and the judgment in *Diputación Foral de Álava v Commission*, cited above in footnote 17, paragraph 60, and the case law cited therein. This case law was reproduced by the Commission in its Notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation (cited above in footnote 30).

deductible depreciation of assets leased out or otherwise made available and must therefore be considered to form an inherent part of the said scheme ⁽⁶⁵⁾.

creating or safeguarding jobs that most aid measures are granted ⁽⁶⁷⁾.

(136) On the other hand, the scheme provided for in Article 39 CA of the General Tax Code cannot be justified by the nature and overall structure of the French system of depreciation of assets leased out or otherwise made available. Although derogations from the ceiling in principle on depreciation provided for in the second paragraph of Article 39 C of the General Tax Code are admissible, they should be based only on criteria the fulfilment of which would be capable of preventing recourse, for tax optimisation purposes, to the financing of the said assets by means of tax-transparent structures such as EIGs.

(137) Firstly, the limitation of the scope of the derogation in question to the financing of assets depreciable over a period of at least eight years cannot be justified, either in itself or in combination with the other approval grant criteria, in the light of the objective pursued by the French authorities. During the course of the present administrative procedure, those authorities have provided no explanation as to why, in the light of the objective of combating tax avoidance, the derogation was limited to assets having such a depreciation period.

(138) Secondly, as indicated above, of the ministerial approval grant criteria, that which relates to the existence on the part of the financing operation of an economic and social interest, particularly in relation to employment, leaves the national authorities a margin of discretion. This criterion bears no relationship, moreover, to France's objective of combating tax avoidance. At all events, such a social objective is not capable in itself of excluding the scheme at issue from classification as aid within the meaning of Article 87(1) of the Treaty inasmuch as that article does not distinguish between measures of state intervention by reference to their causes or their aims but defines them in relation to their effects ⁽⁶⁶⁾. It has been ruled, furthermore, that Article 87(1) of the Treaty would be deprived of effectiveness if specific measures were to be excluded from classification as state aid for reasons to do with the creation or maintenance of employment, since it is with a view to

(139) The French authorities also claim that the tax scheme provided for in Article 39 CA of the General Tax Code has made possible a rejuvenation and consolidation of the commercial sea fleet. Similarly, Air France states that the scheme promotes the renewal of its fleet, which has been made necessary by changes in environmental standards. However, apart from the fact that such claims confirm the Commission's assessment as to the selective character of the scheme at issue, the pursuit of economic or industrial policy objectives cannot be considered to exclude a selective measure from the application of Article 87(1) of the Treaty ⁽⁶⁸⁾. It has been ruled, moreover, in a similar context that a scheme providing for an interest rate subsidy on loans granted to natural persons, SMEs, local and regional public bodies and bodies providing local public services for purchasing vehicles or for leasing them with intention to purchase was an aid measure and could not be justified by the fact that it was aimed at modernising the commercial vehicles on the road in Spain in the interest of environmental protection and improving road safety ⁽⁶⁹⁾.

(140) All of the general interest grounds to which the scheme at issue is claimed to have the object or effect of contributing — namely employment and the renewal or consolidation of the ships or aircraft concerned — however legitimate they may be, are not justified by the nature and overall structure of the tax scheme at issue and are even irrelevant when it comes to classifying a measure as state aid within the meaning of Article 87(1) of the Treaty.

(141) The Commission also considers that it is irrelevant, for the purposes of applying Article 87(1) of the Treaty, that the scheme provided for in Article 39 CA of the General Tax Code is less favourable to beneficiaries than was the co-ownership shares scheme, the scheme at issue in the case falling to be assessed by the Commission at the time of its implementation ⁽⁷⁰⁾.

(142) In the light of the above, the Commission considers that the scheme provided for in Article 39 CA of the General Tax Code is not justified by the nature and overall structure of the tax scheme at issue and that its selective character is therefore beyond question.

⁽⁶⁵⁾ The Commission considers it appropriate to refer, by analogy, to the judgment in Case C-308/01 *Gil Insurance and Others v Commissioners of Customs & Excise* [2004] ECR I-4777, paragraphs 74 *et seq.*, in which the Court of Justice regarded as justified by the nature and general scheme of the national system of taxation of insurance a measure whose aim was to counteract the practice of taking advantage of the difference between the standard rate of insurance premium tax and that of VAT by manipulating the prices of rental or sale of appliances and of the associated insurance.

⁽⁶⁶⁾ Judgment of the Court of Justice in Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraph 51, and the case law cited therein.

⁽⁶⁷⁾ See, on the subject of selective exemptions from social security charges, the judgment of the Court of Justice in Case 173/73 *Italy v Commission* [1974] ECR 709, paragraphs 27 and 28. See also the judgments in *CETM v Commission*, cited above in footnote 42, paragraph 53, and in Case T-127/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1275, paragraph 168.

⁽⁶⁸⁾ See, for example, the judgment in *Diputación Foral de Álava v Commission*, cited above in footnote 17, paragraph 51.

⁽⁶⁹⁾ Judgment in *CETM v Commission*, cited above in footnote 42, paragraph 53, and the judgment of the Court of Justice in Case C-351/98 *Spain v Commission* [2002] ECR I-8031.

⁽⁷⁰⁾ See the judgments of the Court of Justice in Case 57/86 *Greece v Commission* [1988] ECR 2855, paragraph 10, and in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited above in footnote 40, paragraph 41, and the case law cited therein.

Effect on trade between Member States and distortion of competition

- (143) As indicated above, the beneficiaries under the tax scheme provided for in Article 39 CA of the General Tax Code are, firstly, economic operators active in the sectors of transport and industry and, secondly, the members of EIGs financing assets in those sectors, being financial institutions for the most part. All of these operators are active in the Community markets of the above-mentioned sectors.
- (144) In principle, aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities distorts the conditions of competition⁽⁷¹⁾. It has been ruled that any grant of aid to an undertaking exercising its activities in the Community market is liable to cause distortion of competition and affect trade between Member States⁽⁷²⁾.
- (145) In the present case, in view of the nature and international dimension of the sectors in question, the Commission considers that the aid at issue strengthens the position of operators in these sectors participating in national and intra-Community trade.
- (146) Beneficiaries under the scheme at issue are in a privileged position vis-à-vis both their national competitors⁽⁷³⁾ and their competitors in other Member States who, either because they do not finance or use assets eligible under the scheme or because they are not taxable in France, do not qualify under the scheme.
- (147) On this last point, while it is true that, from a formal point of view, there is no legal obstacle to economic operators from Member States other than France financing or using assets covered by Article 39 CA of the General Tax Code, it is undeniable that, in practice, the scheme at issue favours operators whose tax domicile is in France. It is noteworthy in this respect that all the interested parties benefiting under the scheme at issue who submitted comments as part of the formal investigation procedure are companies incorporated under French law. As regards, moreover, the sector mainly concerned by the tax arrangements at issue, namely maritime transport, the French authorities have themselves stated that the arrangements' adoption was

intended to end the stagnation in the number of commercial vessels registered in France and to reduce tax expenditure. Lastly, as indicated above, Senate Report No 143⁽⁷⁴⁾ states that the scheme is 'a means to promote goods manufactured in France or financing operations for the benefit of a French user'.

- (148) Consequently, without its being necessary to carry out an economic analysis of the actual situation in the markets concerned⁽⁷⁵⁾ and in view of the fact that the tax scheme introduced by France strengthens the position of the economic operators who benefit from it compared with other operators competing in intra-Community trade, the Commission considers that the scheme affects trade between Member States and distorts competition between those operators.
- (149) In the light of all the above considerations, the Commission takes the view that the scheme provided for in Article 39 CA of the General Tax Code constitutes aid within the meaning of Article 87(1) of the Treaty.

2. Quantification and apportionment of the aid among beneficiaries

- (150) As indicated above, the tax advantages resulting from the application of Article 39 CA of the General Tax Code are, firstly, the removal of the ceiling on deductible depreciation, secondly, the one-point increase in the depreciation coefficient and, thirdly, the possible exemption from transfer capital gains tax.
- (151) The amount of the aid, for each leasing operation, corresponds to the difference between the discounted values of the taxes paid throughout the depreciation period, taking into account the one-point increase in the depreciation coefficient, and those which would have resulted from the application of the provisions of the second paragraph of Article 39 C of the General Tax Code, to which difference must be added any exemption from transfer capital gains tax⁽⁷⁶⁾. This amount is determined, for each leasing operation, in accordance with the procedure laid down in paragraphs 46 and 47 of Tax Instruction No 120⁽⁷⁷⁾ for the purpose of passing on part of the overall advantage to the user.
- (152) As regards the exact apportionment of the overall advantage accruing under Article 39 CA of the General Tax Code, the members of an EIG are required — as the direct beneficiaries — to pass on at least two thirds of that advantage to the user of the asset in question. In the context of each leasing operation, the exact amount of the

⁽⁷¹⁾ See the judgment of the Court of Justice in Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 30, and the case law cited therein.

⁽⁷²⁾ See, *inter alia*, the judgments of the Court of Justice in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraphs 11 and 12, and in *Vlaams Gewest v Commission*, cited above in footnote 54, paragraphs 48-50.

⁽⁷³⁾ It is not necessary for the recipient undertaking itself to take part in intra-Community trade. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Moreover, the strengthening of an undertaking which, until then, did not take part in intra-Community trade may enable it to penetrate the market of another Member State (see Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 84).

⁽⁷⁴⁾ See footnote 34.

⁽⁷⁵⁾ See the judgment of the Court of Justice in Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraphs 44 and 45, and, on the unlawfulness of the scheme at issue, paragraphs 153-155.

⁽⁷⁶⁾ See the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (referred to above in footnote 30), paragraph 35.

⁽⁷⁷⁾ See footnote 35.

advantage to be passed on to the user is determined, in accordance with the provisions of Article 39 CA of the General Tax Code, at the time of grant of approval.

3. Classification of the scheme as unlawful aid

(153) Pursuant to Article 88(3) of the Treaty, Member States must notify any plans to grant or alter aid. They may not put the proposed measures into effect until the procedure has resulted in a final decision.

(154) In the present case, the French authorities informed the Commission, by letter dated 17 March 1998 (A/32232), of the introduction of arrangements limiting the depreciation of leased-out assets so as to combat use of the mechanism solely for tax optimisation purposes and providing for an exception to such limitation. In their letter, the French authorities stated that the arrangements did not appear to constitute state aid notifiable to the Commission in advance under Article 88(3) of the Treaty.

(155) The Commission considers that, in these circumstances, the letter cannot be deemed to be a notification within the meaning of Article 88(3) of the Treaty. It would point out, moreover, that the letter did not comply with the formal rules mentioned in the Commission's letter to the Member States No SG (81) 12740 of 2 October 1981, which was in force at the material time. France therefore acted unlawfully by implementing the aid scheme at issue in infringement of Article 88(3) of the Treaty.

4. Compatibility of the aid scheme with the common market

(156) In so far as the tax scheme at issue constitutes state aid within the meaning of Article 87(1) of the Treaty, its compatibility with the common market must be assessed in the light of the exceptions provided for in paragraphs 2 and 3 of that article. It will be recalled that the actual beneficiaries of the scheme at issue operate, according to the information transmitted by the French authorities, in the maritime, air and rail transport sectors and, marginally, in the industrial sector⁽⁷⁸⁾. Inasmuch as the members of EIGs are financial institutions for the most part, the said beneficiaries also operate in the financial sector.

(157) The exceptions provided for in Article 87(2) of the Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the present context regardless of who the beneficiaries of the scheme at issue are.

(158) As for the exception in Article 87(3)(b) of the Treaty, it is sufficient to note that the tax scheme at issue is not an important project of common European interest and does not seek to remedy a serious disturbance in the French economy. Nor does it seek to promote culture and heritage conservation within the meaning of the exception in Article 87(3)(d) of the Treaty.

(159) The Commission would point out in this connection that neither the French authorities nor any interested parties invoked the above-mentioned exceptions during the course of the administrative procedure.

(160) Examination of the exceptions provided for in Article 87(3)(a) and (c) of the Treaty will be carried out sector by sector.

Compatibility of aid to the air transport sector

(161) The Commission takes the view, in relation to the exception provided for in Article 87(3)(c) of the Treaty, which authorises aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, that there is no basis for considering that the aid granted to the air transport sector under the scheme at issue is compatible with the common market. None of the exemptions provided for in this respect by the Commission's guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector⁽⁷⁹⁾ is applicable in the present case.

(162) Nevertheless, it should be noted that the Commission authorises exceptionally certain types of operating aid in the air transport sector:

- a) on the basis of the 1998 guidelines on national regional aid, as amended in 2000⁽⁸⁰⁾, for airlines operating from the outermost regions, with a view to offsetting the additional costs arising from the permanent handicaps suffered by those regions as identified in Article 299(2) of the Treaty; and
- b) on the basis of the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports⁽⁸¹⁾, for new airlines departing from regional airports with an annual passenger volume of less than five million, up to 30 % of the costs strictly linked to their start-up over the first three years (or 40 % of the said costs over the first three years in the case of regional airports located in a disadvantaged region within the meaning of the guidelines).

⁽⁷⁹⁾ OJ C 350, 10.12.1994, p. 5.

⁽⁸⁰⁾ OJ C 258, 9.9.2000, p. 5.

⁽⁸¹⁾ OJ C 312, 9.12.2005, p. 1.

⁽⁷⁸⁾ See the table in recital 17.

(163) The Commission accordingly agrees to France's not including in the calculation of any aid to be recovered aid amounts relating to:

- a) aircraft operated on a permanent basis by airlines departing from an outermost region, provided it can be proved that the maintenance of the aircraft was actually carried out in that region and that the aid is less than the additional costs incurred; and
- b) aircraft operated by new airlines departing from a regional airport, up to the above-mentioned share of the eligible costs, provided the routes in question do not form the subject matter during the period concerned of a public service contract giving entitlement to financial compensation pursuant to Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ⁽⁸²⁾.

(164) In all other cases, aid granted to air transport undertakings under the scheme at issue is incompatible with the Treaty.

Compatibility of aid to the maritime transport sector

(165) In accordance with Article 87(3)(c) of the Treaty, the Community guidelines of 1997, then those of 2004 ⁽⁸³⁾, specify the state aid schemes which may be authorised, with a view to promoting the interests of Community maritime transport undertakings in the face of competition from third countries, 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.

(166) In the light of the above-mentioned objectives, the 1997 and 2004 Community guidelines authorise certain tax measures in favour of shipping companies with a view to improving their competitiveness (point 3.1).

⁽⁸²⁾ OJ L 240, 24.8.1992, p. 8.

⁽⁸³⁾ See footnote 12. The Commission would point out in this connection that the compatibility of unlawfully granted aid must be assessed in accordance with the substantive rules in force at the time when the aid was granted (see the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, OJ C 119, 22.5.2002, p. 22). Where aid measures pursuant to Article 39 CA of the General Tax Code were granted subsequent to the entry into force of the 2004 Community guidelines on State aid to maritime transport, only those guidelines will therefore be applicable. The relevant rules have not been amended, save as regards tugs and dredgers (see recital 170 below).

(167) The objective of state aid within the common maritime transport policy is to promote the competitiveness of the Community fleet in the world market. Consequently, tax relief schemes must, as a rule, require a link with a Community flag.

(168) The advantages procured by such schemes must facilitate the development of maritime transport and employment in the sector in the Community interest. Consequently, the above-mentioned tax advantages must be strictly limited to maritime transport activities. Hence, if a maritime transport undertaking also carries on other commercial activities, there must be a strict separation in the accounts between the two activities to prevent any 'spillover' to non-maritime-transport activities.

(169) It cannot be denied that the scheme at issue seeks to promote the financing of ships under the French flag and to develop maritime transport and employment.

(170) Moreover, aid granted under the scheme at issue facilitates the financing of ships and thus contributes to the renewal of the Community fleet. In this connection, the Commission shares the view of the French authorities that the aid contributes to a consolidation and rejuvenation of the fleet under the French flag ⁽⁸⁴⁾. It subscribes particularly to the argument that, owing to the approval mechanism which makes the application of the scheme at issue conditional on possession, in the territory of the Community, of a strategic decision-making centre for managing maritime activities and ships and which takes into account employment-related considerations, the scheme helps to safeguard Community employment both on board and on shore ⁽⁸⁵⁾. ⁽⁸⁵⁾. This has been confirmed, moreover, by several interested third party shipowners who stress the important part played by the scheme at issue in offsetting the additional cost of crewing under this flag, maintaining high-quality jobs in maritime transport and helping to maintain, or even develop, a fleet flying the flag of a Member State ⁽⁸⁶⁾. The Commission would point out, however, that, under the 2004 Community guidelines, if the ships are tugs or dredgers, the aid granted can be considered compatible with the common market only if at least 50 % of their annual activity corresponds to the definition of maritime transport ⁽⁸⁷⁾.

(171) In the light of the above, it can therefore be considered that, in so far as it is compatible with point 3.1 of the 2004 Community guidelines, the tax scheme provided for in Article 39 CA of the General Tax Code is favourable to the maritime transport sector and is in keeping with the objectives laid down by the applicable Community guidelines.

⁽⁸⁴⁾ See recital 38.

⁽⁸⁵⁾ See recitals 25 and 26.

⁽⁸⁶⁾ See recital 57.

⁽⁸⁷⁾ See, in this connection, the twelfth to sixteenth paragraphs of point 3.1 of the 2004 Community guidelines on State aid to maritime transport, cited above in footnote 12.

(172) However, to qualify for exemption under Article 87(3)(c) of the Treaty, aid granted under the scheme must be strictly proportionate to the objective pursued and not affect trade to an extent contrary to the common interest.

(173) In this connection, the French authorities' attention is drawn to the rule on the limitation of aid laid down in Chapter 11 of the 2004 Community guidelines, according to which: 'A reduction to zero of taxation and social charges for seafarers and a reduction of corporate taxation of shipping activities ... is the maximum level of aid which may be permitted. To avoid distortion of competition, other systems of aid may not provide any greater benefit than this. Moreover, although each aid scheme notified by a Member State will be examined on its own merits, it is considered that the total amount of aid granted under Chapters 3 to 6 should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers'. In implementing this provision, the French authorities will have to verify that the annual aid received by a given shipowner under the present scheme, together with that granted under all the aid schemes concerned by Chapters 3-6 of the 1997 and 2004 Community guidelines (including the scheme of flat-rate tonnage taxation for maritime transport companies⁽⁸⁸⁾ and the exemptions from social security charges and from payment of the maritime part of business tax), does not exceed, for that shipowner, the total amount of taxes and social contributions which ought normally to have been collected from maritime transport activities and from seafarers. Any sum exceeding the above amount is incompatible with the common market and will have to be recovered.

(174) Consequently, the Commission considers that aid granted to maritime transport undertakings under the scheme introduced by Article 39 CA of the General Tax Code is compatible with Article 87(3)(c) of the Treaty subject to the conditions set out in recitals 172 and 173.

Compatibility of aid to the rail transport sector

(175) The Commission considers that the exceptions provided for in Article 87(3)(a) of the Treaty concerning the development of certain areas are not applicable to the scheme at issue in so far as it is used to finance assets in the rail transport sector. It has, however, examined the scheme's compatibility with the common market under Article 87(3)(c) of the Treaty.

(176) In view of the historical situation of the railways and the fall in rail transport's market share, the process of replacing rolling stock must be speeded up in order to compete with other modes of transport. A more serious and urgent effort to modernise and/or renew rolling stock is needed if there

is to be no further fall in rail transport's market share compared with other, less sustainable and more environmentally damaging, transport modes.

(177) The Commission considers that the replacement of rolling stock is compatible with the common policy of increasing interoperability. It contributes, moreover, to safety and to the modernisation of services in terms of punctuality, reliability and speed. Since the replacement of rolling stock is a key element of the policy of strengthening the development of the rail sector, the Commission considers that the measures proposed do not run counter to the common interest.

(178) Consequently, the Commission considers that aid granted to railway undertakings under the scheme introduced by Article 39 CA of the General Tax Code is compatible with Article 87(3)(c) of the Treaty.

Compatibility of aid to the industrial sector

(179) With regard to the exception provided for in Article 87(3)(c) of the Treaty, which authorises aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, there is nothing in the scheme at issue to suggest that aid granted under it to the industrial sector would be compatible with the common market.

(180) However, the Commission cannot exclude out of hand the possibility that certain assets in the industrial sector have been financed under Article 39 CA of the General Tax Code in accordance with the conditions laid down by the guidelines on national regional aid⁽⁸⁹⁾, including the condition that the investment be carried out in a region eligible under Article 88(3)(a) or (c) of the Treaty and the condition that the recipient's contribution to the financing of the investment be at least 25 %. At all events, the regional aid intensity ceilings must be complied with where an undertaking has benefited from a combination of the aid at issue and approved regional aid.

(181) Subject to these conditions, the Commission considers that aid granted to this sector under the scheme at issue is compatible with the common market.

Compatibility of aid to the financial sector

(182) With regard to the financial sector, the Commission considers that the non-sectoral exceptions referred to above are irrelevant for purposes of assessing the compatibility of aid granted to EIG members with the common market.

⁽⁸⁸⁾ Commission Decision C(2003) 1476 FIN of 13 May 2003 — State aid N 737/2002.

⁽⁸⁹⁾ OJ C 74, 10.3.1998, p. 9.

(183) However, in view of the general character of leasing operations, the Commission considers that, inasmuch as it can be declared compatible with the common market, aid to the maritime, air and rail transport sectors and to the industrial sector is compatible not only with respect to the users of the assets in question but also with respect to the members of the EIGs concerned. In order that users might benefit from the exceptions referred to above, the members of EIGs should not be penalised for not belonging to the above-mentioned sectors provided their intermediation was indispensable to carrying out the financing operations in question. The Commission considers that this analysis is borne out by the fact that the exact share of the overall advantage which is to be passed on to the user — which under Article 39 CA of the General Tax Code amounts to at least two thirds of that overall advantage — is, as the French authorities have pointed out, the outcome of a commercial negotiation between EIG members and users. This bears witness to the fact that, in accordance with the rules for assessing the compatibility of the above-mentioned aid measures, only that part of the overall advantage that is indispensable to attaining the objectives pursued is retained by the EIG's members.

5. Recovery

(184) The Commission would point out that, pursuant to Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty ⁽⁹⁰⁾, any aid found to be incompatible with the common market granted under the scheme at issue must be recovered.

(185) Article 14(1) provides, however, that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. In this respect, it has been ruled that the Commission is required to take into consideration on its own initiative exceptional circumstances that provide justification, pursuant to Article 14(1), for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law ⁽⁹¹⁾.

(186) The fundamental requirement of legal certainty is designed to ensure the foreseeability of legal situations and relationships governed by Community law and hence has the effect of preventing the Commission from indefinitely delaying the exercise of its powers ⁽⁹²⁾.

(187) While the principle of legitimate expectation cannot be considered to have been infringed in this case ⁽⁹³⁾, the Commission is of the opinion, in the light of the highly specific circumstances of this case, that the principle of legal certainty has not been taken proper account of vis-à-vis the beneficiaries of the tax scheme at issue.

(188) The Commission considers that there is a body of exceptional evidence to suggest, firstly, that the Commission delayed exercising its powers when it came to examining the scheme here at issue and, secondly, that beneficiaries under the scheme have been misled as to its lawfulness.

(189) It will be recalled that, by their letter dated 17 March 1998, the French authorities informed the Commission of the existence of the mechanism provided for in the second paragraph of Article 39 C and Article 39 CA of the General Tax Code. While it is true that that letter did not constitute a notification within the meaning of Article 88(3) of the Treaty ⁽⁹⁴⁾ and that the absence of a reaction on the part of the Commission to the letter could not, therefore, by itself alone, constitute an infringement of the principle of legal certainty on pain of depriving the provisions of Articles 87 and 88 of the Treaty of all practical effectiveness, it nevertheless remains that the Commission's attention was drawn, on that date, to the scheme at issue ⁽⁹⁵⁾.

(190) During the course of the investigation into the two complaints made to it denouncing the aid which the shipping companies Sea France and BAI had allegedly received, the Commission twice questioned the French authorities about the method of financing some of those

⁽⁹⁰⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁹¹⁾ See the judgment in *RSV v Commission*, cited above in footnote 24.

⁽⁹²⁾ See the judgment of the Court of Justice in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140.

⁽⁹³⁾ The Commission has not provided any specific, unconditional and concordant assurances of such a nature as to give rise to justified hopes on the part of the French authorities and/or beneficiaries under the scheme at issue that the scheme was lawful (see, on the definition of the principle of legitimate expectation, the judgments of the Court of Justice in Cases 265/85 *Van den Bergh en Jurgens v Commission* [1987] ECR 1155, paragraph 44, and C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 26; judgments of the Court of First Instance in Cases T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, paragraph 59, and T-223/00 *Kyowa Hakko Kogyo v Commission* [2003] ECR II-2553, paragraph 51; see, on the absence of a legitimate expectation on the part of recipients of aid unlawfully implemented, the judgment of the Court of Justice in Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission* [2004] ECR I-10609, paragraphs 44 and 45, and the case law cited therein).

⁽⁹⁴⁾ See recitals 153-155.

⁽⁹⁵⁾ The Commission would point out that, since the entry into force of Regulation No 659/99 (referred to above in footnote 90) and of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing it (OJ L 140, 30.4.2001, p. 1), such a state of affairs cannot happen again. Both Regulations remind Member States of their obligation to notify in advance any proposal to grant new aid. The practical arrangements for making such notifications, such as the use of standard forms, are set out clearly.

companies' ships. Both in their reply of 10 July 2000 and in that of 2 April 2003, the French authorities described clearly the scheme provided for in Article 39 CA of the General Tax Code ⁽⁹⁶⁾, setting out its content in unambiguous terms.

(191) Consequently, in not following up these letters describing the scheme at issue sent by the French authorities at its request, the Commission may be deemed to have delayed the exercise of its powers — the formal investigation procedure having been initiated only on 14 December 2004 — and to have left room for doubt as to the scheme's lawfulness.

(192) As for the French authorities' reference to the Commission Decision of 8 May 2001 concerning State aid implemented by France in favour of Brittany Ferries ⁽⁹⁷⁾, it should be pointed out that the Commission found therein that the scheme then at issue constituted a general measure as it was open to all sectors of the economy and came under the ordinary law. While it is true that the scheme at issue in that case was that in force before 1998, it must nevertheless be observed that that fact was not made clear in the grounds for the Decision and that that circumstance may have helped to mislead beneficiaries under the scheme here at issue.

(193) All the above-mentioned factors taken together illustrate the exceptional nature of the circumstances of the present case and justify, in the interests of compliance with the principle of legal certainty vis-à-vis beneficiaries under the scheme at issue, limiting recovery of the aid by drawing a distinction according to the date of grant.

(194) The Commission considers, therefore, that France need not recover any incompatible aid unlawfully granted since the entry into force, in 1998, of Law No 98-546 as part of financing operations concerning which the competent national authorities have undertaken to grant the benefit of the scheme provided for in Article 39 CA of the General Tax Code by a legally binding act ⁽⁹⁸⁾ predating the publication in the *Official Journal of the European Union*, on 13 April 2005, of the Commission's decision of 14 December 2004 to initiate the formal investigation procedure under Article 88(2) of the Treaty.

(195) By contrast, in the case of financing operations concerning which the competent national authorities have undertaken to grant the benefit of the scheme provided for in Article 39 CA of the General Tax Code by a legally binding act postdating the above-mentioned publication, any incompatible aid will be recovered from its recipients. Account will be taken here of the amount of any advantage ultimately retained by the members of the EIG and of the amount passed on the user ⁽⁹⁹⁾. In the event of the aid being partially compatible with the common market as far

as the user of the asset is concerned, the amount to be recovered from the members of the EIG will be determined in the same proportion as that applied to the share of the advantage passed on to the user.

(196) The Commission considers it appropriate to point out in this connection that the fact that the legal and tax-related risks incurred by the members of EIGs may, in some cases, have been contractually passed on to the users of the assets cannot negate the principle that the Commission's purpose in demanding, where appropriate, the recovery of unlawful aid is to deprive the various recipients of the advantage they have enjoyed in their respective markets compared with their competitors and to restore the status quo that existed before the aid was granted. Just as the achievement of that purpose cannot depend on the form in which the aid was granted, so it also cannot depend on contractual stipulations agreed upon by the aid recipients ⁽¹⁰⁰⁾.

VIII. CONCLUSION

(197) The Commission finds that France has unlawfully implemented the aid scheme provided for in Article 39 CA of the General Tax Code, in infringement of Article 88 (3) of the Treaty.

(198) Consequently, France must take all necessary measures to recover the aid, apart from that which the competent national authorities have undertaken to grant by a legally binding act predating the publication in the *Official Journal of the European Union*, on 13 April 2005, of the decision to initiate the formal investigation procedure and that concerning assets in the rail transport sector, and, in the case of other operations, minus the maximum amounts of aid admissible under the sectoral rules applicable to state aid and taking into account any aid already granted under other heads. The sectoral rules in question are the 1997 and 2004 Community guidelines on State aid to maritime transport, the 1998 guidelines on national regional aid, as amended in 2000, the 2005 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports and, lastly, as far as the financing of assets in the industrial sector are concerned, the guidelines on national regional aid.

(199) The above-mentioned incompatible aid which the competent national authorities have undertaken to grant by a legally binding act postdating the above-mentioned publication must be recovered from its recipients in accordance with recitals 151, 152 and 194 to 196.

(200) In respect of such aid, the Commission would ask France to transmit to it the attached form reporting progress with the recovery procedure and to draw up a list of recipients from whom aid is to be recovered,

⁽⁹⁶⁾ Referred to above in footnote 16.

⁽⁹⁷⁾ Referred to above in footnote 15.

⁽⁹⁸⁾ See the judgment of the Court of First Instance in Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, paragraphs 74 *et seq.*

⁽⁹⁹⁾ See recitals 150-152.

⁽¹⁰⁰⁾ See, by analogy, the judgment of the Court of Justice in Case C-183/91 *Commission v Greece* [1993] ECR I-3131, end of paragraph 16.

HAS ADOPTED THIS DECISION:

Article 1

The scheme provided for in Article 39 CA of the General Tax Code, which has been implemented by France in infringement of Article 88(3) of the Treaty, is, with the exception of the measures referred to in Article 2, incompatible with the common market.

Article 2

Grants of aid under the scheme referred to in Article 1 are compatible with the common market where they are made:

- (1) in the maritime transport sector and in the air transport sector, up to the maximum amounts permissible under the Community guidelines on State aid to maritime transport or the corresponding guidelines on aid to air transport, taking into account any aid already granted during the period concerned;
- (2) in the rail transport sector; and
- (3) in the industrial sector, up to the maximum amounts permissible under the guidelines on national regional aid.

In view of the general character of leasing operations under the said scheme, aid to the maritime, air and rail transport sectors and to the industrial sector which can be deemed compatible with the common market shall be so compatible not only with respect to the users of the assets in question but also with respect to the financial sector operators belonging to the EIGs involved.

Article 3

France shall put an end to the aid scheme referred to in Article 1 to the extent that it is incompatible with the common market and hence shall grant no new approvals falling within the bounds of such incompatibility.

Article 4

1. France shall take all necessary measures to recover from recipients aid granted unlawfully under the scheme referred to in

Article 1, with the exception of aid granted as part of financing operations concerning which the competent national authorities have undertaken to grant the benefit of the said scheme by a legally binding act adopted before 13 April 2005 and the aid referred to in Article 2.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest throughout the period running from the date on which they were put at the disposal of the recipients until their actual recovery. Interest shall be calculated in accordance with the provisions of Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁰¹⁾.

Article 5

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken and intends to take to comply therewith.

France shall furnish such information to the Commission using the form in Annex II and shall draw up an exhaustive list of undertakings which have received aid from the scheme referred to in Article 1 under the conditions of Article 4(1), of the movable transport assets concerned and of the amounts paid in each case.

France shall also draw up a list of undertakings which have received aid as referred to in Article 4(1), specifying the amounts of aid which each undertaking has received. For this purpose, France shall use the forms in Annex III.

Article 6

This Decision is addressed to France.

Done at Brussels, 20 December 2006.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁰¹⁾ OJ L 140, 30.4.2004, p. 1.

ANNEX I

List of interested parties who submitted comments to the Commission under Article 88(2) of the Treaty

- (1) Méridionale de Navigation
 - (2) Caisse d'Epargne
 - (3) Broström
 - (4) Calyon
 - (5) BNP Paribas
 - (6) Brittany Ferries
 - (7) CMA CGM
 - (8) Bourbon Maritime
 - (9) Société Générale Corporate and Investment Banking
 - (10) Gaz de France
 - (11) Louis Dreyfus Armateurs
 - (12) Anonymous
 - (13) Fouquet Sacop
 - (14) Pétro Marine
 - (15) Air France
 - (16) Anonymous
-

ANNEX II

Information concerning implementation of the Commission Decision 2007/731/EC

(to be transmitted to the Directorate-General for Competition in the case of projects in the industrial sector and to the Directorate-General for Energy and Transport in the case of projects in the transport sector)

1. *Total number of recipients and total amount of aid to be recovered under Article 4(1) of this Decision*

1.1. Please explain how the amount of aid to be recovered from the various recipients will be calculated, giving a breakdown into:

— capital:

— interest:

1.2. What is the total amount of unlawful aid granted under the scheme that has to be recovered (gross grant equivalent, price, etc.)?

1.3. What is the total number of recipients from whom unlawful aid granted under the scheme has to be recovered?

2. *Measures taken and to be taken to recover the aid*

2.1. What measures have been or will be taken to recover the aid immediately and effectively? What is the legal basis for those measures?

2.2. When will all the aid have been recovered?

3. *Information on individual recipients*

For each recipient from whom unlawful aid granted under the scheme at issue is to be recovered, please fill in the following table:

Name of recipient	Amount of unlawful aid granted (*) Currency:....	° Amounts reimbursed Currency:...

(*) Amount of aid made available to the recipient (gross grant equivalent, price, etc.)

° Gross amounts reimbursed (including interest)

ANNEX III

A — MARITIME AND AIR TRANSPORT

(to be transmitted to the Directorate-General for Energy and Transport)

FOR EACH MARITIME OR AIR TRANSPORT COMPANY

A. Nature of the investment and eligibility under the applicable guidelines. For example, in the case of air transport: location in an outermost region, additional operating costs; maximum eligible expenditure under the guidelines, etc.

B. Calculation of the aid to be reimbursed

(1) Share of the advantage passed on by the EIG to the company.

(2) Amount of the advantage received by the company under Article 39 CA for its entire air or sea fleet throughout the period concerned.

(3) Amount of any other aid granted to the company under the applicable guidelines during the period concerned.

(4) Maximum allowable amount of aid which may be granted to the company under the applicable guidelines.

(5) = (2) + (3) — (4) is the amount of any incompatible aid to be reimbursed

If (5) is a positive figure, the EIG concerned must reimburse: (5) * [1 - (1)]
and the company must reimburse: (5) * (1)

B — INDUSTRIAL INVESTMENTS AND THE CORRESPONDING EIGs

(to be transmitted to the Directorate-General for Competition)

A. Amount of the investment, region in which it was carried out and payment of the recipient's 25 % contribution

B. Regional aid ceiling for the region concerned

C. Calculation of the aid to be reimbursed

(1) Amount of the advantage such as it results from the ministerial instruction

(2) Amount of the advantage enjoyed by the company under Article 39 CA

(2) = (1) x share of the advantage passed on by the EIG to the company in accordance with the approval

(3) Amount of any other regional aid obtained for the same investment

(4) Maximum amount of regional aid allowable under ceiling B

(5) = (2) + (3) — (4) is the amount of any incompatible aid to be reimbursed

If (5) is a positive figure, the EIG concerned must reimburse: [(1) — (2)] x (5)/(1).
and the company must reimburse: (5) * (2)/(1)

COMMISSION DECISION

of 20 December 2006

on State aid No C 44/05 (ex NN 79/05, ex N 439/04) partially implemented by Poland for Huta Stalowa Wola S.A.

(notified under document number C(2006) 6730)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2007/257/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 ⁽¹⁾ pursuant to those provisions,

Whereas:

- (4) By letter of 23 November 2005, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (5) The Commission's decision to initiate the Article 88(2) procedure was published in the *Official Journal of the European Union*. ⁽²⁾ The Commission invited interested parties to submit their comments on the aid.
- (6) The Polish authorities submitted their observations by letter of 7 March 2006, registered as received on 9 March. No comments from third parties have been received.

2. DETAILED DESCRIPTION OF THE AID

2.1 The company

1. PROCEDURE

- (1) By letter of 8 October 2004, Poland informed the Commission of restructuring aid granted to Huta Stalowa Wola S.A. (hereinafter referred to as 'HSW' or 'the recipient') with a view to obtaining legal certainty that the aid was granted before accession and was, as a result, not applicable after accession and that it did not constitute new aid which could be examined by the Commission under Article 88 of the EC Treaty. In the event of the Commission finding that this aid constituted new aid, Poland asked for it to be approved as restructuring aid.
- (2) The Commission requested Poland to provide further information by letters dated 11 November 2004, 1 March 2005, 27 April 2005 and 26 July 2005, to which Poland replied by letters dated 31 January 2005, registered as received on 2 February, 4 April 2005, registered as received on 8 April, 7 June 2005, registered as received on 9 June, and 2 September 2005, registered as received on 6 September.
- (3) In the course of this exchange of correspondence it emerged that some of the notified aid had been put into effect in contravention of Article 88(3) of the EC Treaty. The case was therefore classified as unlawful aid and a new case number was attributed (NN 79/2005).

- (7) HSW, the aid recipient and parent company of the HSW holding company, is based in Stalowa Wola in Podkarpackie province. This region is eligible for aid under Article 87(3) (a) of the EC Treaty. In February 2006 the holding company comprised eight companies in which HSW held at least 51 % of the shares (which it controlled) and ten in which it held less than 51 %. The companies which make up the HSW holding company operate as mutual suppliers of goods and services. Apart from the parent company itself, the companies with the largest stake in the holding company are HSW-Zakład Zespołów Napędowych Sp. z o.o and HSW-Zakład Zespołów Mechanicznych Sp. z o.o. HSW's share of sales to the companies forming part of the holding company as a percentage of its total sales amounts to 20-30 %.
- (8) HSW was set up in 1937 and initially produced guns and stainless steel. Unlike its subsidiary HSW-Zakład Metalurgiczny, it is not a steel producer. In 1991 it was converted into a joint stock company. The State still owns 76 % of the shares and employees hold 9 %. The remainder is accounted for by private and public shareholders none of which has a holding in excess of 5 %. The company manufactures construction equipment and machinery and military equipment (guns, howitzers, etc.).
- (9) HSW had about 2 400 employees in 2005, down from 3 173 in 2002.

⁽¹⁾ OJ C 34, 10.2.2006, p. 5.

⁽²⁾ See footnote 1.

- (10) One of the subsidiaries of HSW is the distribution company Dressta Sp. z o.o. (hereinafter 'Dressta'). Since September 2006 Dressta has been fully controlled by HWS S.A. In the past, however, 51 % of its shares were owned by Komatsu American International Company USA ('KAIC'), a competitor of HSW. In 1995 HSW transferred licences and assets pertaining to the sale of its goods on foreign markets to Dressta for a twelve-year period.

2.2 Difficulties faced by the company

- (11) The recipient started to experience difficulties in 2002 following a decline in turnover from PLN 494,9 million (EUR 130,2 million⁽³⁾) in 2000 to PLN 352,6 million (EUR 92,7 million), i.e. a fall of 29 %. Its exports decreased from PLN 505 million (EUR 132,8 million) to PLN 279 million (EUR 73,4 million). The decline in turnover on foreign markets was caused mainly by a business slump and by the fact that Dressta, under the influence of its principal shareholder, which was a major competitor of HSW, had significantly reduced sales of HSW goods on the North American market.
- (12) In 2002 the recipient faced operating losses of PLN 44,2 million (EUR 11,6 million) that were due mostly to low utilisation of production capacity. Since most of the sales on foreign markets were effected in US dollars and most of the company's costs were expressed in PLN, the appreciation in the zloty adversely affected sales and the recipient's viability.
- (13) HSW was heavily indebted. Its average level of debt in 2000-02 was PLN 169,1 million (EUR 44,5 million).
- (14) Nor were the company's operating activities profitable, i.e. losses on sales increased from PLN 6,4 million (EUR 1,68 million) in 2000 to PLN 33,9 million (EUR 8,60 million) in 2002.
- (15) The HSW Capital Group recorded net losses of PLN 137,7 million (EUR 36,2 million) in 2002 and PLN 123,9 million (EUR 32,5 million) in 2003.

2.3 The restructuring operation

- (16) With a view to addressing these difficulties, the recipient drew up in 2002 a restructuring plan for the period 2003-07. This plan was amended in February 2006.
- (17) One of the restructuring plan's principal measures entailed amending the recipient's organisational structure. The main idea of the restructuring process was to separate the part of HSW directly linked to production from the assets to be restructured. Accordingly, an independent company, HSW-Trading Sp. z o.o. ('HSW-Trading') was set up by HSW's

majority shareholder, the Treasury. HSW-Trading received a capital injection of PLN 40 million (EUR 10,5 million) from the Treasury; the Polish authorities gave notification of this measure within the framework of the aid granted to HSW (see Table 1).

- (18) Whereas HSW-Trading was responsible for the production and sales of industrial machinery, logistics management, quality management and supplies of materials for machine production, HSW retained R & D activities, financing of production assets, strategic marketing, sales of spare parts, repairs, and production and sales of military equipment and was responsible for organisational restructuring. In exercising its activities, HSW-Trading leased from HSW assets that were directly related to production. The necessary workforce was also transferred temporarily to HSW-Trading.
- (19) This division was to continue during 2004-05, i.e. throughout HSW's restructuring. HSW-Trading was to merge again with HSW at the end of 2006.
- (20) The plan states that major employment restructuring should be undertaken. HSW plans to employ 2 100 workers by the end of the restructuring exercise in 2007, down from 3 173 at the end of 2002.
- (21) Another area of restructuring was the organisation of a network for distributing building machinery and spare parts on the world market, the aim being to give the recipient access to new markets.
- (22) The restructuring of HSW also entailed selling off its subsidiaries and privatising departments providing services. By 2006 HSW had sold HSW-Zakład Kuźnia Matrycowa Sp. z o.o. for PLN [...] (*) million (EUR [...] million). A private investor was found for two HSW-Zakład Metalurgiczny subsidiaries (HSW-Walcownia Blach Sp. z o.o. and HSW-Huta Stali Jakosciowych). In total, HSW generated receipts privatisation of PLN 112,2 million (EUR 29,5 million). The sale of two subsidiaries, HSW-Zakład Sprężynownia and HSW-Tlenownia, was to be finalised by 2006.
- (23) Asset restructuring entails reducing annual production capacity from 1 500 to 1 200 items of construction machinery. The size of HSW's assets was deemed clearly excessive in relation to its needs. Since HSW planned to focus mainly on producing construction machinery, a significant number of its assets had to be sold. The actual sale of assets from January 2003 to December 2005 generated revenue of PLN 52,1 million (EUR 13,7 million), which by far exceeded the planned sale, estimated at PLN 10,3 million (EUR 2,7 million). The following assets were sold: some 248,4 hectares of land (including about

⁽³⁾ All amounts provided by the Polish authorities in PLN have been converted for information purposes into euro using the exchange rate as at 17 November 2006 of EUR 1 = PLN 3,8019.

(*) Confidential information.

153 hectares of woodland); real estate with a usable surface area of about 76 000 m² and 94 items of machinery and equipment.

- (24) Overall restructuring costs, including costs incurred prior to accession, amount to PLN 450,3 million (EUR 118,5 million) and consist of the items indicated in Table 1.

Table 1:

Restructuring costs (PLN '000)

Restructuring measure	Costs
Restructuring of civil-law liabilities	95 648
Restructuring of public-law liabilities	113 213
Organisation of supply and distribution system	151 241
Continuity of supply of materials, spare parts and components	40 000
Product restructuring	11 666
Asset restructuring	871
Employment restructuring	5 170
Organisational restructuring	2 013
Modernisation of production potential	30 524
Total	450 346

2.4 The aid measures

- (25) The granting authorities are the Treasury, the Ministry of Science and Information Technology, tax offices, local authorities, the Social Insurance Fund (ZUS), the State Fund for the Rehabilitation of the Disabled (PFRON), town halls and the Industrial Development Agency.
- (26) Poland has maintained that part of the aid granted to HSW was linked to the need to protect essential national security interests. The aid amounted to some PLN 19 million (EUR 5 million) and was granted both before and after Poland acceded to the European Union. The Polish authorities maintain, with reference to Article 296 of the EC Treaty, that the provisions of that Treaty do not preclude Member States from granting aid deemed necessary to protect essential national security interests.
- (27) The most significant aid measures granted before accession to the non-military part of HSW were two loans from the Industrial Development Agency of PLN 75 million (EUR 19,7 million). Another important aid measure was a capital injection by the Treasury of PLN 40 million (EUR 10,5 million) for the subsidiary HSW-Trading Sp. z o.o.
- (28) An amount of PLN 27,9 million (EUR 7,3 million) in the form of debt write-offs was granted on the basis of the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 (see Table 4 below). Restructuring under the Act was supervised by the President of the Industrial Development Agency and was based on a so-called restructuring decision within the meaning of Articles 10(1)(4) and (19) of the Act ('restructuring decision'). The restructuring decision approving the restructuring plan and allowing the restructuring of public-law liabilities was issued on 29 April 2005 and amended on 17 June 2005.
- (29) The different measures as originally notified to the Commission are presented in the following table:

Table 2:

Planned and granted aid (PLN '000), as notified

	Category of aid	Nominal amount	Aid amount
I.	Restructuring aid granted before 30 April 2004	145 785,5	129 309,1
II.	Restructuring aid granted on the basis of the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002	27 897,1	19 293,7
III.	Restructuring aid to be awarded after 30 April 2004	43 456,9	13 562,9
	Total	217 139,5	162 165,7

3. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE EC TREATY

- (30) The Commission decided to initiate the formal investigation procedure for two reasons.
- (31) First, it doubted that the restructuring aid was compatible with the common market.
- (32) The Commission doubted that the measures provided for in the restructuring plan were sufficient to restore the recipient's long-term viability as the plan seemed to focus on debt servicing and covering operating costs.
- (33) The Commission also expressed doubts as to whether sufficient compensatory measures had been implemented. Whereas, according to the Polish authorities, HSW planned

to reduce production capacity by 20 %, the plan provided for capacity utilisation to be increased from 27,7 % in 2002 to 66 % in 2007. The Commission had doubts about the net effect of this operation.

- (34) The Commission also had doubts as to whether the aid was limited to the minimum necessary and whether the recipient's own contribution was significant, given that Poland had not made a clear distinction between what it regarded as the recipient's own contribution to restructuring and what was funded by state aid.
- (35) The Commission also had doubts regarding compliance with the 'one time, last time' rule. In fact, a subsidiary of HSW, HSW-Zakład Zespołów Mechanicznych, had received restructuring aid for 2003-07 before Poland had joined the European Union. It was necessary to demonstrate that this aid had had no spillover effects on the parent company, HSW. Poland was also asked to provide the Commission with an assurance that the restructuring aid to HSW, if allowed, would not have any spillover effects on HSW-Zakład Zespołów Mechanicznych.
- (36) The second reason for initiating the formal investigation procedure was that the Commission had doubts as to whether subsidised special military production (guns) had been kept sufficiently separate from civil production of construction machinery. Poland had assured the

Commission in letters dated 7 June and 2 September 2005 that cross-subsidisation had been ruled out and the Commission had noted that the ratio of aid allocated to military production/total aid was small in comparison with the ratio of military production to total production. Nevertheless, the Commission asked for more detailed explanations on separate accounting.

4. COMMENTS FROM POLAND

- (37) First, the Polish authorities disputed the Commission's conclusion in the decision to initiate the formal investigation procedure that no aid had been granted on the basis of the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 (see Table 2, row II) prior to accession. The Polish authorities repeated their earlier submission that the consent of the recipient's public creditors (so-called administrative promises), not the restructuring decision issued by the President of the Industrial Development Agency, was crucial when it came to granting state aid under the Act. Since HSW's public creditors, whose receivables had been restructured under the Act, had already given their consent regarding HSW before Poland joined the European Union, the Polish authorities maintain that the aid was granted before accession and, as such, its compatibility with the common market does not have to be assessed by the Commission.
- (38) Second, the Polish authorities signalled two amendments to the aid as originally notified. The first and most important amendment was that the planned state aid referred to in row III of Table 2 was partially withdrawn and replaced by two measures which, it was claimed, did not constitute state aid. The second amendment was of a factual nature and concerned the precise amount of the three aid measures referred to in Table 3. The following tables list all the aid measures granted or to be granted to HSW throughout the restructuring period, as amended after the decision to initiate the formal investigation procedure.

Table 3:

Aid granted before 30 April 2004 (PLN '000)

No	Assumed date of agreement or decision	Granting authority	Form of aid	Nominal amount	Aid amount
1.	2003-12-12	Treasury Office in Stalowa Wola	Write-off of VAT for September 2002	1 047,5	1 047,5
2.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of VAT for December 2002	4 769,8	155,0
3.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of VAT for March 2003	1 771,8	52,2
4.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of VAT for May 2003	2 175,2	77,4
5.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of PIT for March 2003	623,3	16,0

No	Assumed date of agreement or decision	Granting authority	Form of aid	Nominal amount	Aid amount
6.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of PIT for May 2003	463,4	5,0
7.	2003-02-04	Social Insurance Institution (ZUS), Rzeszów branch	Agreement on payment in instalments of contributions for June-October 2002	6 252,1	1 211,6
8.	2003-08-28	Industrial Development Agency	Loan	40 000,0	40 000,0
9.	2003-09-15	Treasury Office in Stalowa Wola	Agreement on payment in instalments of VAT for June 2002	696,9	77,1
10.	2003-09-15	Treasury Office in Stalowa Wola	Deferral of payment of PIT instalment for July 2002	183,9	15,3
11.	2003-09-15	Treasury Office in Stalowa Wola	Change of payment dates of PIT instalments for August 2002	211,5	26,8
12.	2003-12-02	Treasury Office in Stalowa Wola	Agreement on payment in instalments of VAT for August 2002	655,5	49,3
13.	2003-09-05	District Starost Office, Stalowa Wola	Instalment scheme of payments for perpetual usufruct	172,7	8,0
14.	2003-03-21	District Starost Office, Nisko	Instalment scheme of payments for perpetual usufruct	20,5	0,3
15.	2004-04-30	Industrial Development Agency	Loan	35 000,0	35 000,0
16.	2004-04-30	Treasury	Initial capital increase	40 000,0	40 000,0
17.	2003-11-07	Ministry of Science and Information Technology	Subsidy	637,0	465,0
18.	2003-05-20	District Starost Office, Stalowa Wola	Refund of expenditure	3,3	2,4
19.	2003-05-20	District Starost Office, Stalowa Wola	Refund of expenditure	3,3	2,4
20.	2002-12-06	Head of Podkarpackie Province Tax Office, Rzeszów	Write-off of VAT arrears	1 210	1 210
21.	2002-12-06	Stalowa Wola Town Hall	Write-off of real estate tax arrears	496,8	496,8
22.	2002-12-11	Social Insurance Institution (ZUS), Rzeszów branch	Write-off of unpaid contributions, plus interest	11 088,1	11 088,1
Total I				147 482,6	131 006,2

Table 4:

Aid granted under the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 (PLN '000)

No	Date of transfer of debts and receivables to the operator	Type of restructured receivables	Nominal amount	Aid amount
23.	2005-06-20	Restructuring of VAT and PIT	10 696,6	Aid amount not indicated by the Polish authorities
24.	2005-06-20	Restructuring of environmental taxes, plus interest	5 826,5	,
25.	2005-06-20	Restructuring of Social Insurance (ZUS) contributions, plus interest and extension fees	7 333,2	,
26.	2005-06-20	Restructuring of payments to the State Fund for the Rehabilitation of the Disabled. (PFRON), plus interest	996,5	,
27.	2005-06-20	Restructuring of real estate tax, from September 2002 to June 2003, payable to Stalowa Wola Town Council	3 044,3	,
Total 2			27 897,1	19 293,7 ⁽¹⁾

⁽¹⁾ The Polish authorities have not provided information on the grant equivalent of the measure. The aid amount was calculated on the basis that 30,84 % of the restructured debt under the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 would be repaid to creditors using income obtained from the sale of the beneficiary's assets in the proceedings provided for in that Act. The figure of 30,84 % is used in the amended restructuring decision of 17 June 2005. The amount written off would then amount to 69,16 % of the total debts. The grant equivalent amounts to 100 % of the debts written off.

Table 5:

Aid granted after 30 April 2004 (PLN '000)

No	Planned date of disbursement of aid	Granting authority	Form of aid	Nominal amount	Aid amount
28.	2004-12-21 — 2005-10-19	Public bodies	Deferral of public-law liabilities	22 094,4	0,259
29.	2005-04-25	Social Insurance Institution (ZUS), Rzeszów branch	Deferral of public-law liabilities	16 386,2	0,0
Total 3				38 480,6	0,259

Table 6:

Aid granted and planned (PLN '000), as updated following the comments received from the Polish authorities after the formal investigation procedure was instituted (update of Table 2)

	Category of aid	Nominal amount	Aid amount
I.	Restructuring aid granted before 30 April 2004	147 482,6	131 006,2
II.	Restructuring aid granted on the basis of the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002	27 897,1	19 293,7

	Category of aid	Nominal amount	Aid amount
III.	Deferral of public law liabilities — measures recognised as constituting <i>de minimis</i> aid by Poland ⁽¹⁾	22 094,4	0,259
IV.	Deferral of public-law liabilities by the Social Insurance Institution (ZUS) ⁽²⁾	16 386,2	0,0
	Total	213 860,3	150 300,2

⁽¹⁾ Granted after December 2004.
⁽²⁾ Granted in 2005.

(39) With regard to the measures referred to in row III of Table 6, the Polish authorities claimed that the deferral and payment in instalments of public-law liabilities of PLN 22,1 million (EUR 5,8 million) (row II of Table 2) should be treated as *de minimis* aid. Of this amount, PLN 19 million (EUR 5,0 million) has already been granted. The methodology used by the Polish authorities to calculate the aid amount compares the interest rate applied to the deferral with the Commission reference rate. Where the applied interest rate is higher than the reference rate, the Polish authorities concluded that the measure does not constitute aid. According to the Polish authorities, this is the case for the aid referred to in row IV of Table 6.

(40) Third, regarding the company's viability, the Polish authorities claim that the organisational restructuring proved to be successful; HSW has regained control of HSW-Dressta and will thus be able to expand on the profitable North American market.

(41) With regard to the requirement to limit distortions of competition, the Polish authorities have maintained that the reduction of production capacity from 1 500 to 1 200 machines was a valid compensatory measure. They also regarded the sale of HSW's subsidiaries as a compensatory measure.

(42) Regarding the limitation of the aid to the minimum necessary, the Polish authorities have provided various details on the amounts considered as constituting an own contribution.

(43) To conclude, the Polish authorities claim in their observations that no state aid was granted after accession and that none is planned. Should the Commission conclude otherwise, they will provide additional elements to support the conclusion that the state aid is compatible with the common market.

5. ASSESSMENT OF THE AID

5.1. Competence of the Commission

(44) Given that some of the events of relevance to this case took place before Poland acceded to the European Union on

1 May 2004, the Commission first has to determine whether it is competent to act with regard to the aid in question.

(45) Aid which was implemented before accession and was not applicable after accession cannot be examined by the Commission, either under the so-called interim mechanism procedure, regulated by Annex IV, point 3 of the Accession Treaty, or under the procedures laid down in Article 88 of the EC Treaty. Neither the Accession Treaty nor the EC Treaty requires or empowers the Commission to examine this aid.

(46) On the other hand, aid implemented after accession would constitute new aid and would fall within the competence of the Commission under the procedure laid down in Article 88. For the purpose of determining the moment when a given aid measure was put into effect, the relevant criterion is the legally binding act by which the competent national authority undertook to grant aid ⁽⁴⁾.

(47) Individual aid is not applicable after accession if the precise economic exposure of the State was known when the aid was granted.

(48) On the basis of the information provided by Poland, the Commission was able to determine that the aid measures listed in Table 3 above were granted before accession and are not applicable thereafter. The Commission is therefore not empowered to assess their compatibility with the common market. However, they must be taken into account when determining the compatibility of aid granted or to be granted after accession. This aid amounts to PLN 147 million (EUR 38 million).

(49) With regard to the aid measures granted under the amended State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 and listed in Table 4, the Commission's doubts as to the day on which they were granted have not been resolved. In that respect, the Polish authorities have not provided any new arguments in their comments on the decision to initiate the formal investigation procedure. The consent of individual granting authorities to restructuring of their receivables under this

⁽⁴⁾ Judgment of the Court of First Instance of 14 January 2004 in Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, paragraph 74.

Act is necessary but not of itself sufficient for such restructuring to take place. The decisive element of the procedure under the Act is the restructuring decision, which was taken by the President of the IDA on 29 April 2005, i.e. after accession. The Commission therefore takes the view that the aid in question was granted after accession. As such, it is competent to assess the aid's compatibility with the common market. It should be noted that this aid was granted in contravention of the standstill clause in Article 88(3) of the EC Treaty and that it therefore constitutes unlawful aid of PLN 27,897 million (EUR 7,34 million).

- (50) Finally, with regard to the measures listed in Table 5, if it is determined that they constitute state aid, the Commission is competent to assess their compatibility with the common market as they were clearly extended after accession.

5.2. State aid within the meaning of Article 87(1) of the EC Treaty

- (51) Article 87(1) of the EC Treaty stipulates that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.
- (52) The Polish authorities have not contested the fact that the measures listed in Tables 3 and 4 constitute state aid.
- (53) As regards the aid in the form of deferrals of HSW's tax and social security liabilities (Table 5), the Polish authorities maintain that it does not constitute state aid as it is *de minimis* aid or its aid component is equal to zero. They therefore base their argument on the calculation of the aid component of individual aid measures.
- (54) The Commission cannot endorse the calculation method used by the Polish authorities because the aid was granted to a company in financial difficulties. The risk of debt rescheduling is higher than for healthy companies, which should be reflected in the interest charged. The reference rate cannot therefore be applied as the benchmark. A calculation method which compares the actual interest rate charged with the reference rate is not appropriate in this case and the Commission therefore cannot accept the argument put forward by the Polish authorities.
- (55) It is established Commission practice and Court of Justice case-law⁽⁵⁾ that the aid component in the case of companies in financial difficulties can be equivalent to the

nominal amount. The aid measures listed in Table 5 amount to PLN 38,480 million (EUR 10 million).

- (56) The Commission concludes that the measures listed in Tables 4 and 5 were financed using state resources. They favour an individual firm by conferring on it an advantage not available to it on the market and are thus selective. HSW is active in the production of construction machinery, which is a sector involving intensive trade within the European Union. These measures therefore constitute state aid within the meaning of Article 87(1) of the EC Treaty amounting to PLN 66,77 million (EUR 17,467 million).

5.3. Compatibility of the aid: derogation under Article 87(3) of the EC Treaty

- (57) The exemptions referred to in Article 87(2) of the EC Treaty do not apply in this case. As regards exemptions under Article 87(3), given that the primary objective of the aid is to restore the long-term viability of a firm in difficulty, only the exemption set out in Article 87(3)(c), which authorises state aid to promote the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, can be applied.

5.3.1. Applicable legal basis

- (58) The Commission will assess the measures constituting new aid and the whole restructuring plan in accordance with the Community guidelines on state aid for rescuing and restructuring firms in difficulty. The current Community Guidelines on state aid for rescuing and restructuring firms in difficulty⁽⁶⁾ ('the 2004 guidelines') entered into force on 10 October 2004. In the case of measures notification of which was registered before this date, the previous 1999 rescue and restructuring guidelines⁽⁷⁾ ('the 1999 guidelines') apply. According to point 104 of the 2004 guidelines, 'the Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty on the basis of those Guidelines if some or all of the aid is granted the date of their publication in the Official Journal of the European Union.'
- (59) In this case, notification of the measures described in Table 2 was given on 8 October 2004 (two days before the entry into force of the 2004 guidelines). However, the Polish authorities also informed the Commission by letter dated 7 March 2006 of additional aid granted unlawfully to HSW.

⁽⁵⁾ Cf. cases *Wildauer Kurbelwelle* (OJ L 287, 13.12.2000) and *Lautex Weberei und Veredelung* (OJ L 42, 20.7.1999).

⁽⁶⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁷⁾ OJ C 288, 9.10.1999, p. 2.

The measures described in Table 6, rows III and IV, were all granted after December 2004, i.e. after 1 October 2004, when the 2004 guidelines were published. The Commission therefore concludes that, in this case, the 2004 guidelines should apply to both notified and non-notified measures since they all concern the same restructuring plan.

- (60) As already mentioned in the Commission decision to initiate the formal investigation procedure, it is necessary to look at the whole picture in order to assess the compatibility of the new restructuring aid. In order to establish whether the plan will result in the restoration of viability, all aid measures, not only new aid, must be taken into account when assessing whether the aid is limited to the minimum necessary and when determining the appropriate compensatory measures.

5.3.2. Eligibility of the firm

- (61) For all the reasons already set out in the decision to initiate the formal investigation procedure (see in particular points 85 et seq.), the firm is a company in difficulty within the meaning of points 9 et seq. of the 2004 guidelines and is therefore eligible for restructuring aid.

5.3.3. Restoration of viability

- (62) The guidelines indicate that 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. [...] The improvement in viability must derive mainly from internal measures [...].'

- (63) HSW's most fundamental problem was its high indebtedness. The Commission notes that financial restructuring has almost been completed.

- (64) In the decision to initiate the investigation procedure, the Commission expressed doubts that the restructuring was mainly financial rather than industrial and noted that insufficient attention had been given to aspects of industrial restructuring. In their comments following the decision, the Polish authorities provided sufficient evidence that the obsolete organisational structure genuinely was one of the key problems facing the company. This problem was addressed by separating the part of the company directly linked to production (HSW-Trading) from the parts intended to be sold. This was the reason for the temporary creation by HSW S.A. of the independent company HSW-Trading.

- (65) The sale of shares in subsidiaries and the ring-fencing and sale of selected service departments was planned as one of the main elements of restructuring. In the decision to initiate the investigation procedure, the Commission expressed doubts as to whether the sales plan was realistic. However, in fact, HSW realised more than four times the forecast revenue from the sale.

- (66) Another key component of the restructuring's success was the ownership situation of Dressta. The controlling share in Dressta held by one of HSW's competitors — KAIC — constituted an obstacle to full access to the important North American market. The problem has now been solved as HSW has regained control of Dressta, and its expansion on the growing North American market is no longer blocked by its competitor. Indeed, the Commission notes that the most crucial sales market, owing to its absorptive power and size, is the North American market, and in particular the USA. The increase in sales in this market is a great opportunity for HSW, particularly since it is to begin using the Dressta brand name, which is well known on the market.

- (67) Employment restructuring designed to reduce the workforce by more than 1 000 is a real and credible cost-cutting measure.

- (68) HSW recorded a profit for the first time in 2005. At the end of the restructuring period (2007), the profit is expected to decrease, but this is due to high restructuring costs and an exceptionally inflated profit figure for 2005, resulting from one-off sales of assets in that year. However, from 2007 onwards, the net result is expected to improve and to double by 2012. By the end of the restructuring period the liquidity problem should be resolved.

- (69) On the basis of these elements, the Commission concludes that its doubts as to whether the plan will lead to restoration of viability have been allayed.

5.3.4. Avoidance of undue distortions of competition

- (70) According to the Polish authorities, HSW plans to reduce annual production capacity from 1 500 to 1 200 construction machines, i.e. by 20 %. The Commission takes the view that this capacity reduction is insufficient as the company plans in any case to use only 66 % of capacity at the end of the restructuring period, i.e. in 2007. The Commission has not received any information from Poland to suggest that the company was actually selling more than 1 200 machines before the start of restructuring.

- (71) Furthermore, the Polish authorities maintain that the recipient has sold a number of profitable production companies, thereby limiting its activities and production capacity. At least two big subsidiaries (HSW-Walcownia Blach Sp. z o.o. and HSW-Huta Stali Jakosciowych) were profitable and were sold at a profit. The combined turnover of these two subsidiaries in 2005 was PLN 460 million (EUR 121 million) with a workforce of 1 000, whereas the core activity of HSW group (HSW and HSW-Trading) achieved a turnover of PLN 430 million (EUR 113,1 million) with 2 400 employees. The two subsidiaries that were sold produced finished steel products. At the time of the sale, according to an evaluation submitted to the Commis-

sion, these two subsidiaries were profitable, with the prospect of a return on sales of about 6 %. The two subsidiaries formed a very significant part of the HSW group, with profitable activities and good market prospects.

- (72) The Commission therefore takes the view that the sale of these subsidiaries can be regarded as a compensatory measure and not simply as an action necessary to restore HSW's viability.

5.3.5. Aid limited to the minimum

- (73) The Polish authorities have provided various details on the amounts regarded as constituting the recipient's own contribution to the restructuring costs.
- (74) First, the company plans to obtain bank loans to an amount of PLN 46,9 million (EUR 12 million). The Polish authorities have provided evidence that HSW will be able to obtain such financing on the market, given that it benefited from limited private financing of PLN 31,9 million (EUR 8,4 million) in the period 2003-05. They also claim that the recipient will be able to find market financing until the end of the restructuring period.
- (75) Second, HSW received revenue of PLN 112,2 million (EUR 29,5 million) from the sale of its subsidiaries.
- (76) Lastly, the recipient has sold assets to a value of PLN 52,1 million (EUR 13,7 million).
- (77) To conclude, as regards the financing sources of the restructuring measures, PLN 243,1 million (EUR 64 million) can be regarded as constituting the recipient's own contribution or external resources free of state aid. Overall restructuring costs, including costs incurred prior to accession, amount to PLN 450,3 million (EUR 118,5 million). HSW's own contribution to the total restructuring costs is therefore equivalent to 54 %.
- (78) The 2004 guidelines set 50 % as the minimum level of the own contribution to restructuring costs. The Commission therefore concludes that the level of own contribution is significant and that, in light of the information provided, the aid is limited to the minimum necessary.

5.3.6. 'One time, last time' principle

- (79) In the decision to initiate the formal investigation procedure, the Commission noted that HSW-Zakład Zespołów Mechanicznych had received restructuring aid that was granted before accession for the period 2003-07. It was necessary to demonstrate that the aid had had no spill-over effects on the parent company. On the other

hand, Poland was asked to assure the Commission that the restructuring aid to HSW, if approved by the Commission, would not have any spill-over effects on HSW-Zakład Zespołów Mechanicznych.

- (80) The Polish authorities have assured the Commission that bilateral relations between HSW-Zakład Zespołów Mechanicznych and HSW are based on market conditions (including terms of payment and of delivery) and that the companies, as distinct legal entities, have separate accounts. The sole reason why HSW chose HSW-Zakład Zespołów Mechanicznych as a supplier was its geographical proximity.

5.3.7. Separation between subsidised special military production and civil production

- (81) The Commission expressed doubts in the decision to initiate the formal investigation procedure as to whether a sufficient separation had been made between subsidised special military production (guns) and civil production of construction machinery in order to avoid cross-subsidisation between these two fields of activity. The Polish authorities have assured the Commission that the current system of cost accounting allows for a clear separation of the costs of these two types of activities.

6. CONCLUSIONS

- (82) The Commission concludes that the partially unlawful and partially notified state aid is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

State aid amounting to PLN 66,377 million which has been granted to or is planned for HSW and some of which Poland has already partially or fully implemented in contravention of Article 88(3) of the EC Treaty and some of which Poland has not yet implemented is compatible with the common market.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 20 December 2006.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 20 December 2006

on the measure No C 24/2004 (ex NN 35/2004) implemented by Sweden for the introduction of digital terrestrial television

(notified under document number C(2006) 6923)

(Only the Swedish version is authentic)

(Text with EEA relevance)

(2007/258/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 called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments ⁽¹⁾,

Whereas:

also from the following interested parties: B2 Bredband AB ('B2') ⁽⁴⁾, the European Cable Communications Association ('ECCA') ⁽⁵⁾, the European Satellite Operators Association ('ESOA') ⁽⁶⁾, NSAB ⁽⁷⁾, Telenor Broadcast Holding AS ('Telenor Broadcast') ⁽⁸⁾, TeliaSonera AB ('TeliaSonera') ⁽⁹⁾, UGC Europe, Inc. ('UGC') ⁽¹⁰⁾ and Viasat ⁽¹¹⁾.

- (4) By letters dated 17 November 2004 and 17 January 2006, the Commission forwarded interested parties' observations to the Swedish Government. The latter submitted its comments on the observations by letters dated 20 December 2004 and 20 March 2006.

1. PROCEDURE

- (1) By letter dated 9 August 2001, the satellite operator Nordic Satellite AB ('NSAB') ⁽²⁾ submitted a complaint to the European Commission ('the Commission') regarding alleged State aid granted by the Swedish State to the Swedish terrestrial network operator, Teracom AB ('Teracom') and certain of its subsidiaries in connection with the establishment of digital terrestrial television in Sweden ⁽³⁾. By letter dated 28 November 2001, the television distributor Viasat AB ('Viasat') — an integrated free-television and pay-television operator — submitted a very similar complaint to that of NSAB.
- (2) After a preliminary investigation, the Commission informed Sweden, by letter dated 14 July 2004, that it had decided to initiate the formal investigation procedure (hereafter referred to as the 'opening Decision') as set out in Article 88(2) of the EC Treaty in respect of the alleged aid measures. The opening Decision was published in the *Official Journal of the European Union* on 25 September 2004. It called upon Sweden and other interested parties to submit their comments on the alleged aid measures.
- (3) On 29 October 2004, the Commission received the Swedish Government's response (the '29 October response') to its opening Decision. It received comments
- (5) On 22 November 2004, the Commission departments met with ECCA. Meetings were also held with representatives of NSAB and ESOA on 1 March 2005 and on 21 and 30 November 2005.
- (6) By letters dated 8 February 2006, 7 April 2006, 31 May 2006 and 30 August 2006, the Commission sent additional requests for information to Sweden. The Swedish Government responded by letters dated 20 March 2006 (the '20 March response') (registered as received on 22 March 2006), 25 April 2006 (the '25 April response') (registered as received on 24 October 2006), 5 May 2006 (the '5 May response') (registered as received on 11 May 2006), 15 June 2006 (registered as received on 16 June 2006) and 1 September 2006 (registered as received on 4 September 2006).

⁽⁴⁾ See B2's submission dated 22 October 2004.

⁽⁵⁾ See ECCA's submission dated 25 October 2004 (registered as received on 2 December 2004).

⁽⁶⁾ See ESOA's submission dated 18 October 2004 (registered as received on 25 October 2004).

⁽⁷⁾ See NSAB's submissions dated 22 October 2004, 11 February 2005 (registered as received on 14 February 2005), 9 March 2005 (registered as received on 10 March 2005) and 1 December 2005 (registered as received on 6 December 2005).

⁽⁸⁾ See Telenor Broadcast's submission dated 17 November 2004 (registered as received on 18 November 2004).

⁽⁹⁾ See TeliaSonera's submission dated 25 October 2004 (registered as received on 26 October 2004).

⁽¹⁰⁾ See UGC's submission dated 25 October 2004 (registered as received on 26 October 2004).

⁽¹¹⁾ See Viasat's submission dated 25 October 2004 (registered as received on 26 October 2004).

⁽¹⁾ See Case C 24/04 (ex NN 35/04) *Introduction of digital terrestrial television in Sweden*, OJ C 238, 25.9.2004, p. 5.

⁽²⁾ On 1 December 2005, NSAB changed its name to SES Sirius AB. Notwithstanding this, the complainant will throughout this Decision be referred to as 'NSAB.'

⁽³⁾ On 12 April 2002 and on 2 October 2002, NSAB supplemented its complaint with additional information concerning the alleged state aid measures.

2. BACKGROUND

- (7) This Decision concerns the alleged State aid provided to Teracom and its subsidiary Boxer TV-Access ('Boxer') (unless otherwise stated, Teracom and its subsidiaries will hereafter be collectively referred to as 'Teracom') in connection with the development of the digital terrestrial television platform in Sweden⁽¹²⁾. According to the complainants, Teracom has received direct and indirect (through the public-service broadcasters SVT and UR) financial support from the Swedish State. This support has allegedly been used to give digital terrestrial transmission in Sweden an unfair competitive advantage over other types of digital transmission platforms such as cable and satellite.
- (8) This Decision will not address Sweden's failure to adopt the laws, regulations and administrative provisions necessary to comply with the Directive on the transparency of financial relations between Member States and public undertakings because this has been the subject of a separate ruling by the European Court of Justice⁽¹³⁾.

3. RELEVANT COMPANIES

3.1. Companies involved in the development of the digital terrestrial platform in Sweden

3.1.1. Teracom

- (9) Teracom is a company charged with the building and operation of the terrestrial television transmission platform in Sweden. It is a public company, wholly owned by the State. It was created in 1992 to take over the television and radio transmission operations previously carried out by the Swedish Telecommunications Administration ('Televerket')⁽¹⁴⁾.
- (10) According to its articles of association, Teracom is to transmit and distribute radio and television programmes, and develop, market and perform other services related to or compatible with its transmission and distribution activities. These other services consist mainly of telecom and information services.
- (11) Since its creation, Teracom has been the exclusive owner and operator of the only existing terrestrial broadcasting

network in Sweden⁽¹⁵⁾. To broadcast via the terrestrial platform, private and commercial television channels enter into transmission agreements with Teracom and pay Teracom for services provided.

- (12) On 15 December 2005, the Swedish Post and Telecommunications Regulator ('Post- och telestyrelsen') adopted two Decisions stating that Teracom, in its role as a network operator, has significant market power in the Swedish wholesale markets for terrestrial broadcasting services. It therefore imposed special obligations on Teracom with regard to the distribution of television content to end-users through both the analogue and the digital terrestrial network. Teracom is now obliged, under certain conditions, to provide access to the terrestrial platform to companies wishing to distribute television content to end-users, to apply cost-oriented pricing, to apply non-discriminatory conditions for access to the terrestrial platform and to keep separate and open accounts for its own activities and activities connected with the provision of access⁽¹⁶⁾.

3.1.2. Boxer

- (13) Boxer offers consumers access to television programme packages and other services via the digital terrestrial television platform. The company was established in October 1999 and is owned 70 % by Teracom and 30 % by the British private equity and venture capital company 3i⁽¹⁷⁾.
- (14) Boxer is the only distributor of television programmes (including pay television) in the digital terrestrial network in Sweden. When a television channel receives a broadcasting licence for the Swedish terrestrial network, the channel can either sign a distribution agreement with Boxer to have its programmes distributed or choose to broadcast free-to-air, i.e., unencrypted. Most television channels broadcasting in the digital terrestrial network have signed a distribution

⁽¹⁵⁾ In December 2004, the Commission opened infringement proceedings against Sweden for violations of the Directive on competition in the markets for electronic communications networks and services (SG infringement No 2004/2197; Case COMP/C-1/39.157). The case concerned the maintenance of exclusive rights in the relevant sector. As a result of these proceedings, the Government undertook to abolish the exclusive rights awarded to Teracom with regard to the provision of analogue terrestrial broadcasting services by 1 January 2006. The case concerning digital terrestrial broadcasting services is still ongoing although the Government no longer disputes the Commission's assessment that the regulatory framework currently in force infringes the said Directive. However, because the Government has failed to provide the Commission with a draft piece of legislation which would allow it to ascertain whether the infringement will come to an end and when the new legislation would enter into force, the Commission has decided to refer Sweden to the Court of Justice; see Commission press release IP/06/1411 of 17 October 2006.

⁽¹⁶⁾ See Decision 05-8675/23 of 15 December 2005 relating to the digital terrestrial network and Decision 05-8674/23 of 15 December 2005 relating to the analogue terrestrial network.

⁽¹⁷⁾ See www.boxer.se. Between April 2000 and April 2005, 3i's 30 % shareholding in Boxer was held by Skandia Liv ('Skandia').

⁽¹²⁾ According to the complainants, unlawful state aid has also been provided to a company called Senda i Sverige AB ('Senda'). Senda used to be a subsidiary of Teracom dealing with the coordination, marketing and packaging of television programmes and services for terrestrial digital television. Since 1 October 2002, Senda has been merged with Boxer and the two companies are now operating under the name 'Boxer.'

⁽¹³⁾ See Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 193, 29.7.2000, p. 75. Judgment of the Court of Justice of 15 July 2004 in Case C-141/03 *Commission v Sweden*, not yet reported.

⁽¹⁴⁾ See Prop. 1991/92:140, bet. 1991/92:KrU28, rskr. 1991/92:329. Televerket has since been privatised and is now known as Telia AB.

agreement with Boxer⁽¹⁸⁾. According to Boxer, it grew by 42 % in 2005 and had over half a million subscribers at the end of December 2005⁽¹⁹⁾.

3.1.3. SVT

- (15) SVT is the main public service broadcaster in Sweden. Since 1997, SVT, like all the other radio and television public service companies in Sweden, is owned by a Foundation⁽²⁰⁾. Its obligations as a public service broadcaster are regulated in both its analogue and its digital broadcasting licences, which are issued by the Government. SVT's public service channels must reach 99,8 % of the Swedish population and it must broadcast via the terrestrial network to its fullest extent⁽²¹⁾. The requirement to cover 99,8 % of the population means that, until the digital terrestrial platform is fully built out, SVT must broadcast in parallel over the analogue terrestrial network. SVT currently purchases all its services for terrestrial transmission from Teracom⁽²²⁾.
- (16) All of SVT's channels are broadcast as 'free-to-air television'. SVT's broadcasting licence also states that SVT can use satellite and, in fact, to reach the entire Swedish population, SVT broadcasts its public service channels via satellite. Between March 1999 and April 2004, NSAB — one of the complainants — had the exclusive right to broadcast SVT's public service channels in the Nordic region via its satellites⁽²³⁾. SVT's public service channels are also available via the cable network by virtue of must-carry legislation.

3.1.4. Utbildningsradion ('UR')

- (17) UR — the 'educational radio' — is the second public service broadcaster in Sweden. It broadcasts both radio and television. Like SVT, UR is also owned by the Foundation (see 3.1.3. above)⁽²⁴⁾.
- (18) Similarly to SVT, UR's obligations as a public service broadcaster are regulated in its broadcasting licence and UR is required, after having consulted Swedish Radio ('Sveriges Radio') and SVT, to purchase services for transmitting via the analogue terrestrial network from Teracom⁽²⁵⁾. UR broadcasts via one of SVT's channels and its programmes must reach 99,8 % of the Swedish population. Also, UR's

programmes must be broadcast over the terrestrial network, and are broadcast free-to-air on the terrestrial networks and as must-carry on the cable networks.

- (19) In the remaining part of this Decision, SVT and UR will be collectively referred to as 'SVT' and figures (e.g., appropriations and payments) relating to each of the two companies will be referred to in aggregate⁽²⁶⁾.

3.2. Complainants

3.2.1. NSAB

- (20) NSAB is a company with its head office registered in Sweden. NSAB owns and operates two Sirius satellites that provide the Nordic and Baltic regions, as well as Eastern and Central Europe, with television and other media and telecommunications services. NSAB distributes radio and television signals of both public and private broadcasters.
- (21) NSAB is 75 % owned by one of the leading direct-to-home satellite services operators in Europe — the Luxembourg-registered SES ASTRA — and 25 % owned by the Swedish Space Corporation ('Svenska Rymdaktiebolaget'). Swedish Space Corporation is a State-owned limited liability company with operations in Sweden⁽²⁷⁾. Until March 2000, NSAB was partly owned by Teracom⁽²⁸⁾.

3.2.2. Viasat

- (22) Viasat is an integrated free- and pay-television operator which distributes programmes via the Sirius satellite platform. It operates out of the United Kingdom, where it is also registered. Viasat is a wholly owned subsidiary of the Swedish media group MTG AB ('MTG'). MTG operates worldwide and claims to be, among other things, the largest free- and pay-television operator in Scandinavia and the Baltic countries.

4. TELEVISION BROADCASTING

4.1. Television broadcasting platforms in Sweden

- (23) In Sweden, television is currently distributed through the terrestrial networks, through cable networks and satellite-delivered master antenna television systems ('SMATV'), via

⁽¹⁸⁾ This Decision is without prejudice to the application of the EU internal market rules.

⁽¹⁹⁾ See Boxer's press release of 18 January 2006, *Boxer grew by 42 % in 2005*. See also Boxer's press release of 12 July 2005, *Boxer fortsätter att öka antalet digitala TV-kunder*; and its press release of 20 October 2005, *Fortsatt ökning för Boxer*.

⁽²⁰⁾ See www.svt.se and Prop. 1995/96:161, pp. 70-72.

⁽²¹⁾ See, e.g., Government Decision of 10 February 2005 (No I:11), Government Decision of 22 June 2005 (No I:22), Government Decision of 15 December 2005 (No I:102) and Government Decision of 23 February 2006 (No I:15).

⁽²²⁾ Until 31 December 2005, it was obliged to do so with regard to analogue broadcasting.

⁽²³⁾ The agreement between NSAB and SVT was notified to the Commission in 1999 (Case No IV/C-2/37.517) and the parties received a comfort letter in November 1999.

⁽²⁴⁾ See www.ur.se/ur/start.php?s1=omur&s2=historik.

⁽²⁵⁾ See Government Decision 29 addressed to UR, *Tillstånd att sända television*, KU2001/1543/Me (partly) of 20 December 2001; and Annex 1 to Government Decision I:12, *Tillstånd att sända ljudradio och television*, U2005/1824/Me of 2 October 2005. This broadcasting licence has been prolonged and covers the whole of 2006 as well.

⁽²⁶⁾ The reason for this is that the appropriations allocated to UR are not significant and the rules governing UR's activities and transmissions are virtually the same as those governing SVT. Moreover, UR broadcasts via one of SVT's channels. The appropriations allocated to each of the two companies, and payments made by each of them, will therefore be treated as one.

⁽²⁷⁾ See <http://www.ses-sirius.com>.

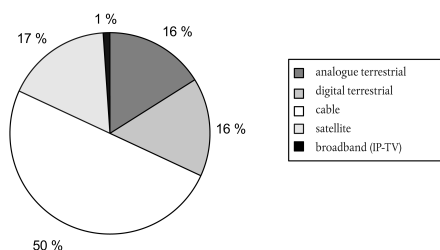
⁽²⁸⁾ See Teracom's Annual Report 2000.

satellite and via broadband. According to the Government, television broadcasting will soon be available also through third-generation mobile telephone networks ⁽²⁹⁾.

- (24) Figure 1 below illustrates the comparative significance of the different television platforms in Sweden in 2006. The figure indicates the actual use of the different platforms as a percentage of all Swedish households ⁽³⁰⁾. In the case of the terrestrial platform, the figure distinguishes further between analogue and digital reception.

Figure 1:

Actual household TV reception in Sweden in 2006



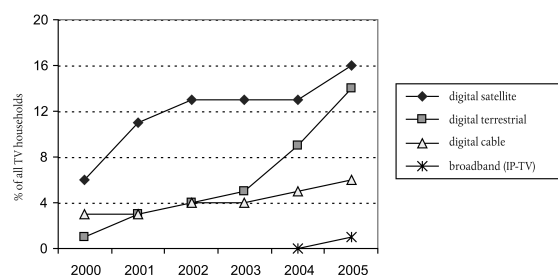
- (25) All the currently commonly available transmission platforms, i.e. cable, satellite and terrestrial, have been or are affected by the transition from analogue to digital television broadcasting. The digitisation of broadcasting has great advantages in terms of more efficient spectrum usage and increased transmission possibilities. This will lead to new and better high-quality services and to wider consumer choice.
- (26) Irrespective of the transmission mode, digital transmission has either an open architecture or contains a conditional access system where the channels are encrypted. This means that, in order to receive open digital transmissions, viewers need a digital receiver which is either built into the television set or comes in the form of a separate 'set-top box' which operates as a decoder. In order to watch encrypted channels, viewers must have a set-top box which is capable of reading a so-called 'access card'.

4.2. The development of digital terrestrial television in Sweden

- (27) Digital television in Sweden has developed strongly during the last five years. While all the digital platforms — satellite, cable and terrestrial — experienced growth during the period from 2000 to 2005, satellite was at the forefront of digitisation (see Figure 2) ⁽³¹⁾.

Figure 2:

Development of digital platforms in Sweden (2000-05)



- (28) On the basis of a proposal from the Government, Parliament decided in 1997 that the development of a digital terrestrial network should start in several parts of the country and that the State should gradually decide whether, and if so how, the build-out of the network should continue ⁽³²⁾. It was decided that the development of the digital terrestrial network should be financed entirely by the participating companies, i.e., the broadcasters and the network owner, and not by the State ⁽³³⁾.
- (29) In 2003, Parliament decided that the analogue terrestrial network should be switched off by 1 February 2008 ⁽³⁴⁾, and in May 2004 it decided that the multiplex reserved for SVT's digital transmissions should be built out to cover 99,8 % by the time the analogue terrestrial network was entirely shut down. By then, at least one more multiplex should cover 98 % of the population. No requirements as to the coverage of the other multiplexes were decided on ⁽³⁵⁾.
- (30) According to Teracom, the first stage of the shut-down of the analogue terrestrial network started on 19 September 2005 and covered approximately 150 000 households in Sweden ⁽³⁶⁾. See Table 1 below for the planned stages and the estimated percentage population affected by the shut-down in each stage.

Table 1:

Planned shut-down of the analogue terrestrial network and estimated percentage of the population affected

	% of population in affected area	% of population covered by digital terrestrial television (accumulated figures)
Stage 1 ended in November 2005	4	4

⁽²⁹⁾ See the 29 October response, p. 11.

⁽³⁰⁾ See Statens Offentliga Utredningar: *Sveriges övergång till digital-TV*, Digital-TV-Kommissionen.

⁽³¹⁾ Source: Mediavision, MMS, see the 20 March response, question 15. See also Radio och TV-verket's *Mediautveckling 2005 och 2006*.

⁽³²⁾ See Bet. 1996/97:KU17; Rskr. 1996/97:178.

⁽³³⁾ See Bet. 1996/97:KU17.

⁽³⁴⁾ See Bet. 2002/03:KU33, Rskr. 2002/03:196.

⁽³⁵⁾ See Bet. 2003/04:KU24; Rskr. 2003/04:231.

⁽³⁶⁾ See <https://www.teracom.se>.

	% of population in affected area	% of population covered by digital terrestrial television (accumulated figures)
Stage 2 ended in May 2006	20	24
Stage 3 is scheduled to end in November 2006	16	39
Stage 4 is scheduled to end in May 2007	28	67
Stage 5 is scheduled to end in October 2007	33	100

Source: Teracom. Note that figures are estimates.

- (31) Teracom's own funds and the revenues from the sale of network services (e.g., user fees) have not been sufficient to cover the entire investment costs related to the roll-out of the countrywide digital terrestrial network and Teracom, therefore, has had to raise additional capital. It has done this through loans on the capital market and through the sale of assets, and in this way it has managed to finance the development of the digital terrestrial network ⁽³⁷⁾.

4.2.1. Transmission via the digital terrestrial network in Sweden

- (32) Digital terrestrial television operates through multiplexes, which are systems that combine and digitalise multiple signals for transmission over a single line or a common channel. This results in more capacity and in a larger number of channels which can be broadcast simultaneously. Teracom currently operates five multiplexes, each multiplex having the capacity to transmit around eight individual television channels. During the spring of 2006, four of the multiplexes covered approximately 98 % of the Swedish population and the fifth multiplex approximately 50 % of the population ⁽³⁸⁾.
- (33) The Government bases its decision to grant a licence on recommendations from the Radio and Television Agency ('Radio och TV-verket'), which reviews the applications. In October 2006, approximately 40 television channels were granted a licence to broadcast in the digital terrestrial network. One of the five multiplexes is reserved for SVT, a second one is currently mainly devoted to TV4 and the remaining multiplexes are shared among the other licence holders ⁽³⁹⁾.

⁽³⁷⁾ See the 29 October response, sections 3.4.2. and 3.5.

⁽³⁸⁾ See <http://www.teracom.se> and Statens Offentliga Utredningar: Sveriges övergång till digital-TV, Digital-TV-Kommissionen.

⁽³⁹⁾ See http://www.rtvv.se/se/Om_media/tv/digitaltv but also the Report made by the Post and Telecommunications Regulator in November 2005, Förstudie: Frigjort frekvensutrymme vid övergången till digitalt marksänd TV, pp. 5-7.

4.2.2. The marketing of the digital terrestrial network to consumers

- (34) Boxer is responsible for the subscriber base — that is, for marketing the pay television offer on the digital terrestrial platform to end customers. According to the Government, Teracom and Boxer face fierce competition from other transmission platforms such as satellite operators. This made it difficult for Boxer, while trying to establish itself and build up a customer base, to charge customers the full cost of a set-top box. After the launch of the digital terrestrial platform, Boxer therefore offered set-top boxes to customers at a low price and recovered the costs over the entire subscription contract period. This explains why Boxer suffered substantial losses in the initial phase of its operations. When Boxer was making losses, it received a capital injection on equal terms from both its parent companies: 70 % from Teracom and 30 % from Skandia ⁽⁴⁰⁾.

4.3. Swedish public service television and its funding

- (35) According to Swedish law, each household that owns a television set must pay a television licence fee. The money from the television licence fee finances the public service companies (television and radio) in Sweden ⁽⁴¹⁾.
- (36) The television licence fee is collected by an entity jointly owned by all the Swedish radio and television public service companies: Radiotjänst i Kiruna AB ('Rikab') ⁽⁴²⁾. Rikab transfers the money it collects to a specific account with the Swedish National Debt Office ('Riksgäldskontoret'), the so-called 'rundradiokontot'.
- (37) On the basis of SVT's activities and any changes or additions that the Government wishes to add to the public service obligations, Parliament decides each year on the amount the company will have at its disposal for the performance of its public service duties ⁽⁴³⁾. SVT uses the money allocated to it to perform its public service activities, as detailed in the broadcasting licence and the conditions of funding ⁽⁴⁴⁾. Out of the allocated money, SVT decides itself how much should be used for, e.g., programme activities and how much should be spent on distribution of programmes (e.g., transmission fee payments to Teracom) ⁽⁴⁵⁾.
- (38) During the digital terrestrial switchover, analogue and digital terrestrial transmissions will be broadcast in parallel

⁽⁴⁰⁾ See the 29 October response, p. 22, and the Government's response of 20 December 2004, p. 2. It should be noted that, as of April 2005, 3i is the owner of the 30 % previously held by Skandia.

⁽⁴¹⁾ See the Law on the Television Licence Fee (1989:41).

⁽⁴²⁾ Ibid.

⁽⁴³⁾ See *Radio och TV i allmänhetens tjänst — Riktlinjer för en ny tillståndperiod*, Betänkande av Kommittén om radio och TV i allmänhetens tjänst, Stockholm 2005.

⁽⁴⁴⁾ See *Anslagsvillkor för Sveriges Television AB för år 2005*, Prop. 2004/05:1, bet. 2004/05:KrU1, rskr. 2004/05:97.

⁽⁴⁵⁾ See the 29 October response, pp. 27-30 and 42-43.

to give viewers time to switch to the new reception mode. To prevent the higher costs incurred by SVT because of these parallel transmissions leading to a significant increase in the television licence fee collected from television set owners ⁽⁴⁶⁾, the State decided to implement an alternative financing mechanism to cover the costs. To this end, a separate account was opened with the National Debt Office in 2002, the so-called 'distribution account' ('distributionskontot'). The distribution account is financed by money from the rundradiokontot and through a credit facility granted by the National Debt Office. From the distribution account money is then transferred to SVT to pay for terrestrial transmission ⁽⁴⁷⁾.

(39) For the first few years, the distribution account is running a deficit because the amount of money which is transferred to it from the rundradiokontot is less than the amount which is transferred from it to SVT for transmission payments. The difference between what the distribution account receives from the rundradiokontot and the money which SVT needs for transmission payments is covered by the credit granted by the National Debt Office. Once the analogue terrestrial network is switched off and SVT no longer needs to pay for the parallel transmission of analogue and digital terrestrial signals, the transfers from the distribution account to SVT will be reduced and the deficit on the distribution account will be paid off gradually. It is estimated that all costs for parallel transmission will be fully recovered by 2013, when the distribution account will be in balance again ⁽⁴⁸⁾.

(40) According to the conditions of funding, SVT appears in no way to be restricted in how it uses and allocates the amount given to it from the rundradiokontot and the distribution account — on condition that the money is used solely for its public service activities as detailed in the broadcasting licence and the conditions of funding ⁽⁴⁹⁾.

4.4. Public service broadcasting in the terrestrial network: SVT's payments to Teracom for transmission services

(41) Part of the funding SVT receives is used to purchase terrestrial transmission services from Teracom. The price of those services is negotiated between SVT and Teracom without the involvement of the Government. According to the Government and the Annual Reports of Teracom, Teracom applies a principle of 'equal treatment' ('likabehandlingsprincipen') towards all broadcasters with regard to its fees for analogue and digital transmission ⁽⁵⁰⁾.

⁽⁴⁶⁾ Also, the distribution costs will decrease as the analogue terrestrial network is shut down.

⁽⁴⁷⁾ See the 29 October response, pp. 27-30.

⁽⁴⁸⁾ See the 29 October response, pp. 27-29; Prop. 2001/02:1, p. 121; Prop. 2004/05:1, p. 108; and the 20 March response, question 4.

⁽⁴⁹⁾ See, e.g., *Anslagsvillkor för Sveriges Television AB för år 2005*, Prop. 2004/05:1, bet. 2004/05:KrU1, rskr. 2004/05:97; but also the 20 March response, question 4.

⁽⁵⁰⁾ See the 29 October response, section 3.6.2; the 20 March response, question 9; and Teracom's Annual Reports for, e.g., 2003 and 2004.

(42) With regard to analogue terrestrial transmission, Teracom was, from 1992 until December 2005, required to set its prices at cost level ('självkostnads kalkyl'). SVT's actual payments to Teracom are usually fixed for several years in advance in agreements negotiated between the two companies. According to the current agreement, SVT's payments to Teracom for the period from 2004 until 2013 are based, *inter alia*, on the planned timetable for the switch-off of the analogue terrestrial network. If Parliament decides to change this timetable, the payments may be adjusted ⁽⁵¹⁾.

(43) With regard to digital terrestrial transmission, Teracom's application of the principle of equal treatment is reflected in the fact that, since 1999, all broadcasters (including SVT) have been charged according to the same pricing model, the so-called penetration-based pricing model ('penetrationsbaserad prissättning') ⁽⁵²⁾. This means that, apart from certain fixed fees per channel, i.e., a basic fee ('grundavgift') and a connection fee ('anslutningsförbindelser'), the broadcasters are charged a variable fee which is proportionate to their respective number of viewers (i.e., penetration). The amount per viewer of this variable fee is the same for all channels ⁽⁵³⁾. The principle of equal treatment constrains Teracom's pricing behaviour towards SVT and guarantees that SVT does not pay more for digital terrestrial transmission than the other broadcasters — to the extent the services required are the same ⁽⁵⁴⁾. The principle of equal treatment has recently been re-confirmed in the Government's budget bill 2005/06 ⁽⁵⁵⁾.

(44) [...] (*) ⁽⁵⁶⁾.

5. DETAILED DESCRIPTION OF THE ALLEGED AID MEASURES

(45) The measures assessed in this Decision are the following:

- indirect financial support to Teracom through allegedly excessive transmission fees paid by SVT in return for Teracom's transmission services provided on both the analogue and the digital terrestrial network;
- direct financial support by means of a State credit guarantee granted to Teracom; and

⁽⁵¹⁾ See the 29 October response, section 3.6.2; and the framework agreement ('ramavtal') between Teracom and SVT signed on 4 March 2004, annexed to the 20 March response. The reason why Teracom is no longer obliged to price analogue transmission at cost level is the recent decision (with commitments) issued by the PTS. Since that decision, Teracom's prices are subject to *ex ante* control by the PTS. See Section 3.1.1. above.

⁽⁵²⁾ See the 29 October response, section 3.6.1, p. 29.

⁽⁵³⁾ It is only in the case of the fourth multiplex that since 2002 the variable part of the transmission fee has been based on another, cost-based pricing model; see the Government's reply of 21 March 2003.

⁽⁵⁴⁾ See the 29 October response, section 3.6.2., and the 20 March response, question 9.

⁽⁵⁵⁾ See Prop. 2005/06:1, Utgiftsområde 24, pp. 71-74.

(*) The text in paragraph 44 and related footnote has been deleted for confidentiality reasons. The text contains certain information about an agreement between SVT and Teracom.

⁽⁵⁶⁾ [...]

- direct financial support in the form of a conditional shareholder contribution ('villkorat aktieägartillskott'), to be repaid by Teracom.

transmitting SVT's channels. The excess funding appeared to amount to approximately SEK 509,61 million by 2013 (see below).

5.1. SVT's transmission fee payments to Teracom

- (46) On the basis of the information available to it at the time of the opening Decision, the Commission had reason to believe that the Government used SVT as a vehicle to channel State money to Teracom during the switch-over from analogue to digital terrestrial television. According to the available information, SVT had been allocated funding for transmission which, cumulated over the period from 2002 to 2013, would exceed Teracom's expected costs of
- (47) As set out in the opening Decision, the Commission was also concerned that the funding allocated to SVT to cover its transmission payments was automatically transferred to Teracom. Should Teracom's terms and conditions for the provision of transmission services to SVT not be comparable to those of a normal market transaction, any payments in excess of the market price could raise concerns of possible disguised aid in favour of Teracom.
- (48) The information at the Commission's disposal at the time of the opening Decision suggested that, up to 2007, SVT's transmission fee payments to Teracom would be lower than Teracom's costs of transmitting SVT (visible from column 5 in Table 2). As of 2008, however, when the analogue terrestrial network will be switched off and SVT will no longer be obliged to make parallel transmissions in analogue and digital mode, the information suggested that SVT's annual payments would exceed Teracom's costs of transmitting SVT: from 2008 until 2013, SVT would, every year, pay Teracom considerably in excess of its transmission costs. In 2013, SVT's payments were estimated at 2,3 times the size of its transmission costs. Such payments would more than offset Teracom's initial losses and would allow Teracom a cumulated profit of SEK 509,61 million by 2013. The Commission had doubts that this profit would be the result of normal market conditions and was concerned that the profit might constitute State aid in favour of Teracom (see the opening Decision, paragraph 32).

Table 2:

SVT's transmission fee payments to Teracom from 2002 to 2013 as presented in the opening Decision

Year	Payments from SVT to Teracom (1)	Teracom's costs of transmitting SVT in analogue (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT (4 = 2+3)	Teracom's predicted annual profits (5 = 4 — 1)	Teracom's predicted cumulated profits/losses (6)
2002	485	480	160	640	- 155,00	- 155,00
2003	523	480	160	640	- 117,00	- 272,00
2004	556,46	480	160	640	- 83,54	- 355,54
2005	591,79	480	160	640	- 48,21	- 403,75
2006	256,19	240	160	400	- 143,81	- 547,56
2007	273,79	120	160	280	- 6,21	- 553,77
2008	291,58		160	160	131,58	- 422,19
2009	309,57		160	160	149,57	- 272,61
2010	327,77		160	160	167,77	- 104,85
2011	346,16		160	160	186,16	81,31
2012	364,75		160	160	204,75	286,06
2013	383,55		160	160	223,55	509,61

5.2. The State guarantee issued in favour of Teracom

- (49) On the basis of the information available at the time of the opening Decision, the Commission had reason to suspect that a credit guarantee was issued in favour of, or at least was available to, Teracom.
- (50) During 2001, for reasons mainly related to Teracom's investments in digital terrestrial television, the predictions concerning Teracom's solvency were not very optimistic and it was expected that its solvency would continue to fall⁽⁵⁷⁾. As a consequence, there was a serious risk that Teracom would not only fail to respect its contracts for the transmission of SVT and TV4's programmes but also have no means for developing and operating the digital terrestrial network as a whole. In addition, there was a risk that Teracom would not be able to honour its creditors.
- (51) A Government proposal of November 2001 recommended that a credit guarantee amounting to a maximum of SEK 2 000 million (approximately €210 million) be given to Teracom. Teracom would be charged a fee to cover the risks and administrative costs involved in granting the guarantee and the guarantee was limited in time⁽⁵⁸⁾. This proposal was approved by Parliament in February 2002⁽⁵⁹⁾. According to the information available to the Commission at the time of the opening Decision, subsequent to the approval, the Government took a decision to issue a credit guarantee in favour of Teracom.
- (52) The Commission explains the application of Article 87(1) of the EC Treaty to credit guarantees granted by a Member State in its Notice on State aid in the form of guarantees (the 'Notice on Guarantees')⁽⁶⁰⁾. According to section 4 of the Notice on Guarantees, only the fulfilment of all of a number of conditions ensures that an individual State guarantee does not constitute State aid under Article 87(1)⁽⁶¹⁾.

- (53) On the basis of the background to the credit guarantee and the reasons for the decision to issue a guarantee — as explained in the opening Decision (Teracom's poor financial situation and falling solvency), the Commission had reason to believe that the conditions set out in section 4 of the Notice on Guarantees might not have been fulfilled and that the credit guarantee constituted State aid to Teracom.

5.3. The capital injection

- (54) On the basis of information concerning Teracom's financial position available at the time of the opening Decision, the Commission could not exclude that the conditional shareholder contribution in the form of a capital injection constituted State aid to Teracom.
- (55) Although Teracom had started a reorganisation of the entire Group's activities in 2002 to improve its financial situation⁽⁶²⁾ and sales forecasts were improving, Teracom still made losses and its solvency kept falling⁽⁶³⁾. According to the information available to the Commission at the time of the opening Decision, Teracom's solvency ratio was at 20 % at the end of 2002 while its lenders required that the solvency ratio be at a level of 25 % (the level for the Group was, according to the Commission's information, apparently 30 %)⁽⁶⁴⁾. Both Teracom and its lenders therefore requested that a capital injection be granted to Teracom⁽⁶⁵⁾.
- (56) According to the Commission's information, the Government concluded that Teracom's dire financial situation was of a temporary nature, triggered by high investment and operating costs, and that in the long term Teracom would be a viable company with a strong position in the marketplace and a serious business model. In March 2003, the Government proposed that Parliament should authorise it to grant Teracom a conditional shareholder contribution in the form of a capital injection amounting to approximately SEK 500 million (approximately €52,5 million)⁽⁶⁶⁾. After approval by Parliament in May 2003 and the signing of an agreement with Teracom in June 2003, the State granted Teracom the conditional shareholder contribution.

⁽⁶²⁾ See, e.g., Teracom's Interim Report for the second quarter of 2002.

⁽⁶³⁾ *Ibid.*

⁽⁶⁴⁾ This is defined as the consolidated equity/assets ratio.

⁽⁶⁵⁾ See the 29 October response, p. 39.

⁽⁶⁶⁾ See Prop. 2002/03:64. A conditional shareholder contribution is not a loan. A conditional shareholder contribution means that the repayment takes place through payments of dividends once the company has enough own capital in the balance sheet. According to the agreement between the State (through the Government) and Teracom, there was a condition that repayment should start as soon as Teracom had sufficient financial means to do so. It is also specifically stated in the agreement that the contribution is done on 'market terms' and that the expected return is the same as that of a conditional shareholder contribution made in respect of a 'competitive business operation.'

⁽⁵⁷⁾ See Teracom's Interim Report for the second quarter of 2002.

⁽⁵⁸⁾ See Government bill 2001/02:76.

⁽⁵⁹⁾ See Parliament's Decision 2001/02:KrU07; Rskr. 2001/02:149.

⁽⁶⁰⁾ See the Commission's Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71, 11.3.2000, p. 7.

⁽⁶¹⁾ These conditions are: (i) the borrower may not be in financial difficulty; (ii) the borrower must, in principle, be able to obtain a loan on market conditions from the financial markets without any intervention by the State; (iii) the guarantee should be linked to a specific financial transaction, be for a maximum amount, not cover more than 80 % of the outstanding loan or other financial obligation (except for bonds and similar instruments) and not be open-ended; and (iv) the market price for the guarantee should be paid (which reflects, among other things, the amount and the duration of the guarantee, the security given by the borrower, the borrower's financial position, the sector of activity and the prospects, the rates of default, and other economic conditions).

(57) In March 2003, prior to the adoption of the proposal, the Government informed the Commission about its intention to put forward a proposal to Parliament about the capital injection. According to the Government, however, this did not constitute a formal notification to the Commission ⁽⁶⁷⁾.

(58) The information available to the Commission indicated, therefore, that prior to the capital injection Teracom's solvency was lower than the requested 25 %. This led the Commission to conclude that the transaction may not have taken place on conditions similar to those on the private credit market (i.e., that a private creditor would have taken the same decision to inject capital into Teracom). The Commission could, therefore, not exclude that the capital injection constituted State aid.

5.4. Reasons for initiating the formal investigation procedure

(59) The information available to the Commission at the time the procedure was initiated suggested that it could not be excluded that all three alleged State aid measures met the requirements of Article 87(1) and, therefore, constituted State aid.

(60) In addition, at the time of the opening Decision, the Commission had no information suggesting that the aid would be compatible with the EC Treaty. None of the derogations provided for in Articles 87(2), 87(3) or 86(2) seemed to be applicable and it was problematic that Sweden appeared to have disregarded the principle of technological neutrality during the digitalisation process.

(61) The Commission therefore initiated the formal investigation procedure to provide Sweden and interested parties the opportunity to submit their comments on the Commission's preliminary assessment as set out in the opening Decision.

6. COMMENTS FROM INTERESTED PARTIES

6.1. B2 Bredband AB ('B2')

(62) B2 agrees with all the allegations set out in the opening Decision. According to B2, the advantages granted to Teracom are capable of distorting competition not only for digital satellite but also for digital cable. For broadband distribution, multicast television will become a major product in the next few years ⁽⁶⁸⁾.

6.2. ECCA

(63) ECCA has no specific comments on the information presented in the opening Decision, but welcomes the Commission's examination of digital terrestrial services in Sweden. This is particularly because several Member States are intervening to finance new infrastructure and,

especially, digital terrestrial networks and services. According to ECCA, these policies already influence customers' behaviour vis-à-vis cable services.

(64) In addition, according to ECCA, the procedures and conditions set for these platforms by national and regional authorities are discriminatory in nature and have the effect of putting other platform operators at a competitive disadvantage. According to ECCA, capital investors are reluctant to invest in infrastructure if it is likely that public authorities will promote the establishment of a competing infrastructure capable of offering the same types of services at subsidised prices. This could have very negative effects on the availability of financing needed to consolidate this branch of the cable industry, upgrade networks and introduce new services ⁽⁶⁹⁾.

6.3. ESOA

(65) According to ESOA, the Swedish authorities grant unlawful State aid to Teracom. The effect of the aid is to favour the terrestrial technological solution over others such as cable and satellite solutions, which distorts competition because State aid enables Teracom to reduce costs and undercut prices set by normal market conditions.

(66) According to ESOA, the operation of satellites for digital television transmission requires significant investment. Nevertheless, in an undistorted market, satellites are strong competitors to terrestrial (including cable) digital solutions. Given that the transition from analogue to digital transmission is ongoing throughout the European Union, ESOA is concerned that interventions similar to those seen in Sweden may be occurring in other Member States as well ⁽⁷⁰⁾.

6.4. NSAB

(67) NSAB stands by the arguments advanced in its complaint and supplementary submissions and agrees with the allegations as set out in the opening Decision. It doubts, however, whether the figures communicated by the Swedish authorities in response to the opening Decision correspond to all payments made by SVT to Teracom and whether they give a fair and accurate picture of the amounts actually being paid. It therefore urges the Commission to demand further information and explanations from the Government.

(68) With regard to the Government's arguments in favour of digital terrestrial broadcasting as against digital satellite broadcasting, NSAB notes that in some neighbouring countries there are only relatively few households that cannot receive satellite broadcasts. In addition, it points out that in countries such as, for example, Finland 10 % of households within adequate digital terrestrial network

⁽⁶⁷⁾ See the 29 October response, p. 50.

⁽⁶⁸⁾ See footnote 4 above.

⁽⁶⁹⁾ See footnote 5 above.

⁽⁷⁰⁾ See footnote 6 above.

coverage experience reception problems. It states further that, according to the BBC, 25 % of households in the United Kingdom cannot watch digital terrestrial television owing to poor aerial installations.

- (69) Finally, NSAB questions the neutrality of the report by Öhrlings PriceWaterhouseCoopers (PWC) concerning the capital injection to the Teracom Group. It also claims that the report based its business forecast for Teracom on some over-optimistic assumptions, for example with respect to the expected number of subscribers ⁽⁷¹⁾.

6.5. Telenor Broadcast

- (70) Telenor Broadcast does not take a position on whether the alleged measures in the present case constitute State aid. However, it stresses that aid provided to the digital terrestrial platform will put other platform operators at a competitive disadvantage; both in the distribution markets, where television services are offered to consumers, and in the transmission markets, where infrastructure transmission capacity is offered to broadcasters.
- (71) Teracom (including Boxer) is active as a provider of both transmission services to broadcasters and television services to consumers, and will be able to use the State aid to subsidise both activities. In the downstream television distribution market this can be done either by offering the television services at lower prices or offering more set-top-boxes than would otherwise be economically feasible without the State aid. According to Telenor Broadcast, this is of critical importance at this stage of the development towards a single market for all platforms.

6.6. TeliaSonera

- (73) TeliaSonera does not take a position on whether the alleged measures in the present case are compatible with the EC Treaty. However, it emphasises the importance of competitive neutrality among various technical infrastructures in the television distribution marketplace ⁽⁷³⁾.

⁽⁷¹⁾ See footnote 7 above.

⁽⁷²⁾ See footnote 8 above.

⁽⁷³⁾ See footnote 9 above.

6.7. UGC

- (74) UGC does not take a position on whether the alleged measures in the present case are compatible with the EC Treaty. At the same time, however, it strongly supports the Commission's investigation. It further maintains that State-sponsored competition can only serve to distort the market. In its view, there can be no justification for State involvement in the development of digital terrestrial television based on a public interest argument. Should it be in the public interest to provide digital television, there are many alternative infrastructures that can do so ⁽⁷⁴⁾.

6.8. Viasat

- (75) Viasat welcomes the Commission's investigation and takes the view that it is clear from the opening Decision that Teracom (including Boxer) has received considerable funding from State resources which constitute unlawful State aid. It fully agrees with the conclusions in the opening Decision. According to Viasat, satellite transmission is a much more cost-efficient distribution platform and the choice by the Government to favour the terrestrial network will lead to a reduction of consumer choice and lower quality of available products.
- (76) Viasat adds that Boxer has also benefited from additional State aid not only through Teracom but also directly from SVT. Unlike satellite broadcast distributors (including Viasat), Boxer does not have to pay a fee for the distribution rights to SVT's programmes ⁽⁷⁵⁾.

7. COMMENTS FROM SWEDEN

- (77) In its 29 October response, the Government takes the view that there has been no aid to Teracom in contravention of Sweden's obligations under the EC Treaty. It maintains in particular that the opening Decision relied on incomplete and often inaccurate information.

7.1. SVT's allegedly excessive transmission fee payments to Teracom

- (78) According to the Government, SVT has not made and will not make any excessive payments to Teracom in return for transmission services on the analogue and the digital terrestrial network. In addition, the Government claims that the Commission's assessment in the opening Decision was based on inaccurate figures.

⁽⁷⁴⁾ See footnote 10 above.

⁽⁷⁵⁾ See footnote 11 above.

- (79) First, in the opening Decision, the Commission looks at Teracom's costs in the digital terrestrial network (column 3 of Table 2) excluding VAT although all other figures in the same table included VAT. According to the Government, all figures should exclude VAT to make them comparable⁽⁷⁶⁾. Table 3 below presents the relevant table from the opening Decision corrected for VAT. According to these corrected figures, Teracom's accumulated profits will, by 2013, be significantly lower (SEK 23,7 million) than the amount indicated in the opening Decision (SEK 509,61 million).

Table 3:

SVT's transmission fee payments from SVT 2002 to 2013**(excluding VAT)**

Year	Payments from SVT to Teracom excl. VAT (1)	Teracom's costs of transmitting SVT in analogue excl. VAT (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT excl. VAT (4 = 2+3)	Teracom's predicted annual profits/losses (5 = 4 — 1)	Teracom's predicted accumulated profits/losses (6)
2002	388,0	384	160	544	- 156,0	- 156,0
2003	418,4	384	160	544	- 125,6	- 281,6
2004	445,2	384	160	544	- 98,8	- 380,4
2005	473,4	384	160	544	- 70,6	- 451,0
2006	205,0	192	160	352	- 147,1	- 598,1
2007	219,0	96	160	256	- 37,0	- 635,0
2008	233,3		160	160	73,3	- 561,8
2009	247,7		160	160	87,7	- 474,1
2010	262,2		160	160	102,2	- 371,9
2011	276,9		160	160	116,9	- 255,0
2012	291,8		160	160	131,8	- 123,2
2013	306,8		160	160	146,8	23,7

Source: The 29 October response, p. 25. Note, however, that the table still includes a number of errors which are explained and corrected in below.

- (80) Second, the Government maintains that the Commission's opening Decision is based on estimates of Teracom's costs of transmitting SVT made as early as 2001 (see columns 3 and 4 in Table 4 and Table 3 respectively). According to the Government, Teracom's actual costs have been significantly different from these estimates (see Table 4 below) and to support its statement, the Government submitted accurate figures. The difference is most notable for Teracom's costs in the digital terrestrial network where the costs were originally estimated at SEK 160 million per year. This estimate was based on a coverage rate of the digital network of 98 % and on a complete functionality of the network as of 2002 including, for example, a regional breakdown ('regional nedbrytbarhet') of transmission signals and security enhancing measures ('säkerhetsåtgärder')⁽⁷⁷⁾. It was, however, only during the course of 2005 that the digital terrestrial network was rolled out to this degree and that Teracom's costs of transmitting SVT via the digital platform started to correspond to the original estimates (see Table 4 below). The submitted figures which reflect Teracom's actual costs also address the concern the Commission expressed in the opening Decision that the costs of transmitting SVT were, in the initial phase of the roll-out, lower than SEK 160 million⁽⁷⁸⁾.

⁽⁷⁶⁾ In particular, the Government has pointed out that the transmission fees which Teracom charges SVT include VAT and that the amounts which SVT receives from the distribution account allow for this. Teracom does not benefit from the part of the payment earmarked for VAT because it has to pay this money to the tax authority; see the 20 March response, question 2.

⁽⁷⁷⁾ See the 29 October response, p. 34.

⁽⁷⁸⁾ See the opening Decision, paragraph 36.

- (81) Third, the Government pointed out that SVT's transmission fee payments to Teracom as presented in the opening Decision (column 1 of Table 2 and Table 3 above) do not correspond to SVT's actual payments but refer to the funding that was intended to be transferred from the distribution account to SVT. These funds were at SVT's disposal to pay for terrestrial transmission, but there was no obligation for SVT to use these funds solely for that purpose ⁽⁷⁹⁾. The Government also pointed out to the Commission that, contrary to the original assumption, SVT is scheduled to receive SEK 384 million (excluding VAT) in 2006 from the distribution account instead of SEK 205 million (excluding VAT) as estimated in the opening Decision ⁽⁸⁰⁾.
- (82) Table 4 below presents SVT's actual payments to Teracom (columns 1a to 1c) and Teracom's actual costs of transmitting SVT (columns 2 to 4) for the period from 1999 to 2006 ⁽⁸¹⁾. In addition to the timeframe covered in the opening Decision, the table includes the years 1999, 2000 and 2001. According to the Government, these figures allow the Commission to verify that for the entire period since the launch of the digital terrestrial network in April 1999 SVT has not made any excessive payments to Teracom. The information relating to these additional years also addresses the concern raised by the Commission in the opening Decision ⁽⁸²⁾, namely that SVT received extra funds during the initial phase of the roll-out of the digital terrestrial network (from 1997 until 2001) i.e., before the distribution account was created. The Government made clear that SVT received, during this period, in total SEK 300,3 million for technical renewal ('teknisk förnyelse'). Out of this amount, SEK [...] million was spent on digital terrestrial transmission services (SEK [...] million in 2000 and SEK [...] million in 2001). These figures are included in Table 4 (column 1b) and are considered in the calculation of Teracom's profits and losses in its dealings with SVT.
- (83) Based on Teracom's actual costs and fees, Table 4 illustrates, for every year between 1999 and 2006, Teracom's profits or losses in its dealings with SVT (column 5). It appears that, in every year except 2005, SVT's total payments for analogue and digital transmission to Teracom (column 1c) have been lower than Teracom's total costs of transmitting SVT (column 4). Over the period as a whole, Teracom has in fact made losses on transmitting SVT in the order of SEK 149,5 million.

Table 4:

**SVT's actual transmission fees and Teracom's actual transmission costs from 1999 until 2006
(excluding VAT)**

Year	SVT's analogue fees (1a)	SVT's digital fees (1b)	SVT's total fees (1c)	Teracom's costs of transmitting SVT in ana- logue excl. VAT (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT excl. VAT (4 = 2+3)	Teracom's annual profits/ losses (5 = 4-1c)	Teracom's accumula- ted profits/ losses (6)
1999	[...]	[...]	[...]	[...]	[...]	[...]	- 10,3	- 10,3
2000	[...]	[...]	[...]	[...]	[...]	[...]	- 31,8	- 42,1
2001	[...]	[...]	[...]	[...]	[...]	[...]	- 24,1	- 66,2
2002	[...]	[...]	[...]	[...]	[...]	[...]	- 18,9	- 85,1
2003	[...]	[...]	[...]	[...]	[...]	[...]	- 3,6	- 88,7
2004	[...]*	[...]*	[...]	[...]	[...]	[...]	- 58,2	- 146,9
2005	[...]*	[...]*	[...]	[...]	[...]	[...]	17,5	- 129,4
2006	[...]*	[...]*	[...]	[...]	[...]	[...]	- 20,1	- 149,5

Source: Annex 6 to the 20 March response. For figures with an asterisk, see explanation in footnote 81.

⁽⁷⁹⁾ See the 29 October response, section 3.6.2., p. 32.

⁽⁸⁰⁾ See the 20 March response, Annex 7.

⁽⁸¹⁾ [...]

⁽⁸²⁾ See the opening Decision, paragraph 36.

(84) The Government has provided the Commission with explanations regarding the losses Teracom made on SVT transmissions during the period 1999 to 2006. First, according to the Government, Teracom's pricing in the digital terrestrial network was based on the actual number of viewers (the so-called penetration rate), which, during the initial phase of the roll-out, was below expectations. Second, to give broadcasters an incentive to start digital terrestrial transmissions, Teracom was initially not able to charge transmission fees which would fully cover its costs. Finally, Teracom's costs as presented include imputed costs such as the owner's required rate of return. Such imputed costs are not considered losses under accountancy rules ⁽⁸³⁾.

(85) The Government has also submitted Teracom's actual prices and costs of transmitting broadcasters other than SVT in the analogue and the digital terrestrial network ⁽⁸⁴⁾, in particular the costs and prices of Sweden's main commercial broadcaster, TV4, which is also the only other broadcaster present in the analogue terrestrial network. To the extent that the data indicate that SVT has paid higher transmission fees than TV4, these price differences can, according to the Government, be explained by the special requirements for SVT's transmissions, for example, SVT's higher coverage rate and greater capacity utilisation, the regional breakdown of SVT's transmission signals and security enhancing measures ⁽⁸⁵⁾.

7.2. The alleged credit guarantee issued in favour of Teracom

(86) According to the Government, a credit guarantee was never issued. The Government concedes, however, that in February 2002 Parliament adopted a Decision authorizing the Government to issue a credit guarantee ⁽⁸⁶⁾.

(87) As indicated by the Government, it is important to note that, according to the Swedish Constitution, only the Government, but not Parliament, can make financial commitments towards third parties (such as Teracom) with respect to funds belonging to the State budget. However, the Government cannot make such commitments without Parliament's prior approval. Also, in the case at hand, the Government had requested that the National Debt Office be charged with the task of issuing the guarantee ⁽⁸⁷⁾.

(88) According to the Government, once parliamentary approval was given, the Government, in June 2002, by decision, asked the National Debt Office to issue a credit guarantee in favour of Teracom and decide upon a fee to charge Teracom for the risks involved and the

administrative costs. The Government emphasises, however, that this decision specified that the National Debt Office had to consider the EC rules on State aid to see whether a credit guarantee would be compatible with those rules, and, if it was not, to gather the information necessary for a notification under Article 88(3) of the Treaty ⁽⁸⁸⁾. In addition, the National Debt Office had to make a risk assessment of any State guarantee. Importantly, prior to a decision by the National Debt Office concerning the amount of the credit guarantee, the time period and the amount of the fee and prior to establishing that the credit guarantee would not conflict with EC State aid rules, the credit guarantee could not be issued ⁽⁸⁹⁾.

(89) The National Debt Office, which based itself partly on a preliminary credit assessment carried out between July and September 2002 by Standard & Poor's ⁽⁹⁰⁾, concluded that the financial risks involved in issuing a credit guarantee were too significant. If any credit guarantee were to be issued, a very high fee would have to be charged to cover the risks involved. In addition, the National Debt Office found that it could not be excluded that a State guarantee would constitute State aid ⁽⁹¹⁾. According to the Government, after the National Debt Office had reported its view on 1 October 2002, no actions were taken by the Government, the National Debt Office or by Teracom.

7.3. Capital injection

(90) According to the Government, the conditional shareholder contribution in the form of a capital injection does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(91) The Government notes first that the opening Decision is based on partly inaccurate information, which makes Teracom's economic and financial situation look worse than in reality. Teracom's solvency was not as low as indicated in the opening Decision and Teracom had made losses only in 2001 and 2002 and not in 2003 ⁽⁹²⁾.

(92) According to the Government, the Commission, in the opening Decision, made a wrong assessment of Teracom's economic and financial situation at the time of the capital injection. The Government emphasises that at the end of June 2003, when it injected capital into Teracom, the company's financial and economic situation had changed considerably compared with the time period which provided the basis for the National Debt Office's negative opinion on the proposal to grant a State guarantee to Teracom ⁽⁹³⁾.

⁽⁸⁸⁾ See Government Decision Ku2002/483/Me dated 27 June 2002.

⁽⁸⁹⁾ See Government Decision Ku2002/483/Me dated 27 June 2002, read in conjunction with § 8, 9, 11 and 12 of the Guarantee Decree (1997:1006).

⁽⁹⁰⁾ Standard & Poor's is a global company providing independent credit ratings, indices, risk evaluations, investment research, data, and valuations. The preliminary credit assessment was based mainly on the financial indicators of the company and not on a detailed market analysis.

⁽⁹¹⁾ See the National Debt Office's report DNR 2002/000170 dated 1 October 2002.

⁽⁹²⁾ In fact, since its creation in 1992, Teracom has only made losses in these two years — 2001 and 2002. See Teracom's Annual Reports but also the 29 October response, page 40.

⁽⁹³⁾ See the 29 October response, pp. 38-40.

⁽⁸³⁾ See the 25 April response, question 4.

⁽⁸⁴⁾ See the 20 March response, Annex 6.

⁽⁸⁵⁾ See the 20 March response, questions 7 and 8. For each of the special requirements, the Government also quantified the effect on Teracom's prices.

⁽⁸⁶⁾ See Parliament's Decision 2001/02:KrU07; Rskr. 2001/02:149.

⁽⁸⁷⁾ See Regeringsformen (1974:152), chapter 9 § 10; the Guarantee Decree (1997:1006) and the Law regarding the State's budget (1996:1059). See also Government Decision Ku2002/483/Me dated 27 June 2002.

(93) As indicated by the Government, over the course of 2002 Teracom had taken various steps to remedy its financial and economic problems. It sold off three of its subsidiaries, reduced costs by laying off a significant part of its workforce (20 %), merged subsidiaries, shut down parts of its operations and concentrated its business on fewer locations and reduced investments compared with 2000 and 2001. In addition, the market for digital terrestrial television was developing favourably, with growing demand for digital television subscriptions, in particular during the autumn of 2002. For Teracom, this led to a significant increase in annual subscription sales from approximately 100 000 at the end of 2001 to approximately 140 000 at the end of 2002. These cost-cutting measures and the sales increase during the second half of 2002 significantly improved Teracom's financial and economic situation and, in fact, the company was already making profits in the first three months of 2003 — before the Government made its proposal to Parliament ⁽⁹⁴⁾.

(94) The Government explains that, when the National Debt Office communicated its negative opinion to it, the Government decided to conduct a more in-depth analysis of Teracom's economic and financial position ⁽⁹⁵⁾ — instead of the snapshot type of analysis which the National Debt Office had carried out.

(95) Similarly to what a private shareholder would have done, the Government assessed Teracom's short- and long-term economic and financial position based on Teracom's business plans for the years 2003 to 2005, on its financial forecasts for the period 2003 to 2010 and on comparisons with other companies and other shareholders in the same and similar industries. It concluded that a conditional shareholder contribution in the form of a capital injection amounting to SEK 500 million would improve Teracom's solvency and allow Teracom to subsequently generate enough profits to pay back the injection within a reasonable time. The Government maintains that, in this situation, the shareholder capital injection did not constitute State aid. According to the Government, a private investor would, in the same situation, have been prepared to contribute capital because Teracom's long-term financial forecasts were positive ⁽⁹⁶⁾.

(96) The Government adds that, in this context and contrary to what it should have done, the Commission did not take into account all relevant factors in examining whether the capital injection could be expected to generate a reasonable return. The Commission limited its analysis to Teracom's past losses and its solvency ratio. In the Government's view, the Commission was also wrong to compare the State with an outside creditor but should instead have compared it with a private shareholder, which can be presumed to take a long-term approach to its investment. The State owns

100 % of Teracom, which also implies a longer term interest than in the case of a minority holding ⁽⁹⁷⁾.

(97) To further support its arguments, the Government submitted a report by PWC, an independent auditing consultancy, which was requested by the Government to review the Government's decision concerning the capital injection. The report assesses Teracom's economic and financial situation at the time of the capital injection and based on information available at the time of the Government's decision. The report concludes that the Government had sufficient information to decide on the injection and that Teracom's long-term profitability was at a level which would have satisfied a private investor ⁽⁹⁸⁾.

(98) Finally, the Government is of the opinion that the Commission did not sufficiently take into account the broader context of the capital injection. It should, for example, have taken into account that the injection was necessary to secure the investments already made which, in the long term, were expected to be profitable ⁽⁹⁹⁾.

8. ASSESSMENT OF THE ALLEGED AID MEASURES

(99) For a measure to be characterised as State aid within the meaning of Article 87(1), four conditions must be fulfilled: (1) there must be a transfer of State resources; (2) the measure in question must involve an economic advantage to the recipient; (3) the measure must distort, or threaten to distort, competition; and (4) the measure must affect trade between Member States.

8.1 SVT's transmission fee payments to Teracom

8.1.1. Economic advantage

(100) To determine whether the transmission fees which SVT pays to Teracom for terrestrial transmission confer an economic advantage on Teracom, it needs to be examined whether SVT has paid or is, in the future, due to pay amounts which exceed what Teracom could reasonably expect to obtain from customers under normal market conditions.

(101) First, the Commission has investigated whether, since the launch of digital terrestrial television in Sweden in 1999 up to the year 2006, SVT has paid Teracom more than Teracom's costs of transmitting SVT. While the calculations in the opening Decision were to a large extent based only on estimates of SVT's payments and Teracom's costs, the Commission has in the present Decision based its calculations on actual figures (see Table 4 above). These figures demonstrate that, during the period from 1999 to 2006, SVT has not made excessive payments to Teracom.

⁽⁹⁴⁾ See the 29 October response, pp. 38 and 39, and Teracom's Annual Reports 2002 and 2003.

⁽⁹⁵⁾ See the 29 October response, p. 39.

⁽⁹⁶⁾ See the 29 October response, pp. 39, 40 and 51-56.

⁽⁹⁷⁾ See the 29 October response, pp. 51 and 53.

⁽⁹⁸⁾ See the 29 October response, Annex 33.

⁽⁹⁹⁾ See the 29 October response, pp. 55 and 56.

In fact, seen over the entire period, SVT's payments have been lower than Teracom's costs of transmitting SVT, resulting in losses on transmission amounting to approximately SEK 149,5 million. Because this figure (SEK 149,5 million) includes payments for both analogue and digital transmissions, this also indicates that there has been no cross-subsidisation in the sense that Teracom has charged excessive fees for analogue transmissions in order to use the money for its digital operations.

(102) Second, the Commission has verified whether Teracom has charged higher transmission fees to SVT than to commercial broadcasters and, in this way, extracted an economic advantage from SVT. In this respect, the Commission notes that Teracom's pricing is subject to the principle of equal treatment, i.e., Teracom applies the same terms and conditions to all its customers⁽¹⁰⁰⁾. More particularly, the Commission notes that Teracom's pricing for analogue transmissions has been cost-based ever since 1992 and that its prices for digital transmissions are determined by the so-called penetration-based pricing model in which the parameters are the same for all of Teracom's customers⁽¹⁰¹⁾. The Commission has also compared the actual prices which Teracom has charged to SVT and to other broadcasters in the digital terrestrial network. While Teracom has charged a higher price to SVT than to, for example, the commercial broadcaster TV4, this price difference is due to additional services which SVT requires from Teracom⁽¹⁰²⁾. The Commission, therefore, has not found any indications that SVT is subject to less favourable (or more favourable) terms and conditions than other broadcasters or that it is charged disproportionately high transmission fees.

(103) Third, and for the sake of completeness, the Commission has investigated whether, in the future, SVT will have to pay Teracom more than a normal market price for transmission. One of the concerns raised in the opening Decision was whether, between 2008 and 2013, SVT would make excessive transmission payments to Teracom which, by 2013, would lead to accumulated profits in favour of Teracom of about SEK 510 million. However, the Commission notes that Teracom's pricing is currently and for the foreseeable future subject to the above-mentioned pricing principles which will prevent it from charging SVT excessive transmission fees⁽¹⁰³⁾. Moreover, since the decisions of the Swedish Post and Telecommunications Regulator in 2005, Teracom is subject to ex-ante regulation in the wholesale markets for analogue and for digital terrestrial transmissions⁽¹⁰⁴⁾. These decisions should, in principle, eliminate any risk that Teracom might charge SVT excessive transmission fees. Finally, as has been

explained by the Government (see paragraph 40 above) and contrary to the concern raised by the Commission in the opening Decision, SVT is not obliged to use all the funds it receives from the distribution account to pay Teracom for transmission. SVT negotiates the transmission price independently with Teracom, and if it ends up spending less on transmission than forecast it is free to use these funds for its programme activities⁽¹⁰⁵⁾.

(104) On the basis of the above considerations, the Commission takes the position that, although SVT is obliged to transmit via the analogue and digital terrestrial network and currently has no other alternative than to use Teracom for its services, Teracom is restricted in its capacity to take advantage of SVT as a captive customer. In this context, the Commission also notes that, because commercial broadcasters find it worthwhile being present in the digital terrestrial network and paying Teracom's respective transmission fees, it is reasonable that SVT does so too.

(105) As regards the allegation that Boxer received aid because SVT does not pay for distribution⁽¹⁰⁶⁾, the Commission would point out that commercial agreements between broadcasters and distributors can take various forms. In view of the fact that the transaction between these two parties involves an exchange of transmission services versus availability of content which is valuable to both parties, the precise terms and conditions can vary considerably depending, for example, on the platforms and operators involved.

(106) On the basis of the foregoing, the Commission concludes that the transmission fees paid by SVT to Teracom do not confer an economic advantage on Teracom and thus do not constitute State aid within the meaning of Article 87(1).

8.2. The State guarantee

(107) According to the Notice on Guarantees, a guarantee generally falls within the scope of Article 87(1) if trade between Member States is affected and no market premium is paid. According to section 2 of the Notice on Guarantees, if a State guarantee has been issued, even if no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1). This is because aid is considered to have been granted at the

⁽¹⁰⁰⁾ See paragraph 41 above.

⁽¹⁰¹⁾ See paragraphs 42 and 43 above.

⁽¹⁰²⁾ See paragraph 85 above.

⁽¹⁰³⁾ See paragraph 102 above.

⁽¹⁰⁴⁾ See paragraph 12 above.

⁽¹⁰⁵⁾ See paragraph 41 above.

⁽¹⁰⁶⁾ See paragraph 76 above.

moment the guarantee is granted, not at the moment at which it is invoked or the moment at which payments are made under the terms of the guarantee.

The opening Decision, therefore, pictured Teracom's financial situation as slightly worse than in reality.

(108) However, the Commission notes that, according to settled case law, e.g., *Austria v Commission*, there has to be an unconditional and legally binding promise to grant the aid in question before aid can be established to exist ⁽¹⁰⁷⁾.

(109) In the present case, the Commission takes the view that the Government's decision to request the National Debt Office to issue a credit guarantee was a conditional decision and did not confer on Teracom an unconditional right to request that a credit guarantee be issued to it. The Commission notes that, under Swedish law, when authorities subject to governmental oversight issue a credit guarantee, its issuance is always conditional upon the findings of the National Debt Office regarding, among other things, solvency and honesty. This feature of the Swedish system and laws is a matter of public knowledge. Also, it is clear that the Government was aware of its obligations under Community law because it stated that the National Debt Office had to consider the credit guarantee under the State aid rules and, if necessary, gather the relevant information for a notification to the Commission. Importantly, the Commission notes that no action was taken subsequent to the National Debt Office's report. To sum up, on the basis of the above the Commission therefore finds that it is not possible to conclude that a credit guarantee was ever issued and that an unconditional and legally binding promise to grant the aid was made to Teracom. Consequently, no economic advantage was granted to Teracom.

8.3. The capital injection

(110) Where a State provides finance to a company in circumstances that would not be acceptable to an investor operating under normal market economy conditions, it confers an economic advantage on the beneficiary ⁽¹⁰⁸⁾. To determine whether the conditional shareholder contribution in the form of a capital injection granted to Teracom at the end of June 2003 conferred an economic advantage on Teracom, it needs to be examined whether this capital injection complied with the market economy investor principle.

(111) The Commission concedes that the information concerning Teracom's financial situation as set out in the opening Decision was not entirely accurate. As demonstrated by the Government, Teracom's solvency was not as low as indicated in the opening Decision and Teracom had made losses for two years and not for three consecutive years.

(112) Having analysed the information submitted by the Government in its 29 October response as well as in subsequent responses, including Teracom's short- and long-term business plans, the Commission considers that the Government's assessment, in 2003, of Teracom's then current and future economic and financial situation was realistic, and that the prospects of a satisfactory return on the capital injection were credible.

(113) As described in detail in Section 7.3 above, the Government made an assessment of Teracom's economic and financial position based on the company's business plans for the years 2003 to 2005, its financial forecasts for the period 2003 to 2010 and comparisons with other companies and other shareholders in the same and similar industries. It concluded that a conditional shareholder contribution amounting to SEK 500 million would improve Teracom's solvency and allow the company to subsequently generate enough profits to pay back the shareholder contribution within a reasonable time ⁽¹⁰⁹⁾. The forecast for 2003 indicated that Teracom's loss and profit accounts would be positive. In this context, the Commission notes that Teracom was already making profits in the first three months of 2003 — before the Government made its proposal to Parliament.

(114) Finally, the Commission has reviewed the report made by PWC on behalf of the Government, which explains the data which formed the basis for the Government's decision. In the Commission's view, these data provided a credible basis for an investment decision. In particular, the report indicates that, after losses in 2001 and 2002, Teracom was close to break-even at the time the capital injection was made. Especially, Teracom's economic and financial situation had improved considerably compared with the time when the National Debt Office gave a negative opinion on issuing a State credit guarantee ⁽¹¹⁰⁾.

(115) The report demonstrates that the Government's choice is compatible with the type of analysis that a private investor would have carried out, which consists in assessing the expected additional profits from the investment and whether these profits are sufficient to compensate for the risks of the investment. The report calculates the expected internal rate of return of the investment by determining the incremental cash flow it generates. This is done by taking the difference between two alternative scenarios — with or without the shareholder contribution. The internal rate of return of the investment was expected to reach approximately 24 %, a level that would exceed the demands of

⁽¹⁰⁷⁾Case C-99/98 *Austria v Commission* [2001] ECR I-1101.

⁽¹⁰⁸⁾See the Commission communication to the Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307, 13.11.1993, p. 3.

⁽¹⁰⁹⁾A conditional shareholder contribution has to be paid back once the company is demonstrating free own capital in the balance sheet.

⁽¹¹⁰⁾See paragraphs 93 and 94.

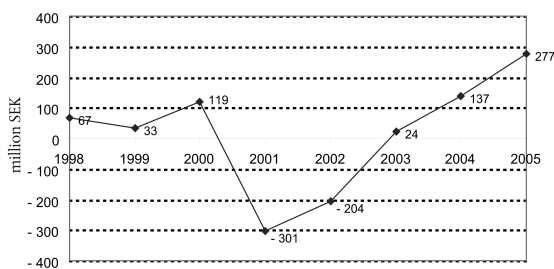
private market investors in this sector (the comparable industry rate of return on equity is 8,6 %) and compensate also for the financial risk of the company ⁽¹¹¹⁾.

(116) Although it is impossible to establish with certainty *ex post* what would have been the evolution of revenues in the absence of the shareholder contribution, the Commission notes that Teracom's return on equity grew from 3 % in 2003 to 11 % in 2004 and 19 % in 2005 ⁽¹¹²⁾.

(117) Figure 3 below illustrates Teracom's return to profitability in 2003, 2004 and 2005. The company made its first repayment of the conditional shareholder contribution in 2006 ⁽¹¹³⁾.

Figure 3:

Development of Teracom's actual profits from 1998 to 2005



Source: Teracom's Annual Reports 1998 to 2005

(118) The Commission concludes, therefore, that the conditional shareholder contribution by way of a capital injection was made in circumstances that would be acceptable to a private investor operating under normal market economy conditions.

(119) However, in this particular case the question arises whether the fact that Teracom maintained its position as exclusive terrestrial network operator notwithstanding the entry into force in October 2002 of the Directive on competition in the markets for electronic communications networks and services (the 'Competition Directive') ⁽¹¹⁴⁾, which prohibits the maintenance of exclusive rights in the relevant sector, has an impact on the present State aid assessment ⁽¹¹⁵⁾.

⁽¹¹¹⁾ See PWC's report *Bedömning av kapitaltillskott till Teracom AB enligt den marknadsekonomiska investeringsprincipen*, Annex 33 to the 29 October response.

⁽¹¹²⁾ See Teracom's Annual Reports 2003 to 2005.

⁽¹¹³⁾ See Teracom's Interim Report for the second quarter of 2006. The repayment amounted to SEK 150 million, i.e., approximately one third of the conditional shareholder contribution.

⁽¹¹⁴⁾ See reference in footnote 15.

⁽¹¹⁵⁾ According to the Directive, Sweden had to abolish all monopoly rights for broadcasting transmission services by 24 July 2003.

(120) When, in examining a potential aid measure, the Commission finds that another provision of the EC Treaty has been breached, it must be assessed whether aspects of that aid contravene specific provisions of the EC Treaty other than Articles 87 and 88 and are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ⁽¹¹⁶⁾. In such a case, it is only if the breach of that other EC Treaty provision has a distortive effect which is demonstrable and additional to that inherent in the potential aid measure that it can determine the Commission's assessment of the measure ⁽¹¹⁷⁾.

(121) In the case at hand, the Commission notes that the infringement of the Competition Directive does not form part of the measure under assessment, but results from a course of action of the Government that is separate and distinct from the decision to grant the shareholder contribution.

(122) Moreover, although it cannot be excluded that the exclusive right may have influenced the profitability of Teracom and, therefore, of the shareholder contribution to a certain extent, this cannot be established with certainty since Teracom is subject to price regulation — as explained above in paragraphs 42, 43 and 102 — and cannot freely exercise its market power. In the present case, it can, therefore, not be demonstrated that it is primarily because of the exclusive right that the shareholder contribution was a profitable investment. It can therefore also not be determined that, without the exclusive right, the expected return on the shareholder contribution would not have been acceptable to a private investor.

(123) Therefore, in the absence of a clearly established causal link between Sweden's breach of the Competition Directive and the expected profitability of the shareholder contribution, the Commission is not in a position to invalidate Sweden's claim that the MEIP test has been met in the present case. This, however, does not prejudice the position which the Commission may take in future cases in the light of their facts.

(124) To conclude, in the present case the shareholder contribution and the breach of the Competition Directive can and should be assessed separately in accordance with the rules and procedures applicable to the two measures. It should

⁽¹¹⁶⁾ See, e.g., Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* [1977] ECR 557; Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203.

⁽¹¹⁷⁾ See, e.g., Case 47/69 *France v Commission* [1970] ECR 487 and Case C-204/97 *Portugal v Commission* [2001] ECR I-3175.

be noted that, with regard to the Competition Directive, the Commission has referred Sweden to the European Court of Justice under Article 226 of the EC Treaty.

HAS ADOPTED THIS DECISION:

Article 1

The measures investigated by the Commission and described in this Decision relating to the introduction of digital terrestrial television in Sweden do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 20 December 2006.

For the Commission

Neelie KROES

Member of the Commission

(125) As regards the shareholder contribution, however, the Commission concludes that the existence of State aid within the meaning of Article 87(1) has not been established.

9. CONCLUSION

(126) On the basis of the foregoing, the Commission finds that there are no indications that the investigated measures conferred an economic advantage upon Teracom or any of its subsidiaries. The Commission therefore concludes that the measures which Sweden has implemented do not constitute aid within the meaning of Article 87(1) of the Treaty,
