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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 24 October 2011

on State Aid SA 32600 (2011/C) — France — Restructuring aid to SeaFrance SA granted by the SNCF*(notified under document C(2011) 7808)***(Only the French version is authentic)****(Text with EEA relevance)**

(2012/397/EU)

THE EUROPEAN COMMISSION,

information, which was provided by the French authorities on 4 May 2011.

Having regard to the Treaty on the Functioning of the European Union (hereinafter: 'TFEU'), and in particular the first subparagraph of Article 108(2) thereof,

- (3) On 6 April 2011, a competitor of SeaFrance, P&O Ferries (hereinafter: 'P&O'), filed a complaint with the Commission against the restructuring aid.

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

- (4) By letter dated 22 June 2011, the Commission notified the French Republic of its decision to initiate the procedure (hereinafter: 'the decision to initiate the procedure') provided for under Article 108(2) TFEU.

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

- (5) The Commission invited interested parties to submit their comments on the aid in question ⁽³⁾. A detailed description of the comments received by it is given in Section V.

Whereas:

I. PROCEDURE

1.1. General procedural context

- (1) By decision of 18 August 2010 ⁽²⁾ the Commission approved rescue aid (hereinafter: 'rescue aid') in favour of SeaFrance SA (hereinafter: 'SeaFrance'), which France has since implemented. This aid consisted of a loan for a maximum amount of EUR [40-70] million granted by the SNCF to SeaFrance.

- (6) The French authorities presented comments on 14 July 2011 in response to the decision to initiate the procedure, on 22 July 2011 following the complaint by P&O, and on 19 August 2011 in response to the comments by interested third parties on the decision to initiate the procedure.

- (2) On 18 February 2011, the French authorities notified restructuring aid (hereinafter 'restructuring aid') in favour of SeaFrance amounting to EUR 223 million, accompanied by a restructuring plan. By letter dated 29 March 2011, the Commission requested additional

- (7) On 12 September 2011, the French authorities communicated a modified restructuring plan.

- (8) On 3 October 2011, the French authorities again modified the restructuring plan (hereinafter: 'the modified restructuring plan').

⁽¹⁾ OJ C 208, 14.7.2011, p. 8.

⁽²⁾ OJ C 102, 2.4.2011, p. 2.

⁽³⁾ See footnote 1.

- (9) The Commission and the French authorities met [...]. A large number of telephone calls⁽⁴⁾ and e-mail exchanges also occurred throughout the procedure. On 18 October 2011, the French authorities sent a letter to the Commission, summarising the arguments presented during the previous exchanges.

1.2. National procedural context

- (10) In the context of the procedure for judicial reorganisation of SeaFrance, initiated on 30 June 2010, the Paris Commercial Court is to give a final decision on 25 October 2011 on whether SeaFrance is to go into liquidation or continue its activity⁽⁵⁾.
- (11) Furthermore, since the opening of the judicial reorganisation procedure, third parties have been permitted to submit bids to the official receiver that will enable the company to remain in business through its total or partial sale. According to the information available to the Commission, three takeover bids have been presented: one jointly by the French group Louis Dreyfus Armateurs and the Danish company DFDS A/S (hereinafter: 'DFDS') (referred to jointly hereinafter as 'DFDS-LDA'), one by the trade union Confédération française démocratique du travail (hereinafter: 'the CFDT') and one by the SNC Being Bang Immaterial (hereinafter: 'Being Bang').
- (12) DFDS-LDA submitted a partial bid to take over the assets and staff of SeaFrance for three symbolic euro⁽⁶⁾. It forwarded a copy of the bid to the Commission, for information. Under this bid, DFDS-LDA would retain only 460 employees (i.e. 200 fewer than proposed in the modified restructuring plan) and would retain the freight vessel Nord Pas-de-Calais (in addition to the multi-purpose car ferries Berlioz and Rodin), but not the car ferry Molière (whereas the modified restructuring plan proposes the sale of the freight vessel Nord Pas-de-Calais and does not consider relinquishing the car ferry Molière, but on the contrary early exercise of the purchase option on it).
- (13) According to the press, the CFDT lodged a takeover bid for the company with the Paris Commercial Court on 24 August 2011. The CFDT would like to retain all the present 1 100 employees. To this end, it is considering purchasing the SeaFrance vessels for a symbolic euro and not taking over the company's liabilities. The CFDT plans to obtain a secured loan amounting to at least EUR 50 million from banks and also to apply to regional and local authorities for an additional loan of EUR 80 million to be able to contend with any new crisis.

- (14) Still according to the press, Being Bang also submitted a bid to take over SeaFrance, the terms of which are not known to the Commission. Being Bang communicated a bid to take over SeaFrance to the Commission for information. This document reached the Commission outside the time limit in which interested parties could present their comments, i.e. within 15 days of the date of publication of the decision to initiate the procedure. In accordance with case-law, the Commission did not therefore forward it to the French authorities and will not take it into account for the purposes of the present decision⁽⁷⁾.
- (15) None of the bids referred to in recitals (11) to (14) has been forwarded by France to the Commission. Therefore they will not be the subject of the present decision.

1.3. Subject of the present decision

- (16) The present decision concerns only the capital increase notified by France in respect of SeaFrance, two loans, of EUR 99,8 million and EUR [40-70] million respectively, planned in favour of SeaFrance, and the rescue aid approved by the Commission on 18 August 2010.
- (17) The present decision does not cover either the extension of the cash management agreement granted by the SNCF to SeaFrance (SA.31331 - 2011/NN) or the financing granted to SeaFrance by the SNCF with a view to the exercise of the option on the vessel SeaFrance Berlioz (SA.31252 - 2010/NN). The Commission had also initiated the procedure provided for under Article 108(2) TFEU in respect of these two measures on 22 June 2011.
- (18) In view of the urgency associated with the judicial reorganisation procedure – the Paris Commercial Court being due to give its decision on 25 October 2011 –, the present decision concerns only the restructuring aid, which according to the modified restructuring plan, consists of recapitalisation and two loans, and the rescue aid authorised for a limited period. The investigation procedure therefore remains open with regard to the cash management agreement (SA.31331 - 2011/NN) and the Berlioz financing (SA.31252 - 2010/NN).

II. DESCRIPTION OF THE BENEFICIARY

- (19) SeaFrance is a public limited liability company governed by French law, fully owned by SNCF Participations SA, also a public limited liability company governed by French law, which manages the participating interests of the SNCF group, which in turn is fully owned by the public industrial and commercial entity 'Société nationale des chemins de fer français' (hereinafter: 'SNCF').

⁽⁴⁾ [...].

⁽⁵⁾ Article L. 622-1, first paragraph, of the Commercial Code.

⁽⁶⁾ One euro for the tangible assets (the business, ships, slots, etc.), one euro for the intangible assets (the IT systems) and one euro for the stocks.

⁽⁷⁾ Judgment of 9 September 2009, *Diputación Foral de Álava and Gobierno Vasco v Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, ECR II-3029, points 259 to 272.

- (20) SeaFrance provides maritime transport services (freight and passengers). It operates only on the Calais-Dover route. Its market shares on this route are as follows:

	2007	2010
Passengers (*)	3 720	2 920
Freight (**)	770 550	550 884

(*) In thousand passengers
(**) In thousand units

- (21) At the time of notification of the original restructuring plan in February 2011, the SeaFrance fleet consisted of the following vessels:

- three multi-purpose car ferries ('Ro-pax', roll-on-roll-off passenger ships) carrying passengers and freight: the Rodin, the Molière and the Berlioz;
- one vessel dedicated exclusively to freight transport: the Nord Pas-de-Calais; and
- two vessels not in operation awaiting sale, the Cézanne and the Renoir (these vessels were sold in July 2011).

- (22) In December 2009, SeaFrance had a permanent workforce of 1 550 employees.

- (23) SeaFrance transports freight (transport of lorries) and passengers (foot passengers until the end of 2008, cars, caravans, motorbikes and coaches) and also offers other services, such as on-board sales⁽⁸⁾ and foreign exchange services.

III. DESCRIPTION OF THE AID

- (24) Under the restructuring plan, as originally notified in February 2011 (hereinafter: 'the original restructuring plan'), the restructuring aid was to consist of a SeaFrance capital increase of EUR 223 million, to be underwritten by its sole shareholder, SNCF Participations SA.

- (25) The original restructuring plan was essentially based on:

- a reduction in capacity from 6 to 4 vessels;
- a reorganisation of the crossings schedule leading to a decrease of 29,4 % in the number of crossings per year compared to the original crossings schedule;

⁽⁸⁾ Catering services, take-away sales, mainly of alcoholic beverages, tobacco and perfumes.

- the equivalent of 725 full-time redundancies, i.e. almost half the December 2009 workforce, in order to return to a staff costs/turnover ratio of 26 % in 2013.

- (26) The plan also provided for an improvement in productivity of on-board sales depending on passenger numbers, a change in the catering range, a redefinition of the 'Croisière Bleu marine' package, a review of the car-deck space management, the abandonment of transporting individual foot passengers (effective since the end of 2008) and the axing of tours operating to single destinations. Furthermore, reductions in external charges completed the restructuring: the creation of a purchasing department to rationalise the purchasing procedures and improvement of internal control (launch of a computer-assisted maintenance management project, centralised stock control on land and on board, invitations to tender systematically open to European shipyards for the award of contracts for withdrawal from service of the vessels, reduction in advertising expenditure).

- (27) Under the restructuring plan communicated on 12 September 2011, the SeaFrance capital increase underwritten by the SNCF was to amount to only EUR 166,3 million.

- (28) This capital increase was to be supplemented by two loans of EUR 99,8 million and EUR [40-70] million respectively, the former intended to finance the restructuring proper of SeaFrance and the latter to replace the existing loan concerning the vessel Molière in order to exercise the purchase option for this vessel early (at the beginning of the year [...] instead of the end of the year [...]). Taking up this option early was to enable SeaFrance to acquire, from the end of [...], full ownership of a vessel with an estimated value of EUR [...] million.

- (29) These two loans were to be granted at 6,05 % interest for a period of 12 years with constant capital repayments.

- (30) The French authorities justified this rate of 6,05 %:

- (1) by the application of the Communication from the Commission on the revision of the method for setting the reference and discount rates⁽⁹⁾ (hereinafter: 'the Reference Rates Communication'), taking account of high collateral for a rating of CCC, i.e. a margin of 400 basis points; and

- (2) by the application by the SNCF, at its request, of a method presented as 'traditional'⁽¹⁰⁾, resulting in a rate of between [6,00-6,15] % and [6,00-6,15] %⁽¹¹⁾, based on:

⁽⁹⁾ OJ C 14, 19.1.2008, p. 6.

⁽¹⁰⁾ The application of this method is presented in Annex 5 to the French authorities' comments dated 12 September 2011 modifying the original restructuring plan.

⁽¹¹⁾ EURIBOR 12 months + margin + management costs = 2,18 % + [0-5] % + (between [0,00 -0,20] % and [0,10 - 0,20] %).

- the reference rate EURIBOR 12 months (which on 1 August 2011 stood at 2,18 %);
 - a rating of SeaFrance by the SNCF at BB-, based on financial projections covering the period 2011-2019 consisting of 6 ratios, i.e. the leverage⁽¹²⁾, gearing⁽¹³⁾, equity⁽¹⁴⁾, interest coverage⁽¹⁵⁾, liquidity⁽¹⁶⁾ and profitability⁽¹⁷⁾ ratios, evaluated at between [0-5/20] and [15-20/20]; and
 - the calculation of a margin (in this case [0-5] %) resulting from the combination of the BB- rating and a loss given default rate of between [30-40] % and [40-50] %.
- (31) In addition to the measures already announced in the original restructuring plan and the two above-mentioned loans, other measures were proposed in the restructuring plan communicated on 12 September 2011, i.e.:
- the sale of another vessel, the freight vessel Nord Pas-de-Calais, in addition to the two vessels Cézanne and Renoir sold in July 2011 in accordance with the original restructuring plan;
 - a total reduction in the workforce of 922 employees (instead of 1 550 employees in December 2009, i.e. a – 60 % reduction) bringing the total wage bill/turnover ratio to [20-25] % in 2013 and [20-25] % in 2019;
 - a decrease in the number of crossings per year of 5 830 crossings (i.e. an additional cut of 2 352 crossings compared to the original restructuring plan), which boils down to a 37,6 % reduction compared to the crossings schedule of 2007;
 - economies amounting to EUR [1-5] million (closing of two SeaFrance agencies located in Calais and Paris, closing of the call centres in Belgium and Germany, reduction in marketing expenditure, transfer of all services by the end of 2013 to Calais, abolishing the quality certification of the freight vessel Nord Pas-de-Calais and introduction of automated embarkation checks).
- (32) The restructuring period defined in the modified restructuring plan is spread over 5 years, i.e. from 2011 to 2015, whereas that provided for in the original restructuring plan lasted until 2019.
- (33) Under the modified restructuring plan, the conditions agreed for the two loans granted by the SNCF are now as follows:
- the loans are granted at a rate established at 8,55 %⁽¹⁸⁾; France justifies this rate by referring to the Reference Rates Communication, taking account of normal collateral for a CCC rating. Consequently the margin is established at 650 basis points;
 - the loans are granted for a 12-year term; the loan of EUR 99,7 million may be drawn down in four instalments⁽¹⁹⁾ and that of EUR [40-70] million in one instalment; and
 - each drawing must be repaid in constant annual instalments until repayment in full at the end of 2023.
- The other measures proposed in the restructuring plan communicated on 12 September 2011 (see recital 31) have been included in the modified restructuring plan.
- (34) The estimated financing needs for the implementation of the modified restructuring plan are as follows:
- repayment of the credit line granted by the SNCF to SeaFrance (EUR [40-70] million);
 - repayment of the cash management agreement concluded between the SNCF and SeaFrance (EUR [40-70] million);
 - the future operating cash flows until 2017, net of the job-protection plan, existing investments and borrowings (EUR [...] million);
 - the cost cover for the job-protection plan (EUR [...] million);
 - the payments related to borrowings, including the Rodin, Berlioz and Molière loans (EUR [...] million);
 - the payments related to investments, i.e. primarily the scrubbers (EUR [...] million);
 - the intra-annual working capital requirements (WCR) or requirements related to operating contingencies (EUR [...] million).

⁽¹²⁾ Corresponds to the gross financial debt/EBITDA ratio. The concept of EBITDA (earnings before interest, tax, depreciation and amortisation) is comparable to the concept of gross operating surplus.

⁽¹³⁾ Gross financial debt/equity ratio.

⁽¹⁴⁾ Equity/total assets ratio.

⁽¹⁵⁾ EBITDA/net financial expenses ratio.

⁽¹⁶⁾ Net cash x360/turnover ratio.

⁽¹⁷⁾ EBITDA/turnover ratio.

⁽¹⁸⁾ The collateral for the loan of EUR 99,7 million consists of a first mortgage on the Rodin (according to the French authorities, market value of EUR [...] million, free of any pledge) and a second mortgage on the Berlioz (according to the French authorities, market value of EUR [...] million, [...] and, for the loan of EUR [40-70] million, of a mortgage on the vessel Molière (according to the French authorities, market value estimated at EUR [...] million).

⁽¹⁹⁾ [...]

- (35) The estimated financing needs for the implementation of the modified restructuring plan amount to a total of EUR [...] million (net of proceeds from sales):

(in EUR million)

	2011	2012	2013	2014	2015	2016	2017	Total
Repayment of short-term credit facilities	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Future operating cash flows (from December 2011)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Residual job-protection plan	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Payments related to borrowings	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Payments related to investments	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Intra-annual WCR	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total financing needs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

IV. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (36) The Commission concluded that the notified measure constituted aid within the meaning of Article 107(1) TFEU and launched a detailed investigation in the light of its doubts regarding the prospects for return to long-term viability of the company under the restructuring plan and the level of the company's own contribution. The Commission also wondered about the adequacy of the measures proposed with a view to limiting the distortions of competition caused by the aid.

V. COMMENTS BY INTERESTED PARTIES

5.1. Comments by interested parties opposed to the restructuring aid

5.1.1. Complaint and comments of P&O

- (37) On 29 July 2011, P&O communicated comments on the decision to initiate the procedure, which supplement its complaint.

- (38) The arguments put forward in the complaint and P&O's comments are as follows:

5.1.1.1. Concerning the difficulties of SeaFrance

- (39) According to P&O, SeaFrance's share of the market concerned ⁽²⁰⁾ fell from 21 % in 2006 to 17 % in 2010 and the company's load factor fell from 63 % in 2008 to 56 % and 58 % in 2009 and 2010 respectively, i.e. to a non-viable level.
- (40) P&O points out that, for many years, SeaFrance's losses have been well in excess of its profits (net losses of EUR 120 million over the period), which means that SeaFrance would be unable to offer a return on investment to its shareholders/investors for a very long time.

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Profits/losses of SeaFrance (*)	- 16,8	- 1,7	- 2,8	2,6	- 3,5	3,4	14,8	- 2,4	- 3,0	- 19,0	7,9	7,27	- 13,6	- 57,7	- 36,0

(*) In EUR million.

Source: P&O's comments.

⁽²⁰⁾ According to P&O, the market concerned is that of short sea crossings (i.e. between Dover and France) for passengers and freight (Short French Sea tourist and freight market).

(41) In view of the fact that most of SeaFrance's car ferries are ro-pax (multi-purpose vessels able to carry both passengers and freight) and that the 'passenger' business is very seasonal, it would be crucial for SeaFrance not to alienate the freight customers who must be assured that the service will be provided reliably and continuously throughout the year.

(42) However, according to P&O, as regards the freight business, the value of the goodwill, reputation and market share of SeaFrance had declined significantly, notably on account of the frequent interruptions in service (strikes, etc.), the market's awareness of SeaFrance's difficulties and the lay-up of the freight vessel Nord Pas-de-Calais (to keep a vessel laid up would be very expensive, according to P&O, which also points out that the laying-up of the vessels Cézanne and Renoir in the port of Dunkerque would cost at least EUR 1,09 million, and possibly EUR 2,4 million).

5.1.1.2. Concerning the compatibility of the aid

(43) P&O provides statistics to show that the market concerned is subject to long-term structural overcapacity. However, according to point 8 of the Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²¹⁾ (hereinafter: 'the Guidelines'), 'it would not be justified to keep a firm artificially alive in a sector with long-term structural overcapacity or when it can only survive as a result of repeated State interventions'.

5.1.1.3. Concerning the causes of SeaFrance's difficulties

(44) The causes of SeaFrance's difficulties are the following:

- over-staffing, salaries too high, vessels ill-adapted to the market;
- the management is not sufficiently independent of the State and social power to truly be able to manage the company according to the market;
- inability to adapt to three new market components: the rising price of fuel, a market tending towards recession and the competitive pressure from Eurotunnel.

(45) Finally, it is revealing, according to P&O, that SeaFrance, which was up for sale for a period of over three years, did not find a buyer.

5.1.1.4. Concerning the difficulty of restoring long-term viability

(46) To explain the difficulty in restoring the long-term viability of SeaFrance, P&O essentially takes up the

arguments already set out concerning the market shares of SeaFrance, its load factors and its status of firm in difficulty.

5.1.1.5. Concerning the ill-adapted nature of the internal restructuring measures

(47) The only substantial measure proposed by SeaFrance in the original restructuring plan consisted in reducing the workforce, but the salaries would remain too high (salary costs/turnover ratio of 26 % compared to 15 % at P&O). Even in the case of an additional 200 redundancies, the ratio would be in the vicinity of 22 %.

(48) The laying-up of the vessels Manet, Cézanne and Renoir would in no way have improved the results (losses) of 2008, 2009 and 2010 and the planned laying-up of the freight vessel Nord Pas-de-Calais would not significantly improve SeaFrance's situation, especially on account of the cost of keeping a vessel laid up (EUR 1.8 million per year).

(49) The reduction in the number of crossings alleged by SeaFrance is misleading as it would amount to only 10 % and would result from the change in fleet (the vessels Cézanne and Renoir replaced by the larger vessel Molière). The laying-up of the freight vessel Nord Pas-de-Calais would reduce capacity by only an additional 7 %.

(50) The proposals to improve on-board sales, the restaurants, the subcontracting and the control of advertising expenditure are only part of normal business management, like that of all the competitors of SeaFrance.

(51) None of the measures proposed would respond to the three new market components (recession, price of fuel, competition from Eurotunnel) and the exchange rate fluctuations.

5.1.1.6. Concerning the market forecasts used by SeaFrance

(52) P&O points out that SeaFrance's restructuring plan forecasts a spectacular increase in its load factors (from 58 % to 80 %) on the basis of a rapid rise in demand and/or a significant increase in its market share.

(53) However, the SeaFrance forecasts in no way correspond to those of P&O nor to the trend in SeaFrance's market share, which fell from 21 % in 2006 to 17 % in 2010. The quality of the offer to freight customers would be liable to suffer from the laying-up of the freight vessel Nord Pas-de-Calais and some of the customers could turn to Eurotunnel in periods of affluence, when SeaFrance would suffer from under-capacity.

⁽²¹⁾ OJ C 244, 1.10.2004, p. 2.

(54) The fact that the aid measures will have effect only from 2016 but will permit the long-term viability of the company to be assured only from 2019, would not comply with point 35 of the Guidelines, according to which the duration of the restructuring plan must be 'as short as possible' and 'must restore the long-term viability of the firm within a reasonable timescale'. The laying-up of the freight vessel Nord Pas-de-Calais and additional job reductions would not significantly improve SeaFrance's situation: it would save EUR 6 million in salary costs and EUR 7 million in vessel-related costs (i.e. EUR 13 million in total). P&O nevertheless considers that SeaFrance would lose 50 000 freight units, i.e. EUR 5-6 million in freight revenue, and that the laying-up of the freight vessel Nord Pas-de-Calais would cost EUR 1,8 million per year in the absence of a buyer.

5.1.1.7. Concerning the compensatory measures

(55) The compensatory measures must be added to the measures aiming to restore viability and must therefore be separate from them. However, according to the French authorities and the decision to initiate the procedure, all the allegedly compensatory measures are necessary to restore the company's viability. There is therefore no compensatory measure, according to P&O.

5.1.1.8. Concerning the company's own contribution

(56) According to P&O, the withdrawal of the vessel Manet in 2008 and that of the vessels Cézanne and Renoir cannot count as a contribution since these withdrawals took place well before the notification of the restructuring and the value of the vessels is minimal compared to the total amount of the State aid, i.e. EUR 400 million, according to P&O. The French authorities apparently did not propose that the sale of the freight vessel Nord Pas-de-Calais should count as own contribution and its value, estimated at EUR 12 million, would be negligible compared to the total amount of State aid.

(57) P&O suggests the sale and lease-back of the SeaFrance vessels as own contribution.

5.1.1.9. Concerning the conditions of granting the aid

(58) P&O suggests that the restructuring of SeaFrance should be subject to the following conditions, in addition to changes remedying the inadequacies and problems described:

- the sale and lease-back of the multi-purpose vessels fully owned by SeaFrance;
- the transparency of costs relating to the main assets of SeaFrance (notably the leasing of vessels);
- during the restructuring period:
- the commitment not to sell at a loss;

- the commitment not to extend the fleet (beyond the three existing multi-purpose vessels);
- the commitment to limit the capacity and frequency of crossings of the multi-purpose ferries;
- the commitment of France/SNCF not to grant any more aid;
- the commitment of France/SNCF to draw up a report showing verifiably that SeaFrance is complying with the restructuring plan.

(59) In conclusion, P&O asked the Commission not to approve the restructuring aid.

5.1.2. Comments by Eurotunnel

(60) On 29 July 2011, the Eurotunnel SA group (hereinafter: 'Eurotunnel') forwarded its comments to the Commission on the decision to initiate the procedure.

(61) Eurotunnel is sceptical about the feasibility of the increase in the load factors forecasted by SeaFrance. In fact, Eurotunnel considers that the Channel has been suffering from overcapacity for many years. The capacity of the Channel Tunnel is only 57 % used and the ferries have invested in vessels with very large capacity, thereby increasing the already existing overcapacity of supply. Moreover, Eurotunnel is of the opinion that the reduction in the SeaFrance fleet from 6 to 4 vessels still does not allow the cross-Channel market to return to equilibrium. For that matter, from January to February 2011, SeaFrance operated with only two vessels without any reduction in its overall traffic. The load factors of 80 % for the period 2011-2019 are therefore unrealistic. According to the Eurotunnel estimates, SeaFrance would need to increase its traffic by 25 %. On the basis of press articles: '[...] to recover this traffic we have had to cut our prices' ⁽²²⁾, Eurotunnel therefore accuses SeaFrance of having conducted a price war for a long time.

(62) Finally, Eurotunnel considers that it is not relevant to compare the load factors of ro-pax and the railway shuttles using the Channel Tunnel, as the latter are not passenger/freight and they allow real-time adjustment to traffic demand.

(63) With regard to taking into account the fuel surcharge, Eurotunnel asserts that SeaFrance only invoices part of this surcharge to its customers, i.e. EUR 8,11 per crossing, compared to EUR 11,62 for P&O and EUR 14,73 for DFDS. The lost earnings for SeaFrance would amount to EUR 1,2 million since the beginning of 2011.

⁽²²⁾ Nord Littoral of 9 April 2010 (p. 10).

(64) With regard to the nearly 50 % redundancies, this loss of staff should be seen in relative terms, according to Eurotunnel, as some of the employees have the possibility of being reintegrated into the SNCF group, which will only have a minimal impact on the net balance of employment in the region.

(65) Finally, Eurotunnel concludes that the restructuring plan is not only inadequate, but also fails to meet the specifications of prudent investments.

5.1.3. *Comments by DFDS*

(66) DFDS communicated its comments to the Commission by letter dated 29 July 2011.

(67) DFDS remains sceptical about the ability of SeaFrance to recover long-term economic viability on account of the inadequacy of the restructuring measures in relation to its present financial situation. DFDS is concerned about the effects of these new aid measures on competition in the market concerned.

(68) DFDS sent the Commission comments on the SeaFrance restructuring plan by e-mail dated 23 September 2011.

(69) This document reached the Commission outside the time limit within which interested parties could submit their comments, i.e. within 15 days of the date of publication of the decision to initiate the procedure. Furthermore, it provides no new information. In accordance with case-law, the Commission has therefore not forwarded this document to the French authorities and will not take it into account for the purposes of the present decision ⁽²³⁾.

5.1.4. *Comments by CLdN*

(70) On 29 July 2011, the CLdN group (hereinafter: 'CLdN') communicated its comments to the Commission.

(71) CLdN is a Luxembourg-based transport company which is involved in particular in the transport of freight by freight vessel (roll-on/roll-off or 'ro-ro') or by ro-pax, in the Channel and the North Sea between Belgium and the Netherlands, on the one hand, and the United Kingdom, Ireland, Sweden and Denmark, on the other.

(72) CLdN regards itself as a competitor to SeaFrance which would suffer considerably from the adverse consequences of the measures implemented by the SNCF in favour of its subsidiary SeaFrance on account of the geographical proximity of the routes operated by CLdN, i.e. Ipswich-Rotterdam and Purfleet-Zeebrugge.

(73) CLdN considers in fact that the measures implemented are very likely to have anti-competitive consequences on freight not only on the Calais-Dover route, but also on the neighbouring routes between the United Kingdom and Belgium. It considers that the negative effects of

these measures are not sufficiently offset by the compensatory measures and the own contribution proposed in the restructuring plan. On the contrary, these measures would merely maintain a firm in difficulty, incapable of reducing its basic costs, on the market and would enable it to increase its capacities on a market with overcapacity.

(74) According to CLdN, the measures in question will reduce the viability of the existing competitors by maintaining on the market transport capacity which should normally have disappeared. It would be unrealistic to rely on SeaFrance being able to achieve a load factor of 80 %, unless the aid is used to carry out aggressive price cuts and to take market shares from competitors. However, this strategy would be economically unsustainable in the medium or long term for SeaFrance and would be harmful for its direct competitors, i.e. P&O and Eurotunnel, which operate on the same Calais-Dover route, but also, in time, for CLdN.

(75) Finally, CLdN emphasises the inadequacy of the workforce cuts provided for in the restructuring plan (which would be far from enabling SeaFrance to approach the staff costs/turnover ratio of its competitors) and the fact that the redundancy costs will be low compared to traditional restructuring, as a large number of SeaFrance employees will be taken on by the SNCF.

(76) CLdN consequently wishes the European Commission to take a negative decision.

5.2. **Comments from interested parties in favour of the restructuring aid**

5.2.1. *Comments by the SNCF*

(77) On 29 July 2011, the SNCF communicated comments to the Commission, which correspond to the comments made by the French authorities (see section VI).

5.2.2. *Comments by an economic operator wishing to remain anonymous*

(78) On 30 July 2011, an economic operator wishing to remain anonymous communicated its comments to the Commission.

(79) Firstly, it recalls the main characteristics of the cross-Channel market, concluding from this that the keener competition between the shipping companies and Eurotunnel, the inflation in fuel prices and the volatility of the sterling exchange rate have caused difficulties for SeaFrance, but also pose a threat to the long-term viability of P&O and DFDS.

(80) The operator in question considers that the difficulties of SeaFrance are chiefly structural (employment coefficient too high and organisation too inflexible), but that recapitalisation combined with the restructuring of SeaFrance and a fleet maintained at 4 vessels can guarantee the long-term viability of the company.

⁽²³⁾ Judgment of 9 September 2009, *Diputación Foral de Álava and Gobierno Vasco v Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, ECR II-3029, points 259 to 272.

(81) It considers that the disappearance of SeaFrance would in fact result in a duopoly between Eurotunnel and P&O. However, many road hauliers work with at least 2 shipping companies to guarantee timetable flexibility and the profitability of their lorries.

(82) According to the operator in question, if SeaFrance were to disappear, the capacity of the other two shipping companies would be insufficient to cope with the traffic in the Channel. According to the operator wishing to remain anonymous, Eurotunnel has almost achieved maximum capacity and therefore could absorb only a small proportion of the SeaFrance traffic. 'The overcapacity in the Channel today is [...] very relative and should not constitute a serious problem' since as soon as a problem arises at one shipping company or in the ports, this leads to congestion in the ports of Calais, Dover and Dunkerque.

(83) Moreover, a single freighter in the Channel operated by P&O would not guarantee the necessary transport capacity and would distort the market in favour of P&O, which would in this way hold a monopoly for the transport of hazardous goods.

(84) According to the operator in question, P&O is at the origin of the price undercutting; this operator believes in the viability of SeaFrance on account of the quality of management of the company (quality of cooperation with its agents), its modern fleet capable of functioning for at least 10 years and the high motivation of its staff.

5.2.3. Comments by road haulage companies

(85) By letters dated 26, 27 and 28 July 2011, five road haulage companies and representative associations (LKW Walter Internationale Transportorganisation AG, Youngs Transportation & Logistics Ltd, Laser Transport International Limited, Carna Transport Ltd and Road Haulage association international group) communicated their comments to the Commission.

(86) These five companies and associations express their concerns in the event of the disappearance of SeaFrance. In their opinion, the disappearance of SeaFrance would result, on the one hand, in an oligopoly on the cross-Channel transport market leading to a decline in the quality of services and an increase in prices and, on the other hand, a risk regarding the capacity of the operators remaining on the market to be able to cope with the volume of freight, especially in cases where one of them is unable to provide services.

(87) If SeaFrance were to dispose of its freight vessel, the Nord Pas-de Calais, they are also worried about the emergence of a *de facto* P&O monopoly for the

transport of hazardous goods which cannot be undertaken through the Tunnel or by a multi-purpose ferry.

5.2.4. Comments of tour operators and travel agencies

(88) A large number of travel agencies and tour operators expressed their concern regarding the possible disappearance of SeaFrance (see list in the table in this recital):

Date of the comments	Name of the interested parties
26.07.2011	4 separate position papers: 1) R&T Tours; 2) Sports Tours Ltd; 3) TM Ski&Travel Ltd; 4) International Sport & Leisure
27.07.2011	5 separate position papers: 1) Broadway Tours; 2) Gemini Travel; 3) DE Vere Travel Group; 4) Adaptable Travel; 5) Gower Tours Ltd
28.07.2011	2 separate position papers: Angling Lines Ltd; Acorn Ventures Ltd
29.07.2011	Bartletts Battlefield Journeys Ltd

(89) In their opinion, the disappearance of SeaFrance would lead, on the one hand, to the emergence of an oligopoly on the cross-Channel transport market, with the consequence of a decline in the quality of the services and a rise in prices and, on the other hand, a risk regarding the capacity of the operators remaining on the market to cope with the passenger volume, especially in cases where one of them is unable to provide services.

5.2.5. Comments from the Côte d'Opale Chamber of Commerce and Industry

(90) By letter dated 29 July 2011, the Côte d'Opale Chamber of Commerce and Industry (hereinafter: 'CCI') communicated its comments to the Commission. The CCI specifies that it is a public institution responsible for contributing to economic development, attractiveness and support of businesses in the Nord Pas-de-Calais region. The CCI is also the concessionaire of the Port of Calais and, in this capacity, runs the port.

(91) Firstly, the CCI recalls the key role played by SeaFrance in the development of the Port of Calais. At the end of 2008, the SeaFrance workforce comprised 1 600 employees, most of whom lived in the Nord Pas-de-Calais region. It also contributes to the revenue received by the Port of Calais in respect of services to ships and goods services. In 2008, SeaFrance was also the largest purchaser of non-port goods and services, representing EUR 130 million per year in supplies, services, consumables, repairs and maintenance, about 36 % of which were in the Nord Pas-de-Calais region. The CCI adds that the Port of Calais plays a leading role in the economic development of Pas-de-Calais.

(92) According to the CCI, the disappearance of SeaFrance would have a significant impact on the development of the Port of Calais on account of the loss of jobs and of direct and indirect revenue generated by the company. The Nord Pas-de-Calais region has also approved the implementation of the 'Port 2015' project which provides for the extension of the port, the construction of a new sea dock and the improvement of the existing structures. This project is based on operational forecasts which risk being seriously affected in the event of the disappearance of SeaFrance.

(93) Furthermore, the CCI is worried about the emergence of a Eurotunnel-P&O duopoly which would have a negative impact on prices and services, if SeaFrance were to disappear.

(94) The CCI concludes from this that keeping SeaFrance in operation is necessary in the present competitive context, particularly as the traffic forecasts are upwards, especially for freight transport.

5.2.6. Comments by the CFDT trade union

(95) By letter dated 29 July 2011, the Syndicat Maritime Nord (hereinafter: 'the SMN'), which belongs to the CFDT, communicated its comments to the Commission.

(96) The SMN firstly stresses that since its creation in 1996, SeaFrance has never been recapitalised by its sole shareholder, the SNCF. SeaFrance has therefore had to pay for the renewal of its fleet from its equity, which has had a considerable impact on the cash position of the company.

(97) The SMN also points out the disparities existing between British and French social legislation (longer working hours in the United Kingdom not entirely offset by smaller crews in France). On account of the staff costs/turnover ratio, the SMN emphasises the fact that SeaFrance is not inclined to practise a low price policy

and compensates for this by the quality of the services offered. It also points out that in view of the market shares of SeaFrance, which are well below those of the market leaders, both in freight and in passenger transport, SeaFrance has little impact on prices.

(98) The SMN considers that the adverse impacts of the fall in sterling continue to decrease as expenses, and especially technical expenses, are as often as possible denominated in sterling.

(99) The SMN considers that SeaFrance has already made significant cuts in the number of crossings and the transport capacities since 2009 (– 30 % in frequency and – 25 % in volume) and with the 4 vessels currently operating, SeaFrance has reached the minimum size allowing it a sufficient rotation frequency to remain credible.

(100) Finally, the SMN points out that the employees of SeaFrance would not understand the Commission not taking account of the consequences of the successive restructuring implemented, in terms of both working conditions and employment at SeaFrance, but also in the Calais employment area, which is one of the most stricken in France.

VI. COMMENTS BY FRANCE

6.1. Comments concerning the reasons for SeaFrance's difficulties in general

(101) Regarding the difficulties of SeaFrance, the French authorities point out that the information communicated by P&O is largely incorrect and that, contrary to the results of SeaFrance as presented by P&O — which contain errors for the years 2002, 2004, 2005 and 2006 (see recital 40), the cumulated losses of SeaFrance between 1996 and 2010 amount to EUR – 151,4 million and not EUR – 169 million. The French authorities communicated the following table, rectifying the errors appearing in the table drawn up by P&O in its complaint:

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Profits/losses of SeaFrance (*)	– 16,8	– 1,7	– 2,8	2,6	– 3,5	3,4	26,2	– 2,4	4,9	– 9,3	7,9	15,4	– 20,9	– 57,7	– 36,2

(*) In EUR million

(102) The French authorities dispute the reasons for the difficulties of SeaFrance put forward by P&O, i.e. that the value of the goodwill, reputation and market share of SeaFrance concerning freight has declined significantly on account, in particular, of the frequent interruptions in service and market awareness of SeaFrance's difficulties (see recital 42). They counter this with the observations of SeaFrance customers which underline the quality of the services provided by the company and the progress achieved in recent years to improve the quality of the services supplied (see recitals 85 to 89).

(103) In response to the argument of the competitors of SeaFrance that the company workforce is too large, the French authorities point out that SeaFrance undertook a significant reduction in the workforce, as a result of which nearly 725 jobs were cut, this drastic measure being designed to enable a staff costs/turnover ratio of 26 % to be restored in 2013. This ratio would remain slightly higher than those obtained by Eurotunnel and Irish Ferries. However, the activities of SeaFrance will be quite significantly different in their implementation from those of the Channel Tunnel operator, whose

ratio stood at 22,5 % in 2010, and it is inconceivable, under the French flag, for SeaFrance to manage to achieve such a low ratio as Irish Ferries, whose vessels are apparently under the Cypriot flag. The French authorities consider that, in view of the considerable effort made by SeaFrance as regards redundancies, the staff costs/turnover ratio of 26 % is sufficient and allows SeaFrance to remain competitive. They specify that the level of salaries paid by SeaFrance results from French social legislation, which offers greater protection than that of the States where its competitors are established, and especially that of the United Kingdom, in particular with regard to the minimum wage.

- (104) The SeaFrance fleet, as defined in the restructuring plan, is not ill-adjusted. Quite the contrary, it was specifically constructed for the Calais/Dover route, with the exception of the vessel Molière, which had to have conversion work carried out on it to be adapted to maritime transport in the North Sea. As regards P&O's argument that the management of SeaFrance is not sufficiently independent of the State and of worker power to manage the company efficiently, the French authorities consider that this is an assertion which is not based on any evidence.

6.2. Comments concerning the competitive position on the Dover/Calais market

- (105) The French authorities contest the allegations of P&O, Eurotunnel and CLdN concerning structural overcapacity of the market. In their view, the overcapacity observed is largely attributable to the economic climate (in particular, the economic crisis has led to a reduction in freight traffic and rise in the sterling exchange rate). On the basis of the growth forecasts drawn up before the crisis, certain operators increased their capacities but the hoped-for growth failed to materialise on account of the economic recession. The French authorities cite market analyses carried out by the Dover Harbour Board in 2005 ⁽²⁴⁾ and 2008 ⁽²⁵⁾ indicating long-term growth in freight volumes.
- (106) France considers that the concerns expressed by certain SeaFrance customers relating to the emergence of a P&O monopoly for the transport of hazardous goods on the Calais/Dover route (see recitals 83 and 87) are unfounded. In fact, since there are no national or international regulations prohibiting the transport of hazardous goods on car ferries, SeaFrance could consider carrying out such transport during crossings with low passenger numbers, for example on certain night crossings.

6.3. Comments concerning the compatibility of the restructuring aid

- (107) As regards the compatibility of the measures notified under the restructuring plan, the French authorities

provided the following replies to the doubts expressed by the Commission concerning the return to long-term viability expected from the restructuring plan, on the prevention of any excessive distortion of competition and on SeaFrance's own contribution to the restructuring plan.

6.3.1. On the return to long-term viability and the restructuring plan

- (108) The French authorities justify the fact that the load factors forecasted for the coming years are higher than those observed in the past on the basis of the introduction from 2006 of a new information system allowing optimisation and rationalisation of the loading of these vessels. In their opinion, this system in particular has allowed low profitability crossings to be identified and withdrawn from the SeaFrance schedule. Furthermore, the French authorities emphasise the fact that between 2000 and 2007, the period taken into account by the Commission, SeaFrance's operating activities were organised in the form of shuttles, irrespective of the intensity of demand.
- (109) The French authorities also justify the lower load factors of SeaFrance's competitors by the operating method chosen by the competitors. In their opinion, P&O had a large number of vessels and a 'shuttle' type service exerting a downwards influence on the load factor. As regards DFDS, the specialised nature of its vessels would preclude the optimisation of its loads according to their individual profitability. Moreover, on account of the length of its crossings, DFDS would be forced to offer a shuttle service over long periods. Finally, the high capacity of its vessels would automatically lower the average load factors of DFDS through crossings with low demand.
- (110) Furthermore, the French authorities reacted to the Commission's doubts and to the comments of third parties concerning taking into account the risks (fuel costs, depreciation of sterling), which is necessary to evaluate the credibility of the restructuring plan. They emphasise firstly that the financial hedging policy in the form of foreign exchange contracts will be resumed by SeaFrance as soon as the judicial reorganisation is over. They then explain that the company applies a 'bunker adjustment factor' (hereinafter: 'BAF') which covers about 40 % of the additional cost associated with the increase in the price of fuel above EUR 285 per tonne and that after 2015, the BAF will be supplemented by a new surcharge taking account of the obligation to consume fuel with 0,1 % sulphur content.

- (111) As regards the depreciation of sterling, the French authorities specify firstly that the policy of hedging part of the monthly balances in sterling by forward sales based on the budgetary rate, interrupted on account of the judicial reorganisation procedure, will be applied once more as soon as this procedure is over. [...]

⁽²⁴⁾ http://www.doverport.co.uk/_assets/client/images/collateral/30%20year%20master%20plan%20zoning%20report.pdf

⁽²⁵⁾ http://www.doverport.co.uk/_assets/client/images/collateral/dover_consultation_web.pdf

(112) Concerning the other measures mentioned in recital 96 of the decision to initiate the procedure, the French authorities specify that their effects were not taken into account in the business plan as they are difficult to quantify. However, these measures would be likely to generate savings.

(113) Finally, the French authorities point out that the staff costs/turnover ratio should change from [20-25]% in 2012 to [20-25]% in 2019. It would approach the ratios of SeaFrance's competitors.

6.3.2. *Concerning the prevention of any excessive distortion of competition*

(114) As regards the prevention of any excessive distortion of competition, the French authorities wish to confirm that the sale of the two vessels, the *Renoir* and the *Cézanne*, did indeed occur on 7 July 2011 at the price of USD [0-10] million (EUR [0-10] million).

6.3.3. *Concerning SeaFrance's own contribution to the restructuring plan*

(115) According to the French authorities, a first part of SeaFrance's own contribution to the restructuring plan consists of the proceeds from the sale of the vessels *Renoir* and *Cézanne*, as well as the expected income from the sale of the vessel *Nord Pas de Calais*.

(116) The French authorities consider in addition that the two loans described in recitals 28 to 33 are exempt from State aid and that the loan of EUR 99,8 million must be considered as an own contribution. According to the French authorities, to evaluate the existence of aid, the Commission must take only the Reference Rates Communication as a basis. They point out that the Commission applied this Communication in its decision to initiate the procedure concerning the loan granted to ČSA – Czech Airlines by the publicly owned company Osinek⁽²⁶⁾ and in its decision concerning the loans granted by the Hungarian Development Bank in favour of Hungarian fertiliser producer Péti Nitrogénművek⁽²⁷⁾. They consider that, for the reasons described in recitals 28 to 33, the two loans do not constitute aid.

VII. ASSESSMENT OF THE AID

7.1. Existence of aid

(117) According to Article 107(1) TFEU, '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 internal market'.

(118) The classification of a measure as State aid presupposes that the following cumulative conditions are satisfied, i.e.: 1) the measure in question confers an advantage, 2) this advantage is granted through State resources, 3) this advantage is selective and 4) the measure in question distorts or threatens to distort competition and is liable to affect trade between Member States⁽²⁸⁾.

(119) The present decision covers three aid measures: the recapitalisation and the two loans described in recitals 28 to 33.

7.1.1. *Recapitalisation of SeaFrance*

(120) The French authorities themselves consider in their notification that the capital increase in favour of SeaFrance constitutes State aid. By their notification, the French authorities admit that the recapitalisation measure is imputable to the State and that it confers a selective advantage on SeaFrance alone.

(121) As regards the existence of an advantage, the Commission considers that, for the reasons to be explained in section 7.2.1, SeaFrance constitutes a firm in difficulty. In view of the very difficult situation of SeaFrance and the fact that it has been placed under the judicial reorganisation procedure, the company would be unable to cope with the implementation of its restructuring plan and its cash requirements. In such circumstances, a private operator would not have contributed capital. In addition, the French authorities did not even try to demonstrate that the expected return corresponds to that which a private investor would have required. The measure therefore constitutes a selective advantage since only SeaFrance benefits from it. It is granted through public resources, since the SNCF is a public undertaking. It is imputable to the State.

(122) As regards the effect on competition and on trade within the Union, it should first be pointed out that, according to established case-law, as soon as an undertaking operates in a sector where producers from various Member States are effectively competing, any aid that this undertaking may receive from the public authorities is liable to affect trade between Member States and damage competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share⁽²⁹⁾.

⁽²⁶⁾ Decision of 24 February 2010 in case NN 1/10 (ex CP 371/09) — Czech Republic ČSA — Czech Airlines — possible State aid implications of a loan provided by Osinek.

⁽²⁷⁾ Decision of 27 October 2010 on State aid C 14/09 (ex NN 17/09) granted by Hungary to Péti Nitrogénművek Zrt (OJ L 118, 6.5.2011, p. 9).

⁽²⁸⁾ See, for example, Court of Justice judgment of 10 January 2006 in case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, point 129.

⁽²⁹⁾ See in particular Court of Justice judgment of 21 March 1991 in case C-305/89 *Italy v Commission* ECR I-1603.

- (123) In this respect, the fact that an economic sector has been liberalised at Union level constitutes evidence that the aid may have a real or potential effect on competition and on trade between Member States ⁽³⁰⁾.
- (124) In this context, it is important to point out that Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries ⁽³¹⁾ fully liberalised maritime transport between Member States as of 1 January 1993.
- (125) In the present case, as previously established, there is modal competition with the other maritime operators in a liberalised sector and also intermodal competition, especially with railway transport ⁽³²⁾.
- (126) The Commission concludes from this that the recapitalisation is likely to strengthen the position of the company in relation to its competitors in trade between the Member States of the Union. The measure therefore affects trade between Member States and is liable to cause distortions of competition.
- (127) In the light of the above, the Commission considers that the measure in question constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.2. The loans described in recitals 28 to 33

- (128) France considers that the two loans described in recitals 28 to 33 are granted under market conditions and therefore respect the principle of the private market economy investor (see recital 116).
- (129) The Commission does not agree with this analysis. In fact, in the present case, the SNCF has already granted aid to SeaFrance, notably rescue aid, and is planning to grant new aid, i.e. the recapitalisation. The loans pursue the same purpose as the other aid measures, i.e. the rescue and restructuring of SeaFrance. They will be granted at a time when SeaFrance is a firm in difficulty and at the same time as the restructuring aid. This is self-evident as regards the loan of EUR 99,7 million, which is intended – just like the recapitalisation – to enable SeaFrance to meet its current capital requirements. However, it is also true of the loan of EUR [40-70] million, which serves to refinance and exercise the purchase option under the leasing contract for the vessel Molière earlier than provided for. In fact, the financing of means of production, here the vessel, is closely linked to the day-to-day activities of SeaFrance. Through the refinancing and early purchase under the leasing contract, SeaFrance aims to reduce its operating costs, which comes under the restructuring of the company. Consequently, the loan of EUR [40-70]

million also comes under the logic of restructuring SeaFrance.

- (130) In its *BP Chemicals* judgment, the Court of First Instance clarified that in such a situation, it is appropriate to analyse the loans, from the point of view of State aid, not in isolation, but together with the other measures ⁽³³⁾.
- (131) According to the judgment of the Court of First Instance, it is true that the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as ‘aid’ does not, in principle, mean that a further capital injection cannot be classed as an operation which satisfies the private market economy investor test. However, the Court considers that, in a case which concerned three capital injections made by the same investor over a period of two years, the first two of which brought no return, it was for the Commission to determine whether the third injection could reasonably be dissociated from the first two and classed, for the purposes of the private investor test, as an independent investment.
- (132) The Court considers that the considerations relevant to determining whether the subsequent measure could reasonably be dissociated from the first two and classed, for the purposes of the private investor test, as an independent investment, include in particular the timing of the capital injections in question, their purpose and the subsidiary’s situation at the time when each decision to make an injection was made.
- (133) France does not dispute the fact that the recapitalisation constitutes aid, as it has no prospect of obtaining a return corresponding to that which a private investor would have demanded. This also emerges from the table in recital 35, which indicates the financing need for the period 2011-2017. In fact the company would be unable to distribute dividends during this period. In view of the considerable costs entailed in the payment of the interest and principal on the loans described in recitals 28 to 33 and the low profit margin provided for in the restructuring plan, this situation would be very likely to continue beyond 2017 until the repayment of the loans in full in 2023. However, a private investor in a traditional industry such as maritime transport would not accept the entire absence of return on an investment amounting to EUR 166,3 million for a 12-year period. Since the two loans have the same purpose as the recapitalisation, i.e. the financing of the restructuring costs, and since the economic situation of the company is unchanged (it is in difficulty) and the loans are granted at the same time as the recapitalisation, these loans cannot reasonably be dissociated from the rescue aid and the recapitalisation.

⁽³⁰⁾ Court of Justice judgment of 13 February 2003 in case C-409/00 *Spain v Commission* [2003] ECR I-1487.

⁽³¹⁾ OJ L 378, 31.12.1986, p. 1.

⁽³²⁾ Especially with the railway transport of passengers and freight provided by Eurotunnel.

⁽³³⁾ Judgment of the Court of First Instance of 15 September 1998 in case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, points 170 and 171.

- (134) Taken as a whole, the return on the rescue aid and on the recapitalisation and the two loans is below the return that a private market economy investor would require. In fact, as explained, the SNCF cannot expect any return on the recapitalisation before 2023. Even if, considered individually, the return on the two loans corresponded to market conditions – which is not the case –, this would not be sufficient for the measures as a whole to be regarded as satisfying the private market economy investor principle. The following developments are therefore set out for the sake of completeness.
- (135) The French authorities cite the Reference Rates Communication to justify the absence of aid as regards the two loans. They consider that, in view of the company rating (CCC) and the collateral offered (normal), the rate must amount to 8,55 %, i.e. EURIBOR 12 months plus 650 basis points. The French authorities consider that this is a conservative application of the Reference Rates Communication.
- (136) Even if the two loans were to be assessed in isolation – which is not the case –, the French authorities would not have demonstrated that they were granted at a market rate.
- (137) In this respect, the Commission first wishes to emphasise that, as pointed out in the first paragraph of the Reference Rates Communication: 'The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. They are also used to check compliance with the de minimis rule and block exemption regulations.'⁽³⁴⁾ The Reference Rates Communication cannot therefore be binding on the Commission as regards its application of the principle of the private market economy operator, especially in cases where real market data are available which are manifestly different from those resulting from the methodology set out in this Communication.
- (138) In this case, since the provider of the aid is also supplying the loan, in order to ensure that the proposed remuneration does in fact correspond to market remuneration, the Commission must take operators external to the SNCF as a basis. The Commission asked the French authorities on several occasions to produce an example of an offer from an independent financial institution. This offer was never produced.
- (139) Furthermore, the Commission also carried out a market survey. According to the Commission's estimates, with normal collateral, the rate on the loans, to be in line with market conditions, should be around 14 % (5-year swap rate of 2,825 %⁽³⁵⁾ + average CDS⁽³⁶⁾ below B- (i.e. CCC) of 11,18 % + premium of 0,2 %). This corresponds to the data observed in April, May and June 2011. In addition, despite the Commission's repeated requests⁽³⁷⁾, the French authorities have never produced a rating or a rate proposal from a private bank.
- (140) In addition, on several occasions⁽³⁸⁾, the Commission asked the French authorities to consider external financing or to produce a rating or a rate proposal from a commercial bank. These suggestions were not formally followed up.
- (141) Finally, the arguments put forward by the French authorities under recital 116 that the Commission applied the Reference Rates Communication in two recent procedures could not be accepted. In fact, as regards these two procedures, one of which is still in progress, the issues were different. As regards Péti Nitrogénművek, all the measures under examination constituted State aid. As for Osinek, the Commission has not yet taken a final decision and at the time when the loan was granted, no aid measure had been notified.
- (142) The Commission concludes that the loans used to finance the own contribution and the early exercise of the purchase option for the vessel Molière also confer an advantage on SeaFrance. For the reasons set out in recitals 121 to 126, the other three conditions for the existence of aid (selective advantage granted through public resources, effect on competition and effect on intra-Community trade) are also satisfied. These loans therefore constitute State aid.

7.1.3. The rescue aid

- (143) For the reasons set out in recitals 30 to 47 of the Commission decision of 18 August 2010, the loan granted by the SNCF to SeaFrance as rescue aid constitutes aid within the meaning of Article 107(1) TFEU.

7.2. Compatibility of the three aid measures

- (144) In view of the purpose of the three restructuring aid measures in question and the claims made by the French authorities in the context of their notifications, the Commission considers that the compatibility of the three aid measures with the internal market must be analysed on the basis of Article 107(3)(c) TFEU and in the light of the Guidelines.

7.2.1. Eligibility: firm in difficulty

- (145) To be able to qualify for restructuring aid, a firm must be regarded as a firm in difficulty within the meaning of Section 2.1 of the Guidelines.

⁽³⁵⁾ At 1 July 2011, Bloomberg EUSA5.

⁽³⁶⁾ All sectors together.

⁽³⁷⁾ [...]

⁽³⁸⁾ See recital 9 above.

⁽³⁴⁾ OJ C 14, 19.1.2008, p. 6.

(146) In this respect, the Commission considers that SeaFrance is a firm in difficulty within the meaning of point 10(a) of the Guidelines, since more than half of its registered capital has disappeared, falling from EUR 81,7 million in 2007 to EUR 57,7 million in 2008 and to EUR – 0,69 million in 2009 (i.e. a reduction of more than 100 %, by EUR 82,4 million between 2007 and 2009), and more than one quarter of that capital has been lost over the preceding 12 months, since it fell from EUR 57,7 million in 2008 to EUR – 0,69 million in 2009.

(147) In addition, SeaFrance can also be considered as being in difficulty within the meaning of point 10(c) of the Guidelines on the grounds that it fulfils the criteria for being the subject of collective insolvency proceedings. In fact, as indicated in recital 10, SeaFrance was placed under a judicial reorganisation procedure on 30 June 2010 by the Paris Commercial Court.

(148) Furthermore, the conditions set out under point 13 of the Guidelines are also satisfied as, although belonging to the SNCF group, SeaFrance's difficulties relate specifically to itself and are not the result of an arbitrary allocation of costs within the group.

7.2.2. *Own contribution*

(149) In the decision to initiate the formal investigation procedure, the Commission considered that SeaFrance's own contribution to the restructuring effort was uncertain and insufficient according to the provisions of the Guidelines.

(150) In the modified restructuring plan, the French authorities propose an own contribution from SeaFrance of EUR [80-130] million, consisting in the following measures:

- a loan of EUR 99,7 million at 8,55 % to finance the restructuring of SeaFrance;
- the planned sale of the freight vessel Nord-Pas-de-Calais (market value estimated at EUR [0-10] million by two independent experts); and
- the sale of the vessels Renoir and Cézanne in July 2011 for an amount of USD [0-10] million, or approximately EUR [0-10] million.

(151) Pursuant to point 43 of the Guidelines, 'The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment

will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.' ⁽³⁹⁾.

(152) Point 7 of the Guidelines also specifies that 'it is appropriate to reaffirm with greater clarity the principle that [the substantial contribution from the beneficiary to the restructuring] must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition. [...]' ⁽⁴⁰⁾.

(153) The Union case-law also emphasised that the own contribution must indicate that the markets believe in the feasibility of the return to viability ⁽⁴¹⁾.

(154) The French authorities informed the Commission that the sale of the two vessels, i.e. the Renoir and the Cézanne, took place on 7 July 2011, for an amount of EUR 3,1 million.

(155) The planned sale of the freight vessel Nord-Pas-de-Calais should bring SeaFrance's contribution resulting from the sale of the vessels to EUR [10-20] million. At the time of notification of the original restructuring plan, the French authorities had committed to SeaFrance disposing of the vessels Renoir and Cézanne. These two sales took place in July 2011. It is established decision-making practice of the Commission that future sales of assets can be accepted as own contribution on condition that the Member State has produced a realistic estimate of their market value ⁽⁴²⁾. In this case, the French authorities produced two valuations for the freight vessel Nord-Pas-de-Calais carried out by two independent experts, both establishing the market value of the vessel at about EUR [0-10] million. The Commission points out that one of the two experts had estimated the market value of the vessels Renoir and Cézanne at USD [0-10 000 000] in April 2011. The two vessels were sold for a value of USD [0-10 000 000] in July 2011. Consequently, the Commission considers firstly that the estimate of the market value can be considered realistic and secondly that the planned sale of the freight vessel Nord-Pas-de-Calais is acceptable as own contribution.

⁽³⁹⁾ Underlining added.

⁽⁴⁰⁾ Underlining added.

⁽⁴¹⁾ General Court judgment of 7 December 2010 in case T-11/07 *Frucona Košica v Commission*, not yet published in the ECR, points 244 and 245.

⁽⁴²⁾ Decision N 488/09 Restructuring aid to POLFA 'Tarchominskie Zakłady Farmaceutyczne' SA, recital 47.

- (156) As a preliminary point, the French authorities specified that the loan for EUR [40-70] million intended to finance the exercise of the purchase option on the vessel Molière does not constitute an additional own contribution. In fact, it replaces an off-balance sheet contribution already existing under the leasing contract relating to the vessel Molière. It was not therefore taken into account in the calculation of the total own contribution. Nevertheless, in so far as this financing replaces existing financing, the Commission must ensure that it too meets the criteria of compatibility of the own contribution, especially that of the absence of aid.
- (157) In so far as the loans are granted by the SNCF in accordance with point 43 of the Guidelines, the Commission must ensure that this financing is free of aid and it 'is a sign that the markets believe in the feasibility of the return to viability'. Such is not the case for the following three reasons, each of which would suffice to support this conclusion.
- (158) Firstly, as indicated by the Commission in section 7.1.2, recitals 129 to 142 above, the conditions to which the loans were subject do not correspond to market conditions.
- (159) According to the Commission's estimates, with normal collateral, the rate on the loans, to be in line with market conditions, should be around 14 % (5-year swap rate of 2,825 %⁽⁴³⁾ + average CDS⁽⁴⁴⁾ below B- (i.e. CCC) of 11,18 % + premium 0,2 %). This corresponds to the data observed in April, May and June 2011. In addition, despite the Commission's repeated requests⁽⁴⁵⁾, the French authorities never produced a rating or rate proposal from a private bank.
- (160) Secondly, as shown in section 7.1.2., recitals 129 to 142, the loans in question themselves constitute State aid. They could not therefore be taken into consideration as an own contribution which must be free of aid, in accordance with the title preceding point 43 of the Guidelines.
- (161) Thirdly, and in any case, according to points 7 and 43 of the Guidelines, the real contribution serves in particular to show that the markets believe in the feasibility of the return to viability⁽⁴⁶⁾. However, in the present case, the authority granting the aid and the parent company are combined in a single legal person, i.e. the SNCF, and the measures concerned are simultaneous. Under these circumstances, this purpose cannot be complied with in the absence of a real contribution obtained from an investor or creditor external to the SNCF. In fact, the conduct of the authority granting the aid in no way shows that the markets believe in the return to viability.
- (162) As indicated in recital 141, the Commission considers that the reference made by France in its comments to the decisions relating respectively to the aid granted by the publicly owned company Osinek in favour of ČSA – Czech Airlines and the loans granted by the Hungarian Development Bank in favour of Hungarian fertiliser producer Péti Nitrogénművek (see recital 116) is not relevant as, in the first of these cases, the Commission has not yet taken a final decision and, in the second, this is not a case of restructuring.
- (163) In addition, as indicated previously and independently of the question of a possible aid element in the loans, the own contribution must indicate that the markets believe in the feasibility of the return to viability.
- (164) In this case, the financing by the SNCF could not demonstrate this. In fact, the SNCF is both the grantor of aid and the provider of the own contribution. The French authorities did not provide any information showing that a prudent independent investor would be prepared to enter into a firm commitment to provide an own contribution and a loan to exercise the option under the same conditions as those proposed by the SNCF.
- (165) SeaFrance's own contribution meeting the requirements of point 43 of the Guidelines, i.e. free of aid and expressing the belief of the markets in the feasibility of a return to viability, consequently amounts to only EUR [10-20] million, i.e. to less than [< 10] % of the restructuring costs. The 50 % threshold provided for in point 44 of the Guidelines is therefore not reached. The Commission therefore considers that SeaFrance's own contribution to the restructuring effort remains very inadequate in terms of the provisions of the Guidelines.
- (166) The Commission also observes that France has not invoked the exceptional circumstances clause provided for in point 44 of the Guidelines or provided any evidence of the existence of an exceptional situation of this kind.
- (167) The Commission therefore concludes that the requirement of a 'real contribution, free of aid', provided for by the Guidelines, is not satisfied.

7.2.3. Return to long-term viability

- (168) In so far as SeaFrance's own contribution to the restructuring effort remains very inadequate in the light of the provisions of the Guidelines, the Commission considers that there is no need to assess the condition of return to long-term viability.

⁽⁴³⁾ At 1 July 2011, Bloomberg EUSA5.

⁽⁴⁴⁾ Average CDS all sectors together.

⁽⁴⁵⁾ [...]

⁽⁴⁶⁾ General Court judgment of 7 December 2010 in case T-11/07 *Frucona Košica v Commission*, not yet published in the ECR, point 245.

7.2.4. *Prevention of any excessive distortion of competition (compensatory measures)*

- (169) In the decision to initiate the procedure, the Commission indicated that the compensatory measures proposed by the French authorities were inadequate. In their comments in response to the decision to initiate the procedure, the French authorities accepted ⁽⁴⁷⁾ the near non-existence of compensatory measures ⁽⁴⁸⁾. They indicated that this problem would be resolved under a modified restructuring plan.
- (170) Supplementary compensatory measures were indeed proposed under the restructuring plan communicated on 12 September 2011, and especially the forthcoming sale of the freight vessel Nord Pas-de-Calais. The French authorities also mention the already completed sale of the vessels Renoir and Cézanne, the reduction in the number of crossings (reduction by 5 830 crossings, i.e. – 37,6 % compared to the 2007 crossings schedule) and the reduction in market shares of SeaFrance ([10-15]% of the car transport market for 2012-2019, compared to [15-20]% in 2008).
- (171) In so far as SeaFrance's own contribution to the restructuring effort remains very inadequate in the light of the provisions of the Guidelines, the Commission considers that there is no need to analyse the compensatory measures proposed.

7.2.5. *Consequence of the incompatibility of the restructuring aid and the rescue aid*

- (172) Following the notification of the restructuring plan by France on 18 February 2011, in accordance with point 26 of the Guidelines, the 6-month period within which the loan must be reimbursed was extended until the Commission reaches its decision on the restructuring plan. Since the Commission considers that the measures notified as restructuring aid do not satisfy the compatibility conditions provided for by the Guidelines, the consequences of this incompatibility must be drawn. The loan cannot therefore be extended any longer beyond the date of this decision and must therefore be reimbursed without delay.
- (173) The amount to be recovered consists of the principal of the rescue loan, plus contractual interest due and not yet paid on the date of notification of the present decision, plus, from the date of the notification of the present decision, interest calculated in accordance with 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 ⁽⁴⁹⁾.

⁽⁴⁷⁾ See section 2.2 (bottom of page 19 and page 20) of the comments of the French authorities.

⁽⁴⁸⁾ Under the 2004 Guidelines on restructuring aid, compensatory measures must be taken to minimise the adverse effects on trading and may comprise divestment of assets or reductions in capacity or market presence.

⁽⁴⁹⁾ OJ L 140, 30.4.2004, p. 1.

VIII. CONCLUSION

- (174) The capital increase of EUR 166,3 million, the loan of EUR 99,7 million and the loan of EUR [40-70] million that the SNCF plans to grant to SeaFrance constitute aid within the meaning of Article 107(1) TFEU. This aid is incompatible with the internal market and therefore cannot be implemented.
- (175) The loan granted by France, through the SNCF, as rescue aid in favour of SeaFrance, authorised by Commission decision of 18 August 2010, must be reimbursed immediately, together with the contractual interest due and not yet paid on the date of notification of the present decision.

HAS ADOPTED THIS DECISION:

Article 1

The capital increase of EUR 166,3 million, the loan of EUR 99,7 million and the loan of EUR [40-70] million that the French Republic is planning to implement, through the SNCF, as restructuring aid in favour of SeaFrance constitute State aid within the meaning of Article 107(1) TFEU and are incompatible with the internal market.

For this reason, these aid schemes may not be implemented.

Article 2

The loan granted by France, through the SNCF, as rescue aid in favour of SeaFrance, referred to in the Commission decision of 18 August 2010, constitutes aid which is incompatible with the internal market.

Article 3

1. France, through the SNCF, shall recover the aid referred to in Article 2 from the beneficiary, including the contractual interest due and not yet paid on the date of notification of the present decision.

2. The amounts to be recovered shall bear interest from the date of notification of the present decision until they are in fact recovered.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 4

1. The recovery of the aid referred to in Article 2 shall be immediate and effective.

2. France shall ensure that the present decision is implemented within four months following the date of its notification.

Article 5

1. During the two months following the notification of the present decision, France shall communicate the following information to the Commission:

- (a) the principal amount of the aid to be recovered from the beneficiary, which comprises the amount of the loan and the interest on the loan due and not yet paid;
- (b) the amount of the interest to be recovered from the beneficiary, which must be calculated according to the principles set out in Article 3(3);
- (c) a detailed description of the measures already taken and planned to comply with the present decision; and
- (d) the documents showing that the beneficiary has been ordered to reimburse the aid.

2. France shall keep the Commission informed of the progress in the national measures taken to implement the present decision until full recovery of the aid referred to in Article 2. It shall forward immediately, at the Commission's request, any information on the measures already taken and planned to comply with the present decision. It shall also provide detailed information on the amounts of aid and the interest already recovered from the beneficiary.

Article 6

This decision is addressed to the French Republic.

Done at Brussels, 24 October 2011.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION

of 9 March 2012

on State aid No SA.12522 (C 37/08) — France — Enforcing the *Sernam 2 Decision*

(notified under document C(2012) 1616)

(Only the French text is authentic)

(Text with EEA relevance)

(2012/398/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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 those provisions ⁽²⁾,

Whereas:

(3) By letter dated 24 June 2005, a first third party ('the first complainant') complained about the incorrect application of the *Sernam 2 Decision* ⁽³⁾.

(4) On 22 February 2006, this first complainant also brought proceedings for failure to act against the Commission, in so far as the latter, at the time, had taken no action on the complaint.

(5) By letter dated 10 April 2006, a second interested party, the Mory Group company ('the second complainant') also complained to the Commission ⁽⁶⁾.

(6) The two complainants essentially considered that the *Sernam 2 Decision* had been incorrectly applied and asked the Commission to initiate a new formal investigation procedure on the application by France of the *Sernam 2 Decision*.

1. PROCEDURE

1.1. GENERAL PROCEDURAL CONTEXT

(1) On 23 May 2001, the Commission approved aid for the restructuring of SCS Sernam (limited partnership), which became Sernam SA in December 2001 ('the *Sernam 1 Decision*') ⁽³⁾.

(2) On 20 October 2004, the Commission adopted a final decision in which it confirms that the aid approved under the *Sernam 1 Decision*, amounting to EUR 503 million, is compatible with the internal market under certain conditions ('the *Sernam 2 Decision*') ⁽⁴⁾. This Decision also establishes the presence of supplementary aid amounting to EUR 41 million which is incompatible with the internal market, to be recovered by France.

(7) By letter dated 16 July 2008, the Commission informed France of its decision to initiate the procedure provided for in Article 108(2) TFEU concerning the application by France of the *Sernam 2 Decision* ('the opening decision'). The Commission in particular expressed doubts as to the compatibility with the *Sernam 2 Decision* of France's chosen arrangements purportedly to apply this Decision, and the possibility that these arrangements involve new State aid.

(8) This Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁷⁾. The arguments of the two complainants are summarised in recital 16 of that decision. By means of the same decision, the Commission called on interested parties to submit comments on the application by France of the *Sernam 2 Decision*.

(9) On 8 October 2008, the French authorities presented comments on the opening decision.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ OJ C 208, 14.7.2011, p. 8.

⁽³⁾ Decision of 23 May 2001 concerning State aid case NN122/00 (ex NJ 140/00), OJ C 268, 22.9.2001, p. 15.

⁽⁴⁾ Decision of 20 October 2004, OJ L 140, 29.5.2006, p. 1.

⁽⁵⁾ This complaint was supplemented in particular by letters dated 13 July, 25 August, 6 September, 5 October, 25 October and 16 December 2005.

⁽⁶⁾ This complaint was supplemented in particular by correspondence dated 23 April 2007.

⁽⁷⁾ OJ C 4, 9.1.2009, p. 5.

(10) The Commission received comments on this matter from interested parties. The first complainant submitted comments on 13 November 2008, the Société nationale des chemins de fer (‘SNCF’) on 6 February 2009, and the investment fund Butler Capital Partners (‘BCP’) on 9 February 2009. The Commission forwarded the comments received to France on 25 March 2009, asking it to comment, which the French authorities did with respect to the first complainant’s comments on 7 May 2009.

(11) On 15 March 2011, the second complainant served notice on the Commission to implement ‘investigation measures’ for the purposes of verifying the conditions of application of the Sernam 2 Decision. The Commission replied to this on 18 May 2011, indicating the investigation measures taken since the adoption of the opening decision.

(12) On 25 November 2009 and 29 November 2011, the Commission sent requests for information to the French authorities. Replies were received on 15 January 2010 and 25 January 2012 respectively.

1.2. NATIONAL PROCEDURAL CONTEXT

(13) On 3 January 2007, the Mory group company asked the French authorities to issue two repayment orders: (1) one against Sernam SA concerning the EUR 41 million aid declared to be incompatible with the common market by the Sernam 2 Decision and which, in its opinion, had not in fact been recovered by France and (2) the other against the (undesignated) beneficiary of aid for restructuring Sernam SA allegedly granted by France with a view to the Sernam SA asset transfer operation (for the details of this operation, see section 2.4 of the present decision).

(14) The Minister for the Economy, Finance and Industry rejected the requests made by the second complainant by letter. The Mory group company appealed against this rejection decision on grounds of *ultra vires* before the Paris Administrative Court. As far as the Commission knows, this litigation is still pending.

(15) In addition, compulsory administration proceedings were brought on 31 January 2012 against the company Sernam Xpress (‘Sernam Xpress’). Sernam Xpress is the company which received the assets and non-financial liabilities from Sernam SA at the time of the Sernam SA asset transfer operation (for the details of this operation, see section 2.4). The Nanterre Commercial Court

ordered an observation period of six months and arranged a new hearing for 27 March 2012.

2. DESCRIPTION

2.1. SERNAM

(16) Since it was set up in 1970 as part of SNCF, Sernam’s activities have consisted in mail and express parcel and pallet delivery services ⁽⁸⁾.

(17) On 1 February 2000, all Sernam’s business activities were assigned to a subsidiary and SCS Sernam (limited partnership) was thereby formed. SCS Sernam was transformed into a public limited company (Sernam SA) on 21 December 2001. In 2005, Sernam SA had 10 operating subsidiaries and a road transport service company, Sernam Transport Route.

(18) On 17 October 2005, Sernam Xpress received the assets and non-financial liabilities of Sernam SA on the transfer of Sernam SA’s activities to Financière Sernam (for the details of this operation, see section 2.4). Sernam Xpress was at the time a wholly-owned subsidiary of Financière Sernam.

(19) During 2006, BCP took a 51,8 % stake in the capital of Sernam Xpress. At the same time, Sernam Xpress acquired the company Coulonge, a transport firm established in Limoges.

(20) During 2011, the companies Financière Sernam and Sernam Xpress found themselves obliged to recapitalise before the end of the financial year. Since BCP did not contribute the necessary capital, two operations were undertaken.

(21) Firstly, in May 2011, Sernam Xpress contributed the Sernam brand to its operating subsidiary, Sernam Services (this contribution is valued at EUR 15 million).

(22) Secondly, on 30 June 2011, the company Sernam Xpress was wound up and the company Financière Sernam, the sole partner, absorbed its assets and liabilities (an operation referred to as the ‘transfer of all assets and liabilities’).

⁽⁸⁾ For a more detailed description of Sernam’s activities, see recitals 12 to 31 of the Sernam 2 Decision and recitals 8 and 9 of the opening decision.

(23) Consequently, the Sernam group now consists of Financière Sernam and the subsidiaries of the ex-Sernam Xpress, which are Sernam Services, already mentioned, and the company Aster ('Aster'). Aster is the former company Sernam Transport Route. Sernam Xpress had sold this subsidiary in December 2005, and had granted a turnover guarantee to the purchaser. In March 2008, Sernam Xpress repurchased the company, which in the meantime had changed its name to Aster. At the time of the takeover, Sernam Xpress made a current account contribution of EUR 5 million to ASTER. This amount in current account was made over to ASTER during a board meeting held in July. In December 2011, Financière Sernam, which in the meantime had taken over Sernam Xpress (see recital 22), recapitalised the company ASTER by making over EUR 5 599 998, entered in its current account.

(24) Since the financial situation of the Sernam group continued to deteriorate, compulsory administration proceedings were initiated on 31 January 2011 against the companies Financière Sernam and Sernam Services. On 3 February 2011, the subsidiary Aster was put into liquidation with temporary continuation of business. The Nanterre Commercial Court ordered an observation period of six months and arranged a new hearing for 27 March 2012.

2.2. THE SERNAM 1 DECISION OF 23 MAY 2001

(25) In its Sernam 1 decision, the Commission authorised aid totalling EUR 503 million for restructuring SCS Sernam. The authorisation of this aid was based in particular on a commitment by France to sell the undertaking. 60 % of SCS Sernam's capital was to be taken over by Géodis SA ⁽⁹⁾, a transport and logistics company under general law quoted on the second market of the Paris Stock Exchange. In this way, Géodis SA should have become entirely liable for SCS Sernam's debts without limitation ⁽¹⁰⁾ and covered the additional costs of Sernam's restructuring up to EUR 67 million. In turn, SCS Sernam undertook to reduce the number of its operating sites from 107 to 72 over the period from 1999 to 2004, reduce its turnover by 18 %, reduce its staff and implement restructuring with the above-mentioned budget and within the prescribed timeframe, i.e. before the beginning of 2004.

2.3. THE SERNAM 2 DECISION OF 20 OCTOBER 2004

(26) In its Sernam 2 Decision, the Commission found that the aid amounting to EUR 503 millions authorised under the Sernam 1 Decision, was paid out on conditions differing from those provided for in the Sernam 1 Decision, in particular the takeover by Géodis of 15 % (instead of the envisaged 60 %) of the shares in SCS Sernam. Géodis also

renounced contributing itself to the restructuring costs of the undertaking to the amount of EUR 67 million.

(27) In the light of these factors, the Commission imposed conditions on the authorisation of the EUR 503 million of restructuring aid paid to Sernam SA. Article 3 of the Sernam 2 Decision, which contains these conditions, is worded as follows:

'Article 3

1. Subject to paragraph 2, the following conditions shall be complied with:

(a) Sernam may develop only its activities to carry mail by railway in accordance with the Train Bloc Express (TBE) concept. In this regard, SNCF guarantees that it will offer to any other operator who so requests the same conditions as those granted to Sernam to develop TBE freight transport by rail.

(b) In return, Sernam shall, in the next two years as from the day on which this Decision is notified, fully replace its own road transport resources and services by road transport resources and services of one or more companies that are legally and economically independent of SNCF and are chosen in accordance with an open, transparent and non-discriminatory procedure.

Sernam's own road transport resources and services means all of the road resources — i.e. road transport vehicles — of the Sernam company of which it has full ownership or which it leases or rents.

The companies that take over Sernam's road activities shall perform the road transport services using their own resources.

2. In the event that Sernam sells its assets en bloc by 30 June 2005 at market price, through a transparent and open procedure, to a company that has no legal link with SNCF, the conditions of paragraph 1 shall not be applicable.'

(28) In the Sernam 2 Decision, the Commission also pointed out that the French authorities had paid additional aid amounting to EUR 41 million to Sernam. It considered this aid to be incompatible with the internal market and ordered its recovery by France.

⁽⁹⁾ For the record: Géodis was to acquire 60 % of Sernam against payment of a symbolic EUR 1 (see recital 51 of the Sernam 1 decision).

⁽¹⁰⁾ No limitation of liability in limited partnerships.

2.4. THE TRANSFER OF THE ACTIVITIES OF SERNAM SA TO FINANCIÈRE SERNAM

- (29) For the purposes of implementing the Sernam 2 Decision, France claims to have respected the condition provided for in Article 3(2). It explains that SNCF, in a press release ⁽¹¹⁾, invited any interested party to contact Bank ABN AMRO. Thirty-four industrial groups, financial groups or consortiums were allegedly invited to examine the file. The letters of invitation for the first round, sent by ABN AMRO to the parties which had requested the file, contain a call for tenders concerning the takeover of all the assets of Sernam SA.

- (30) According to the French authorities, Sernam's economic situation failed to elicit any proposals based on a positive valuation. Apparently, all the offers submitted under this procedure concluded that the value was very negative:

— [candidate 1] (preliminary offer): EUR -120 million;

— [candidate 2] (preliminary offer): EUR -90,4 million;

— [candidate 3] (preliminary offer): EUR -90,4 million;

— [candidate 4] (second-round offer): EUR -65,2 million;

— [candidate 5] (second-round offer): EUR -56,4 million.

- (31) In view of the absence of a firm offer, the Sernam SA management team, through a company still to be set up and initially called Bidco, then Financière Sernam, made a takeover offer.

2.4.1. Effective date of the operations for the transfer of Sernam's activities to Financière Sernam

- (32) This offer was forwarded to SNCF on 30 June 2005 and accepted in principle by the SNCF General Management on the same day. However, formalities were necessary for the formal conclusion of the memorandum of understanding between all the parties involved. The memorandum of understanding between SNCF, Sernam SA, Sernam Xpress (one of the 10 wholly-owned subsidiaries of Sernam SA, set up in 2002) and the managers of the future company Financière Sernam,

was signed on 21 July 2005 (hereinafter: the 'memorandum of understanding of 21 July 2005'). Financière Sernam was registered in the trade register on 14 October 2005. The various operations for the transfer of Sernam's activities to Financière Sernam, described in detail in the recitals below, were carried out on 17 October 2005.

2.4.2. The various operations for the transfer of Sernam's activities to Financière Sernam

- (33) The French authorities indicated that the transfer of Sernam's activities to Financière Sernam took place in four stages:

- (a) SNCF recapitalised its wholly-owned subsidiary Sernam SA to the amount of EUR 57 million;

- (b) Sernam SA made a contribution to its wholly-owned subsidiary Sernam Xpress of all the assets, including the EUR 57 million from the recapitalisation described in point (a), and the liabilities of Sernam with the sole exception of the 'financial' liabilities (equity loan contracted by Sernam SA with the SNCF group, liability relating to the cancellation of the 'IBM-GPS' contract) amounting to EUR 38,5 million ⁽¹²⁾. In return for this contribution, Sernam SA received a share in Sernam Xpress with a nominal value of EUR 100;

- (c) Sernam Xpress then undertook a capital increase of EUR 2 million which was underwritten in full by SNCF; following this operation, SNCF held the majority of the shares in Sernam Xpress;

- (d) Sernam SA and SNCF assigned to Financière Sernam, for a price of EUR 2 million, all their shares in Sernam Xpress, which represented the entire capital of the latter.

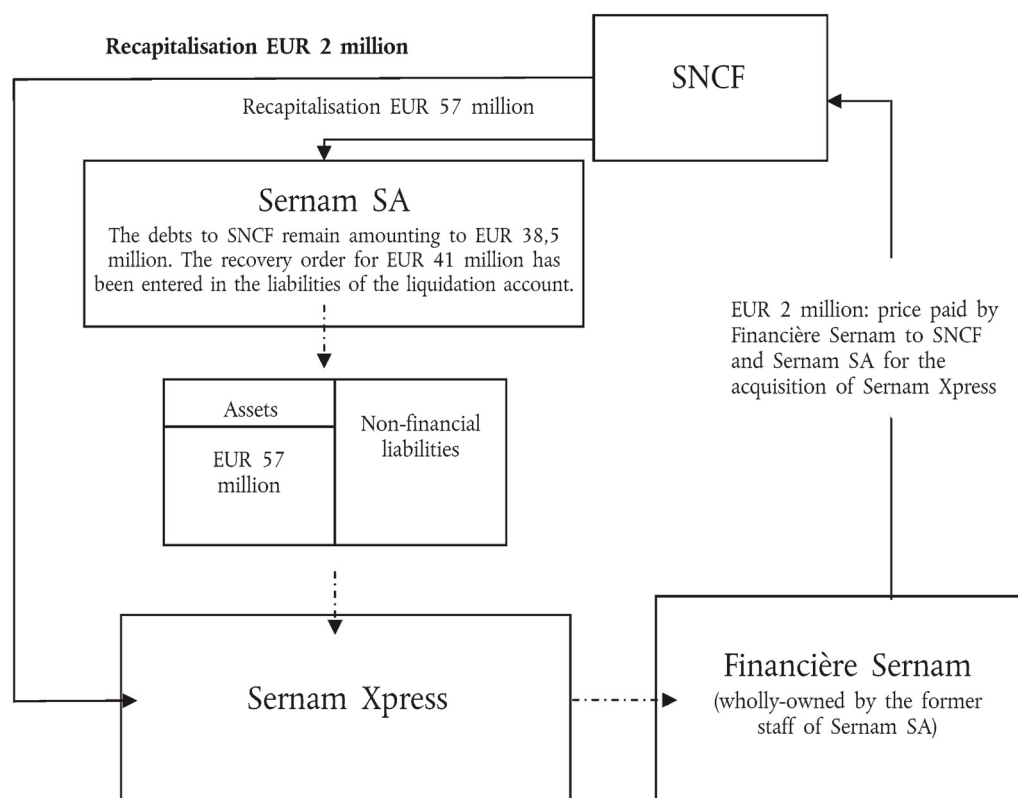
- (34) Sernam SA was put into compulsory liquidation on 15 December 2005. The amount of EUR 41 million repayable to SNCF under the Sernam 2 Decision was entered in the liabilities of the liquidation account. ⁽¹³⁾

- (35) The operations are shown in the following table:

⁽¹¹⁾ Press release dated 24 November 2004.

⁽¹²⁾ The contribution by Sernam SA to Sernam Xpress was made under the French legal form of 'partial contribution of assets'.

⁽¹³⁾ Letter from the French authorities dated 7 May 2008, point 77.



- (36) The memorandum of understanding of 21 July 2005, besides the recapitalisation by SNCF, of Sernam SA by EUR 57 million and of Sernam Xpress by EUR 2 million, provided for guarantees granted by SNCF to Financière Sernam (described in detail in recitals 72 to 85 of the opening decision) and a cancellation clause in the case of a negative decision by the Commission within five years following the conclusion of the memorandum of understanding (described in detail in recital 117 of the opening decision).

2.5. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (37) In its decision of 16 July 2008, the Commission wished to verify whether France had in fact, as it claims, complied with Article 3(2) of the Sernam 2 Decision and whether the procedure for the recovery of the incompatible aid amounting to EUR 41 million chosen by France, i.e. entering the debt to the State in the liabilities of the liquidation account of Sernam SA, in fact enabled the distortion of competition caused by this aid to be eliminated. In addition, the Commission wished to check whether the operation transferring the assets of Sernam SA did not give rise to new State aid to be regarded as incompatible with the internal market.

2.6. COMMENTS BY INTERESTED PARTIES

2.6.1. Comments by the complainants

- (38) Firstly, the first complainant considers that the conditions laid down in the Sernam 2 Decision for the sale of Sernam SA's assets were not complied with.
- (39) To start with, it was alleged that the deadline imposed by the Sernam 2 Decision, i.e. 30 June 2005, to make the sale was not respected, as the transfer operations were approved only on 17 October 2005 and the sale of the shares should have occurred on the same day.

- (40) Then, regarding the price of the transfer, the first complainant considers that it was set solely by reference to the offer made by Financière Sernam. This offer was purportedly unlawful as it implied the granting of new aid, and in particular the recapitalisation of Sernam SA. Finally, the first complainant emphasises that Sernam Xpress was not a company independent of Sernam SA, as shown by the Commission in its opening decision.
- (41) Moreover, it is alleged that the transfer operations in reality constitute a share deal, i.e. the beneficiary entity is kept on the market with a mere change of owner.
- (42) It also criticises the infringement of the condition of organising the sale through a transparent and open procedure. In its opinion, the sale of Sernam Xpress should have been subject to public consultation and invitation to tender after the dual recapitalisation of Sernam SA and Sernam Xpress, rather than that of Sernam SA.
- (43) Second, the first complainant criticises manipulations in the valuation of the assets and liabilities transferred and the undervaluation of the entity sold.
- (44) Third, the first complainant lists a series of measures which, in its opinion, constitute new aid: the recapitalisation of EUR 57 million, the non-recovery of the EUR 41 million in unlawful aid, the write-off of Sernam SA's financial debts to SNCF. All these measures, in its opinion, constitute aid which is incompatible with the internal market.
- (45) Fourth, the first complainant emphasises that Sernam SA should have been wound up rather than sold. It shares the Commission's doubts that certain costs were taken into account in the calculation of the liquidation and considers that it is not shown at any time that the real cost of restructuring Sernam was less than that of liquidation.
- (46) The first complainant concludes from this that the French authorities have not only eluded the obligation to recover EUR 41 million in aid declared to be incompatible, but have also granted new aid amounting to at least EUR 95 million, to which should be added various aid measures granted in the form of guarantees.
- (47) The second complainant, for its part, did not submit comments on the opening decision.
- 2.6.2. Comments by interested parties considering that the Sernam 2 Decision was duly complied with**
- 2.6.2.1. Comments by SNCF**
- (48) SNCF considers that it respected the condition provided for in Article 3(2) of the Sernam 2 Decision. It claims to have sold all of Sernam's assets en bloc, before 30 June 2005, at market price, to a company that has no legal link, through a transparent and open procedure.
- (49) According to SNCF, the transfer operations were indisociable and simultaneous. The Commission could not therefore break them down artificially.
- (50) It considers that in the case of a negative price, the principle of the private investor in a market economy would be respected if the cost of the transfer is lower than the cost of winding up, which the State would have borne as shareholder, and submits detailed observations to prove this.
- (51) Finally, it emphasises that the obligation relating to the recovery of the aid amounting to EUR 41 million has been entered in the liabilities of the liquidation account of Sernam SA.
- 2.6.2.2. Comments by Butler Capital Partners**
- (52) Firstly, BCP provides details of its involvement in the capital of Sernam Xpress.
- (53) Secondly, BCP specifies the objective pursued by the takeover of the company Coulange.
- (54) Thirdly, BCP denies that Sernam Xpress had a cash surplus following the capital injections of EUR 57 million and EUR 2 million. BCP would have had to reinject EUR 6 million to bring the cash flow to an acceptable level given the losses to be financed.
- (55) Fourthly, BCP disputes that the benefit of the aid of EUR 41 million was transferred to Sernam Xpress. BCP considers that such a situation would be conceivable only if it were proved that the transfer of Sernam SA's activities was not made at market price. However, according to BCP, the transfer was made following an open, transparent and non-discriminatory procedure. BCP recalls too that the transfer process was accompanied by an expert valuation.

- (56) Finally, regarding the consequences of its takeover of Sernam, BCP analyses the capital increase as a sale and considers that, in accordance with the *Banks* ⁽¹⁴⁾ and *SMI* ⁽¹⁵⁾ case-law, the recovery of hypothetical aid cannot be imposed on Financière Sernam or its subsidiary Sernam Xpress.

2.7. COMMENTS BY FRANCE

2.7.1. Concerning compliance with the Sernam 2 Decision

2.7.1.1. Concerning observance of the deadline for the sale

- (57) The French authorities consider that the firm takeover offer, which is legally binding on the purchaser, was submitted on 30 June 2005 and accepted on the same day by SNCF, which made the agreement irrevocable under French contract law.

2.7.1.2. Concerning the selling price

- (58) The French authorities consider that the Sernam 2 Decision did not prohibit sale at a negative price and that case-law recognises that this can constitute a market price.
- (59) The assets were apparently sold at the negative price of EUR 57 million, corresponding to the amount of the recapitalisation of Sernam SA by SNCF. This price was allegedly better than the indicative offers initially presented and constituted the only firm offer proposed by the market to SNCF. It was purportedly endorsed by several independent valuations (ABN Amro, Oddo Corporate Finance/Paul Hastings and the French Privatisations Board).
- (60) According to the French authorities, the prior recapitalisation undertaken by SNCF is merely an implementation arrangement. The Commission could not therefore refer to this recapitalisation to challenge the market value of the Sernam assets, since the existence of a market price precluded any categorisation as aid for the entire negative price.

2.7.1.3. Concerning the sale of assets

- (61) The French authorities consider the Commission's analysis, according to which the transfer of Sernam SA's activities to Financière Sernam comprises two successive operations, i.e.: (1) an intra-group transfer of assets en bloc from Sernam SA to Sernam Xpress (at this stage a wholly-owned subsidiary of Sernam SA), then (2) a sale of Sernam Xpress to Financière Sernam,

corresponding to a share deal and not to a sale of assets, to be artificial and unjustified.

- (62) Firstly, the transfer operations were considered to correspond to a 'contribution and disposal operation' implemented through recapitalisation, i.e. an operation which is inextricably linked and undertaken for two reasons: (1) French law did not permit a sale of assets to be undertaken at a negative price, and (2) it was appropriate to ensure that the acquiring party has no legal link with SNCF.

- (63) Since its economic situation continued to be in deficit (the cumulated losses of the four financial years prior to the disposal amounted to EUR 309,2 million), the total value of Sernam SA's assets would have been negative.

- (64) To comply with the prohibition of a sale at a negative price under French law and to ensure the economic neutrality of the disposal operation, it is customary for practitioners in the case of negative value of assets to be transferred (1) to provide that the price paid by the purchaser is symbolic and (2) to set up an arrangement intended to compensate the purchaser (either participation by the seller in a capital increase prior to the disposal or write-off by the seller of debts owed to it by the transferred company).

- (65) In addition, in order to avoid Sernam SA's creditors calling into question the validity of the operation or exercising their right to oppose it, it was appropriate for the assets en bloc to be accompanied by the liabilities necessary to continue Sernam's business. Merely selling the assets would not have allowed inclusion of these liabilities.

- (66) It was therefore appropriate to undertake a partial contribution of assets subject to the regulations on divisions under Articles L.236-16 to L.236-21 of the French Commercial Code. In this respect, the French authorities specify that the contribution is equivalent to a sale in that it also entails a transfer of ownership, through remuneration by shares issued by the company in receipt of the contribution.

- (67) As, pursuant to Article 3(2) of the Sernam 2 Decision, the acquiring party could have no legal link with SNCF, it was not possible to carry out the contribution of assets en bloc directly to Financière Sernam as, in this case, Sernam SA would automatically have become shareholder of Financière Sernam through the contribution. This would explain why there was a partial contribution of assets to Sernam Xpress then disposal of Sernam Xpress to Financière Sernam.

⁽¹⁴⁾ Case 390/98 *Banks v The Coal Authority* [2001] ECR I-6117.

⁽¹⁵⁾ Case 277/00 *Germany v Commission* [2004] ECR I-3925.

(68) According to the French authorities, the partial contribution of assets to Sernam Xpress is not an intra-group transfer in any case, since Sernam Xpress is a 'shell company' used to accommodate the assets en bloc of Sernam SA for the sole purposes of permitting their simultaneous disposal to the acquiring party – the company Financière Sernam – and not to continue the business of the parent company. These assets were purportedly accommodated and contributed at their market value to Sernam Xpress for the purposes of carrying out the operation. In any case, the contribution of assets would have implied transfer of ownership, for which Sernam Xpress had issued a share with a nominal value of EUR 100. According to the French authorities, this share represents the price of the real value of the assets and liabilities contributed, once recapitalised to the amount of EUR 57 million.

(69) The French authorities enclosed with their comments in response to the opening decision the opinion of Nicolas Molfessis, Law Professor, according to which 'Under French law ... SNCF would not be permitted to dispose of Sernam's assets directly en bloc to Financière Sernam; under the legal rules applicable, SNCF was obliged to set up a contribution and disposal operation to comply with the constraints imposed by the Commission:

— since French law makes no provision for the very concept of sale at a negative price, the operation could not be undertaken at market price, as imposed by the Commission, without prior recapitalisation;

— since French law makes no provision for the concept of the assignment of debt, and makes the assignment of contract conditional upon the prior agreement of all the contractors assigned, an agreement which is impossible to obtain in practice, the assignment of the operating liabilities necessary to continue the business called for recourse to the technique of the partial contribution of assets to overcome this obstacle. Recourse to the technique of the partial contribution of assets required the intervention of a company, Sernam Xpress, to comply with the condition of absence of legal link between the assignor and the assignee imposed by the Commission.

The arrangement put in place by Sernam must be assimilated to a disposal of the assets en bloc:

— The contribution and disposal operation, which is well-known in practice, has been assimilated by the Court of Cassation to a disposal of assets whenever indicators showed that the two operations were inextricably linked, since in the end their sole aim is the transfer of the assets;

— Such an inextricable link is perfectly obvious in the present case, since the various agreements signed between the parties very clearly show the will of the parties to regard the various operations as inter-dependent, and having the sole objective of the disposal of Sernam's assets to Financière Sernam.'

(70) According to the French authorities, Sernam SA's assets were sold en bloc to a company that has no legal link with SNCF, at a negative price corresponding to a market price, following negotiation of the disposal conducted in the context of an open, transparent, unconditional and non-discriminatory tendering procedure, in accordance with the conditions laid down in Article 3(2) of the Sernam 2 Decision.

2.7.1.4. *Concerning the open and transparent nature of the selection process*

(71) For the French authorities, the assertion that the file transmitted to potential buyers of Sernam SA's assets did not refer to the sale of Sernam Xpress but to the sale of Sernam SA's assets is materially incorrect. Moreover, the requirement of an open, transparent and non-discriminatory tendering procedure would not imply undertaking a new tendering procedure after the recapitalisation, since this is merely the direct result of the tendering procedure and the negative price resulting from it.

2.7.1.5. *Concerning legitimate expectations*

(72) The French authorities consider that by providing explicitly for the possibility to undertake the disposal of Sernam's assets en bloc, the Sernam 2 Decision gave rise to expectations on the part of SNCF and the French authorities based on the fact that they were authorised to proceed in this way. Initiating the State aid investigation procedure would therefore ignore the legitimate expectations that the French authorities had placed in the Sernam 2 Decision, especially as they had acted with total transparency in relation to the Commission, providing it with all the relevant explanations on the terms and conditions of this disposal.

2.7.2. **Concerning the alleged manipulations carried out at the time of the valuation of the assets and liabilities transferred from Sernam SA to Sernam Xpress**

(73) Concerning the alleged manipulations carried out at the time of the valuation, the French authorities firstly reject the discount of EUR 22 million purportedly made on the valuation of the assets. In fact, since the operation in question was a partial contribution of assets followed by a disposal, the accounting rules applicable required valuation not at net accounting value as the first complainant claims, but based on the current value of the assets and liabilities contributed. These values were

assessed in accordance with the market price or valuations by independent experts. The accounting rules in force were also applied for the valuation of the deferred tax credits. As regards the valuation of the brand portfolio, this was based on an estimate made by the European Commission on 23 May 2001 at the time of a contribution by SNCF to SCS Sernam.

- (74) With regard to the valuation of the liabilities, the French authorities consider that only the liabilities necessary to continue the business of the company in receipt of the contribution were transferred. Moreover, in their view, the valuation of the goodwill corresponds only to the entry in the accounts of the negative market value of EUR 57 million.

2.7.3. Concerning the absence of obligation to recover the aid amounting to EUR 41 million from Sernam Xpress

- (75) The French authorities emphasise that the distinction between share deal and asset deal, which forms the basis for the Commission's arguments developed in the context of the SMI⁽¹⁶⁾ and CDA⁽¹⁷⁾ cases, is not relevant in the present case.

2.7.3.1. Concerning the breakdown of the operation into intra-group transfer and share deal

- (76) For the reasons described in recitals 61 to 70, the French authorities consider that the operations for the transfer of the activities from Sernam SA to Financière Sernam do not constitute an intra-group transfer followed by a share deal, but a disposal of assets to a third party.
- (77) In the alternative, they emphasise that the market price of Sernam Xpress would necessarily have taken into account the existence of the debt of EUR 41 million if the aid had been transferred. Under this assumption, the negative price would have been EUR 98 million (57 + 41). However, the negative price 'paid' – in reality received – by Financière Sernam was allegedly only EUR 57 million. Consequently, the seller would have saved EUR 41 million, but it is therefore the seller who would have kept the economic benefit of the aid. They refer in this context to the *Banks* judgment⁽¹⁸⁾.

2.7.3.2. Concerning compliance with the conditions of the CDA and SMI judgments

- (78) The French authorities maintain that, in its CDA judgment, the General Court considered that the fact

that CDA continued the business of the undertakings which have benefited from aid does not, as such, prove the existence of an intention to evade the effects of a recovery order⁽¹⁹⁾.

- (79) The General Court specified that there was no intention to evade the effects of the recovery order in so far as a purchase price in line with the market was paid by CDA for the takeover of the company LCA's assets⁽²⁰⁾.
- (80) According to the French authorities, since Sernam Xpress had acquired ownership of the assets and part of the liabilities from Sernam SA at their market value, this operation did not transfer to Sernam Xpress the actual benefit of the advantage generated by the granting of aid of EUR 41 million. Furthermore, the Commission cannot argue that, as a result of the takeover of its assets, Sernam SA remains like an empty shell from which it is not possible to secure repayment of the unlawful aid. Such an argument, already developed in the CDA judgment, was rejected by the General Court⁽²¹⁾.
- (81) The French authorities emphasise that the disposal of Sernam SA's assets en bloc was a possibility explicitly considered by the Commission. For SNCF, the fact of transferring Sernam's assets to a company en bloc, at market price, through an open and transparent procedure, could not therefore under any circumstances be considered an evasion.
- (82) This is all the more compelling as the Commission itself apparently considered that such an evasion was ruled out 'where, in addition to taking place at the market price, the transfer of the beneficiary company's assets 'en bloc' is made as part of an unconditional procedure that is open to all the company's competitors'⁽²²⁾.
- (83) Concerning the Commission's argument⁽²³⁾ that the operation not only allowed the assets to be sheltered as authorised by the CDA judgment, but also a structure to be created permitting the financing of new investments such as the takeover of the company Coulonge, it sufficed to observe that the acquisition of

⁽¹⁶⁾ Judgment *Germany v Commission* cited above in footnote 15.

⁽¹⁷⁾ Case T-324/00 *CDA Datenträger Albrechts v Commission* [2005] ECR II-4309.

⁽¹⁸⁾ ECJ judgment *Banks*, cited above in footnote 14, paragraph 78.

⁽¹⁹⁾ Judgment *CDA Datenträger Albrechts v Commission*, cited above in footnote 17, paragraph 98.

⁽²⁰⁾ Judgment *CDA Datenträger Albrechts v Commission*, cited above in footnote 17, paragraph 99.

⁽²¹⁾ Judgment *CDA Datenträger Albrechts v Commission*, cited above in footnote 17, point 100.

⁽²²⁾ Judgment *Germany v Commission*, cited above in footnote 15, point 70; Judgment *CDA Datenträger Albrechts v Commission*, cited above in footnote 17, point 73.

⁽²³⁾ Recital 128 of the opening decision.

the company Coulange Services by Sernam Xpress was carried out simultaneously with the takeover of Sernam Xpress by BCP and that Sernam Xpress was able to draw on the takeover by BCP by injection of new capital to undertake this acquisition.

- (84) Consequently, contrary to the doubts expressed by the Commission, 'the third criterion' of the CDA judgment, as identified by the French authorities, is therefore also complied with.

2.7.4. Concerning the new aid to Sernam Xpress and/or Financière Sernam

- (85) Concerning the existence of new aid in the memorandum of understanding of 21 July 2005 (recapitalisation of Sernam SA by SNCF amounting to EUR 57 million; recapitalisation of Sernam Xpress by SNCF amounting to EUR 2 million; guarantees granted by SNCF to Financière Sernam; cancellation clause), the French authorities consider that, where a sale took place at market price following a tendering procedure which was open and transparent and at a cost lower than the cost of winding-up, this does not include any aid components.
- (86) In addition, the negative price presented by Financière Sernam allegedly corresponds to the estimates made by independent experts.
- (87) Moreover, the French authorities specify that the cancellation clause was included in the memorandum of understanding of 21 July 2005 at the request of Financière Sernam and solely to protect it against the risk of a negative decision by the Commission. The French authorities consider that no disposal would have been possible without this type of clause and claim that the Commission did not call this clause into question in a previous case ⁽²⁴⁾.

3. ASSESSMENT BY THE COMMISSION

3.1. REMINDER OF REASONING BEHIND ARTICLE 3 OF THE SERNAM 2 DECISION

- (88) Firstly, the Commission recalls that the present procedure was initiated under Article 16 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁵⁾, as the Commission had received indications that France has misused the aid authorised, subject to conditions, by the Sernam 2 Decision, following the misuse of aid authorised, also subject to conditions, by the Sernam 1 decision.

⁽²⁴⁾ Decision of 8 July 2008 concerning the measures which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM), OJ L 225, 27.8.2009, p. 180.

⁽²⁵⁾ OJ L 83, 27.3.1999, p. 1.

- (89) The Commission considers it appropriate to recall the reasons which led to it imposing the conditions provided for by Article 3 of the Sernam 2 Decision ⁽²⁶⁾:

'[...] taking account of the misuse of aid established above and the extension of the period of the restructuring plan, the Commission takes the view that Sernam should take a specific compensatory measure by permanently withdrawing from market segments with overcapacity so as to warrant approval of part of the aid at issue.

The immediate consequence of granting State aid in markets with structural overcapacity or in decline is that a company that would have had to give up its business on account of the stated difficulties would be enabled to artificially occupy market shares for which there is a very strong demand, to the detriment of financially sound competing companies. Care should therefore be taken to avoid driving away financially sound competitors from the market to the benefit of those that appear to be unable to survive by their own efforts.

Bearing this in mind, the Commission is of the opinion that Sernam should permanently withdraw from market segments with overcapacity, in this case the market segment of groupage/traditional mail carried by road.

Even though Sernam has already started this withdrawal, the Commission believes that it is not enough and that such it should be sustained. The Commission therefore considers it necessary to impose conditions which (i) will enable Sernam to continue moving through innovative diversification towards a market segment to be developed (and therefore without overcapacity) and (ii) will make it possible to replace Sernam's services by services of other operators (which will have the effect of freeing up Sernam's market shares in these segments) in market segments with overcapacity or stagnation or in decline.

[...]

The Commission also recalls that, if Sernam is sold in its entirety (assets and liabilities) as intended by the French authorities, the conditions of the decision (takeover of Sernam's road activities by other companies and diversification of its activities towards rail freight) should in any case apply. On the other hand, should Sernam sell its assets en bloc, the Commission recalls that the above two conditions concerning the company's restructuring will not apply

⁽²⁶⁾ Recitals 208 to 217 of the Sernam 2 Decision.

as Sernam will no longer operate in its current legal form and will cede its market shares to the independent acquiring party (which will de facto continue its activities with Sernam's assets).'

and open procedure to a company that has no legal link with SNCF, the conditions of paragraph 1 shall not be applicable.'

(90) The Sernam 2 Decision therefore considers two different sale scenarios for Sernam SA: sale of the whole of Sernam SA (assets and liabilities), and sale of the assets only. Under the first hypothesis, the company acquiring the assets and liabilities is subject to the conditions set out in Article 3(1) of the Sernam 2 Decision; under the second, these conditions do not apply.

(91) Furthermore, the broader context of the Commission's Sernam 1 and Sernam 2 Decisions should be recalled. Sernam SA, a constantly loss-making company, was the beneficiary of State operating aid, which was paid to it by its parent company, SNCF, and was necessary for the survival of the undertaking.

(92) It was necessary to put an end to the artificial survival of a company which was unduly occupying market shares when it was not competitive. This resulted, on the one hand, in the process of regular replenishment of the company Sernam by the State being brought to an end, and, on the other hand in the distortions of competition created by this replenishment having to either disappear or give rise to compensatory measures. In this way, the EUR 41 million of unlawful, incompatible aid granted to the company Sernam between 2001 and 2004 was to be recovered and compensatory measures were to be adopted releasing market shares in exchange for the EUR 503 million in restructuring aid.

(93) However, the Commission observes straight away that the way in which France intended to implement the 2004 decision is directly counter to the objectives thus pursued. In fact, the French authorities continued to grant operating aid, under cover of implementing this decision, and endeavoured to preserve the economic continuity of the undertaking without releasing market share and on the contrary trying to strengthen its competitive position.

(94) At this stage, it is appropriate to carry out a methodical examination of the means implemented by the French authorities to achieve their objectives.

3.2. MISUSE OF THE AID AUTHORISED BY THE SERNAM 2 DECISION

(95) The French authorities confirm non-compliance with the conditions set out in Article 3(1) of the Sernam 2 Decision. Consequently, the Commission can confine itself to verifying whether France complied with the conditions set out in Article 3(2) of the Sernam 2 Decision. As a reminder, this paragraph is worded as follows:

'In the event that Sernam sells its assets en bloc by 30 June 2005, at market price through a transparent

(96) As will be shown below, France failed to comply with these conditions.

3.2.1. The transfer of the activities was not completed by 30 June 2005

(97) The observations of the French authorities and the first complainant show that, on 30 June 2005, the SNCF management only accepted the firm offer of Financière Sernam in principle. However, the memorandum of understanding which is binding on all the parties to the transaction was not signed until 21 July 2005 and the various transfer operations were carried out only on 17 October 2005.

(98) The Commission concludes from this that the transfer of the activities of Sernam SA to Financière Sernam did not take place by 30 June 2005 at the latest, even though this was a requirement under the Sernam 2 Decision. This reason alone would already suffice to conclude that France misused the aid authorised conditionally by the Sernam 2 Decision.

3.2.2. The transfer of activities does not constitute a sale ⁽²⁷⁾

(99) A contract of sale under the legal systems of the Member States of the Union is based on principles developed in Roman law (*emptio venditio*). The sale consists in the transfer of ownership of a good against the payment of a price. This price, as the French Government emphasises in respect of French law, must be a positive price.

(100) A transaction by which the person wishing to transfer ownership of one or more goods offers money to the person who acquires them is not a sale, but a different type of contract.

(101) In the present case, SNCF paid EUR 59 million, by undertaking the recapitalisation of Sernam SA for EUR 57 million and of Sernam Xpress for EUR 2 million respectively, and granted various guarantees to Financière Sernam. The payment of EUR 2 million by Financière Sernam in favour of SNCF and Sernam SA neutralises the recapitalisation of Sernam Xpress, but not the other components of the transaction. Consequently, the contract concluded between SNCF and Financière Sernam cannot be termed a sales contract. For that matter, this is not disputed by the French authorities,

⁽²⁷⁾ The Commission emphasises that the question of whether a contract can be termed a sale is independent of the question whether the conclusion of a contract corresponds to the conduct of a private operator.

which explain that the various operations for the transfer of the activities of Sernam SA to Financière Sernam do not constitute a sale as French law does not permit them to carry out a sale which would have led to this result.

- (102) The Commission concludes that the contract concluded between SNCF and Financière Sernam is not a sale. For this reason too, Article 3(2) of the Sernam 2 Decision has not been observed as there was no sale. Consequently, France has misused the aid authorised conditionally by the Sernam 2 Decision.

3.2.3. The transfer of the activities is not a sale of assets but a transfer of Sernam SA in its entirety (assets and liabilities)

- (103) Even if the transfer of the activities of Sernam SA to Financière Sernam did constitute a sale, compliance with Article 3(2) of the Sernam 2 Decision presupposes that this sale relates solely to the assets, and not to Sernam SA in its entirety (assets and liabilities). This results from recital 217 of the Sernam 2 Decision, cited at recital 89 of the present decision.
- (104) As stated in section 2.4, the transfer of Sernam SA's activities by SNCF to Financière Sernam is based on the use by Sernam SA of its wholly-owned subsidiary, Sernam Xpress, to which Sernam SA's assets were transferred together with its liabilities, with the exception of some of its debts to its parent company, SNCF. Before this transfer, Sernam SA had been recapitalised by SNCF to the amount of EUR 57 million and this new capital was included in the assets transferred. Once the transfer had been made, Sernam Xpress was in turn recapitalised by SNCF to the amount of EUR 2 million. The Sernam Xpress shares were then sold to Financière Sernam for the same amount (EUR 2 million).
- (105) As indicated in section 2.7.1.3, the French authorities justify this operation by the two-fold constraint of French law and the Sernam 2 Decision.
- (106) They point out that the overall result of the operation is identical to that of the sale of the assets. It should therefore be assimilated to a sale of Sernam SA's assets en bloc within the meaning of Article 3(2) of the Sernam 2 Decision.
- (107) The Commission comes to a different conclusion, for two reasons.

3.2.3.1. *The transfer consists in an intra-group transfer en bloc of the assets and liabilities, followed by a sale of shares (share deal) of the subsidiary which received them*

- (108) The operation carried out by SNCF enabled Financière Sernam to acquire the shares of Sernam Xpress and therefore to undertake a sale of shares ('share deal').
- (109) First, it is true that SNCF undertook an operation termed under French law, according to the French authorities, a 'partial contribution of assets' (in reality of assets and liabilities). However, even analysed in isolation, this operation could not be termed a 'sale of assets to a third party'. It took place for a negative price of EUR 57 million and does not therefore constitute a sale (see section 3.2.2). In addition, it relates not only to the assets, but also to the entire liabilities, with the exception of certain debts of Sernam SA to its parent company, SNCF. It was therefore a transfer of Sernam SA in its entirety (assets and liabilities) and not a sale of the assets only (also see section 3.2.3.2).
- (110) Finally, this transfer was made to a wholly-owned subsidiary, i.e. Sernam Xpress, an *ad hoc* entity intended to receive Sernam SA's assets and liabilities for the sole purposes of itself being sold to Financière Sernam. Therefore this contribution was not made to a third-party undertaking independent of SNCF.
- (111) Secondly, the Sernam Xpress shares were sold to Financière Sernam, which does not constitute a sale of assets to a third party either, but a transfer of shares or share deal (and therefore a transfer of the undertaking in its entirety).
- (112) Consequently, none of the operations carried out by SNCF constitutes a sale of Sernam SA's assets en bloc to a company that has no legal link with SNCF and the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.3.2. *The transfer is not limited to the assets, but comprises Sernam SA in its entirety (assets and liabilities)*

- (113) Recital 217 of the Sernam 2 Decision, cited at recital 89 of the present decision, establishes a clear distinction between a sale of assets, on the one hand, and a sale of Sernam SA in its entirety (assets and liabilities), on the other. This recital clearly shows that if the French authorities were to undertake a sale of Sernam SA in its

entirety (assets and liabilities), as they intended at the time of the adoption of the Sernam 2 Decision, they were obliged to comply with the conditions set out in Article 3(1) of the Sernam 2 Decision.

(114) The result of the various transfer operations is that Financière Sernam, through its acquisition of Sernam Xpress, acquires Sernam SA's assets and liabilities in their entirety at the time of the adoption of the Sernam 2 Decision, apart from the following exceptions: on the one hand, the assets were boosted by the injections of EUR 57 million in favour of Sernam SA and EUR 2 million in favour of Sernam Xpress (also see section 3.2.4 of the present decision) and, on the other hand, the liabilities were reduced by the amount of the equity loan contracted by the company Sernam SA with the SNCF group, a liability relating to the cancellation of the 'IBM-GPS' contract, and the amount of the obligation to repay the incompatible aid amounting to EUR 41 million.

(115) However, these marginal adjustments cannot hide the fact that the bulk of Sernam SA's assets and liabilities were indeed transferred first to Sernam Xpress and then to Financière Sernam.

(116) The transfer of the business is not therefore a sale of assets, but a sale of Sernam SA in its entirety (assets and liabilities), barring a few exceptions. Consequently, and for this reason too, the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.4. The transfer is not limited to the assets owned by Sernam SA at the time of the Sernam 2 Decision, but were increased by EUR 59 million

(117) On the assets side, the Commission also notes that the sum of EUR 59 million was added by the recapitalisations of Sernam SA and Sernam Xpress and that, at economic level, taking account of the payment of EUR 2 million by Financière Sernam, this addition comes to EUR 57 million. Such an addition to the assets is not authorised by Article 3(2) of the Sernam 2 Decision.

3.2.5. The transfer of the business did not take place through a transparent and open procedure

(118) The French authorities at first organised a transparent and open procedure. However, at the end of this procedure, SNCF had not received any binding offer.

(119) Following the failure of the transparent and open procedure, the contract concerning the various operations for the transfer of Sernam SA's business was concluded with Financière Sernam. Since the latter did not participate as such and in an autonomous manner in the transparent and open procedure, the transfer of the business finally did not take place through a transparent and open procedure.

(120) For this reason too, the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.6. The ultimate purpose of a sale of assets was not observed

(121) Recital 217 of the Sernam 2 Decision explains the ultimate purpose of a sale of assets as follows:

'Sernam [...] will cede its market shares to the independent acquiring party (which will de facto continue its activities with Sernam's assets).'

(122) The ultimate purpose of a sale of assets was therefore to cede market shares and Sernam SA's assets, and to allow a third party to use these assets. The sale of the assets therefore aimed to break off Sernam SA's economic activity.

(123) However, in the present case, Sernam SA was acquired in its entirety by its management, regrouped in the future Financière Sernam. The economic continuity is total; furthermore, the undertaking has been released from a significant part of its debt and received new capital amounting to EUR 59 million, of which EUR 57 million remains the economic responsibility of SNCF. Consequently, apart from the fact that the operation put in place does not comply with the conditions set out in Article 3(2) of the Sernam 2 Decision, it does not allow the objectives pursued by this decision to be attained either. On the contrary, it leads to strengthening of the economic entity which is liable to increase the distortions of competition that the measures imposed by the decision aimed precisely to allay.

3.2.7. The arguments presented by France do not allow compliance with Article 3(2) of the Sernam 2 Decision to be shown

(124) France's argument that the operations taken as a whole are equivalent to a sale of assets en bloc cannot be accepted. In fact, through its nature, the first characteristic of a sale of assets en bloc is that it is not based on a sale of shares. Consequently, the Commission cannot accept the argument that several different legal instruments (partial contribution of assets and liabilities, then share deal) are equivalent to a given legal instrument (sale of assets) since one of the legal instruments actually implemented is the negation of the legal instrument sought.

(125) Likewise, the argument that a direct sale of Sernam SA's assets to Financière Sernam is not possible under French law cannot be accepted. Firstly, it should be recalled that the Sernam 2 Decision left France two alternative means

of implementing this decision. Assuming that the sale of the assets proved inapplicable, the French authorities could always implement the decision by following the possibility provided for by Article 3(1) of the Sernam 2 Decision (confining of Sernam SA's own activities to carrying mail by railway, with the road transport subcontracted). Secondly, if the third-party creditors were really opposed to a sale at a negative price, Sernam SA could have been the subject of a collective procedure, which means that the sale of assets could have taken place under this procedure.

- (126) Finally, if the French authorities were experiencing difficulties in implementing the Sernam 2 Decision, they should have recontacted the Commission to find a solution, in agreement with it, concerning other arrangements pursuant to the principle of sincere cooperation provided for in Article 4(3) of the Treaty on European Union (TEU). Although the French authorities did visit the Commission on 24 November 2004 and wrote to it officially on 21 December 2004 to inform it of the choice to sell the assets en bloc, without describing the key components, it should be stressed that at no time did France notify the Commission of any changes to the restructuring plan conditionally approved by the latter in the Sernam 2 Decision. On the other hand, section 3.2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁸⁾ confirms that a Member State may not deviate from the restructuring plan without notifying and obtaining the prior approval of the Commission.

- (127) The Commission never gave its approval to the transfer of Sernam SA's activities to Financière Sernam, implemented by France.

3.2.8. Conclusion: France failed to comply with Article 3 of the Sernam 2 Decision and misused the aid of EUR 503 million

- (128) In conclusion, in the Commission's opinion, Article 3 of the Sernam 2 Decision was not respected. Consequently, the restructuring aid of EUR 503 million conditionally authorised by the Sernam 2 Decision was improperly used.

3.2.9. The aid of EUR 503 million is incompatible with the internal market

- (129) Since the aid of EUR 503 million was used by the recipient in breach of the Sernam 2 Decision, it is not compatible with the internal market on the basis of this decision.
- (130) According to the Court of Justice case-law, it is for the Member State to invoke the reasons for compatibility of aid. Since France has not invoked any reason for

compatibility, the Commission concludes that the aid of EUR 503 million is incompatible with the internal market and must be recovered, together with interest from the date on which it was made available.

- (131) This recovery must be made from Financière Sernam and its subsidiaries, and notably Sernam Services and Aster, which are currently continuing the economic activity which received the aid, previously engaged in by Sernam SA (now wound up) and then by Sernam Xpress (the assets and liabilities of which were absorbed by Financière Sernam following a transfer of all assets and liabilities). In fact, it is appropriate to consider, firstly, that Sernam Xpress took over all the assets and a portion of the liabilities from Sernam SA following a transaction which took place within the group. Sernam Xpress therefore continued the economic activity of Sernam SA (also see the detailed account in section 3.3). Then, on account of the transfer of all assets and liabilities, Financière Sernam is the legal successor to Sernam Xpress. Finally, Financière Sernam and its subsidiaries, and notably Sernam Service and Aster, are continuing the business of Sernam SA and Sernam Xpress and therefore continuing to benefit from the aid of EUR 503 million initially granted to Sernam SA.

3.3. THE RECOVERY OF THE AID OF EUR 41 MILLION

- (132) The State aid of EUR 41 million which was to be recovered by France from its recipient under the Sernam 2 Decision has been entered in the liabilities of the liquidation account of the company Sernam SA.
- (133) The French authorities consider that pursuant to Article 4 of the Sernam 2 Decision, the transfer of the activities of Sernam SA to Financière Sernam through a procedure that they term transparent and open has the consequence of confining the recovery obligation to the company Sernam SA only.
- (134) Article 4 of the Sernam 2 Decision is worded as follows:

'Any partial or full sale of Sernam shall be effected at market price and through a transparent procedure that is open to all its competitors. Under these conditions, the Sernam company shall, if it continues to exist, be responsible for paying back the aid of EUR 41 million.'

- (135) Article 4 draws a distinction according to whether or not there has been an interruption of Sernam's economic activity. In the case of the disappearance of this activity, recovery is not necessary from the parties who have acquired the assets at market price through a transparent and open procedure.

⁽²⁸⁾ OJ C 244, 1.10.2004, p. 2.

(136) The Commission notes moreover that in their case-law, the Court of Justice and the General Court attach decisive importance to these same factors.

(137) The *SMI* judgment⁽²⁹⁾ draws a distinction between two hypotheses in the case of the sale of the activities for which aid has been received, i.e. the sale of the shares of the undertaking, following which the undertaking that has benefited from aid retains its legal personality (share deal), and the sale of all or part of the assets of the undertaking to another undertaking, following which the assisted economic activity is no longer carried out by the same legal person (asset deal).

(138) As regards the share deal, the Court of Justice ruled that⁽³⁰⁾:

‘[...] where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, Case 305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 40).

In the present case, the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid. Therefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. [...]

(139) As regards the asset deal, the Court of Justice continues as follows⁽³¹⁾:

‘It is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation

without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid.’

(140) The same distinction is to be found in the *Seleco* judgment⁽³²⁾. In this judgment, the Court of Justice confirms that the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms. The Court also accepted the relevance of the following indicators to establish economic continuity: the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction⁽³³⁾.

(141) It seems appropriate also to emphasise that the sales of assets in the *SMI* and *Seleco* cases were undertaken under collective proceedings, under the supervision of a court. They concerned only part of the assets of the undertakings subject to the collective proceedings. In addition, according to the Court, it was not established that they did not correspond to market conditions.

(142) The General Court analysed an asset deal in the *CDA* judgment⁽³⁴⁾ and in particular checked whether in the case in point there was evidence permitting the conclusion that the recovery order was being evaded through a partial sale of assets. The General Court considered that such an intention had not been established by the Commission in this case and that *CDA* did not retain the actual benefit of the competitive advantage connected with the receipt of the aid granted. The General Court based this finding on two matters of fact: the sale was confined to part of the assets, sold en bloc and proceeding in that way (i.e. sale en bloc) made it possible to obtain a higher sum than would have been obtained by selling the assets in question separately.

(143) It is therefore appropriate to examine the transfer of Sernam SA's activities to Financière Sernam in the light of the criteria developed by the Court of Justice and General Court in order to establish whether it is appropriate to extend the recovery to Financière Sernam and its subsidiaries, Sernam Services and Aster.

⁽²⁹⁾ Judgment *Germany v Commission*, cited above in footnote 15.

⁽³⁰⁾ Judgment *Germany v Commission*, cited above in footnote 15, points 80 and 81.

⁽³¹⁾ Judgment *Germany v Commission*, cited above in footnote 15, paragraph 86.

⁽³²⁾ Regarding the share deal, see Case 328/99 *Italy and SIM 2 Multimedia v Commission*, and C-399/00 [2003] ECR I-4035, paragraph 83: ‘it is correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery’, for the asset deal, see paragraphs 66 to 85 of the same judgment.

⁽³³⁾ Judgment *Italy and SIM 2 Multimedia v Commission*, cited above in footnote 32, paragraphs 77 and 78.

⁽³⁴⁾ Judgment *CDA Datenträger Albrechts v Commission*, cited above in footnote 17.

- (144) As regards firstly the transfer of all the assets and liabilities, with the exception of the three financial liabilities (equity loan contracted by the company Sernam SA with the SNCF group, liability relating to the cancellation of the 'IBM-GPS' contract; obligation to repay the incompatible aid of EUR 41 million), from Sernam SA to Sernam Xpress, the Commission points out that this transfer covered the undertaking in its entirety (see section 3.2.3). There is therefore economic continuity between Sernam SA and Sernam Xpress. This distinguishes the present case from the facts which gave rise to the *SMI*, *Seleco* and *CDA* judgments, which concerned the sale of only part of the assets. In addition, the transfer took place within a group. It took place after a final decision by the Commission ordering the recovery of the aid and its only economic logic is to allow the continuation of the Sernam SA's activities, without having to comply with the conditions imposed by Article 3 of the Sernam 2 Decision. All the criteria evidencing economic continuity within the meaning of the decision and the *Seleco* judgment are therefore met.
- (145) The Commission points out incidentally that the transfer to Sernam Xpress does not correspond to market conditions. The transfer to Sernam Xpress was made at a negative price and is not the result of a transparent and open procedure (see section 3.2.5). To the negative price of EUR 57 million, which is perceived as operating aid enabling the losses of Sernam Xpress to be covered for the years from 2005 to 2008 ⁽³⁵⁾, is added the write-off of Sernam SA debts to SNCF amounting to EUR 38,5 million (see recital 27). Finally, the Commission points out too that the liabilities remaining in Sernam SA are debts to third parties and not to SNCF. Through the capital injection of EUR 57 million, SNCF enabled Sernam Xpress, at least for the period from 2005 to 2008, to honour these debts in their entirety. If, on the other hand, SNCF had sold only the assets at a positive price, the debts of Sernam SA in relation to third parties would have been honoured only up to the proceeds from the sale. This is an additional indicator that the contractual balance between SNCF and Financière Sernam does not correspond to market conditions.
- (146) It should also be pointed out that the negative price of EUR 57 million is higher than the best offer received during the unsuccessful tendering procedure which had been a negative price of EUR 56,4 million (second-round offer [candidate 5]).
- (147) The transfer enabled Sernam Xpress to elude the recovery order for EUR 41 million imposed on Sernam SA, and enabled it to continue Sernam SA's activities without having to repay this aid and without having to comply with the conditions of Article 3 of the Sernam 2 Decision.
- (148) For these reasons, the Commission concludes that the transfer of the activities from Sernam SA to Sernam Xpress had the consequence that Sernam Xpress continued to benefit from the competitive advantage linked with the receipt of the aid granted. In fact, there was economic continuity between the two companies and the transfer corresponds to an evasion of the recovery order imposed on Sernam SA.
- (149) As explained in the *SMI* and *Seleco* judgments, the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery from the recipient company. Consequently, the sale of the Sernam Xpress shares to Financière Sernam did not have the consequence of releasing Sernam Xpress from the requirement to repay the aid of EUR 41 million.
- (150) Following the merger between Sernam Xpress and Financière Sernam, the obligation regarding recovery was transferred to Financière Sernam. Furthermore, the latter and its subsidiaries, and notably Sernam Services and Aster, are continuing the business of Sernam SA and Sernam Xpress and are therefore continuing to benefit from the aid of EUR 41 million initially granted to Sernam SA.
- (151) Furthermore, for the reasons set out under point 3.4 below, the arguments inferred by the French authorities from the application of the principle of the private investor in a market economy must be discounted.

3.4. CONCERNING THE NEW AID GRANTED TO SERNAM XPRESS

- (152) The memorandum of understanding of 21 July 2005 provides for a certain number of measures, which may constitute new aid (cf. recital 36 above). The Commission must check whether these measures constitute new aid and whether, if appropriate, this aid can be declared compatible with the internal market.
- (153) According to the French authorities, all these measures conform to the principle of the private investor in a market economy. SNCF allegedly transferred the activities of Sernam SA to the company having submitted the best offer received during a transparent and open tendering procedure and this offer, even though it consists of a negative price, is purportedly less costly for the State as shareholder than the winding-up of Sernam.

⁽³⁵⁾ Cf. report of ABN Amro forwarded by the French authorities and described in section 2.5.8.2 of the opening decision, p. 47.

- (154) The Commission considers that in a situation of recovery of the aid, it is not appropriate to apply the private investor principle. On recovery of aid, the State acts under the obligations incumbent upon it under Union law and not as a State which is a shareholder.
- (155) Furthermore, the Commission points out that Article 3(2) of the Sernam 2 Decision perceived the sale of assets as an equivalent to the compensatory measures imposed by Article 3(1). According to point 40 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽³⁶⁾, the divestment of a loss-making activity cannot be considered as a compensatory measure. The negative price agreed between SNCF and Financière Sernam shows that a divestment of a loss-making activity is involved which cannot be the equivalent of a compensatory measure. In this case, the negative price corresponds to operating aid to the undertaking, which is therefore inherently ill-suited to reduce distortions of competition.
- (156) Moreover, if the position maintained by France were to be accepted, France could evade its obligation to recover from Sernam SA and from any other company which continues its economic activity the aid of EUR 41 million, declared incompatible by the Sernam 2 Decision, and the aid of EUR 503 million used improperly. Such a result would be in flagrant contradiction with the case-law of the Court of Justice, according to which the Member State is required to recover the aid without delay, using all the legal means at its disposal, including seizure of the firm's assets and, where necessary, its liquidation if it is unable to repay the amounts in question⁽³⁷⁾.
- (157) Acceptance of the position maintained by France would also lead to discrimination between a private undertaking and a public undertaking. Whereas the State would take measures for recovery from the private undertaking, where necessary going as far as its liquidation, the public undertaking could escape this fate on the sole condition that it proves to be cheaper for the State to sell it at a negative price rather than recover the illegal, incompatible aid it has received.
- (158) For these reasons, the Commission considers that the principle of the private operator in the market economy cannot be invoked by France to have the measures provided for in the memorandum of understanding of 21 July 2005 escape the concept of State aid.
- (159) It is therefore necessary to establish whether the measures in question conferred an advantage upon Sernam Xpress or Financière Sernam. Since these two

undertakings merged subsequently, there is no need to distinguish between the advantages granted to one or the other. The three other criteria evidencing the presence of aid are met: the measures are granted from the resources of a public undertaking, SNCF; SNCF is an EPIC [industrial and commercial public undertaking] subject to very close scrutiny by the State; the granting of the advantage is therefore also imputable to the State. Since Sernam Xpress/Financière Sernam operate in road transport, which is open to competition within the Union, the advantage is liable to create distortions of competition and affect trade between Member States.

3.4.1. Concerning the EUR 57 million capital injection by SNCF in Sernam SA

- (160) As a result of the EUR 57 million capital injection by SNCF in Sernam SA, Sernam SA received a considerable financial advantage which is not available to its competitors. This advantage was then transferred with the other assets and liabilities to Sernam Xpress.

3.4.2. Concerning the EUR 2 million capital injection by SNCF in Sernam Xpress

- (161) As a result of the EUR 2 million capital injection by SNCF in Sernam Xpress, Sernam Xpress received a considerable financial advantage which is not available to its competitors. However, the Commission notes that SNCF received a payment of EUR 2 million from Financière Sernam, which neutralises the EUR 2 million capital injection, which consequently did not confer any advantage.

3.4.3. Concerning the write-off of Sernam SA's debts to SNCF

- (162) As explained in recital 33, the transfer of Sernam SA's activities to Financière Sernam does not include two of Sernam SA's debts to SNCF amounting to EUR 38,5 million. By writing off these debts, SNCF grants an advantage for an equivalent amount to Sernam Xpress/Financière Sernam.

3.4.4. Concerning the guarantees granted by SNCF

- (163) On the transfer of Sernam SA's activities to Financière Sernam, SNCF granted the following guarantees:

— It undertook to complete, within a fixed time limit, the development of a specific site (Valenton) necessary for the running of Train Bloc Express (TBE), on pain of a fine of EUR 1 million in the event of delay;

⁽³⁶⁾ OJ C 244, 1.10.2004, p. 2.

⁽³⁷⁾ Judgment *Italy and SIM 2 Multimedia v Commission*, cited above in footnote 32, point 69.

- It undertook to cover any increase in rent for the new operating sites, limited to a differential of a maximum of EUR 3 million;
 - It extended by three years the right to return of [...] railwaymen seconded within Sernam;
 - It extended by three years a social protocol guaranteeing to [...] Sernam employees re-employment within SNCF in the event of redundancy (by Sernam);
 - SNCF guaranteed 'the continuity of the Train Bloc Express (TBE)' ⁽³⁸⁾ and access to the TBE ⁽³⁹⁾. In this connection, SNCF paid EUR 3 million to Sernam Xpress.
- (164) The first two guarantees obviously confer an advantage on Sernam Xpress/Financière Sernam. In fact, in the absence of these two guarantees, Sernam Xpress/Financière Sernam would have had to bear the costs in question themselves.
- (165) The TBE guarantees, in the Commission's view, significantly reduce the risk incurred by Sernam Xpress/Financière Sernam and therefore confer an advantage.
- (166) According to France, the guarantee granted to the railwaymen would in fact benefit SNCF. In fact SNCF apparently posted a certain number of railwaymen within Sernam SA. These railwaymen, the cost of whom was borne by Sernam SA, apparently had the right to be reintegrated into SNCF on request. In the light of the fears to which privatisation could give rise, SNCF then extended the period during which the railwaymen could exercise this right with a view to avoiding their return *en masse* which would have been more onerous for SNCF.
- (167) The Commission considers that in the absence of this guarantee, the railwaymen would have been very likely to have applied for reintegration in SNCF at the time of the transfer of the activities. Sernam Xpress would have had to replace them with new employees under private status. The Commission considers it likely that in this case the salary of these new employees would have been less high than that of the railwaymen, which would have offset the additional cost for Sernam Xpress resulting from their more limited experience or difficulties in recruiting a large number of new employees in a very short time.
- (168) France considers the three-year extension of the guarantee of re-employment to be a personal right granted to certain employees by SNCF. Neither Financière Sernam nor Sernam Xpress were apparently parties to this agreement.
- (169) The Commission does not concur with this analysis. In fact, this guarantee makes it more attractive to remain employed at Sernam Xpress during the period in question, without Sernam Xpress having to bear the slightest additional cost.
- (170) The Commission concludes that the guarantees granted by SNCF in the memorandum of understanding of 21 July 2005, with the exception of the guarantee for the railwaymen, confer an advantage on Sernam Xpress/Financière Sernam.
- (171) Whereas it is easy to put a figure on the value of the first three guarantees (EUR 1 million, EUR 3 million and EUR 3 million respectively), this is not the case for the guarantee of re-employment of employees. France should have established the salary increase that Sernam Xpress/Financière Sernam should have awarded to the employees in the absence of these guarantees to achieve the same objective.

3.4.5. Concerning the selling price

- (172) In recital 164 of the opening decision, the Commission also considered the question whether the negative price 'paid' by Financière Sernam did in fact correspond to market value. In this respect, the Commission observes that in the meantime, the merger had taken place between Sernam Xpress and Financière Sernam, and that possible aid to Financière Sernam consisting in too high a negative price would not exceed the EUR 57 million of aid that Sernam Xpress received as new aid. Consequently, it is no longer necessary to decide on the question of possible aid to the purchaser.

3.4.6. Conclusion on the presence of new aid

- (173) The measures provided for in the memorandum of understanding of 21 July 2005 described in the present section 3.4 constitute new aid for Sernam Xpress/Financière Sernam.

3.4.7. Incompatibility with the internal market and recovery

- (174) According to the Court of Justice case-law, it is for the Member State to invoke the reasons for compatibility of aid. Since France invoked no reason for compatibility, the Commission concludes that this aid is incompatible with the internal market and must be recovered, together with interest.
- (175) This recovery must be made from Financière Sernam and its subsidiaries, and notably Sernam Service and Aster, which are currently continuing the economic activity which received the aid, previously carried out by Sernam Xpress (merged with Financière Sernam).

⁽³⁸⁾ Recitals 72 to 74 of the opening decision.

⁽³⁹⁾ Recitals 75 to 77 of the opening decision.

3.5. CONCERNING THE CANCELLATION CLAUSE

- (176) The memorandum of understanding of 21 July 2005 contains a cancellation clause in case of a negative decision by the European Commission within five years following the conclusion of the memorandum of understanding. This clause could also constitute new aid. However, in such a case, the remedy would consist in its inapplicability. Since the clause has not in fact been applied, this result has been achieved. There is therefore no need for further analysis of the clause in question.

3.6. CONCERNING LEGITIMATE EXPECTATIONS

- (177) The argument put forward by the French authorities that the steps taken in good faith in relation to the Commission in accordance with their duty of cooperation (such as their visit to the Commission on 24 November 2004 and their letter of 21 December 2004), gave rise to legitimate expectations concerning the conformity of the transfer of Sernam SA's activities to Financière Sernam with the Sernam 2 Decision and Union law, cannot be accepted.

- (178) In fact, the information communicated by France was confined to informing the Commission of the choice to sell the assets en bloc without describing the key components of the operation for the transfer of Sernam SA's assets. In particular, the information note of 21 December 2004 to the Commission is confined to indicating certain aspects relating to the organisation of the asset transfer procedure and its open and transparent nature, with a view to achieving a sale at market price by 30 June 2005.

- (179) None of the following facts were brought to the Commission's attention:

- (1) the fact that the planned disposal would be based on an intra-group transfer of the assets and liabilities to another legal entity (Sernam Xpress), followed by divestiture of that other entity (*share deal*);
- (2) the fact that part of the liabilities would be transferred with the assets and that only the recovery order relating to the aid of EUR 41 million and the debts to the SNCF amounting to EUR 38,5 million will remain in the liabilities of Sernam SA;
- (3) the fact that France was prepared to recapitalise Sernam SA and Sernam Xpress in the event of a takeover offer at a negative price.

- (180) In the absence of information on these factors, it was not possible for the Commission to foresee how France

finally implemented the Sernam 2 Decision. On the contrary, the note of 21 December 2004 gives the impression that the disposal would be carried out without distinction between the liabilities and at a positive price, since it indicates that 'as soon as the disposal has been carried out, the proceeds will be used to repay the liabilities of the legal person Sernam, including the incompatible aid, under normal national procedures'.

- (181) Although, considering the negative nature of the prices offered for Sernam SA's assets, the possibility of recapitalisation (fact 3) arose only on receipt of the offers, at least the principle of a sale of the assets with part of the liabilities (fact 2) must in principle already have been known by France when it drew up its note of 21 December 2004. Be that as it may, the French authorities cannot claim the benefit of legitimate expectations without having voluntarily informed the Commission of these material facts on 21 December 2004 or later.

- (182) Finally and above all, if the French authorities were experiencing difficulties in implementing the Sernam 2 Decision, they should have recontacted the Commission to find a solution, in agreement with it, concerning other arrangements pursuant to the principle of sincere cooperation provided for in Article 4(3) TEU. Section 3.2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁴⁰⁾ confirms that, in application of this general principle, a Member State may not deviate from the restructuring plan without notification and prior approval of the Commission.

- (183) Furthermore, the Commission never gave any agreement of any kind on the transfer of Sernam SA's activities to Financière Sernam implemented by France.

- (184) The Commission therefore concludes that neither France, nor the beneficiaries of the aid can invoke legitimate expectations of any kind.

4. RECOVERY

- (185) The Commission has concluded that the conditions of the Sernam 2 Decision were not respected. Consequently, the aid measures authorised by the Sernam 2 Decision were implemented improperly within the meaning of Article 16 of Regulation (EC) No 659/1999. In the absence of France presenting reasons for compatibility of this aid, it is incompatible with the internal market. France must therefore take all necessary steps to recover this aid, together with interest.

⁽⁴⁰⁾ OJ C 244, 1.10.2004, p. 2.

- (186) This aid comes to a total of EUR 503 million. It consists of various restructuring aid amounting to FRF 2 938 million or EUR 448 million. This aid is presented in Table 3 of the decision of 30 April 2003, the main components of which are shown in the table below:

	(FRF million)
Initial capital	44
Financing of losses 2000	698
Financing of losses 2001	252
Financing of restructuring: SNCF contribution	1 300
Financing of restructuring: equity loan from SNCF	250
Additional costs for railwaymen	394
Total restructuring aid	2 938

- (187) To reach the amount of EUR 503 million, it is necessary to add the amount of aid paid under contracts for the transport of customer baggage and newspapers amounting to EUR 34 million and under contracts for supplies amounting to EUR 21 million.

- (188) For further details, reference is made to the Sernam 1 decision of 23 May 2001.

- (189) In order to undertake the effective and immediate recovery of the aid, the French authorities must supply each date on which aid was made available to the beneficiary ⁽⁴¹⁾. It is on the basis of this date that the interest on the sums to be recovered must be calculated for each measure on a compound basis pursuant to Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁴²⁾.

- (190) Likewise, the aid of EUR 41 million already considered incompatible by the Sernam 2 Decision must be recovered, together with interest calculated using the same method.

- (191) Finally, the recapitalisation of EUR 57 million, the write-off of Sernam SA's debts by SNCF amounting to EUR 38.5 million and the guarantees granted by SNCF on the transfer of Sernam SA's activities to Financière Sernam, with the exception of the guarantee granted to the railwaymen, also constitute State aid which is incompatible with the internal market. This new aid must be

recovered, together with interest calculated using the same method. The Commission refers to recitals 171 and 189 of the present decision for the calculation of the amounts to be recovered.

- (192) To establish the amount of aid to be recovered, France may take into account any sums received by SNCF under the liquidation of the company Sernam SA as repayment for the aid of EUR 41 million plus interest and/or the equity loan plus interest.

- (193) In the event of SNCF having received a lump-sum repayment of all its claims, France will be able to take into account any amounts recovered by SNCF following the winding-up of Sernam SA only in proportion to the ratio between the amount of the first two aid measures recorded and the total amount of the debt entered in the liabilities of the company Sernam SA.

- (194) These amounts, including that of the aid originally granted to Sernam SA and Sernam Xpress, must be recovered from Financière Sernam and its subsidiaries, Sernam Service and Aster, which are currently carrying out the economic activity in receipt of aid, previously carried out by Sernam Xpress (having merged with Financière Sernam) and, prior to this, by Sernam SA.

- (195) There is in fact no doubt that Sernam Xpress and its operating subsidiaries Sernam Services and Aster continued the economic activity of Sernam SA, since this was precisely the objective of the transfer of Sernam SA's activities to Financière Sernam, implemented by France. Furthermore, it emerges from the case file that Sernam Xpress, Sernam Services and Aster did indeed continue to run the business which had received aid according to the current business plan of Sernam SA and with the same staff. Then, on 30 June 2011, Financière Sernam, the sole partner, dissolved the company Sernam Xpress and took over its assets and liabilities. Financière Sernam is therefore the legal successor of Sernam Xpress and its economic successor since it (Financière Sernam) currently holds and controls directly the operating subsidiaries Sernam Services and Aster. In addition, Financière Sernam and its subsidiaries, and notably Sernam Services and Aster, are continuing the business of Sernam SA and Sernam Xpress and therefore continuing to benefit from the aid. Furthermore, in May 2011, Sernam Services received a contribution of assets, with the transfer of the Sernam brand, which is valued at EUR 15 million, without paying adequate compensation. Aster, for its part, benefited in March 2008 from a contribution of EUR 5 million in current account, an amount which was assigned to it in July 2008, on the one hand, and was recapitalised in December 2011 by the assignment of EUR 5 599 998 in current account, on the other. These two subsidiaries therefore benefited from the aid initially

⁽⁴¹⁾ The figures indicated in the present decision have been rounded to the nearest million. The calculation of the interest, on the other hand, must be based on the exact amount under each aid measure.

⁽⁴²⁾ OJ L 140, 30.4.2004, p. 1.

granted to Sernam SA and Sernam Xpress not only as companies belonging to the group and on account of the fact that they are continuing its business, but also on account of the transfer of certain assets or recapitalisation measures in their favour.

(196) It should be specified that Sernam SA itself stems from the transformation of Sernam SCS into a public limited company at the end of 2001 (on this subject, see Sernam 2 Decision, recital 11). Sernam SCS was therefore the original beneficiary of part of the aid in question.

(197) The company Financière Sernam and its subsidiary Sernam Services having been put into receivership on 31 January 2012, and Aster, subsidiary of Financière Sernam, having been put into compulsory liquidation on 3 February 2012, the French authorities are requested to determine the amount of the aid, together with interest, to be recovered as soon as possible so as to have it entered in the liabilities of these undertakings,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid of EUR 503 million, granted by France to Sernam SCS (which became Sernam SA) and approved by the Commission by Decision 2006/367/EC⁽⁴³⁾ was used improperly. It is incompatible with the internal market. This aid also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, Sernam Services and Aster.

2. The State aid of EUR 41 million, granted by France to Sernam SCS and declared incompatible by the Sernam 2 Decision, also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, and notably Sernam Services and Aster.

3. The recapitalisation of EUR 57 million of Sernam SA by SNCF, the write-off of Sernam SA's debts to SNCF amounting to EUR 38,5 million and the guarantees granted by SNCF on the transfer of the business of Sernam SA to Financière Sernam, with the exception of the guarantee granted to the railwaymen, constitute State aid which is incompatible with the internal market.

Article 2

1. France shall recover the aid referred to in Article 1 from Financière Sernam and its subsidiaries, Sernam Services and Aster.

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis pursuant to Chapter V of Regulation (EC) No 794/2004 of 21 April 2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

3. In implementing this Decision, France may take account of any sums recovered by SNCF as a result of the winding-up of Sernam SA under the conditions set out above.

Article 4

1. Within two months of the date on which this decision is notified, France shall communicate the following information to the Commission:

(a) the date on which aid under each measure was made available to the beneficiary and the total amount (principal and interest) to be recovered from the beneficiary for each aid measure;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents showing that the beneficiary has been ordered to repay the aid.

2. France shall keep the Commission informed of the progress in the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and the interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 9 March 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

⁽⁴³⁾ OJ L 140, 29.5.2006, p. 1.

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