JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

15 June 2005 *

In Case T-349/03,

Corsica Ferries France SAS, established in Bastia (France), represented by S. Rodrigues and C. Scapel, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by C. Giolito and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

French Republic, represented by G. de Bergues and S. Ramet, acting as Agents, with an address for service in Luxembourg,

and by

Société nationale maritime Corse-Méditerranée (SNCM) SA, established in Marseilles (France), represented initially by H. Tassy, and subsequently by O. d'Ormesson and A. Bouin, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of the Société nationale maritime Corse-Méditerranée (SNCM) (OJ 2004 L 61, p. 13),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 18 November 2004,

gives the following

Judgment

Legal framework

1 Article 87 EC states that:

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

...

3. The following may be considered to be compatible with the common market:

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest ...'

2 Section 8 of the Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5) provides that the Commission is to apply the guidelines on restructuring and rescuing firms in difficulty to restructuring aid for maritime companies.

3 In the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) ('the guidelines'), which apply from 9 October 1999, the Commission sets out the conditions under which the aid concerned may be declared to be compatible with the common market under Article 87(3)(c) EC. Point 3.2.2 of the guidelines states that those conditions concern the question whether the beneficiary qualifies as a firm in difficulty, restoration of viability, the avoidance of undue distortions of competition, the limitation of aid to the minimum, the imposition of conditions and obligations necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest and the full implementation of a restructuring plan.

4 Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime

cabotage) (OJ 1992 L 364, p. 7) requires Member States to open up national cabotage markets. Article 4 of that regulation provides that whenever a Member State concludes public service contracts, it is to do so on a non-discriminatory basis in respect of all Community shipowners.

Facts

1. *Relevant shipping companies*

5 The applicant is a shipping company operating regular services to Corsica from mainland France (Toulon and Nice) and Italy (Savona and Livorno).

6 The Société nationale maritime Corse-Méditerranée ('SNCM') is a shipping company operating regular services to Corsica from mainland France (Nice, Toulon and Marseilles) and to North Africa (Tunisia and Algeria) from mainland France and seasonal services to Sardinia from April to September.

7 Currently, 80% of SNCM's shares are held by the Compagnie générale maritime et financière ('CGMF') and 20% by the Société nationale des chemins de fer ('SNCF'). The objects of CGMF, in which the French State has a direct 100% share, are the authorisation of any operations of maritime transport, outfitting and chartering of ships and the acquisition of shares and any commercial or industrial operations directly or indirectly connected with those objects.

8 SNCM holds a minority interest in the Compagnie méridionale de navigation ('CMN'), a shipping company operating between Marseilles and Corsica, which is controlled by the Stef-TFE Group through the Compagnie méridionale de participation.

2. *Public service obligations relating to shipping services between mainland France and Corsica*

9 Since 1948, regular shipping services between mainland France and Corsica have been operated as public service obligations.

10 Until 1976, those services were provided under a system partly regulated by French law, as a national cabotage monopoly. Under that system, the State paid companies providing the service a lump-sum subsidy to balance their accounts in return for fulfilling public service requirements concerning the ports to be served, regularity, frequency, the capacity to provide the service, fares charged and the crewing of the ship.

11 In 1976, France laid down new conditions for providing public shipping services to Corsica on the basis of a territorial continuity principle. That principle aims to limit the disadvantages involved in being an island and to ensure that the island is served in a way which resembles services on the mainland as closely as possible. A concessions scheme was established with a set of specifications laying down the public service framework. A framework agreement was concluded with SNCM and CMN for a period of 25 years, expiring on 31 December 2001.

12 Between 1976 and 1982, the French Government established, on the basis of that framework agreement, the procedures for providing the service.

13 The Law of 30 July 1982 conferring special status on the region of Corsica transferred to the Corsican Assembly the management of territorial continuity in a contractual framework with the French State. Subsequently, the Law of 13 May 1991 conferring status on the territorial community of Corsica granted that assembly full responsibility for services to the island. Since then, those services have been administered by the Office des transports de la Corse ('OTC').

14 Since 1991, two five-year agreements have been concluded between the OTC and the two concessionary companies on the basis of the framework agreement. The first of those agreements ('the 1991 agreement') specified the manner in which the public service was to be performed for the period from 1991 to 1996 and the second ('the 1996 agreement') did so in relation to the period from 1996 to 2001. The agreements also laid down the principles governing the payment of the lump-sum subsidy from the budget for territorial continuity in return for the obligations imposed. At the time, the public service obligations covered all services to Corsica from three ports in mainland France, namely Nice, Toulon and Marseilles.

15 In 2001, acting under Regulation No 3577/92, the Corsican regional authority issued a call for tenders in order to select the operator responsible for operating the public services between mainland France and Corsica under a five-year contract from 1 January 2002, in return for financial compensation. Given the increase in competition on crossings from Toulon and Nice, the Corsican regional authority decided that only services operated from Marseilles should be subject to those public service obligations.

16 The contract was awarded jointly to SNCM and CMN, as the applicant withdrew its bid.

17 Under a 'public service delegation agreement' ('the 2002 agreement') concluded between the Corsican regional authority and OTC, SNCM and CMN are required, as concessionaries, to provide regular shipping services between Marseilles and Corsica from 1 January 2002, subject to a duty to comply with a number of public service obligations regarding frequency, capacity, timetables, fares (maximum fares according to season, mandatory reductions for certain categories of persons) and service quality. Under that agreement, those obligations are to be performed in exchange for financial compensation, termed 'reference compensation', paid on a reducing annual basis, the amount of which is determined on the basis of anticipated revenue and is adjusted at the end of each year in line with the difference between anticipated revenue and actual revenue. The agreement provides that the maximum amount of financial compensation for the whole of the period covered by it is to be EUR 326.85 million for SNCM and EUR 128.2 million for CMN, that is to say a total of EUR 455.05 million. The 2002 agreement also provides that the final annual compensation for each concessionary is to be limited to the operational deficit incurred in providing the public service obligations allowing for a reasonable return on marine capital employed in proportion to its effective utilisation, with that reasonable return being set at 15% of the market value of the vessels, as defined in the agreement. The 2002 agreement expires on 31 December 2006 unless previously terminated by agreement between all the parties.

Administrative procedure

1. *Aid in favour of SNCM by way of compensation for public service obligations under the 1991 agreement and the 1996 agreement*

18 On 22 December 1998, following objections regarding aid granted to Corsica Marittima, a subsidiary of SNCM which carries passengers between Corsica and Italy, the Commission communicated to the French Republic its decision to initiate

the formal investigation procedure in respect of the aid under Article 93(2) of the EC Treaty (now Article 88(2) EC) (OJ 1999 C 62, p. 9). That case was registered as Case C-78/98.

19 On 28 February 2001, following fresh complaints regarding the aid received by SNCM to cover the cost of its public service obligations, the Commission communicated to the French Republic its decision to initiate the formal investigation procedure in respect of the aid under Article 88(2) EC (OJ 2001 C 117, p. 9). That case was registered as Case C-14/01.

20 By Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to SNCM (OJ 2002 L 50, p. 66), the Commission, closing the procedures initiated in Cases C-78/98 and C-14/01, held that the aid of EUR 787 million granted to SNCM for the period from 1999 to 2001 by way of compensation for the public service obligations provided to Corsica from three ports on mainland France, namely Nice, Toulon and Marseilles, by SNCM was compatible with the common market under Article 86(2) EC. No action for annulment of that decision has been brought before the Court of First Instance.

2. *Rescue aid and restructuring aid in favour of SNCM*

21 On 20 December 2001, the French authorities notified the Commission of a cash advance from CGMF to SNCM of EUR 22.5 million by way of rescue aid. That aid was registered as NN 27/2002 (formerly N 849/2001), as it had already been paid in part to SNCM.

22 By letter of 18 February 2002, the French Republic notified the Commission of a plan to grant aid for the restructuring of SNCM. The proposed restructuring aid comprised the recapitalisation of SNCM, through CGMF, in the sum of EUR 76 million, thereby increasing SNCM's capital from EUR 30 million to EUR 106 million. That aid was registered by the Commission as notified aid under reference N 118/2002.

23 By Decision C (2002) 2611 final of 17 July 2002, the Commission authorised the rescue aid to SNCM under the preliminary procedure for investigating aid laid down under Article 88(3) EC. In its decision, the Commission held that the aid notified satisfied the five criteria laid down under the guidelines, in particular the undertaking by the French State to notify a restructuring plan. No action for annulment of that decision has been brought before the Court of First Instance.

24 By letter of 19 August 2002 addressed to the French Republic, the Commission, having determined in a preliminary investigation that the restructuring aid notified gave rise to concerns as to its compatibility with the common market, decided to initiate the formal investigation procedure under Article 88(2) EC in accordance with Article 4(4) and Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) ('the decision to initiate the formal investigation procedure'). The aid notified was registered under the new reference C-58/2002.

25 By letter of 8 October 2002, sent on 15 October together with its annexes, the French authorities communicated their observations on the decision to initiate the formal investigation procedure to the Commission.

26 On 11 December 2002, the decision to initiate the formal investigation procedure, accompanied by a summary, was published in the *Official Journal of the European Communities* (OJ 2002 C 308, p. 29). Interested parties were invited to submit their observations on the plan to provide aid as notified within a period of one month from the date of publication.

27 By letter of 8 January 2003, the applicant submitted to the Commission its written observations on the decision to initiate the formal investigation procedure. In addition, the Commission received observations from the Stef-TFE Group and from various local and regional authorities. The Commission forwarded all the observations received to the French Republic and gave it the opportunity to comment on them.

28 On 4 February 2003, at the applicant's request, the Commission held a meeting with it, during which the applicant provided it with further documents.

29 By letter of 10 February 2003, the French authorities submitted arguments to the Commission intended to show that the plan to provide aid complied with the guidelines, together with details of new undertakings regarding the number of staff and level of wages, control of intermediate consumption and SNCM's fares policy.

30 By letter of 13 February 2003, the French authorities provided the Commission with their comments on the observations of the applicant and Stef-TFE.

31 By letter of 21 February 2003, the French authorities replied to the additional questions raised in the Commission's letter of 10 February 2003.

32 By fax of 27 May 2003, the French authorities provided the Commission with their comments on the documents which the applicant had submitted to the Commission on 4 February 2003 and which the latter had forwarded to the French authorities by letter of 21 February 2003.

33 On 9 July 2003, the Commission adopted Decision 2004/166/EC on aid which France intends to grant for the restructuring of SNCM (OJ 2004 L 61, p. 13). That decision ('the contested decision') is the subject of the present action for annulment.

34 The operative part of the decision is worded as follows:

'Article 1

The restructuring aid which France plans to grant to [SNCM] is compatible with the common market under the conditions laid down in Articles 2 to 5.

Article 2

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

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

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

Article 3

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

— Amadeus France,

— Compagnie Corse Méditerranée,

— Société civile immobilière Schuman,

— Société méditerranéenne d'investissements et de participations,

— Someca.

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

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

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

Article 4

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

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

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

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

Before 30 June each year, France shall inform the Commission of all the elements necessary to show that this condition has been duly complied with in the preceding calendar year in respect of all crossings to or from Corsica.

Article 5

In accordance with the commitments made by the French authorities in the restructuring plan, the annual number of round trips of ships on the various sea links to and from Corsica are until 31 December 2006 limited to the thresholds indicated in Table 3 of this Decision, save for exceptional reasons for which SNCM is not responsible that would oblige it to transfer particular round trips to other ports, and save for any change made to the public service obligations incumbent on the company.

Article 6

France is authorised to recapitalise SNCM through a first payment of EUR 66 million from the date on which this Decision is notified.

Until the end of the restructuring period, i.e. until 31 December 2006, the Commission may decide, upon a request from the French authorities, to subsequently authorise a second payment to SNCM which will correspond to the difference between the EUR 10 million remaining and the proceeds from the disposals required in Article 3, in accordance with the conditions laid down in the said Article.

Such a decision can be taken only if the action required in Article 3 has been carried out, the proceeds from the disposals does not exceed EUR 10 million and the conditions laid down in Articles 2, 4 and 5 have been complied with, without prejudice to the Commission's right to initiate, where appropriate, the formal investigation procedure for failure to comply with any of these conditions. Failing this, the second instalment of aid shall not be paid.

Article 7

Within six months of the date on which this Decision is notified, France shall inform the Commission of the measures taken to comply with it.

...'

Procedure and forms of order sought

35 By application lodged at the Registry of the Court of First Instance on 13 October 2003, the applicant brought the present action.

36 By document lodged at the Registry on 3 February 2004, the French Republic sought leave to intervene in support of the forms of order sought by the Commission.

37 By document lodged at the Registry on 26 February 2004, SNCM sought leave to intervene in support of the forms of order sought by the Commission.

38 By order of 10 March 2004, the French Republic was granted leave to intervene.

39 By order of 30 March 2004, SNCM was granted leave to intervene.

40 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to reply to written questions. The parties complied with those requests within the prescribed period.

41 In their replies, the parties informed the Court that, on 8 September 2004, the Commission had adopted Decision C (2004) 3359 final ('the decision of 8 September 2004'), amending the contested decision. Pursuant to an additional written question from the Court, the main parties were asked to state their views on the effect of that decision on the present action.

42 The parties presented oral argument and replied to the questions put by the Court at the hearing on 18 November 2004. 11

43 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

44 The Commission, supported by the French Republic and SNCM, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

45 The applicant puts forward two pleas in law in support of the present action for annulment. The first plea is based on infringement of Article 253 EC inasmuch as the decision is inadequately reasoned. The second plea is based on infringement of Article 87(3)(c) EC, of Regulation No 659/1999 and of the guidelines inasmuch as the contested decision contains errors of fact and manifest errors of assessment.

46 At the outset, however, it is necessary to consider any effect that the decision of 8 September 2004 may have on the present action.

1. *Preliminary observation regarding the effect of the decision of 8 September 2004 on the present action*

47 In the decision of 8 September 2004, the Commission amended the contested decision in order, as is shown by the second recital in the new decision, to allow

SNCM to replace the *Asco* by the *Aliso* in the list of vessels set out in Article 2 of the contested decision, that is to say in the list of ships which SNCM is authorised to use during the restructuring period and, in the light of the difficulties encountered in selling the *Asco*, to dispose either of that ship or the *Aliso*.

48 It must however be noted that it is settled case-law that in the context of an application for annulment under Article 230 EC the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81).

49 Furthermore, it does not appear in the present case that the decision of 8 September 2004 led to some of the pleas and arguments put forward by the applicant in support of the present action becoming irrelevant. Nor, when the matter was raised in a written question from the Court, did either the applicant or the Commission suggest that such was the result.

50 In those circumstances, the decision of 8 September 2004 does not affect the present action for annulment of the contested decision in any way.

2. *The first plea, based on infringement of Article 253 EC inasmuch as the contested decision is inadequately reasoned*

51 By this plea, the applicant submits that the contested decision is inadequately reasoned as regards the nature of the aid measure at issue and the question whether

part of the aid represents public service compensation, the setting-aside of the concerns which led to the initiation of the formal investigation procedure, the assessment of the restoration of viability, the realism of the assumptions made as to restructuring and the determination of non-strategic holdings.

Preliminary observations on the scope of the plea

52 It must be noted that case-law provides that a plea based on infringement of Article 253 EC is a separate plea from one based on a manifest error of assessment. While the former, which alleges absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of essential procedural requirements within the meaning of Article 230 EC and, involving a matter of public policy, must be raised by the Community judicature of its own motion, the latter, which goes to the substantive legality of a decision, is concerned with the infringement of a rule of law relating to the application of the Treaty, again within the meaning of Article 230 EC, and can be examined by the Community judicature only if it is raised by the applicant. The obligation to state reasons is thus a separate question from that of the merits of those reasons (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67; Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35; Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 65; and Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 97).

53 In the present case, the applicant, by its first plea, limits itself to arguing that the contested decision is, in some respects, inadequately reasoned and thus contrary to Article 253 EC, as is explicitly shown by the heading to that plea in the application ('Infringement of essential procedural requirements: insufficient statement of reasons') and the reasoning set out under it, in particular in paragraphs 17, 18 and 43 of the application — which refer respectively to the infringement of essential

procedural requirements, the case-law relating to Article 253 EC and the need to annul the contested decision having regard to its 'formal legality' — as well as by the third and fourth paragraphs of the summary of the application produced by the applicant — which refer to the existence of 'an insufficient statement of reasons'.

54 The scope thereby conferred on that plea is not disputed by the parties. In reply to the observations of the Commission and the French Republic in that regard, the applicant observes, as is stated in paragraph 3 of the reply, that by that plea it criticises the Commission's statement of reasons as being 'insufficient' and that the Commission has 'failed' to state adequate reasons.

55 Moreover, the application shows that the applicant is fully aware of the distinction between the obligation to state reasons and a manifest error of assessment since, having contested the adequacy of the reasons set out in the contested decision in the first plea, it argues in its second plea (headed 'Infringement of the EC Treaty and the implementing rules: material errors of fact and manifest errors of assessment'), based on infringement of Article 87(3) EC and the guidelines, that the contested decision contains manifest errors of assessment. The same distinction appears in the summary of the application, in which the applicant states in paragraph 3 that 'the application seeks the annulment of the contested decision on the ground that it is vitiated both by an insufficient statement of reasons and by material and manifest errors of assessment'. Similarly, in its reply, having acknowledged the observations made by the Commission and the French Republic on this point, the applicant states once again that it alleges, first, failures to comply with the obligation to state reasons and, secondly, manifest errors of assessment.

56 In those circumstances, the first plea put forward by the applicant in support of the present action must be understood as being based exclusively on an infringement of Article 253 EC inasmuch as the contested decision is inadequately reasoned in a number of areas, since the objections put forward by the applicant in order to contest the merits of the contested decision are set out under the second plea.

57 Plainly, however, as the Commission, supported by the French Republic, rightly points out, several of the objections and arguments put forward by the applicant under the first plea do not seek to establish that the contested decision is inadequately reasoned, but that it contains errors. Under the cloak of challenging the reasons given in the contested decision, the applicant is truly thereby challenging the merits of it.

58 As the Court of Justice has already held, it would be inappropriate for the Court of First Instance to examine, in considering fulfilment of the obligation to state reasons, the substantive legality of the reasons relied on by the Commission to justify its decision (*France* v *Commission*, cited in paragraph 52 above, paragraph 38).

59 It follows that, in a plea based on a failure to state reasons or a lack of adequate reasons, objections and arguments which aim to challenge the merits of the contested decision are misplaced and irrelevant (see, to that effect, *Thermenhotel Stoiser Franz and Others* v *Commission*, cited in paragraph 52 above, paragraph 97; Joined Cases T-305/94 to T-307/94, T-313/94 to T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 389; Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 425; and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraphs 1175 and 1176).

60 Furthermore, since the applicant has expressly confirmed that the first plea was based exclusively on an insufficient statement of reasons and it is clear from the manner in which the application is set out that the applicant is aware of the distinction between an insufficient statement of reasons and the presence of errors in the reasons, it is not for the Court to reclassify the objections put forward under this plea which truly seek to challenge the merits of the contested decision. That is all the more the case where, as in these proceedings, the applicant puts forward a second plea based on the existence of manifest errors of assessment, under which some of those objections are restated for the purposes of challenging the merits of the contested decision.

61 Accordingly, it is appropriate to consider under this plea only whether the contested decision is adequately reasoned. The applicant's objections and arguments set out under this plea which truly seek to challenge the merits of the decision must be rejected as being irrelevant.

The objections relating to the statement of reasons for the contested decision

Preliminary observations

62 According to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the Community judicature to exercise its power of review (*Commission* v *Sytraval and Brink's France*, cited in paragraph 52 above, paragraph 63; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 278; and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 119).

63 It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*France* v *Commission*, cited in paragraph 52 above, paragraph 36; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 175; and *Westdeutsche Landesbank Girozentrale* v *Commission*, cited in paragraph 62 above, paragraph 279).

64 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, and *Westdeutsche Landesbank Girozentrale* v *Commission*, cited in paragraph 62 above, paragraph 280). Thus, the Court of Justice has already held that the Commission was not required to define its position on matters which were manifestly irrelevant or insignificant or plainly of secondary importance (*Commission* v *Sytraval and Brink's France*, cited in paragraph 52 above, paragraph 64).

65 With regard to the characterisation of a measure as aid, the obligation to state reasons requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 87(1) EC should be stated (*Westdeutsche Landesbank Girozentrale* v *Commission*, cited in paragraph 62 above, paragraph 281).

66 As regards the compatibility of State aid for restructuring with Article 87(3)(c) EC, it is clear from case-law that the obligation to state reasons is complied with when the Commission's decision states the reasons why it considers the aid to be justified having regard to the conditions laid down in the guidelines, in particular the existence of a restructuring plan, satisfactory evidence as to the long-term viability and the proportionality of the aid taking into account the contribution of the beneficiary of it (see, to that effect, *France* v *Commission*, cited in paragraph 52 above, paragraph 37, and Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 102; see, as regards other Community guidelines relating to State aid, *Fleuren Compost* v *Commission*, cited in paragraph 62 above, paragraph 125).

67 It is in the light of those principles that it should be considered whether the contested decision is adequately reasoned in the present case.

The nature of the measure in question and the status of public service compensation of a part of the aid

68 The applicant argues that the contested decision is inadequately reasoned with respect to the determination of the amount of the undercompensation for the performance of public service obligations. It states that the Commission has not provided it with details of the expert report used for that purpose, that the contested decision fails to explain why the grant in respect of the depreciation of the *Liamone* is taken into account, although that vessel was not required for the operation of the public service concession, and that it cannot be determined from the decision which part of the total amount of the aid actually represented public service compensation.

69 It should be noted at the outset that the Commission took the view in recital 259 in the contested decision that, independently of the need to analyse the cash injection in the form of restructuring aid, the part of the aid corresponding to undercompensation for the performance of public service obligations for the period from 1991 to 2001 was compatible with the common market under Article 86(2) EC.

70 It is apparent that, in order to determine the amount of the undercompensation for the performance of public service obligations, the Commission calculated, in recitals 256 and 257 in the contested decision, the amount of the losses incurred by SNCM between 1991 and 2001 on all services to Corsica that were subject to a public service obligation. It explains in that regard that, for the period from 1991 to 1999, it took as a basis the result before tax for services to Corsica, as determined in the expert report used for the purposes of Decision 2002/149, under deduction of the appreciation on disposal of vessels, while for the period between 2000 and 2001, which is not covered by the report, it recalculated itself the result before tax for Corsica services, on the basis of the approach used in Decision 2002/149, and deducted provisions for restructuring already included in the restructuring costs notified, there having been no disposal of vessels during the two years in question. As regards the possible deficit in 2002 on services between Marseilles and Corsica,

the Commission states that that deficit could not be recognised 'as since 1 January 2002 the operating fares for services to Corsica from Marseilles and the amounts of financial compensation have been agreed between the public authorities and SNCM on a contractual basis, contrary to the practice followed for the 1991 and 1996 agreements'.

71 On that basis, the Commission concludes, in recital 258 in the contested decision, that the aggregated corrected results of appreciations on vessels sold in that period and restructuring costs is EUR 53.48 million for the whole of the period from 1991 to 2001. A summary of the Commission's calculations is set out in Table 11 in recital 257 in the contested decision.

72 However, in recital 260 in the contested decision, the Commission took the view that, as the French authorities had notified aid of a higher amount, namely EUR 76 million, as restructuring aid, and as the procedure under Article 88(2) EC had been initiated for that reason, the aid in question ought to be investigated in its entirety as restructuring aid. That investigation forms the subject-matter of recitals 261 to 367 in the contested decision.

73 In those circumstances, the applicant's objection that the contested decision is inadequately reasoned as regards compliance with the conditions laid down under Article 86(2) EC must be rejected as being misplaced. In so far as the Commission took the view that it was appropriate to consider the whole of the aid of EUR 76 million, including the element corresponding to the undercompensation for the performance of public service obligations amounting to EUR 53.48 million, as restructuring aid under that part of its investigation which forms the subject-matter of recitals 261 to 367 in the contested decision, a failure to state adequate reasons as to the compatibility of the amount of the undercompensation with Article 86(2) EC will not, of itself, result in the annulment of the contested decision, as the reasoning underlying it is set out in the recitals relating to the assessment of the aid as restructuring aid.

74 By contrast, it is necessary to consider the applicant's objection relating to the inadequacy of the reasons set out in the contested decision regarding the determination of the amount of the undercompensation for the performance of public service obligations. In recital 327 in the contested decision, the Commission held, in assessing whether the aid was limited to the minimum for the purposes of the guidelines, that the part of the aid corresponding to the undercompensation was necessary for SNCM's restructuring. To that extent, any inadequacy in the statement of reasons in relation to the determination of the amount of the undercompensation for the performance of public service obligations could affect the assessment of the aid as restructuring aid.

75 In that regard, it is clear, however, that the reasons set out in recitals 256 to 260 in the contested decision, which disclose both the criteria taken into account by the Commission in determining the amount of the undercompensation for the performance of public service obligations and the method of calculation used for that purpose, enable the persons concerned to be aware of the justifications for the measure taken, so that they can defend their rights and ascertain whether or not the measure is well founded and so as to enable the Community judicature to exercise its power of review.

76 None of the arguments and objections put forward by the applicant affects that conclusion.

77 As regards, first, the failure of the Commission to make the expert report available to the applicant, the Court finds that that complaint is irrelevant for the purposes of establishing whether there has been an infringement of the obligation to state reasons. Even assuming it to be proved, such a failure does not constitute in any way an absence of reasons in the contested decision or mean that the reasoning stated in the contested decision is inadequate. At its highest, that complaint would allow the applicant to invoke a possible breach of its right of access to the file, which would not go to the statement of reasons but to respect for the rights of the defence.

However, it must be stated, and the point is not disputed, that the applicant does not invoke such a breach of its rights of defence. Such a plea does not concern an infringement of essential procedural requirements and cannot be raised by the Court of its own motion (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 425, and the case-law cited there).

78 In so far as the applicant argues by that complaint that it was not in a position to understand the reasoning which led the Commission to determine the amount of the undercompensation for the performance of public service obligations, it suffices to hold that the Commission's reasoning in that regard is, as mentioned above, set out clearly and explicitly in recitals 256 to 258 in the contested decision.

79 With respect to the contention that the Commission was not entitled to rely on the report in question for the years 2000 and 2001 and that the provisional accounts used by the Commission for those years differ from the published final accounts, those are matters which relate to the validity of the Commission's methodology and are, accordingly, irrelevant to the present plea based on a failure to state adequate reasons.

80 As regards, secondly, the purported absence of reasoning in relation to the taking into account of the grant for the depreciation of the *Liamone* when that ship was not required for the operation of the public service concession, it must be held that that contention is based on an incorrect reading of the contested decision. It is clear from Table 11 in recital 257 in the contested decision that, contrary to what the applicant maintains, the Commission did not take that grant into account for the purposes of determining the amount of the undercompensation for the performance of public service obligations. The sum of EUR 14.771 million which that depreciation represents is deducted from the deficit relating to the public service activities and not added to those activities. Moreover, when questioned at the hearing by the Court, the applicant expressly acknowledged that its reading of the contested decision on that point was incorrect. Plainly, the Commission cannot be criticised for failing to substantiate reasoning which does not appear in its decision.

81 As the Commission explains in its written pleadings, the amount of the depreciation of the *Liamone* is, by contrast, taken into account in the costs of the restructuring plan which form the subject-matter of the investigation carried out in recitals 261 to 367, the exceptional depreciation of that vessel being recorded in that plan, as is clear from, in particular, recitals 126, 144, 302 and 330 in the contested decision.

82 In its reply and at the hearing, the applicant stated that the objection in question was in fact intended to show that it is illogical for the Commission to take the view that the *Liamone* was necessary for the performance of the public service obligations prior to 2002, when it acknowledges having excluded the grants for the depreciation of that ship from the calculation of the additional costs linked to public service obligations in respect of which no compensation was paid. As, in the applicant's view, the *Liamone* was not required for the carrying-out of public service obligations, it considers that the Commission wrongly took the depreciation of that vessel into account as part of the costs of the restructuring plan.

83 However, it is clear that those contentions, which amend the scope of the objection as originally set out in the application, seek to challenge the merits of the assessments made in the contested decision and, accordingly, that they must be rejected as being irrelevant as regards the plea under consideration.

84 As regards, thirdly, the purported impossibility of determining the proportion of the total amount of the aid which truly represented compensation for the performance of public service obligations, it is sufficient to find that, contrary to what the applicant maintains, the Commission expressly states at recital 258 and in Table 11 in recital 257 in the contested decision that that proportion is EUR 53.48 million, and does so after having set out the calculation which produced that amount in recitals 256 and 257 in the decision.

85 Inasmuch as the applicant objects in that regard that the Commission did not state reasons to the 'necessary level' for the compensation for the performance of public

service obligations and did not investigate the possibility that the additional costs linked to the public service obligations might be excessive, particularly the reason why 50% of SNCM's losses were incurred in 2000 and 2001, it must be held that the applicant seeks by that objection to challenge the calculation of the undercompensation carried out by the Commission, inasmuch as that calculation takes the amount of the losses incurred by SNCM as a basis. Such an objection, which seeks to challenge the merits of the contested decision in that respect, is irrelevant to the present plea.

86 Moreover, inasmuch as that objection can be understood as criticising the Commission for having failed to state adequate reasons in the contested decision in that regard, it must be observed that the applicant did not raise such an objection during the administrative procedure, either in its observations on the decision to initiate the formal procedure or at the meeting of 4 February 2003, so that the Commission cannot be criticised for failing to reply to it in its decision.

87 In any event, it is clear that the contested decision states to the requisite legal standard both the reasons why the Commission takes the view that the losses incurred by SNCM allow the amount of the undercompensation for the performance of public service obligations to be determined and the reasons why those losses should have arisen.

88 As regards the reasons why the losses incurred by SNCM allow the amount of the undercompensation for the performance of public service obligations to be determined, it must be pointed out that in recital 257 in the contested decision the Commission stated that, in order to establish that amount, it was 'following the same approach and criteria as Decision 2002/149/EC', which was adopted following a procedure in which the applicant participated as an interested party and which related to aid granted to the same company under agreements relating to the same public service obligations, and to the same period, as the 1996 agreement applied until 2001.

89 In those circumstances, having regard to the express reference in the contested decision to Decision 2002/149 and taking account of the fact that the last-mentioned decision relates to matters well known to the applicant, it must be accepted that Decision 2002/149 is capable of supplementing the statement of reasons in the contested decision as regards the determination of the undercompensation for the performance of public service obligations (see, to that effect, Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraphs 69 and 70, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 217).

90 In recitals 87 to 105 in Decision 2002/149, the Commission stated, on the basis of its expert's conclusions relating to the period from 1991 to 1999, that the amount of the losses determined by the expert reasonably reflected the cost of the public service obligations. In the light of those losses and notwithstanding the payment of compensation under the 1991 agreement and the 1996 agreement, the Commission held in that decision that there was no overcompensation.

91 As regards the reasons for SNCM's losses, it must be observed that both in the contested decision (recitals 281, 282 and 326) and in Decision 2002/149 (recital 123), to which recital 257 in the contested decision refers, the Commission stated that the financial compensation provided for under the 1991 agreement and the 1996 agreement was insufficient to cover the whole of the cost of the public service obligations because, in particular, it was relatively independent of revenue. In addition, in recital 282 in the contested decision, the Commission stated that the applicant's arrival on the market in 1996 had negative effects on SNCM's results.

92 It follows that the applicant's objections regarding the reasons given in the contested decision relating to the undercompensation for the performance of public service obligations must be rejected in their entirety.

The setting-aside of the concerns which led to the initiation of the formal investigation procedure

93 The applicant considers that the contested decision fails to state to the requisite legal standard the reasons why the Commission set aside the concerns which led to the initiation of the formal investigation procedure as regards the connections between SNCM's losses and its public service obligations, the effect of SNCM's ship purchasing policy on its accounting results, the measures proposed in order to increase SNCM's productivity and the measures to reduce intermediate consumption, as well as SNCM's future fares policy.

94 In order to consider whether the Commission gave adequate reasons in the contested decision in that regard, it is necessary to determine the scope of the concerns raised by the Commission in the decision to initiate the formal investigation procedure, in order, next, to establish the extent to which the contested decision set out the reasons why those concerns could be set aside.

95 As regards, first, the connections between SNCM's losses and its public service obligations, it must be held that the Commission raised concerns in the decision to initiate the formal investigation procedure as to SNCM's restoration of viability, on the ground that the analytical data provided in the restructuring plan did not allow the structural causes of SNCM's chronic losses over recent years to be determined. The Commission considered that it had to establish that the restructuring aid would not serve to offset past operating losses and that the restructuring plan under which the aid was to be made available would put the undertaking on a footing which would enable it to make an operating profit in future. In that regard, the Commission noted in the decision to initiate the formal investigation procedure, first, that the restructuring plan did not show how SNCM was to reduce its losses on routes which had formerly been subject to public service obligations and, secondly, that the plan had to be able to guarantee the viability of the company even if SNCM were not to be awarded the public service obligations contract for services between Marseilles and Corsica after 2006.

96 It follows that there are two separate aspects to the concerns raised by the Commission regarding the connections between SNCM's losses and the public service obligations, namely, first, whether the aid for the costs connected with the public service obligations between 1991 and 2001 was set at the proper amount, as that aid was to allow the company to cover past losses arising exclusively from the performance of the public service obligations under the 1991 agreement and the 1996 agreement and, secondly, the contribution which the aid would make to the restoration of viability for the period between 2002 and 2006, as that aid was to allow the company to reduce its future losses on routes which are not, or are no longer going to be, subject to public service obligations.

97 As regards, first, the question whether the aid in relation to the costs connected with the public service obligations between 1991 and 2001 was set at the proper amount, it is sufficient to note that it has already been held above that the reason why the losses incurred by SNCM in the past on services to Corsica, which were at the time all subject to public service obligations, could be regarded as corresponding to the additional costs borne by SNCM in order to perform those obligations was set out to the requisite legal standard both in the contested decision, in particular in recitals 256, 257, 281 and 282, and in Decision 2002/149, to which it refers.

98 It must be held in that regard that the applicant's objections regarding the reasoning set out in recitals 281 and 282 in the contested decision, by which it contends that the 2002 agreement is not designed to offset losses and that the arrival of a competitor in 1996 was the result of Community liberalisation, in reality concern the merits of the Commission's findings and not the reasoning underlying them. Those objections must accordingly be rejected as being irrelevant.

99 Furthermore, as regards any losses that may have been incurred in the carrying-out of public service obligations under the 2002 agreement, the contested decision gives adequate reasons in recital 256 in the decision, where the Commission states that those losses cannot be recognised as the compensation was agreed on a contractual basis.

100 As regards, secondly, the contribution of the aid to the restoration of viability for the period from 2002 to 2006, it must first of all be held that in recitals 263 to 282 in the contested decision, contrary to what the applicant contends, the Commission analysed the causes which led to SNCM's difficulties and put a figure on the costs arising from them. In particular, in recitals 270 to 273, the Commission considered, in that context, the rationality of SNCM's purchasing policy for new ships. Next, in recitals 299 to 303, the Commission set out the reasons why the restructuring plan ought to allow for a restoration of SNCM's viability both prior to 2006 and after that date. It must be noted in that regard that in recitals 142 to 152 in the contested decision the Commission set out in detail the anticipated financial results under the 'intermediate scenario' adopted both for the period between 2002 and 2006 and for the period after 2006. In addition, in recital 315 in the contested decision, the Commission noted that SNCM's plans for recovery included the sale of four ships. Furthermore, in recitals 111 and 113 in the contested decision, the Commission, contrary to what the applicant maintains, noted and described the additional undertakings proposed by the French authorities following the decision to initiate the formal investigation procedure in order to reduce staff costs and the purchase cost of intermediate consumption. In recital 114 in the contested decision, the Commission held that those undertakings, combined with fleet reduction, had led to a reduction of maintenance expenditure from EUR 29.6 million to EUR 23 million between 2001 and 2002.

101 It is clear that, in those recitals, taken as a whole, the Commission set out to the requisite legal standard the reasons why SNCM will be in a position under the restructuring plan to reduce its future losses on those routes that are not, or will no longer be, subject to public service obligations.

102 None of the arguments put forward by the applicant is capable of affecting that conclusion.

103 With respect, first of all, to the objections based on a purported lack of consistency in the reasons for the contested decision where it holds that the proposed savings on

intermediate purchases are inadequate (recital 279) and that the accounts for 2002 are not positive, contrary to the forecasts made in the restructuring plan (recital 280), it is clear that those objections relate to the merits of the contested decision in relation to those points and not its reasoning, and they must accordingly be rejected as being irrelevant.

104 As regards, next, the contention that recitals 258 to 260 in the contested decision do not specify the reasons why the aid must be assessed under the guidelines, it suffices to hold that that contention is incorrect, since the contested decision states in recital 260 that the aid was notified as restructuring aid and that its amount exceeds that of the undercompensation for the performance of public service obligations, and next, in recital 326, that the restructuring aid may cover both the costs of the different actions provided for in the restructuring plan and the losses incurred by the company in carrying out its public service agreements until the end of 2001.

105 As regards, lastly, the contentions based on the judgment of the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, it must be observed that, as that judgment was delivered after the contested decision, the Commission was clearly under no duty to set out the reasons why the conditions laid down in that judgment were satisfied in the present case, a point which is, moreover, accepted by the applicant.

106 With respect, in the second place, to the effect of SNCM's ship purchasing policy on its accounting results, it suffices to hold that the applicant's objection, by which it calls into question the finding in recital 271 in the contested decision that SNCM has not excessively invested in fleet renewal in recent years, seeks to challenge the merits of the Commission's appraisal of that matter and the methodology adopted for that purpose, by criticising it, in particular, for failing to take account of a number of factors which the applicant considers to be relevant and for having restricted itself to a purely balance-sheet-related analysis. Such an objection is irrelevant in the context of the present plea.

107 In any event, it must be held, as has already been stated above, that recitals 269 to 273 in the contested decision set out to the requisite legal standard the reasons why SNCM's ship purchasing policy did not lead to overinvestment.

108 With respect, in the third place, to the measures proposed in order to increase SNCM's productivity and the absence of concrete measures to reduce the amount of intermediate consumption, it must again be held that, by its objections in that regard, the applicant is challenging the merits of the Commission's appraisal. Those objections seek to deny that the concerns in this area could be set aside, since the Commission holds in recitals 279 and 280 in the contested decision that the plan entitled 'achetons mieux' ('buy better') is not sufficient and that the results for 2002 are not positive. Such objections are irrelevant in the context of the present plea.

109 In any event, it must be noted that it has already been observed above that the contested decision was adequately reasoned in that regard by recitals 113, 114 and 279.

110 With respect lastly, and in the fourth place, to SNCM's future fares policy, it is once again clear that the applicant is truly challenging the merits of the Commission's appraisal. The applicant is essentially arguing that the Commission's appraisal of SNCM's fares policy prior to the adoption of the contested decision was incorrect and that it did not have the material available to it to make an appraisal of that policy in 2003. Those objections are irrelevant in the context of the present plea and must accordingly be rejected.

111 Furthermore, inasmuch as the applicant's objections are to be understood as criticising the Commission for failing to provide a specific response in the contested decision to the applicant's contentions regarding SNCM's ticket prices prior to the

adoption of the decision, it must be observed that the Commission expressly states in recital 359 that the arguments put forward by the French Republic in that regard, which are set out in recitals 119 to 123 and 191 to 203, enable those contentions to be rejected.

112 It follows from the above that the applicant's objections and arguments relating to the reasoning underlying the setting-aside of the concerns which gave rise to the initiation of the formal investigation procedure must be rejected in their entirety.

The assessment of restoration of viability

113 The applicant is of the view that the contested decision is inadequately reasoned as regards restoration of viability, inasmuch as the Commission does not state the reasons why it agreed to take account, as a derogation from the principle laid down in the guidelines, of external factors, namely the expansion of the Maghreb market, anticipated developments in services to and from Nice and the possibility that the 2002 agreement would not be renewed after 2006.

114 It must be noted in that regard that point 32 of the guidelines states that 'the improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence if the market assumptions made are generally acknowledged'.

115 In the present case, as regards, in the first place, the expansion of the market to the Maghreb, the Commission states in recital 300 in the contested decision that the

effect of the restructuring measures is not dependent on market trends 'except for the increase of services to the Maghreb which corresponds in particular to a return to the position which SNCM had in the mid-1990s'. In recitals 66 to 81 in the contested decision, the Commission held, on the basis of the market survey provided for the purposes of the restructuring plan, that that market was likely to expand considerably. In the light of point 32 of the guidelines, the applicant was thus fully able to understand the reason underlying the Commission's conclusion set out in recital 300 in the contested decision.

116 Furthermore, the same findings regarding the expansion of the market to the Maghreb were also referred to explicitly in the decision to initiate the formal investigation procedure. Although the applicant argued in its written observations of 8 January 2003 regarding the initiation of that procedure that SNCM's market share objectives were ambitious having regard to the strong competition offered by the national companies and stated that SNCM's commercial reputation in North Africa was a negative one, at no stage did it challenge the assumption adopted in the market survey that there would be a considerable increase in the market. Apart from the fact that that conduct confirms the fact that the assumption of an increase in that market was generally acknowledged for the purposes of the guidelines, it also explains why the Commission did not provide more specific reasons for that aspect of the contested decision in the absence of any objection on the applicant's part.

117 With respect, in the second place, to the continuation of services between Nice and Corsica, the applicant's objection is based on an incorrect reading of the contested decision. Contrary to what the applicant maintains, the Commission does not accept in the contested decision that those services should be maintained on the ground that the market is expanding, but for the reasons set out in recital 302, namely that the importance of those services is diminishing and that the early depreciation of the *Liamone* will facilitate a return to positive results. It must also be observed that, in recital 283 in the contested decision, the Commission referred in that context to its concern to avoid the emergence of a de facto monopoly of the applicant on services to Corsica. While it is true that, in recital 316 in the contested decision, which the applicant does not refer to, the Commission refers to the strong growth in the

market throughout the Gulf of Genoa and Toulon, it does not, however, do so in order to supply an external justification for SNCM maintaining its position in Nice, but, on the contrary, to emphasise the importance of the compensatory measures in favour of competitors, including, in particular, the virtual withdrawal from Toulon and the limitation on round trips on services to Nice. Plainly, the Commission could be under no duty to provide reasons in its decision for a position which it does not adopt.

118 As regards the alleged absence of reasons for the failure to take account of options other than retaining or withdrawing services between Nice and Corsica, it is clear from the applicant's observations of 8 January 2003 on the initiation of the formal procedure that, contrary to what it contends in its reply, it did not put forward any other option, but merely claimed, in essence, that SNCM was not capable of becoming profitable on that route. In those circumstances, the Commission did not have to provide reasons in the contested decision concerning the failure to take account of other options.

119 With respect, in the third place, to the possibility that the 2002 agreement might not be renewed after 2006, it is sufficient to hold that the contested decision is adequately reasoned in that regard in recital 303, as the Commission states there that, with regard to long-term viability, 'implementation of the plan should make it possible for the company to face competition effectively when contracts are renewed'. Furthermore, the contested decision states in recital 149 that 'it is important to know what will be the company's competitive position in 2006 at the end of the current public service delegation contract and how viable the company will be', a point which is considered again in recital 310.

120 Inasmuch as the applicant argues that it is inconsistent to treat the possibility of a non-renewal of the agreement as premature, while at the same time assessing long-term viability, it is sufficient to hold that that objection, which relates to the merits of the contested decision, is irrelevant in the context of the present plea.

121 It follows from the above that the objections and arguments of the applicant as to the reasons relating to restoration of viability must be rejected in their entirety.

Whether the assumptions underlying the restructuring are realistic

122 As regards the question whether the assumptions underlying the restructuring are realistic, the applicant argues that Commission merely restated the guidelines and indicated, in recital 306 in the contested decision, that the market survey submitted by the French authorities provided a 'sound basis for scenarios of company development'.

123 It is none the less clear from recitals 139 to 141 in the contested decision that the Commission stated reasons in that decision why the three scenarios relating to financial trends, namely the best-case and worst-case scenarios considered in the market survey and the intermediate scenario adopted in the restructuring plan, which point 33 of the guidelines requires, were a 'sound basis' for assessing the company's development. The Commission states its reasons in relation to the best-case and worst-case scenarios in recital 139, before concluding that those assumptions 'on the whole seem to present a situation that is quite representative of possible developments'. In recital 140, the Commission adds that the results under the worst-case scenario could be improved by a fine-tuning by SNCM of its supply to demand according to the time of year. Furthermore, in recital 141 in the contested decision, having compared the trend of the main financial indicators under the three possible scenarios in Table 6, the Commission held that 'these simulations show[ed] that SNCM should become profitable again in each of the three scenarios'.

124 As to the remainder, the applicant's objections are indissociable from those relating to restoration of viability. Under point 32 of the guidelines, the requirement that the restructuring plan be based on realistic assumptions relative to future operating conditions exists in order to determine whether the plan allows for a restoration of viability.

125 It is clear from recitals 142 to 148 in the contested decision that the trends envisaged in the intermediate scenario adopted for the purposes of assessing a restoration of viability were determined after an arithmetical analysis of the following points: the redeployment of services to the Maghreb, services between Nice and Corsica, services between Marseilles and Corsica and SNCM's indebtedness. In addition, it is clear from recitals 149 to 152 that the market survey also took into account the possibility that the public service agreement might not be renewed after 2006. It is also clear that each of those points is addressed specifically in recitals 300 to 304 and, as consideration of the objections relating to restoration of viability has already shown, those recitals contain a sufficient statement of the reasons why the Commission considers that the restructuring plan is capable of procuring a restoration of viability, even if SNCM were not to be carrying out its public service obligations.

126 With respect to the argument based on the increase in the capacity of the fleet in 2004 following the acquisition of a new ship by the applicant, it must be noted that the Commission is not obliged to reply to all the arguments of fact and of law put forward during the administrative procedure. Furthermore, contrary to what the applicant maintains, neither the written observations of 8 January 2003 nor recitals 169 to 174 in the contested decision, which summarise, without challenge by the applicant, the arguments submitted by it at the meeting of 4 February 2003, show that the applicant particularly drew the Commission's attention to that point.

127 As regards the fact that the Commission has adjudicated in other decisions on the validity of aid to shipping companies after a detailed analysis of the financial trends of the company which is the beneficiary of the restructuring plan, not only having

regard to its cash flow, but also to its ability to earn profits and its ability to procure financing (for example, Commission Decision 2002/15/EC of 8 May 2001 concerning State aid implemented by France in favour of the 'Bretagne Angleterre Irlande' company ('BAI' or 'Brittany Ferries') (OJ 2002 L 12, p. 33)), it is sufficient to hold that the extent of the reasoning set out in that decision, to which the contested decision does not refer in support of its own reasoning, does not show in any way that, were it to have been adopted in the same field, the contested decision is inadequately reasoned and, in any event, does not affect the preceding conclusion that recitals 300 to 304 in the contested decision are adequately reasoned as regards the question of restoration of viability.

128 Lastly, inasmuch as the applicant criticises the Commission for having taken account only of the arithmetical assumptions put forward by the French authorities in support of its conclusions regarding restoration of viability, which are, moreover, now shown to be factually incorrect, an objection of that kind, which seeks to challenge the merits of the Commission's appraisal of the matter, is irrelevant in the context of the present plea. That applies in particular to the argument based on the alleged failure to investigate the cash flow of the beneficiary of the aid and the failure to take account of the increase in the capacity of the fleet as a result of the applicant's acquisition of a new ship.

129 It follows from the above that the applicant's objections and arguments regarding the reasoning in relation to whether the assumptions underlying the restructuring are realistic must be rejected in their entirety.

Determination of non-strategic shareholdings

130 The applicant considers that the contested decision is inadequately reasoned as regards the reason why SNCM's shareholding in CMN constitutes a strategic shareholding which accordingly does not have to be disposed of.

131 However, it is clear from recitals 348 to 354 in the contested decision that the Commission set out in detail in the decision, in reply to the arguments put forward by the applicant and by Stef-TFE during the administrative procedure, the reasons why it considered that that shareholding was essential and did not have to be disposed of. In particular, the Commission noted in that regard in recitals 349 to 351 in the contested decision that the two companies participated in carrying out the public service contract, that they had developed synergies on services to Corsica which went beyond what is required by the 2002 agreement and that the fleets of CMN and SNCM were complementary. Those statements clearly provide adequate reasoning in the contested decision in that regard.

132 While it is true, as regards the claim that there was a failure to take into account the value of SNCM's shares in CMN, that recital 174 in the contested decision shows that that claim was made at the meeting of 4 February 2003, it must be pointed out that the Commission is not under an obligation to reply to all the arguments of fact and of law put forward during that procedure. It must be held that recitals 348 to 354 in the contested decision provide adequate reasons in relation to the shareholding in CMN. Moreover, it must also be observed that the applicant was in a position to understand the Commission's reasoning in that regard, as it is clear from recital 256 in the contested decision that the Commission took the view that unrealised appreciation could not be taken into account for the purposes of determining the level of resources available to SNCM.

133 As to the remainder, the arguments put forward by the applicant in order to emphasise the allegedly contradictory nature of the reasoning of the contested decision in relation to that point seek in reality to challenge the merits of the contested decision. Those arguments must accordingly be rejected as irrelevant in the context of the present plea.

134 It follows from the above that the objections and arguments put forward by the applicant regarding the reasoning in relation to the level at which shareholdings are to be determined to be non-strategic must be rejected in their entirety.

Conclusion as regards the first plea in law

135 It follows from all the above points that the first plea in law, based on infringement of Article 253 EC, inasmuch as the contested decision is inadequately reasoned, must be rejected.

3. The second plea, based on infringement of Article 87(3)(c) EC, of Regulation No 659/1999 and of the guidelines inasmuch as the contested decision contains errors of fact and manifest errors of assessment

136 By this plea, the applicant argues that the contested decision contains errors of fact and manifest errors of assessment regarding the assessment of a part of the aid as compensation for the performance of public service obligations, the analysis of the causes leading to SNCM's financial difficulties, compliance with the guidelines and the need for the conditions imposed by the Commission.

Preliminary observation regarding the review undertaken by the Court

137 It is settled case-law that, in the application of Article 87(3)(c) EC, the Commission has a wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18, and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83).

138 Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers (Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 93; *Italy* v *Commission*, cited in paragraph 137 above, paragraph 83; Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 63; Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 47; Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 46; and *Westdeutsche Landesbank Girozentrale* v *Commission*, cited in paragraph 62 above, paragraph 282). In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision (*British Airways and Others* v *Commission*, cited in paragraph 48 above, paragraph 79).

139 Furthermore, case-law provides that the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States (*Spain* v *Commission*, cited in paragraph 138 above, paragraph 95; Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 149; and Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 134).

140 It is clear from case-law that by assessing specific aid in the light of such guidelines, previously adopted by it, the Commission cannot be considered to exceed the limits of its discretion or to waive that discretion. On the one hand, it retains the power to repeal or amend any guidelines if the circumstances so require. On the other, the guidelines concern a defined sector and are based on the desire to follow a policy established by it (*Vlaamse Gewest* v *Commission*, cited in paragraph 66 above, paragraph 89).

141 In that context, it is for the Court to verify whether in the present case the requirements which the Commission has itself laid down, as mentioned in those guidelines, have been observed (Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 77, and *Ducros* v *Commission*, cited in paragraph 138 above, paragraphs 61 and 62).

142 Furthermore, it must be pointed out that, in an action for annulment under Article 230 EC, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made (*Salomon* v *Commission*, cited in paragraph 138 above, paragraph 48, and *Kneissl Dachstein* v *Commission*, cited in paragraph 138 above, paragraph 47).

143 Lastly, the mere assertion that one of the conditions authorising aid is not complied with cannot cast doubt on the legality itself of the decision authorising it. In general, the legality of a Community act cannot depend on the possible existence of opportunities for circumvention or on retrospective considerations of its efficacy (*British Airways and Others* v *Commission*, cited in paragraph 48 above, paragraph 291, and *Salomon* v *Commission*, cited in paragraph 138 above, paragraph 49).

144 It is in the light of the abovementioned principles that the objections and arguments put forward by the applicant must be considered.

The objections relating to the validity of the contested decision

145 In so far as the present plea is based on infringement of Regulation No 659/1999, it must be rejected at the outset as being irrelevant. That regulation, which lays down

the rules of procedure applying to the investigation of State aid, cannot be infringed in any way by the alleged errors of fact and manifest errors of assessment attributed to the Commission, particularly since the contested decision was adopted after the initiation of the formal investigation procedure provided for under Article 88(2) EC. It is also clear that the applicant does not put forward any argument to show that the contested decision infringes Regulation No 659/1999 and fails to identify the provisions of that regulation infringed by the decision.

146 The present plea accordingly falls to be considered only in so far as it alleges infringement of Article 87(3)(c) EC and of the guidelines.

The assessment of part of the aid as public service compensation

147 The applicant argues that the Commission incorrectly assessed the part of the aid representing undercompensation for the performance of public service obligations in that, first, it took into account the depreciation of the *Liamone*, although that vessel is not used for public service obligations and, secondly, it failed to take into account the potential appreciation of the fleet which is used for such obligations. In addition, the applicant refers to the substantial increase in losses between 2000 and 2001.

148 These objections must be rejected as irrelevant in that they aim to establish that the contested decision incorrectly assessed the compatibility of the aid with Article 86 (2) EC, since, in recital 260 in the contested decision, the Commission held that the whole of the aid of EUR 76 million in question, including the part representing undercompensation for the performance of public service obligations, should be investigated as restructuring aid.

149 By contrast, it is appropriate to investigate these objections in so far as they aim to challenge the determination by the Commission of the amount of the undercompensation for the performance of public service obligations.

150 As regards, first, the depreciation of the *Liamone,* the applicant's objection is based on an incorrect reading of the contested decision. Contrary to what the applicant submits, in calculating the part of the aid representing undercompensation for the performance of public service obligations, the Commission did not take into account the grant relating to that depreciation, but quite the contrary, as is clear from Table 11 in recital 257 in the contested decision, it subtracted the amount of that grant in its calculations. Moreover, in response to questions put by the Court at the hearing, the applicant expressly acknowledged that its reading of the contested decision on that point was incorrect.

151 It follows from the above that the sum of EUR 53.48 million considered by the Commission to represent the non-compensated costs of the public service obligations undertaken by SNCM on services to Corsica between 1991 and 2001 does not include the depreciation of the *Liamone.*

152 As regards, secondly, the potential appreciation of the fleet used for public service obligations, the applicant states that the market value of the five ships used for public service obligations on 31 December 2001 is higher, to the extent of EUR 22.2 million, than their net book value. The applicant contends that the losses incurred between 1991 and 2001 on services to Corsica, which, according to the Commission, correspond to the undercompensation for the performance of public service obligations, should accordingly be reduced by the amount of that appreciation.

153 It should first be held in that regard (and the point is not contested) that the alleged latent appreciation was not recorded in SNCM's accounts for 2000 and 2001, which

were certified by auditors. As the Commission argues, without being challenged by the applicant, and as the former confirmed at the hearing, it follows from the application of general accounting principles, in particular the principle of prudence, that a company is not in principle entitled to revalue the amount credited to an asset on its balance sheet on the ground that its market value is higher than its book value. The same principles provide that in the contrary case a company must apply early depreciation where the market value of an asset is lower than its book value.

154 It is true that the applicant contends, in general terms, in the context of other objections, that the provisional accounts held by the Commission at the time when the contested decision was adopted differed from the final accounts approved by the auditors, which became available after the adoption of the contested decision. However, the applicant provides no evidence to support that assertion and at no point does it indicate in what way the provisional accounts differ from the certified final accounts.

155 Next, and most importantly, it must be pointed out that, in recital 272 in the contested decision, the Commission indicated that two of the five ships used for public service obligations before 2002 were mortgaged, while, as regards the three remaining ships, the company had not found any bank prepared to accept them under mortgage guarantee. The Commission held in that respect that 'the level of the company's indebtedness and its weak cash flow, detailed below, which only just enables it to service its existing debt, are such that it is unlikely that any bank, acting as a private lender under market conditions, would be inclined to offer SNCM an additional loan. The risk that SNCM would not be able to pay back the instalments of the debt would be significant in view of the sums involved. Similar difficulties make it impossible for SNCM to have recourse to lease-back operations to reduce its indebtedness. The Commission's experience in effectively seizing ships or aircraft shows that it is difficult to enforce this in practice if such assets are used for services of national or regional interest'. It is clear that, although the applicant challenges those findings, it provides no concrete evidence under the objections concerned that would call them into question.

156 Lastly, inasmuch as the applicant argues that SNCM should have realised the purported gains by way of appreciation in order to produce additional revenue from its own resources and thus to reduce the losses arising from the exercise of public service obligations, that contention must be rejected, as it would require the sale of precisely those ships that are used by SNCM for its public service obligations.

157 In those circumstances, it does not appear that the Commission committed a manifest error of assessment by excluding latent appreciation of the ships used for public service obligations from the calculation of the undercompensation for the performance of public service obligations.

158 Contrary to what the applicant contends, there is no inconsistency with the methodology adopted in Decision 2002/149. As recital 102 in that decision makes clear, the Commission there took account, in order to correct the amount of losses arising from the performance of public service obligations, of the amount of the capital gains actually realised on three ships that were disposed of between 1991 and 1999. By contrast, that decision does not show that the Commission also took into account latent appreciation on other ships which had not actually been disposed of. While it is therefore correct that in Decision 2002/149 the Commission found it necessary to correct SNCM's accounting results for services to Corsica by allocating a capital gain to it which did not appear in the figures for those services but was included in other figures, the situation in the present case is entirely different, since the applicant criticises the Commission for failing to correct SNCM's accounts by taking account of appreciation that is not included in the accounts.

159 As for the point which was stressed by the applicant that, conversely, the Commission took account of the depreciation of the *Liamone* in determining the restructuring costs, it suffices to hold that that point, as has been held above, results from the strict application of accounting rules which have not been challenged by the applicant.

160 As regards, thirdly, the alleged significant increase in SNCM's losses between 2000 and 2001, it is sufficient to hold that, far from calling into question the finding set out in recital 256 in the contested decision that SNCM incurred substantial deficits between 1991 and 2001 on all services to Corsica that were subject to public service obligations, that point, assuming it to be true, confirms that finding and cannot accordingly call into question in any way the analysis in the contested decision relating to the part of the aid corresponding to the undercompensation for the performance of public service obligations.

161 Accordingly, the objections and arguments put forward by the applicant relating to the determination of the undercompensation for the performance of public service obligations must be rejected in their entirety.

The analysis of the causes which led to SNCM's financial difficulties

162 The applicant essentially argues that SNCM's difficulties arise not from the constraints imposed by the public service obligations but from its overcapacity, which results from a policy of overinvestment in new ships.

163 It should be noted at the outset in that regard that point 33 of the guidelines provides that 'the restructuring plan should describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate'.

164 It follows that, as the Commission rightly contends, the analysis of the causes of SNCM's difficulties set out by the Commission in recitals 263 to 281 in the contested

decision, giving particular consideration to SNCM's ship purchasing policy, the extent of the wage bill, the effect of intermediate purchases and the effect of public service constraints, is not necessary in itself, but only for the purposes of determining the adequacy of the measures proposed to remedy those difficulties and thus to procure restoration of the viability of the company concerned.

165 It follows that in the present case the objections put forward by the applicant regarding SNCM's overcapacity can establish that the contested decision is flawed only if they are able to demonstrate the inadequacy of the measures provided for under the contested decision to allay the concerns raised by the Commission in relation to that point.

166 It should be pointed out in that regard that in the contested decision the Commission, having stated in recital 333 that 'the reduction of the fleet provided for in the restructuring plan should be balanced in the light of the ship purchase policy which SNCM has pursued in recent years', held in recitals 336 to 339 in the contested decision that it was appropriate, without making a finding as to the existence of overcapacity on SNCM's part or quantifying that overcapacity, to impose on SNCM, as well as the undertaking given in the restructuring plan, referred to in recitals 97 to 101 and 315, to dispose of four ships, three additional conditions intended to reduce its capacity, namely a limit on the fleet of the SNCM Group to the current number of ships following disposal of the four ships, a prohibition on SNCM from renewing its fleet during a specified period and a limit on the number of round trips on the various services to Corsica. As required by points 35 and 36 of the guidelines, those conditions reflected the Commission's concern, expressed in recitals 311 to 317 in the contested decision, to mitigate any adverse effects of the aid on competitors by limiting SNCM's presence to its traditional market, namely services to Corsica.

167 It must be held that, while by the present objections the applicant is arguing that SNCM's capacity is excessive, the applicant does not explain why the undertaking by the French authorities as to the disposal of four ships and the additional conditions imposed by the Commission referred to above do not represent an adequate remedy for the alleged overcapacity.

168 In those circumstances, the applicant's objections in that regard are irrelevant.

169 In any event, those objections are unfounded.

170 First, the Court must reject the contention that the Commission's finding in recital 271 in the contested decision that SNCM had not excessively invested in fleet renewal in recent years was reached on the basis of net immobilisations of ships and not on the basis of trends in the capacity offered by SNCM as regards places offered.

171 In examining the trend in net immobilisations of ships, the Commission was not seeking to investigate whether SNCM was providing excess capacity but, as recital 270 in the contested decision and point III 2 of the decision to initiate the procedure explicitly state, the rationality of the company's purchasing decisions in order to be satisfied that past losses did not result from factors other than public service obligations between 1991 and 2001. Thus, having considered the trend in net immobilisations of SNCM's ships and held that SNCM had not invested excessively, the Commission went on, in recital 272 in the contested decision, to examine SNCM's indebtedness as a result of the purchase of the ships in question.

172 It follows that the applicant's objection is made on the basis of an incorrect reading of the contested decision.

173 In any event, it is plain that the statistics put forward by the applicant relating to the trend in vessel capacity as regards places do not support its argument, since they clearly show, as, moreover, the applicant does not dispute, that that capacity has reduced, taking into account the sale of four ships after refitting and the purchase of three other ships. In that regard, the statement made in the reply that the average capacity of the three new ships as regards places is, for its part, higher than that of the previous fleet must be rejected as being irrelevant, as the purported average capacity is a purely theoretical piece of information and bears no relationship to the actual capacity offered by SNCM's ships.

174 With respect to the assertion that that reduction in the number of places does not bear any relation to the reduction in traffic suffered by SNCM and was dictated more by the alleged reduction in SNCM's turnover, the reduction in public service obligations and the increase in the number of crossings by the applicant, it must be pointed out that that contention is irrelevant since it is on those grounds in particular that the Commission regarded it as necessary, without making a finding as to the existence of overcapacity on SNCM's part or quantifying that overcapacity, to reduce the capacity offered by SNCM by imposing various conditions. It must once again be stated that, although the applicant criticises the Commission for failing to hold that SNCM's capacity is excessive, it does not challenge the remedies put forward by the Commission by way of compensatory measures in favour of competitors.

175 In any event, the applicant cannot claim to prove SNCM's overcapacity by invoking the fact that the *Pascal Paoli*, in service on the Marseilles to Bastia route, offers a higher number of places than those provided for in the 2002 agreement. It is clear from Annex I to that agreement that it lays down a minimum number of places in

order to ensure a minimum service, termed a 'basic' service. Furthermore, the Commission held, without being challenged by the applicant, that the *Pascal Paoli* had an identical number of cabins to those required under the public service obligations.

176 As regards, secondly, the claim that SNCM's losses increased in 2000 and 2001, that is to say in precisely those years in which the *Liamone* was delivered and the *Danielle Casanova* was ordered, it is sufficient to hold that the applicant has provided no concrete evidence to establish a causal connection between those matters and the increases in SNCM's losses.

177 In the light of those points, the objections regarding the analysis of the causes of SNCM's difficulties must be rejected in their entirety.

Compliance with the guidelines

178 The applicant submits that the Commission has committed errors of fact and manifest errors of assessment as regards compliance with the conditions laid down in the guidelines with respect to whether the firm which is the beneficiary of the aid is a firm in difficulty, the assessment of the restoration of viability, the avoidance of undue distortions of competition and the limitation of aid to the minimum.

179 It should be noted as a preliminary point that, by those objections, the applicant is merely alleging breach by the Commission of the conditions set out in the guidelines as regards the four points referred to above, and does not claim that the guidelines are unlawful in the light of Article 87(3)(c) EC.

180 In those circumstances, consideration of those objections must be restricted to examining whether the Commission complied with its own guidelines and cannot extend to the lawfulness of those guidelines under the EC Treaty. As the applicant has not raised any argument in that regard, such a question does not form part of the case which the Court can or must consider of its own office (see, inter alia, *Commission* v *Sytraval and Brink's France*, cited in paragraph 52 above, paragraph 67).

181 It is in the light of that preliminary observation that the Court will consider the objections and arguments put forward by the applicant in order to show that the contested decision infringed the guidelines.

— Whether SNCM was a firm in difficulty

182 The applicant essentially criticises the Commission for having held that SNCM was a firm in difficulty in the light of the disappearance of its share capital, taking the net book value of its assets as a basis and without taking into account the possibility of rendering some of them liquid.

183 While there is no Community definition of what constitutes a firm in difficulty, the Commission states at point 4 of the guidelines that it regards a firm as being in difficulty 'where it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term'.

184 The Commission states in point 5(a) of the guidelines that 'in particular, a firm is, in any event and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines ... in the case of a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. In addition, in point 6 of the guidelines, the Commission indicates:

'The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value ... In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or creditors.'

185 It follows that, although the guidelines provide that a firm is 'in any event' regarded as being in difficulty where a material part of its share capital has disappeared, there is nothing to prevent a firm from establishing that it is in financial difficulty for the purposes of the guidelines by the use of other evidence, such as the factors referred to above, even if it has not lost a significant part of its share capital.

186 In the present case, the Commission took the view that SNCM satisfied both the condition laid down under point 5(a) of the guidelines and that laid down in point 6. Accordingly, after holding in recital 291 in the contested decision that SNCM had lost more than half of its share capital, more than a quarter of which had disappeared during the preceding year, it held, in recitals 292 to 294 in the contested decision, that other factors showed that SNCM was a firm in difficulty for the purposes of the guidelines. The Commission referred in that regard to the increase in losses, the reduction in turnover, the increase in financial debt, the increase in

financial charges, the reduction in capital, the weakness of capital in relation to the company's size, financing requirement and the net fixed assets of the company, together with the weakness of its internal financing capacity. The Commission went on to state, in recital 295 in the contested decision, that the French authorities had confirmed to it that the banks were refusing to lend money to SNCM because of its indebtedness, even though SNCM proposed to put up its newest vessels, unencumbered by mortgage or other servitude, as a security for a bank loan.

187 It is clear that, although, by the objections in question, the applicant denies that the condition laid down under point 5(a) of the guidelines is satisfied, it does not actually challenge those findings of the contested decision.

188 Taking the applicant's position at its highest, its first submission is that SNCM's balance sheet for the 2002 financial year did not bear an auditors' certificate. It is however clear that that contention is not supported by any concrete evidence.

189 To the extent that, by that objection, the applicant criticises the Commission for having adopted the contested decision on the basis of provisional accounts, a point which is not contested and is explicitly referred to in recitals 17 and 293 in the contested decision, it suffices to hold that the applicant puts forward no evidence in that regard to show that the final accounts differed from the provisional accounts.

190 The manifestly unfounded allegations relating to the annual accounts of SNCM must accordingly be rejected at the outset.

191 Next, as regards more particularly the factors referred to in recitals 293 and 294 in the contested decision, it must be held that the applicant does no more than dispute the Commission's analysis of SNCM's internal financing capacity. It is clear that the other factors referred to in the contested decision, in particular the level of losses and of financial indebtedness, are capable by themselves of establishing that SNCM was a firm in difficulty. While the applicant challenges the level of SNCM's indebtedness for the first time in its observations on the statements in intervention, it fails however to indicate in what way the purported error should mean that the Commission's conclusion that SNCM was a firm in difficulty should be altered. At several points in its pleadings, the applicant itself forcefully pointed out the significant increase in SNCM's indebtedness between 2000 and 2001 as the result of alleged overinvestment in ships.

192 Those factors are, in any event, not called into question by the claim, which the applicant made for the first time in the reply, that SNCM carried on a fares war. Such conduct is not incompatible in any way with the existence of financial difficulties. On the contrary, the fact that SNCM offered extremely low prices, possibly beneath the level of its costs, may bear out the fact that it is a firm in difficulty, since such conduct is capable of resulting in financial losses. The fact, also mentioned in the reply, that SNCM appointed a new managing director in 2003 cannot be taken into account for the purposes of considering the lawfulness of the contested decision, since it took place after the latter's adoption.

193 Lastly, as regards the assertion that, contrary to what the Commission stated in recital 295 in the contested decision, some ships were available to be put up as security for a bank loan, it suffices to hold that that assertion is not supported by any concrete evidence. At most, in its observations on the statements in intervention, the applicant states in that regard that, according to SNCM's statement in intervention, that company obtained a credit of EUR 22.5 million at the end of 2001 and that it could have obtained a short-term credit of EUR 40 million in 2002. However, in reply to a question from the Court on that point, SNCM explained at the hearing that the 'credit' was in reality an existing line of credit which was entirely exhausted at the time when the contested decision was adopted. It is clear that the

applicant did not dispute that explanation, which is, moreover, confirmed by recital 272 in the contested decision, where the Commission states that, having regard to SNCM's indebtedness and its weak cash flow, no bank acting as a private lender under market conditions would be inclined to offer an 'additional' loan to SNCM. In any event, the fact that SNCM obtained or could have obtained bank loans in 2002 does not call into question the fact that, at the time when the contested decision was adopted, the Commission found that the banks were henceforth refusing to make any new lending available to SNCM. In those circumstances, the finding set out in recital 295 in the contested decision, which is also repeated in substantive terms in recital 272 in the decision, must be held to be established.

194 It follows from the above that the fact that SNCM was a firm in difficulty within the meaning of the guidelines must be held to be established to the requisite legal standard by the factors set out in recitals 293 and 294 in the contested decision.

195 Accordingly, the objections put forward by the applicant in order to challenge the Commission's findings in relation to the disappearance of SNCM's share capital are ineffective.

196 It must in any event be observed in that regard that, although the applicant criticises the Commission for having undervalued SNCM's assets in adopting a strictly accounting approach, based on the net value of the assets and disregarding their market value and the possibility of using some of them as security, it fails to indicate how taking the market value of those assets into consideration could lead to a materially different conclusion from that reached in the contested decision, namely that, contrary to what was held in that decision, SNCM did not lose half of its capital and that a quarter of that capital disappeared during the final year. On the contrary, in its observations on the statements in intervention, the applicant itself acknowledges that a quarter of the share capital had disappeared during the final

12 months. Similarly, although, as has already been mentioned above, the applicant maintains that some ships are available to be used as security for a bank loan, it fails to put forward any figures or concrete evidence in support of its contention, apart from material put forward by SNCM itself, which, as stated in paragraph 193 above, does not alter the analysis set out in the contested decision on the matter.

197 It follows from the above that the applicant's objections regarding the disappearance of SNCM's share capital are irrelevant and have no factual basis.

198 On those grounds, the objections and arguments put forward by the applicant in relation to the question whether SNCM was a firm in difficulty must be rejected.

— Restoration of viability

199 The applicant criticises the Commission for not considering an intermediate option between SNCM continuing its activities with the benefit of the grant of aid and the disappearance of that undertaking in the absence of any grant of aid.

200 It is clear that those objections are made on the basis of an incorrect reading of the contested decision. As the Commission rightly submits, the contested decision did not accept either of the extreme solutions which the applicant refers to and opted, in line with what the applicant proposes, for an intermediate solution.

201 Thus, as is stated in recitals 300 to 302 in the contested decision, SNCM was obliged for the purposes of ensuring its restoration of viability, first, to redeploy its activities to the Maghreb in the light of the prospects for growth in that market and, secondly, to abandon those activities which, even after restructuring, would remain structurally loss-making, in particular the services between Italy and Corsica operated by Corsica Marittima.

202 Furthermore, in recitals 315 to 317 in the contested decision, with a view to preventing undue distortions of competition, the Commission required SNCM, as well as terminating services between Italy and Corsica, to implement a virtual withdrawal of services between Toulon and Corsica, to limit the number of round trips made each year from 2003, specifically on services between Nice and Corsica, and to sell four ships. In addition, the Commission thought it necessary, in order to avoid SNCM using surplus liquid assets for aggressive activities that might cause distortions on the market, to prohibit it from financing any new investment other than the costs of redeploying its activities to the Maghreb, even in order to replace existing ships.

203 Lastly, in order to preserve the common interest, the Commission also imposed, in recitals 331 to 367 in the contested decision, a series of requirements on SNCM in order to limit its capacity and to prevent it from adopting an aggressive fares policy. To that end, as well as the measures referred to above relating to the number of round trips and investment, the Commission required SNCM to limit its fleet to the current total number of ships following disposal of the four ships, to dispose of non-strategic shareholdings and prohibited it from acting as a price leader. Those conditions are set out in Articles 2 to 5 of the operative part of the contested decision.

204 It follows from the above that, far from having authorised SNCM to continue its existing activities with the benefit of the grant of the aid in question, the

Commission in fact adopted a decision which required SNCM, in order to benefit from that aid, to modify some of its activities significantly. In those circumstances, the applicant's objections in that regard must be rejected.

205 Inasmuch as the applicant seeks more particularly by these objections to challenge, under the cloak of a general criticism of the investigation of the restoration of viability, the continuing presence of SNCM on services between Nice and Corsica, where the applicant itself is in direct competition with SNCM, it must be observed that, although the applicant appears in its application to criticise the Commission for failing to require SNCM to withdraw completely from services between Nice and Corsica, it submits, in more qualified terms, in its reply that the Commission ought to have required SNCM to reduce its presence on those services.

206 In so far as, in the first place, the applicant criticises the contested decision on the ground that the Commission should have required SNCM to reduce its presence on services between Nice and Corsica, it suffices to hold that such a criticism results from an incorrect reading of the contested decision, since, as is clear from the above, the Commission did indeed require SNCM to take measures for the purpose of reducing its presence on those services in the form of limitations on the number of round trips. It is of no relevance in that regard that the condition imposed by the Commission takes the form of a lowering of the number of annual crossings rather than a reduction in traffic, since in any event it entails a limitation on SNCM's activities out of Nice. The applicant's objection in this regard accordingly has no factual basis.

207 In so far as, in the second place, the applicant criticises the contested decision on the ground that the Commission should have required SNCM to withdraw completely from services between Nice and Corsica, it must be pointed out that, in recital 302 in the contested decision, the Commission stated in that regard that, although services from Nice remained uncertain, their relative importance was diminishing and the early depreciation of the *Liamone* in 2001 would make it possible to turn the company around to positive results on that link and that even a reduced presence from Nice remained necessary for the company's position on the market as a whole.

Furthermore, in recital 338 in the contested decision, the Commission stated that it had not imposed more drastic conditions with regard to capacity reduction because, inter alia, of the prospects for traffic increase to Corsica and the risk of bringing about a situation in which SNCM's direct competitor had a monopoly position on links between mainland France and Corsica.

208 It is clear, first, that the applicant does not contest the ground set out in recital 302 in the contested decision that the importance of services from Nice is diminishing and that the early depreciation of the *Liamone* in 2001 will make it possible to turn the company round to positive results on that link.

209 Secondly, with respect to the reasoning relating to SNCM's position on the market as a whole, the applicant, without actually contesting it, merely states that it does not understand it. It is plain that by that reasoning the Commission was accepting that SNCM's presence on services between Nice and Corsica was necessary in order to reduce its dependence on the traditional route between Marseilles and Corsica, which is the subject of public service obligations. That is apparent from the final part of recital 302 in the contested decision, which states that redeployment to the Maghreb will help to reduce the company's dependence on that traditional route. Contrary to what the applicant argues, SNCM remains vulnerable at Marseilles, since the 2002 agreement expires in 2006 and it has no exclusive rights on that route. It is also the case that the applicant withdrew from the tender process relating to the award of the 2002 agreement. Moreover, the applicant cannot reasonably deny the need for SNCM to diversify its services, since the applicant operates services on four routes to Corsica. Furthermore, SNCM explained in that connection, without being challenged by the applicant, that inasmuch as a significant number of journeys are made from Nice and to Marseilles (or vice versa) withdrawal from Nice would necessarily have negative repercussions as far as Marseilles is concerned. Similarly, as is clear from recital 205 in the contested decision, which is not challenged by the applicant, the French authorities have emphasised the complementary relationship between services from and to Nice and Marseilles and the need for SNCM to provide a balance of services in the light of the applicant's presence on routes from four mainland ports.

210 As regards the objection set out in the observations on the statements in intervention that the retention of unprofitable services is not justified by its complementary relationship with more profitable services, that objection is founded on two unproven hypotheses. First, for reasons which will be addressed in detail below, the applicant fails to show in any way that routes from Nice are unprofitable. Secondly, as regards routes from Marseilles, it is clear that, contrary to what the applicant suggests, not only can its profitability not be imputed to a purported monopoly on that route, as SNCM has no exclusive rights in relation to those routes, but also that the applicant fails to have regard to the fact that the sole purpose of the 2002 agreement is to reimburse the cost of public service obligations on that crossing, without providing any guaranteed profit to SNCM. Were the applicant's position to be correct, it would be difficult to understand why the applicant chose to operate from Nice and to cease operating from Marseilles.

211 Thirdly, as regards the risk invoked by the Commission in relation to services from Nice that a monopoly might be created, it must be pointed out that the Court has already held that the Commission was entitled to consider, in the exercise of its wide discretion, that the presence of an undertaking was necessary in order to prevent the emergence of a strengthened oligopolistic structure on the markets in question (*Kneissl Dachstein* v *Commission*, cited in paragraph 138 above, paragraph 97).

212 It is clear in the present case that the applicant, which does not deny that it is SNCM's only current competitor on services between Nice and Corsica, so that the withdrawal of SNCM from that route would confer on the applicant a de facto monopoly on that route, does no more than contend that Moby Lines and other Italian companies might start services on that route. It must however be observed that neither Moby Lines nor any other Italian company mentioned by the applicant is currently active on routes between mainland France and Corsica. Moreover, the applicant provides no information whatsoever to support its argument that shipping companies currently have plans to begin services on that route. In those circumstances, the applicant's assertions in that regard cannot call into question the Commission's conclusions with respect to the risk that a monopoly be created in its favour on services between Nice and Corsica.

213 None of the other arguments put forward by the applicant is capable of calling into question the Commission's findings regarding the need to maintain SNCM's presence on services between Nice and Corsica.

214 As regards, first, the alleged structurally loss-making nature of that route, it is clear that not only does the applicant not provide any concrete information to support its claim in any way, but also that its uninterrupted presence on that route since 1999 disproves that argument. It should be noted first of all in that regard that the applicant has not ceased increasing its capacity, as the applicant itself points out in its reply, where it refers to an increase of 109% in its sailings to Corsica between 2000 and 2004. Furthermore, the applicant states in its reply that an order for a 12th ship will allow it to increase its services on French routes by 70%. Next, the Commission held in recitals 65 and 86 in the contested decision, without being challenged by the applicant, that the applicant embarked upon an aggressive policy to conquer a larger share of the market on services to Corsica in 2001 and that, under that strategy, it offered overcapacity for one or two years to attract new customers.

215 As regards, next, the assertion that SNCM is selling at a loss on routes where there is competition, it must also be held that that assertion is founded on an unproven hypothesis. The questions raised by the applicant as to why SNCM did not contemplate a restructuring plan in 1992, when it was clear that liberalisation of cabotage would come into force from 1999, are plainly irrelevant. When a restructuring plan was presented to the Commission in 2002, it was under a duty to adopt a position as regards that plan only. The assertion that that plan might, circumstances permitting, have been presented earlier is made on the basis of a theoretical assumption and cannot affect the lawfulness of the contested decision. In any event, SNCM cannot be criticised for seeking to adapt to its new competitive environment by relying on its own resources without seeking restructuring aid, where, furthermore, there has been no evidence to show that the guidelines would have allowed it to have been validly granted to SNCM at that time.

216 Furthermore, as regards SNCM's purported inability to carry on its activities in an unsubsidised competitive context, it suffices to hold that such an assertion is not substantiated. It should be pointed out in that regard that it is only since 2002 that SNCM has been operating on the route between Nice and Corsica without any public service obligation and the corresponding public compensation. Besides, the applicant itself states in its application that SNCM is operating with three vessels to the Maghreb, which is another route operated without any public service obligation, with positive results.

217 As regards, lastly, the alleged overcapacity on the market to Corsica, it should be noted that in recitals 82 to 87 and 313 in the contested decision, the Commission held that, on the basis of the market survey submitted by the French authorities, there was no overcapacity on services to Corsica.

218 None of the factors put forward by the applicant is capable of calling that conclusion into question. On the contrary, since the applicant itself points out, as has already been established, that it increased its crossings to Corsica by 109% between 2000 and 2004 and that the order for a 12th ship would allow it to increase its services by 70% on the routes to France, the assertion that there is excessive capacity on the market lacks any credibility. Moreover, the applicant fails to provide any information regarding the overall level of services offered. Furthermore, recital 170 in the contested decision, which has not been challenged in this action, shows that at the meeting with the Commission of 4 February 2003 representatives of the applicant stated that the market in respect of crossings between mainland France and Corsica 'was doing well, with a 17% increase between 2000 and 2001 and 13% increase between 2001 and 2002', thereby confirming the Commission's finding, recorded in recital 61 in the contested decision, that, on the basis of the market survey submitted by the French authorities, the market was experiencing sustained growth. Similarly, it should be noted that, according to the applicant's own figures put forward in the reply, the market rose by 6.6% in 2000 to 2001, by 8.3% in 2001 to 2002 and, although it showed some levelling off, by 1% in 2002 to 2003. In that

regard, the clear difference between these figures and those for the preceding periods serves, moreover, only to cast doubts upon the credibility of the applicant's line of reasoning. Lastly, as regards the figures put forward in the observations on the statements in intervention in order to show a reduction in the number of passengers at the beginning of 2004, it suffices to hold that not only do those figures concern a period after the contested decision, but also, as they relate only to a single year, they cannot by themselves call into question the forecasts of growth over the period from 2002 to 2006.

219 It follows from the above that none of the objections put forward by the applicant is capable of showing that the Commission committed a manifest error of assessment in failing to require SNCM to withdraw completely from the Nice to Corsica route.

220 The applicant's objections and arguments relating to restoration of viability must accordingly be rejected in their entirety.

— The prevention of undue distortions of competition

221 The applicant argues that the Commission incorrectly assessed the distortions of competition arising from the grant of the aid in question and failed to consider a number of distortions which became apparent on the investigation of that aid.

222 As regards, first, the distortions of competition arising from the grant of the aid in question, it should be noted that in recital 312 in the contested decision the Commission held that, in accordance with point 39 of the guidelines, it was necessary to limit SNCM's presence on its traditional market, namely services to Corsica, where it faces competition from Community operators, which is not the

case as regards services to the Maghreb. Thus, in recitals 313 to 317, having held that there was no excess capacity on the market, the Commission accepted that the following four compensatory measures were sufficient to reduce SNCM's presence on its market to the direct benefit of its competitors: the termination of services between Italy and Corsica operated by Corsica Marittima, the virtual withdrawal of services between Toulon and Corsica, the limitation on the total number of places on offer and the number of round trips made each year from 2003, in particular on services between Nice and Corsica, and the sale of four ships. In addition, the Commission considered it to be necessary, in order to avoid SNCM using surplus liquid assets for activities that might cause distortions on the market, to prohibit SNCM from financing any new investment other than the costs of redeploying its activities to the Maghreb incorporated in the restructuring plan.

223 By those objections, the applicant, without challenging the sale of the ships and the virtual withdrawal from Toulon, contests the Commission's conclusions as to the absence of excess capacity on the market, the termination of services between Italy and Corsica and the limitation on the number of round trips.

224 As regards, first, the question whether there is excess capacity on the market, it suffices to hold that the applicant's contentions in that respect have already been rejected in paragraph 217 above. At this point, the applicant merely adds, in reply to the observation of the French Republic concerning the purchase by the applicant itself of a new ship in 2004, that its decision in that regard had been taken before SNCM's recapitalisation plan. However, apart from the fact that the applicant has failed to prove that that purchase would not have been undertaken if the recapitalisation plan had been known of, it must be held that, as is shown by the complaint lodged by the applicant with the Commission on 18 February 2004 relating to misuse of aid by SNCM, the increase in capacity undertaken by it on the Nice route is not limited to the new ship purchased in 2004 but has been under way continuously from 1996, with the construction of three fast ships in 1996 and two fast ferries in 2001, which, as it says itself, allowed it to increase its capacity on that route by 18.17% in 2004.

225 As regards, secondly, the termination of services between Italy and Corsica, there is no dispute, as the applicant states, that this took place in January 2002, before the implementation of the restructuring plan. However, that fact cannot mean that that measure no longer represents a compensatory measure in favour of competitors by reducing SNCM's presence on its market, since it is apparent that the withdrawal of that route was provided for in the restructuring plan adopted on 17 December 2001 and notified to the Commission on 18 February 2002. As the Commission rightly submits, it is for each economic operator to adopt the measures necessary to limit damage done to it and that done to competitors. In that regard, even though it was true, as the applicant contends, that the restructuring plan did not perceive withdrawal of the route concerned as a compensatory measure in favour of competitors within the meaning of the guidelines, that is irrelevant since it is not in dispute that a measure of that kind is likely to reduce the distortions of competition resulting from the aid in question.

226 With respect, thirdly, to the limitation on the number of round trips, it seems that by its objection in that regard the applicant criticises the Commission for having taken as a basis for imposing that measure the number of passengers carried between mainland France and Corsica, as set out in Table 2 in recital 53 in the contested decision, and not the number of places actually offered.

227 It should be noted in that regard that in Article 5 of the operative part of the contested decision the Commission required SNCM, as a compensatory measure in favour of competitors, to limit the annual number of round trips on the various sea links to and from Corsica 'to the thresholds indicated in Table 3 [in recital 104 in the contested decision]'. The cross-reference to Table 2 in recital 53 in the contested decision made by note 113 to recital 315 in the contested decision, which sets out in the statement of reasons the condition set out in Article 5 of the operative part, is plainly the result of a clerical error.

228 It follows that, contrary to what the applicant contends, the limitation on round trips to Corsica was determined having regard not to the number of passengers carried but to the number of crossings. The applicant's argument is accordingly founded on an incorrect reading of the contested decision.

229 In any event, it should be observed that while the Commission states in recital 315 in the contested decision that it imposed the limitation of the total number of places on offer 'and' the number of round trips made each year from 2003 on SNCM as a compensatory measure in favour of competitors, it is clear, by contrast, from Article 5 of the operative part of that decision as well as from recitals 337, 363 and 364, which form the basis of that condition, that it is only the limitation on the annual number of round trips that is imposed on SNCM as a condition of the aid being authorised. As the Commission confirmed at the hearing in reply to a question from the Court, the contested decision should thus be regarded as not imposing any limitation on SNCM with respect to places offered on those ships.

230 That being the case, it is plain that under this objection the applicant does not indicate either in what way the limitations on round trips imposed by the contested decision are manifestly inadequate to reduce undue distortions of competition resulting from the grant of the aid or in what way the approach it suggests would have the result of imposing different limitations on round trips, which would better be able to reduce those distortions.

231 It is admittedly true in that regard that, as the applicant argues, a limitation on round trips is not necessarily the same in all cases as a limitation on the number of places, as SNCM's ships do not all have the same capacity and, at least in theory, the services on which they are used could be changed, as the 2002 agreement provides only that, for the provision of public service obligations, there is to be an allocation 'in principle' of each specified ship to a particular route. In that regard, the explanation given by SNCM at the hearing that the 2002 agreement is interpreted by the signatories to it as prohibiting changes to the routes on which ships are used cannot be accepted, as it directly contradicts the terms of that agreement. Moreover, it should be noted that in recital 29(c) in the contested decision the Commission itself noted that the high-speed ships *Liamone* and *Asco* operated 'mainly' from Nice.

232 However, it must be accepted that, at the very least, the limitation on the number of round trips is capable of contributing to the objective of reducing capacity. The applicant does not challenge the Commission's finding set out in recital 104 in the contested decision that the limitation of the number of round trips provided for by the restructuring plan, which forms the basis of the condition laid down in Article 5 of the operative part of the contested decision, entails a reduction in the number of places offered of 28% on all services. The applicant has likewise not challenged the finding set out in recital 316 in the contested decision that 'throughout the Gulf of Genoa and from Toulon, SNCM is lowering its services on offer by more than one million places a year compared with 2001, i.e. a division by more than two, which is to the immediate benefit of its competitors even though it is these services that are showing the strongest growth'.

233 In addition, it must be pointed out that the reduction in capacity which the contested decision provides for is achieved not only by the condition relating to round trips but, as is clear from recitals 315 to 317 and 333 to 358, and from Articles 2 and 3 of the operative part of the decision, by a set of conditions which provide also for the closure of Corsica Marittima, the virtual withdrawal from Toulon, the disposal of four ships, the disposal of non-strategic shareholdings, the limitation of the fleet to the 11 ships remaining after the disposal of the four ships and the prohibition, in principle, of renewing those ships.

234 The applicant's objections in relation to those matters must accordingly be rejected.

235 As regards, secondly, the purported failure to consider certain distortions of competition, the applicant objects that the Commission did not investigate the State aid issues arising from the exceptional fiscal depreciation which allows SNCM to apply early depreciation to the *Liamone*.

236 It is clear, first of all, that, contrary to what the applicant submits, the early depreciation of the *Liamone* is not the result of exceptional fiscal depreciation. As has already been pointed out above, the early depreciation of an asset results from the application of accounting rules under which, by virtue of a principle of prudence, a company must correct its balance sheet by providing for exceptional depreciation where it establishes that one of its assets has a real or market value which is lower than its book value. Thus, in the present case, as recital 144 in the contested decision makes clear, SNCM provided for such exceptional depreciation in 2001 in relation to the *Liamone* in the sum of EUR 14.8 million.

237 That exceptional depreciation bears no relation to the exceptional fiscal depreciation permitted under French legislation. As the Commission states in note 106 to recital 294 in the contested decision: 'Exceptional depreciation is the difference between straight-line depreciation, deducted from assets on the balance sheet, and diminishing balance depreciation authorised by tax law. If diminishing balance depreciation is not used to enter depreciation into the accounts, the difference between it and cumulated straight-line depreciation is entered under liabilities (exceptional depreciation), traditionally included in French accounting under capital. Total depreciation at the end of the accounting period remains the same and the system therefore does not make it possible to anticipate and generate a tax reduction in the first years.' In the present case, recital 294 in the contested decision shows that SNCM provided, under the heading 'regulated provisions', for exceptional depreciation of EUR 60 million, which depreciation does not necessarily relate to the *Liamone*.

238 As the applicant's present objection is founded on an incorrect premiss, it must be rejected on that ground alone.

239 In addition, it is clear that, as the Commission maintains without being challenged by the applicant, the mechanism of exceptional depreciation laid down under national accounting law being open to all undertakings, it cannot constitute a State aid within the meaning of Article 87(1) EC.

240 With respect to the assertion, made for the first time in the reply, that that depreciation allowed SNCM to cover through aid potential losses in order to anticipate a potential risk, it suffices to hold that the applicant has not disputed that SNCM's accounts for 2001 which provided for that depreciation were properly certified and it is not for the Court, in the absence of any grounds for doing so, to question them. The Commission was therefore entitled in the present case to take the view, without committing a manifest error of assessment, that that depreciation represented a cost for SNCM which could be offset by the aid concerned as part of its restructuring.

241 Lastly and in any event, in so far as the objection in question falls to be understood as seeking to challenge the exceptional fiscal depreciation provided for by SNCM, it must also be held that such an arrangement, which is laid down under national accounting law, is open to all undertakings and thus cannot, as such, constitute a State aid within the meaning of Article 87(1) EC.

242 On those grounds, the applicant's objections and arguments relating to the prevention of undue distortions of competition must be rejected in their entirety.

— The limitation of the aid to the minimum

243 The applicant submits that the aid authorised is not limited to the strict minimum needed to allow for the restructuring of SNCM in the light of the undertaking's resources. It challenges in that regard the amount of undercompensation for the performance of public service obligations, the cost of the social plan, the amount of the depreciation of the *Liamone* and the net proceeds of disposal of ships and fixed assets provided for under the restructuring plan.

244 It should be noted first of all that the restructuring aid notified by the French authorities amounts to EUR 76 million. As recital 326 in the contested decision makes clear, that restructuring aid comprises a financial component and an operational component. The financial component corresponds to the undercompensation for the performance of public service obligations in the past. In recitals 256 to 258 in the contested decision, the Commission held that the financial component corresponded to the losses incurred by SNCM for the performance of its public service obligations until 2001. As regards the operational component, recital 328 in the contested decision shows that it corresponds to the costs of the various actions provided for under the restructuring plan.

245 In recitals 256 to 258 in the contested decision, the Commission calculated that the undercompensation for the performance of public service obligations amounted, as it notes in recital 327, to EUR 53.48 million. In recital 328 in the contested decision, the Commission held that the restructuring costs amounted to EUR 46 million. According to note 120 to recital 328 in the decision, that amount covers the operational restructuring measures (EUR 31.2 million) and the depreciation of the *Liamone* (EUR 14.8 million). However, as SNCM was expected to realise EUR 21 million by way of net proceeds of disposal upon implementation of the disposals provided for in the restructuring plan (recitals 97 to 99 and 319 in the contested decision), the Commission, having taken the view that the company was unable to find other internal sources of capital to finance its restructuring programme, reached the conclusion in recital 328 in the contested decision that the sum of EUR 76 million was justified to restore the company's viability in the short term.

246 However, in order to take account of the proceeds of disposal of non-strategic shareholdings required by Article 3 of the operative part of the contested decision which would supplement the disposals under the restructuring plan, the Commission, as it explains in recitals 329, 357 and 358 in the contested decision, authorised the restructuring aid in question under Article 6 of the operative part of the decision to the extent only of a first tranche of EUR 66 million, thus refraining from giving authorisation for the second tranche of EUR 10 million. If it becomes apparent that the disposals concerned have generated more than EUR 10 million for the company, the second tranche cannot be granted to SNCM. However, should

those disposals generate less than EUR 10 million, the remainder will be paid, after authorisation by the Commission, with the proceeds of those disposals being taken into account.

247 By its objections relating to the question whether the aid was limited to the minimum, the applicant seeks to challenge the calculation both of the amount of the undercompensation for the performance of public service obligations (financial component) and of the restructuring costs (operational component).

248 With reference, first, to the amount of the undercompensation for the performance of public service obligations, it suffices to note that the applicant's objections concerning the merits of the contested decision in that regard have already been rejected in paragraphs 149 to 161 above. The additional objection made at this point, according to which SNCM also provided for excessive depreciation to the extent of EUR 22.2 million, corresponding to latent appreciation on the fleet, cannot be accepted, since the amount authorised in respect of depreciation of assets arises purely by virtue of the application of accounting rules which are not challenged by the applicant. In any event, as the past accounts of SNCM which gave effect to that depreciation have been certified, a matter which is not in dispute, it is not for the Court to question them. Furthermore, it has already been held in paragraph 193 above that the Commission was entitled to hold that the level of SNCM's indebtedness and the weakness of its cash flow were not such as to lead a bank, acting as a private lender under market conditions, to offer an additional loan to SNCM.

249 As regards, secondly, the amount of the restructuring costs, the applicant estimates, first, the costs of the operational restructuring measures not at EUR 31.2 million but at EUR 17.091 million on the basis of the costs of the social plan, or at EUR 16.86 million on the basis of the amount of the grant recorded in SNCM's accounts for 2002.

250 It is plain, however, with respect to the figure of EUR 17.091 million, that that amount relates, as Table 11 in recital 257 in the contested decision clearly shows, only to the cost of the social plan for routes to Corsica. The restructuring in question concerns not only SNCM's services to Corsica but the whole of the company's activities, in particular its services to the Maghreb. As regards the figure of EUR 16.86 million, the Commission and SNCM have explained, without being challenged by the applicant, that not all the expenses of restructuring could be provided for in the accounts, as they represented investment expenses.

251 Since, as to the rest, the applicant merely criticises the Commission in a general fashion for failing to investigate the real cost of the social plan, without providing other evidence to challenge the amount of EUR 31.2 million adopted in the contested decision, it must be considered to be established that that amount corresponds to the costs of the operational restructuring measures.

252 As regards, secondly, the depreciation of the *Liamone*, the applicant considers that that depreciation is unjustified.

253 In so far as the applicant refers in that regard to the arguments already considered in the context of other objections above, those arguments must be rejected for the same reasons as those set out in paragraphs 150 and 151 above.

254 As regards the assertion made in the observations on the statements in intervention that SNCM was under no obligation to purchase an oversized high-speed vessel, particularly as it had concerns itself in 1998 as to the poor availability figures for its high-speed vessels, it suffices to note that the objections put forward by the applicant to deny the absence of significant overinvestment have also already been

rejected in paragraphs 170 to 175 above. In any event, the concerns expressed by SNCM regarding the profitability of the new high-speed vessels in 1998, when it stated that the use of those vessels for public service obligations depended on the positive outcome of their experimental use, are not such as to call into question the justification for purchasing a high-speed vessel in 2000. The same applies to the observations expressed by the chairman of SNCM in a newspaper article of 4 November 2004 on which the applicant relies. Apart from the fact that such an article cannot carry significant evidential weight, it must be held that while, in that article, the chairman of SNCM questions, as the applicant notes, whether it was appropriate to order the *Liamone*, he also adds, as the applicant fails to point out, that 'at the time, customers wanted the company to provide a high-quality product', whereas 'nowadays ... passengers give priority first of all and above all to fares', while stating at the same time that the *Liamone* was 'universally acclaimed when it was launched'.

255 As regards, thirdly, the net proceeds of disposal provided for under the restructuring plan, the applicant criticises the Commission for failing to take account, in determining whether the aid was limited to the minimum, of the net proceeds of disposal of the fixed assets provided for under the restructuring plan and which were in fact realised in 2003.

256 In that regard, it should be noted that in recital 328 in the contested decision the Commission, having indicated that it had adopted the figure of EUR 46.0 million for costs linked with operational restructuring measures, stated that SNCM 'should make EUR 21 million in the net revenue from disposals following implementation of the disposals provided for in the restructuring plan'. In those circumstances, and having regard to the fact that the financial undercompensation for the performance of public service obligations in the period between 1991 and 2001 amounted to EUR 53.48 million, the Commission concluded in that recital that 'the sum of EUR 76 million [was] completely justified to restore the company's viability in the short term'.

257 It is not disputed, as is clear from note 121 to recital 328 in the contested decision, which refers to recitals 97 to 101 in that decision, that the amount of EUR 21 million referred to in recital 328 in the contested decision relates to the net proceeds of disposal mentioned in recital 99 in the decision.

258 It is relevant that, in that section of the contested decision, the Commission, having noted, first, in recital 97, that SNCM had made provision in its restructuring plan for selling four of its vessels in 2002, namely the *Napoléon*, the *Liberté*, the *Monte Rotondo*, and the high-speed ship *Asco*, all of which are stated to have been sold apart from the *Asco*, and, secondly, in recital 98, that to those disposals there should be added that of the *Southern Trader* which was currently in progress, stated that 'the expected proceeds from these disposals were EUR 40 million, representing a cash injection (net proceeds of disposal) of EUR 21 million, taking account of residual refunds'.

259 It must, however, be noted that in recital 101 in the contested decision, the Commission added the following:

'At the same time, [SNCM] had in its restructuring plan intended to dispose of the [fixed] assets present in its subsidiaries (Marseilles offices). These were disposed of for EUR 12 million in 2003, with EUR 5.1 million appreciation.'

260 It is thus apparent from the terms of the contested decision that the Commission held that, under its restructuring plan, SNCM had, as regards, first, the sale of ships, anticipated realising net proceeds of disposal of EUR 21 million, and as regards, secondly, the sale of fixed assets, in fact disposed of those assets and thereby realised EUR 12 million by way of net proceeds of disposal.

261 In recital 328 in the contested decision, however, the Commission, when determining the minimum amount, stated only that SNCM was to make EUR 21 million by way of net revenue from disposals, without referring to the sum of EUR 12 million mentioned in recital 101 in the decision relating to the net proceeds of disposal of the fixed assets.

262 In order to explain the findings of the contested decision in that regard, the Commission first of all submitted in its defence that the receipts arising from the disposals of fixed assets did not fundamentally alter the analysis, having regard to the fact that the surplus generated of EUR 5.1 million had had a marginal impact on the reduction of the financial indebtedness, with the result that the risk of surplus cash had to be disregarded. Both the French Republic and SNCM, as interveners, also supported that view in their written submissions.

263 Next, in the rejoinder, the Commission adopted the same argument as that used by SNCM, namely that it had not been in a position to make the calculations necessary to determine the cash which might have been at SNCM's disposal, by reason of the lack of consistency in the figures available at the time when the contested decision was adopted and their lack of clarity as to what precisely they represented. In that regard, the Commission stated that many of the disposals required in the contested decision were disposals provided for under the restructuring plan that had not been implemented at the time the contested decision was adopted, that a number of the figures relating to provisional net proceeds of disposal required to be reduced in the light of the difficulties faced by SNCM following the adoption of the contested decision in finding a purchaser and that the figures put forward by the French authorities were in large measure provisional. For those reasons, the Commission indicated that it had evaluated 'in overview' the cash that was reasonably available to SNCM in order to fund the costs of the restructuring plan from its own resources to the maximum extent possible, both before and after the contested decision.

264 However, none of those explanations can be accepted to justify the failure to take into account the net proceeds of disposal of the fixed assets.

265 As regards the first explanation, it must be pointed out that point 40 of the guidelines requires that the amount of the aid must be limited to the 'strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company'.

266 It follows from this that, since in the present case SNCM undertook in its restructuring plan to dispose of non-essential naval and fixed assets, it must, as the Commission accepted in reply to written questions put by the Court, apply the whole of the proceeds of disposal of those assets to the funding of the restructuring plan. Contrary to what SNCM contends, that obligation does not oblige the beneficiary of aid in any way to use all of its resources to reduce the amount of the aid granted, but only to use all the resources generated by assets considered to be non-essential in carrying on the company's activities for the purposes of its restructuring. Such a contribution to the restructuring plan from the beneficiary out of its own resources is necessary in order to ensure that the aid remains, as required by point 40 of the guidelines, limited to the strict minimum needed to enable restructuring to be undertaken on the basis of the existing financial resources of the company, its shareholders or the business group to which it belongs.

267 Furthermore, that is the approach adopted by the Commission in the contested decision, since, first, recital 328 in the decision shows that for the purposes of satisfying itself that the aid was limited to the minimum needed the Commission deducted from the total cost of the operational restructuring measures the whole of the sum of EUR 21 million representing net proceeds of disposal mentioned there, stating, moreover, that SNCM was unable to find other internal resources to fund its restructuring. Secondly, the Commission also took account of the obligation to limit the amount of the aid to the strict minimum needed by requiring that payment under the scheme be made over a period of time, and be subject to offset. Under Article 6 of the operative part of the contested decision, the Commission authorised the aid in question to the extent only of a first tranche of EUR 66 million, with payment of the remainder of EUR 10 million being made conditional on the result of the disposal of a number of non-strategic shareholdings required by the Commission under Article 3 of the operative part of the decision. Clearly, those arrangements for authorising the aid in tranches also reflect the fact that the

Commission intended to take account of the whole of the proceeds of disposal realised in relation to non-essential assets, since, as it states in recital 341 in the contested decision, the proceeds of those disposals should 'proportionately' reduce the requirement for aid in view of the need to keep the amount of the aid to a minimum in accordance with point 40 of the guidelines.

268 It follows from the above that in determining whether the aid granted to SNCM was limited to the minimum the Commission was under a duty to take into account the whole of the net proceeds of disposal realised in implementation of the restructuring plan.

269 In that regard, the contention that the amount of the aid authorised in the contested decision does not allow SNCM to benefit from surplus cash is irrelevant.

270 It is true that point 40 of the guidelines required the Commission to determine, as it did in recital 330 in the contested decision, that neither the form in which the aid was granted nor its amount would lead SNCM to have surplus cash available to it which it might use to pursue aggressive, market-distorting activities. Nevertheless, the fact that the amount of the aid authorised in the contested decision made it possible to avoid such a risk does not justify the Commission's failure to take account of the net proceeds of disposal of the fixed assets, as to do so could have led it to declare aid of a lower amount to be compatible, or, depending on the circumstances, to declare the aid in question to be incompatible, with the common market, with the result, on any basis, that it would have been all the more possible to avoid the risk of distortion of competition.

271 The Commission's explanation regarding the marginal impact of the net proceeds of disposal of the fixed assets on SNCM's financial situation must accordingly be rejected.

272 As regards the second explanation, it should be noted that the Court has already held in relation to restructuring aid (*Kneissl Dachstein* v *Commission*, cited in paragraph 138 above, paragraph 84) that the Commission was not bound to estimate the specific cost of each of the measures to be undertaken by the company in question. Besides the fact that a precise evaluation of the various items of expenditure would in any event have been uncertain owing to the prospective nature of the measures envisaged, the Commission is entitled, in the exercise of its broad discretion, to confine itself to an overall assessment.

273 It must therefore be accepted that in the present case, given the difficulty in putting a definite figure on the net proceeds of disposal of the naval assets and fixed assets under the restructuring plan, the Commission was, in principle, entitled, in the exercise of its broad discretion, to proceed on the basis of an approximate evaluation of those proceeds.

274 None the less, in the present case, it must be stated that, as regards, first, the disposal of the naval assets, the Commission stated in recitals 97 and 98 in the contested decision that three of the four ships which were to be disposed of under the restructuring plan, namely the *Napoléon*, the *Liberté* and the *Monte Rotondo* had already been sold, with only the high-speed ship *Asco* not finding a purchaser, and that the disposal of the *Southern Trader* was in hand. Similarly, while the Commission indicates in recital 99 in the decision that the 'expected' net proceeds from those disposals were EUR 21 million taking account of residual refunds, it states in the same recital that 'the *Monte Rotondo* and *Napoléon* were disposed of in 2002', while 'the *Liberté* and *Southern Trader* have been or will be disposed of in 2003', the latter being the subject of an offer to sell. Moreover, the Commission states in recital 99 in the contested decision that 'the total net proceeds of the disposal of these four vessels was EUR 1.2 million in excess of the sum expected'.

275 It is therefore clear from the wording itself of the contested decision that at the time of its adoption the Commission was aware of the actual amount of the net proceeds of disposal of a number of ships, as it holds in relation to the disposal of four ships

that there was a surplus of net proceeds of disposal over their estimated value. With respect to the *Napoléon* and the *Monte Rotondo*, since they were disposed of in 2002, the Commission must, given the passage of time between those disposals and the adoption of the contested decision, necessarily have been aware of all information required to determine the exact amount of their net proceeds of disposal. As regards the *Liberté*, which was disposed of in 2003 prior to the adoption of the contested decision, it is also clear that, subject to the need, should the case arise, to make minor adjustments to take account of subsequent costs requiring to be set against the sale price, the Commission should likewise have been aware of all material information needed to allow it to calculate the amount of the net proceeds of disposal.

276 Moreover, in reply to a written question from the Court, the Commission has confirmed that its staff could have determined the surplus realised on the disposal of the *Napoléon*, *Monte Rotondo* and *Liberté* on the basis of information provided by the French authorities on 14 May 2003, that is to say approximately two months prior to the adoption of the contested decision.

277 It is true that, by contrast, as regards the fifth ship, namely the *Southern Trader*, only an estimate of its net proceeds of disposal was available to the Commission. However, in relation to that ship, it is clear from Article 3 of the operative part of the contested decision that its disposal was to be taken into account only, as SNCM rightly states, on payment of the second tranche of the aid, as the ship was leased to one of SNCM's subsidiaries, Société méditerranéenne d'investissements et de participations ('SMIP'), which was considered by the Commission to be a non-strategic shareholding. Thus, the second paragraph of Article 3 of the operative part of the contested decision provides that instead of disposing of that holding SNCM may sell that company's sole asset, the *Southern Trader*, and close down that subsidiary. In reply to a written question from the Court on that point, the Commission accordingly confirmed that the net proceeds of disposal of the *Southern Trader* were not included in the sum of EUR 21 million referred to in recital 99 in the contested decision.

278 It follows from the above that at the time when the contested decision was adopted the Commission should have been aware of the actual amount of the net proceeds of disposal of the ships which were to be sold under the restructuring plan and which had in fact been disposed of on the date on which the decision was adopted.

279 Secondly, as regards the net proceeds of disposal of the fixed assets, it must be noted that in recital 101 in the contested decision the Commission stated that '[the fixed assets] were disposed of for EUR 12 million in 2003, with EUR 5.1 million appreciation'. It is thus clear from the wording itself of that recital that the Commission puts forward the figure of EUR 12 million referred to in it not as an approximate assessment but as a precise evaluation of the net proceeds of a disposal that had actually been made.

280 Moreover, in reply to a written question from the Court, the Commission confirmed that the figure of EUR 12 million referred to in recital 101 in the contested decision was derived from information provided by the French authorities on 14 May 2003, that is to say approximately two months prior to the adoption of the contested decision.

281 In those circumstances, it also cannot be accepted, contrary to what the Commission submits in its written pleadings, that the amount of the net proceeds of disposal of the fixed assets was not clearly and definitively known on the date when the contested decision was adopted.

282 It is thus plain from the wording of the contested decision that at the time of its adoption the Commission had to be aware, as regards both the naval assets and the fixed assets which were to be disposed of under the restructuring plan and which had already been disposed of at that time, not only of the figure for their net proceeds of disposal that was incorporated in the plan, but also of the actual amount of those net proceeds of disposal.

283 In those circumstances and in the light, in particular, of the principle laid down under Article 87(1) EC that State aid is prohibited, the Commission was not entitled, in determining whether the aid was limited to the minimum, to restrict itself as regards those assets to an assessment 'in overview' of the cash reserves available to SNCM.

284 Since, as regards the disposal of the naval assets, the Commission determined that there was a surplus of net proceeds of disposal over and above the estimate of EUR 21 million incorporated in the restructuring plan and, as regards the disposal of the fixed assets, that the net proceeds of disposal amounted to EUR 12 million, it could not, without committing a manifest error of assessment, when determining in recital 328 in the contested decision whether the aid was limited to the minimum, use only the estimated figure of EUR 21 million given in the restructuring plan for the disposal of the naval assets.

285 Accordingly, the explanation put forward by the Commission regarding the lack of clarity in the figures available at the time when the contested decision was adopted must also be rejected.

286 In reply to written questions from the Court, the Commission has, under a new explanation which does not appear in its defence or in the rejoinder, submitted, on the basis of confidential documents not produced in the present Court proceedings, that the net proceeds of disposal of EUR 21 million mentioned in recital 99 in the contested decision covered in reality both the disposal of the four ships referred to in recital 97 in the decision and that of the fixed assets under the restructuring plan. The same explanation was given by SNCM in its statement in intervention.

287 However, even without determining the validity of that explanation by reference to the documents relied on by the Commission, it must be pointed out that it is settled

case-law that the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given ex post facto cannot be taken into account (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131; Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 171; and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95). It follows that the decision must be self-sufficient and that the reasons on which it is based may not be stated in written or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Community judicature (Case T-16/91 RV *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45).

288 In the present case, the explanation put forward by the Commission and SNCM, in terms of which the net proceeds of disposal of the fixed assets are included in the figure of EUR 21 million of net proceeds of disposal mentioned in recital 99 in the contested decision, does not appear in the contested decision, which, moreover, the Commission conceded at the hearing in reply to a question put by the Court.

289 It is in any event clear that that explanation, put forward belatedly by the Commission, is inconsistent with the contested decision. As recitals 97 and 98 in the contested decision refer merely to the planned disposals of ships by SNCM, and as there has been no reference of any kind prior to this part of the contested decision to the disposal of fixed assets, which are mentioned for the first time in recital 101 in the contested decision, it is clear that the reference in recital 99 in the decision to the expected proceeds from 'these' disposals being EUR 21 million necessarily relates only to the disposals of ships referred to in the previous recitals, namely recitals 97 and 98. Similarly, the statement in recital 101 in the contested decision that 'at the same time' SNCM had intended to dispose of fixed assets, which were in fact disposed of for EUR 12 million, confirms that the net proceeds of disposal of the fixed assets were considered by the Commission to be separate from the net proceeds of disposal of the ships and as being complementary to them. It must also

be pointed out that neither recital 328 nor recital 341 in the contested decision, which refer, without more, to net proceeds of disposal of EUR 21 million, can be interpreted as meaning that that figure includes not only the net proceeds of disposal of the ships but also the net proceeds of disposal of the fixed assets.

290 It follows that the explanation put forward by the Commission and SNCM, according to which the sum of EUR 21 million taken into account in determining the minimum amount of aid in recital 328 in the contested decision includes the disposal of fixed assets, must be rejected.

291 In any event, even if it were accepted that, as the Commission and SNCM contend, the expected net proceeds of disposal of EUR 21 million referred to in recital 99 in the contested decision are to be understood as including the net proceeds of disposal of the fixed assets, it none the less remains the case that the Commission was not entitled to take account in recital 328 in the contested decision only of net proceeds of disposal of EUR 21 million for the purposes of satisfying itself that the aid was limited to the minimum.

292 While it is conceivable that the net proceeds of disposal of the naval and fixed assets were estimated in the restructuring plan at EUR 21 million, it cannot be accepted, contrary to what the Commission argued at the hearing, that it is entitled to rely on mere forecasts, even though they do not reflect the true position, so as not to delay the adoption of its decision. Since the estimate of the net proceeds of disposal of EUR 21 million used in the restructuring plan was established in December 2001, as is shown by note 31 to recital 88 in the contested decision, the Commission was under a duty, in the light of the requirement under the guidelines to determine that the aid was strictly necessary, to correct that estimate in order to take account of SNCM's actual position at the time when the contested decision was adopted almost 19 months later.

293 Accordingly, while SNCM is right to argue that, having encountered difficulties in disposing of the high-speed vessel *Asco*, the Commission was entitled when it adopted the contested decision to take into account a lower figure for the net proceeds of disposal of that ship than the estimate provided in the restructuring plan, thereby making a negative correction to that estimate, the Commission was also under a duty to make any positive corrections that might increase the estimates relating to the other ships.

294 In the present case, recitals 99 and 101 in the contested decision show that SNCM not only disposed of the three other ships which were to be sold under the restructuring plan together with the *Southern Trader* and that the total of the net proceeds of sale of those four ships was in fact EUR 1.2 million higher than had been expected but also disposed of the fixed assets that were to be sold under the plan, thereby realising net proceeds of EUR 12 million.

295 It is clear, and is not, moreover, denied by SNCM, that the reduction in the net proceeds arising from the negative correction relating only to the high-speed vessel *Asco* cannot compensate completely for the failure to take those points into account.

296 In its statement in intervention, SNCM provided the Court, for each of the four ships which were to be sold under the restructuring plan, with a figure representing the 'actual resources available to SNCM'. As has already been held above, since the *Napoléon* and *Monte Rotondo* were disposed of in 2002, it must be the case that, having regard to the passage of time between those disposals and the adoption of the contested decision, the figure given by SNCM includes the exact amount of the net proceeds of disposal of those ships. Similarly, as regards the *Liberté*, which was disposed of in 2003 before the adoption of the contested decision, it is also clear that, subject to the need to make any minor adjustments that may be relevant, the figure given in SNCM's statement in intervention represents the approximate

amount of the net proceeds of disposal of that ship, as the principal information needed to calculate that amount was known at the time when the contested decision was adopted. Furthermore, SNCM confirmed at the hearing that the figure provided in its statement in intervention was correct.

297 That information provided by SNCM shows that, even allowing for negative proceeds of disposal of the high-speed vessel *Asco*, the true amount of the net proceeds of disposal of the four ships concerned was approximately EUR 16.5 million, so that, taking into consideration the net proceeds of disposal of EUR 12 million specified in recital 101 in the contested decision arising from the disposal of the fixed assets, the aggregate net proceeds of disposal available to SNCM at the time when the contested decision was adopted must have amounted to approximately EUR 28.5 million, rather than the figure of EUR 21 million taken into account by the Commission in the contested decision.

298 In that regard, SNCM's contentions that the sum referred to in recital 101 in the contested decision relates to gross proceeds of disposal must be rejected, as they are directly contradictory to the wording of that recital. With respect to the claim that the amount referred to in that recital relates in part to the sale of assets that were essential to the activities of the company, it suffices to hold that, apart from the fact that no other evidence is offered in support of that claim, there is nothing in either recital 101 or recital 328 in the contested decision that could justify the failure to take the net proceeds of disposal of those fixed assets into account. It must in any event be pointed out that, even when the figures given by SNCM regarding the net proceeds of disposal of the fixed assets are taken into consideration, the actual amount of the resources available to the company, as indicated by it in its statement in intervention, is EUR 24.9 million.

299 Furthermore, when questioned on the matter at the hearing, the Commission ultimately accepted that the aggregate amount of the net proceeds of disposal of the naval and fixed assets available to the company at the time when the contested decision was adopted was greater than EUR 21 million.

300 It thus follows from the above that the contested decision is vitiated by a manifest error of assessment in that, in determining the minimum amount of the aid, it adopts a figure for net proceeds of disposal of EUR 21 million, whereas it is clear from the decision and the explanations provided in these proceedings that the Commission was in a position to determine, on the basis of the information in its possession at the time when the contested decision was adopted, that the net proceeds of disposal were greater than EUR 21 million.

301 None of the other arguments put forward by the Commission and the interveners is capable of undermining that conclusion.

302 In the first place, the assertion made by the Commission in the rejoinder that, when considering in the future the second tranche of EUR 10 million under Article 6 of the operative part of the contested decision, it will be appropriate to take into account the net proceeds of the expected disposal of the fixed assets and the ships which were to be disposed of under the restructuring plan and which had not yet been disposed of on the date on which the contested decision was adopted must be rejected as being without foundation.

303 While it is true that Articles 3 and 6 of the operative part of the contested decision provide for the net proceeds of disposal of fixed assets by SNCM to be deducted from the second tranche of the aid, it is clear from the wording of those articles and from recitals 357 and 358 which constitute their essential basis, that the second tranche is intended only to take account of disposals of the non-strategic shareholdings required by the Commission as a condition of the aid being compatible with the common market. Those disposals are exhaustively listed in the first paragraph of Article 3 of the operative part of the contested decision and relate to the shareholdings in Amadeus France, Compagnie Corse Méditerranée, Société civile immobilière Schuman, SMIP and Someca.

304 As the Commission confirmed on several occasions in its replies to the written questions and at the hearing, the fixed assets referred to in the abovementioned provisions of the operative part of the decision regarding payment of the second tranche are not included within the scope of the disposals of fixed assets mentioned in recital 101 in the decision which the Commission was required to take into account in determining in recital 328 in the decision whether the aid was limited to the minimum. As regards the *Southern Trader*, which was held by SMIP, the Commission explained in its replies to the written questions that it required its disposal in Article 3 of the operative part of the contested decision because of the lack of clarity in the restructuring plan as to the sale of that ship, so that that ship could not be considered to be an asset included in the EUR 21 million figure incorporated in the restructuring plan.

305 It follows from the above that, contrary to what the Commission suggested in its written pleadings, the net proceeds of disposal of the fixed assets referred to in recital 101 in the contested decision do not have to be taken into account when the second tranche of the aid falls to be paid.

306 Accordingly, the fact that it is open to the Commission to give subsequent consideration to the question whether the conditions for payment of the second tranche are satisfied does not affect in any way the above conclusions as to the failure to take account, in determining whether the aid was limited to the minimum, of the aggregate net proceeds of disposal of the non-essential assets.

307 For the same reason, it is not open to the Commission to contend, as it did at the hearing, that in authorising the aid by way of a first tranche of EUR 66 million it had satisfied itself that the aid was limited to the minimum, as the bringing into consideration of net proceeds of disposal of non-essential assets in excess of EUR 21 million ought, in principle, to have led it to find that the amount of aid notified by the French authorities did not satisfy the requirement that the aid be limited to the minimum and, accordingly, that the conditions for the aid to be declared to be compatible with the common market in terms of Article 87(3)(c) EC were not satisfied.

308 As regards, in the second place, the point, briefly made by the Commission, that the amount of the undercompensation for the performance of public service obligations was underestimated until the end of 2001, it suffices to hold that that point was duly taken into account by the Commission in determining whether the aid was limited to the minimum since, as recitals 326 and 327 in the contested decision in particular make clear, the part of the aid notified by the French authorities as restructuring aid intended to permit '[the drawing of] a definitive line under the consequences of the inadequacy of financial compensation under the [1991 agreement and the 1996 agreement] in view of the operating expenses and onshore costs recorded for this period on the sea links covered by the public service obligations' was authorised in the sum of EUR 53.48 million. Therefore, that fact cannot be taken into account a second time in determining the net proceeds of disposal of the non-essential assets to be deducted for the purposes of calculating the minimum amount of the aid.

309 As regards, in the third place, SNCM's contention that the restructuring costs ultimately adopted in the contested decision, that is to say EUR 25 million (EUR 46 million less EUR 21 million), and the amount of the undercompensation for the performance of public service obligations, namely EUR 53.48 million, could together justify up to EUR 78.48 million of restructuring aid, thus providing a margin of EUR 2.48 million, it suffices to hold that the aid notified by the French authorities related to aid not of EUR 78.48 million but of EUR 76 million. It is not for the Court, when faced with proceedings for annulment, to rule on the lawfulness of aid of a different amount from that considered by the Commission, thereby substituting its own assessment for that of the latter (Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 64). It must also be observed that the difference invoked by SNCM is insignificant in relation to the error committed in its favour in determining the amount of the net proceeds of disposal of non-essential assets.

310 As regards, in the fourth place, SNCM's contention that the amount of the aid in the strict sense is only EUR 22.5 million, that is to say the difference between the financial injection made by the French State and the undercompensation for the performance of public service obligations, and thus represents 48% of the

restructuring costs of EUR 46 million, that contention is based on the false premiss that the amount of the undercompensation for the performance of public service obligations does not constitute a State aid within the meaning of Article 87(1) EC. That would only be the case if the conditions laid down in *Altmark Trans and Regierungspräsidium Magdeburg* (cited in paragraph 105 above) relating to that part of the financial injection were satisfied. However, it is not for the Court to substitute its own assessment for that of the Commission in annulment proceedings (*SNCF and British Railways* v *Commission*, cited in paragraph 309 above, paragraph 64).

311 That point applies all the more in the present case since the Commission expressly stated in the contested decision, as is clear in particular from recitals 260 and 326 in the decision, that, even if the amount of the undercompensation for the performance of public service obligations could be justified under Article 86(2) EC, the whole of the aid in question of EUR 76 million fell to be investigated as restructuring aid, including the part representing undercompensation for the performance of public service obligations, on the ground that the aid in question had been notified as restructuring aid and that the restoration of viability required that that aid also allowed for the repayment of the indebtedness arising from that undercompensation.

312 In those circumstances, it appears that the total amount of the aid in question, namely EUR 76 million, represents approximately 76% of the total restructuring costs, amounting, by adding the undercompensation for the performance of public service obligations of EUR 53.48 million and the restructuring costs of EUR 46 million, to EUR 99.48 million. Furthermore, even if only the first tranche of EUR 66 million is taken into account, it is clear that that tranche still represents approximately 66% of the total costs.

313 In any event, even assuming that the conditions laid down in *Altmark Trans and Regierungspräsidium Magdeburg* (cited in paragraph 105 above) were satisfied, the fact that the aid would represent less than 50% of the restructuring costs in such a case does not undermine in any way the finding that that aid nevertheless remains

excessive given the failure to take account of the whole of the net proceeds of the disposals realised in implementation of the restructuring plan. As was stated above, point 40 of the guidelines requires that restructuring aid be limited to 'the strict minimum needed' taking account of the existing financial resources of the company resulting inter alia from the sale of certain assets that are not essential to the company's survival.

314 Finally, as regards, in the fifth place, the contention advanced by the French Republic in its written pleadings that the other methods of evaluation put forward by the French authorities would have justified a sum equivalent to the aid in question, it suffices to hold that, in recitals 320 to 325 in the contested decision, the Commission expressly rejected those methods in favour of an alternative method which it itself had drawn up.

315 It must accordingly be concluded that the applicant's objection relating to the Commission's failure to take into account the aggregate of the proceeds of disposal of the non-essential assets in determining whether the aid was limited to the minimum is well founded, the contested decision being vitiated in that regard by a manifest error of assessment.

Conclusion as regards the second plea in law

316 It follows from all the above considerations that the second plea in law, based on infringement of Article 87(3)(c) EC and the guidelines inasmuch as the contested decision contains errors of fact and manifest errors of assessment, must be rejected save for the objection based on an erroneous appraisal of the question whether the aid was limited to the minimum.

317 As the requirement that the aid be limited to the minimum is, as the Commission has indicated at points 19 and 20 of the guidelines, linked to the condition specified in Article 87(3)(c) EC that, in order for aid to be declared compatible with the common market, it must not adversely affect trading conditions to an extent contrary to the common interest, it follows that the defect which renders the contested decision unlawful goes to one of the conditions laid down under Article 87(3)(c) EC which must be satisfied in order for aid to be declared to be compatible with the common market.

318 In those circumstances, it must be held that the conditions required to be satisfied for the aid in question to be declared to be compatible with the common market were not satisfied in the present case. Accordingly, the defect which renders the contested decision unlawful had, in the present case, a decisive effect on the outcome (Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49).

319 Accordingly, since the determination of the question whether the aid was limited to the minimum is of essential importance in the general scheme of the contested decision (*Westdeutsche Landesbank Girozentrale* v *Commission*, cited in paragraph 62 above, paragraph 420) and since it is not for the Court to substitute its own assessment for that of the Commission in proceedings for annulment (*SNCF and British Railways* v *Commission*, cited in paragraph 309 above, paragraph 64), that decision must be annulled and there is no need to consider the merits of the objections put forward by the applicant regarding the conditions imposed by the contested decision.

320 In particular, it remains open, inter alia in the light of *Altmark Trans and Regierungspräsidium Magdeburg* (cited in paragraph 105 above) to the Commission to undertake a reappraisal in the light of Article 87(1) EC of the extent to which the measure concerned or, at the least, of a part of it, constitutes State aid, and for it to vary, as appropriate, the conditions imposed by the contested decision in so far as

those conditions are still necessary having regard to the amount of the measure constituting State aid (see, to that effect, *SNCF and British Railways* v *Commission*, cited in paragraph 309 above, paragraph 64).

321 It follows from the above that the contested decision must be annulled.

Costs

322 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in its pleadings and the applicant has applied for costs, the Commission must be ordered to bear its own costs and to pay those of the applicant.

323 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, SNCM, as intervener, shall bear its own costs.

324 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. It follows that the French Republic must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Commission Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of the Société nationale maritime Corse-Méditerranée (SNCM);**

2. **Orders the Commission to bear the costs of the applicant together with its own costs;**

3. **Orders the French Republic and SNCM to bear their own costs.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 15 June 2005.

H. Jung M. Jaeger

Registrar President

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