II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 October 2004

on the State aid partly implemented by France for the 'Sernam' company

(notified under document number C(2004)3940)

(Only the French text is authentic)

(Text with EEA relevance)

(2006/367/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement on the European Economic Area, and in particular the first subparagraph of Article 62(2) thereof,

Having regard to the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, [1]

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [2]

Having called on interested parties to submit their comments pursuant to those provisions and having [3] regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 23 May 2001 (No D/288742), the Commission informed France of its decision to authorise restructuring aid for Sernam (hereinafter referred to as the 'decision of 23 May 2001' or the 'Sernam 1 decision').

(2) By letter of 17 June 2002 (registered on the same day under No A/60693), the French authorities submitted a first annual report on the restructuring of Sernam and a new memorandum of understanding between SNCF and Geodis, indicating that the aid approved on 23 May 2001 had been implemented under conditions different from those on the basis of which the Commission had taken its decision of 23 May 2001. By letter of 30 October 2002 (registered on 31 October 2002 under No A/69194), France transmitted additional information. On 27 November 2002 the Commission sent a letter to France to which it replied by letter of 30 January 2003 (registered on 31 January 2003 under No A/12246). Meetings between the French authorities and the Commission took place on 29 August 2002, 25 February 2003 and 22 March 2004. Additional information was supplied by the French authorities at the meeting of 22 March 2004 and by letter of 14 April 2004.

(3) The Commission commissioned an independent expert to carry out market research, the report of which was submitted in early June 2004.

[1] OJ C 288, 9.10.1999, p.2.
[2] OJ L 83, 27.3.1999, p.1. Regulation last amended by Regulation (EC) No 794/2004 (OJ L 140, 30.4.2004, p.1).
[3] OJ L 182, 1.8.2003, p.2.

(4) Moreover, by letter of 8 July 2002 (registered on 15 July 2002 under No A/62493), the Commission received a complaint (submitted jointly by several complainants, hereinafter referred to as 'the complainants') concerning the Sernam dossier. Meetings between the complainants and the Commission took place on 3 September 2002 and 29 January 2003. By letter of 13 December 2002 (registered on 17 December 2002 under No A/72603), the complainants served notice on the Commission for the first time to take action, indicating that they would otherwise institute proceedings for failure to act, a notice which they repeated by letter of 24 April 2003. ([1]) Subsequently, they sent the Commission additional letters, including one dated 4 February 2003 ([2]) and two dated 28 February 2003, one of which was sent on 4 March 2003, ([3]) and a letter of 10 March 2003 ([4]) and one of 15 September 2003. ([5]) The complainants served notice on the Commission for the second time urging it to take steps, indicating again that they would otherwise bring an action for failure to act, by letters dated 13 and 18 February 2004, ([6]) and transmitted further letters on 19 May, ([7]) 10 June and 9 September. The Commission's replies included letters of 7 February 2003 (response to the first notice), 25 February, 17, 20 and 21 March and 8 May 2003 (response to the repeat of the first notice) and 19 March 2004 (response to the second notice).

(5) By letter of 30 April 2003, the Commission informed France of its decision to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of this aid (Decision C 32/03).

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*. ([8]) The Commission called on interested parties to submit their observations on the aid in question.

(7) The Commission received observations on this matter from interested parties which it forwarded to France by letter of 26 September 2003 asking it to comment, which it did by letter of 26 November 2003.

2. **DESCRIPTION**

What follows is a brief description of the aid. For more details, please refer to the decision of 23 May 2001 and the decision of 30 April 2003 to initiate the procedure.

2.1. **Sernam's structure**

(8) As indicated in the decision of 23 May 2001, Sernam was set up in 1970 as part of the SNCF bringing together all activities involved in parcel services. A reorganisation in 1993 led to the creation of Sernam Domaine and its subsidiary Sernam Transport SA. Sernam Domaine remained part of SNCF whereas Sernam Transport SA was set up as a 100% subsidiary of SNCF which in turn had 24 subsidiaries ([9]) through which it carries out its road transport operations.

(9) The group established in 1993 consisting of Sernam Transport SA and its subsidiaries (hereinafter referred to as the 'Sernam Transport group') has always more or less been in financial equilibrium. However, the business results of Sernam Domaine steadily deteriorated from 1992 but it was only in 1996, partly because of considerable industrial unrest within SNCF, that a recovery plan could be drawn up. Nevertheless, the SNCF has studied ways and means of improving Sernam Domaine's situation as its performance continued to get worse.

(10) On 1 February 2000 Sernam Domaine was transformed into a 100% subsidiary of SNCF and a new limited partnership (hereinafter referred to as 'SCS Sernam') was then created by SNCF with separate legal personality. It comprises the fixed assets of the former Sernam Domaine and the financial assets of Sernam Transport SA. Consequently, SNCF's subsidiary Sernam Transport SA has become a 100% subsidiary of SCS Sernam while nevertheless remaining a separate company and the holding company of its 24 subsidiaries.

(11) The present decision concerns the restructuring of SCS Sernam (even though it was transformed into a *Société Anonyme* following the memorandum of understanding signed between SNCF and Geodis on 21 December 2001 and though 15% of SCS Sernam sold to Geodis and Cogip respectively was taken over by SNCF).

2.2. **Sernam's activities**

(12) Since its inception in 1970, Sernam has mainly been engaged in parcel services (less-than-truckload transport) on the groupage market which basically includes traditional mail services (delivery normally between 24 and 48 hours) and express mail services (delivery normally in less than 24 hours) and, to a lesser extent, on the charter market (point-to-point full truckload transport) and in logistics (warehousing, storage, order picking, assembly).

([1]) Registered on 25 April 2003 under No A/18967.
([2]) Registered on 7 February 2003 under No GAB. LdP 490.
([3]) Registered on 5 March 2003 under No A/14685.
([4]) Registered on 11 March 2003 under No GAB Loyola de Palacio 899.
([5]) Registered on 17 September 2003 under No A/29815.
([6]) Registered at DG Tren on 26 February 2004 under No A/14167.
([7]) Registered on 24 May 2004 under No A/21123.
([8]) OJ C 182, 1.8.2003, p.2. The deadline by which interested parties could submit comments expired on 1 September 2003. At the request of the interested parties that had submitted comments, the Commission extended the deadline until 15 September 2003.

([9]) On 31 December 2000 there were 24 small subsidiaries.

(13) As indicated in the Sernam 1 decision, 'groupage may generally be defined as an activity which consists of collecting the goods from the sending customer, concentrating the goods at a sending agency, carrying them to the destination agency and finally delivering them to the destination customers. Groupage operations are necessary to optimise the use of means of transport; the groupage company ensures the transport of grouped parcels coming from various shippers and intended for several recipients. While it is related to the goods transport market, groupage constitutes a market by itself, characterised by the size of the units transported (from one package to batches of several tonnes) and by the fact that it involves the transport of parcels from various shippers to several recipients'.

(14) For all of its activities, Sernam has made use essentially of transport by road (lorries). The carriage of parcels by conventional railways was abandoned with the introduction of the new transport plan mentioned in the restructuring plan. Since then, Sernam has developed a new railway transport concept known as 'Train Bloc Express' (hereinafter referred to as 'TBE') which is used as the key element in transporting traditional and express mail flows over distances exceeding 400 km including the transport of SNCF customer baggage and the transport of newspapers between the Paris region and southern France.

(15) In 2000 about 58% of the total turnover of €552 million was connected with groupage activities in France (basically conventional and express mail services and night-time deliveries). About 18% of turnover was connected with freight, 10.7% with logistics activities, 6.3% with newspaper and baggage transport on behalf of SNCF, 4% with various activities such as the transport of supplies and 3% with international activities.

(16) The French authorities also indicate that 'Sernam traffic directly served by TBE already represents € […]* million in turnover (out of € […] million groupage turnover)'. In 2003 Sernam's real turnover was €414 million and it was expected to reach €443 million in 2006.

(17) In 2003 road transport for Sernam accounted for €[…] million in turnover. €[…] million of this activity is directly provided by Sernam and €[…] million by a Sernam subsidiary, Sernam Transport Route, hereinafter referred to as 'STR'. Sernam uses […] traction units (44t), […] semi-trailers (24t), […] trailers (between 3.5t and 12t) and […] light vehicles (less than 3.5t). Sernam, as a group, uses […] lorries and […] paid drivers. Of these totals, […] lorries and […] drivers come from STR. […].

2.3. **Sernam's market capacity (expert study)**

(18) The Commission has commissioned market research from an independent expert (hereinafter referred to as 'the expert') to determine the capacity of the market segments in which Sernam operates and its position on these markets. [1]

(19) According to the expert, Sernam is described as the leading express mail distributor in France even though, according to the expert, this estimation depends on how the market is defined. Sernam operates in particular on the French national market. In 2000 Sernam had 7% of the groupage and parcel dispatch markets (for specific parameters (parcels)), Geodis had 12% and La Poste 25%. In terms of market shares of the French groupage market, La Poste held 28.1%, Geodis 15.3%, Deutsche Post 8.7%, TNT 7.9%, Mory 6.4%, Sernam 5.2%, followed by 13 other major companies which held between 4 and 0.8% of the market.

(20) In terms of the number of sites in France (by groupage, standardised parcels and express), the expert lists Geodis/Calberson with 204 sites, TNT with 120, La Poste TAT and Geopost DPD with 85, Sernam with 57, Groupe Joyeau (now part of Schenker) with 53 and DPWN with 20 sites.

(21) According to the expert, Sernam operates mainly in the following segments:

— the groupage/express mail segment in France (consisting of sorting (groupage) and the carriage by road and rail of parcels or batches of several tonnes normally within less than 24 hours);

— the groupage/traditional mail segment in France (consisting of sorting (groupage) and the carriage by road and rail of parcels or batches of several tonnes normally between 24 and 48 hours);

— to a lesser extent in the following segments: freight, logistics, order picking, assembly and international mail services.

[1] *Jacobs Consultancy*: Capacity of ABX Logistics and Sernam markets, Framework contract No TREN/CC/04-2002, Order No 2004/001/14 – S07.30053, May 2004.

* The items in square brackets and marked by an asterisk refer to business secrets or confidential information that has been taken out.

(22) Express groupage/mail: According to the expert, the market for express parcel delivery, normally within 24 hours, has shown strong growth in Europe and in particular in France over the past 20 years but the rapid entry of transport companies in this sector has led to a drop in prices. In France, however, a distinction should be made between international express, which has expanded tremendously during the past 15 years, and national express, which has shown more modest growth. National express services are nevertheless expected to show some growth in the future, in particular as a result of the general economic recovery expected in France. According to the expert, the growth of the national express market will basically depend on the growth of electronic commerce. The expert further points out that 74% of the leading French companies already make regular use of express mail services.

(23) Traditional groupage/mail: Traditional groupage/mail consists of the carriage, normally by road but also by rail, and usually through intermediary grouping/breakdown of shipments, of parcels of less than 3 tonnes between two destinations, normally within 24 to 48 hours.

(24) With regard to these market segments in France, the expert notes that:

— The groupage market segment is stagnating, although it is expected that the market will show some growth.

— The traditional parcel transport segment (specific parameters (parcels)) will continue to shrink with the general decline of mail volumes which are being replaced by electronic mail.

(25) In this regard, the expert concludes that the traditional groupage/mail market is basically stagnating even though some market growth is expected, and that the carriage of parcels (specific parameters) is in decline because of the rise in electronic mail.

(26) As indicated above, groupage constitutes a market by itself, although it is related to the goods transport market. Groupage operations are characterised by the sorting of goods and by their size (from a parcel to batches of several tonnes) as well as by the fact that it involves carrying these parcels from various shippers to several recipients. The two aspects of groupage are therefore sorting and carrying goods of a particular size. While sorting enables optimisation of the use of modes of transport, the efficient carriage of goods nevertheless remains the main objective of the whole operation.

(27) Since giving up its traditional railway transport operations, Sernam has basically made use of grouped goods transport by road (by lorry) while at the same time working out an innovative concept, known as 'Train Bloc Express' or 'TBE', which will be explained below in the comments from France. It is appropriate, therefore, to examine the capacity of the road transport market and the rail transport market.

(28) Road transport in Europe: The expert indicates that for Europe as a whole road transport – which is a key element of groupage/mail/parcel services – is an industry that newcomers find easy to join and which therefore suffers from permanent structural overcapacity, [1] as borne out by the fact that over the past five to seven years there has been a fall in prices.

(29) The expert states that in any case the relevant French market is in general characterised by fierce competition and that there is a strong trend towards concentrations between companies.

(30) Rail transport: Three sub-groups are identified:

— The expert does not expect growth in groupage and mail carried by conventional railway services. Competition is intense and there is a trend for companies on the markets to - concentrate. Moreover, Sernam's possibilities of using trains to transport parcels are reduced as the SNCF is limiting the number of stations it serves.

— This applies to the carriage of freight by conventional trains and that carried by high-speed trains ('TGV') n France.

— According to the expert, TBE as developed by Sernam has a certain potential for growth although it is not very substantial for the railway mail market in France as a whole because it is currently only a small part of the market. Express rail courier services as operated through TBE have the disadvantage that there are at least two stops necessary for unloading. [2]

[1] Even though the recent enlargement seems to be calming the current situation temporarily. Nevertheless, the fact that many transport companies seem to subcontract the carriage of goods by road to cheaper transport operators from the new Member States is bound to increase competitive pressure on prices in the road haulage market.

[2] A first stop to transfer the goods from lorries to TBE at departure and another stop on arrival of the TBE to transfer the goods onto lorries.

(31) The Commission's expert has referred in particular to a study compiled by Mercer Management Consulting: Mercer on Travel and Transport, Volume X, Number 1, Fall 2003/Winter 2004, which notes that the current competitive positioning of freight railways is frustrating but by no means hopeless. Railways offer advantages that ought to be exploited but this calls for a partial rethinking of the concept of railway freight transport.

(32) According to these experts, the railway networks, with their high cost, can best be exploited through the use of differentiated products and pricing, together with sophisticated yield management. But for such a system to work, the sales culture must be changed, with value--based pricing taking the place of prices negotiated in accordance with bargaining power.

(33) To this end, Mercer believes that a railway transport company should ensure that its products are standardised, value priced, and easy for customers to understand. According to Mercer, the measures to be taken should cover the following:

(a) product modules should be introduced (e.g. according to booking time, price or reliability of the transport product on offer);

(b) next, core products should be defined (e.g. standard or express transport time, and a low-cost product); and

(c) customised transport solutions should be introduced for these different types of products.

(34) In the light of these expert opinions, the conclusion must be that courier services by normal trains is beset by overcapacity and has no future, courier services by classic high-speed trains are limited and courier services by TBE have some growth potential within the French national market although this segment is not particularly developed at present.

2.4. **SNCF - Background**

(35) SNCF, set up as a *société anonyme* in 1938, became a commercial industrial public corporation (hereinafter referred to as 'EPIC') ([1]) with effect from 1 January 1983. Since the change made by the Act of 13 February 1997 setting up the public corporation Réseau Ferré de France (hereinafter referred to as 'RFF'), SNCF (EPIC) has had the following objectives: ([2])

— operating rail transport services on the national railway network in accordance with public service principles and

— discharging infrastructure management tasks in accordance with the same principles through a mandate assigned to it by RFF on the basis of a formal agreement.

(36) SNCF has a board of directors composed of 18 members, namely (i) seven government representatives, (ii) five members chosen on the basis of their special competence, with at least one representing railway users, appointed by decree and (iii) six members, of whom one representing management, elected by the staff of the corporation and its subsidiaries. The chairman of the board of directors is appointed, on a proposal from the board, by a decree of the Council of Ministers. ([2])

(37) Moreover, as regards the development of groupage and express mail carried by rail (TBE concept), the French authorities note that 'Sernam does not have a monopoly of TBE as any operator may ask Fret SNCF for an equivalent service. To date, however, none of Sernam's competitors has explicitly asked Fret SNCF for such a service. Fret SNCF confirms that it is prepared to supply an equivalent service, on the same conditions, to any operator asking for it. Sernam has responded positively to requests for technical cooperation on TBE made by an operator who wished to evaluate its relevance and efficiency.'

2.5. **Commission Decision of 23 May 2001 'Sernam 1' - Background**

(38) By letter of 23 May 2001 (No D/288742, dossier No NN 122/00 (ex N 140/00) – France), the Commission informed France of its decision that the logistical cooperation since 1 February 2000 (lease of sites and wagons) between SNCF and SCS Sernam does not constitute State aid whereas the measures for commercial assistance to and turnaround of SCS Sernam, taken by SNCF and to be implemented between the beginning of 2001 and the end of 2004, constitute State aid compatible with the EC Treaty.

([1]) Governed by Articles 18 to 26 of the Act of 30 December 1982 on guidelines for internal transport (LOTI). An EPIC cannot go bankrupt or be subject to seizure.

([2]) Information taken over from SNCF's Internet site: http://www.sncf.com

(39) The Commission has authorised a total amount of aid of €503 million, [1] of which €448 million restructuring aid and €55 million for baggage, press and supplies contracts between SNCF and Sernam. This authorisation was based on a number of basic conditions which formed part of the dossier examined.

(40) This aid was authorised on the basic condition that Sernam would be privatised. 60% of Sernam's capital was to be taken over by Geodis, [2] a transport and logistics company under general law quoted on the second market of the Paris Stock Exchange. 56.6% of its capital belongs to private investors (the two major shareholders are the Société Générale, through the Salvépar group, which holds 26.6% of its capital and 29.7% of voting rights, and AGF-VIE with 8.4% of the capital and 9.5% of voting rights). 43.3% of the capital and 48.6% of voting rights belong to SNCF.

(41) In this way, Geodis should have become entirely liable for SCS Sernam's debts without limitation [3] and covered the additional costs of Sernam's restructuring up to €67 million. In turn, Sernam undertook to reduce the number of its operating sites from 107 to 72 over the period from 1999 to 2004, reduce its turnover by 18%, reduce its staff and implement restructuring with the abovementioned budget and within the prescribed timeframe, i.e. before the beginning of 2004.

2.6. **Initiation of the procedure - Background**

(42) Following the first annual report and following the abovementioned complaint, the Commission noted that part of the aid had been paid even though particular basic elements of the Sernam 1 decision had not been complied with. In this regard, the Commission found that there had been misuse of aid and expressed doubt especially on the following points:

— the change in the status of SCS Sernam into a public limited company *(société anonyme)*, thus reducing Geodis' liability for Sernam's debts to its own capital contribution;

— the reduction of Geodis's shareholding to 15% of Sernam's shares which, although itself in difficulties, was initially due to take over 60% of the shares;

— the additional takeover of 15% of Sernam's shares by another company, Compagnie générale d'investissement et de participation (COGIP). COGIP is 34% owned by Geodiset and 66% by Sofivir; [4]

— the extension by one year of the period of restructuring;

— the increase of public capital injection by €41 million, corresponding to a net increase in financial requirements for restructuring Sernam due to the delay of the initial plan; [5]

— the presumed absence of the €67 million private capital injection planned by Geodis which was intended to reduce the intensity of the aid proportionally;

— the lack of adequate counter-measures to offset the modification of the initial restructuring plan;

— the return of Sernam to viability within a reasonable period;

— the prevention of undue distortion of competition;

— compliance with the 'one time, last time' principle;

— aid limited to the minimum necessary;

— implementation of the restructuring aid in conformity with the Sernam 1 decision;

— compatibility with the Treaty of all aid qualified or requalified as new aid and/or misuse of aid.

Because of these doubts, it is necessary to undertake a new analysis of Sernam's restructuring plan.

[1] This amount consisted of €448 million (2 938 million French francs) of restructuring aid and about €7 million initial capital injection paid by SNCF on 1 February 2000 when it transferred these activities from its assets base to its new 100% subsidiary Sernam SCS (details in table 3) and €34 million plus €21 million (FF 222 million plus FF 140 million) in the form of baggage, press and supplies contracts; the total authorised therefore amounted to €503 million (FF 3 300 million). For more details, see the Sernam 1 decision and the initiation of procedure No C 32/03. (The figures in euros and the conversion into French francs are rounded to the nearest million in the text of the present decision.)

[2] For the record: Geodis would acquire 60% of Sernam against payment of a symbolic €1 (see para. 51 of the Sernam 1 decision).

[3] No limitation of liability in limited partnerships.

[4] Sofivir itself is held by shareholders who are natural persons and by Crédit agricole.

[5] For a breakdown of this amount, see the initiation of procedure C 32/03.

(43) When initiating procedure C 32/03, the Commission emphasised that it was necessary to ascertain that the elements which in the decision to initiate the procedure had been found to be compliant with the Sernam 1 decision would be finalised correctly (in particular to ensure efficient competition on the relevant markets on 31 January 2003 [1] – this concerns the contracts concluded between SNCF and SCS Sernam for the transport of customer baggage, the transport of newspapers and the transport of SNCF supplies). The Commission also stressed that these doubts made it necessary to carry out a new analysis of the dossier on the basis of an updated comprehensive restructuring plan that took account of the new circumstances.

2.7. **Subsequent developments**

(44) Following the Commission's initiation of the procedure and in accordance with the clauses on the lapsing of validity laid down in the agreement between SNCF and Geodis on the one hand and COGIP on the other in the event that the Commission initiates the procedure or that the case is brought before the Court of Justice of the European Communities, [2] SNCF has had to take back the 15% of Sernam's shares acquired by Geodis and COGIP respectively.

(45) According to the latest information supplied by France, the amount of aid provided by the French Republic to Sernam from the time of its conversion into subsidiaries was €489.1 million. This amount is composed of €6.7 million initial capital, €419.6 million capital transaction, €33.5 million equity loan and €29.3 million corresponding to additional costs for railwaymen. [3] This total sum corresponds to the €448 million restructuring aid of the plan approved by the Commission in May 2001, increased by €41 million to take account of the new circumstances that have occurred since the Commission's decision (in return for additional efforts, in particular in terms of site closures).

(46) The other developments announced by France, mainly when it submitted its comments on the initiation of the procedure, such as the updating of Sernam's restructuring plan, are summed up below in the section on the comments from France.

(47) Moreover, […] the French authorities served […] notice of their decision to put Sernam up for sale. The conditions of this sale are as follows:

— a transparent and non-discriminatory process

— search for a European buyer

— sale at market price.

(48) To this end, the French authorities instructed a bank to look for potential buyers at European level. According to the indications of the French authorities, the deadline for this sale is […].

(49) Accordingly, the Commission takes cognizance of the intention of the French authorities to sell the Sernam company in its entirety (including assets and liabilities).

3. **OBSERVATIONS FROM INTERESTED PARTIES**

(50) The joint observations from various third parties, which wish to remain anonymous, are summed up below. In light of the circumstances of the case and in particular the conclusions outlined by the Commission when it initiated the procedure, these third parties have submitted the following observations.

(51) Authorisation for the restructuring plan depended on the sale of most of the shares which SNCF held in Sernam's capital to a private investor who would make a commitment to make his 'own' 20% contribution to Sernam's restructuring costs.

(52) Sernam should have provided a sufficient quid pro quo for this restructuring aid in the form of a reduction of its turnover (by at least 18%) and market shares to preclude all unwarranted distortion of competition. In this regard, the complainants note that the Commission has stated in the fourth paragraph of point 75 of its summary that 'While France has proposed the closure of […] [4] additional sites of Sernam, it is not clear, on the one hand, if this countermeasure would be sufficient and, on the other hand, if it would be acceptable, given the new context of the dossier as described above'. The complainants take the view that the closure of additional sites is in no way a sufficient countermeasure, given the significant increase (by at least €108 million (€67 + 41 million)) of the amount of restructuring aid sought for Sernam and the extension of the restructuring period by at least one year.

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[1] In accordance with Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84) as amended by Directive 98/4/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 1). Directive 93/38/EEC has been replaced by Directive 2004/17/EC of the European Parliament and of the Council (OJ L 134, 30.4.2004, p. 1).

[2] In its decision to initiate the procedure, the Commission noted that these clauses on lapsing of the agreement were contrary to Community law.

[3] Compensation paid by SNCF to Sernam for the additional costs for railwaymen employed by Sernam.

[4] Unpublished confidential information.

(53) The amount of aid authorised in 2001 should not have exceeded the minimum necessary to restore Sernam to viability. In particular, the Commission should ensure that henceforth Sernam will not have at its disposal liquid assets enabling it to continue, as is currently the case, to charge prices below market level and 'poaching' experienced personnel from its competitors (see paragraph 96 of the Commission's summary).

(54) The complainants are of the opinion that Sernam should not be authorised to restart its restructuring and continue to have access to aid and distort competition solely because it (and SNCF) does not comply with the conditions laid down in the decision of 23 May 2001.

(55) The Commission ought to reject any new investment and development plan submitted by Sernam/SNCF and France as Sernam/SNCF and Geodis deliberately contravene the provisions of the restructuring plan authorised by the Commission's decision and because they have agreed not to participate in any Commission investigation of this initial restructuring plan in the light of the suspensory clauses of the memorandum of understanding signed by SNCF and Geodis.

(56) On the basis of the 'one time, last time' principle for the grant of aid, the Commission should ensure that Sernam is not authorised to receive additional aid. Given that the measures taken by SNCF to privatise Sernam and implement the approved restructuring plan have proved insufficient to restore Sernam to viability within the prescribed period, the Commission should take the measures necessary to ensure that Sernam is put into liquidation and no longer has access to new State aid.

(57) By letter of 19 May 2004, registered on 24 May 2004, these third parties submitted additional information showing that the number of shutdowns in the transport sector in France rose by 21.37% in the twelve months preceding March 2004 (source: INSEE). According to the third parties, the serious financial difficulties in the French road transport sector are due 'to the economic slump but also to structural causes. Transport companies have no room for manoeuvre for lack of capital resources and company cash. Consequently, they are unable to cope when they lose a contract or when one of their customers goes bankrupt. As they often have insufficient guarantees, transport companies have more difficulty gaining confidence among bankers, shippers and also their suppliers'.

(58) Moreover, the third parties give various examples of customers of company 'X' [1] to whom Sernam reportedly still only recently offered prices 10% to 30 % below those offered by company 'X':

Customers of 'X'	Reduction of price proposed by Sernam compared with that of 'X'	Region
Customer 1	-30%	Amiens
Customer 2	-15%	Paris
Customer 3	-10%	Paris
Customer 4	-20%	Paris
Customer 5	-20%	Paris
Customer 6	-20%	Paris

(59) Moreover, these third parties indicate that Sernam has systematically attracted personnel from company 'X', [2] offering 30% bonuses on the wages paid by company 'X'.

(60) The third parties conclude that Sernam is trying to use the aid it receives in order to gain a competitive advantage on the market at the expense of its competitors. They ask for a negative decision and immediate recovery of the aid already granted to Sernam. They also ask that the possible sale of Sernam should take place under the same conditions as those imposed on Geodis in 2001 and that it should take the form of an appropriate call for tenders.

4. **COMMENTS FROM FRANCE**

(61) By letters of 19 June 2003, 26 November 2003 and 14 April 2004, France submitted comments in response to the Commission's initiation of the procedure and to the comments made by the third parties and following working meetings that had taken place.

SUMMARY OF COMMENTS FROM FRANCE

(62) The French authorities consider that they have provided all the information required in response to the doubts expressed by the Commission:

— Sernam's turnover has been significantly reduced;

[1] Operating in the same market segment as Sernam.
[2] In particular in the Paris region.

— SNCF will not act in lieu of Geodis to cover Sernam's working capital requirement. This capital need, estimated as €67 million in 2001, is now only €7.8 million and will be financed from current bank credit lines;

— the sales prices of mail services, groupage and express services have effectively increased between 2000, 2001 and 2002;

— the newspaper, baggage and supplies markets, whose value has not changed, have been opened to competition;

— Sernam has obtained its quality certificate, namely the CLIQ label;

— Sernam has changed over to express mail; in fact, this has been one of the key elements for the success of Sernam's recovery plan;

— the development of TBE has likewise been one of the main elements of Sernam's development.

(63) Moreover, as the Commission recognised in its decision to initiate the procedure, the other elements of the plan have been complied with:

— the closure of sites has been started and continues beyond the Sernam 1 decision;

— 4/5 of the personnel have been renewed within a period of two years, following the return of railwaymen to SNCF, which has made it possible to establish a new internal communication system on the ground and to underpin local initiatives to develop a new result-oriented culture;

— production sites are being reorganised;

— employee training has been set up;

— the new transport plan has been established;

— the changeover of computer systems to those of Geodis has also been carried out.

(64) Only the association of Sernam with the Geodis group has not been possible within the conditions and the deadline laid down in the memorandum of understanding signed between SNCF and Geodis on 21 April 2000.

COMMENTS FROM FRANCE IN MORE DETAIL

4.1. **The lapsing of SNCF's agreements with Geodis and COGIP**

(65) The French authorities indicate that the memoranda of understanding between Geodis and COGIP have lapsed with the Commission's initiation of the procedure for which it was a resolutive condition. Consequently, SNCF has taken over 15% of the shares in Sernam acquired by Geodis and COGIP respectively.

(66) With regard to the resolutive clauses of the memoranda signed between SNCF and Geodis and between SNCF and COGIP, the French authorities believe that these were neither exorbitant nor contrary to Community law, account being taken of the risks assumed by the investor. As no Commission decision had been taken by 31 December 2000 (the date linked to the resolutive clauses), Geodis had accepted to extend the memorandum of understanding of 21 April 2000 until 30 June 2001 (this memorandum included a suspensive clause linked to the adoption by the Commission before 31 December 2000 of a final decision on compatibility). In the meantime, the Sernam 1 decision was taken on 23 May 2001. According to the French authorities, however, this decision took effect only on 14 September 2001, two months after it was published. At that point in time, the memorandum had lapsed and SNCF was obliged to renegotiate a new memorandum with Geodis. It is recalled that even though SNCF is the leading shareholder in Geodis, holding 45% of its capital, it does not control it and, moreover, cannot take part in voting on decisions by Geodis concerning Sernam. SNCF therefore had no power enabling it to oblige Geodis to apply a memorandum that had lapsed, even if the decision was applicable from the moment it was notified to the Member State. On the other hand, SNCF has done everything in its power to apply the restructuring plan.

(67) The French authorities conclude that neither Sernam or SNCF nor the French authorities can be blamed for the lapsing of the first memorandum (on account of the absence of a final decision regarding Geodis before 30 June 2001), the length of negotiations for the second memorandum and the changes imposed by Geodis compared with the first memorandum (because of its financial difficulties).

(68) Nevertheless, according to the French authorities the lapsing of these agreements has not prevented the further strengthening of synergies between Geodis, COGIP and Sernam. […].

4.2. **Period of implementation of the plan**

(69) The French authorities indicate that although reorganisation measures had been taken right from 2000, the application of the restructuring plan could not be started until 1 January 2003 with the arrival of Mr Charles Henri Brousseaud as the president and chief executive officer and Mr Jean Michel Tremelet as financial director of Sernam, i.e. after six months' delay.

4.3. **€41 million increase in aid**

(70) France indicates that this financing requirement basically corresponds to financing the losses recorded during the period needed for negotiation and to adapt the plan to the new circumstances. These new circumstances result from changes that have taken place at Geodis and in the general economic environment during the period in which the Commission has been investigating the dossier following the Sernam 1 decision.

(a) Impact of the worsening quality of rail services (€[…] million): Following a two-week strike in spring 2001, SNCF had to accept the suspension of the use of the railway transport plan around the Villeneuve St-Georges nodal point. To limit the loss of customers, Sernam had to replace it as a matter of urgency by a road transport plan which, given the urgency of the situation, could not be optimised and prices for which could not be negotiated under favourable conditions. As a result, Sernam sustained a loss which may be evaluated at €[…] million in 2001, including €[…] million loss in turnover and €[…]million costs of exceptional litigation which Sernam has had to bear.

(b) Unforeseen delay in implementation of the recovery plan (€[…] million): On top of this worsening of rail services came the operating losses during seven months of uncertainty (from June to December 2001) connected with the difficult negotiations with Geodis. As the agreements between SNCF and Geodis had lapsed at the end of 2000, SNCF was obliged to renegotiate a new memorandum of understanding with Geodis at the end of 2001 (21 December 2001) while the other parties that had expressed an interest in the takeover in the tendering procedure had in the meantime turned their attention to other investment. These discussions were all the more difficult as Geodis's own position had deteriorated in the course of 2001. This delay in the signing of the new agreements caused a concomitant extension of the period in which heavy losses were sustained because of the delay in implementing the recovery plan which could only start on 1 January 2002. The accumulated additional losses amount to about €[…]million.

(c) Additional costs of agency closures (€[…] million) and overall savings on extra costs relating to railwaymen (€[…] million): The main reason why the level of financing of the restructuring plan was exceeded (€[…] million) was that the costs of closing down agencies (dismissals, tightening-up of social legislation, etc.) proved higher than expected. Overall it was offset by a lower than expected extra cost for personnel with railwayman status (€[…] million). Requests by members of full-time personnel to return to SNCF were more numerous and were submitted sooner than expected but the geographic requirements they expressed slowed down their reassignment, contributed to disrupting the workings of the agencies and added to the financial burden connected with their return compared with what would have been the case under an ordinary social plan. The initial plan made provision for retaining […] members of full-time staff (railwaymen). In practice, only […] railwaymen stayed on at Sernam, i.e. producing savings on the additional costs originally expected, estimated at €[…] million. At the same time, since these returns to SNCF were quicker (almost […]in November 2000 alone and nearly […] over a four-month period in 2001) and in greater numbers than expected, Sernam was obliged in 2001 to take on, as a matter of urgency, staff under private contract, who had not received prior training, and in greater numbers than originally envisaged. In the end, the additional workers were gradually integrated, generating an additional cost of dismissals compared with the forecasts of the initial plan.

(d) Profit-sharing loan (€ […] million): In accordance with the memorandum of understanding signed with Geodis on 21 December 2001, the amount of the profit-sharing loan actually paid by SNCF was reduced by the amount of investment already made and charged to the financial years 2000 and 2001. Accordingly, the amount of the loan paid was reduced by €[…]million.

4.4. **The €67 million expected from Geodis (under the decision of 23 May 2001)**

(71) According to the French authorities, the total cost of restructuring of €515 million indicated in the Sernam 1 decision should be financed to the tune of €448 million by SNCF and €67 million by Geodis. The high sum of €61 million in working capital requirement (hereinafter referred to as 'WCR') is due to the disruption at the end of 2000 connected with the mass return of railwaymen (more than 1 600 workers returned in 2000). France indicates that this sum represented the amount of an operating loan granted by Geodis to Sernam (to finance the WCR). This disruption caused delays and incidents in goods transport, leading to extensive litigation and a major extension of customer credit. At the end of 2000, the average period of recovery of claims from customers exceeded four months. The French authorities indicate that during the first half of 2002 the WCR forecast had diminished to € […]million, evaluated on the basis of an average credit of about 30 days' turnover and financed from current bank loans. On 31 December 2002 this WCR had diminished to only € […] million financed from current bank credit lines. According to France, the measures taken by Sernam to reduce the working capital requirement thus make it possible to assert that the €67 million initially indicated, which was to be financed by Geodis, will now no longer be necessary.

4.5. **Sernam's prices**

(72) The French authorities indicate that Sernam has since 1995 implemented a new strategy of increasing charges intended to restore its profitability, re-evaluating its revenue from express and traditional mail services. This policy is reflected in the company's performance, as indicated below.

(73) Express mail services: In order to enable a comparison between Sernam's position and the market, Sernam has used the price per kilo as an indicator. Sernam's average weight by dispatch is higher than the average weight by dispatch of the market ([…] kg compared with 29 kg at end June 2003). The dispatch price per kilo is digressive in relation to weight (the heavier a dispatch, the lower its price per kilo). In order to be able to make the data comparable, Sernam has made a comparison of the prices per kilo for dispatches weighing between 25 and 35 kg, i.e. the average weight of dispatches recorded on the express market.

2nd quarter 2003 Express	Sernam (overall)	(74) Sernam in the 25 to 35 kg range	Market (same weight)
Price/kilo in €	[…]	[…]	1.07
Weight by dispatch in kg	[…]	[…]	29.00

(74) For Sernam's dispatches in the average market weight category, Sernam's price is therefore € […]/kg, with an average market price of €1.07/kg. In this average weight category, the price charged by Sernam would therefore be above the market level.

(75) Moreover, the French authorities indicate that Sernam's price rise was […] points in the first quarter of 2003 compared with the first quarter of 2001, whereas the market rose by 13 points. At the same time, Sernam's weight per dispatch rose quite significantly ([…] points up) compared with the market (down 7 points). Inasmuch as the price per kilo is digressive with weight, if the average weight of Sernam's dispatches rises significantly while the market price goes down, it could be expected that the value of Sernam's price/kg indicator would drop substantially. The fact is, however, that Sernam's price/kg indicator is increasing and this increase is even higher than the market level. Sernam's price per kilo increase is therefore significantly higher than that of the market. This finding is confirmed by the data available in the second quarter of 2003 excepting Sernam's night deliveries.

(76) Traditional mail: The French authorities indicate that the same analysis has been carried out in respect of dispatches weighing between 95 and 105 kg (average dispatch weight recorded on the mail market).

(77)

(78) 2nd quarter 2003 Mail	Sernam	Sernam in 95-105 kg range	Market
Price/kilo in €	[…]	[…]	0.33
Weight by dispatch in kg	[…]	[…]	98.00

(78) For Sernam's dispatches within the market average weight category, Sernam's price is € […]/kg, i.e. above market level.

(79) Moreover, the French authorities indicate that Sernam's price rise in relation to the market is […] higher over the period from the first quarter of 2001 to the first quarter of 2003 (and identical for the period from the first quarter of 2001 to the second quarter of 2003). At the same time, Sernam's weight by dispatch has risen slightly ([…] points up) compared with the market (down 3 points). As the price per kg is digressive with weight, the rise in Sernam's price per kilo has therefore also been more marked than that of the market. This finding is confirmed by the data available in the second quarter of 2003.

4.6. **Trend in Sernam's performance**

(80) The French authorities indicate first of all is that Sernam is not legally bound to compile consolidated accounts. Consequently, Sernam cannot be reproached for failing to have published information concerning such accounts. Nevertheless, the French authorities have transmitted to the Commission Sernam's consolidated financial statements for 2002.

(81) The French authorities have supplied the following data showing the trend in performance since 2000 and up to the forecasts for 2006:

	2000	2001	2002	03 foreseen	03 actuel	2004	2005	2006
Turnover	552	573	449	430	414	431	452	449
Gross operating surplus	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Depreciation appropriation	no data	[…]	[…]	[…]	no data	[…]	[…]	[…]
Provisions appropriation	no data	[…]	[…]	[…]	no data	[…]	[…]	[…]
Restructuring costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Remission of profit-sharing loan	no data	[…]	[…]	[…]	no data	[…]	[…]	[…]
Financial result	no data	[…]	[…]	[…]	no data	[…]	[…]	[…]
Result before tax	-104.0	-102.0	-78.3	-87.7	-85.0	-40.9	0.1	3.4

(82) According to these figures, and on the basis of the restructuring measures planned and already partly implemented, Sernam should attain a neutral result in 2005 and begin to make a profit in 2006.

4.7. **Sernam's market shares**

(83) According to the French authorities, the table showing the classification of operators by activity, compiled by the statutory auditors on the basis of figures published in Logistique Magazine, shows that Sernam dropped from third to tenth place on the French courier market between 1998 and 2002, and from fifth to sixth place for express mail over the same period. This table has been reproduced by the French authorities:

	1988				2001				2002	
	Sernam		Logistique Magazine		Sernam		Logistique Magazine		Logistique Magazine	
	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking
Mail services in France	6.5	4	5.17	3	4.4	8	4.59	8	3.82	10
Express services in France	8.5	5	7	5	7.39	6	5.3	5	4.52	6
Mail international	0.9	16	1.36	12	1.23	12	1.79	8	0.64	8

	1988				2001				2002	
	Sernam		Logistique Magazine		Sernam		Logistique Magazine		Logistique Magazine	
	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking	Market share in %	Ranking
Express international	1	9	2.21	7	1.01	7	1.14	6	0.83	
	5.4		4.98		4.23		4.21		3.38	

4.8. **Drop in turnover**

(84) According to the letter from the French authorities of 14 April 2004, the trend in Sernam's turnover is as follows:

Turnover-1								
Sernam's turnover	2000	2001	2002	2003 (forecast)	2003 (actual)	2004	2005	2006
Sernam's turnover in million €	552	573	449	430	414	431	452	449
Sernam's turnover (base 100 in 2000)	100	104	81	78	75	n.a.	n.a.	n.a.
Annual drop in turnover in million €		4	- 22	- 4	- 6	n.a.	n.a.	n.a.
% change in turnover between 2000 and the year indicated		4	- 19	- 22	- 25	-22	-18	-19

Turnover-2					
Gross data Express mail in figures (without correction for market trend)	2000	2001	2002	2003 (forecast)	% change between 2000-2003
Turnover Sernam's express in million €	[…]	[…]	[…]	[…]	[…]
Sernam's mail turnover in million €	[…]	[…]	[…]	[…]	[…]
Ratio: Sernam's express/traditional mail	[…]	[…]	[…]	[…]	
Turnover express + mail (*)	[…]	[…]	[…]	[…]	
Turnover express (*)	[…]	[…]	[…]	[…]	
% share mail (*)	[…]	[…]	[…]	[…]	

Turnover-3					
Express mail data in points (base 100 in 2000) (data corrected for market effects)	2000	2001	2002	2003	% change between 2000-2003
Sernam express (corrected for market effects)	[…]	[…]	[…]	[…]	[…]
Sernam mail (corrected for market effects)	[…]	[…]	[…]	[…]	[…]
express/mail ratio (corrected for market effects)	[…]	[…]	[…]	[…]	

(*) Information not directly resulting from the data provided by the French authorities but added by the Commission.

(85) According to the information provided by France, the change in Sernam's turnover in mail services and express services between 2000 and 2003 shows that Sernam's share of the two markets has diminished and Sernam has tended to focus more on express services.

(86) Sernam's turnover fell by 18% between 2000 and 2005. The part of turnover linked with traditional mail services reportedly fell by […]% and that linked with express services by […]% between 2000 and 2003. If account is taken of the corrections made by the French authorities to take market trends into account, the fall in Sernam's turnover for mail services over the same period is even greater ([…]%), while that for express services is only slightly less, namely […]% instead of […]%.

(87) Moreover, according to the information supplied by the French authorities, there has been a certain shift in focus in that the express/traditional mail ratio was […] in 2000 and […] in 2003. Accordingly, the share of traditional mail services in Sernam's activities has diminished to the benefit of express services. Viewed in a different way, however, if account is taken of the combined turnover for traditional and express services, traditional services constitute the major part of Sernam's activities, […] in 2000 and […] % in 2003 compared with […]% and […]%, respectively, for express services.

4.9. **Staff reduction**

(88) The number of people employed by Sernam has diminished as follows:

	1999	2000	2001	2002	2003	2004	2005
Decision of 23 May 2001	5 050			3 900		2 600	
Sernam's staff on 31 Dec.			4 257	3 800	3 259	2 995	[…]

(89) According to the decision of 23 May 2001, staff numbers should have been reduced to 2600 workers in 2004. In reality, however, there were still 2 995 employees in 2004 but […] in 2005, i. e. a lower number than the 2004 target.

(90) The reduction of the number of employees thus recommended should enable important savings to be made and give Sernam the flexibility and adaptability necessary to achieve its innovative objectives.

4.10. **Closure and reorganisation of sites**

(91) Closure of sites: The French authorities indicate that Sernam will go beyond the targets fixed in its decision of 23 May 2001 regarding the closure of sorting centres:

	1999	2000 (31 Dec.)	2001 (30 June)	Target end 2002	Target end 2003		
Targets decision of 23 May 2001	107	87	80	74	72	32.71%	
(on 31 Dec. of each year)		2001 (31 Dec)	2002 (31 Dec)		2003 (31 Dec)	2004 (31 Dec)	2005 (31 Dec)
Number of Sernam's sites		87	74		62	61	61
% change between 1999 and 2005							-43

According to the French authorities, the data in italics are forecasts.

(92) Reorganisation of sites: Sernam's former network was poorly adapted to making profits because there were too many sites, they were poorly located (some sites were very costly because they were situated in the city centre (Paris)) and it had sorting centres that were unsuitable in the way that they were laid out. ([1]) The reduction by nearly half of the number of sites and the partial relocation of sorting activities from the city to the outskirts and to sites geared to road transport connections has enabled Sernam to reduce its expenditure on rents by half and has been among the key elements for rationalisation and improved efficiency in its groupage and mail activities with a view to sustainably restoring the company's viability.

4.11. **Relocation and modernisation of remaining sites**

(93) Twenty-five of Sernam's traditional operational sites have physical conditions incompatible with current productivity ratios in this sector. Mostly located in major cities, however, they are nevertheless indispensable for the continuity and integrity of the Sernam network. In order to restore the sites to viability, Sernam has embarked upon a policy of site modernisation where the geographic position is satisfactory (three sites concerned) and relocation where this is not the case (25 sites concerned), with operations relocated either to existing facilities renovated by Sernam or to new facilities.

([1]) The French authorities indicate that the premises used were partly dilapidated. Their position was often right in the centre of town and not, as most competing couriers, in logistic areas on the city's outskirts, more quickly accessible from main trunk roads and better placed in relation to industrial areas concentrating most of Sernam's customers. Such a location has an impact on the unduly high rents which Sernam has had to pay. Mixed rail/road facilities (railway platform on one side, road on the other) have since May 2001 been used purely on the road side. For road transport purposes, these facilities are used as one-sided platforms. Such use makes them insufficiently productive (more surface area than a classic two-sided facility, consequently more distance covered by parcels on the platform, consequently more handlers to move them around and more risk of damage to parcels). Moreover, the premises are unsuitable for modern equipment: the lanes around the platforms are too cramped and make manoeuvres to place goods on the platform more difficult (involving longer procedures than at an installation with a normal configuration), and even impossible in some segments, preventing the operator from getting their lorries onto the platform at the loading bays which would make for better platform management. Following the adjustments of Sernam's portfolio and because of the general economic downturn, a large number of facilities were oversized.

(94) This modernisation and relocation plan will make it possible to improve the network's operating result of € […] million (in a full year, outside the Ile de France region affected by two relocations and two site modernisations). At these modern facilities, secured and optimised, Sernam (i) will reduce platform surface by 50%, (ii) reduce the number of administrative platform staff by […]%, (iii) reduce the number of disputes regarding damaged parcels, (iv) reduce the number of parcels stolen and (v) and optimise the placement of carriers on platform while reducing their immobilisation. Relocation to new facilities leads to 15% average savings on current rents.

4.12. **New computer systems**

(95) With the assistance of Geodis, Sernam has switched its computer system to two new management software packages ('Aanael' and 'Alizée 2000') which should optimise Sernam's future operations.

4.13. **From 'traditional mail' to 'express'**

(96) The French authorities indicate that in January 2003 Sernam merged its traditional mail and express mail transport plans into a single 'express' road [1] transport plan [2] based on Train Bloc Express (TBE). Thanks to this transport plan, Sernam is now properly equipped to focus purely on express services and on delivering all products with express quality service (Cliq certification, [3] which guarantees the security, reliability, timing and traceability of the packages carried) even though only about one third reportedly constitutes a genuine express mail service. [1] This quality guarantee for the customer has in particular made it possible to significantly reduce the costs linked with ongoing disputes while at the same time substantially reducing the working capital requirement. [4]

(97) Sernam's turnover broken down by different types of customers shows that […]% of overall turnover (corresponding to […]% of its customers) is realised with express mail customers for mixed products where Sernam does not compete with services on offer from pure courier firms which have no express services. The […]% of the turnover generated by these customers includes:

— […]% linked with express services

— […]% linked with mail services

— […]% linked with freight services.

(98) The remaining […]% of Sernam's turnover is generated by customers who do not make use of express services.

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[1] Indication given by the French authorities at a meeting on 22 March 2004.

[2] The services are as follows: (i) 'Urgence Xpres': same-day delivery within a couple of hours (using HST holds), (ii) 'Livraison de nuit' (night-time delivery between 4 and 8 am in private compartment), (iii) 'H Xpress': next-day delivery before noon, (iv) 'Avantage Xpress': next-day delivery before 6 pm, (v) 'Tempo Xpress': delivery within 48/72 hours in Europe, (vi) 'Lot Xpress': transport of batches from 1 to 25 tonnes in France and in Europe and (vii) 'Disram': industrial distribution of palettes.

[3] The 'Cliq' certificate guarantees reliability at all transport stages, effective response throughout the network, the certainty of clear procedures and real-time transparency in the event of any anomalies occurring.

[4] The working capital requirement linked with a customer claims recovery time of over four months at the end of 2000 was an important factor for the €67 million financial requirement mentioned above. This cost could be reduced to € […] million on 31 December 2002 and should attain the normal standards in this sector by the time the restructuring plan is fully implemented.

4.14. **From 'road' to 'rail' (Train Bloc Express)**

(99) The Train Bloc Express or 'TBE' concept: Train Bloc Express or TBE [1] is a shuttle train running at high speed according to a fixed time schedule and with a fixed number of wagons dedicated to the transport of traditional mail and especially express mail, which forms part of a service project that simultaneously offers Quality, Reliability, Security, Speed (160 km/h on conventional lines, 200 km/h on HST lines) and allows late collection (hence better groupage).

(100) According to the French authorities, 'the specific features of this offer of services are connected with the railways as a mode of transport (the TBEs are monitored with the same managerial control as HST trains even though they do not necessarily run on HST lines.) TBE forms part of a policy of sustainable development (it supplements road haulage in a market segment – express – where 12 tonne lorries now travel at speeds of 110 km/h which will be called into question in the near future in the framework of European regulations. [2] Moreover, it is fully consistent with the guidelines of the White Paper on Transport Policy for 2010 and the interoperability schemes of the national railway networks. Sernam has chosen the TBE formula to progressively change over from traditional mail to express mail'.

(101) According to the French authorities, a TBE wagon can carry about 100 m³ of goods. The 1 500 m³ per day carried by TBE in 2002 correspond to about 30 lorries a day. In 2006, Sernam intends to transport the equivalent of about 120 lorries a day by TBE, i.e. 6000 m³, which will at the same time relieve the burden on the roads and help spare the environment.

(102) Competitiveness of TBE: The two TBE rail shuttles which each night link Paris and Orange on the one hand and Paris, Bordeaux and Toulouse on the other hand travel at 160 km/h and even 200 km/h on high-speed lines in operation between these cities, which is particularly competitive for an express mail service.

(103) According to the French authorities, 'Express is currently developing on long hauls through the use of dedicated fast vehicles. In this regard, TBE is one of the alternatives enabling Sernam to free itself from the need to use road transport. Sernam's traffic directly served by TBE today accounts for € […]million in turnover (of the total groupage turnover of € […] million). Sernam's transport plan is technically organised around the TBE concept and it is therefore indelibly linked with this technique. [2]

(104) According to the French authorities: "The express mail companies use light road vehicles (12 t) to carry their express freight. Over long north-south distances, Sernam uses a railway formula with higher traction costs (i.e. without distorting competition). However, this extra traction cost is offset by other optimisations of the transport plan (late collection, therefore better groupage), to which must be added advantages in terms of service (speed, reliability, security, care for the environment [2])."

(105) TBE already saturated: According to the French authorities, the capacity of the various TBEs operating in France is already saturated and Sernam is studying ways and means of operating other TBEs. In order to meet the growing demand for the abovementioned rail links, Sernam intends from 2005 to relocate four mixed agencies to facilities well connected to the railway network, with double the capacity for accommodating TBEs. [3] Sernam has already started negotiations to ensure that by 1 January 2005 SNCF will be able to provide it with the recommended additional capacity.

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[1] These TBEs consist of conventional rolling stock that has been technically improved to run at 200 km/h on high-speed lines: i) conventional locomotives with greater traction capacity, ii) conventional wagons with special axles, iii) train set of limited length (maximum 9 to 12 wagons, depending on the line) with automatic electronic braking distribution between the wagons according to their position in the set so as to prevent coupling breaks. Moreover, the train sets which are arranged in inseparable groups of wagons have a reliability level equivalent to that of the HST. On the basis of railway knowhow acquired in the past, Sernam has in this way been able to work out a new concept: TBE.

[2] Commission's underlining.

[3] This would involve (i) two additional shuttles plying between Paris and Orange, (ii) a shuttle between Paris and Bordeaux and (iii) a shuttle between Paris and Toulouse.

(106) Moreover, with regard to Sernam's multimodal system (bringing together the four operating accounts of the four multimodal hubs (Paris-Chevaleret, Bordeaux, Toulouse, Orange)), the French authorities indicate that the result of the hubs have been projected onto the years 2004 to 2010 in the framework of a gradual strategy to replace mail traffic by express traffic, in particular in long-distance services (national north-south link).

(107) The gradual replacement of mail traffic by express traffic on rail links (encouraged by the pressure of rules and regulations which penalise lorries on long-distance journeys by imposing speed limits) will make it possible to enhance the results of the multimodal formula in successive stages during the period 2005-2010. As the multimodal hubs are configured to handle express services, this replacement will proceed at constant cost as the value transported increases.

(108) It should be noted that in 2007 the increase in the performance of the hubs will be (slightly) slowed down following the establishment of the new hub at […] and a new rail shuttle system developed in conjunction with the SNCF whose fixed development costs will be amortised in 2007.

(109) The operating account for multimodal services for 2003 to 2010 breaks down as follows:

	2003	2004	2005	2006	2007	2008	2009	2010
CA TOTAL	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
of which partners' contribution	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
TOTAL EXTERNAL SUB-CONTRACTING	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
TOTAL INTERNAL SUB-CONTRACTING	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
GROSS OPERATIONAL MARGIN	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
COSTS OF OPERATIONS	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
NET MARGIN	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
GENERAL & ADMINISTRATIVE COSTS	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
OPERATING RESULT	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

(110) The table shows a steady trend with a turnover that should more or less double and an operating result that should more or less triple over seven years.

(111) Partners for national and international TBE: In the medium term, this system appears attractive also for other undertakings engaged in the mail services sector.

(112) According to the French authorities, "Sernam is currently looking for other partners so as to obtain, as soon as possible, the technical cooperation necessary for its recovery. This technical cooperation will enable Sernam to use a partner's sites, share the variable costs and have only its commercial team present on the site. The purpose of these partnerships in the medium term is to secure the continuity of the undertaking's development (and in particular of its TBE service) and in the short term to speed up the attainment of the objectives of the business plan (e.g. technical cooperation)".

(113) "The contribution of a partnership is in fact necessary to optimise the TBE tool which, taking account of the requirements of express services in term of reliability, security, speed and compatibility with environmental criteria, is instrumental in ensuring Sernam's future. Moreover, it is clear that in express services railways become more of a competitive tool as traction distances lengthen (speed becoming an increasingly critical factor)."

(114) "Under these circumstances, TBE is a tool that is bound to expand on international and transborder connections. Linking up with a partner of international stature is therefore imperative to develop the full potential of TBE. At present, the express market is a market dominated by players offering international services. Consequently, Sernam needs this linkage with partners to be able to pursue its express mail strategy".

(115) "The French authorities therefore confirm that it is part of their strategy to strive for Sernam to link up with a partner in its own interest".

(116) Moreover, for 2005 Geodis, whose express and mail service plans are exclusively focused on road transport, intends to use the TBE formula on long distances through Sernam. Other express courier services, such as TAT Express, have also informed Sernam that they are interested in this formula.

(117) Avoiding a monopoly by Sernam: It is recalled that in France Sernam is a pioneer in the development of mail transport by rail through the TBE formula as, according to the indications provided by the French authorities, Sernam is the only undertaking developing a new railway groupage concept. Nevertheless, according to the French authorities, [1] "Sernam does not have a monopoly on TBE as any operator may ask Fret SNCF for an equivalent service. To date, however, none of Sernam's competitors has submitted an explicit request to Fret SNCF. Fret SNCF confirms that it is prepared to provide an equivalent service on the same terms to any operator asking for it. For its part, Sernam has given a favourable response to requests for technical cooperation on TBE made by an operator who wished to evaluate its relevance and its efficiency."

4.15. **Competition in SNCF's newspaper, baggage and supplies contracts**

(118) As indicated in their report of 17 June 2002, the French authorities and SNCF have complied with all the obligations to which they had committed themselves. They explained that they had opened up these contracts to competition in accordance with their commitment made by letters of 4 December 2000 and 10 April 2001. In response to paragraph 77 of the decision to initiate the procedure, the French authorities specify below the dates on which these contracts were opened up to competition in the *Official Journal of the European Communities*, together with their amounts.

(119) The services provided by Sernam concerned the following:

— transporting personal files between sorting centres

— transporting business documents from the Main Lines directorate

— transporting tickets for Main Lines

— transporting supplies for the equipment, infrastructure and purchasing directorates

— transporting daily newspapers and magazines

— transporting baggage.

(120) Regarding the first four services: The Commission has been informed of the renewal of the corresponding contracts. This renewal was completely in accordance with the commitments made to the Commission to make the award of these contracts open to competition (call for tenders).

[1] Letter from the French authorities of 14 April 2004, registered on 15 April 2004 under No A/18141.

(121) In order to meet this commitment, SNCF asked Sernam by letter of 20 June 2001 to cancel the following contracts on 31 January 2002:

— Transport contract between Sernam and SNCF (Equipment Directorate)

— Transport contract between Sernam and SNCF (Infrastructure Directorate)

— Transport contract between Sernam and SNCF (Purchasing Directorate)

— Contract between Sernam and SNCF for transporting business documents of the Main Lines Directorate

— Contract between Sernam and SNCF for transporting personal files

— Contract between Sernam and SNCF for diffuse transport.

(122) The contract between Sernam and SNCF for transporting tickets was not covered by this letter because, having been signed belatedly, SNCF had directly assigned the 31 January 2002 deadline to it as recommended by the Commission.

(123) On 20 July 2001, the following notices for the opening of the above contracts to competition were published in the *Official Journal of the European Communities* with the deadline for replies from candidates fixed at 31 August 2001.

(124) Development since July 2001: Two candidates presented themselves after the notice had been published: Sernam and TCS. The SNCF Purchase Directorate did not accept TCS's application as TCS could only to a very limited extend meet SNCF's demand and, in particular, could not cope with large and heavy shipments. In the absence of new acceptable candidates, SNCF asked Sernam by letter of 10 October 2001 to regard its previous letter of 20 June 2001 as invalid and to extend all contracts until 31 October 2002.

(125) By letter of 19 October 2001, Sernam confirmed its agreement to extend the contracts to 31 October 2002. By letter of 31 January 2002, the Purchase Directorate extended the contract to 31 October 2002.

(126) Development in 2002: At the beginning of 2002, a call for applications was issued with a view to launching a call for tenders for the award of the following contracts before 31 October 2002:

— Transport contract between Sernam and SNCF (Equipment Directorate)

— Transport contract between Sernam and SNCF (Infrastructure Directorate)

— Transport contract between Sernam and SNCF (Purchasing Directorate)

— Contract between Sernam and SNCF for transporting business documents of the Main Lines Directorate

— Contract between Sernam and SNCF for transporting tickets

— Contract between Sernam and SNCF for transporting personal files

— Contract between Sernam and SNCF for diffuse transport.

(127) This call for applications specified the characteristics of the traffic flows of goods transported, the criteria for selecting applicants, the forecast contract values updated from the data of the first nine months of 2001, and the rules for awarding contracts.

(128) The contracts were split up into four segments, for each of which separate calls for tenders would be issued in order to take account of the specific features relating to the nature of the sector, synergies existing between contracts, and the importance for low-volume and fragmented contracts to be grouped together with industrial higher-volume traffic in order to be able to offer a competitive service.

(129) Accordingly, each contract comprised mail, express and freight services and each candidate had to be able to propose in each case the performance of all of these services.

(130) Under this procedure, a new periodic indicative notice (PIN) common to all the contracts were published together with a consultation announcement in the *Official Journal of the European Communities* of 18 February 2002 for each of the four following contracts (lots):

— transporting personal files between sorting centres

— transporting Main Lines business documents

— transporting Main Lines tickets

— transporting supplies (for the Purchasing, Equipment, Infrastructure and Diffuse Transport directorates).

(131) The deadline for responding was 27 March 2002, by which date three applications had been submitted:

— Sernam: for all the lots

— TCS: for all the lots

— Chronopost: for lot 1 only.

(132) TCS applied for all the lots but its turnover of less than €100 million did not qualify it to make a bid for lot 4. Moreover, as TCS was specialised in the transport of "small packages", it could not meet the demand for the transport of heavy parcels and freight required for lots 2 and 3. Consequently, TCS could be consulted only for lot 1 for "personal files".

(133) Chronopost wished to be consulted only for lot 1 for "personal files".

(134) Sernam was the only party bidding for all the lots and the only one that complied with the conditions to take part in all four consultations.

(135) Following the call for tenders, lot 1 was awarded on 31 July 2002 to TCS, a company outside the SNCF group, which started providing its services on 4 November 2002. The value of this contract has been evaluated at €4.5 million over a three-year period.

(136) On 26 December 2002, the contract for transporting business documents of the Main Lines Directorate, commencing on 1 January 2003, was signed with Sernam for the sum of €2.12 million and for a two-year period with one year renewable, making a maximum of three years.

(137) The contract for transporting tickets of the Main Lines Directorate commencing on 1 January 2003 was signed with Sernam on 26 December 2002 for the sum of €1.57 million covering a two-year period plus one year renewable, making a maximum of three years.

(138) The transport contracts of the equipment, infrastructure, purchasing and diffuse transport directorates commencing on 1 February 2003 were signed with Sernam on 26 February 2003. Initially, the term of the contract was intended to be four years at the most but, account being taken of the lack of sufficient applicants, SNCF decided to limit the term of the contract to two years, with one year renewable, making a maximum total of three years before issuing a new call for tenders. The value of the contract was evaluated at €36.1 million under the economic conditions obtaining in June 2002.

(139) For transporting newspapers, a consultation announcement was published in the *Official Journal of the European Communities* of 8 July 2002. There were two applications, one from the Beugniet company, a subsidiary of Bourgey Montreuil, and another from Sernam. As Beugniet did not have the structures required for the scope of the contract, only Sernam's application was deemed admissible.

(140) SNCF's task of transporting newspapers requires a major organisational structure covering virtually the whole of French territory. It involves collecting newspapers from printers/binders, taking them to distribution centres, delivering them from there to 350 agents and providing rapid transport between the collection and distribution centres.

(141) By opening the newspaper transport market to competition, SNCF's aim was to find a service provider with an existing collection and distribution network already in use for other transport operations and not one which did not yet have a proper structure and would therefore be obliged to create facilities practically dedicated to newspaper transport or to subcontract these activities.

(142) Accordingly, in order to ensure that applicants did have the proper organisational or structure commensurate with the scope of the contract, SNCF took the view that their turnover ought to be substantially above the value of the contract.

The value of the contract for the transport of newspapers had been estimated at approximately €29 million a year prior to the contract notice. In order to express this requirement in terms of the structure expected from applicants, the minimum amount of turnover required from bidders in the contract notice was three times the annual value of the contract, i.e. exceeding the rounded sum of €100 million.

(143) Beugniet, whose turnover in 2001 was €24 million, obviously did not have the required size.

(144) Consequently, a new contract was concluded with Sernam, commencing on 1 February 2003. For the same reasons as for the supplies transport contract, the term of the contract was limited to two years with the possibility of extending it for one year, making a maximum of three years before a new call for tenders.

(145) For a maximum of three years, the contract value calculated in the light of the volume of services provided in 2002 amounts to €95.65 million under the economic conditions obtaining in November 2002.

(146) For transporting accompanied baggage of Main Lines customers, a consultation notice was published in the *Official Journal of the European Communities* of 22 May 2002. Four companies responded but only Sernam's application was declared admissible. The other three applications were rejected:

(147) the application by the company B2S because it had applied only for the management of the customer call centre whereas the consultation notice specified that the contract was indivisible;

(148) the company TCS because it lacked the structures necessary to meet the requirements of the contract;

(149) the company FIXEMER because it had not submitted the application file requested.

(150) As only Sernam's application was found to be admissible, the new contract was concluded with effect from 1 April 2003. The term of the contract was also limited to two years, with a possible extension by one year before a new call for tenders. The value of the contract, calculated on the basis of the services provided in 2002, is €40.3 million under the economic conditions obtaining in October 2002 over a maximum period of three years. Moreover, the French authorities have informed the Commission that the consultation announcement for "lot 4" included as a selection criterion a minimum turnover which TCS did not attain. This criterion was necessary because "lot 4" concerns the transportation of large industrial objects (HST axles, sleepers, etc.), making it necessary to work with companies with a sizeable turnover and substantial means at their disposal. On the basis of the information supplied, moreover, a distinction should be made between lot 4, lots 2 and 3, and lot 1. As described above, lot 4 involves transporting large industrial objects, lots 2 and 3 transporting "heavy mail" and "freight" and lot 1 the transportation of "personal files". As TCS was specialised in transporting small packages, it could be consulted only with regard to lot 1 "personal files". Lot 1 was awarded to TCS. Since Sernam was therefore the only remaining company that had submitted an application and qualified for lots 2, 3 and 4, it was with Sernam that the contracts were concluded.

(151) The French authorities have also informed the Commission that the fact that Sernam had made a bid for all the lots was in no way a condition for obtaining the contract.

(152) Conclusion: The value of the five contracts concluded with Sernam has been estimated, on the basis of forecasts, at €175.74 million. In its decision of 23 May 2001, the Commission indicated that, over a period of eleven months in the financial year 2000, the contracts represented a value of about €55.3 million, i.e. €181 million over three years. Taking account of the fact that the contract for personal files was not awarded to Sernam (€4.5million for three years), comparison of the two amounts shows a slight drop in current monetary value despite the general price trend.

(153) It is clear from the information and the supporting documents provided that the French authorities have met their commitment to open the supplies, newspaper and baggage contracts to competition by launching transparent and regular tendering procedures. Even though only one of these calls for tenders has led to a change in service provider, the opening-up of these contracts to competition now makes it possible to confirm that the contracts concluded between Sernam and SNCF in no way constitute aid within the meaning of Article 87 of the Treaty.

5. SUMMARY OF NEW DEVELOPMENTS FOLLOWING SERNAM 1

(154) The new elements since the Sernam 1 decision are summed up below:

(a) Geodis has not taken over 60% of Sernam as planned, but only 15%, like COGIP which has likewise acquired 15% of Sernam;

(b) The 15% acquired by Geodis and COGIP was surrendered to SNCF following the initiation of the procedure by the Commission which led to the interruption of the second memorandum of understanding which SNCF signed with Geodis and COGIP respectively;

(c) The Sernam limited partnership (SCS Sernam) was transformed into a joint-stock company [*société anonyme*] (so as to enable Geodis to acquire a 15% share with the result that Geodis is no longer entirely responsible for Sernam);

(d) The period of restructuring is extended by one or two years (from 2004 to 2005-2006);

(e) The amount of aid should increase by €41 million;

(f) According to the complainants, Sernam continues to charge aggressive prices on the market, whereas the French authorities indicate the contrary;

(g) The French authorities indicate that they have complied with the number of site closures, the staff cuts and the decrease in turnover as provided for in the Sernam 1 decision;

(h) The French authorities indicate that they have complied with the transport contracts between SNCF and Sernam should be opened to competition;

(i) Sernam is developing a new range of express services;

(j) The range of express services is linked with the innovative development of TBE which is operating in a new market segment that can be further improved and is therefore not affected by overcapacity. This is in contrast with Sernam's groupage/mail services which operate in market segments that are stagnating and even in decline. Road transport, which is normally the essential instrument for the transport of mail (grouped or ungrouped), represents a market segment with structural overcapacity, even though it is currently regarded as being in equilibrium, following the Union's enlargement.

(155) It is recalled that the initial restructuring cost was €515 million. [1] France intends to increase the initial restructuring aid from €448 million by €41 million, making a total of €489 million in restructuring aid.

6. **ASSESSMENT**

6.1. **Existence of aid**

(156) Under Article 87 (1) of the Treaty, "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

(157) Even though the elements that featured in the Sernam 1 decision are still in existence, it is incumbent on the Commission to ascertain that the four criteria of Article 87(l) are effectively met for all the measures implemented or to be implemented before or after 23 May 2001. In this context, it should also take account of the development of Community law and in particular the judgment of the Court of Justice in the *Stardust Marine* case. [2]

(158) According to this judgment, it is necessary to verify for every subsidy that the decision to pay it is imputable to the State in order to establish whether one of the four criteria of Article 87(1) - the "State resources" criterion - is met.

6.1.1. *Public resources*

(159) According to the description given above, it should be noted that SNCF, as an EPIC [industrial and commercial public undertaking], is a public undertaking within the meaning of Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [3] as the public authorities may exercise directly or (159) indirectly a dominant influence on SNCF by virtue of their ownership of it or because of their financial participation in it or the rules which govern it.

(160) Consequently, the €503 million and €41 million which SNCF/the French State has paid to Sernam are public resources.

6.1.2. *Imputability to the State*

(161) Under these conditions, there is a strong presumption that SNCF is acting under State control. This presumption is based on several "indicators" highlighted by the Court in the *Stardust Marine* case. [4]

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[1] €448 million of this amount was covered by restructuring aid and €67 million by the contribution from Geodis.

[2] Judgment of 16 May 2002 in case C-482/99, *France v Commission*, Reports, p.I-4397.

[3] OJ L193, 29.7.2000, p.75

[4] In paragraph 52, the Court states that'… the only fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.'
For this purpose, the judgment mentions a number of 'indicators' that can be used to show that an aid measure taken by a public undertaking is imputable to the State, such as requirements on the part of the public authorities, 'its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.'

(a) Of the 18 members of the SNCF board of directors, seven directly represent the public authorities, showing a certain level of supervision exercised by the public authorities (even though these seven members of the board do not represent the majority).

(b) Its legal status as an EPIC, which does not come under general company law, puts SNCF in a position allowing it to pursue its activities outside normal conditions of competition with private operators.

(c) Moreover, because of its EPIC status, which rules out bankruptcy or other insolvency procedures, the Commission finds, in the light of its Notice on State aid in the form of guarantees, ([1]) that SNCF has an unlimited guarantee from the State and can thus obtain on the market credit conditions that are more favourable and available only to companies subject to private company law. ([2]) Since SNCF grants risk capital funds covered by an unlimited and unpaid guarantee to a company in financial difficulties such as Sernam, which operates on markets open to competition (groupage/mail services/road transport), there is, in the light of the abovementioned Notice, an advantage granted to the beneficiary undertaking. ([3]) Even if the State does not make payments under the guarantee granted, aid exists within the meaning of Article 87(1) of the Treaty as soon as the guarantee is offered.

(d) Finally, according to paragraph 15 of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, "restructuring aid […] may come from State holding companies or public investment companies" and paragraph 17 "where funding is provided or guaranteed by the State to an enterprise that is in financial difficulties […] it must be deemed likely that the financial transfers involve State aid".

([1]) OJ C 71, 11.3.2000, p.14

([2]) The Commission Notice on State aid in the form of guarantees provides in paragraph 2.1.1 that 'State guarantees thus generally fall within the scope of Article 87(1), if trade between Member States is affected and no market premium is paid.' In paragraph 2.1.2 it states that 'the benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. This carrying of a risk by the State should normally be remunerated by an appropriate premium. Where the State forgoes such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if no payments are ever made by the State under a guarantee, there may nevertheless be a State aid under Article 87(1). The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee.' In paragraph 2.1.3 it states that 'The Commission also regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form [i)] rules out bankruptcy or other insolvency procedures or [ii)] provides an explicit State guarantee or[iii)] coverage of losses by the State.'

([3]) Markets open to competition are by definition not markets closed to competition *de facto* or *de jure*, in which case the State could have imposed public service obligations or contracts through which a company may in certain cases benefit from financial compensation by the State.

(162) Under these conditions, the Commission considers that the payment at issue of public resources by SNCF to Sernam is imputable to the French State and that the State guarantees granted to SNCF constitute aid.

6.1.3. *The other criteria of Article 87(1)*

(163) Application of the other criteria of Article 87(1): According to the information at the Commission's disposal, it is noted that the other elements determining whether of not there is State aid as established in the Sernam 1 decision are still present. Accordingly, the conclusion of the Sernam 1 decision that State aid is involved in Sernam's restructuring is still upheld, namely:

— the logistical cooperation between SNCF and the SCS Sernam limited partnership since 1 February 2000 does not constitute State aid and

— the other measures (commercial assistance and turnaround) do constitute State aid within the meaning of Article 87(1).

(164) Consequently, it is found that the measures that have been or will be implemented before or after 23 May 2001 to restructure Sernam constitute State aid within the meaning of Article 87(1) of the Treaty.

6.2. **Legal basis**

(165) As announced when the abovementioned procedure was initiated, the Commission will below analyse the new facts in order to ascertain to what extent they are or are not in conformity with the Sernam 1 decision.

(166) Moreover, the Commission will verify to what extent the new factual situation today – compared with the Sernam 1 decision – is compatible overall with the guidelines, in particular with regard to the 'one time, last time' principle.

6.3. **Compatibility**

6.3.1. *Structure of the analysis*

(167) Initially, the analysis will ascertain to what extent the €503 million in aid, previously authorised in 2001, has been used improperly and whether in this analysis it will be found that the additional illegal aid paid amounting to €41 million is compatible.

(168) Secondly, the elements of the 2001 decision that have been complied with will be clarified. In light of these elements, Sernam's eligibility for restructuring aid will be re-analysed as well as its potential for returning to viability.

(169) This will be followed by the measures which the Commission intends to take to prevent distortion of competition and guarantee that the amount of aid approved in this decision will be kept to a minimum.

6.3.2. *Misuse of aid authorised by the Sernam 1 decision*

(170) First of all, the Commission cannot accept the argument adduced by the French authorities that the lapsing of the first memorandum of understanding concluded on 21 April 2000 between SNCF and Geodis is imputable neither to Geodis nor to SNCF or the French authorities on the grounds that the Sernam 1 decision was not final before 30 June 2001, the date on which the extension of the memorandum between SNCF and Geodis expired.

(171) The fact is that the Sernam 1 decision was notified to the French authorities on 23 May 2001, i.e. more than one month before the expiry of the extension of the memorandum between SNCF and Geodis. [1]

(172) Article 254(3) of the Treaty provides that " … decisions shall be notified [by the Commission] to those to whom they are addressed and shall take effect upon such notification." Moreover, Article 242 of the Treaty provides that "actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act shall be suspended".

(173) Accordingly, the decision notified to France on 23 May 2001 was applicable from that date, on which it took effect. France therefore had the choice of:

— either fully (and immediately) applying the decision of 23 May 2001 in order to be able to pay the authorised aid – in which case it should have ensured the application of the memorandum of understanding between SNCF and Geodis because there was still time to do so;

— or refraining from paying the aid approved on 23 May 2001 and, where appropriate, notifying the new granting conditions.

(174) The fact is that France did neither of these things. Instead, it started the payment of aid, failed to apply the Sernam 1 decision (and therefore the memorandum) correctly and also failed to notify the changes of the granting conditions in violation of the Sernam 1 decision and Article 88(3) of the Treaty.

(175) It is the Commission's opinion that the failure to apply the Sernam 1 decision and consequently the failure to apply the memorandum of understanding between SNCF and Geodis and the unlawful grant of part of the aid which was paid under circumstances not approved by the Commission is imputable to France, to whom this decision was addressed.

(176) It is because of the French authorities' failure to apply the memorandum of understanding that the Sernam 1decision was not correctly implemented with regard to:

— the first memorandum of understanding, as extended, because Geodis took over only 15% of Sernam instead of the 60% originally planned (this share was subsequently equalled by COGIP, which likewise took a 15% share in Sernam);

— the conclusion of the second agreement between SNCF and Geodis/COGIP [2] which could not be relied upon against the Commission and led to the application of clauses on breach of contract between SNCF and Geodis/COGIP respectively. Consequently, the 15% which Geodis and COGIP had each acquired in Sernam were returned to SNCF which thus again became the 100% owner of Sernam;

— the transformation of Sernam into a limited partnership (SCS) in order to make Geodis indefinitely responsible for Sernam's debts. To this must be added the transfer of the risk which Geodis had to assume vis-à-vis SNCF concerning (i) the amount of investment necessary to turn Sernam around, (ii) the appropriate reduction of Sernam's operating costs, and (iii) a significant defection by customers in this period of financial uncertainty;

— the absence of payment of €67 million by Geodis;

— partial payment of the total amount of aid approved by the Sernam 1 decision, even though the conditions laid down in this decision were no longer met;

[1] The said memorandum was therefore still in force and should have been applied by the French authorities (even though Geodis may already has been experiencing financial difficulty on 23 May 2001).

[2] This was the second agreement between SNCF and Geodis but obviously the first agreement between SNCF and COGIP.

— payment of additional aid amounting to €41 million, essentially due to the delay in Sernam's linkage to Geodis, of which the French authorities informed the Commission only in their annual report of 17 June 2002 even though such an additional sum should have been the subject of a full re-notification of the dossier;

— extension of the restructuring plan which had originally been envisaged for the period from 1999 to 2004, and which must now end in 2005-2006 (the time when Sernam should be restored to financial equilibrium), i.e. one to two years later than planned.

(177) According to the Guidelines, [1] "The company must fully implement the restructuring plan that has been accepted by the Commission and must discharge any other obligations laid down in the Commission decision. The Commission will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid".

(178) In light of the above, the Commission concludes that there has been failure to comply with the Sernam 1 decision of 23 May 2001 with regard to the above mentioned elements and confirms that this failure constitutes misuse of the aid within the meaning of the Article 1(g) of Regulation (EC) 659/1999 and paragraph 43 of the Guidelines.

(179) It follows that the amount of €41 million paid as additional aid by SNCF to Sernam, which is a direct consequence of this misuse (as it was paid because of the delay in linkage), should be declared incompatible with the Treaty and must be paid back in the appropriate form (with interest).

6.3.3. *Elements in conformity with the Sernam 1 decision*

(180) However, the Commission notes that the French authorities have met several of their objectives in accordance with the Sernam 1 decision. For instance, they have opened the contracts between SNCF and Sernam to competition.

(181) Moreover, France has complied with the Sernam 1 decision with regard to the number of closures of Sernam's sorting centres and their reorganisation, employee training, development in terms of staff reduction, phasing in a new transport plan, switching computer systems to those of Geodis, reducing turnover by 18% between 2000 and 2005, non-replacement by the State of the €67 million which Geodis will not provide to Sernam, changeover from Sernam's traditional mail activities to express mail services, and in particular the changeover to an innovative service in railway transport focusing on the new combination of "range of express services" and "Train Bloc Express (TBE)" which occupies a new market segment whose full potential remains to be developed.

(182) Moreover, in paragraph 3.2.4. of the Guidelines, the Commission specifies the conditions under which a restructuring plan may be amended.

(183) With regard to the dossier at issue, the Commission notes the following:

— Apart from the sale of Sernam which has not (not yet) been carried through, the restructuring plan as initially envisaged is moving ahead basically according to plan. Essentially this involves reorganising the transport plan, reorganising and reducing the number of sites, the turnover and the staff as provided for in the initial plan and even going beyond the reduction envisaged in the Sernam 1 decision, and also refocusing activities on an innovative development concept (TBE).

— The company's difficulties noted prior to 23 May 2001 necessarily remain unchanged.

— The objective of the viability of restructuring also remains the same.

— There is only a one- to two-year delay in the restructuring period initially recommended.

— In connection with the initiation of the procedure for this dossier, the Commission is reinvestigating the overall situation of 2001 in the light of its updating to 2003-4.

(184) Having regard to these elements, the Commission concludes that the aid investigated for the purposes of this decision meets the criteria of paragraph 3.2.4. of the abovementioned Guidelines. Consequently, the aid examined does not constitute new restructuring aid and the "one time, last time" principle does not apply.

6.3.4. *Eligibility for restructuring aid*

(185) The Commission confirms the elements set out in the Sernam 1 decision with regard to Sernam's eligibility for restructuring aid, in respect of which it has in fact not raised any doubt in its decision to initiate the procedure (C 32/03). In paragraphs 82 to 87, the Sernam 1 decision contains considerations regarding the concept of a company in difficulty, a newly created company and 'one time, last time' aid.

[1] Paragraph 43.

(186) Even though Sernam was eventually reconverted from an SCS (limited partnership) to a *société anonyme* and although Sernam's privatisation is no longer a constituent element of the dossier, the analysis of eligibility remains unchanged. This is due, in particular, to the fact that the company's difficulties noted before 23 May 2001 necessarily remain unchanged and the objective of restructuring also remains the same.

6.3.5. *Restoring viability*

(187) Even though Sernam's privatisation did not take place as envisaged in the Sernam 1 decision, Sernam has continued to carry out many elements of the initial restructuring plan while adding a range of new elements, indicating that a genuine change is in progress and raising prospects that Sernam will eventually restore its viability.

(188) Reorganisation of sites: This reorganisation of operating sites appears to be a key element to restore the viability of a company such as Sernam. The reasons adduced by the French authorities such as the transactions referred to above with regard to the organisation of these sites, their geographic location and their excessive numbers constitute essential rationalisation towards greater efficiency and lower costs of future operations.

(189) Staff cuts: Furthermore, the reduction of the number of staff is quite considerable, from 5050 persons in 1999 to […]in 2005, which should make it possible to make substantial savings and give Sernam the flexibility and adaptability necessary to attain its innovative objectives.

(190) Computer system: With the assistance of Geodis, Sernam has changed over its computer system to two new management software packages ("Aanael" and "Alizée 2000") which should optimise its future operations.

(191) The "Xpress" range: The new express range has made it possible to classify transported products in several categories with the advantages of express services. In this way, Sernam has aligned its services in accordance with a modern operating concept as recommended by experts to ensure profitable operation on a market with growth potential.

(192) "TBE": Moreover, by centring its activities around the certified "express" range of services, Sernam has also been able to focus its new road transport plan on "TBE", a highly innovative concept. The combination of "express services" and TBE has enabled Sernam to attain a current turnover of € […] million, of the total groupage turnover of € […] million. Moreover, the TBE concept, combined with the new range of express services seems to be fully consistent with the approach recommended by the abovementioned experts to make railway transport attractive. As TBE is profitable on minimum distances of 400 km and its speed is in any case faster than the speed limits on the road, it should be possible for TBE to be fully competitive with long-distance lorry transport, even if a minimum of two stops for unloading appear necessary. [1] The competitiveness of TBE should be further enhanced if the speed limit on the road is further reduced below that currently allowed for small and medium-sized lorries.

(193) The success of TBE, which according to the French authorities is assured, shows that the concept meets a genuine need on the French national market.

(194) This interest is another element showing that the diversification started by Sernam in order to become gradually specialized in mail transport through TBE may indeed have an economic future. The trend toward regionalisation of the French mail and express market could explain the interest kindled by TBE which by definition operates only on long distances. It should further be borne in mind that the opening-up of the railway market, initiated by the Commission, should eventually enable Sernam to gain a foothold in a new segment of the international market. In this scenario (whether of national or international scope), and taking account of the conditions imposed by the present decision, Sernam should enter into one or more partnerships with other companies in order to achieve its objectives.

(195) Sernam's overall viability: Sernam has been able to eliminate almost entirely, and through its own restructuring efforts, the €67 million requirement which Geodis would have had to contribute to Sernam's restructuring. This shows that Sernam has been able independently to carry through an important part of the planned reorganisation, which will be very conducive in particular for the future management of its working capital requirement.

(196) Moreover, the forecasts of the business plan in terms of Sernam's performance seem plausible, given the other elements of rationalisation it has implemented, in particular as regards sites (number, location and organisation), staff, activities and WCR and having regard to the innovative concepts developed and established by Sernam (the express range and TBE) and the industrial partnerships which it intends to conclude (a condition of the present decision) to enable it to extend its railway activities (TBE), not only on the national express market but also in international express services which have grown considerably in recent years and for which the prospects remain promising.

[1] One stop to transfer the goods from lorries onto TBE at its point of the departure and another on the arrival of TBE to transfer the goods onto lorries.

(197) Even in the absence of the abovementioned €41 million in additional aid, the Commission takes the view that Sernam should be able to restructure successfully by the deadline set. It has been noted that even though Sernam has only a part of the aid authorised in the Sernam 1 decision at its disposal, its performance in 2003 was already slightly better than expected (a fall of €85 million before tax in 2003 as against an expected fall of €87 million) and should break even as forecast in Sernam's business plan around 2005-2006.

(198) Taking the abovementioned factors into account, the Commission is of the opinion that Sernam could be restored to permanent financial viability within a reasonable period of time, as announced by the French authorities.

6.3.6. *Preventing distortion of competition - Reduction of capacity*

(199) According to the information from the French authorities, Sernam has already substantially reduced its capacity and is planning further cuts in addition to those provided for in the Sernam 1 decision by the end of the restructuring period 2005-2006 by reducing the number of sites, staff and turnover. Moreover, Sernam is shifting its focus from groupage/traditional mail services to express mail services and also from road transport to a new rail concept, TBE. The TBE concept is being developed in a new market segment where there is no overcapacity and may provide capacity for additional growth at national and international level. The French authorities have thus met a number of criteria laid down in the Sernam 1 decision.

6.3.7. *Preventing distortion of competition – Specific compensatory measures*

(200) The Commission notes first of all that:

— measures should be taken to attenuate the unfavourable consequences of aid for competitors as much as possible;

— the limitation or forced reduction of Sernam's presence on the market or markets concerned in which the company operates is a compensatory measure for the benefit of its competitors;

— compensatory measures could take different forms, depending on whether or not the company is operating in a market where there is overcapacity.

(201) Next, the Commission notes the following:

(202) The markets concerned: The Commission notes that the main markets in which Sernam operates are the French national markets of groupage, traditional mail services and express mail services. These markets nevertheless involve an essential element of road and rail transport.

(203) Rail transport (TBE concept): As regards the development of groupage and mail transported by express rail services (TBE concept), the French authorities have confirmed to the Commission that "Sernam does not have a monopoly of TBE as any operator may ask Fret SNCF for an equivalent service. To date, however, none of Sernam's competitors has explicitly asked Fret SNCF for such a service. Fret SNCF confirms that it is prepared to supply an equivalent service, on the same conditions, to any operator asking for it. Sernam has responded positively to requests for technical cooperation on TBE made by an operator who wished to evaluate its relevance and efficiency."

(204) Railway groupage as practiced by Sernam through TBE and the new express range is a new market to be developed where there is no structural overcapacity. Taking account also of the fact that the French authorities have provided the necessary assurances that Sernam cannot have a monopoly on this market, the Commission considers that Sernam need not take any compensatory measures as a *quid pro quo* for the aid in this market segment and may continue to develop its services within it.

(205) Road transport: However, there is structural overcapacity in road transport throughout Europe, and therefore also in France. Moreover, the French traditional groupage market is regarded as stagnating and that for the transport of standardised packages (parcels) is in decline.

(206) The interested parties indicate that the market is exacerbated by the closure of companies in the relevant market in France, which are more numerous than those in the previous year, and the market is also affected by strong price competition, in particular on the part of Sernam.

(207) Groupage and express: Sernam occupies a strong position on the groupage/traditional mail market and in particular the express market in France and has a significant market share compared with a large number of other market participants.

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

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

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

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

— Sernam will be able to develop only its activities in the transport of mail by rail (TBE concept). In this connection, SNCF guarantees that it will offer to any other operator that so requests the same conditions as those granted to Sernam to develop freight transport by rail or TBE.

— As a *quid pro quo*, Sernam must over the next two years starting from the date on which this decision is notified, fully replace its own road transport resources and services by road transport resources and services of one or more companies in which SNCF does not have a majority share.

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

— The companies that take over Sernam's road transport activities must provide all the road transport services using their own resources.

(212) The obligation to carry out this replacement will certainly be a challenge to the company. About € […] million of Sernam's turnover comes from its road transport activities out of a total turnover of €414 million and € […] million groupage turnover. However, replacing its road transport activities should be possible without affecting its viability, mainly because of the following reasons:

— Sernam should quickly commit to one or more company partnerships in order to replace its parcel transport services by road – i.e. road transport vehicles – at the points of departure and arrival of Sernam's rail service (TBE). As company partnerships and Sernam's franchising of road transport have in any case been planned and announced by the French authorities, this condition will secure the implementation of these plans.

— Since Sernam's restructuring centres around combining its new express range with the new TBE rail transport concept whose economic prospects seem to be quite solid and creditable, Sernam should be able to position itself in a new market segment to be developed.

(213) Moreover, at the request of the Commission, which has emphasised that Sernam should not gain a monopoly position in express freight transport services by rail, the French authorities have confirmed in writing [1] that any other operator potentially interested in performing mail transport services by rail will be able to benefit from the same conditions as those granted to Sernam. Accordingly, the Commission considers that any risk of a *de facto* or *de jure* monopoly emerging is excluded, and only the barriers to market entry remain. [2]

(214) Furthermore, the strategy of developing TBE is fully in line with the Commission's transport policy as it is conducive to the road–to-rail modal shift. In this regard, the Commission considers that a company which diversifies in such a way as to make it possible to shift large volumes of goods from road to rail over long distances deserves to be given the opportunity to translate this into practice, provided that it effectively withdraws from market segments where there is overcapacity.

(215) Consequently, the Commission considers that the following objective has been achieved:

— Sernam's restructuring

— to ensure that its sustainable viability is restored

[1] Letter from the French authorities of 14 April 2004

[2] These barriers to market entry should *a priori* consist essentially of the know-how needed for operating such services and the configuration of wagons properly adapted to these requirements, given the fact that, at least Sernam's case, railway traction will be operated by SNCF.

— by focusing its road transport activities on express rail transport and replacing its road activities by those of other companies independent of SNCF

— in a way that does not affect trade between Member States to an extent contrary to the common interest.

(216) However, the Commission takes account of the French authorities' intention to sell off Sernam in its entirety (including assets and liabilities) by […]. In this connection, the Commission recalls that if such a transaction is effected at market price through a transparent procedure that is open to all competitors, as ascertained by an independent expert, and Sernam is sold to a party that has no legal links with SNCF, the acquiring party need not refund the sum of €41 million that has been declared incompatible. In accordance with the Court's case law, the buyer could not be considered as having benefited from an advantage over other operators on the market.

(217) The Commission also recalls that, if Sernam is sold in its entirety (assets and liabilities) as intended by the French authorities, the conditions of the decision (takeover of Sernam's road activities by other companies and diversification of its activities towards rail freight) should in any case apply. On the other hand, should Sernam sell its assets *en bloc*, the Commission recalls that the above two conditions concerning the company's restructuring will not apply as Sernam will no longer operate in its current legal form and will cede its market shares to the independent acquiring party (which will *de facto* continue its activities with Sernam's assets).

6.3.8. *Aid limited to the minimum*

(218) As mentioned above, the need for €41 million in additional aid is basically a consequence of the failure of the French authorities to comply with the Sernam 1 decision. The payment of such an amount in additional aid is not justified as it is intended for a company which is still basically operating in market segments with structural overcapacity, stagnation and even decline. Moreover, Sernam should not have surplus liquid assets which it could allocate to activities that could cause distortion on the market and would not be connected with the restructuring process, in particular in terms of prices charged. Accordingly, it is the Commission's view that the grant of €41 million in additional aid on top of the total sum of €503 million initially notified and approved in the Sernam 1 decision is not justified.

(219) Moreover, the replacement of Geodis's contribution to Sernam's restructuring, as initially planned, by possible aid of €67 million may be excluded on the grounds that such a contribution will no longer be necessary. The capital injection of €67 million which Geodis was to provide through a credit line has been financed by reducing Sernam's credit to its customers. In order to raise the €67 million, Sernam could have assigned its customer receivables through discounts or securitisations to obtain corresponding resources from a financial institution. In fact, Sernam has adopted a more fundamental approach, reducing the length of customer credit which has enabled it to raise the funds needed and thereby correspondingly reduce its working capital requirement. Such a process is in fact preferable to the external financing option as described above because it improves Sernam's balance-sheet and provides greater security for future transactions (given the reduced duration of customers' credit).

(220) The Commission can therefore accept that Sernam has replaced the absence of a €67 million contribution from Geodis by an equivalent, indeed better, measure than with external funding by mobilising funds that remained blocked in customer credit for too long.

(221) Consequently, the intensity of the aid granted to restructure Sernam in the present situation (indicated as Sernam 2 in the table below) is 81% compared with 87% intensity in Sernam 1. This takes account of the fact that Sernam has from its own resources made up the €67 million financing requirement which Geodis was to provide and should likewise make up from its own resources the additional €41 million financing requirement, which Sernam should be able to do in particular through the sale of its road activities and other means.

(222) To the sum of €556 million [1] should be added the €34 million and €21 million compensation provided by SNCF in the form of contracts between SNCF and Sernam for the transport of baggage, newspapers and supplies during the 11 months SCS Sernam's financial year 2000, which were regarded as compatible State aid in the Sernam 1 decision. Since France has kept its commitment to open up the contracts for the transport of supplies, newspapers and baggage for SNCF, the Commission can uphold its view recorded in the Sernam 1 decision that the sum of €55 million paid under the abovementioned contracts for 11 months of the financial year 2000 may be authorised in the framework of Sernam's restructuring.

[1] Comprising the financing of restructuring to the amount of €448 million by SNCF, the financing by Sernam of the €67 million which Geodis was to provide (Sernam has reduced this financing requirement by implementing restructuring measures from its own resources) and the financing from Sernam's resources of the €41 million in proposed additional aid.

(223) **Restructuring costs**

€ million	Sernam 1	Change	Sernam 2
Restructuring costs	515	41	556
Total (1)	515		556

Financing sources

€ million	Sernam 1	Change	Sernam 2
Financing of restructuring by SNCF	448		448
Financing by Geodis	67	- 67	0
Financing by Sernam		67	67
Other funds to be provided by Sernam		41	41
Total (2)	515		556

Intensity of aid for restructuring Sernam 1 in %	87		
Intensity of aid for restructuring Sernam 1 in %			81

Aid granted for contracts in € million	55		55
Total (3)	55		55

€ million	Sernam 1		Sernam 2
Financing of restructuring by SNCF	448		448
Aid granted for contracts in million €	55		55
Total (4) Total amount of aid	503		503

6.3.9. *Implementation and compliance with conditions*

(224) France is requiring to submit an annual report on the development of restructuring and compliance with the present decision. The first report must be submitted not later than six months after the date on which the present decision is notified.

7. **CONCLUSIONS**

(225) The Commission concludes that France has paid the amount of €503 million [1] in aid under conditions different from those approved in the Sernam 1 decision and has unlawfully paid the sum of €41 million in additional aid.

(226) However, taking account

— of the written commitment given by the French authorities, following the Commission's express request, that Sernam will not be favoured by SNCF and will not be able to acquire a monopoly in the (express) transport of rail freight,

— of the thorough restructuring started by Sernam (with regard to its operating sites, transport plan, capacity reduction already carried out and essential innovations in the new express range and TBE), and

— of the conditions imposed by the present decision,

the Commission considers that the sum of €503 million in aid for Sernam is compatible with the Treaty as

— Sernam can be restored to viability within a reasonable period of time;

[1] This amount consists of €448 million paid by SNCF as restructuring aid proper and €55 million aid for the contracts, totalling €503 million.

— competition will not be distorted to a degree contrary to the common interest;

— aid will be reduced to the minimum necessary in that the total amount of financial requirements approved by the Sernam 1 decision (€570 million [1]) is reduced by €67 million because Geodis will not make its contribution, but has nevertheless been - financed by mobilising Sernam's resources, and/or the additional aid of €41 million will have to be recovered with interest.

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid of €503 million for the Sernam company approved in May 2001 is compatible with the common market under the conditions laid down in Articles 3 and 4.

2. The State aid of €41 million provided by France to the Sernam company is incompatible with the common market.

Article 2

1. France shall take all the measures necessary to recover from the beneficiary the aid referred to in Article 1(2) that has already been unlawfully placed at the beneficiary's disposal.

2. Recovery shall take place immediately in accordance with the procedures of national law to the extent that these procedures permit the immediate and effective implementation of this Decision. The aid to be recovered shall include interest from the day on which the aid was placed at the beneficiary's disposal to the day on which the aid is recovered. Interest shall be calculated on the basis of the reference rate used for the calculation of the subsidy equivalent for aid granted for regional purposes.

Article 3

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

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

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

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

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

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

Article 4

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

Article 5

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

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 20 October 2004.

By the Commission
LOYOLA DE PALACIO
Vice-President

[1] This amount consists of €448 million from SNCF, €55 million for the contracts and €67 million which Geodis had to contribute.