# COMMISSION DECISION

## of 20 December 2006

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

*(notified under document number C(2006) 6629)*

**(Only the French version is authentic)**

**(Text with EEA relevance)**

(2007/256/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

### I. PROCEDURE

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

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

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

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

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

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

### II. DETAILED DESCRIPTION OF THE SCHEME

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

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

[1] OJ C 89, 13.4.2005, p. 15.

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

[3] OJ C 89, 13.4.2005, p. 15.

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

(9) The second paragraph of Article 39 C of the General Tax Code provides that the tax-deductible depreciation of an asset leased out by an EIG may not exceed the amount of any leasing charges collected by it, less any other charges relating to the asset.

(10) Since the declining depreciation and the financial charges are, by definition, concentrated on the first few years of the asset's use, the EIG's results show an exceptional loss during that period and become positive only during a later period when the amount of the leasing charges collected exceeds total costs (depreciation and financial charges included). Because EIGs are governed by the law on partnerships, they can deduct the losses thus posted during the first few years of the operation from the taxable profits earned by their members from their current activities. The ceiling on depreciation provided for in the second paragraph of Article 39 C of the General Tax Code is intended, therefore, to combat abusive recourse to this type of financing for the purpose of tax avoidance.

(11) An exception to this limitation, introducing a depreciation system favourable to certain undertakings, has nevertheless been inserted in the General Tax Code. Article 39 CA of the General Tax Code thus stipulates that the ceiling laid down in the second paragraph of Article 39 C of the Code shall not be applicable to the financing by EIGs of depreciable movable assets according to the declining balance method over a period of at least eight years ([5]) provided that the operation has been approved in advance by the Minister for the Budget.

(12) Such approval is subject to a number of criteria. These are essentially as follows:

— the acquisition price of the asset must correspond to the market price

— the investment must be of significant economic and social interest, particularly in relation to employment

— the user of the asset must show that the asset is necessary to his business and that the financing arrangements adopted are not of a purely tax-related nature

— two thirds at least of the tax advantage accruing from the approval must be passed on to the user of the asset.

(13) As a rule, the EIG — which is generally made up of financial institutions — acquires the asset to be financed at the market price and leases it out to its user. The leasing charges paid by the user and the price of the end-of-contract purchase option enable the EIG to cover its own financing costs, including capital and interest.

(14) Apart from the removal of the depreciation ceiling ([6]), the grant of ministerial approval makes it possible to increase by one point the declining depreciation coefficient normally applicable to the asset concerned. Moreover, the resale of the asset by the EIG to its user once two thirds of the normal period of use of the asset has elapsed is exempt from transfer capital gains tax.

(15) As to the criterion relating to the existence of a significant economic and social interest ([7]), the French authorities have indicated that there are no guidelines for assessing such an interest and that the examination is carried out in the light, firstly, of the indirect fallout from the investment in the labour market area, the conditions of competition and the development of the activity in the economic area concerned, including the contribution to the growth or establishment of a production, management or decision-making centre, and, secondly, of the investment's contribution to improving safety and protection of the environment.

(16) Article 39 CA of the General Tax Code provides that the passing-on to the user of the asset of two thirds at least of the tax advantage which the EIG derives from the grant of approval ([8]) must take the form of a reduction in the amount of the leasing charge or of the purchase option. Moreover, the exact amount of the advantage to be passed on by the EIG to the user must be determined at the time of grant of the approval.

(17) At the Commission's request, the French authorities furnished a breakdown by area of activity of all applicants for approval and of the actual beneficiaries of the scheme at issue:

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

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

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

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

([7]) See recital 12.

([8]) See recital 12.

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

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

## III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(20) In its decision of 14 December 2004 the Commission found that an advantage seemed to granted under Article 39 CA of the General Tax Code to investors belonging to tax EIGs and to the users of assets financed by EIGs. As far as the selectivity of the measure in question was concerned, the Commission noted, firstly, that the Minister for the Budget seemed to enjoy a discretionary power when it came to assessing the approval grant criteria and that this enabled him to select the beneficiaries of the scheme at issue according to subjective standards. Secondly, it appeared that the tax arrangements provided for in Article 39 CA of the General Tax Code constituted an aid measure for the benefit mainly of the transport sector. The Commission thus took the view that the measure at issue did not appear to be justified by the nature or general scheme of the French tax system. In its opinion, the advantages in question also involved the use of state resources, distorted competition and affected intra-Community trade.

(21) As to the compatibility of the scheme at issue with the common market, the Commission considered at that stage that none of the exceptions provided for in Article 87(2) and (3) of the Treaty were applicable in the present context. Nor did the scheme appear to satisfy the conditions of the Community guidelines and frameworks in the field of state aid. It was therefore prima facie incompatible with the common market.

(22) The Commission accordingly decided to initiate the formal investigation procedure in order to allay its doubts both as to the state aid nature of the scheme at issue and as to the scheme's compatibility with the common market.

## IV. COMMENTS FROM THE FRENCH AUTHORITIES

(23) As part of their comments, the French authorities maintained, firstly that the scheme provided for in Article 39 CA of the General Tax Code did not constitute state aid. It was simply a technical procedure for implementing the ordinary law which made it possible to place the method of financing concerned under the supervision of the authorities, and not a departure from the ordinary law. The ceiling on deductible depreciation provided for in the second paragraph of Article 39 C of the General Tax Code sought, by introducing a presumption of tax avoidance, to prevent recourse to that financing mechanism for tax optimisation purposes. The scheme provided for in Article 39 CA of the General Tax Code was also designed to combat tax avoidance. However, the heavy capital goods concerned by that provision were characterised by a relatively long return on investment, and in those circumstances recourse to leasing was motivated not only by a desire for tax optimisation but also by economic necessity.

(24) The French authorities stated that, viewed as a whole, the approval grant criteria made it possible to carry out prior monitoring of capital goods financing operations involving leasing with a purchase option and to deny the benefit of the tax scheme at issue to all financing operations primarily motivated by tax optimisation considerations.

(25) This was especially the case with the criterion that the investment be of significant economic and social interest, particularly in relation to employment, the satisfaction of which required that the approval application be backed up by commitments to hire staff. The jobs created had to be maintained for the minimum period of use of the asset, i.e., the duration of the leasing contract or of the 'making available', namely at least eight years. They also had to lead to a net increase in the number of employees of the company seeking approval and be directly related to the investment.

(26) The French authorities pointed out that some applications for approval had been rejected on the ground that the financing proposal submitted lacked significant economic and social interest. Two types of situation were characterised by such lack of interest. Firstly, the lack or insufficiency, both quantitative and qualitative, of new hirings capable of strengthening or making possible the establishment of a management or decision-making centre. And, secondly, the state of affairs whereby the applicant's financial position enabled him to have recourse to other means of financing which were not in the nature of an incentive.

(27) The criterion relating to the passing-on to the user of most of the tax advantage accruing to the EIG's members under Article 39 CA of the General Tax Code also made it possible, according to the French authorities, to combat tax optimisation by excluding from the benefit of that provision operations which were designed only to generate increased cash flow.

(28) The French authorities pointed out, further, that the monitoring arrangement thus introduced was not discretionary in character. They referred in this connection to the decision by the French Constitutional Council to the effect that an approval such as that provided for in Article 39 CA of the General Tax Code was not so much a discretionary measure as one which conferred on the Minister for the Budget sole power to ensure that the operation in question satisfied the conditions laid down by law ([9]).

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

(29) At all events, so the French authorities claimed, the tax advantage attaching to the deduction of the amount of depreciation did not lead to any loss of tax revenue, being more akin to a different breakdown, over time, of the taxable base. Moreover, the determination of the exact share of the advantage retained by the investors belonging to the EIG was in the nature of an exercise in remuneration the amount of which was a function of market conditions and the outcome of a classic commercial negotiation.

(30) In answer to the Commission's allegation of selectivity of the tax scheme at issue, the French authorities put forward several arguments.

(31) First of all, they contended, the scheme was a general measure potentially applicable both to the industrial sector and to the transport sector. Examples of its application were: pulping machinery, hydrocarbon storage tanks, printing presses and refrigerating units, all of which were industrial assets which could be depreciated according to the declining balance method over a period of at least eight years. The French authorities pointed out, moreover, that certain means of transport, such as lorries and buses, were excluded from the measure's scope owing to their shorter depreciation period. The depreciation period in question applied, therefore, to all assets whose return on investment required a fairly long time.

(32) Secondly, the concentration of the benefit of the scheme at issue on transport equipment was due, in reality, to matters outside the French public authorities' control, namely, changes in industrial companies' financial circumstances and the attractiveness of transport equipment to investors. Such equipment comprised assets highly attractive in the eyes of investors who, in order to limit their risks, opted for assets which were easily negotiable should the operator encounter difficulties.

(33) Thirdly, the scheme at issue did not favour French companies in so far as nationality was not a factor in becoming a member of an EIG. A foreign investor, in particular a financial institution, could thus benefit from the scheme and from the resulting increased cash flow irrespective of its tax domicile.

(34) At all events, even supposing that the scheme provided for in Article 39 CA of the General Tax Code were a departure from the ordinary law, it was of unlimited scope and duration and was based on objective, horizontal tax avoidance combating criteria. Just like the aid scheme in Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility ([10]), it could not, therefore, be classified as state aid.

([10]) OJ L 146, 20.6.1996, p. 42.

(35) With regard to the exemption from capital gains tax on the transfer of title in an asset, the French authorities stated that the advantage which the members of an EIG derived from such exemption also had to be passed on to the tune of at least two thirds to the user of the asset. They maintained that this exemption, which was conditional, was justified by the nature and overall structure of the French tax system. It was necessary, in the event of an early transfer of title, in order to ensure the maintenance of the tax advantage resulting from the deduction of the depreciation under conditions of ordinary law. The French authorities pointed out, moreover, that the exemption would be included in the ordinary law as from 1 January 2007. From that date onwards, any capital gains on the transfer of equity interests held for more than two years would be exempted, apart from a share of the costs and charges equal to 5 % of the net total of the transfer capital gains taken into account in determining the taxable amount. In view of the date of conclusion of the contracts for the making available of assets between EIGs and users, the date on which the early transfer of title in those assets would be possible would be after 1 January 2007 inasmuch as such transfer could not take place until after the contracts had been two-thirds implemented. EIG members would benefit, therefore, from the exemption under the ordinary law.

(36) The French authorities pointed out that the exemption from transfer capital gains tax was not automatic. One of the conditions for such exemption was that the actual user of the asset had to show that, in view of the asset's cost, he was unable to purchase it directly without endangering his financial equilibrium. According to the report of 25 March 1998 by the rapporteur of the National Assembly's Finance Committee, that condition was to be viewed in the context of the implementation of alternatives to the tax deduction for subscription of co-ownership shares in ships (*quirats*) (hereinafter called 'the co-ownership shares scheme'), which was abolished by the 1998 Finance Act.

(37) With regard to the compatibility of the tax scheme at issue with the common market, the French authorities maintained that, even if the scheme were to constitute state aid, it was in keeping with Article 87(3) of the Treaty as it facilitated the development of certain activities without adversely affecting trading conditions to an extent contrary to the common interest. Article 39 CA of the General Tax Code did not place domestic economic operators at an advantage over operators from other Member States and was no more advantageous than schemes in force in other Member States.

(38) The French authorities drew attention to the specific situation of maritime transport services, the operators of which were the main users of the scheme at issue. They pointed out that the scheme was a measure having an effect equivalent to the co-ownership shares scheme — a scheme for financing vessels registered in France — which had previously been notified to and approved by the Commis-

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

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

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

(41) Lastly, as regards the application in the present case of the principle of legitimate expectation, the French authorities referred to Commission Decision 2002/15/EC of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company (hereinafter called 'BAI' or 'Brittany Ferries') ([15]), in which the scheme at issue was examined.

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

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

## V. COMMENTS FROM INTERESTED THIRD PARTIES

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

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

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

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

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

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

([13]) See footnote 12.

([14]) See footnote 12.

([15]) OJ L 12, 15.1.2002, p. 33.

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

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

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

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

(50) In the opinion of, among others, Calyon and BNP, the selectivity of the scheme at issue was due to market practices and the specificities of transport assets (certain guarantees of long-term value added and liquidity) and not to the wording of Article 39 CA of the General Tax Code. Transport assets, so they maintained, had special features which made them suitable for long-term financing. Moreover, even had it been the case that Article 39 CA of the General Tax Code did not require prior approval by the Minister for the Budget, the beneficiaries under the scheme would have been the same as they were then.

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

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

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

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

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

([18]) See footnote 9.

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

(55) According to Brittany Ferries, the exemption from capital gains tax provided for by Article 39 CA of the General Tax Code was no more favourable than that resulting from the ordinary law provisions (subject to a 5 % share of the costs and charges) applicable from 2007 onwards.

(56) Air France pointed out that the savings resulting from the tax arrangements at issue were comparable to those achieved using other means of financing with tax levers existing in the world. Moreover, the operations financed under Article 39 CA of the General Tax Code were subject to quid pro quos liable to temper that provision's advantages. Air France pointed out, furthermore, that, in some cases, the EIG could contractually pass on the tax-related risks and ancillary costs to the lessee, which had the effect of reducing appreciably the potential saving to the user.

(57) Lastly, a number of interested parties, including Compagnie Méridionale de Navigation, maintained that the scheme at issue introduced, for shipowners, numerous constraints in the form of quid pro quos demanded by the State for approval grant purposes. The advantages flowing from the tax scheme thus offset the extra cost of managing vessels under the French flag, which was basically due to the cost of French crewing, one of the highest in Europe. Fouquet Sacop pointed out in this connection that the scheme had induced it to opt for rapid growth under the French flag, the constraints and extra costs related to that flag being offset by the tax scheme at issue. CMA CGM, Broström Tankers, Pétro Marine and Louis Dreyfus Armateurs stated that, without the benefit of the scheme, they would have been unable to invest in French-flagged vessels and, in so doing, to take part in the development of the Community fleet. Bourbon Maritime indicated for its part that the arrangements provided for in Article 39 CA of the General Tax Code made it possible to maintain high-quality jobs linked to the direct management of maritime transport and its ancillary activities and that they contributed effectively to the improvement of safety and the protection of the environment.

(58) As regards, secondly, the requirement in Article 87(1) of the Treaty as to an effect on trade between Member States, several interested parties pointed out that the members of an EIG and the users of the assets concerned could be foreign operators or their French subsidiaries. Moreover, the scheme at issue was no more favourable than those existing in other Member States. SG stated in this connection that those of its clients concerned by the approvals who were French were in a minority.

(59) As regards, thirdly, the compatibility of the scheme at issue with the common market, CNCE stated that the approvals granted to maritime operators were in keeping with the spirit of the 1997 and 2004 Community guidelines ([19]). The measure at issue was thus compatible with the common market pursuant to Article 87(3)(c) of the Treaty, as interpreted in the light of the principles set out in the said Community guidelines.

(60) Brittany Ferries maintained that the scheme provided for in Article 39 CA of the General Tax Code was compatible with the common market pursuant to Article 87(3)(c) of the Treaty inasmuch as the measure sought only to compensate for 'market failures' in relation to the financing of investments in heavy capital goods. It was also stressed by the majority of interested parties that the other Member States had reacted accordingly by introducing similar measures.

(61) As regards, fourthly, the application in the present case of the principle of legitimate expectation, the majority of interested parties — being beneficiaries under the scheme — maintained that they had always been convinced that the measure at issue did not constitute state aid within the meaning of Article 87(1) of the Treaty. The application in the present case of the above-mentioned principle therefore precluded any recovery.

(62) SG pointed out in this respect that, under the scheme preceding the one at issue, any partnership losses generated by depreciation could be fully offset against the tax liability of the partnership members. The Commission had never considered that ordinary law scheme to be state aid.

(63) It was also maintained that the Commission had refrained from acting for six years. According to Calyon, the Commission appeared to have learned of several asset financing operations under Article 39 CA of the General Tax Code without ever having raised the question of their validity in the light of Article 87 of the Treaty ([20]). CNCE maintained in this connection that the period which had elapsed between the date on which the Commission learned of the aid and the date on which the formal investigation procedure was initiated was excessively long, and Calyon described that period as unreasonable. What is more, the Commission had already exceptionally established the

([19]) See footnote 12.

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

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

(64) Some interested parties also stressed that the Commission had previously approved the co-ownership shares scheme — a scheme which was more favourable from a tax point of view than the scheme at issue here — and that that circumstance had given rise to their legitimate expectation in the lawfulness of the scheme at issue. Moreover, according to CNCE, the creation of a legitimate expectation on the part of beneficiaries did not require the Commission to have ruled on an identical scheme. The acceptance of a merely similar scheme could, it argued, give rise to such an expectation. And the Commission had in fact accepted a similar scheme in its Decision of 8 May 2001 ([22]). CNCE and SG also referred to several similar schemes approved by the Commission ([23]) and to the judgment of the Court of Justice in *RSV* v *Commission* ([24]).

(65) More specifically, Brittany Ferries considered that the Commission Decision of 8 May 2001 ([25]) had given rise to a legitimate expectation on its part that the scheme at issue did not comprise any state aid.

(66) CNCE stressed also that France had adopted Law No 98-546 some three months after informing the Commission about it in accordance with Article 88(3) of the Treaty. The Commission had not replied within two months of that notification, and so the measure in question was covered by the existing aid arrangements within the meaning of the *Lorenz* case law ([26]).

(67) Two interested parties who asked not to be named submitted comments to the Commission as part of the formal investigation procedure.

(68) In the comments which it transmitted to the Commission within the period allowed, the first of these parties maintained that the scheme at issue was unlawful. It asked the Commission to extend the scope of the present administrative procedure to include the co-ownership shares scheme. It considered, like the Commission in its decision initiating the formal investigation procedure, firstly, that the scheme at issue was selective in that it favoured French shipowners, and, secondly, that it affected trade between Member States *inter alia* in the cross-Channel market. It pointed out in this connection that, as was clear from the Finance Committee report of 25 March 1998, the scheme at issue in this case, replacing as it did the co-ownership shares scheme, had been introduced to keep the French shipping industry happy.

(69) Moreover, by favouring French operators, the tax arrangements at issue helped to increase overcapacity in the cross-Channel market by enabling cash-strapped companies to acquire new ships. The distortion of competition resulting from the scheme's application was illustrated by the acquisitions of ships, through this tax mechanism, by Seafrance and Brittany Ferries. The latter had, it was claimed, seen their capacity increase considerably following these new ship acquisitions.

(70) The second interested party who requested that its identity be withheld referred in its comments to the preferential competitive position enjoyed by French operators — foremost among which was Brittany Ferries — owing to their ships being financed through the scheme at issue. It mentioned in this connection the continued presence of Brittany Ferries on the cross-Channel routes and on the France/Ireland route despite the unfavourable competitive conditions prevailing there — conditions which had led, moreover, to the withdrawal of P&O from the market.

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

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

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

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

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

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

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

([22]) See recital 41 and footnote 15 above.

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

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

([25]) See footnote 15.

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

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

(72) The comments submitted by the two interested parties whose identity had been kept confidential were, in the French authorities' opinion, based on inaccurate or imprecise data.

(73) As to the argument that Brittany Ferries' eligibility under the tax EIG scheme had led indirectly to the withdrawal of P&O from the western and central English Channel, the French authorities replied that only two vessels operated by Brittany Ferries had qualified under the scheme and that the financing of its *Mont St Michel* ferry by the mechanism had been approved by the Commission's decision of 8 May 2001 ([27]).

(74) According to the French authorities, an in-depth investigation was carried out by the British competition authorities when the above-mentioned operator withdrew from the market. No distortion of competition was found to be at the root of the operator's withdrawal. Moreover, the falling turnover of some operators was due to the steadily increasing competition from low-cost airlines and not to the commissioning of new vessels by other shipowners.

(75) As for the call by one of those interested parties for the Commission to extend the scope of its investigation to include the co-ownership shares scheme, the French authorities pointed out that that scheme had been declared compatible with the Treaty rules in the Commission's decision of 3 May 1996.

(76) Lastly, in the French authorities' opinion, the increase in cross-Channel capacity was not attributable to companies which had benefited under the tax EIG scheme. Account should be taken instead of new entrants on the routes on which the incumbent operators had previously operated. The French authorities also pointed out that Eurotunnel had doubled its freight-handling capacity between 2000 et 2003 and that P&O had bought out Stena Line's share of their joint venture and had modernised its fleet.

## VII. ASSESSMENT OF THE AID

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

### 1. Existence of state aid

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

(79) The classification of a national measure as state aid presupposes that the following cumulative conditions are met: (1) the measure confers an advantage through state resources; (2) the advantage is selective; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States ([28]).

(80) The reasons why it is considered that the scheme provided for in Article 39 CA of the General Tax Code, as described above, satisfies these cumulative conditions need to be explained.

*The existence of an advantage conferred through state resources*

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

(82) The second paragraph of Article 39 C and Article 39 CA of the General Tax Code concern the depreciation rules applicable to the financing, notably by EIGs, of assets leased out or otherwise made available. According to the French authorities, these two provisions were introduced with a view to combating abusive recourse to this method of financing.

(83) The French authorities and a number of interested parties claim that the scheme provided for in Article 39 CA of the General Tax Code corresponds to a return to the ordinary law in relation to the deduction of depreciation, that is to say, to the provisions of the second paragraph of Article 39 (1) and the first paragraph of Article 39 C of the said Code, and therefore does not constitute state aid. The second paragraph of Article 39 C of the General Tax Code constitutes, in their view, an exception to the provisions contained in those articles.

(84) According to settled case law, the application of Article 87 (1) of the Treaty only requires it to be determined whether under a particular statutory scheme a state measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme ([29]).

(85) Consequently, in order to identify what constitutes an advantage as contemplated in the case law on state aid, it is imperative to determine the reference point or the common system applicable, under a particular statutory scheme, against which that advantage is to be compared ([30]). In this respect, the Court of Justice has ruled, moreover, that the

([27]) See footnote 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(94) It would appear, therefore, that the scheme introduced by Article 39 CA of the General Tax Code seeks to enable the members of an EIG to enjoy an advantage in the form of a tax deferment.

(95) No support can be given to the argument that users for whom an EIG does not receive approval pursuant to Article 39 CA of the General Tax Code have recourse to other methods of financing in order to circumvent the tax-deductible depreciation ceiling provided for in the second paragraph of Article 39 C of the Code and are therefore not placed at a disadvantage compared with those for whom the EIG does receive approval. It should be pointed out first of all that, in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies ([36]). Secondly, such an argument means having to take into account individual situations which are factually and legally distinct ([37]) and, what is more, hypothetical.

(96) Lastly, it cannot be ruled out that users who cannot benefit from the provisions of Article 39 CA of the General Tax Code may be unable to have recourse to an alternative method of financing. This might be the case where a bank decided, in the light of the financial situation of the undertaking concerned, not to assume alone the risks inherent in the financing operation (leasing in its own right) or where, for reasons to do with the user's balance sheet structure or financing capacity, other financing methods proved impossible (direct investment with recourse to debt or equity). At all events, even if such users were actually able to have recourse to an alternative financing method and thereby circumvented their depreciation ceiling, the fact remains that the most advantageous solution initially chosen would have to be abandoned in favour of a necessarily less favourable second choice and that they would not benefit from the tax treatment specific to leasing out by an EIG (in the form of the obligation laid down in Article 39 CA of the General Tax Code to pass on part of the tax advantage to the user).

(97) Besides the removal of the ceiling on the amount of deductible depreciation, the members of an EIG benefit from a one-point increase in the declining depreciation coefficient and, in the event of early transfer of title in the asset to the user and provided certain conditions are met, from exemption from capital gains tax ([38]).

(98) The increased coefficient and the possible exemption from transfer capital gains tax are advantages from which the members of an EIG benefit under Article 39 CA of the General Tax Code, but from which they would not benefit under the reference tax framework, namely the second paragraph of Article 39 C of the Code. At all events, the application of Article 39 CA of the General Tax Code as far as these two advantages are concerned cannot constitute a return to the ordinary law on depreciation, as claimed by the French authorities, since the first paragraph of Article 39 C of the Code makes no provision whatsoever for such tax advantages.

(99) In these circumstances, the argument to the effect that, from 2007, the exemption from transfer capital gains tax will come under the ordinary law is irrelevant inasmuch as the existence of that advantage must be assessed in the light of the legal framework in force and not in that of a future legal situation ([39]). Nor is it claimed by the parties that an amendment of the applicable legal framework would make the advantage granted earlier disappear.

(100) With regard to the state origin of the advantages resulting from the application of the scheme at issue, it will be recalled that the concept of aid is more general than that of subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect ([40]). It follows from this that a measure by which the public authorities grant to certain undertakings exemption from, a reduction in or a deferral of payment of the tax normally due, which, although not involving a transfer of state resources, places beneficiaries in a more favourable

([35]) Tax Instruction 4D-3-99 No 120 of 29 June 1999, paragraph 47 (annexed by the French authorities to their comments of 3 May 2004).

([36]) See, for example, Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24.

([37]) See recitals 86 and 87.

([38]) Senate Report No 413 (cited above in footnote 34) makes clear that the exemption from transfer capital gains tax has the effect of multiplying by two the tax advantage resulting from the first part of the provision (removal of the ceiling on the amount of tax deductible depreciation and increase in the depreciation coefficient).

([39]) The legality of Commission decisions falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and cannot depend on retrospective considerations (see *inter alia* the judgment of the Court of First Instance in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81).

([40]) See *inter alia* the judgments of the Court of Justice in Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and the case law cited therein; C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 77; and C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze*, cited above in footnote 28, paragraph 131, and the case law cited therein.

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

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

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

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

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

*The general character of the tax scheme at issue*

(105) It should be noted first of all that the specificity of a state measure, namely its selective character, is one of the defining features of state aid within the meaning of Article 87(1) of the Treaty. In that regard, it is necessary to determine whether or not the tax scheme at issue entails advantages accruing exclusively to certain undertakings or certain sectors of activity ([42]).

The selective character of the scheme

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

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

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

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

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

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

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

([44]) See footnote 34.

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

(110) In view, moreover, of the depreciation period of the assets in question provided for in Article 39 CA of the General Tax Code, that provision benefits, in fact, mainly undertakings operating in the — particularly maritime and air — transport sector, and EIGs financing assets in that sector.

(111) In that respect, the information furnished by the French authorities shows that, of the 189 applications for approval lodged under Article 39 CA of the General Tax Code, 182 concerned the transport sector. And, according to that information, the maritime transport sector alone accounted for 75 % of the applications for approval lodged and 82 % of the approvals granted (see the table in recital 17 above).

(112) The introduction of this scheme derogating from the ceiling on the depreciation of assets financed by EIGs was primarily motivated by the desire on the part of the legislature to promote the transport sector, and, more particularly, maritime transport.

(113) That this is the case can be seen from the following.

(114) Firstly, of all the assets that are eligible under Article 39 CA of the General Tax Code, ships alone are expressly referred to in Tax Instruction No 120 ([46]). It is thus stipulated that the only second-hand assets capable of benefiting under the tax scheme provided for in Article 39 CA of the General Tax Code are ships. As far as the approval grant procedure is concerned, it is also stipulated that approval applications for ships must be submitted before they are ordered inasmuch as they start to depreciate as soon as they are laid down ([47]).

(115) Secondly, as is clear from the preparatory work prior to the adoption of Law No 98-546 and, more particularly, from Senate Report No 413 ([48]), the previously existing tax arrangements applied to all economic sectors whereas Article 39 CA of the General Tax Code applies 'only to heavy capital goods (aircraft, high-speed trains, ships, etc.)'. As regards, more specifically, the maritime sector, the said report criticises the fact that, compared with the co-ownership shares scheme, the scheme at issue is not favourable enough to boost investment in the sector. It also states that the introduction, in Article 39 CA of the General Tax Code, of a provision on exemption from capital gains tax in the event of early transfer of title in an asset to the user was motivated by the fact that the scheme at issue was less favourable to maritime investment. The French authorities likewise pointed out in this connection in their comments of 3 May 2004 that it was with a view to ending the stagnation in the number of commercial vessels registered in France and to reducing tax expenditure that provision had been made for the possibility of EIGs benefiting, subject to certain criteria, not only from depreciation-related tax deferment, but also from exemption from capital gains tax on the asset transfer.

([46]) See footnote 35.

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

([48]) See footnote 34.

(116) Thirdly, General Report No 66 on the 1999 Finance Bill ([49]) states that 'Law No 98-546 … made possible the creation of a new tax arrangement in favour of maritime investment'. It also states that, although the preferential scheme of financing by leasing introduced by Article 39 CA of the General Tax Code does not apply only to ships, in reality it was designed mainly with them in mind.

(117) In the light of all the above considerations, the Commission takes the view that the scheme provided for in Article 39 CA of the General Tax Code is selective in character in that it favours certain economic operators active in the transport sector and in the financial sector. Since the scheme does not apply to all economic operators, it cannot be considered to be a general tax policy measure.

(118) This assessment cannot be called into question by the arguments raised by the French authorities.

(119) Firstly, the French authorities' argument based on the multiplicity of sectors potentially concerned by the tax measure at issue cannot be accepted. Apart from the fact that certain assets only are concerned by the tax scheme, the very marginal number of approval applications for financing assets in sectors other than transport ([50]) does not leave any doubt as to the scheme's specificity. It has been ruled in any event that the fact that the number of undertakings able to claim entitlement under a measure is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective character ([51]).

(120) Secondly, contrary to what the French authorities claim, the argument that there are equivalent tax measures in the other Member States is irrelevant for purposes of justifying the existence of the scheme provided for in Article 39 CA of the General Tax Code. Comparison of the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aim and functioning of the provisions on the monitoring of state aid. In the absence of Community-level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States ([52]). It has also been ruled that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their

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

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

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

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

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

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

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

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

(124) When questioned about the scope of the examination they carry out to establish whether the investment in question is of significant economic and social interest ([57]) both in general and from an employment standpoint in particular, the French authorities stated that that interest was determined in the light of six criteria, including that of 'the impact of the investment on the economic environment of the area in which it is to be carried out and in which the user operates'. In the Commission's opinion, the assessment of that criterion necessarily involves giving the national authorities a margin of discretion.

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

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

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

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

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

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

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

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

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

([58]) See footnote 34.

([59]) See footnote 9.

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

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

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

(131) Lastly, the Commission considers that the French authorities' argument centred on the absence of a distinction based on the nationality of the members of an EIG and of users likewise does not call into question the selective character of the scheme provided for in Article 39 CA of the General Tax Code ([62]), especially since Senate Report No 413 ([63]) states that the condition as to the existence of a significant economic and social interest of the investment is 'a means to promote goods manufactured in France or financing operations for the benefit of a French user'.

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

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

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

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

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

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

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

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

([63]) See footnote 34.

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

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

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

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

(138) Secondly, as indicated above, of the ministerial approval grant criteria, that which relates to the existence on the part of the financing operation of an economic and social interest, particularly in relation to employment, leaves the national authorities a margin of discretion. This criterion bears no relationship, moreover, to France's objective of combating tax avoidance. At all events, such a social objective is not capable in itself of excluding the scheme at issue from classification as aid within the meaning of Article 87(1) of the Treaty inasmuch as that article does not distinguish between measures of state intervention by reference to their causes or their aims but defines them in relation to their effects ([66]). It has been ruled, furthermore, that Article 87(1) of the Treaty would be deprived of effectiveness if specific measures were to be excluded from classification as state aid for reasons to do with the creation or maintenance of employment, since it is with a view to creating or safeguarding jobs that most aid measures are granted ([67]).

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

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

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

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

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

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

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

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

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

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

*Effect on trade between Member States and distortion of competition*

(143) As indicated above, the beneficiaries under the tax scheme provided for in Article 39 CA of the General Tax Code are, firstly, economic operators active in the sectors of transport and industry and, secondly, the members of EIGs financing assets in those sectors, being financial institutions for the most part. All of these operators are active in the Community markets of the above-mentioned sectors.

(144) In principle, aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities distorts the conditions of competition ([71]). It has been ruled that any grant of aid to an undertaking exercising its activities in the Community market is liable to cause distortion of competition and affect trade between Member States ([72]).

(145) In the present case, in view of the nature and international dimension of the sectors in question, the Commission considers that the aid at issue strengthens the position of operators in these sectors participating in national and intra-Community trade.

(146) Beneficiaries under the scheme at issue are in a privileged position vis-à-vis both their national competitors ([73]) and their competitors in other Member States who, either because they do not finance or use assets eligible under the scheme or because they are not taxable in France, do not qualify under the scheme.

(147) On this last point, while it is true that, from a formal point of view, there is no legal obstacle to economic operators from Member States other than France financing or using assets covered by Article 39 CA of the General Tax Code, it is undeniable that, in practice, the scheme at issue favours operators whose tax domicile is in France. It is noteworthy in this respect that all the interested parties benefiting under the scheme at issue who submitted comments as part of the formal investigation procedure are companies incorporated under French law. As regards, moreover, the sector mainly concerned by the tax arrangements at issue, namely maritime transport, the French authorities have themselves stated that the arrangements' adoption was intended to end the stagnation in the number of commercial vessels registered in France and to reduce tax expenditure. Lastly, as indicated above, Senate Report No 143 ([74]) states that the scheme is 'a means to promote goods manufactured in France or financing operations for the benefit of a French user'.

(148) Consequently, without its being necessary to carry out an economic analysis of the actual situation in the markets concerned ([75]) and in view of the fact that the tax scheme introduced by France strengthens the position of the economic operators who benefit from it compared with other operators competing in intra-Community trade, the Commission considers that the scheme affects trade between Member States and distorts competition between those operators.

(149) In the light of all the above considerations, the Commission takes the view that the scheme provided for in Article 39 CA of the General Tax Code constitutes aid within the meaning of Article 87(1) of the Treaty.

### 2. Quantification and apportionment of the aid among beneficiaries

(150) As indicated above, the tax advantages resulting from the application of Article 39 CA of the General Tax Code are, firstly, the removal of the ceiling on deductible depreciation, secondly, the one-point increase in the depreciation coefficient and, thirdly, the possible exemption from transfer capital gains tax.

(151) The amount of the aid, for each leasing operation, corresponds to the difference between the discounted values of the taxes paid throughout the depreciation period, taking into account the one-point increase in the depreciation coefficient, and those which would have resulted from the application of the provisions of the second paragraph of Article 39 C of the General Tax Code, to which difference must be added any exemption from transfer capital gains tax ([76]). This amount is determined, for each leasing operation, in accordance with the procedure laid down in paragraphs 46 and 47 of Tax Instruction No 120 ([77]) for the purpose of passing on part of the overall advantage to the user.

(152) As regards the exact apportionment of the overall advantage accruing under Article 39 CA of the General Tax Code, the members of an EIG are required — as the direct beneficiaries — to pass on at least two thirds of that advantage to the user of the asset in question. In the context of each leasing operation, the exact amount of the

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

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

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

([74]) See footnote 34.

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

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

([77]) See footnote 35.

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

### 3. Classification of the scheme as unlawful aid

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

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

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

### 4. Compatibility of the aid scheme with the common market

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

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

([78]) See the table in recital 17.

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

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

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

*Compatibility of aid to the air transport sector*

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

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

a) on the basis of the 1998 guidelines on national regional aid, as amended in 2000 ([80]), for airlines operating from the outermost regions, with a view to offsetting the additional costs arising from the permanent handicaps suffered by those regions as identified in Article 299(2) of the Treaty; and

b) on the basis of the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ([81]), for new airlines departing from regional airports with an annual passenger volume of less than five million, up to 30 % of the costs strictly linked to their start-up over the first three years (or 40 % of the said costs over the first three years in the case of regional airports located in a disadvantaged region within the meaning of the guidelines).

([79]) OJ C 350, 10.12.1994, p. 5.
([80]) OJ C 258, 9.9.2000, p. 5.
([81]) OJ C 312, 9.12.2005, p. 1.

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

a) aircraft operated on a permanent basis by airlines departing from an outermost region, provided it can be proved that the maintenance of the aircraft was actually carried out in that region and that the aid is less than the additional costs incurred; and

b) aircraft operated by new airlines departing from a regional airport, up to the above-mentioned share of the eligible costs, provided the routes in question do not form the subject matter during the period concerned of a public service contract giving entitlement to financial compensation pursuant to Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ([82]).

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

*Compatibility of aid to the maritime transport sector*

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

— safeguarding employment in the Community (at sea and on shore)

— improving safety

— maintaining maritime know-how in the Community and improving maritime skills.

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

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

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

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

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

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

([82]) OJ L 240, 24.8.1992, p. 8.

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

([84]) See recital 38.

([85]) See recitals 25 and 26.

([86]) See recital 57.

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

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

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

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

*Compatibility of aid to the rail transport sector*

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

(176) In view of the historical situation of the railways and the fall in rail transport's market share, the process of replacing rolling stock must be speeded up in order to compete with other modes of transport. A more serious and urgent effort to modernise and/or renew rolling stock is needed if there is to be no further fall in rail transport's market share compared with other, less sustainable and more environmentally damaging, transport modes.

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

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

*Compatibility of aid to the industrial sector*

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

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

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

*Compatibility of aid to the financial sector*

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

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

([89]) OJ C 74, 10.3.1998, p. 9.

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

## 5. **Recovery**

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

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

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

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

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

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

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

([90]) OJ L 83, 27.3.1999, p. 1.

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

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

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

([94]) See recitals 153-155.

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

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

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

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

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

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

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

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

## VIII. **CONCLUSION**

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

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

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

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

([96]) Referred to above in footnote 16.

([97]) Referred to above in footnote 15.

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

([99]) See recitals 150-152.

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

HAS ADOPTED THIS DECISION:

*Article 1*

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

*Article 2*

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

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

(2) in the rail transport sector; and

(3) in the industrial sector, up to the maximum amounts permissible under the guidelines on national regional aid.

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

*Article 3*

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

*Article 4*

1. France shall take all necessary measures to recover from recipients aid granted unlawfully under the scheme referred to in Article 1, with the exception of aid granted as part of financing operations concerning which the competent national authorities have undertaken to grant the benefit of the said scheme by a legally binding act adopted before 13 April 2005 and the aid referred to in Article 2.

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

*Article 5*

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

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

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

*Article 6*

This Decision is addressed to France.

Done at Brussels, 20 December 2006.

*For the Commission*

Neelie KROES

*Member of the Commission*

([101]) OJ L 140, 30.4.2004, p. 1.

*ANNEX I*

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

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

*ANNEX II*

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

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

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

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

— capital:

— interest:

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

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

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

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

2.2. When will all the aid have been recovered?

3. *Information on individual recipients*

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

| Name of recipient | Amount of unlawful aid granted (*) Currency:.... | º Amounts reimbursed Currency:… |
|---|---|---|
| | | |
| | | |
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| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

(*) Amount of aid made available to the recipient (gross grant equivalent, price, etc.)
º Gross amounts reimbursed (including interest)

*ANNEX III*

## A — MARITIME AND AIR TRANSPORT

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

FOR EACH MARITIME OR AIR TRANSPORT COMPANY

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

B. Calculation of the aid to be reimbursed

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

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

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

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

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

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

## B — INDUSTRIAL INVESTMENTS AND THE CORRESPONDING EIGs

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

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

B. Regional aid ceiling for the region concerned

C. Calculation of the aid to be reimbursed

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

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

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

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

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

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

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