# COMMISSION DECISION (EU) 2015/1587

## of 7 May 2015

## on the State aid SA.35546 (2013/C) (ex 2012/NN) implemented by Portugal for Estaleiros Navais de Viana do Castelo S.A.

*(notified under document C(2015) 3036)*

**(Only the English text is authentic)**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.35546 (2013/C) (ex 2012/NN) ([1]),

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

Whereas:

### 1. PROCEDURE

(1) By e-mail of 3 October 2012, the Portuguese authorities informally submitted to the Commission a brief memorandum on the State measures seeking to maximise revenues from the privatisation of Estaleiros Navais de Viana do Castelo S.A. ('ENVC'). On the basis of the information provided, the Commission decided to open an *ex officio* case on 5 October 2012, registered with number SA.35546 (2012/CP). Portugal was informed of the opening of the case by letter of 11 October 2012.

(2) The Commission requested additional information by letter of 12 October 2012, to which Portugal replied by e-mail of 9 November 2012 and letter of 20 November 2012. It appeared from that information that ENVC had benefited in the past from a number of measures that might constitute State aid. A conference-call with the Portuguese authorities took place on 16 October 2012. At the request of the Portuguese authorities, a meeting between the Commission and the Portuguese authorities took place on 11 December 2012. Additional information was submitted by Portugal by letter of 28 December 2012 and by e-mail of 18 January 2013.

(3) By letter dated 23 January 2013, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid ('the opening decision').

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]), inviting interested parties to submit their comments on the measures. Portugal submitted its comments on the opening decision by letter dated 12 March 2013. The Commission received no observations from interested parties.

(5) Throughout the formal investigation procedure, Portugal submitted information in numerous occasions in reply to requests for information from the Commission. Moreover, the Commission and the Portuguese authorities held telephone conference-calls on 27 May 2013, 29 July 2013, 13 November 2013 and 20 January 2015. Also, a meeting between the Commission and the Portuguese authorities took place on 17 March 2014.

([1]) State aid — Portugal — State aid SA.35546 (2013/C) (ex 2012/NN) — Past measures in favour of Estaleiros Navais de Viana do Castelo S.A. — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 95, 3.4.2013, p. 118).

([2]) See footnote 1.

(6) By letter dated 27 February 2015, Portugal asked the Commission to confirm that any potential recovery obligation would not be extended to WestSea. In the same letter, Portugal agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation No 1/1958 ([3]) and to have the present decision adopted and notified in English.

## 2. BACKGROUND

### 2.1. **The beneficiary**

(7) ENVC was a Portuguese shipyard founded in 1944 and nationalised in 1975. It was fully owned by the State through *EMPORDEF — Empresa Portuguesa de Defesa (SGPS), S.A.* ('EMPORDEF'), a 100 % State-owned holding company controlling a number of State-owned enterprises in the defence sector.

(8) By the time of the opening decision of the Commission (see recital 3 above), ENVC employed some 638 employees and was the only shipyard in Portugal capable of constructing military vessels ([4]). ENVC's shipbuilding portfolio at that point in time was limited to the construction of two asphalt carriers commissioned by Petróleos de Venezuela S.A ('**PDVSA**'), a company 100 % owned by the Venezuelan State.

(9) ENVC used to operate on land under concession. This concession was first granted to ENVC in 1946 and subsequently modified in 1948, 1949 and 1974. In 1989 the concession area was extended in size and the duration — originally until 2006 — was extended until 2031 ([5]).

### 2.2. **The privatisation procedure**

(10) At the time of the opening decision, ENVC was still active on the market. By Decree-Law 186/2012, of 13 August 2012, the Government decided to re-privatise the company ([6]).

(11) The privatisation process was to be carried out within the framework of the Portuguese Privatisation Law ([7]). The specific rules governing the process, i.e. Decree-Law 186/2012 and Resolution of the Council of Ministers 73/2012, were published in the Portuguese Official Gazette on 13 and 29 August 2012 respectively ([8]). The Resolution of the Council of Ministers 73/2012 clarified that the privatisation was to be carried out by a direct sale — no tender — of up to 95 % of ENVC's share capital.

(12) Portugal indicated that over 70 potential investors were identified by EMPORDEF and its financial advisor. Three investors submitted binding offers by the deadline of 5 November 2012, but only two were considered eligible: Brazil's Rio Nave Serviços Navais and Russia's JSC River Sea Industrial Trading ([9]).

(13) By resolution of the Council of Ministers 27/2013, of 17 April 2013, the Portuguese Government decided to reject the only valid offer of JSC River Sea Industrial Trading (the offer of Rio Nave Serviços Navais had in the meantime expired) arguing that its conditions were excessive and could not be assumed.

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([3]) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

([4]) On the basis of the information provided by Portugal, it appears that the capacity in terms of workforce devoted to the construction of vessels for military purposes peaked in 2005 at 33 % of the total activity of ENVC (including construction, repairing, etc.). From 2006 to 2011, the average capacity devoted to military construction had been approximately 11 %, but in 2012 it fell to zero due to the cancellation of an order of the Portuguese Army to build military vessels.

([5]) The concession agreement was also modified in 2005 and 2007 to allow ENVC to sub-concession part of the land for the manufacturing of wind generators.

([6]) This process was not covered by the Memorandum of Understanding on specific economic policy conditionality signed between Portugal and the Commission, the International Monetary Fund and the European Central Bank.

([7]) *Lei Quadro das Privatizações*, approved by Law No 11/90 of 5 April 1990 and re-published by Law No 50/2011 of 13 September 2011.

([8]) *Diário da República* nº 156, 13.8.2012, p. 4364 and *Diário da República* nº 167, 29.8.2012, p. 4838, respectively.

([9]) Although Volstad Maritime submitted a binding offer on 5 November 2012, it was disqualified for submitting it after the deadline of 10 o'clock am.

(14) By Decree-Law 98/2013, of 24 July 2013, the Portuguese Government authorised ENVC to proceed to a sub-concession of the land on which it operated. The sub-concession procedure was initiated on 31 July 2013. Two bidders submitted offers, but only the one of Martifer-Energy Systems SGPS, S.A. jointly with Navalria-Docas, Construções e Reparações Navais, S.A. (through their join subsidiary WestSea) was considered eligible. Portugal confirmed that the offer of WestSea had been selected on 11 October 2013.

(15) In view of the financial situation of ENVC, which by mid-2013 had accumulated losses in excess of EUR 264 million, the Portuguese Government decided to liquidate ENVC by resolution of the Council of Ministers 86/2013, of 5 December 2013. At the same time, the Government instructed ENVC's Board of Directors to start selling the company's assets and to maximize their value through transparent sales.

(16) On 4 March 2014, ENVC held a general assembly in which EMPORDEF, as the sole shareholder of ENVC, confirmed the decision to proceed with the sale of the assets of ENVC as well as with the dismissal of the approximately 607 employees at that point in time, in order to liquidate and dissolve the company as soon as possible.

(17) After doing the necessary arrangements to comply with the decision of the general assembly of ENVC, selling the assets and dismissing the employees, the Portuguese Government requested the *Comissão de Recrutamento e Selecção para a Administração Pública* — CRESAP (the Portuguese Agency for the Selection and Recruitment of Senior Administration Officers) to nominate the liquidation team in charge of the liquidation of ENVC. The Portuguese authorities confirmed that ENVC will be liquidated in the coming months.

## 3. **DESCRIPTION OF THE MEASURES**

(18) On the basis of the information provided by Portugal in the course of the formal investigation procedure, it appears that ENVC benefited from several aid measures in the past ('**the past measures**').

(19) Some of the past measures were provided by EMPORDEF or by the Portuguese Treasury in order to cover operating costs and/or losses of ENVC between 2006 and 2013. The measures are summarised in table 1 below.

*Table 1*

**Past measures granted to cover operating costs and/or losses of ENVC**

| Date | Measure | Provider | Amount (in EUR) |
|---|---|---|---|
| 11 May 2006 | Capital increase of ENVC | EMPORDEF | 24 875 000 |
| 2012/2013 | Interest-bearing loans to cover operating costs — *see Annex I for details* | EMPORDEF | 101 118 066,03 |
| (i) 31 January 2006<br>(ii) 11 December 2008<br>(iii) 28 April 2010<br>(iv) 27 April 2011 | Loans to cope with operating costs | Direção-Geral do Tesouro e Finanças (DGTF) | (i) 30 000 000<br>(ii) 8 000 000<br>(iii) 5 000 000<br>(iv) 13 000 000 |

(20) On 11 May 2006, the General Assembly of ENVC (whose sole member was EMPORDEF) decided to proceed to an increase of ENVC's capital of EUR 24,875 million ('**the 2006 capital increase**') ([10]). According to Portugal, the 2006 capital increase was necessary to allow ENVC to honour its financial and commercial commitments (in particular with the Portuguese Navy) and was carried out bearing in mind a restructuring plan for ENVC dated 17 August 2005 (see recital 47 below). Portugal also notes that the 2006 capital increase was needed in order to comply with Article 35 of the Portuguese Companies Code ('*Código das Sociedades Comerciais*'), the alternatives being a reduction of ENVC's capital or the liquidation of the company.

(21) In 2012 and early 2013, several banks ceased providing loans to ENVC and were only willing to do so in relation to EMPORDEF. As a result, in order to ensure the continuation of activities by ENVC, EMPORDEF — as its sole shareholder — provided financial support to ENVC in the form of multiple interest-bearing loans amounting to a total of EUR 101 118 066,03 ('**the 2012 and 2013 loans**') ([11]). Portugal explains that these loans were granted to cover operating costs and to ensure the rollover of existing bank loans. The interest rates applicable to the 2012 and 2013 loans depend on each specific contract. Portugal claims that the interest rates applied by EMPORDEF to ENVC replicated the bank interest rates applicable to the underlying loans to EMPORDEF. As of February 2014, ENVC had neither reimbursed the 2012 and 2013 loans nor paid any interest.

(22) Finally, in 2006, 2008, 2010 and 2011, ENVC obtained financing for a total of EUR 56 million from the Portuguese Treasury ('*Direção-Geral do Tesouro e Finanças*' — DGTF) in the form of several loan agreements ('**the DGTF loans**'). Portugal states that the interest rates applicable were EURIBOR plus a variable spread depending on the contract. The DGTF loans were granted to cover previous outstanding financial responsibilities and cash requirements to cope with operating costs of ENVC. Portugal confirmed that the DGTF loans have not been repaid ([12]).

(23) Portugal also provided information about a number of other measures granted to ENVC in the past. The measures are summarised in table 2 below.

*Table 2*

**Other past measures granted to ENVC** ([1])

| Date | Measure | Provider | Amount (in EUR) |
|---|---|---|---|
| 29 November 2011 | Comfort letter for a loan granted by Banco Comercial Português (BCP) | EMPORDEF | 990 000 |
| 3 November 2011 | Comfort letter for a loan granted by BCP | EMPORDEF | 400 000 |
| 30 September 2010 | Comfort letter for a loan granted by BCP | EMPORDEF | 12 500 000 |
| 31 August 2010 | Comfort letters for two standby letters of credit issued by Caixa Geral de Depósitos (CGD) | EMPORDEF | 12 890 000 ([2]) |
| 24 June 2010 | Comfort letter for a loan granted by BCP | EMPORDEF | 5 000 000 |

([10]) In its submission of 28 December 2012, Portugal referred to a capital increase apparently carried out in 2009. However, in the course of the formal investigation procedure Portugal confirmed that no capital increase had taken place in 2009.

([11]) This measure includes the assumption by EMPORDEF of debt of ENVC towards Parvalorem in an amount of EUR 5 111 910,08, as well as interest accrued and not paid of EUR 5 281 882,02.

([12]) Portugal noted that ENVC paid interest in relation to the 2006 and 2008 DGTF loans on five occasions between 2006 and 2010, for a global amount of EUR 3 291 293,50.

| Date | Measure | Provider | Amount (in EUR) |
|---|---|---|---|
| 25 November 2009 | Comfort letter for revolving loan by CGD | EMPORDEF | 15 000 000 |
| 7 September 2009 | Comfort letter for revolving loan by Banco Espírito Santo (BES) | EMPORDEF | 4 500 000 |
| 26 June 2008 | Comfort letter for BCP as performance bonds in relation to two shipbuilding contracts | EMPORDEF | 14 512 500 |
| 8 January 2007 | Comfort letter for revolving loan by CGD | EMPORDEF | 5 000 000 |
| — | Aid for shipbuilding 2000-2005 ([3]) — *see Annex II for details* | DGTF | 27 129 933,20 |
| — | Aid for professional training 2005-2006 ([4]) | DGTF | 257 791 |
| 23 December 2009 | Loan for the construction of the Atlântida vessel | EMPORDEF | 37 000 000 |

([1]) The opening decision included among the other measures a comfort letter from EMPORDEF in relation to letters of credit issued by CGD, of EUR 12 890 000. During the formal investigation procedure, Portugal clarified that this measure is the one described in recital 24.

([2]) During the formal investigation procedure, Portugal clarified that the amount subject to the standby letters of credit was EUR 12 890 000, i.e. 10 % of the construction costs of the two asphalt carriers (EUR 128 900 000). In addition, Portugal clarified that the contract for the emission of the standby letters of credit was entered into in 2010 and not 2012 as stated in the opening decision.

([3]) According to the information provided by Portugal, the aid for shipbuilding purposes was provided in the form of subsidies linked to 14 contracts in the period 2000-2005, and not 2000-2007 as indicated in the opening decision.

([4]) Portugal has clarified that the aid for professional training was provided in 2005 and 2006 and not in the period 2000-2007 as indicated in the opening decision.

(24) In 2010, ENVC entered into a contract with PDVSA for the construction of two asphalt carriers. The contract value for each vessel was EUR 64,45 million, totalling EUR 128,9 million. According to the construction contract, PDVSA was to make an advanced down payment to ENVC of 10 % of the total price of the contract, i.e. EUR 12,89 million, with the precedent condition of obtaining two standby letters of credit, which served the purpose of guaranteeing PDVSA's down payment in case ENVC would fail to comply with its contractual obligations. The two standby letters of credit were issued by CGD on the basis of comfort letters from EMPORDEF and were withdrawn on 28 February 2014 and 31 March 2014.

(25) Portugal also explains that between 2007 and 2011 EMPORDEF issued numerous other comfort letters and guarantees in support of financing agreements between ENVC and commercial banks (the comfort letters detailed in recital 24 above and in the present recital will be jointly referred to as '**the comfort letters**' — they total EUR 70 792 500). Portugal notes that EMPORDEF never charged ENVC for the comfort letters.

(26) Between 2000 and 2005, ENVC received numerous subsidies for shipbuilding activities amounting to EUR 27 129 933,20 ('**the shipbuilding subsidies**'). This amount corresponds to multiple non-refundable subsidies for the construction of a number of vessels and tankers, which Portugal claims were provided according to Decree-Law 296/89 implementing Council Directive 87/167/EEC ([13]).

([13]) Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ L 69, 12.3.1987, p. 55).

(27) ENVC also received financial aid for professional training amounting to EUR 257 791 ('**the professional training subsidies**') in 2005 and 2006 under the Operational Programme for Employment, Training and Social Development (POEFDS) sponsored by the European Social Fund.

(28) In relation to the Atlântida vessel, Portugal explains that its construction was subject to an international public tender in 2006, in which only ENVC and one more company participated. However, both offers were rejected because they did not comply with the necessary requirements of the tender. The construction of the vessels was awarded to ENVC at a later stage through direct negotiation with Atlanticoline, the public company responsible for the ocean transportation in Azores. The initial value of the contract for the Atlântida vessel was EUR 39,95 million, subsequently increased to EUR 45,35 million. At a later point in time, Atlanticoline terminated its contract with ENVC claiming that the Atlântida vessel was incapable of reaching the stipulated speed.

(29) In order to put an end to the conflict between Atlanticoline and ENVC, EMPORDEF received a loan from CGD for an amount of EUR 37 million on 23 December 2009. The loan agreement specified that the loan was to be used by EMPORDEF to provide ENVC with the necessary funds to allow ENVC to put an end to the proceedings with Atlanticoline. The interest rate charged was 6-month EURIBOR plus a 2 % spread ('**the loan for the Atlântida vessel**').

(30) The finished vessel was tendered out in the course of 2014. This sale procedure was publicised in national and international newspapers and the price was the sole criterion for choosing the winner of the tender. The purchase agreement with the buyer (Mystic Cruises SA) for EUR 8,75 million was signed on 30 September 2014.

## 4. THE OPENING DECISION

(31) On 23 January 2013, the Commission decided to open the formal investigation procedure. In its opening decision, the Commission's preliminary view was that ENVC could be considered a firm in difficulty in the sense of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([14]) ('**the 2004 R&R Guidelines**'), in particular in view of ENVC's significant losses since at least 2000.

(32) Although the Commission highlighted in its opening decision that it had been provided with limited information on the past measures, it came to the preliminary view that all of them entailed State resources and were imputable to the State ([15]). The Commission was also of the preliminary opinion that the past measures provided ENVC with an undue advantage, given that it seemed unlikely that any rational private operator would have provided ENVC with the past measures given the difficulties of ENVC at the time. The advantage would be selective in nature given that its sole beneficiary was ENVC.

(33) The Commission also noted that the past measures were likely to affect trade between Member States as ENVC was in competition with shipyards from other Members States of the European Union as well as from the rest of the world. The past measures therefore enabled ENVC to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results.

(34) On the basis of the above, the Commission's preliminary view was that the past measures seemed to constitute State aid within the meaning of Article 107(1) TFEU. Also, since the past measures would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU, the Commission noted that they appeared to constitute unlawful State aid.

([14]) OJ C 244, 1.10.2004, p. 2. On 1 August 2014 entered into force the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1) ('the 2014 R&R Guidelines'). According to point 135 of the 2014 R&R Guidelines, the Commission will apply these guidelines with effect from 1 August 2014 until 31 December 2020. However, in accordance with point 138 of the 2014 R&R Guidelines, the past measures subject to the present decision are to be assessed on the basis of the guidelines which applied at the time the aid was granted, i.e. the 2004 R&R Guidelines (or where applicable the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2 — 'the 1999 R&R Guidelines').

([15]) As regards EMPORDEF, the Commission observed in recitals 46 to 48 of the opening decision that its decisions seemed imputable to the Portuguese State within the meaning of the *Stardust Marine* case-law (judgment in *France v Commission*, C-482/99, EU:C:2002:294).

(35) The Commission also expressed doubts on the compatibility with the internal market of the past measures, in particular since the Portuguese authorities did not provide any possible grounds for compatibility.

(36) The Commission nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would *prima facie* be applicable to the past measures. After discarding the applicability of the exceptions laid down in Article 107(2) TFEU, the Commission preliminarily observed that only the exception laid down in point (c) of Article 107(3) TFEU could apply.

(37) The Commission noted that the past measures did not appear to have been granted pursuant to the specific State aid rules applicable the shipbuilding industry at the time the past measures were granted, i.e. the Framework on State aid to shipbuilding ([16]) or its predecessors ([17]). In view of the fact that ENVC seemed to be a firm in difficulty within the meaning of the 2004 R&R Guidelines at the time when the past measures were provided, the Commission noted that only relevant compatibility basis appeared to be the one concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU, i.e. the 2004 R&R Guidelines.

(38) The Commission noted that the conditions for rescue aid laid down in section 3.1 of the 2004 R&R Guidelines did not seem to be met. Also, in relation to restructuring aid as defined in section 3.2 of the 2004 R&R Guidelines, the Commission observed that Portugal failed to demonstrate that any of the necessary elements for the past measures to be considered compatible restructuring aid (restructuring plan, own contribution, compensatory measures, etc.) were present. The Commission therefore lacked evidence whether any of the past measures could be found compatible on the basis of the R&R Guidelines as rescue or restructuring aid.

(39) In view of the above, the Commission expressed doubts on the compatibility of the past measures in favour of ENVC with the internal market.

(40) In addition, the Commission made a number of observations on the measures planned by Portugal in the context of the privatization of ENVC. Although the planned measures accompanying the privatisation of ENVC were not subject to the opening decision, the Commission, in view of the economic situation of ENVC and the nature of the planned measures, considered it likely that those measures would contain State aid. However, the Commission observes that Portugal rejected the only valid offer for the privatization of ENVC and that it decided to liquidate the company instead (see recitals 14 to 15 above). On this basis, the Commission understands that the planned measures accompanying the privatisation of ENVC were not provided and will therefore not be considered in the present decision.

## 5. COMMENTS OF PORTUGAL ON THE OPENING DECISION

(41) In its comments on the Commission's opening decision, Portugal noted that despite the losses that ENVC had accumulated since 2000, and in particular since 2009, the decision to keep the company afloat by providing it with sufficient means was a rational option for EMPORDEF in line with the logic of the market economy operator ('MEO') principle.

(42) As regards the difficulties of ENVC, Portugal noted that the gravity of its financial situation became evident only in 2009/2010 and that its irreversibility was only recognised in the annual accounts of the company of 2012.

(43) Portugal also explained that the **2006 capital increase** was due to a legal obligation on the basis of Article 35 of the Portuguese Companies Code. According to this provision, when half of the share capital of a given company is lost, (i) the company must be dissolved, (ii) the share capital must be reduced for an amount not lower than the equity ('*capital próprio*') of the company, or (iii) the shareholders of the company must contribute to the share capital. It is on this basis that the shareholders of ENVC decided in 2006 to inject EUR 24,875 million of capital into the company.

([16]) OJ C 364, 14.12.2011, p. 9.
([17]) Namely the 2004 Framework on State aid to shipbuilding (OJ C 317, 30.12.2003, p. 11) and Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1).

(44) According to Portugal, this decision was taken in the belief that the alternative options under Article 35 of the Portuguese Companies Code would not allow ENVC to honour its financial and commercial commitments (in particular with the Portuguese Navy). As of 2006, ENVC had in its order book 15 construction projects for a global amount of EUR 386 million.

(45) Portugal claims that a market economy investor would have opted as well for increasing the capital of ENVC and allowing it to continue operating, thereby reinforcing its competitiveness in the shipbuilding market.

(46) In its submission of 14 February 2014, Portugal indicated that the decision to proceed to the 2006 capital increase was taken having in mind not only the portfolio of the company but also a restructuring plan for ENVC dated August 2005.

(47) The restructuring plan, a draft of which was provided, was prepared by Banco Português de Investimento S.A. ('BPI') and covered the period 2005-2009. According to the restructuring plan, ENVC would need to focus on military activities in order to return to viability although it acknowledged that the financial and economic sustainability of ENVC was conditional on management capacity, the fulfilment of the existing contracts and the evolution of the shipbuilding market.

(48) The restructuring plan did not quantify the costs associated to the non-fulfilment of the contracts available to ENVC at the time. However, the costs associated to closing down the company (including the dismissal of the employees and the regularization of liabilities) were estimated at EUR 175 million. According to Portugal, in view of the fact that liquidation was more onerous than the capital increase, the former line of action was not retained.

(49) Portugal further explains that the restructuring plan acknowledged the need for support to ENVC, since the company was not able on its own to continue operations in 2005-2007. However, Portugal observes that a 2009 report of the *Inspecção-Geral de Finanças* — IGF (the entity charged of supervising the Portuguese public companies) noted that the restructuring plan of ENVC had not been sufficiently implemented and that the financial and economic forecasts for the period 2008-2011 were too optimistic.

(50) In relation to **the 2012 and 2013 loans**, Portugal claims that the interest rates applied to ENVC were the same as those that EMPORDEF managed to obtain from the market. Therefore, the interest rates should be considered at market terms and free of aid. According to Portugal, since EMPORDEF was the sole shareholder of ENVC, it could be considered liable at last instance for the debts and liabilities of ENVC. Therefore, Portugal claims that EMPORDEF did not increase its risk by exposing it further to ENVC by means of the 2012 and 2013 loans.

(51) In its submission of 14 February 2014, Portugal clarified that as of February 2014, ENVC had neither reimbursed the 2012 and 2013 loans nor paid any interest. Moreover, Portugal also noted that the loans to ENVC were, when necessary, accompanied by comfort letters issued by EMPORDEF.

(52) Concerning **the DGTF loans** granted in 2006, 2008, 2010 and 2011, Portugal is of the view that they were provided on market terms since the interest rate applied was EURIBOR plus a variable spread depending on each loan contract. Portugal also notes that the DGTF loans were provided bearing in mind the order book of ENVC, which would create reasonable expectations that ENVC would be able to pay back the loans.

(53) Portugal also highlights that the use of **comfort letters** is normal between private operators as a mechanism to guarantee access to the financial markets for companies with a lower borrowing capacity. Portugal notes that EMPORDEF would in any case be considered liable in last instance for the debts of ENVC given that it was its sole shareholder. In any event, Portugal acknowledges that EMPORDEF never charged ENVC for the comfort letters.

(54) As regards **the shipbuilding subsidies**, Portugal claims that they were provided according to Decree-Law 296/89 — implementing Directive 87/167/EEC — and that they would therefore constitute compatible aid to the shipbuilding industry. Concerning **the professional training subsidies**, Portugal claims that they were provided to all companies fulfilling the regulatory conditions and that therefore they would not have provided ENVC with an undue selective advantage.

(55) In relation to **the Atlântida vessel**, Portugal observes that as of June 2012 its market value was estimated at EUR 29,24 million, taking into consideration *inter alia* the economic obsolescence and the physical and functional depreciation. In this context, Portugal claims that there are no reasons to consider that the construction of the vessel entailed an undue advantage to ENVC, bearing in mind that the cost of construction exceeded the contractual price.

## 6. **ASSESSMENT OF THE MEASURES**

(56) This decision addresses as a preliminary point the issue of whether ENVC is a firm in difficulty in the sense of the 2004 R&R Guidelines ([18]). It then analyses whether the measures under scrutiny entail State aid to ENVC in the meaning of Article 107(1) TFEU and then whether such aid, were it to be present, is lawful and compatible with the internal market.

### 6.1. **Difficulties of ENVC**

(57) As noted above in recital 42, Portugal claims that the gravity of ENVC's financial situation became evident only in 2009/2010 and that its irreversibility was only recognised in the annual accounts of the company of 2012.

(58) The Commission reiterates the views it expressed in its opening decision. According to recital 9 of the 2004 R&R Guidelines, the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

(59) Recital 10 of the 2004 R&R Guidelines clarifies that a limited liability company is regarded as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(60) Recital 11 of the 2004 R&R Guidelines adds that, even if the conditions in recital 10 are not satisfied, a firm may be considered to be in difficulty in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(61) The Commission observes that ENVC is a limited liability company which has continuously registered significant losses since at least 2000 (see table 3 below):

*Table 3*

**Net results of ENVC between 2000 and 2013**

| | Net result (in EUR million) |
|---|---|
| 2000 | – 2,72 |
| 2001 | – 4,98 |
| 2002 | – 11,12 |

([18]) See footnote 14 above.

| | Net result (in EUR million) |
|---|---|
| 2003 | – 26,87 |
| 2004 | – 27,02 |
| 2005 | – 14,38 |
| 2006 | – 5,26 |
| 2007 | – 8,04 |
| 2008 | – 12,07 |
| 2009 | – 22,26 |
| 2010 | – 41,90 |
| 2011 | – 22,70 |
| 2012 | – 8,78 |
| 2013 | – 52,42 |

*Source:* annual accounts of EMPORDEF for 2006, 2007, 2008, 2012 and 2013 (available at http://www.empordef.pt/main.html), annual accounts of ENVC for 2001, 2002, 2003, 2009, 2010 and 2011.

(62) In addition to the significant losses of ENVC, which constitute a first indication of the difficulties of the company, some of the other usual signs of a firm in difficulty in the sense of the 2004 R&R Guidelines are also present. For instance, ENVC's turnover was in constant decrease since at least 2008, passing from EUR 129,62 million in that year to EUR 55,58 million in 2009, EUR 20,22 million in 2010 and EUR 15,11 million in 2011. Although in 2012 there was an increase in turnover (EUR 30,38 million) due to some additional works for a logistic support vessel ([19]), this was a one-off event and in 2013 the turnover plummeted again to EUR 3,79 million.

(63) In addition, ENVC had negative equity since at least 2009: EUR -25,62 million in 2009, EUR -74,49 million in 2010, EUR -129,63 million in 2011, EUR -142,45 million in 2012 and EUR -193,46 million in 2013 ([20]).

(64) According to Portugal (see recital 43 above), the 2006 capital increase was needed in order to comply with Article 35 of the Portuguese Companies Code, the alternatives being a reduction of ENVC's capital or the liquidation of the company. Moreover, the restructuring plan prepared by BPI dated August 2005 (see recital 47 above), highlights that since the end of 2003, ENVC was in a situation of technical bankruptcy ('*falência técnica*'). Finally, the Commission observes that the 2009 report of the IGF indicates that as of 31 December 2005 and at the end of 2008, ENVC was again in a situation of technical bankruptcy. Therefore, it appears that at those points in time when ENVC was in technical bankruptcy it showed all the signs of bankruptcy except that it had not been formally declared bankrupt by the competent court. This suggests that the company fulfilled the criteria under domestic law for being the subject of collective insolvency proceedings, in line with recital 10 of the 2004 R&R Guidelines at least at the end of 2003, 2005 and 2008.

(65) In view of the above, the Commission concludes that ENVC was a firm in difficulty within the meaning of the 2004 R&R Guidelines at the time when all the past measures were granted.

([19]) Source: annual accounts of EMPORDEF for 2012.
([20]) Source: annual accounts of EMPORDEF for 2012 and 2013. From the annual accounts of ENVC for 2001, 2002 and 2003, it results that ENVC also had negative total equity in 2000 (EUR -5,99 million), 2001 (EUR -10,97 million), 2002 (EUR -22,09 million) and 2003 (EUR -48,97 million).

### 6.2. **Existence of aid**

(66) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(67) In order to conclude on whether State aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of State resources, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the measures identified.

(68) The Commission already notes in this respect that Portugal does not contest the State aid character of the **shipbuilding subsidies** since they were — according to the Portuguese authorities — provided according to Decree-Law 296/89 implementing Directive 87/167/EEC. The Commission will assess their compatibility with the internal market in section 6.4 below.

(69) In relation to the **professional training subsidies** provided in 2005 and 2006 amounting to EUR 257 791, Portugal states that they were granted under the Operational Programme for Employment, Training and Social Development (POEFDS) sponsored by the European Social Fund. The Commission observes that these funds constitute *per se* State aid since they were provided by the Member State in the context of the Structural Funds 2000-2006. Therefore, the Commission will directly assess their compatibility with the internal market in section 6.4 below.

#### 6.2.1. *State resources and imputability*

(70) Portugal does not dispute the preliminary findings of the Commission as per the opening decision in relation to the presence of State resources and imputability.

(71) In the first place, the Commission highlights that the DGTF loans, the shipbuilding subsidies and the professional training subsidies were provided directly from the State budget (mainly through the DGTF) and therefore there is no doubt that these past measures entail State resources and are imputable to the State.

(72) As regards EMPORDEF, the Commission also considers that its actions entailed State resources (given that the budget of EMPORDEF is provided directly by the State) and that those actions are imputable to the State in the sense of the *Stardust Marine* case-law ([21]). In the first place, the Commission notes that this is a public holding 100 % owned by the State: the sole shareholder of EMPORDEF on behalf of the State is the DGTF. Moreover, EMPORDEF is under the direct supervision of the Ministry of Finance and Public Administrations, as regards financial supervision, and the Ministry of National Defence, as regards sectorial supervision ([22]).

(73) In addition, according to the web page of EMPORDEF, its operations are consistent with the objectives, policies and goals established by its sole shareholder, i.e. the State ([23]). Moreover, the President of EMPORDEF and its Executive Directors are nominated directly by the Minister of National Defence ([24]).

([21]) Judgment in *France v Commission*, C-482/99, EU:C:2002:29.
([22]) Source: http://www.empordef.pt/main.html.
([23]) Source: http://www.empordef.pt/uk/main.html.
([24]) See list of nominations in the web page of the Ministry of National Defence (http://www.portugal.gov.pt/pt/o-governo/nomeacoes/ministerio-da-defesa-nacional.aspx). See in addition EMPORDEF's web page (http://www.empordef.pt/main.html) as well as several press releases, for example http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1768612 or http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1950754.

(74) In addition to the above, the rules governing the planned privatisation of ENVC (see section 2.2 above) clearly indicated that the final decision was to be taken by the Portuguese Government and not by EMPORDEF. In terms of indirect evidence, the Commission observes that on 4 January 2012, the Portuguese Ministry of National Defence issued a press release stating the following: 'on 2 July 2011, the Ministry of National Defence decided to suspend the decommissioning of [ENVC]. In August, the Ministry of National Defence mandated the new administration of EMPORDEF to find a solution that would avoid the decommissioning and closure of ENVC' ([25]). Furthermore, on multiple occasions the Minister of National Defence publicly announced the steps to be undertaken as regards the planned privatisation of ENVC ([26]). Once the privatisation plans were discarded, the Portuguese Government empowered EMPORDEF to take the necessary measures as regards ENVC ([27]).

(75) In light of the above, the Commission concludes that EMPORDEF's actions are imputable to the State and that the past measures it granted to ENVC entailed State resources.

6.2.2. *Selective advantage*

(76) As regards whether the past measures provided ENVC with an undue selective advantage, the Commission observes that Portugal considers that this is not the case for most of the past measures since they would be in line with the MEO principle.

(77) In its opening decision, the Commission indicated that despite the limited information available at the time, it seemed unlikely that any rational private operator would have provided ENVC with the past measures. Indeed, given the difficulties of ENVC at the time, the Commission was of the preliminary view that a rational market operator, operating under market conditions, would not have provided such financing to a company like ENVC. The Commission also preliminarily concluded the advantage would be selective in nature given that its sole beneficiary was ENVC.

(78) As regards the **2006 capital increase**, the Commission does not share the opinion of Portugal that a MEO would have opted for increasing the capital of ENVC — instead of liquidating it — in order to allow the company to continue operating in the shipbuilding market, in particular in view of the order book at the time of 15 construction projects for an amount of EUR 386 million (see recital 44 above).

(79) In the first place, the Commission observes that a rational market operator would have taken into consideration whether it would be more economically rational to liquidate the company or to provide additional capital, bearing in mind the poor financial performance of ENVC between 2000 and 2006 and considering as well the measures already granted by the State to ENVC before the 2006 capital increase (i.e. one of the DGTF loans for an amount of EUR 30 million granted in January/February 2006, the shipbuilding subsidies in excess of EUR 27 million and the professional training subsidies).

(80) Although the amount of the book order seemed to exceed the amount resulting from those past measures, the Commission is of the view that a rational market operator would have also taken into consideration the probability that ENVC would have been able to carry out the constructions at a profit and/or within the

([25]) The original text in Portuguese is as follows: *'[…] no passado dia 2 de julho de 2011 o Ministério da Defesa Nacional decidiu suspender o desmantelamento dos Estaleiros Navais de Viana do Castelo. Em agosto, o Ministério da Defesa Nacional mandatou a nova administração da Empordef para que fosse encontrada uma solução que evitasse esse desmantelamento e encerramento dos ENVC*'. See http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120104-mdn-envc.aspx.

([26]) See for instance http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120319-mdn-modelo-reprivatizacao.aspx, http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120502-mdn-envc.aspx and http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120713-seamdn-envc.aspx.

([27]) See for instance http://www.portugal.gov.pt/pt/os-ministerios/ministro-da-presidencia-e-dos-assuntos-parlamentares/documentos-oficiais/20131205-comunicado-cm.aspx. The involvement of the State in the actions of EMPORDEF is further evidenced by the following press release of the Portuguese Government: http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20140205-mdn-comunicado-estaleiros.aspx.

contractual deadlines so as to avoid the payment of penalties ([28]). According to the information provided by Portugal, nothing suggests that EMPORDEF made these considerations at the time of carrying out the 2006 capital increase.

(81) In addition, Portugal notes that according to the restructuring plan prepared by BPI in August 2005, the costs associated to closing down ENVC were estimated at EUR 175 million. According to Portugal, in view of the fact that liquidation was more onerous than the capital increase, the former line of action was not retained.

(82) In this regard, the Commission observes that the estimation made by BPI in the restructuring plan is not backed by evidence. On this basis, the Commission is not able to assess the accuracy of this estimation and conclude whether indeed it was more economically rational for EMPORDEF to carry out the capital increase than to proceed to the liquidation of the company.

(83) Moreover, the Commission observes that the restructuring plan prepared by BPI noted that ENVC on its own did not have the capacity to return to viability and that it needed external funds in an amount of EUR 45-50 million in a base case and EUR 70-80 million is a pessimistic case. The amount of the 2006 capital increase (EUR 24,875 million) remains significantly short from these estimations and would not have allowed ENVC to return to viability.

(84) Finally, the Commission takes notes that ENVC was in need of in-depth restructuring as acknowledged by the restructuring plan prepared by BPI. Although the restructuring plan is merely a draft, it already indicates the difficulties of ENVC and the need for additional external funds. However, the restructuring plan makes clear that the return of ENVC to viability would significantly depend on the capacity of the management of the company to honour its contracts and the evolution of the shipbuilding markets. In this respect, the Commission observes that Portugal has provided no evidence that EMPORDEF took these elements into consideration when carrying out the 2006 capital increase, which — in any event — would fall short from the amounts estimated by the restructuring plan to allow the company to return to viability.

(85) In view of the above, the Commission comes to the conclusion that a prudent market economy operator would not have provided the 2006 capital increase and therefore that it entailed an undue advantage to ENVC.

(86) As regards the **2012 and 2013 loans** provided by EMPORDEF for a global amount of EUR 101 118 066,03, it results on the basis of the information provided by Portugal that in the course of 2012 EMPORDEF signed 70 contracts with ENVC, normally short-term with 90-day maturity. The loans were granted for several different amounts and had different interest rates, mainly 3-month EURIBOR plus a margin. However, some contracts had a fixed interest rate, in particular the contracts signed from October 2012 onwards (see for example the contracts signed on 30 March 2012 for EUR 16,7 million with an interest rate of 2 %, on 2 November 2012 for EUR 10,570 million with an interest rate of 5,871 % or on 1 December 2012 for EUR 1 million with the same interest rate of 5,871 %). It also appears that the loan contracts were not collateralised.

(87) Portugal argues the absence of aid in the DGTF loans given that EMPORDEF applied to ENVC the same interest rates it received from the market. Since in any event EMPORDEF would be considered liable for the debts and liabilities of ENVC, given that it was its sole shareholder, Portugal claims that EMPORDEF did not increase its risk by exposing it further to ENVC.

(88) In the first place, it does not appear that EMPORDEF would be liable for all the debts and liabilities of ENVC, given that EMPORDEF and ENVC are limited liability companies ('*sociedade anónima*'). As a general rule, in limited liability companies the liability of the members (participation holders) is limited to the face value of their shares according to Article 271 of Portuguese Companies Code ([29]). On this basis, by providing the 2012 and 2013 loans to ENVC, EMPORDEF would have incurred additional risks going beyond its shares in the company.

([28]) In this respect, the Commission observes as *ex post* evidence that the 2009 report of the IGF (see recital 49) highlighted that in 2005-2007 ENVC delivered 11 vessels whose construction costs exceeded by 15,4 % the agreed contractual costs (to be noted that already the costs budgeted by ENVC exceeded by 4,1 % the contractually agreed costs, which meant that in any event the company would build the vessels at a loss).

([29]) Source: http://ec.europa.eu/enterprise/policies/sme/business-environment/files/annexes_accounting_report_2011/portugal_en.pdf.

(89) In any event, irrespective of the above, the Commission considers that EMPORDEF did not act as a rational market investor when providing the 2012 and 2013 loans to ENVC. At that point in time, the financial situation of ENVC was extremely difficult: its losses in the previous year had reached EUR 22,70 million (see table 3 above) and its negative equity was of EUR -129,63 million (see recital 63 above). In view of the difficulties of ENVC, the Commission considers that a market economy investor would have assessed the financial situation of ENVC and analysed the ability of the company to pay back the loans and the interests. In this respect, the Commission observes that several financial institutions — in relation to which the Commission has no reason to suspect that they did not operate as market investors — had refused to provide loans directly to ENVC. This in itself indicates that the markets no longer believed that ENVC would be able to repay the loans.

(90) By merely replicating the interests it obtained for the loans in the market, EMPORDEF provided an undue advantage to ENVC, since the latter would not have been able to obtain those conditions — as a matter of fact, ENVC did not get any of the loans from the market. Although some of the interest rates applied by EMPORDEF to ENVC could appear relatively high (e.g. 3-month EURIBOR plus 8,431 % for the contract signed on 30 May 2012), the Commission considers that no private financial institution would have provided such a loan with no collateralisation to a firm clearly in difficulty.

(91) The Commission also notes that once the first contracts had reached their 90-day maturity, EMPORDEF would have been able to observe that ENVC had neither repaid the principal nor paid any interest (see recital 51 above). On this basis, the Commission considers that a rational market operator would not have provided additional loans to ENVC.

(92) The Commission therefore concludes that the 2012 and 2013 loans entailed an undue advantage to ENVC.

(93) The Commission will now assess whether **the DGTF loans** for an amount of EUR 56 million provided ENVC with an undue advantage. Portugal indicates that these loans had an interest rate of 6-month EURIBOR plus a variable spread depending on each contract. According to Portugal, this remuneration would be satisfactory for an investor, thereby excluding the presence of an undue advantage and this of State aid. Portugal also notes that the DGTF loans were provided bearing in mind the order book of ENVC.

(94) The Commission cannot share the views of Portugal that setting an interest rate corresponding to 6-month EURIBOR plus a variable spread would make the DGTF loans market-conform. Table 4 below summarises the total interest rate applicable to the DGTF loans at the time of their signature:

*Table 4*

**Total interest rate applicable to the DGTF loans**

| Date of signature of the contract | Amount in EUR | 6-month EURIBOR (a) (%) | Spread [1] (b) | Total interest rate (a)+(b) (%) |
|---|---|---|---|---|
| 31 January 2006 | 30 000 000 | 2,698 | 150bp | 4,198 [2] |
| 11 December 2008 | 8 000 000 | 3,417 | 100bp | 4,417 |
| 28 April 2010 | 5 000 000 | 0,964 | 100bp | 1,964 |
| 27 April 2011 (paid out in two instalments in April 2011 and in June 2011) | 13 000 000 | 1,661 | 3,907 % (April 2011)<br>3,580 % (June 2011) | 5,568 (April 2011)<br>5,241 (June 2011) |

[1] For the contract signed on 27 April 2011, the applicable spread was the Mid Asset Swap spread of Portuguese public debt with equivalent maturity (data provided by Portugal).

[2] As of 2010, the interest rate was aligned with that of the loan of 11 December 2008.

(95) In order to ascertain the market-conformity of the interest rates applied to the DGTF loans, the Commission will use as the best available proxy the reference rates resulting from the applicable rules at the time.

(96) First, as indicated in section 6.1 above, the Commission considers that in 2006 and 2008 ENVC would qualify as a firm in difficulty. As regards in particular the 2006 DGTF loan, the Commission observes that according to the 2009 report of the IGF, as of 31 December 2005, ENVC was in a situation of technical bankruptcy. As regards the 2008 DGTF loan, the same report indicates that as of the end of 2008 ENVC was again in a situation of technical bankruptcy (see recital 64 above).

(97) In particular, concerning the 2006 DGTF loan, the Commission notice on the method for setting the reference and discount rates of 1997 ([30]), applicable at the time, established that the base rate (3,70 % in Portugal in January 2006) ([31]) was to be increased by a premium amounting to 400bp or more in situations involving a particular risk. In this respect, the Commission highlights the difficulties of ENVC at the time and the fact that it was in a situation of technical bankruptcy. Also, according to the 2006 DGTF loan contract, ENVC agreed to have as collateral the revenues resulting from the construction of certain vessels for the Portuguese Navy. However, it is unclear whether a market-oriented lender would have accepted such collateral in view of ENVC's problems to carry out the constructions at a profit and/or within the contractual deadlines (see in this respect recital 80 and footnote 28 above). In any event, the Commission has not been provided with evidence allowing it to examine those construction contracts. The Commission therefore considers that applying a margin of at least 400bp would be reasonable. As a result, the applicable reference rate would be at least 7,70 %, which is well above the interest rate of 4,198 % actually applied by the DGTF.

(98) As regards the 2008 DGTF loan, the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008 ([32]), applicable at the time, established that to the base rate (2,05 % in Portugal in December 2008) ([33]) a margin was to be applied depending on the rating of the undertaking concerned and the level of collateralisation offered. In view of the difficulties of ENVC at the time and the low level of collateralisation (see recital 97 above, which applies *mutatis mutandis*), the applicable margin would be at least 1 000bp. As a result, the applicable reference rate would be at the very least 12,05 %, also above the interest rate of 4,417 % actually applied by the DGTF.

(99) In relation to the 2010 and 2011 DGTF loans, the Commission reiterates its views that ENVC qualifies as a firm in difficulty at the moment the loans were granted (see section 6.1 above). According to the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008, applicable at the time, the base rate applicable for Portugal was 1,24 % in April 2008 and 1,49 % in April 2011.

(100) As regards the 2010 DGTF loan, the Commission observes that there is no strict collateralisation but merely a promise by ENVC to use the revenues resulting from a given framework-contract with the Ministry of National Defence to repay the loan. On this basis, and bearing in mind the difficulties of ENVC at the time, the Commission is of the view that the applicable margin should be at least 1 000bp. Therefore, the applicable reference rate would be at least 11,24 %, compared to the much lower 1,964 % charged by the DGTF.

(101) Finally, as regards the 2011 DGTF loan, the Commission observes that, as in the case of the 2010 DGTF loan, there is strictly speaking no collateralisation but merely a promise by ENVC to use the revenues resulting from a given framework-contract with the Ministry of National Defence to repay the loan, which moreover had to be confirmed by the Administration Board of ENVC and approved by the Ministry of National Defence. It is thus highly doubtful that this level of collateralisation could be considered adequate by a market-oriented lender. Therefore, given that ENVC was at the time a firm in difficulty, the Commission considers that the applicable margin should be at least 1 000bp, which would result in a reference rate of at least 11,49 %, much higher than the interest rates actually applied to ENVC (5,568 % in April 2011 and 5,241 % in June 2011).

(102) Bearing in mind the above, the Commission comes to the conclusion that the DGTF loans provided ENVC with an undue advantage.

([30]) OJ C 273, 9.9.1997, p. 3.
([31]) Source: http://ec.europa.eu/competition/state_aid/legislation/reference_rates_eu25_en.pdf.
([32]) OJ C 14, 19.1.2008, p. 6.
([33]) Source: http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf.

(103) In what relates to **the comfort letters** issued by EMPORDEF between 2007 and 2011, the Commission first observes that they appear to have a very similar nature to a guarantee, since in most of these letters EMPORDEF specifically stated that it would do everything necessary to make sure that ENVC would have the necessary means available to honour the underlying loan agreement. However, the comfort letters dated 8 January 2007 and 26 June 2008 have a different wording. In these letters, EMPORDEF notes that it owns ENVC at 100 % and that this shareholding will not be diminished; otherwise the granting bank is allowed to ask ENVC to pay back the loan before maturity. This statement alone does not allow the Commission to consider that EMPORDEF would be liable for ENVC's default on the respective loans and therefore it does not appear adequate to assimilate them to guarantees. It is therefore not established that these letters have provided an advantage to ENVC.

(104) As regards the rest of the comfort letters (i.e. the ones provided in 2009, 2010 and 2011), given that EMPORDEF declares to be ready to step in if ENVC does not honour the underlying loan contract, it appears clear that they are equivalent to a guarantee, since EMPORDEF reassures the granting financial institution by undertaking to do everything necessary for ENVC to have the means available to pay back the loans. A normal market operator would have asked a premium in exchange for providing this type of 'guarantee', which however EMPORDEF never did despite the significant risk that ENVC would not be able to repay the loans in view of its difficulties at the time.

(105) According to section 2.2 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([34]) ('the Guarantee Notice'), 'risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms'. It is thus necessary to examine whether the guarantee could in principle have been obtained on market conditions from the financial markets and whether the market premium for the guarantee was paid ([35]).

(106) The Commission observes that the comfort letters were not remunerated and that ENVC did not pay to EMPORDEF any premium. Therefore, the risk incurred by EMPORDEF was not remunerated. This in itself is sufficient to conclude that the comfort letters, which have very similar features to a guarantee, provided ENVC with an undue advantage.

(107) As regards the argument of Portugal that EMPORDEF would in any case be considered liable in the last instance for the debts of ENVC given that it was its sole shareholder, the Commission refers to its reasoning in recital 88 above, which applies *mutatis mutandis*.

(108) Therefore, the Commission is of the view that the comfort letters of 2009, 2010 and 2011 provided ENVC with an undue advantage.

(109) As regards the **loan for the Atlântida vessel**, the Commission observes that in December 2009, EMPORDEF provided ENVC with EUR 37 million obtained from CGD for terminating the legal proceedings with Atlanticoline. At that point in time, when ENVC was already a firm in difficulty, a rational market operator would have assessed the situation of the company and its capacity to repay the loan, instead of simply transferring the funds to ENVC. Also, a rational market operator would have assessed the risks associated to the operation and the possibility of selling the vessel to a different buyer — something which eventually happened in September 2014 (see recital 30 above). The Commission moreover observes that the loan was provided to EMPORDEF at an annual interest rate of 6-month EURIBOR plus 2 %, which at the time of the contract meant 2,993 %. However, in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates of 2008, applicable at the time, the base rate applicable for Portugal in December 2009 was 1,45 % to which a margin of at least 1 000bp should be added in view of the difficulties of ENVC and the absence of strict collateralisation. Therefore, the applicable reference rate would be at least 11,45 %.

([34]) OJ C 155, 20.6.2008, p. 10. See as well the 2000 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

([35]) See for example recitals 249 and 250 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1).

(110) The Commission understands that ENVC did not repay the EUR 37 million of the loan for the Atlântida vessel to EMPORDEF and that it did not pay any interest for this amount, with the exception of EUR 840 480,54 in interests paid in 2010. On this basis, and bearing in mind the above, the Commission comes to the conclusion that the loan for the Atlântida vessel provided ENVC with an undue advantage.

6.2.3. *Distortion of competition and affectation of intra-EU trade*

(111) The past measures are likely to affect trade between Member States as ENVC is in competition with shipyards from other Members States of the European Union as well as from the rest of the world. The past measures in question thus enabled ENVC to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results. Therefore, the past measures also distorted competition.

6.2.4. *Conclusion on existence of State aid and quantification*

(112) On the basis of the assessment above, the Commission concludes that the past measures constitute State aid, since they meet the necessary requirements of the definition of State aid laid down in Article 107(1) TFEU, with the exception of the comfort letters of dated 8 January 2007 and 26 June 2008 (see recital 103 above).

(113) As indicated in recitals 68 and 69 above, the totality of the **shipbuilding subsidies** and of the **professional training subsidies** constitute State aid for an amount of EUR 27 129 933,20 and EUR 257 791, respectively.

(114) As regards the rest of the past measures, the Commission reiterates that in view of the difficulties of ENVC at the time, no market-oriented operator would have provided them to the company. For this reason, the Commission is of the view that ENVC received State aid in an amount equal to the totality of the **2006 capital increase** (EUR 24,875 million).

(115) As regards the **comfort letters** of 2009, 2010 and 2011, the Commission reiterates that they have a very similar nature to guarantees (see recitals 103 and 104 above). In this respect, the Guarantee Notice states the following in section 4.1: 'The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee'.

(116) The Commission observes that the banks provided the loans to ENVC only because of the existence of the 'guarantees' (in the form of comfort letters) of EMPORDEF reassuring the banks that it would do the necessary to ensure that ENVC would pay back the loans. Moreover, the Commission notes that the comfort letters were provided for free at a time when ENVC was in difficulty and despite the significant risk that it would not be able to honour its commitments. The Commission moreover observes that ENVC had been in at least three occasions in a situation of technical bankruptcy (see recital 64 above) and despite this, EMPORDEF decided to issue the comfort letters without a premium. In this context, the Commission concludes that there is no possible market rate that could be used as a reasonable comparator and therefore takes the view that ENVC received State aid in an amount equal to the totality of the amounts guaranteed by the comfort letters of 2009, 2010 and 2011 (i.e. EUR 51 280 000).

(117) A similar logic applies to the case of the loans provided to ENVC, i.e. the **2012 and 2013 loans**, the **DGTF loans** and the **loan for the Atlântida vessel**. EMPORDEF and the DGTF provided these loans to ENVC at a time when the company was in difficulty and no rational market operator would have provided them. This is particularly obvious for the case of the 2012 and 2013 loans, since as indicated in recital 21 above, the banks had ceased providing loans to ENVC and were only willing to do so in relation to EMPORDEF. Also, the

Commission observes that the DGTF loans and the loan for the Atlântida vessel were provided between 2006 and 2011: during these years, private banks were willing to lend to ENVC only on the basis of a guarantee (in the form of a comfort letter) from EMPORDEF. This indicates that no market operator was willing to provide a loan to ENVC alone. Therefore, in view of the above, Commission concludes that ENVC received State aid in an amount equal to the totality of the 2012 and 2013 loans (EUR 101 118 066,03), the DGTF loans (EUR 30 million, EUR 8 million, EUR 5 million and EUR 13 million, respectively) and the loan for the Atlântida vessel (EUR 37 million).

### 6.3. **Unlawful aid**

(118) Article 108(3) TFEU states that a Member State shall not put an aid measure into effect before the Commission has adopted a decision authorising this measure.

(119) The Commission observes that Portugal granted the past measures to ENVC without notifying them to the Commission for approval (with the exceptions indicated in recital 125 below). The Commission regrets that Portugal did not comply with the stand-still obligation and therefore violated its obligation according to Article 108(3) TFEU.

### 6.4. **Compatibility of the past measures with the internal market**

(120) Insofar as the measures identified above constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that provision.

(121) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ([36]). The Portuguese authorities consider that most of the past measures do not constitute State aid and have therefore not provided any possible grounds for compatibility.

(122) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would be applicable to the past measures.

(123) As regards the **shipbuilding subsidies**, Portugal argues that they were provided under Decree-Law 296/89 implementing Directive 87/167/EEC (see recital 68 above). However, as the Commission already noted in the opening Decision, this Directive has ceased to apply since 31 December 1990 (see Article 13 thereof).

(124) In addition, Portugal has not provided any evidence that the shipbuilding subsidies would be compatible with any of the subsequent legal bases for declaring compatible aid for shipbuilding purposes.

(125) The sole exception concerns two shipbuilding subsidies granted to ENVC in 2003 and 2005 for the construction of two vessels (contracts C224 and C225 — see Annex II). These subsidies were authorised by Commission Decision in case C 33/2004 ([37]) on the basis of Regulation (EC) No 1540/98. The Commission therefore concludes according to the information provided that the subsidies for contracts C224 and C225 amounting to EUR 2 675 275 each (or a total of EUR 5 350 550) constitute aid to shipbuilding compatible with the internal market.

(126) The Commission nonetheless comes to the view that the rest of shipbuilding subsidies (amounting to EUR 21 779 383,21) — for which Portugal does not discuss their State aid character — are incompatible with the internal market.

([36]) Judgment in *Italy v Commission*, C-364/90, EU:C:1993:157.

([37]) Commission Decision 2006/946/EC of 6 September 2005 on State aid Portugal — Extension of the three-year delivery limit for two chemical tankers built by Estaleiros Navais de Viana do Castelo, S.A. (OJ L 383, 28.12.2006, p. 16).

(127) In relation to the **rest of the past measures** (with the exclusion of the comfort letters dated 8 January 2007 and 26 June 2008), as already indicated in the opening decision, in view of the nature of the measures and of the difficulties of ENVC, the only relevant compatibility criteria appear to be those concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU on the basis of the 2004 R&R Guidelines ([38]).

(128) In the first place, the Commission reiterates its findings of the opening decision that that the conditions for rescue aid laid down in section 3.1 of the 2004 R&R Guidelines are not met. According to point 25(a) of the 2004 R&R Guidelines, the rescue aid must consist of liquidity support in the form of loans or loan guarantees; in both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms. For instance the 2006 capital increase would already not meet this requirement.

(129) In addition, point 25(a) adds that any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after the disbursement of the first instalment to the firm. As explained above, this does not seem to have occurred for any of the past measures under assessment.

(130) Point 25(b) estates that the recue aid must be warranted on the grounds of serious social difficulties and have no unduly adverse spill-over effects on other Member States. Portugal has provided no evidence that this was the case for any of the past measures.

(131) Also, in the case of non-notified recue aid, point 25(c) requires the Member State to communicate to the Commission, no later than six months after the first implementation of the rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and /or that the guarantee has been terminated. Once again, Portugal did not fulfil this necessary compatibility requirement.

(132) According to point 25(d), the recue aid must be restricted to the amount needed to keep the firm in business. In view of the significant amounts of aid stemming from all the past measures, the Commission concludes that this requirement was not met either.

(133) Finally, point 25(e) of the 2004 R&R Guidelines requires that the 'one time, last time' principle is respected. According to this principle, where less than 10 years have elapsed since rescue aid was granted or a restructuring period came to an end, the Commission will not allow further rescue or restructuring aid. In view of the numerous interventions of the State during the time spam covered by the past measures, it is clear that the 'one time, last time' principle has not been respected and that ENVC benefited from unlawful State aid in numerous occasions.

(134) In relation to restructuring aid as defined in section 3.2 of the 2004 R&R Guidelines, the Commission observes that Portugal did not notify to the Commission any of the measures identified above as restructuring aid and thus failed to demonstrate that any of the necessary elements for it to be considered as such are present (restructuring plan, own contribution, compensatory measures, etc.).

(135) In particular, recital 34 of the 2004 R&R Guidelines states that the grant of restructuring aid is conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. In addition, any restructuring aid must include measures seeking to avoid undue distortions of competition ('compensatory measures' — see points 38 to 42) and must also provide for 'own contribution' from the beneficiary which in the case of ENVC should have reached 50 % of the restructuring costs given that it was a large undertaking (see points 38 to 45). In addition, as for recue aid, the 'one time, last time' principle must be respected.

([38]) As regards the professional training subsidies, the Commission observes that the Guidelines on national regional aid 2000-2006 (OJ C 74, 10.3.1998, p. 9), applicable at the time, excluded the provision of regional aid to firms in difficulty.

(136) The Commission first reiterates that the 'one time, last time' principle has not been respected (see recital 133 above). Indeed, the Commission observes that numerous past measures were provided outside the planned restructuring period 2005-2009. This would be in breach of the 'one time, last time' principle, and therefore sufficient to consider that the past measures cannot be deemed compatible restructuring aid as per the 2004 R&R Guidelines.

(137) In any event, the Commission highlights that Portugal submitted the restructuring plan prepared by BPI only in 2014, i.e. 5 years after the planned restructuring period (2005-2009) had expired. In addition, the Commission highlights that the plan prepared by BPI seems to be a draft for discussion. In any event, while the restructuring plan seems to include some of the elements required by the 2004 R&R Guidelines, it does not include any compensatory measures and does not foresee any own contribution by ENVC. Therefore, the restructuring plan of BPI cannot be deemed to respect the necessary requirements of the 2004 R&R Guidelines.

(138) In the absence of any proposed compensatory measures and own contribution from ENVC, and bearing in mind that the 'one time, last time' principle has not been respected, the Commission concludes that the rest of the past measures cannot be deemed compatible restructuring aid under the R&R Guidelines.

### 6.5. **Conclusion on compatibility**

(139) In view of the above, the Commission considers that the shipbuilding subsidies for contracts C224 and C225, amounting to EUR 2 675 275 each (see recital 125 above), constitute aid to shipbuilding compatible with the internal market.

(140) The Commission also considers that the rest of the past measures (i.e. the 2006 capital increase, the 2012 and 2013 loans, the DGTF loans, the comfort letters of 2009, 2010 and 2011, the professional training subsidies, the loan for the Atlântida vessel and the rest of the shipbuilding subsidies) do not meet the conditions of the 2004 R&R Guidelines. The Commission has not identified any other compatibility basis. Therefore, the Commission considers the rest of the past measures to entail State aid that is incompatible with the internal market.

### 6.6. **Recovery**

(141) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([39]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([40]).

(142) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([41]).

(143) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ([42]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'. Article 15 of the same Regulation clarifies that '[t]he powers of the Commission to recover aid shall be subject to a limitation period of ten years', which 'shall begin on the day on which the unlawful aid is awarded to the beneficiary […]. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period'. Since the first action taken by the Commission in case SA.35546 occurred on 11 October 2012 (see recital 1 above), any recovery of incompatible aid cannot include aid awarded before 11 October 2002.

([39]) Judgment in *Commission v Germany*, C-70/72, EU:C:1973:87, paragraph 13.
([40]) Judgment in *Spain v Commission*, C-278/92, C-279/92 and C-280/92, EU:C:1994:325, paragraph 75.
([41]) Judgment in *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraphs 64 and 65.
([42]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(144) The Commission observes in this respect that some of the shipbuilding subsidies were awarded before 11 October 2002, in particular in relation to contracts C206, C211, C217, C218, C219, C220, C221 and C222 (see Annex II). Therefore, the incompatible aid for these contracts, amounting to EUR 11 297 009,19 is subject to the limitation period of ten years and cannot be recovered.

(145) The rest of the past measures entailing unlawful and incompatible State aid (see table 5 below) must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear recovery interest until effective recovery.

*Table 5*

**Amounts to be recovered (in EUR)**

| Date | Measure | Amount to be recovered [1] |
|---|---|---|
| 11 May 2006 | 2006 capital increase | 24 875 000 |
| 2012/2013 | 2012 and 2013 loans | 101 118 066,03 |
| (i) 31 January 2006<br>(ii) 11 December 2008<br>(iii) 28 April 2010<br>(iv) 27 April 2011 | DGTF loans | (i) 30 000 000<br>(ii) 8 000 000<br>(iii) 5 000 000<br>(iv) 13 000 000 |
| 29 November 2011 | Comfort letters for a loan granted by BCP | 990 000 |
| 3 November 2011 | Comfort letter for a loan granted by BCP | 400 000 |
| 30 September 2010 | Comfort letter for a loan granted by BCP | 12 500 000 |
| 31 August 2010 | Comfort letters for two standby letters of credit issued by CGD | 12 890 000 |
| 24 June 2010 | Comfort letter for a loan granted by BCP | 5 000 000 |
| 25 November 2009 | Comfort letter for revolving loan by CGD | 15 000 000 |
| 7 September 2009 | Comfort letter for revolving loan by BES | 4 500 000 |
| — | Shipbuilding subsidies (contracts C212, C213, C214 and C223) | 10 482 374,01 [2] |
| — | Aid for professional training 2005-2006 | 257 791 |
| 23 December 2009 | Loan for the Atlântida vessel | 37 000 000 |

[1] Where applicable, the interests due and not paid by ENVC must also be subject to the recovery obligation.

[2] This figure results from the totality of the shipbuilding subsidies (*i*) minus those subsidies subject to the 10-year limitation period (*ii*) minus the subsidies declared compatible aid (*iii*), i.e. (*i*) EUR 27 129 933,20 — (*ii*) EUR 11 279 009,19 — (*iii*) EUR 5 350 550 = EUR 10 482 374,01.

## 7. ASSESSMENT OF ECONOMIC CONTINUITY BETWEEN ENVC AND WESTSEA

(146) On 4 March 2014, ENVC held a general assembly in which EMPORDEF, as the sole shareholder, confirmed the decision to proceed with the sale of ENVC's assets, as well as with the dismissal of the employees, in order to liquidate and dissolve the company as soon as possible.

(147) On 27 February 2015, in view of the future liquidation of ENVC, Portugal addressed a two-fold request to the Commission:

'(a) *Taking in consideration that, in the event of a negative Commission decision imposing the recovery of incompatible aid to ENVC in the context of Articles 107 and 108 TFEU, most part of ENVC assets will be sold and the process of ENVC winding up will be practically concluded, the Portuguese State kindly requests the Commission to confirm that under the conditions described above the sale of the said assets does not constitute aid to the purchasers.*

(b) *Taking also in consideration that, in the event of a negative Commission decision imposing the recovery of incompatible aid to ENVC in the context of Articles 107 and 108 TFEU, the Portuguese State would be required to recover the incompatible aid, the Portuguese authorities ask the Commission to confirm that such recovery obligation would not be extended to WestSea in spite of it taking-over some of the assets of ENVC.'*

(148) Indeed, in the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is normally required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies. Furthermore, even in the absence of economic continuity, (new) State aid for the buyer could also result from the sale of the assets below their market value.

(149) By the present decision, the Commission does not assess the assignment of the contracts for the construction of two asphalt carriers ([43]), which has not yet taken place.

(150) In order to decide on whether there is State aid benefiting the buyer(s) of the assets, the Commission needs to (a) determine whether the sale of any assets takes place at their market price; and (b) take into account also other criteria mentioned in the recital below.

(151) According to the Court decision on *Italy and SIM 2 v Commission* ([44]), on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM* ([45]), the assessment of economic continuity between the previous (aided) entity and the buyer is established based on a set of indicators. The following factors may be taken into consideration: (i) the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), (ii) the sale price, (iii) the identity of the buyer(s), (iv) the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and (v) the economic logic of the operation. This set of indicators was confirmed by the General Court in its decision of 28 March 2012 *Ryanair v Commission* ([46]), which confirmed the *Alitalia* decision.

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([43]) See recital 24. The contract initially concluded between PDVSA and ENVC for the construction of two asphalt carriers has been transferred to EMPORDEF. Portugal has committed that the subcontracted parts of the contract will be tendered out following transparent, non-discriminatory and unconditional tenders opened to Portuguese and non-Portuguese bidders, the best price being the sole criterion to select the suppliers and service providers and to exclude ENVC from the process in case its liquidation and dissolution is not concluded when they occur.

([44]) Judgment in *Italy and SIM 2 Multimedia SpA v Commission*, C-328/99 and C-399/00, EU:C:2003:252.

([45]) Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/ Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia*; Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

([46]) Judgment of 28 March 2012 in *Ryanair Ltd v Commission*, T-123/09, ECR, EU:T:2012:164, confirmed on appeal by Judgment of 13 June 2013 in *Ryanair Ltd v Commission*, C-287/12 P, ECR, EU:C:2013:395.

### 7.1. **Scope of assets sold**

(152) In order to avoid economic continuity, the Commission has to establish that the assets and other elements of the business transferred represent only a part of the previous company or its activities. The larger the part of the original business that is transferred to a new entity, the higher the likelihood that the economic activity related to these assets continues benefitting from the advantage stemming from the incompatible aid granted to the previous entity.

(153) ENVC's main assets included (i) the concession granted by the Viana do Castelo Port Administration for the land where the shipyard is located and (ii) various equipment and raw materials. All these assets were sold following transparent, non-discriminatory, and unconditional tenders opened to Portuguese and non-Portuguese bidders, the best price being the sole criterion to select the bidders.

(154) As regards the *sub-concession for the land where the shipyard is located*, following a tender process, it was awarded until March 2031 to WestSea, a joint subsidiary of the Portuguese holding Martifer and the Portuguese shipyard Navalria. WestSea will pay an annual rent fee of EUR 419 233,95 and a guarantee of EUR 435 500.

(155) As regards the *various equipment and raw materials*, including vehicles and a major lifter/crane, they were sold in the course of 120 small tenders in 884 batches of goods. As a consequence, out of the total EUR 3 358 905,13 of goods sold, the buyers acquired on average EUR 55 981,75 of merchandise, ranging from EUR 10 up to EUR 1,035 million. The *Ministério dos Transportes e Comunicações de Timor* was the most important buyer with a share of 31 %. WestSea acquired less than 20 % of the assets sold.

(156) Finally, with respect to *employees*, no employment contract has been transferred to any of the buyers: 596 labour contracts have already been terminated and the remaining 13 employees are in the process of being dismissed. The tenders did not include any specific condition to transfer employment contracts or employees from ENVC to any buyer.

(157) As a consequence of the above elements, the Commission concludes that the scope of the assets acquired or to be acquired by WestSea will be significantly reduced in comparison to that of ENVC and its previous activity.

### 7.2. **Sale price**

(158) In order to avoid economic continuity between ENVC and WestSea, the Commission has to establish that the assets and other elements of the business transferred were or will be sold at market price. The market price is the price, which would be set by a private investor acting under market conditions ([47]).

(159) The sub-concession for the land where the shipyards are located and the various equipment and raw materials have been divested through open, transparent, non-discriminatory and unconditional tenders, the best price being the sole criterion to select the bidders.

(160) As a consequence of the above elements, the Commission concludes that the grant of the sub-concession for the land where the shipyards are located and the sale of ENVC's various equipment and raw materials to WestSea were carried out via open, transparent, non-discriminatory and unconditional tender processes to the highest bidder and thus led to a market price.

### 7.3. **Identity of the buyers**

(161) In order to avoid economic continuity, the Commission has to establish that the buyers of the assets and other elements of the business transferred do not have economic or corporate link with ENVC.

([47]) Judgment in *Seydaland*, C-239/09, EU:C:2010:778, paragraph 34.

(162) As concerns the concession for the land where the shipyard is located, the Portuguese authorities confirm that WestSea does not have any economic or corporate links with ENVC or the Portuguese State.

(163) As concerns the various equipment and raw materials already divested, the Portuguese authorities confirm that none of the main buyers have economic or corporate links with ENVC or its shareholder.

(164) As a consequence of the above elements, the Commission concludes that WestSea is an entity independent from ENVC and from its shareholder.

### 7.4. **Moment of the sale**

(165) In order to avoid economic continuity, the Commission has to establish that the moment of the sale of the assets and other elements of the business transferred does not lead to a circumvention of a decision by the Commission to recover incompatible State aid.

(166) The Commission notes that the tender processes for the sub-concession of the land where the shipyards are located as well as for the acquisition of the assets and equipment have been launched and concluded before the adoption by the Commission of the present final decision.

(167) Moreover, as mentioned in recital 1 above, it was Portugal that first approached the Commission in order to properly organise ENVC's privatisation in accordance with EU State aid rules. Thus, the series of events indicate that the privatisation was not construed as a mechanism to circumvent existing negative decisions or pending investigations by the Commission.

(168) As a consequence of the above elements, the Commission concludes that the fact that the granting of the sub-concession of the land where the shipyards are located as well as the acquisition of ENVC's various equipment and raw materials occurred before the adoption by the Commission of the present final decision does not indicate that there is circumvention of a potential recovery decision by the Commission.

### 7.5. **Economic logic of the operation**

(169) In order to avoid economic continuity, the Commission has to establish that the buyers of the assets and others elements of the business transferred will not employ these assets in the same way as the previous owner but will use them to set up a different activity or strategy.

(170) Some of ENVC's assets acquired by WestSea may be used for the same general activity (shipbuilding), in particular the land where the shipyard is located. However, the mere fact that the buyer would be active in the same economic sector as the previous entity does not necessarily imply that there is economic continuity. WestSea has no obligation to take over any of ENVC employees or employment contracts. In addition, WestSea will integrate the shipyard in its business strategy in order to guarantee synergies with other shipyard sites. WestSea will have the possibility to manage its activities under different operating conditions than ENVC and will have the freedom to apply its own business model.

(171) As a consequence of the above elements, the Commission concludes that WestSea will integrate these elements into its company strategy and will use them in order to pursue its own economic logic.

### 7.6. **Conclusion on the economic continuity between ENVC and WestSea**

(172) First, the scope of the assets acquired by WestSea is significantly reduced in comparison to that of ENVC and its previous activity. Second, the granting of the sub-concession for the land where the shipyard is located and the acquisition of the various equipment and raw materials were carried out via open, transparent, non-discriminatory and unconditional tenders. Third, WestSea is an entity independent from ENVC and its shareholder. Fourth, the moment of the grant of the sub-concession of the land where the shipyards are located as well as the acquisition of various equipment and raw materials does not indicate that there is circumvention of a potential recovery decision by the Commission. Fifth, WestSea will integrate ENVC's assets into its company strategy and will use them in order to pursue its own economic logic.

(173) Consequently, the Commission concludes that there is no economic continuity between ENVC and WestSea.

## 8. **CONCLUSION**

(174) The Commission finds that the past measures, with the exception of the comfort letters dated 8 January 2007 and 26 June 2008, constitute State aid in favour of ENVC within the meaning of Article 107(1) TFEU.

(175) The past measures constituting State aid are incompatible with the internal market (with the exception of the two shipbuilding subsidies authorised by Commission Decision in case C 33/2004), because the relevant conditions of the 2004 R&R Guidelines were not met and no other compatibility grounds were identified.

(176) The Commission also finds that Portugal has unlawfully implemented the measures referred to above in breach of Article 108(3) TFEU.

(177) The incompatible State aid must be recovered from the beneficiary, as outlined in section 6.6 above.

(178) Such recovery will not concern WestSea, due to the absence of economic continuity between ENVC and WestSea.

(179) Finally, the Commission notes that Portugal agreed to have the present decision adopted and notified in English.

HAS ADOPTED THIS DECISION:

*Article 1*

1. The comfort letters dated 8 January 2007 and 26 June 2008 do not constitute State aid within the meaning of Article 107(1) TFEU.

2. The State aid contained in the shipbuilding subsidies corresponding to contracts C224 and C225 (amounting to EUR 5 350 550) is compatible with the internal market.

3. The State aid referred to in the table below, unlawfully put into effect by Portugal in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

| Date | Measure | Amount |
|---|---|---|
| 11 May 2006 | 2006 capital increase | 24 875 000 |
| 2012/2013 | 2012 and 2013 loans | 101 118 066,03 |
| (i) 31 January 2006<br>(ii) 11 December 2008<br>(iii) 28 April 2010<br>(iv) 27 April 2011 | DGTF loans | (i) 30 000 000<br>(ii) 8 000 000<br>(iii) 5 000 000<br>(iv) 13 000 000 |
| 29 November 2011 | Comfort letters for a loan granted by BCP | 990 000 |
| 3 November 2011 | Comfort letter for a loan granted by BCP | 400 000 |
| 30 September 2010 | Comfort letter for a loan granted by BCP | 12 500 000 |
| 31 August 2010 | Comfort letters for two standby letters of credit issued by CGD | 12 890 000 |

| Date | Measure | Amount |
|---|---|---|
| 24 June 2010 | Comfort letter for a loan granted by BCP | 5 000 000 |
| 25 November 2009 | Comfort letter for revolving loan by CGD | 15 000 000 |
| 7 September 2009 | Comfort letter for revolving loan by BES | 4 500 000 |
| — | Shipbuilding subsidies (contracts C212, C213, C214 and C223) | 10 482 374,01 |
| — | Shipbuilding subsidies (contracts C206, C211, C217, C218, C219, C220, C221 and C222) | 11 279 009,01 |
| — | Aid for professional training 2005-2006 | 257 791 |
| 23 December 2009 | Loan for the Atlântida vessel | 37 000 000 |

*Article 2*

1. Portugal shall recover the incompatible aid referred to in paragraph 2 of Article 1 from the beneficiary (including, where applicable, the interests accrued and not paid by ENVC), with the exception of the shipbuilding subsidies linked to contracts C206, C211, C217, C218, C219, C220, C221 and C222 (for an overall amount of EUR 11 279 009,01) for them being subject to the 10-year limitation period laid down in Article 15 of Regulation (EC) No 659/1999.

2. Such recovery of incompatible State aid shall not concern WestSea.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([48]), and to Commission Regulation (EC) No 271/2008 ([49]) amending Regulation (EC) No 794/2004.

5. Portugal shall cancel all outstanding payments of aid, if any, with effect from the date of adoption of this decision.

*Article 3*

1. Recovery of the aid referred to in paragraph 2 of Article 1 shall be immediate and effective.

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

*Article 4*

1. Within two months following notification of this Decision, Portugal shall submit the following information:

(a) the total amount (principal and recovery interests) to be recovered from each beneficiary;

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

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

([48]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

([49]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

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

*Article 5*

This Decision is addressed to Portugal.

Done at Brussels, 7 May 2015.

*For the Commission*
Margrethe VESTAGER
*Member of the Commission*

*ANNEX I*

**THE 2012 AND 2013 LOANS**

| Date of signature | Amount | Interest rate applied |
|---|---|---|
| 6 January 2012 | 970 000,00 | 7,108 % |
| 9 January 2012 | 175 000,00 | 3-month EURIBOR + 7,108 % |
| 31 January 2012 | 3 445 258,51 | 3-month EURIBOR + 6,62 % |
| 8 February 2012 | 64 741,49 | 3-month EURIBOR + 6,62 % |
| 30 March 2012 | 1 026 647,44 | 3-month EURIBOR + 7,887 % |
| 30 March 2012 | 16 700 000,00 | 2 % |
| 30 April 2012 | 1 268 536,13 | 3-month EURIBOR + 5 % |
| 2 May 2012 | 48 997,82 | 3-month EURIBOR + 7,887 % |
| 30 May 2012 | 1 100 000,00 | 3-month EURIBOR + 8,431 % |
| 31 May 2012 | 5 375 000,00 | 3-month EURIBOR + 8,5 % |
| 31 May 2012 | 834 830,96 | 3-month EURIBOR + 8,451 % |
| 1 June 2012 | 12 844 000,00 | 3-month EURIBOR + 4,976 % |
| 5 June 2012 | 281 000,00 | 3-month EURIBOR + 4,976 % |
| 6 June 2012 | 345 000,00 | 3-month EURIBOR + 7,682 % |
| 8 June 2012 | 1 449 714,00 | 3-month EURIBOR + 7,682 % |
| 11 June 2012 | 696 481,42 | 3-month EURIBOR + 7,682 % |
| 21 June 2012 | 177 979,74 | 3-month EURIBOR + 7,682 % |
| 21 June 2012 | 4 785 000,00 | 3-month EURIBOR + 8,1509 % |
| 22 June 2012 | 118 070,71 | 3-month EURIBOR + 7,682 % |
| 25 June 2012 | 83 694,43 | 3-month EURIBOR + 4,976 % |
| 26 June 2012 | 1 163 308,28 | 3-month EURIBOR + 4,976 % |
| 29 June 2012 | 664 537,83 | 3-month EURIBOR + 4,976 % |
| 3 July 2012 | 272 811,37 | 3-month EURIBOR + 8,5 % |
| 11 July 2012 | 71 104,02 | 3-month EURIBOR + 4,976 % |

| Date of signature | Amount | Interest rate applied |
|---|---|---|
| 11 July 2012 | 1 742 275,55 | 3-month EURIBOR + 8,1509 % |
| 13 July 2012 | 40 000,00 | 3-month EURIBOR + 8,431 % |
| 19 July 2012 | 45 000,00 | 3-month EURIBOR + 4,956 % |
| 27 July 2012 | 1 000 000,00 | 3-month EURIBOR + 5,78 % |
| 31 July 2012 | 400 000,00 | 3-month EURIBOR + 8,182 % |
| 31 July 2012 | 1 450 000,00 | 3-month EURIBOR + 4,756 % |
| 2 August 2012 | 100 000,00 | 3-month EURIBOR + 8,182 % |
| 14 August 2012 | 275 000,00 | 3-month EURIBOR + 8,151 % |
| 17 August 2012 | 180 000,00 | 3-month EURIBOR + 8,1509 % |
| 20 August 2012 | 1 186 322,44 | 3-month EURIBOR + 8,1509 % |
| 20 August 2012 | 400 000,00 | 3-month EURIBOR + 5,624 % |
| 24 August 2012 | 600 000,00 | 3-month EURIBOR + 5,624 % |
| 13 September 2012 | 365 000,00 | 3-month EURIBOR + 5,624 % |
| 19 September 2012 | 5 111 910,08 | Debt of ENVC towards Parvalorem assumed by EMPORDEF |
| 21 September 2012 | 19 000,00 | 3-month EURIBOR + 5,624 % |
| 25 September 2012 | 1 180 491,65 | 3-month EURIBOR + 4,668 % |
| 27 September 2012 | 1 050 000,00 | 3-month EURIBOR + 5,624 % |
| 28 September 2012 | 48 000,00 | 3-month EURIBOR + 5,624 % |
| 12 October 2012 | 120 000,00 | 5,871 % |
| 16 October 2012 | 15 000,00 | 8,1509 % |
| 19 October 2012 | 566 000,00 | 3-month EURIBOR + 4,64 % |
| 26 October 2012 | 1 000 000,00 | 3-month EURIBOR + 4,64 % |
| 29 October 2012 | 84 685,34 | 8,151 % |
| 30 October 2012 | 120 000,00 | 8,1509 % |
| 2 November 2012 | 10 570 971,04 | 5,871 % |
| 9 November 2012 | 5 227,50 | 4,459 % |

| Date of signature | Amount | Interest rate applied |
|---|---|---|
| 27 November 2012 | 250 000,00 | 5,871 % |
| 28 November 2012 | 250 000,00 | 8,1509 % |
| 29 November 2012 | 200 000,00 | 7,915 % |
| 29 November 2012 | 120 000,00 | 5,871 % |
| 30 November 2012 | 84 685,12 | 5,871 % |
| 3 December 2012 | 300 000,00 | 4,459 % |
| 3 December 2012 | 35 000,00 | 7,915 % |
| 7 December 2012 | 1 500,00 | 8,151 % |
| 11 December 2012 | 100 000,00 | 4,459 % |
| 14 December 2012 | 180 000,00 | 4,459 % |
| 19 December 2012 | 200 000,00 | 4,459 % |
| 20 December 2012 | 29 159,75 | 4,459 % |
| 21 December 2012 | 1 000 000,00 | 5,871 % |
| 28 December 2012 | 5 000 000,00 | 7,915 % |
| 31 December 2012 | 16 500,00 | 4,459 % |
| 4 January 2013 | 120 000,00 | 4,459 % |
| 9 January 2013 | 84 756,80 | 4,459 % |
| 11 January 2013 | 260 000,00 | 7,911 % |
| 17 January 2013 | 200 000,00 | 8,15 % |
| 8 February 2013 | 5 767 984,59 | 4,165 % |
| 31 May 2013 | 5 281 882,02 | Interest to be paid by ENVC to EMPORDEF for the 2012 loans |
| | ***Total:* 101 118 066,03** | |

*ANNEX II*

**THE SHIPBUILDING SUBSIDIES**

| Contract number | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | TOTAL | Granting act (Despacho) | Date of publication in the Diário da República |
|---|---|---|---|---|---|---|---|---|---|
| ***C206*** | *679 362,74* | | | | | | ***679 362,74*** | | |
| ***C211*** | | | *2 081 867,70* | | | | ***2 081 867,70*** | *245/2002 of 31.12.2001* | *6.4.2002* |
| C212 | | | 1 629 892,00 | 407 473,00 | | | 2 037 365,00 | 882/2002 of 25.12.2002 | 12.12.2002 |
| C213 | | | 2 265 871,06 | 541 732,94 | 701 901,00 | | 3 509 505,00 | 880/2002 of 25.12.2002 | 12.12.2002 |
| C214 | | | 2 807 604,01 | | 701 901,00 | | 3 509 505,01 | 880/2002 of 25.12.2002 | 12.12.2002 |
| ***C217*** | | *1 415 887,71* | | | | | ***1 415 887,71*** | *158/2001 of 29.12.2000* | *16.02.2001* |
| ***C218*** | | *1 415 887,71* | | | | | ***1 415 887,71*** | *158/2001 of 29.12.2000* | *16.02.2001* |
| ***C219*** | | *1 425 998,34* | | | | | ***1 425 998,34*** | *158/2001 of 29.12.2000* | *16.2.2001* |
| ***C220*** | | *1 425 998,34* | | | | | ***1 425 998,34*** | *158/2001 of 29.12.2000* | *16.2.2001* |
| ***C221*** | *1 140 802,66* | *276 446,76* | *8 753,90* | | | | ***1 426 003,32*** | *810/2000 of 25.7.2000* | *5.8.2000* |
| ***C222*** | | | *1 426 003,33* | | | | ***1 426 003,33*** | *244/2002 of 31.12.2001* | *6.4.2002* |
| C223 | | | 1 425 999,00 | | | | 1 425 999,00 | 881/2002 of 25.11.2002 | 12.12.2002 |

| Contract number | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | TOTAL | Granting act (Despacho) | Date of publication in the Diário da República |
|---|---|---|---|---|---|---|---|---|---|
| C224 | | | | 2 140 220,00 | | 535 055,00 | 2 675 275,00 | 879/2002 of 25.11.2002 | 12.12.2002 |
| C225 | | | | 2 140 220,00 | | 535 055,00 | 2 675 275,00 | 879/2002 of 25.11.2002 | 12.12.2002 |
| | 1 820 165,40 | 5 960 218,86 | 11 645 991,00 | 5 229 645,94 | 1 403 802,00 | 1 070 110,00 | **27 129 933,20** | | |