DECISIONS

COMMISSION DECISION (EU) 2016/285

of 6 November 2015

on the state aid SA.38545 2014/C (ex 2014/NN) implemented by the French Republic in favour of Mory — Ducros SAS and MoryGlobal

(notified under document C(2015) 7523)

(Only the French 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 called on interested parties to submit their comments pursuant to the provisions cited above ([1]),

Whereas:

1. PROCEDURE

(1) Following informal talks between the Commission and France, on 7 February 2014 the latter sent the Commission a memorandum concerning the granting of a participating loan by the Economic and Social Development Fund (FDES) to MoryGlobal ([2]).

(2) At the oral request of the Commission, France submitted a further memorandum on 2 April 2014.

(3) Two additional requests for information were sent on 11 April and 8 May 2014, to which France replied by letters dated 30 April and 9 May 2014. Those requests were followed by another request on 27 June 2014, to which France replied on 10 July 2014.

(4) At the Commission's suggestion, a meeting was held with the French authorities on 9 July 2014.

(5) Since the first payment of the FDES loan had been made on 18 February 2014, the Commission entered the measure in the register of non-notified aid.

(6) By letter dated 16 September 2014, the Commission informed France 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 formal investigation procedure').

(7) The Commission's decision to initiate the procedure (the 'opening decision') was published in the *Official Journal of the European Union* ([3]). The Commission called on interested parties to submit their comments on the aid in question. The Commission did not receive any comments from interested parties.

([1]) OJ C 24, 23.1.2015, p. 32.
([2]) The company was originally called Newco MD, but its name was changed to MoryGlobal on 14 February 2014. For the sake of clarity, only the name MoryGlobal will be used in this Decision.
([3]) See footnote 1.

(8) France submitted its comments on 24 October 2014. At the Commission's request, France provided additional information on 12 January and 6 May 2015.

2. **BACKGROUND**

2.1. DESCRIPTION OF THE BENEFICIARY AND THE BACKGROUND

(9) The Mory-Ducros group included Mory-Ducros SAS ('MD') as well as SPAD and ARCATIME CAUDAN, real-estate companies constituted under civil law that were wholly owned by MD.

(10) MD's shareholder was Arcole Industries ('Arcole'), a holding company specialising in the takeover and rescue of firms in difficulty. In June 2010 Arcole had bought Ducros Express from DHL, then in June 2011 it bought certain assets of Mory SA under the court-supervised administration procedure opened in respect of that company. Subsequently, Arcole merged these two businesses within MD.

(11) MD was the second-largest operator in France in the parcels and freight sector, after Geodis. MD had four main activities: national parcels and transport services, national freight, international parcels and freight, and logistics. This sector had been experiencing increasing difficulties in France since the beginning of the decade, resulting in mergers and/or the bankruptcy of major operators. In addition to the history of the assets and companies folded into MD following court-supervised administration procedures, note should also be taken of the acquisition by Geodis of the assets of SERNAM, an incumbent operator and SNCF subsidiary, following its winding up by the court ([4]).

(12) On 31 December 2012, MD had a consolidated turnover of EUR 765 million and employed some 5 300 staff and had 85 branches. However, the adverse effect of the financial crisis and increased competition from other operators against the background of the difficulties in the parcels and freight sector led to a deterioration in results, which was compounded by above-average production costs, unfavourable rates for many customers and the poor state of the buildings and vehicle fleet due to under-investment in previous years.

(13) By judgment of 26 November 2013, Pontoise Commercial Court opened a court-supervised administration procedure in respect of MD.

(14) On 3 January 2014, Arcole, the then majority shareholder in MD, made a takeover offer.

(15) On 28 January 2014, Arcole lodged an improved offer with Pontoise Commercial Court in the form of a plan for a sale to MoryGlobal, a new company set up to that end, for the purposes of taking over the majority of MD's assets.

(16) On 29 January 2014, the Minister for Economic Affairs and Finance issued a decree providing MoryGlobal with an FDES loan of EUR 17,5 million, to be released in one or more tranches.

(17) On 30 January 2014, pending the formalisation of the loan agreement between MoryGlobal and the State, the latter, represented by the Inter-Ministerial Committee for Industrial Restructuring (*Comité interministériel de restructuration industrielle* — 'CIRI'), and Arcole signed a Memorandum of Understanding: Arcole undertook in particular to contribute total funds of EUR 17,5 million — a EUR 10 million capital increase and EUR 7,5 million in the form of convertible bonds ([5]).

(18) On 6 February 2014, Pontoise Commercial Court approved the plan to sell MD to Arcole.

([4]) Judgment of the Court of Justice of 17 September 2015, *Mory and others* v *Commission*, C-33/14 P, ECLI:EU:C:2015:609, in particular paragraphs 2 to 15.

([5]) The agreement also provided for funding for the takeover of MD through factoring of EUR 15 million.

(19) On 31 March 2015, despite the capital injection and the FDES loan, MoryGlobal was placed into compulsory liquidation by Bobigny Commercial Court.

2.2. DESCRIPTION OF THE MEASURES

2.2.1. **The FDES loan of EUR 17,5 million**

(20) By agreement of 11 February 2014, the State granted MoryGlobal an FDES loan of EUR 17,5 million. The terms of the loan state that the loan was intended to finance the acquisition of part of MD's business and MoryGlobal's entire business.

(21) The FDES loan was to be remunerated at an annual fixed rate of 1 %. The interest accruing until the final repayment date was to be calculated yearly, then capitalised and paid at term when the FDES loan became repayable. By way of exception to the above, in the event that dividends had been paid to Arcole, MoryGlobal was to have paid the capitalised fixed interest accrued up to the date of payment of the dividends and up to a maximum of the amount of dividends paid.

(22) To this fixed rate interest was to be added a variable interest rate equal to the total amount of dividends voted for and paid during the financial year, less the amount of the fixed remuneration paid.

(23) The overall interest rate (fixed + variable) on the FDES loan could not be lower than the average rate of interest remunerating the partners' current accounts agreed to by Arcole.

(24) The loan was to be repaid in one instalment 20 years after the date on which the final tranche of the loan was released, which was 24 April 2014.

(25) The FDES loan was guaranteed by a first-rank pledge without competition on a securities account which included all the shares in MoryGlobal. The pledged account was to include, for the entire term of the FDES loan, at least 90 % of MoryGlobal's pledged shares.

(26) In the event of the sale by Arcole of all of its shares in MoryGlobal, MoryGlobal was to have repaid the full amount of the outstanding loan and all sums due under the loan and to have paid to the State an amount representing a breach of loan penalty equal to the sale price less the amount invested by Arcole in MoryGlobal in all its forms, the total remuneration on the participating loan paid up to the date of sale and any costs associated with the sale. In the event of a partial sale of shares, a pro rata of the number of shares sold by Arcole in relation to the total number of shares held by Arcole before the sale was to have applied.

(27) The full amount of the loan was released in three tranches on the following dates and for the following amounts: EUR 3 million on 18 February 2014; EUR 7 million on 11 March 2014; and EUR 7,5 million on 24 April 2014.

2.2.2. **Social measures**

(28) On 6 February 2014, in a press release ([6]), the Ministers for Economic Regeneration, Labour, Employment, Vocational Training and Social Dialogue as well as the Deputy Minister for Transport, Maritime Affairs and Fisheries announced that a support plan for MD employees would be established. It would comprise the following elements.

— Automatic facility: assistance to which the redundant employees are automatically entitled by law on request. And under the occupational security contract (*Contrat de Sécurisation Professionnelle* — CSP), employees may qualify for (i) remuneration almost equivalent to their current net salary and (ii) specific training following the mobilisation of the joint funds for making career paths more secure.

([6]) http://www.developpement-durable.gouv.fr/IMG/pdf/CP_-_MORY_DUCROS_AM_MS_et_FC_-_06-02-2014.pdf

— Discretionary facility: assistance granted at the discretion of France. There are two types of assistance: (i) France will guarantee the employees services such as access to general consultants or training courses for a career change through the enhanced support facility ('enhanced support facility'), and (ii) France will grant temporary degressive allowances to cover the difference in wages for 2 years in the event of recruitment to a lower-paid job, up to EUR 300 per month ('degressive temporary allowance facility').

(29) The total cost of these social measures and the precise conditions for granting them had not been spelled out earlier.

3. DOUBTS RAISED IN THE OPENING DECISION

3.1. CLASSIFICATION AS STATE AID

(30) In the opening decision, the Commission expressed concerns about the presence of an economic advantage arising from both the FDES loan and the social measures for employees. In general, in the light of the chronology of the exchanges between Arcole and France, the Commission considered that it was possible that the FDES loan and the social measures had been granted in particular for social reasons to safeguard jobs and production sites, which are not the motives of a prudent investor.

3.1.1. **The FDES loan**

(31) Firstly, the Commission pointed out that the involvement and repeated interventions by the public authorities through various press releases had helped Arcole's takeover bid and therefore MoryGlobal. Thus, Arcole's initial offer of 3 January 2014 was based on EUR 25 million in external funding by legal entities governed by public law, while in the improved offer of 28 January 2014 the FDES loan of EUR 17,5 million appeared to replace the participation of these other potential investors. Consequently, the Commission had doubts, first, about the reasons for their withdrawal and, second, about the assumption that the FDES loan would be granted in return for improved terms under the redundancy plan.

(32) Moreover, the Commission noted that France seemed to have taken the decision to grant the loan before being apprised of the final report by Eight Advisory setting out the results of simulations of rates of return on investment ('RRI') on the funds provided by Arcole and the FDES loan, since the report was not finalised until 26 January 2014.

(33) Finally, the Commission also had doubts about the terms of the FDES loan. It has the characteristics of both a loan, in the event that the company does not distribute any dividends, and, if it does, a capital contribution.

(34) If the measure constituted a loan, the Commission considered the 1 % rate not to be in line with the market rate, since, regardless of the methodology adopted (application of the Communication from the Commission on the revision of the method for setting the reference and discount rates [7] ('the 2008 Communication') or the method based on data from Bloomberg and Capital IQ), the Commission concluded that the loan was not sufficiently remunerated. Furthermore, it did not seem to the Commission that the deferral of interest payments until the due date of the loan was normal market practice. The Commission also had doubts about the estimated value of the collateral.

(35) If the measure constituted a capital contribution, it appeared to the Commission that the State as an investor was not in the same situation as Arcole in terms of risk, even though the amount of Arcole's contribution was equivalent to that of the State. The State did not have the same financial incentives as Arcole, which had to make a return on its investments made before the court-supervised procedure by continuing the undertaking's business, thereby avoiding a costly redundancy plan. Furthermore, the Commission took the view that the concomitance with Arcole's investment had been made possible through the intervention of the public prosecutor in requesting a derogation (…) (*). The Commission also noted that the minimum opportunity cost of a similar investment over 20 years was around 7,4 %. Similarly, the probability of obtaining a remuneration substantially higher than 1 % seemed low, given the random pattern of dividend distributions. Moreover, the Commission noted that the State's concern in seeking to prevent Arcole from exiting MoryGlobal's capital did not seem to be that of a private investor.

[7] OJ C 14, 19.1.2008, p. 6.
(*) Confidential information

(36) Lastly, irrespective of how the measure is classified, the Commission had doubts about the consistency, having regard to the private investor principle, of including industrial commitments relating to the environment in the loan agreement.

3.1.2. **Social measures**

(37) Furthermore, the Commission noted that the cost of the changes to the redundancy plan in terms of better support for redundant MD employees that were made before the improved offer was tabled appeared to have been borne mainly by the State through the introduction of the social measures described in section 2.2.2. According to the press, the buyer had maintained its proposal of EUR 7 000 per employee by way of ex-gratia redundancy payments and had refused to increase them. Therefore, these measures seemed to have conferred an advantage on MoryGlobal, since part of the redundancy plan had been financed by the State rather than MoryGlobal. The Commission took the view that, if economic continuity between MD and MoryGlobal had been established by releasing MD from its obligations to its employees, MoryGlobal's economic situation had been improved.

3.2. COMPATIBILITY ASSESSMENT

(38) Although the Commission had no doubts about MD being classified as an undertaking in difficulty, it questioned whether MoryGlobal, which was set up on 23 January 2014, could be similarly classified.

(39) Moreover, since France took the view that the measures did not constitute State aid, it had not submitted a compatibility assessment. The Commission therefore called on France to provide one.

3.3. ON THE PRINCIPLE OF ECONOMIC CONTINUITY

(40) The Commission pointed out that, according to the case-law of the Court of Justice of the European Union, the obligation to recover incompatible aid may be extended to a new company to which the company in question has transferred part of its assets, where that transfer permits the conclusion that there is an economic continuity between the two companies ([8]). According to the Commission, there were strong indications of economic continuity between MD and MoryGlobal in relation to the body of evidence set out by the case-law of the Court. MoryGlobal could therefore be liable to repay any incompatible aid received by MD.

4. **OBSERVATIONS BY FRANCE ON THE OPENING DECISION**

(41) France submitted its observations on the opening decision on 23 October 2014.

(42) First of all, France challenged the view that the promise to grant a loan to MoryGlobal and the relevant press releases had allowed the company to benefit by giving precedence to the offer by Arcole, which, thanks to the loan, was able to submit an improved offer.

4.1. CLASSIFICATION AS STATE AID

(43) France takes the view that it behaved like a prudent investor in taking the decision to grant the FDES loan to MoryGlobal. It stresses, first of all, that it is incorrect to assert that the State's investment decision was not based on any substantive economic and financial analysis because it did not wait for the final report of Eight Advisory dated 26 January 2014. The report merely reproduces, for the most part, the content of the analyses carried out earlier by Arcole and CIRI on the prospects for a joint investment.

(44) Furthermore, the specific characteristics of the FDES loan are not taken into account by the Commission. Through the financial instrument of the FDES, France granted a participating loan to MoryGlobal: all the elements relating to the low remuneration from applying the fixed rate in question must be examined in

([8]) Judgment of the General Court of 28 March 2012, *Ryanair* v *Commission*, T-123/09, ECLI:EU:T:2012:164, paragraph 155.

conjunction with the other elements of remuneration and capital gain. France is of the opinion that there is no justification for the Commission to consider MoryGlobal to be an undertaking with a CCC rating under the 2008 Communication. MoryGlobal is a company without MD's liabilities, set up to implement a strategic plan that was adjusted after the collective proceedings. Similarly, France considers that the bullet repayment is the most suitable arrangement for a participating loan, contrary to the Commission's claims. Furthermore, France is surprised that the Commission believes that there is a low probability of obtaining a rate of return above 1 %. This analysis appears to give substance to the idea that no prudent investment could be made in the takeover of MD's most viable and most profitable assets. Moreover, France highlights the fact that it was not pursuing the objective of preventing or penalising an exit by Arcole from the undertaking's capital, rather its objective was not to remain the sole investor if Arcole exited, which is in line with the principle of the prudent investor.

(45) In the end, France considers that the measure must be analysed as a capital contribution made *pari passu* with Arcole.

(46) Lastly, with regard to the Commission's doubts as to whether including industrial commitments relating to the environment in the loan agreement is consistent with the private investor principle, France would refer to the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU ([9]): 'For the purpose of the MEO test, only the benefits and obligations linked to the situation of the State as an economic operator — to the exclusion of those linked to its situation as a public authority — are to be taken into account'.

(47) Moreover, France takes the view that the financing by the State of social measures in favour of redundant workers does not constitute State aid. These measures provide no aid to the undertaking because they do not replace any of the undertaking's obligations towards its employees.

4.2. COMPATIBILITY ASSESSMENT

(48) France takes the view, first, that MoryGlobal was eligible to receive restructuring aid as the economic successor to MD and, second, that the aid is compatible with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([10]) ('the 2004 Guidelines'). France argues that the measures implemented to restore the viability of MD/MoryGlobal are akin to measures that would have been taken under a restructuring plan accepted by the Commission on the basis of the 2004 Guidelines. In the same way, the reduction in MD's scope of activity has limited undue distortions of competition. Finally, the aid is limited to the minimum.

5. **COMMENTS BY THIRD PARTIES ON THE OPENING DECISION**

(49) No third party commented on the opening decision.

6. **ASSESSMENT OF THE AID**

6.1. ASSESSMENT OF THE EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(50) Under 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'.

(51) On the basis of this provision, a measure can be classified as State aid if all of the following tests are met: (i) the measure is imputable to the State; (ii) the measure is selective; (iii) the measure confers an economic advantage on the beneficiary; and (iv) the measure distorts or threatens to distort competition and is likely to affect trade between Member States.

([9]) Draft Commission Notice on the concept of State aid pursuant to Article 107(1) TFEU, paragraph 80, available at: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html

([10]) OJ C 244, 1.10.2004, p. 2.

(52) The Commission would stress that the two types of measure, namely the FDES loan on the one hand and the social measures on the other, are dealt with separately in this Decision solely in order to provide a clear analysis. In practice, the two measures were decided on at the same time and are closely linked in their common purpose of ensuring that MD's economic activity continues with as many jobs as possible, as will be demonstrated in the rest of the Decision.

6.1.1. **Existence of State resources and imputability**

(53) The FDES loan was granted by Order of the Minister for Economic and Financial Affairs, implementation of which was entrusted to the Director-General of the Treasury. The relevant funds come from a special Treasury account and repayments of principal and interest are also paid into the budget of the French State. The loan is signed, paid and managed by the bank Natixis on behalf of France, on the basis of an agreement signed between Natixis and France.

(54) The press release of 6 February 2014 clearly states that the social measures will be financed by the public authorities.

(55) Accordingly, the Commission concludes that the measures in question involve State resources and are imputable to the State.

6.1.2. **Selectivity**

(56) The Commission notes that the FDES loan was granted in favour of MoryGlobal, the company which took over MD's assets. Although the remit of the FDES is to grant loans for economic and social development under the conditions laid down in the Circular of 26 November 2004 on State action in the prevention and resolution of business difficulties ([11]), which governs its operation, the granting of loans by the FDES is always subject to a case-by-case examination. The selectivity condition is therefore met.

(57) The Commission notes that the social measures for employees are divided into two components: one automatic and the other optional, at the discretion of France.

(58) *Automatic facility*. France considers that the occupational security contract (CSP) is a facility under ordinary law provided for by the Labour Code, in particular to ensure that redundant employees maintain their income at almost the same level. The CSP, which was created by the Act of 28 July 2011 ([12]), is intended for employees of undertakings under administration or compulsory liquidation. The Commission notes that MD's employees were eligible for the benefits arising under this contract. Consequently, it considers that the allowances paid to redundant workers under the CSP, as well as the amounts mobilised from the joint funds for making career paths more secure for financing training, do not fulfil the selectivity criterion and do not constitute State aid.

(59) *Discretionary facility*. The Commission's analysis is different when it comes to the benefits under the second facility, since they go beyond the undertaking's statutory obligations and are fully financed by the State. The benefits under the enhanced support facility and the fact that the State bears, for 2 years, the difference in wages in the event of an employee being regraded to a lower-paid job, are the result of a decision by the State exercising its discretionary power and, in this case, in favour of the beneficiary undertaking; this holds true even though the conditions for the degressive temporary allowance facility are laid down in Article R.322-6 of the Labour Code and by the Decree of 22 January 2014 implementing Article R.5123 of the Labour Code ([13]).

(60) In conclusion, the Commission considers selective the measures consisting of the FDES loan on the one hand and the social measures under the discretionary facility on the other. The social measures under the automatic facility are not selective. They do not, therefore, constitute State aid and accordingly will not be considered further in this Decision.

([11]) Official Journal of the French Republic (JORF) No 279, 1.12.2004, p. 20468.
([12]) Law No 2011-893 of 28 July 2011 on the development of apprenticeships and making career paths more secure, Official Journal of the French Republic No 174 of 29.7.2011, p. 12914.
([13]) Official Journal of the French Republic (JORF) No 24, 29.1.2014, p. 19184.

6.1.3. **Existence of an economic advantage**

6.1.3.1. *Framework for analysis*

(61) An economic advantage exists whenever the financial situation of an undertaking is improved as a result of State intervention. However, it is settled case-law that, in order to determine whether a State measure constitutes aid within the meaning of Article 107(1) TFEU, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions ([14]).

(62) Intervention by a public authority does not necessarily confer an advantage on the beneficiary, and as such does not constitute aid if it is carried out under normal market conditions, in other words, if the public authority acted as a prudent operator in a market economy would have done in similar circumstances. In this regard, the presence of significant investments of the same kind, carried out at the same time as the State intervention by other private operators taking similar risks ('*pari passu*'), may provide an indication that the State behaved as a prudent operator. Lastly, it is necessary to examine whether the State intervention is based on economic evaluations comparable to those which, in the circumstances, a prudent private operator in a market economy, in a situation as close as possible to that of the State, would have commissioned before making the investment in order to determine its future profitability.

6.1.3.2. *Political background to the granting of the public measures*

(63) It should be noted that the involvement and repeated interventions of the public authorities between the opening of insolvency proceedings on 22 November 2013 and 6 February 2014, the date on which the takeover was approved by the judgment of Pontoise Commercial Court, benefited Arcole's takeover bid and therefore ultimately MoryGlobal. On 22 November 2013, the Minister for Economic Regeneration and the Minister for Transport announced publicly: 'The period ahead of us must be used to examine all scenarios and consider the solutions for continuing activity in an economically viable scope and preserving as many jobs as possible' ([15]). On 10 January 2014 the Minister for Economic Regeneration stated that France would grant a loan of EUR 17,5 million to secure Arcole's bid in exchange for an improved redundancy plan ([16]). The Minister made statements concerning the social measures for MD employees and promised: 'maintenance of wages for 1 year under the occupational security contract', 'financing of all training for all the career projects which have been approved' and 'partial coverage for 2 years of the wage differential in order to avoid a reduction in purchasing power' ([17]). Finally, on 29 January 2014, the CEO of Arcole was summoned by the Prime Minister to assure him that Arcole was actually committed to the takeover bid for MD ([18]).

6.1.3.3. *FDES loan*

(64) *The legal nature of the measure*. France considers that the measure in question has a dual nature since it is both a loan (payment of interest) and a capital contribution (potential payment of interest, depending on dividends). France explained that, if a choice had to be made, the measure should be classed as a capital contribution, which would allow it to be compared with Arcole's capital contribution, which also amounted to EUR 17,5 million. France therefore concluded that the two financing measures had been made *pari passu* and in the absence of State aid.

(65) Interventions by the FDES are governed by the Circular of the Minister for Economic Affairs and Finance of 26 November 2004 ([19]). Pursuant to that instrument, the FDES may intervene in support of undertakings in difficulty only through repayable loans but may not be used to take control of the undertakings receiving support. Furthermore, the fact that part of the remuneration of the loan is linked to the payment of dividends to the shareholder Arcole in no way implies that the FDES is also receiving dividends: the FDES loan is remunerated partly by variable interest, payment of which is triggered simply by the payment of dividends to Arcole. Finally, there is a clear asymmetry between the rights of the FDES and those of Arcole. By way of illustration, the FDES

([14]) Judgment of the Court of Justice of 29 June 1999, *DMT*, C-256/97, ECLI:EU:C:1999:332, paragraph 22.
([15]) Direct matin.fr, 22 November 2013: '*MD: Montebourg et Cuvillier se saisissent du dossier*' http://www.directmatin.fr/france/2013-11-22/MD-montebourg-et-cuvillier-se-saisissent-du-dossier-616172
([16]) *Les Echos*, 10 January 2014: '*Mory Ducros: l'État va soutenir l'offre d'Arcole, annonce Montebourg*' http://www.lesechos.fr/10/01/2014/lesechos.fr/0203235311692_MD—l-État-va-soutenir-l-offre-d-arcole–annonce-montebourg.htm
([17]) *Libération*, 12 January 2014: '*Montebourg au secours de Mory Ducros*' http://www.liberation.fr/economie/2014/01/12/montebourg-au-secours-de-MD_972338
([18]) *Nord Eclair*, 29 January 2014: '*Mory Ducros: le patron d'Arcole Industries convoqué à Matignon (Montebourg)*' http://www.nordeclair.fr/france-monde/MD-le-patron-d-arcole-industries-convoque-a-ia0b0n353355
([19]) See footnote 11.

cannot know and, still less, participate in the decision-making process as regards MoryGlobal's management and strategic guidelines, just as it would not benefit from any increase in the value of MoryGlobal's capital.

(66) Accordingly, the Commission takes the view that the FDES support must be considered a loan and not a capital contribution and, in the absence of any prospects of similar remuneration, cannot be regarded as *pari passu* with Arcole's capital contribution. Moreover, and in any event, the difference in nature between the contributions by the FDES and Arcole is even more evident when the enhanced support facility and the degressive temporary allowance facility paid for by France are taken into account. Indeed, from a financial point of view, such a defrayal of costs can be likened to an unremunerated, non-repayable grant combined with the FDES loan, without Arcole making a similar financial effort from the point of view of the expected returns. At best, France could expect only the remuneration and repayment of the loan, whereas Arcole remained a shareholder in MoryGlobal and could expect a return on its share of the capital.

(67) *Conduct of France as a prudent economic operator.* There is substantial evidence to suggest that France did not behave like a prudent economic operator.

(68) First of all, as already described in section 6.1.3.2, representatives of France intervened publicly on numerous occasions to stress that France would intervene in order to support the takeover of MD in order to 'preserve as many jobs as possible'. Such declarations of intent do not seem to reflect the behaviour of a prudent economic operator helping an undertaking in difficulty: in such a case, one of the first measures commonly adopted to reduce costs and keep the undertaking afloat is to reduce the wage bill. These considerations and objectives of a public authority which are reflected in an increased wage bill may run counter to the interest of a prudent private creditor because they can reduce the borrower's ability to repay the loan.

(69) Next, France does not appear to have obtained 'economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the State would have had carried out, before making the investment, in order to determine its future profitability' ([20]). In response to the opening decision, France claimed that the final report of Eight Advisory of 26 January 2014 was merely a summary of the interim reports prepared in December. However, despite repeated requests by the Commission ([21]), France did not provide these interim reports in order to enable the Commission to verify this claim. In the light of the information at its disposal, in particular the public statements by the various ministers responsible ([22]), the Commission therefore considers that the decision to grant the loan in principle and the conditions of the FDES loan had been laid down before the report presenting the results of the simulation of the IRR on the capital contributions by Arcole and on the FDES loan had been completed, and that France had taken the decision to grant the loan before becoming apprised of the report's findings. But 'for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a (prudent economic operator in a market economy), it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen' ([23]).

(70) Moreover, the fact that the grounds of the judgment by Pontoise Commercial Court refer explicitly to the FDES loan as a guarantee enabling the undertaking's business to continue on a sustainable basis demonstrates that the loan conferred an advantage on MD under the court-supervised administration procedure and, as a result, on MoryGlobal as the successor to MD's activity following the latter's liquidation.

(71) Lastly, the environmental commitments to replace MoryGlobal's vehicle fleet imposed by the FDES loan are a further demonstration that France acted as a public authority rather than a prudent economic operator. No prudent economic operator would have made the granting of a loan to an undertaking in difficulty conditional on the expensive renewal of the undertaking's vehicle fleet merely in response to environmental concerns. Without specific justification, that condition is totally foreign to the objective of achieving a return that a lender should pursue. The imposition of environmental requirements for the vehicle fleet is reflected in additional costs which may compromise the borrower's ability to repay the loan.

(72) *France did not behave as a prudent economic operator with regard to the terms of the loan.* First, the loan was secured by a pledge on MoryGlobal's capital. In view of MoryGlobal's extremely precarious situation, such a solution seems

([20]) Judgment of the Court of Justice (Grand Chamber) of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 84.
([21]) Requests for information by the Commission to France of 2 December 2014 and 16 July 2015.
([22]) See footnotes 15 to 18.
([23]) Judgment in *Commission* v *EDF*, cited above in footnote 20, paragraph 85.

less than reliable, to say the least. Since the repayment of the principal and interest must take place at term after 20 years, in the event of MoryGlobal going into liquidation, the FDES would not recover the amount originally lent. Furthermore, the value of the stakes held in a company is even lower if the shares are illiquid — as is the case with MoryGlobal. If MoryGlobal's results were to stagnate or even decline, the value of the stakes would also be seriously affected. The collateral granted and the expected remuneration therefore seem low and do not appear sufficient to reward the risk taken by France.

(73) A bullet loan with a 20-year maturity is a considerable risk for the lender. Moreover, it does not seem that the deferral of interest payments until the term of the loan is complete is normal market practice, *a fortiori* for an undertaking coming out of a court-supervised administration procedure which therefore does not have a positive credit or rating history, in particular in an economic sector suffering from the difficulties described in recitals 10 to 12. For the lender, the value of the interest payments decreases if payment is deferred until the term of the loan and may fall below the nominal rate of interest. In this case, with a nominal return of 1 %, it would be enough for inflation to exceed this percentage for the real return on the loan to be negative at the end of the period. The European Central Bank's policy objective is for an inflation rate below, but close to, 2 % over the long term ([24]), while the yield on 10-year and 30-year French government bonds (fungible Treasury bonds) was 2,29 % and 3,27 % respectively in early February 2014. Accordingly, the nominal rate of remuneration on the loan of 1 % could be considered negative in real terms since it would in all likelihood be lower than inflation at the end of the 20-year term. The remuneration on the FDES loan was lower than the cost of financing for the French State based on government bonds for the same period, for an asset that was much riskier.

(74) Furthermore, the negative return on the loan is accentuated by including in the calculation the cost of the enhanced support facility and the degressive temporary allowance facility paid for by France. The amounts set out in recital 90 suggest that these facilities could represent a cost in excess of EUR 10 million in nominal terms for the French State (EUR 4 000 per employee with a maximum workforce of 2 732 employees). By way of illustration, if the net present value of the likely schedule of disbursements and repayments of the FDES loan discounted using the 20-year constant maturity treasury rate (TEC 20) of 2,90 % was already negative to the tune of EUR – 5,45 million, by including the cost of the facilities ([25]) the net present value becomes negative to the tune of EUR – 14,62 million ([26]). A prudent economic operator would not, therefore, have agreed to such financing.

(75) Moreover, the internal rate of return simulations presented by France are based on the assumption that Arcole would exit MD's capital and would pay breach of contract costs to the State, failing which the yield would be much lower. However, Arcole may decide to stay invested in the capital. In that case, the return on the loan for France would be limited to the receipt of interest. Furthermore, in such a situation, Arcole would obtain the benefit of the increase in value of its stake or of the unrealised gains thereon, which the State itself cannot expect. In that regard, it should be noted that the concern of France to prevent or penalise Arcole's exiting the undertaking's capital is not at all that of a prudent economic operator driven solely by considerations of achieving a return in the medium to long term. Rather, it is explained by the concern to ensure the continuity of an undertaking for which France intervened in support of Arcole (…).

(76) In addition, the payment of variable interest seems extremely hypothetical, since MoryGlobal was set up after the liquidation of MD, which was itself created in part from the liquidation of Mory. Furthermore, the scenarios supplied by France provided for the payment of dividends, and thus variable interest, only from 2018, 2019 and 2020, without making the IRR positive. In this regard, it should be noted that the loan provision stipulating that the overall interest rate (fixed + variable) on the FDES loan could not be below the average rate of interest on the associated current accounts agreed by Arcole is not such as to provide further evidence that the granting of the loan was prudent, given the extremely hypothetical payment of variable interest.

(77) Lastly, the internal rate of return calculation presented by France was performed only on the FDES loan and takes no account of the establishment of an enhanced support facility and a degressive temporary allowance facility paid for by France, which was none the less decided on at the same time as the FDES loan. It follows from the

([24]) https://www.ecb.europa.eu/press/pressconf/2013/html/is130502.en.html

([25]) Cost of EUR 10 million, which, for the purposes of simplification, is assumed to be paid in full in 2016 (N + 3). This simplification, like the use of the 20-year constant maturity treasury rate as the discount rate, is a prudent and conservative approach.

([26]) These amounts are calculated by discounting the capitalisable interest rates (1 % p.a.) payable on maturity (N + 20) and the principal; the total is deducted from the principal of EUR 17,5 million and the discounted cost of the facilities. The discount rate used is the TEC 20 of 3 February 2014. This rate is obtained by linear interpolation of the actuarial yields on the two Treasury securities which are closest to the 'n years' maturity (20 years in this case). https://www.banque-france.fr/economie-et-statistiques/changes-et-taux/les-indices-obligataires.html

estimated amounts set out in recital 90 that the first facility, in particular, could represent a cost in excess of EUR 10 million in nominal terms for the French State. A prudent market economy operator would take into consideration all the funds that he is mobilising in an investment in order to estimate its real return. In the case of France, in order to assess whether the total public funding of the continued activity of MD offered sufficient prospects of profitability, a prudent economic operator would have taken into account not only the loan but also the cost of the enhanced support facility and the degressive temporary allowance facility borne by France.

6.1.3.4. *Social measures — Discretionary facility*

(78) As regards the discretionary component of the social measures, which included both the enhanced support facility and the degressive temporary allowance facility, France puts forward two arguments to rule out the existence of an economic advantage to the recipient undertaking. First, France points out that these benefits do not reduce the MD's contribution to the plan to safeguard jobs. Second, France argues that these benefits are intended solely for the workers made redundant and that, accordingly, they do not result in an advantage for the undertaking.

(79) The Commission does not share that analysis.

(80) First, the assurance of granting these measures by the State — even though they are intended to assist the employees — in fact benefited MD and its shareholder Arcole in the context of its takeover offer by simplifying considerably the social context of the takeover. The Commission notes in this regard that the decision by France to launch the enhanced support facility dates from 22 January 2014 and Arcole lodged the higher bid with Pontoise Commercial Court shortly thereafter, on 28 January 2014. The improved terms of the redundancy plan obtained before the higher bid was lodged were borne essentially by France through the introduction of the social measures described above. According to the press, the buyer had maintained its proposal of EUR 7 000 per employee by way of ex-gratia redundancy payments and had refused to increase them.

(81) Moreover, the Commission observes that the fact that the assistance covers expenses incurred by the beneficiary by choice is not sufficient to exclude the possibility that it constitutes aid. It has consistently taken the view, as recalled in the judgment of the Court of Justice of 26 September 1996 in *Kimberly Clark Sopalin* ([27]), that: 'assistance for certain undertakings or for the production of certain goods is to be classified as aid even if it is used to finance costs incurred voluntarily by the undertaking concerned'. In this case, the Commission takes the view that the fact that the social measures under the 'discretionary component' do not reduce MD's contribution to the plan to safeguard jobs is not sufficient to establish the absence of aid. Furthermore, the General Court pointed out in paragraph 83 of its judgment in *Corsica Ferries France* v *Commission* ([28]) that 'Under the principle of equal treatment (see paragraph 75 above), the option of making additional redundancy payments is also open to the Member States in the event that a public company goes into liquidation, even though their obligations cannot in principle exceed the strict minimum under statutory obligations and obligations under agreements'. However, the Court states in paragraph 84 that '… the assumption of the burden of those additional costs, because of legitimate concerns, cannot follow an exclusively social, even political, objective, as it would otherwise go beyond the framework of the private investor test as defined at paragraphs 76 to 82 above. In the absence of any economic rationale, even in the long term, the assumption of the burden of costs which exceeds the strict statutory obligations and obligations under agreements must therefore be considered to be State aid within the meaning of Article 87(1) EC'. In the case at hand, MD was not a public undertaking. The assumption of the social measures by France therefore had no justification other than its acting as a public authority.

(82) Consequently, the enhanced support facility and the degressive temporary allowance facility granted an advantage to MD since part of the redundancy plan, although it was not obligatory for the employer, was financed by France and not by MD, without the latter being required to repay the amounts borne by France.

6.1.3.5. *Conclusion on the existence of an economic advantage*

(83) Therefore, the examination of the FDES loan and the enhanced support facility and the degressive temporary allowance facility, taken individually or, *a fortiori*, taken together, shows that France did not behave like a prudent economic operator and that their granting conferred on MoryGlobal and on MD an economic advantage which they would not have been able to obtain under market conditions. MoryGlobal and MD have therefore been favoured within the meaning of Article 107(1) TFEU.

([27]) Judgment of the Court of Justice of 26 September 1996, *Italy* v *Commission*, C-241/94, ECLI:EU:C:1996:353, paragraph 30.
([28]) Judgment of the General Court of 11 September 2012, *Corsica Ferries France* v *Commission*, T-565/08, ECLI:EU:T:2012:415.

6.1.3.6. *Quantification of the aid element*

(84) *In the FDES loan*. Regarding the interest rate on the loan, the Commission considers that, in itself, the rate of 1 % is not in line with market conditions. In the absence of any information calling into question the interest rates set out in the 2008 Communication, the Commission considers that it is possible to estimate the market interest rate on the basis of the latter.

(85) On this point, it should be noted that the arguments put forward by France are contradictory. In its reply to the opening decision, France explained in response to the concerns raised by the Commission regarding the remuneration of the FDES loan that 'Newco MD/MoryGlobal has never been assigned a credit rating, let alone a CCC rating, as it is a company without liabilities, with its own capital, which was set up to implement a strategic plan adapted (sic) after the collective proceedings' ([29]). However, in its compatibility assessment, France maintained that MoryGlobal was the economic successor to MD and was therefore eligible to receive restructuring aid. In the assessment, it stated the following: 'Newco MD is not a 'newly created firm' within the meaning of the guidelines' ([30]).

(86) In the present case, the Commission notes that, at the time the FDES loan was granted, MoryGlobal was officially a company without MD's liabilities and with its own funds. Thus, in theory, MoryGlobal should not have experienced any difficulties accessing financing from private operators. In practice, given the lack of private operators willing to lend, MoryGlobal had to turn to France and the FDES. Private operators were likely to view MoryGlobal as a company without the liabilities of MD, but none the less as the successor to MD, an unreliable company that had recently been liquidated, some years after the restructuring that led to its creation. On the basis of the information available to the Commission, MD's economic situation appears to be the best available benchmark in the absence of any credit rating for MoryGlobal. Thus, contrary to the argument put forward by France, a CCC rating must be assigned to MoryGlobal.

(87) Furthermore, the collateral, the value of which depended solely on the success of the proposed takeover of MD, and not on intrinsic and objective characteristics, namely physical assets, stock, production assets or immovable property, must be regarded as weak.

(88) Thus, if the 2008 Communication is applied, the rate should have been 10,53 % (i.e. 0,53 %, the base rate of France between January and March 2014, plus 1 000 basis points, given the low value of the collateral granted).

(89) The Commission considers that the amount of the aid equates to the sum of the difference between (i) 10,53 % (reference rate for France + 1 000 basis points) applied to the principal and (ii) 1 % (rate on the FDES loan) applied to the principal, calculated for the period during which the amount was made available to MoryGlobal. This method of estimating the economic advantage conferred by the difference in rate must be applied to the amounts of interest. The fact that the loan agreement provides for variable interest payments does not affect this amount. In the simulations on which France claims to have based its decision to grant the loan, the payment of dividends was planned to begin in 2018 and the projections did not go beyond 2020. Moreover, the fact that MoryGlobal was created from the liquidation of MD, which itself was partly created from the liquidation of Mory, reflects the extremely hypothetical nature of the variable interest payments to be made to France.

(90) *In the enhanced support facility and the degressive temporary allowance facility*. Under the enhanced support facility established by the Decree of 22 January 2014 implementing Article R.5123 of the Labour Code and under the enhanced collective support facility agreement concluded between France and MD's receivers, France will contribute EUR 4 000 per employee, with the maximum number of employees set at 2 732. The aid element therefore corresponds to the amounts actually paid by France under this facility.

(91) Under the degressive temporary allowance facility established by Articles R.5123-9 to R.5123-11 of the Labour Code and the Order of 26 May 2004 on degressive temporary allowance agreements ([31]), and as stated in the press release of 6 February 2014 ([32]), France will pay up to EUR 300 per month for 2 years to MD employees regraded to a lower-paid job. The aid element therefore corresponds to the amounts actually paid by France under this facility.

([29]) Reply from France dated 23 October 2014, p. 13.
([30]) Reply from France dated 23 October 2014, p. 19.
([31]) Official Journal of the French Republic (JORF) No 135, 12.6.2004, p. 10466.
([32]) See footnote 6.

6.1.4. **Effect on competition and trade between Member States**

(92) The social measures favoured MD by relieving it of some of its obligations set out in the redundancy plan. Had MD not been liquidated, its competitive position in relation to other operators in the parcels market would have been strengthened.

(93) The FDES loan favours MoryGlobal by providing it with additional resources. It allows it to maintain a stronger competitive position than it would have had unaided. It therefore threatens to distort competition between operators in the parcels and freight sector.

(94) Furthermore, the parcels and freight market is fully open to competition and there is a high level of trade between Member States. Therefore, the Commission concludes that the advantage conferred by the measures in question on an undertaking operating in a market that is open to competition distorts or threatens to distort competition and is liable to affect trade between Member States.

6.1.5. **Conclusion with regard to the existence of State aid within the meaning of Article 107(1) TFEU**

(95) The FDES loan, the enhanced support facility and the degressive temporary allowance facility constitute State aid within the meaning of Article 107(1) TFEU.

6.2. ASSESSMENT OF THE COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

(96) The prohibition of State aid laid down in Article 107(1) TFEU is neither absolute nor unconditional. In particular, paragraphs 2 and 3 of Article 107 TFEU constitute legal bases allowing some aid measures to be considered compatible with the internal market.

(97) In this case, the Commission takes the view that the aid was granted with the aim of restoring the long-term viability of firms in difficulty. It is therefore necessary to analyse whether the measures in question could be considered compatible under Article 107(3) TFEU.

6.2.1. **Applicable legal basis**

(98) Point 137 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ([33]) provides that 'The Commission will examine the compatibility with the internal market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 108(3) of the Treaty on the basis of these guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union* (31 July 2014)'. Point 138 then states that: 'In all other cases it will conduct the examination on the basis of the guidelines which applied at the time the aid was granted'.

(99) Since the measures in question were granted in February 2014, their compatibility must be assessed in the light of the 2004 Guidelines.

(100) In *Italy* v *Commission*, the Court of Justice held that: 'It should be observed that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled'. ([34]) It is therefore necessary to assess the compatibility of the measures in the light of the information provided by France.

6.2.2. **Social measures — Discretionary facility**

(101) In order to be eligible for rescue and restructuring aid, the undertaking must qualify as a firm in difficulty as defined in section 2.1 of the 2004 Guidelines. MD fulfils the criteria for undergoing collective insolvency proceedings. As referred to in section 2.1 above, MD was placed under a court-supervised administration procedure on 26 November 2013 by Pontoise Commercial Court. The undertaking may therefore be considered to be a firm in difficulty within the meaning of point 10 of the 2004 Guidelines.

([33]) OJ C 249, 31.7.2014, p. 1.
([34]) Judgment of the Court of Justice of 28 April 1993, *Italy* v *Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

(102) Paragraphs 34 and 35 of the 2004 Guidelines state that the granting of aid must be conditional on implementation of the restructuring plan, which must be approved by the Commission for all individual aid measures and must restore the long-term viability of the firm on the basis of realistic assumptions.

(103) In the present case, the Commission notes that France has not submitted a restructuring plan of any kind. France's argument that a restructuring plan implemented on the basis of an analysis by the Commission would have led to the same solution cannot be accepted, since the Commission was not afforded the opportunity to carry out such an analysis. The criterion of a return to long-term viability cannot therefore be met.

(104) Similarly, points 38 to 42 of the 2004 Guidelines state that the company in receipt of aid must implement compensatory measures. A market survey must be used as the basis for determining these measures and the survey must be submitted together with the restructuring plan. Otherwise, the aid will be regarded as contrary to the common interest and thus incompatible with the internal market.

(105) In this regard, France has not proposed compensatory measures of any kind. As with the restructuring plan, France's argument that compensatory measures adopted on the basis of an analysis by the Commission would have led to the same solution cannot be accepted, since the Commission was not afforded the opportunity to carry out such an analysis.

(106) Accordingly, the Commission concludes that, in the light of the 2004 Guidelines, the State aid granted to MD as a result of France bearing the cost of the enhanced support facility and the degressive temporary allowance facility cannot be considered to be State aid compatible with the internal market in accordance with Article 107(3)(c) TFEU.

6.2.3. **The FDES loan**

(107) Firstly, it should be noted that France has not submitted a restructuring plan or compensatory measures enabling the restructuring aid paid to MoryGlobal to be deemed compatible aid. Therefore, one cannot conclude that the aid in question is compatible with the internal market on the basis of the 2004 Guidelines.

(108) Moreover, and for the sake of completeness, it should be noted that point 12 of the 2004 Guidelines states that: 'A newly created undertaking is not eligible for aid under these guidelines even if its initial financial position is insecure. This is the case, for instance, where a new undertaking emerges from the liquidation of a previous undertaking or merely takes over that undertaking's assets'. In this case, MoryGlobal was created on 23 January 2014 following MD's liquidation. In any event, MoryGlobal would not have been able to receive State aid through restructuring aid. Furthermore, even if MoryGlobal, as the 'economic successor' to MD, were not to be considered a newly created undertaking within the meaning of the 2004 Guidelines, it would not be possible to declare the aid compatible for the reasons set out in recital 107. In addition, the Commission finds that it has not been demonstrated that MoryGlobal met the conditions to qualify as a firm in difficulty, which is an essential precondition for the application of the 2004 Guidelines. Lastly, it should be noted that France has not put forward any other legal basis for compatibility during the procedure.

(109) Accordingly, the Commission concludes that, in the light of the 2004 Guidelines, the State aid granted to MoryGlobal as a result of the FDES loan cannot be considered to be State aid compatible with the internal market in accordance with Article 107(3)(c) TFEU.

7. **RECOVERY AND ECONOMIC CONTINUITY**

7.1. FRAMEWORK FOR ANALYSIS

(110) In accordance with the TFEU and the settled case-law of the Court of Justice, the Commission has the power to decide that the Member State concerned must abolish or alter aid when it finds it to be incompatible with the internal market. The Court has also ruled on a number of occasions that the obligation to abolish aid incompatible with the internal market which a Commission decision imposes on a Member State has as its purpose to re-establish the previously existing situation ([35]).

([35]) Judgment of the Court of Justice of 14 September 1994, *Spain* v *Commission*, C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, paragraph 75.

(111) In this context, the Court of Justice has established that this aim is achieved once the beneficiary 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 has been restored ([36]).

(112) In line with case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ([37]) lays down 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 …'.

(113) Consequently, since the measures in question were implemented in breach of Article 108 TFEU and are to be considered unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market before the aid was granted. As such, recovery must cover the period during which an advantage was conferred on the beneficiary, that is to say from the time the aid was made available to the beneficiary until it was effectively recovered. The sums to be recovered should therefore include interest due until recovery takes place. In accordance with case-law, the recovery interest accrues from the date on which the aid was actually made available ([38]).

(114) France should therefore recover from MoryGlobal the incompatible aid consisting in the FDES loan and from MD the incompatible aid consisting in the enhanced support facility and the degressive temporary allowance facility.

7.2. RECOVERY OF THE INCOMPATIBLE AID FROM MORYGLOBAL

(115) MoryGlobal is currently in court-supervised liquidation. In accordance with well-established case-law, the insolvency of the beneficiary and its inability to repay the aid do not constitute a valid reason for exempting it from its obligation to reimburse the aid ([39]). In this case, restoring the situation prior to the payment of the aid and removing the distortion of competition can in principle be achieved by registering the liability relating to the repayment of the aid in the schedule of liabilities as part of the court-supervised liquidation procedure. Where the Member State is unable to recover the full amount of aid, registration of the liability can meet the recovery obligation provided that the insolvency proceedings result in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities ([40]).

(116) In this regard, on 31 March 2015 France lodged a claim on MoryGlobal with the court-appointed liquidator for EUR 17 500 000 in principal and EUR 155 916,66 in interest on the FDES loan. This interest is calculated on the actual duration of the loan, at the rate specified in the contract. The registering of these liabilities is a standard obligation required of a creditor in court-supervised liquidation proceedings, and is not linked to the creditor's obligations arising from the recovery of aid. In order to recover the amounts of aid as detailed in this Decision, France will have to add the recovery of the aid included in the FDES loan to the schedule of liabilities as part of the court-supervised liquidation procedure. This aid will be calculated as the difference between the interest rate applied and a rate of 10,53 % for the time that has already elapsed, and this until such a time as the interest ceases to accrue under French law in the context of a court-supervised liquidation. Recovery interest must be added to these sums for the period starting from when the aid was made available until reimbursement actually takes place or, in the present case, until the interest ceases to accrue under the law governing the court-supervised liquidation procedure.

7.3. RECOVERY OF THE INCOMPATIBLE AID FROM MD — ECONOMIC CONTINUITY

(117) The enhanced support facility and the degressive temporary allowance facility benefited MD. However, MD has been liquidated and by judgment of Pontoise Commercial Court of 6 February 2014 its assets were transferred to Arcole, which consolidated them into MoryGlobal.

([36]) Judgment of the Court of Justice of 17 June 1999, *Belgium* v *Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

([37]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

([38]) Judgment of the General Court of 30 January 2002, *Keller and Keller Meccanica* v *Commission*, T-35/99, ECLI:EU:T:2002:19, paragraphs 106 to 109.

([39]) Judgment of the Court of Justice of 29 April 2004, *Germany* v *Commission*, C-277/00, ECLI:EU:C:2004:238, paragraph 85; Judgment of the Court of Justice of 15 January 1986, *Commission* v *Belgium*, C-52/84, ECLI:EU:C:1986:3, paragraph 14; Judgment of the Court of Justice of 21 March 1990, *Belgium* v *Commission*, C-142/87, ECLI:EU:C:1990:125, paragraphs 60 to 62.

([40]) Judgment of the Court of Justice of 11 December 2012, *Commission* v *Spain*, C-610/10, ECLI:EU:C:2012:781, paragraph 104.

(118) According to case-law, the recovery obligation may be extended to a new company to which the beneficiary has transferred part of its assets, where that transfer permits the conclusion that there is an economic continuity between the two companies ([41]). The recovery obligation can be extended to another company, provided that it is established that the other company is effectively benefiting from the aid in question due to an economic continuity between the two entities. In such a case, those taking over the beneficiaries' activities would therefore also have to repay the aid considered incompatible with the internal market.

(119) In this case it is therefore necessary to examine whether the company taking over MD's activities, namely MoryGlobal, can be regarded as MD's economic successor, and hence as liable for reimbursing the aid incompatible with the internal market from which MD benefited.

(120) In the light of the judgment of the Court of Justice in *Italy and SIM2 Multimedia* v *Commission* ([42]), on which the Commission based its decisions concerning *Olympic Airlines*, *Alitalia* and *Sernam* ([43]), an analysis of whether there is economic continuity between operators must draw on a body of evidence. The following are some of the factors that may be considered, as established by case-law: (i) the scale of the assets transferred, (ii) the price at which the assets were transferred, (iii) the identity of the buyers, (iv) the timing of the transfer and (v) the economic justification for the takeover. This set of factors was confirmed by the Court of Justice in its judgment of 28 March 2012 in *Ryanair* v *Commission* ([44]), which endorsed the Commission's decision in the *Alitalia* case.

(121) In the present case, Arcole took over all of MD's tangible and intangible assets and consolidated them into its MoryGlobal subsidiary. In addition, nearly half of the jobs at MD were transferred to MoryGlobal. In this regard, it should be noted that the judgment handed down by Pontoise Commercial Court refers to Arcole's bid, in which Arcole requested that it be transferred the assets of MD required for it to continue a substantial part of MD's activities in the parcels, logistics and freight market.

(122) Furthermore, the purchase price for these assets was set by Pontoise Commercial Court as part of MD's court-supervised liquidation. In its judgment, the Commercial Court explained that: 'In the present case, it is undisputed that only the offer made by Arcole Industries with a substitution clause could be duly considered and examined'. Therefore, the price at which the assets were transferred was not the result of a comparison of several competing bids. The price at which Arcole acquired MD's assets cannot therefore be considered the result of a market transaction.

(123) Furthermore, MD and MoryGlobal have the same majority shareholder, Arcole. Arcole was only able to take over MD's assets following its liquidation as a result of a one-off derogation required by the French Public Prosecutor (…).

(124) Lastly, MoryGlobal continued MD's business activities in the parcels, freight and logistics market, as was clearly indicated by Arcole when it took over MD. In this regard, it should be noted that the Court specified the following in the grounds of its judgment: 'Whereas the takeover is also likely to enable the undertaking's business to continue on a sustainable basis considering the guarantees put forward'. In addition, MoryGlobal took over all of MD's trade names and brands, and acquired the right to call itself MD's successor in France and abroad without restriction.

(125) Consequently, in the light of the scale of the assets transferred, the price at which the assets were transferred, the identity of the buyers and the economic justification for the takeover, the Commission concludes that there is economic continuity between MD and MoryGlobal.

(126) Accordingly, recovery of the amount of aid under the enhanced support facility and the degressive temporary allowance facility must be extended to MoryGlobal. Recovery must therefore be entered in the schedule of liabilities as part of the MoryGlobal court-supervised liquidation procedure.

([41]) Judgment of the General Court of 28 March 2012, *Ryanair* v *Commission*, T-123/09, ECLI:EU:T:2012:164, paragraph 155.

([42]) Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*, C-328/99 and C-399/00, ECLI:EU:C:2003:252.

([43]) Commission Decision of 17 September 2008, State Aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Sale of certain assets of Olympic Airlines/Olympic Airways Services*; Commission Decision of 12 November 2008, State Aid N 510/2008 — Italy — *Sale of assets of Alitalia*; Commission Decision of 4 April 2012, SA.34547 — France — *Takeover of SERNAM Group assets under the court-supervised administration procedure*.

([44]) Judgment in *Ryanair* v *Commission*, see footnote 41 above.

8. **CONCLUSIONS**

(127) The Commission finds that, by granting an FDES loan to MoryGlobal and by bearing the costs of the enhanced support facility and the degressive temporary allowance facility in MD's stead, France has unlawfully implemented State aid in breach of Article 108(3) TFEU. France must therefore recover the amount of this aid, plus interest, from MoryGlobal or, if full reimbursement is not possible as a result of the court-supervised liquidation procedure, it must ensure that MoryGlobal is effectively wound up.

(128) The Commission finds that the measures granted by France to redundant MD employees under the occupational security contract do not constitute State aid under Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid resulting from the loan from the Economic and Social Development Fund (FDES) granted to MoryGlobal on 11 February 2014, in so far as the interest rate applied is below the rate calculated in this Decision on the basis of the Communication from the Commission on the revision of the method for setting the reference and discount rates, i.e. 10,53 %, unlawfully granted by the French Republic to MoryGlobal, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

2. The State aid resulting from the enhanced support facility established by the Decree of 22 January 2014 implementing Article R.5123 of the Labour Code and resulting from the enhanced collective support facility agreement concluded between the French Republic and the receivers of Mory-Ducros SAS, unlawfully granted by the French Republic to Mory-Ducros SAS, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

3. The State aid resulting from the degressive temporary allowance facility established by Articles R.5123-9 to R.5123-11 of the Labour Code and the Order of 26 May 2004 on degressive temporary allowance agreements, unlawfully granted by the French Republic to Mory-Ducros SAS, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

The social measures granted by the French Republic to redundant employees of Mory-Ducros SAS under the occupational security contract do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

1. The French Republic shall recover the aid referred to in Article 1 from MoryGlobal, in its own name as the economic successor to Mory-Ducros SAS.

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

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([45]).

([45]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

Article 4

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

2. The French Republic shall ensure that this Decision is implemented within 4 months of the date of its notification.

Article 5

1. Within 2 months of notification of this Decision, the French Republic shall provide the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

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

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

2. The French Republic shall keep the Commission informed of the progress of the national measures adopted pursuant to this Decision until the recovery of the aid specified in Article 1 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 6 November 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission