II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/449

of 28 July 2015

on State aid SA.38544 2014/C (ex 2014/N) which France is planning to implement in favour of Kem One

(notified under document C(2015) 5169)

(Only the French version 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 those articles ([1]), and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 30 July 2014, after pre-notification contacts, France notified to the Commission three financial support measures (an FDES loan, grants and repayable advances, and a possible write-off of tax and social security debts) included in the restructuring plan to ensure the continued existence of Kem One SAS ('Kem One' or 'the company').

(2) By letter dated 1 October 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 these measures ('the opening decision'). France submitted its comments by letter dated 3 November 2014.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the measures in question.

(4) The Commission received comments from six interested parties and forwarded them to France, giving it the opportunity to comment on them, and received its observations by letter dated 25 February 2015.

([1]) OJ C 460, 19.12.2014, p. 40.
([2]) See footnote 1.

(5) On 20 March 2015, France submitted additional information in support of its observations. On the same day, the Commission requested additional information, which France provided on 8 May 2015. The Commission subsequently requested additional information on 23 June 2015, which France provided on 2 July 2015.

(6) In addition, several conference calls and meetings took place between the Commission and the French authorities.

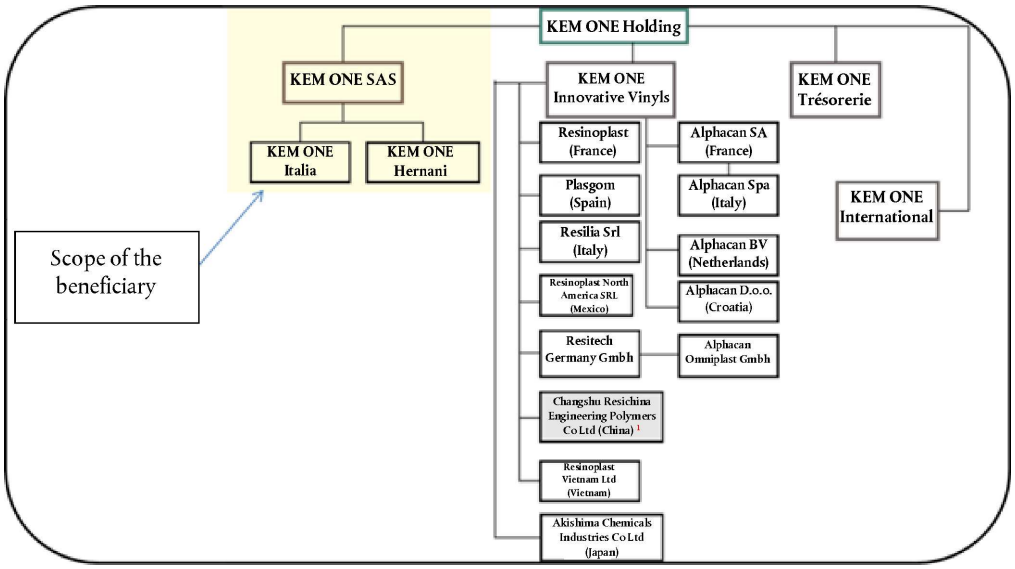
2. BACKGROUND

2.1. THE BENEFICIARY: KEM ONE

(7) Kem One was a wholly owned subsidiary of Kem One Holding, which had been set up in 2012 to enable Arkema's vinyl business to be transferred to a subsidiary and taken over by the Klesch Group, a financial group based in Switzerland. In 2012, Kem One and its subsidiaries (Kem One Italia and Kem One Hernani) generated total turnover of EUR […] (*) million, of which EUR […] million in France, the main centre of production and sales. They employ 1 315 staff in France and approximately 80 in Spain and Italy.

Diagram 1

Structure of the Kem One group before the takeover



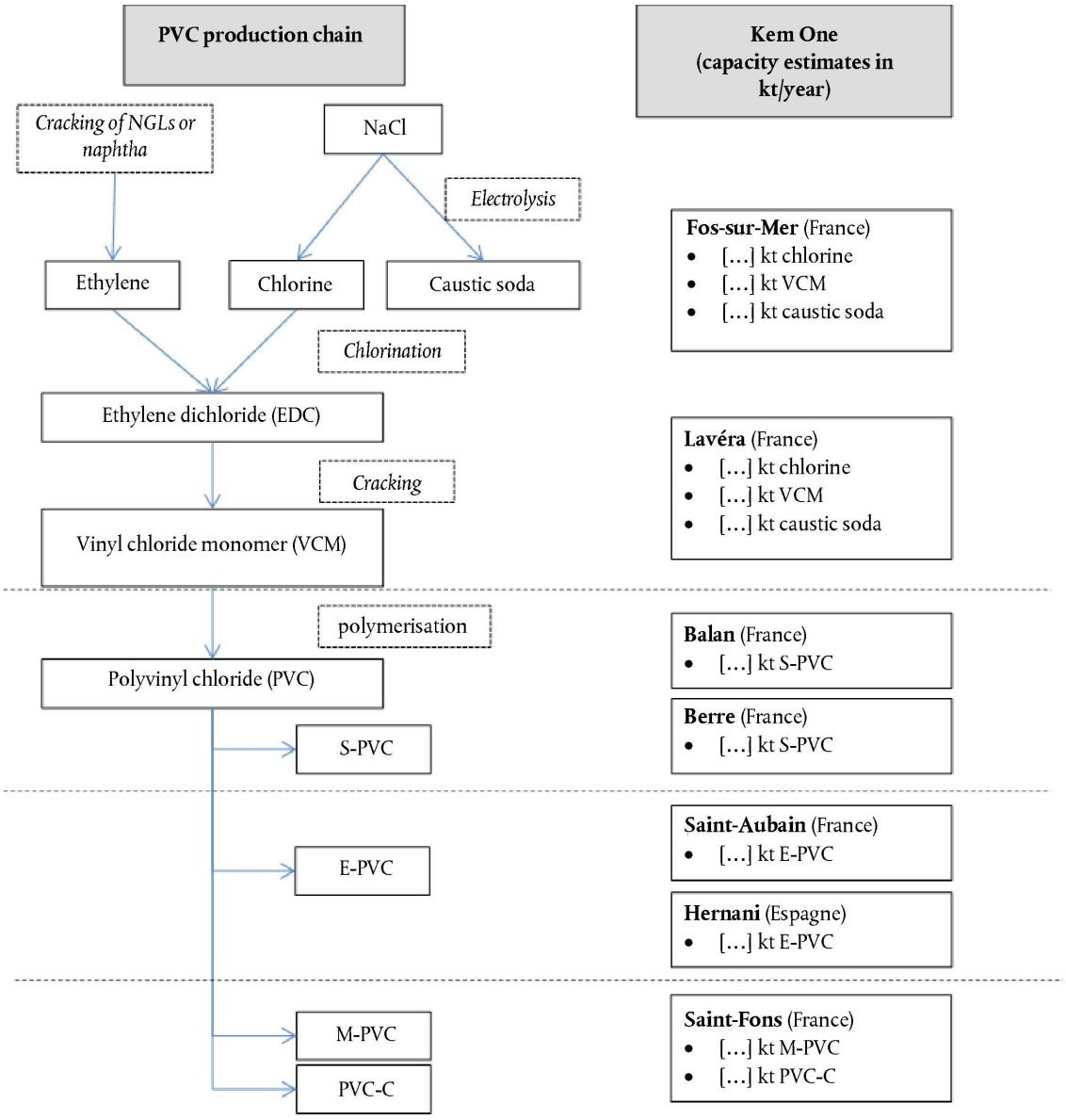
Source: Disclosure

(8) Kem One engages in several activities in a vertically integrated chain from the production of salt to the processing of polyvinyl chloride (PVC). Thus, Kem One combines under one roof the upstream activities of production and marketing of chlorochemicals and PVC for use in many economic sectors: the car industry, construction, agriculture and health.

(*) Confidential information

Diagram 2

Kem One activities in the PVC production chain



Source: Commission, on the basis of the information provided by France and the comments by interested parties

(9) Kem One's main business object is the production ([…] % of turnover) and marketing of PVC. Kem One produces three types of PVC: (i) general-purpose PVC (M-PVC and S-PVC), which accounts for […] % of its PVC output; (ii) emulsion PVC (E-PVC), which accounts for […] % of its PVC output but […] % of its total margin associated with its PVC business; and (iii) chlorinated PVC (PVC-C), which accounts for […] % of its PVC output. It has already been established by previous Commission decisions ([3]) that the PVC market comprises two separate market segments: S-PVC and E-PVC. The S-PVC segment must be further subsegmented by type of S-PVC: commodity S-PVC, specialty S-PVC and extender S-PVC. The same applies to the E-PVC segment (E-PVC paste, specialty E-PVC).

(10) Furthermore, the Commission found that these markets were likely to be Europe-wide (as big as the European Economic Area, EEA) but that it was possible for the S-PVC segment to cover a narrower geographical area,

([3]) See, in particular, the Commission Decision of 8 May 2014 in Case M.6905 — INEOS/Solvay/JV ('INEOS/Solvay/JV Decision').

corresponding to western Europe or even north-western Europe (Germany, Belgium, Denmark, France, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom taken together).

(11) Today, Kem One is present mainly in the market for commodity S-PVC. Kem One estimates its market shares and those of its competitors as follows:

Table 1

Market share for commodity S-PVC in north-western Europe (2012-2014)

S-PVC — north-western Europe						
	2012		2013		2014	
	Market share (Volume) (%)	Market share (Value) (%)	Market share (Volume) (%)	Market share (Value) (%)	Market share (Volume) (%)	Market share (Value) (%)
Kem One	[10-20]	[5-20]	[5-10]	[5-20]	[10-20]	[5-20]
Ineos	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]
SolVin	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
ShinEtsu	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]
Vinnolit	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Vestolit	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]

Source: Reply from France dated 7 July 2015

(12) On the E-PVC market, France takes the view that the joint venture between INEOS and Solvay has a market share in capacity terms of around [20-30] %, while Vinnolit's market share is some [30-40] %, Vestolit's [10-20] % and Kem One's [10-20] %. Thus, the three leading competitors (Vinnolit, the INEOS/Solvay joint venture and Vestolit) together account for almost [80-90] % of output and sales of E-PVC in western Europe.

(13) In addition to PVC, Kem One produces and markets caustic soda, chloromethanes and chlorine used in the manufacture of PVC ([4]).

2.2. THE DIFFICULTIES ENCOUNTERED BY KEM ONE

(14) The difficulties encountered arise from both structural disadvantages and the global crisis which led to substantial financial losses between the second half of 2012 and the beginning of 2013.

2.2.1. **Kem One's structural handicaps**

2.2.1.1. *The vertical disintegration of the ethylene chain*

(15) The French authorities consider that the competitiveness of the players in the PVC sector depends on various factors, including the price of energy and raw materials, the integration and size of the units in any vinyl chain, their geographical location and the associated logistics, the technologies employed by the units and the possibility for certain players to use chlorine twice.

([4]) Chlorine is used to produce vinyl chloride monomer (VCM), which is then used in the manufacture of PVC.

(16) Kem One's current activities developed within Arkema's vinyl division, which became an independent group in 2006. These activities were then sold to the Klesch Group in 2012. The current structure of Kem One is the result of several carve-outs during different disposals of existing activities in the chemical sector in France, which led to a vertical disintegration of the ethylene chain that was unfavourable to Kem One because of the part played by the cost of purchasing ethylene in the production of PVC. Kem One does not, therefore, have integrated access to ethylene, in particular because of the loss of the link with the Total steam cracker, its source of ethylene supplies. Kem One's main competitors are partially integrated thanks to integrated ethylene production for part of their needs (INEOS steam cracker in Norway and Solvay steam cracker in France) or to long-term agreements tantamount to a form of integration (e.g. Shin-Etsu in the Netherlands for access to the Shell steam cracker).

2.2.1.2. *The heart of the production process (electrolysis) is dated and underperforming*

(17) Of four electrolysis units, only one can be considered technologically modern and three are energy-intensive (the diaphragm cell plants at Fos-sur-Mer and Lavéra and the mercury cell plant at Lavéra). Kem One's main competitors embarked on conversion of their mercury cell and diaphragm cell plants to membrane cell electrolysis in the period 2003-2013.

(18) Kem One therefore has only […] % of the most modern capacity (membrane electrolysis), whereas this technology accounts for almost […] % of existing capacity.

2.2.1.3. *High production costs*

(19) The transfer of Arkema's vinyl business to Klesch was not preceded by the setting-up of a subsidiary and internal restructuring, which would have optimised the structural costs. Those costs amounted to EUR […] million in 2013.

(20) Furthermore, many services and performance contracts had to be established between Arkema and Kem One, which resulted in competitiveness gaps.

2.2.1.4. *A commercial policy too geared to southern Europe*

(21) The geographical location of Kem One, whose main production units have direct access to the Mediterranean, has led to the establishment of a sales policy (PVC and caustic soda) largely geared to the countries of southern Europe, whose markets were directly affected by the crisis of 2008-2009 and by the import of low-priced products, in particular caustic soda, compared with prices in the markets of north-western Europe. This commercial policy approach has contributed to the deterioration in Kem One's margin.

2.2.2. **Kem One's financial difficulties**

(22) The poor economic climate in the second half of 2012 and in early 2013 soon led to substantial financial losses for Kem One.

(23) The negative effects of the crisis were reinforced by a number of events which resulted in a significant drop in sales and affected the company's margin: the five-yearly shutdown of the Fos-sur-Mer site in 2012 lasted longer than planned; a problem with the quality of the ethylene supplied by Total; a major incident at the Total steam cracker in Lavéra at the end of December 2012, which resulted in its complete shut-down until March 2013, then its operating at half capacity.

2.2.3. **Insolvency and the opening of the court-supervised administration procedure**

(24) The recurring difficulties encountered by Kem One prompted it to request the opening of a conciliation procedure before Lyon Commercial Court in January 2013. Since no agreement had been reached, on 27 March 2013 the court held that Kem One was insolvent and opened the court-supervised administration procedure.

(25) By judgment of 20 December 2013, Lyon Commercial Court accepted the joint bid from Mr Alain de Krassny and the investment firm OpenGate Capital ('OpenGate') and approved the recovery plan. The objective of the recovery plan was business continuity.

(26) A new company, K1 Group SAS ('K1'), was set up for the purposes of the recovery plan; the company object is to acquire and hold the shares in Kem One and Kem One Innovative Vinyls. K1 is 50 % owned by AK1, a company controlled by Mr de Krassny, and 50 % owned by K1 International, a company controlled by OpenGate.

2.3. DESCRIPTION OF THE PUBLIC SUPPORT MEASURES

(27) […] ([5]):

— a loan from the Economic and Social Development Fund ('the FDES loan') for a maximum amount in principal of EUR 30 million,

— a grant of EUR 15 million and repayable advances of up to EUR 80 million,

— a possible write-off of social security and tax debts at the request of the buyer.

2.3.1. **The FDES loan (EUR 30 million)**

(28) The FDES is used by the French authorities as a tool accompanying the restructuring of certain undertakings in difficulty. The guidelines for using the FDES are currently based on the circular of 26 November 2004 on state action in the prevention and resolution of business difficulties ([6]). The FDES intervenes in the form of loans that are limited to undertakings whose viability is assured at the end of the restructuring period and whose disappearance would have a substantial effect on an entire sector or a region. In any event, the state intervenes in co-financing with the private sector. In November 2013 the French Minister for Economic Regeneration introduced an exceptional package to provide specific help, under the FDES, to viable intermediate-sized enterprises ([7]), which are often placed in collective insolvency proceedings.

(29) The FDES loan of EUR 30 million is intended to be used as a guarantee for the granting of supplier credits to Kem One and to participate in the financing of its working capital requirements and its short-term cash flow needs.

(30) The loan will be granted to Kem One after the signature of the loan contract and will be conditional on the contribution by the buyers to a fully paid-up cash capital increase of at least EUR 10 million.

(31) The loan will generate interest at the fixed annual rate of 3,5 %. Kem One will repay the FDES loan in seven annual instalments.

(32) The state has a first-rank pledge agreed by Kem One on its plant and equipment. The net book value of the plant and equipment included in the accounts prepared on 31 December 2013 was EUR 138,49 million. Given the validation of the contributions by an auditor in July 2012 and the absence of exceptional circumstances that might call into question the depreciation periods, the French authorities consider that the net book values reflect the actual value of those assets.

2.3.2. **The grant (EUR 15 million) and repayable advances (EUR 80 million)**

(33) These financing measures are intended to implement the SAM project to convert the industrial plant (mercury electrolysis unit at the Lavéra site) under the 'Support for re-industrialisation' investment plan for the future.

(34) In its notification, France agreed that the grant constituted State aid.

([5]) […]
([6]) *Official Journal of the French Republic* (JORF) No 279, 1.12.2004, p. 20468.
([7]) According to the definition used by the National Institute of Statistics and Economic Studies (INSEE), an intermediate-sized enterprise is a company with between 250 and 4 999 employees, and a turnover not exceeding EUR 1,5 billion or a balance-sheet total not exceeding EUR 2 billion. A company with fewer than 250 employees but a turnover above EUR 50 million and a balance sheet exceeding EUR 43 million is also considered to be of intermediate size.

(35) The advances will be reimbursed over seven years. They include a grace period of two years and comprise two tranches: (i) EUR 65 million at an annual fixed rate of 3,5 %; and (ii) EUR 15 million at an annual fixed rate of 10 %.

(36) As part of the arrangements for the provision of such funding, a Monitoring Committee comprising representatives of the state, Kem One and the buyers will be set up. It will be responsible for sanctioning expenditure under the SAM project, validating continued activity and employment at the Lavéra site and monitoring the conformity of any management fees received by Mr de Krassny.

2.3.3. **Possible write-off of tax and social security debts**

(37) In its notification, France assessed the tax and social security debts owed by Kem One at EUR 42 million.

(38) On 20 February 2014, Kem One referred itself to the Committee of Heads of Financial Services (*Commission des Chefs de Services Financiers — CCSF*), which is responsible for waivers of tax and social security debts.

(39) […], Kem One lodged with Lyon Commercial Court an application for a substantial modification of the company's recovery plan in accordance with Article 626-26 of the Commercial Code ([8]), with a request for a sizeable remission of the legally remissible public debts. In accordance with the judgment of Lyon Commercial Court, Kem One's request for remission covers 90 % of the remissible part of the debts. The French authorities agreed to EUR […], which corresponds to […] % of the tax and social security debts. The request for remission had not yet been formally examined by the CSSF when the aid measures were notified to the Commission.

2.4. KEM ONE'S RESTRUCTURING PLAN

2.4.1. **The planned measures**

(40) The restructuring plan is based on the continued existence of Kem One, grouped together with the other subsidiaries owned by Kem One Innovative Vinyls SASU in order to reconfigure the upstream and downstream businesses.

(41) The restructuring plan involves three types of measure: industrial, commercial and financial.

2.4.1.1. *Industrial measures: Modernisation of the production process, in particular the electrolysis cells at Lavéra*

(42) The project has three main objectives:

— to comply with the voluntary commitment made by the chlorine producers in Eurochlor to phase out mercury cell technology for chlorine production by 2020,

— to restore the competitiveness of the Lavéra site in the chlorine-caustic soda-chloromethanes-VCM sector to the level of that of its European competitors through the production of chlorine using membrane cell technology,

— to retain the site's upstream vertical integration, through access to brine from Vauvert, and downstream, by business opportunities for VCM and chloromethane.

(43) Kem One's estimate of the cost saving of closing its competitiveness gap is in the order of EUR [20-40] million per year in production costs. Commissioning is planned for 2016. The total cost of the SAM project is EUR [150-250] million.

([8]) 'Substantial modifications of the goals or means of the plan may be made only by the court, on request of the debtor and based on the report of the plan performance supervisor. Where the debtor allows a substantial modification of the plan to creditors, referral to the Court may be made by the Commissioner in execution of the plan'.

2.4.1.2. *Commercial measures: reorientation of commercial policy towards value-added markets*

(44) Kem One intends to use most of its production capacity for the most profitable markets, in particular PVC-C, E-PVC and the liquid chlorine business, thereby enabling it to increase its margin for a constant chlorine capacity.

(45) Kem One also intends to expand its sales of caustic soda and commodity S-PVC in France and north-western Europe.

(46) The recovery plan forecasts an increase of EUR [10-30] million by 2016, i.e. an increase of approximately [0-10] % in the gross margin on turnover.

2.4.1.3. *Financial measures: reduction in structural costs*

(47) The plan provides for [90-110] job losses. Substantial amendments were made to the employment contracts of [1-15] staff as a result of the closure of the Aix-en-Provence site. As regards regrading, [80-100] jobs have been identified within Kem One and the Group. The redundancy plan will result in wage cost savings of EUR [0-10] million.

(48) The plan also provides for structural cost savings of EUR [10-20] million linked to a reduction in insurance costs, the closure of the head office branch in Aix-en-Provence and the postponement of IT projects.

(49) Finally, the plan is intended to make savings of EUR [15-25] million resulting from improved productivity: reduction in fixed and variable costs, improvement in yields. These measures are independent of the SAM project and are scheduled for 2014 and 2015.

2.4.2. **Estimate of restructuring costs and financing of the restructuring plan**

(50) The restructuring costs total EUR 222 million: the project for converting the electrolysis installations in Lavéra (EUR [150-210] million) and the sinking of two doublets at the Vauvert saltworks (EUR [15-30] million).

(51) In order to finance the restructuring costs, the plan provides for the following financing:

Table 2

Sources of financing provided for in the restructuring plan, as set out in the notification

Private contributions (EUR million)		Public contributions (EUR million)	
Self-financing	[30-40]	Grants	15
Bank loan	[60-70] (1)	Reimbursable advances	80
Financing (private operator 1)	[35-45]	FDES loan	30
Financing (private operator 2) (financing by factoring)	[40-50]		
Capital increase	10		
Total	**187,5**	**Total**	**125**
	Total financing	**312,5**	

Source: Notification

(1) The decision to take out this loan will depend on the cash-flow generated by Kem One in 2014 and 2015.

(52) The financing of the restructuring is completed by measures to write off claims by private creditors amounting to EUR 158,8 million and by public creditors amounting to EUR […].

(53) Finally, in the context of the transfer of shares in Kem One to K1, Kem One Trésorerie repaid EUR [10-19] million, corresponding to the 'Seveso' guarantee which had been set up by Kem One Holding through Kem One Trésorerie for Kem One's sites in France when they were transferred by Arkema, pursuant to Article L 515-8 of the Environmental Code ([9]) relating to facilities classified for the protection of the environment. The French authorities explained that, although the release and transfer to Kem One of the amount of the Seveso guarantee initially set up by the Klesch Group have an immediate positive effect on its cash flow, the corresponding amount has not been booked as a private contribution because it will have to be gradually allocated to the reconstitution of the financial guarantees in question.

2.4.3. **Kem One's business plan**

(54) Kem One's business plan covers the period 2013-2017, with a return to viability expected in 2017 on the basis of realistic assumptions, according to the French authorities. In the base-case scenario, Kem One returns to a satisfactory level of cash flow in 2014, a level of gross margin of [25-35] % of turnover from 2017 and an EBITDA of around [4-12] % from 2018, in line with the benchmarks in the chemical commodities sector.

(55) The improvement in profitability stems in particular from the following five measures: significant private contributions for an immediate recovery of cash balances; investments to secure reliable electrolysis and drilling operations in order to improve the competitiveness of the undertaking; renegotiation of contracts for access to raw materials and industrial platforms; an internal restructuring accompanied by a performance and productivity plan and a review of Kem One's commercial policy of market positioning.

(56) The French authorities consider that the assumptions used are realistic: the expected gains are already taken into account by new contracts; with the exception of the electrolysis units, the size of the VCM and S-PVC units is on a par with the best competing plants in western Europe; finally, the market price assumptions are not based on a recovery in demand or an improvement in the balance between supply and demand for PVC, which was none the less expected by the main industry consultants.

(57) The business plan also takes alternative scenarios into consideration. Under the pessimistic scenario, the French authorities assume that repeated incidents affecting production cut production and sales by [8-14] % in relation to the base-case scenario, as well as variable costs and the gains identified on the supply contracts. EBITDA remains impaired over the period 2014-2016 ([1-5] % of turnover). The cash position returns to a satisfactory level at the end of 2014 but does not enable Kem One to reduce its debt. However, the return to long-term viability is assured even in this scenario thanks to the project to convert the electrolysis installations.

(58) The optimistic scenario assumes a gradual increase in sales prices of commodity PVC and caustic soda in the years ahead. Under this scenario, the cash position returns to a satisfactory level in 2014 (+ EUR [40-60] million). The plan also enables Kem One to finance some of its investments (EUR [300-500] million between 2014 and 2020), reduce its debt over the period 2017-2020 and achieve EBITDA of [10-15] % from 2018 onwards.

3. **DOUBTS RAISED IN THE OPENING DECISION**

(59) By decision of 1 October 2014, the Commission initiated the formal investigation procedure. In the opening decision, the Commission raised doubts about both the classification of the measures in question as State aid and their possible compatibility with the internal market under the rules on State aid granted to firms in difficulty.

([9]) 'When an authorisation application concerns a classified facility to be implanted on a new site and likely to create, by danger of explosion or emanation of harmful products, very serious risks for the health and safety of neighbouring populations and for the environment, easements of public interest may be established concerning use of the land and the performance of works subject to planning permission'.

3.1. CLASSIFICATION AS STATE AID

(60) In relation to the three notified measures, i.e. (i) the FDES loan; (ii) the grant and the repayable advances; and (iii) the write-off of claims, the Commission had concerns about the existence of an economic advantage and, if there were one, its amount.

3.1.1. **FDES loan**

3.1.1.1. *Value of collateral*

(61) The Commission had doubts, firstly, about the terms of the FDES loan. The Commission voiced several reservations on the estimate of the value of the collateral. Firstly, the French authorities did not indicate which plant and equipment was pledged. The Commission also noted that the French authorities presented the dated and under-performing, or even obsolete, state of certain production facilities as one of Kem One's major difficulties; that was the case in particular of the mercury cell and diaphragm cell units. The Commission therefore had doubts about the real value of the pledged plant and equipment and doubted that the net book value used to estimate the collateral was the most relevant value, in particular in comparison with the alternative solution, which would be to estimate the value of the pledges on the basis of the net income that can be achieved by operating them.

3.1.1.2. *Level of remuneration of the loan*

(62) In the light of these doubts, increasing the reference rate for France at the time the loan was granted (0,53 %) by 400 basis points in order to calculate the remuneration of the loan was insufficient.

(63) The Commission also had concerns about the conditions of remuneration of the loan. Indeed, the French authorities, by applying the communication from the Commission on the revision of the method for setting the reference and discount rates ('the 2008 Reference Rate Communication') ([10]), arrive at a remuneration of 4,53 %, but set a rate of 3,5 %.

(64) The Commission considered on the contrary that the increase in relation to the quality of the collateral was insufficient and that the rate should instead be in the range between 6,53 % and 10,53 % ([11]).

(65) The Commission also noted that, in the absence of a loan granted to Kem One by a private bank on the same terms, in the context of the undertaking's difficulties and restructuring, the entire loan could be considered aid.

3.1.2. **Grant and repayable advances**

(66) The Commission was of the opinion that a subsidy constitutes an economic advantage that the beneficiary would not obtain under market conditions. A grant is a financial instrument whose capital is not repayable and which does not generate interest to be paid by the beneficiary. A private lender, who has a cost of financing and has to remunerate its capital, would not have agreed to finance a company by grants.

(67) With regard to the repayable advances, the Commission noted the presence of certain conditions relating to the granting of the advances that a private lender would probably not have required. These included in particular the condition relating to the maintenance of activity and jobs at the Lavéra site for five years after project completion, the sustainability of Kem One permitting, and with the prior agreement of the state. Furthermore, in the absence of the demonstration by the French authorities that private lenders would have been willing to lend such a sum on the same terms to an undertaking in difficulty, the Commission considered that the full amount of the repayable advances could be classified as aid.

([10]) OJ C 14, 19.1.2008, p. 2.
([11]) Application of the increase of 650 basis points for a level of collateral considered normal and 1 000 basis points for a level of collateral considered low.

3.1.3. **Possible write-off of social security and tax debts**

(68) The Commission observed first that the percentages of debt write-off were not the same for the private creditors (70 %) as for the public creditors ([…] %), even though it was not certain that the state was in the same position as the private creditors which had long-standing relationships with Kem One.

(69) Moreover, with regard to the principle of the private creditor in a market economy, a write-off of debts *a priori* constitutes aid since it provides an advantage to an undertaking over its competitors by reducing its costs. This is all the more true when the undertaking is in difficulty and subject to collective proceedings. In the case at hand, the Commission had doubts about the motives behind the write-off of tax and social security debts, which gave precedence to the offer from one buyer. The Commission did not discount the possibility that the amount of aid was equal to the total amount of the planned write-off.

3.2. COMPATIBILITY ASSESSMENT

(70) With regard to the compatibility of the measures with the applicable State aid rules, the Commission considered that the applicable legal basis was the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Guidelines') ([12]). By that yardstick, the Commission raised doubts about: (i) the restoration of Kem One's long-term viability; (ii) the avoidance of any distortion of competition; and (iii) the limitation of aid to the minimum necessary.

3.2.1. **Restoration of Kem One's long-term viability**

(71) First, the Commission questioned the precise duration of the restructuring plan, given the lack of clarity on this point by France.

(72) The Commission then noted that the French authorities had included in the restructuring costs only the costs of modernising the production facilities [project to convert the electrolysis units in Lavéra (EUR [150-210] million) and sinking two doublets at the Vauvert saltworks (EUR [15-30] million)]. The Commission considered that Kem One's internal restructuring necessarily had to create additional costs linked to the reduction in structural costs and the reorientation of the commercial policy.

(73) Moreover, the Commission had doubts about the credibility of certain aspects of the scenarios for the restoration of long-term viability presented by France. Thus, the restoration of the cash position seemed uncertain, whether under the base-case scenario or the pessimistic scenario.

(74) The three scenarios proposed by France in the notification included the obtaining of a bank loan of EUR [60-70] million in 2016 from private financial institutions. However, at this stage, the French authorities did not appear to have any guarantee that the loan would be granted. This uncertainty therefore undermined the realistic nature of the three scenarios.

3.2.2. **Prevention of distortion of competition**

(75) In the absence of any compensatory measures proposed by France, the Commission pointed out that the presence of compensatory measures is one of the criteria for the compatibility of restructuring aid. Accordingly, it called on the French authorities to propose compensatory measures taking into account all of their arguments.

3.2.3. **Aid limited to the minimum**

(76) The Commission had doubts about the data used by the French authorities to calculate the amount of Kem One's own contribution, and therefore about compliance with the rule that the own contribution by a large firm to the costs of its restructuring must be 50 % of the total amount.

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

4. RESPONSE BY FRANCE TO THE OPENING DECISION

(77) By letter dated 3 November 2014, France presented its observations on the opening decision.

4.1. ON THE CLASSIFICATION AS STATE AID

4.1.1. **FDES loan**

4.1.1.1. *Value of collateral*

(78) France stresses that the book value of the pledged assets corresponds to their market value. The net book value is the gross book value less depreciation. The gross book value is the acquisition cost of the assets or their transfer value. Thus, at the time of the partial transfer of assets from Arkema to Kem One on 2 July 2012, the transfer was valued by independent experts at EUR [110-120] million. Furthermore, France pointed out that two transactions that had recently taken place in the PVC sector involving companies smaller than Kem One had been concluded at much higher amounts than the book value of Kem One's assets. In addition, although Kem One's activities were valued using the net present value method, their amount would be EUR [80-90] million in 2014, EUR [110-130] million in 2015 and EUR [330-340] million in 2016. Finally, France noted that the collateral was first-rank, ensuring that the state would be satisfied before all other creditors.

(79) France concluded therefore that it should be considered that the state had a sound guarantee that was very high in relation to the amount of the FDES loan.

4.1.1.2. *Level of remuneration*

(80) First of all, France takes the view that the methodology for calculating the interest rate on the basis of a sample of companies for which four-year credit default swap (CDS) contracts are negotiated and with a CCC rating, as set out in paragraph 92 of the opening decision, resulting in a rate of 20,95 %, is not able to provide an approximation of actual market rates. These cannot be borrowing operations comparable to those of Kem One in relation to FDES, since there is no identification of the guarantees or the level of collateral attached to the operations taken as a benchmark for determining the rate of 20,95 %.

(81) Furthermore, given Kem One's financial situation and the level of collateral, application of the 2008 Reference Rate Communication results in a remuneration of 4,53 % (reference rate of France of 0,53 % + 400 basis points), and not 6,53 % as stated by the Commission in the opening decision.

(82) In any event, the rate calculated on the basis of the 2008 Reference Rate Communication serves only as an indication. In the case at hand, Kem One's low risk of insolvency, taking account in particular of the effective implementation of the recovery plan enabling the company's viability to be restored by 2017 and sound financial management, and the high level of collateral, justified a rate of 3,5 % consistent with the market.

(83) Lastly, the financing contract with [private operator 2] provides for a financing rate of Euribor 3 months + […] % with a minimum of […] %. Although this is not a bank rate, the conditions for granting the financing are such that they confirm that the FDES loan is consistent with market conditions.

4.1.1.3. *Amount of aid*

(84) As stated in the notification, France considers that the amount of aid, if any, should be equal to the difference between the rate calculated on the basis of the 2008 Reference Rate Communication and the rate applied, i.e. 4,53 % and 3,5 %, and not the total amount of the loan.

(85) France highlights the fact that, in the past, the Commission has applied this approach on several occasions.

4.1.2. **Grant and repayable advances**

(86) As already pointed out, France acknowledges that the entire grant constitutes State aid.

(87) With regard to the repayable advances, France takes the view that they cannot be considered State aid in their entirety. The repayment of the advances is certain since it becomes automatic two years after the end of the modernisation work. Therefore, the advances should be equated to loans and, consequently, the amount of aid is the grant equivalent, i.e. EUR 14,4 million.

4.1.3. **Possible write-off of tax and social security debts**

(88) First of all, France notes that, contrary to what was stated in the notification, the amount of the tax and social security debts is EUR […] and not EUR 42 million. The EUR […] is broken down as follows: EUR […] million in debts contracted before the opening of the court-supervised administration procedure and EUR […] in debts contracted after the opening of the procedure. The relevant authorities intend to grant a write-off of […] % of the remissible debts contracted before the opening of the procedure ([13]), i.e. EUR […] out of a total public liability of EUR […] ([…] % of the total public liability).

(89) Second, France points out that the write-off applicable to most of the debts owed to private creditors was 100 % or 70 %.

(90) Moreover, the waiver by France of part of its tax and social security claims against Kem One is such as to enable the company's recovery plan to be implemented smoothly. If Kem One were to disappear, France could lose an additional EUR […] million ([14]) if it does not grant a total write-off not exceeding EUR […] million.

(91) In the light of this information, France is therefore behaving like a prudent creditor.

(92) In any event, if the measure were to be considered State aid, the amount of aid would be the difference between the level of the write-off finally agreed to by France and the level of the minimum write-off accepted by all the private creditors.

4.2. COMPATIBILITY

4.2.1. **Restoration of viability**

(93) In the opening decision, the Commission called on France to comment on the statement that it had included in the restructuring costs only the costs of modernising the production facilities, whereas Kem One's restructuring necessarily had to generate additional costs linked to each restructuring measure (reduction in structural costs and reorientation of the commercial policy). In its observations, France stresses that the reduction in structural costs resulted in only 13 redundancies, with an associated financial cost of EUR […] million. This cost was not identified separately in the business plan or the cash flow plan attached to the notification, but was none the less deducted from the opening cash position. Furthermore, the other intense efforts associated with the reduction in central costs did not result in specific financial charges. The reorientation of the commercial policy did not result in any directly associated cost.

(94) In addition, a number of positive aspects confirm the realistic nature of the restoration of viability scenarios presented by the company. Thus, in the base-case scenario, the cash position was increased by EUR [30-40] million at the end of 2017, because of a reduction in the investments needed and an earlier than

([13]) EUR […] in employer's contribution + EUR […] in taxes and charges + EUR […] in contributions under the compulsory scheme owed to the Malakoff Médéric Group.

([14]) Proportion of […] % of the debts not written off, i.e. EUR […], plus the non-remissible debts, i.e. EUR […], plus the social security debts contracted before the administration procedure, i.e. EUR 13 million.

expected restart in activity, while the projected operating income has been revised to EUR [35-45] million per year instead of EUR [25-35] million. Furthermore, the involvement of a number of private companies, such as [private operator 1], [private operator 3], [private operator 4] and [private operator 5], which have agreed to write off all of their claims against Kem One, and of [private operator 2], which has agreed to increase Kem One's factoring capacity, demonstrate these companies' belief in the undertaking's return to long-term viability.

(95) The bank loan of EUR [60-70] million remains hypothetical and had not yet been applied for when France submitted its response. Under these conditions, France considers that the fact that there is no guarantee about the bank loan does not undermine the three scenarios relating to the undertaking's return to viability, nor does the amount of the undertaking's own contribution.

4.2.2. **The company's own contribution**

(96) It its observations, France does not challenge the decision not to include the bank loan of EUR [60-70] million in Kem One's own funds because it is a hypothetical element, given the lack of a firm commitment by a financial institution.

(97) *A contrario*, the debt write-offs agreed to by [private operator 3], [private operator 1], [private operator 4] and [private operator 5] should be considered to be genuine financial flows to the benefit of Kem One and therefore taken into account in the own contribution. These companies are long-standing commercial partners of Kem One, and it is in their interest that Kem One succeeds. Accordingly, the debt write-offs amounting to EUR 180,5 million correspond to prudent industrial decisions, with a direct interest in the success of the recovery plan adopted by Kem One and its buyers. The other debt write-offs follow the same logic and involve lower amounts.

(98) The private contributions therefore total EUR 282,5 million, broken down as follows:

Table 3

Sources of the private contributions allowed for in the restructuring plan, according to France

Source of contribution	Amount (EUR m)
Kem One self financing	[30-40]
Financing [private operator 1]	[35-45]
Financing [private operator 2]	[55-65]
Capital injection by the buyers	[5-15]
Satisfaction of debts [private operator 6]	[0-10]
Write-off of debts [private operator 1]	[90-100]
Write-off of debts [private operator 3]	[25-35]
Write-off of debts [private operator 4]	[0-10]
Write-off of debts [private operator 5]	[0-10]
Total	**282,5**

Source: Response by France to the opening decision

5. COMMENTS BY INTERESTED THIRD PARTIES AND OBSERVATIONS BY FRANCE

5.1. COMMENTS BY INTERESTED THIRD PARTIES

5.1.1. **Comments by Ineos**

5.1.1.1. *Amount of State aid and own contribution by Kem One*

(99) Ineos takes the view that the request by France severely underestimates the amount of State aid and does not envisage a sufficient contribution by Kem One and its shareholders.

(100) Amount of State aid. With regard, first, to the FDES loan, Ineos refutes France's analysis that only the difference between the actual rate on this loan (3,5 %) and a supposedly market rate of 4,53 % (i.e. 1,03 percentage points) may be considered aid. If the assertions by France were correct, Kem One should be able to obtain a loan from a private creditor on the same terms, which the firm was not able to do. Furthermore, the value of the collateral has been greatly overvalued. The book value of assets cannot be equated to the market value in the event of severe economic and financial difficulties, all the more so since the collateral only has value in an operating cycle that has proven to be fragile. In conclusion, according to Ineos, the entire FDES loan should be considered aid.

(101) With regard to the direct grant and the repayable advances, Ineos takes the view that the full amount constitutes aid. As to the repayable advances, the condition of maintaining activity at the Lavéra site would not be required by any private creditor. Furthermore, the rates are too low in comparison with those applied under the same conditions by a private creditor.

(102) With regard to the debt reduction, Ineos stresses that, although the commercial creditors have a legitimate commercial interest in Kem One's recovery, the French state itself is in the position of being a pure financial creditor. Thus, the debt reductions agreed by the French state cannot be likened to the reductions agreed by the private creditors.

(103) Ineos emphasises that Kem One benefits from advantageous contracts for the supply of electricity and ethylene. Ineos has no doubt that the decisions by EDF on this issue are imputable to the French state. Ineos calls on the Commission to look into the reasons underlying the granting of these reductions. These preferential tariffs are likely to improve the competitive position of Kem One.

(104) Own contribution by Kem One. Ineos believes that France has overestimated the amount of Kem One's own contribution to the restructuring costs. France includes in the own contribution three loans from private sources: a loan of between EUR 60 and 80 million and two further loans of, respectively, EUR 35 to 45 million and EUR 40 to 50 million. According to Ineos, there is no evidence that a private entity would consent to such a risk, and the hypothetical and improbable nature of these loans implies that they should not be taken into account when assessing the amount of Kem One's own contribution.

(105) First, Ineos stresses the fact that OpenGate, one of Kem One's parent companies, is in good financial health, so that it could participate in the restructuring costs. Ineos takes the view that France must demonstrate that Kem One's difficulties are too severe to be addressed by its shareholders (OpenGate in particular). Second, if the State aid is found to be admissible in the case of Kem One, the shareholders, and OpenGate in particular, must substantially increase the amount of their contribution.

5.1.1.2. *Restructuring plan*

(106) Ineos takes the view that France is not proposing a realistic restructuring plan capable of returning Kem One to economic viability within a reasonable time.

(107) First, the current restructuring plan is based on very substantial investments and cash injections but does not provide for rationalisation of Kem One's activities. Second, the restructuring plan assumes that Kem One will be able to increase significantly its market share and sales in markets for products which are already suffering from severe overcapacity problems and intense competition, and for which demand estimates are low.

(108) In the view of Ineos, the restructuring plan does not provide for the rationalisation of Kem One's loss-making activities. Kem One is suffering from a structural problem of overcapacity. In 2012, the ratio of its production to its total S-PVC capacity was only 60-70 %, well below the average utilisation rates of S-PVC producers in the north-western European market.

(109) Under the restructuring plan's underlying assumption, Kem One should increase considerably its production and sales in the north-western European market. Besides the fact that Kem One has traditionally concentrated its sales of S-PVC in southern Europe, this prospect seems implausible to Ineos. The PVC market in north-western Europe is already characterised by very high oversupply and the forecasts for this market are for weak demand growth over the next five years. Moreover, the acquisition of Vestolit and Vinnolit by two American PVC producers should provide those two players with a more efficient cost structure, which will make them more effective competitors. Lastly, Kem One has a bad reputation among customers in the north-western European market.

(110) The restructuring plan provides for the reorientation of commercial policy towards more profitable products, i.e. E-PVC, PVC-C and liquid chlorine. An increase in sales of caustic soda in the north-western European market is also planned. According to Ineos, this strategy is unlikely to succeed.

(111) First, the plan provides for growth of production and sales of E-PVC with the aim of utilising Kem One's excess capacity, and because the product is relatively more profitable. Yet the E-PVC market in the EEA is highly competitive and already suffering from overcapacity. No substantial increase in demand in the market is expected in the medium or long term. Ineos also stresses that other E-PVC producers who are more credible and better placed in the EEA have announced recent or future investments in their production capacity.

(112) With regard to the project to increase production of PVC-C with a view to benefiting from its higher profitability, Ineos insists that it is a niche product, for which European demand is very low. The French market for liquid chlorine is characterised by its small size and high degree of competition.

(113) Lastly, with regard to the project to increase sales of caustic soda in the north-western European market, Ineos points out that caustic soda is an inevitable by-product of chlorine production. The level of production of caustic soda (and hence the volume of sales) is determined by demand for chlorinated derivatives (such as PVC). Kem One cannot hope to increase its volume of sales of caustic soda without presenting a plausible plan to increase its sales of chlorinated derivatives downstream.

5.1.1.3. *Compensatory measures*

(114) According to Ineos, France is not proposing any appropriate compensatory measures. Ineos stresses that the 2004 Guidelines unambiguously require the use of compensatory measures.

(115) Ineos notes that only half the production capacity for S-PVC in the north-western European market is used for sales in the same market. This serious problem of overcapacity does not seem likely to disappear in the medium term, given the prospects for the construction industry. The consequence of overcapacity and low demand is a reduction in the margins of European PVC producers. Against this background, the planned aid would give Kem One a significant advantage.

(116) In particular, it would enable it to convert its technology to mercury, which would exacerbate the risk for its competitors of having to close down certain parts of their capacity. Furthermore, if Kem One actually succeeds in increasing its sales in the north-western European market, it would contribute to increasing the competitive pressure still further.

(117) Ineos takes the view that it is essential to reduce Kem One's PVC production capacity permanently, given that the structural problem of overcapacity in the market will continue in the long term.

(118) Lastly, Ineos notes that, in the context of relevant markets suffering from structural overcapacity, the 2004 Guidelines lay down that the Commission should grant in principle only targeted aid for the costs of social and environmental restructuring. Ineos takes the view that the restructuring aid should therefore be targeted on the environmental and social costs linked to closure of the Lavéra site, rather than its conversion.

(119) Ineos believes that Kem One is very well positioned in the S-PVC market in north-western Europe, which constitutes an additional reason why substantial compensatory measures should be effectively applied. In 2012, Kem One was the third biggest player in the S-PVC market in north-western Europe, with between 10 and 20 % of total capacity.

(120) Furthermore, France cannot assert, on the one hand, that Kem One is suffering from a weak position in the S-PVC market, and, on the other, that any reduction in its production capacity would lead to a weakening of the competitive structure in the same market.

(121) Ineos stresses that the purpose of these compensatory measures is not to take out the firm entirely, but to reduce its capacity. Moreover, Ineos takes the view that it is incorrect that a reduction in capacity — and even the very disappearance of Kem One from the market — would render its customers unable to put in place a strategy of multiple sources of supply. Ineos notes that there are, or that there will be in the near future, five other sizeable suppliers, plus other, smaller competitors. Ineos stresses again that Kem One is not, in any case, regarded as reliable in this market. Lastly, Ineos highlights the fact that the market in question is competitive.

(122) According to Ineos, compensatory measures are also necessary in other markets, which are all characterised by overcapacity problems and sound positioning by Kem One. The first market is the E-PVC market, in which Kem One had 10 to 20 % of total capacity in 2012. In the chloromethanes market, the aid in question will result in downstream production on a cost basis that is more advantageous than that of Kem One's competitors. With regard, lastly, to the caustic soda market, Ineos points out that it is an inevitable by-product of chlorine production.

(123) Ineos takes the view that compensatory measures are possible and that they would help to create a viable production chain.

(124) In that regard, Ineos takes the view that Kem One should adopt a restructuring plan involving:

— closure of its Lavéra electrolysis cell rooms,

— closure of the PVC production plants that can no longer receive adequate supplies of VCM from the Fos-sur-Mer site, i.e. Saint-Fons and Balan.

(125) In the opinion of Ineos, such a capacity reduction by Kem One would mitigate the distortive effects of the aid in the market, rationalise Kem One's activities on a more competitive basis, and make good the withdrawal from structurally loss-making activities (in particular on the Lavéra site). This solution would resolve the problem of Kem One's overcapacity and obviate the need for the French state to contribute to the conversion of the Lavéra site through substantial investments.

5.1.2. **Comments by anonymous undertaking 1**

5.1.2.1. *Justification for State aid*

(126) First, anonymous undertaking 1 emphasises the fact that the PVC sector is in crisis and the major players are subject to substantial economic and financial pressure. European operators must agree to substantial investments under the regulatory framework in a context marked since 2007 by a fall in margins, a reduction in European demand for PVC, falling prices, high energy costs, overcapacity problems and, lastly, the poor economic situation of the construction sector.

(127) Against this background, it is important to maintain a level playing field. Aid to Kem One is considered a potential source of serious market distortion.

(128) France claims that, without any aid measures to Kem One, the market would be characterised by a situation of tight oligopoly. Anonymous undertaking 1 does not agree with that point of view. It points out that the Commission, in its Ineos/Solvay/JV decision, did not conclude that the market was characterised by such a situation. At the time, the Commission referred to the fact that S-PVC was currently produced or imported by 11 companies.

(129) Moreover, anonymous undertaking 1 notes that granting aid to the third-largest player in the sector would only delay the necessary market adjustments and improvements and exacerbate the financial difficulties of the other operators. According to anonymous undertaking 1, it is even possible to argue that no aid may be granted, under point 8 of the 2004 Guidelines, because the market is suffering from structural overcapacity.

(130) Anonymous undertaking 1 also raises doubts about Kem One's prospects of returning to profitability. It notes that the Commission, in its Ineos/Solvay/JV decision, had already established Kem One's inability to return to economic viability, even after its acquisition by Klesch.

(131) The measures in the restructuring plan as announced in the opening decision lack detail, in particular with regard to Kem One's new commercial strategy, the conversion of the electrolysis units and the credibility of the firm's future contracts. Furthermore, it seems likely that the restructuring period will exceed five years — the duration judged acceptable by the Commission in its previous decisions.

(132) Moreover, the timing of the investments required to modernise the electrolysis plants is uncertain (2016 or 2017). The European rules require European operators to convert from mercury technology by the end of 2017. If France allowed Kem One to delay the necessary investments, it would be preferential treatment that could constitute a financial advantage and therefore a form of State aid.

(133) Lastly, implementing restructuring measures depends on external factors that are outside the firm's control. That is the case in particular with the bank loan of EUR 60 to 70 million in 2016.

5.1.2.2. *Amount of State aid*

(134) With regard to the amount of aid, anonymous undertaking 1 stresses the fact that it is much higher than the amount granted by France. Certain measures may be considered State aid in their entirety, such as the direct grant of EUR 15 million and the repayable advances of EUR 80 million for the modernisation of production plant. A private investor would not, under any circumstances, have made his decision conditional on the maintenance of activity and staff at the Lavéra site. Moreover, the purely hypothetical nature of the private bank loan is not enough to demonstrate the willingness of a private investor to grant a loan on the same terms.

(135) With regard to the FDES loan of EUR 30 million, in the absence of a detailed list of the assets and equipment constituting the collateral, and of an evaluation of their market value, it is impossible to conclude that the level of collateral is 'high'. According to anonymous undertaking 1, the level may at most be regarded as normal, in which case, in accordance with the 2008 Reference Rate Communication, the base rate of 0,53 % would have to be increased by at least 6,00 %. This would considerably increase the amount considered to be aid in the FDES loan.

(136) Lastly, anonymous undertaking 1 cites the write-off of tax debts and social security contributions of EUR […]. According to anonymous undertaking 1, these debt write-offs by the state authorities may be likened to the write-offs agreed to by the private creditors only to the extent that they do not exceed the average of such write-offs. Since the average write-off was 70 %, the EUR […] that exceed the average should be considered State aid.

(137) Moreover, anonymous undertaking 1 highlights the fact that the deferred payment of the Seveso guarantee may also be potential aid. An intra-group transfer of EUR 10-19 million was made to Kem One by the Klesch Group for the purposes of the Seveso guarantee. France has confirmed that the amount paid and transferred from the Seveso guarantee would have to be gradually allocated to the reconstitution of the Seveso financial guarantee by Kem One. The financial guarantees are *intuitu personae*, so that in the event of a change in site operator, the

French Environmental Code requires the new operator to make a statement to the relevant Prefect within one month. The Commission should seek confirmation from France that the amount transferred will be actually used to reconstitute the Seveso guarantee and that the delayed payment of the guarantee does not constitute preferential financial treatment granted to Kem One by the Prefect, which potentially implies State aid.

(138) Moreover, according to anonymous undertaking 1, the existence of possible reductions granted by EDF to Kem One on its new electricity contracts is a fact of which the market is aware. If this point were to be proven, there would then be no doubt about the fact that this preferential treatment is imputable to the French state, since it controls EDF's board of directors and holds more than two thirds of its capital.

(139) Anonymous undertaking 1 also expresses doubts about the limitation of the aid to the strict minimum, in particular for the SAM investment project. The EUR 95 million awarded in the form of a direct grant and repayable advances serve to finance an investment that the undertaking is required in any case to undertake in accordance with current legislation. The aid for this conversion project may possibly no longer have any incentive effects for Kem One because the company would only be acting in accordance with its legal obligations. There are therefore serious doubts about whether the SAM project is actually an investment essential for restoring Kem One's viability.

(140) The bulk of Kem One's own resources is constituted by the debt write-offs by its private creditors. On that basis, Kem One's own contribution does not even reach half of the amount of aid calculated by France, an amount which, as has already been explained, is much lower than the actual amount of aid that has to be taken into account.

(141) Moreover, the private debt write-offs cannot be considered an own contribution because they do not provide any additional resources to Kem One to cover the costs of its restructuring.

(142) The other block constituting Kem One's own contribution is represented by the bank loan of EUR 60 to 70 million. However, anonymous undertaking 1 has already stressed the hypothetical nature of this loan.

5.1.2.3. *Compensatory measures*

(143) Lastly, anonymous undertaking 1 stresses the need for compensatory measures to neutralise the consequences of the aid. It does not agree with the position of France that the compensatory measures would jeopardise Kem One's viability and the effects of the aid on the competitive structure would be limited, or even beneficial, for competition in the market.

(144) Anonymous undertaking 1 stresses in particular point 40 of the 2004 Guidelines, which states that compensatory measures should take place in particular in markets where the firm will have a significant market position after restructuring. Anonymous undertaking 1 estimates Kem One's market share in the S-PVC market in north-western Europe at 20 %.

(145) Anonymous undertaking 1 disagrees with the position of France that the measures in question are also necessary to maintain a competitive structure in the market. Following the implementation of the corrective measures provided for in the Ineos/Solvay/JV decision, the market will see the emergence of new players, whatever the situation of Kem One. Moreover, there is no evidence that the fact of maintaining Kem One's production capacities constitutes an essential condition for its economic recovery. The measures in question risk exacerbating the problem of overcapacity in the market.

(146) With regard to possible compensatory measures, anonymous undertaking 1 puts forward a number of proposals:

— reduce Kem One's capacity by 200 to 300 kilotonnes. If this reduction were to affect the Lavéra site, that would require a corresponding reduction in the site's VCM capacity,

— reduce Kem One's production (if the State aid measures enable the company to artificially maintain a certain level of marginal production),

— other measures: sell a minority shareholding, terminate certain cooperation agreements, undertake not to diversify Kem One's production during a limited period of time, divide the payment of the restructuring aid into a number of instalments conditional on the effective implementation of the planned measures to a detailed timetable.

5.1.3. **Comments by Arkema**

(147) In relation to recital 13 of the opening decision, Arkema points out that its vinyl business was transferred to two subsidiaries when the company was sold to the Klesch Group. At the time of the transfer, an initial adjustment was made to the structural costs of the two units sold. Arkema states that between 2005 and 2010 it implemented a restructuring plan in its vinyl division. Arkema points out that exceptional events, such as the reversal in the economic situation in the second half of 2012 and the interruption of ethylene supplies because of an incident at the Lavéra site, explain the financial difficulties encountered by Kem One in 2013.

(148) With regard to recital 14 of the opening decision, Arkema points out that the services and performance contracts between Arkema and Kem One were concluded at the request of Kem One to enable it to continue its activities as usual once the transfer of the business to a subsidiary had been completed.

(149) In recital 126 of the opening decision, the Commission notes that the debt write-offs by the private partners must not be taken into account in the private contributions. In this regard, Arkema points out that, at the same time as its debt write-off, it provided a consolidated contribution of EUR 40,5 million, which did constitute a genuine financial flow and expressed its confidence in the viability of Kem One's recovery plan. According to Arkema, there is no reason to consider the debt write-off differently. The purpose of the write-off of EUR 95,6 million to which Arkema agreed was to assist in providing Kem One with a balance-sheet structure enabling it to contract the necessary loans on acceptable terms, when the time was right.

(150) Arkema recalls that it is a stakeholder in part of the risks involved in Kem One continuing its activity. For example, Arkema has chosen to maintain its flow of supplies of products and by-products with Kem One, whereas they could have been reallocated to other suppliers.

5.1.4. **Comments by Vestolit**

(151) Vestolit considers that the measures granted to Kem One by the French state will have an adverse impact on the competitive situation of the PVC market in Europe. Vestolit draws the Commission's attention to the fact that the market is in a state of overcapacity and that a number of independent studies are forecasting stagnation of demand.

(152) These measures will cause difficulties in particular for the companies which have modernised their assets themselves (using own resources). The State aid will enable Kem One to maintain obsolete assets that are not economically viable.

(153) Lastly, Vestolit stresses that Kem One would not have been able to obtain the loans on the same terms in the market.

(154) Accordingly, Vestolit calls on the Commission to consider imposing compensatory measures.

5.1.5. **Comments by the ECVM**

(155) The European Council of Vinyl Manufacturers (ECVM) represents the interests of the European producers of PVC resin. Its five members account for some 70 % of the PVC produced in the EU and Norway. The ECVM is a founder member of the VinylPlus programme, which is a 10-year voluntary commitment relating to sustainable development launched in 2011.

(156) In 2012, Kem One took a unilateral decision to leave the EVCM, at the same time ceasing to contribute to the VinylPlus programme. The ECVM takes the view that Kem One benefits from the efforts and financial contributions of other PVC producers to the VinylPlus programme, without sharing the financial burden. This situation is at the origin of an unfair competitive advantage for a company that is also a beneficiary of State aid. Consequently, the ECVM calls for the setting-up of a compensatory measure consisting of an obligation for Kem One to contribute to VinylPlus.

5.1.6. **Comments by anonymous undertaking 2**

(157) The Commission notes first that the comments by anonymous undertaking 2 were submitted after the deadline for receiving comments from third parties.

(158) First, anonymous undertaking 2 claims that the measures in question give a substantial competitive advantage to Kem One. It takes the view that, given the current market situation, the conversion from mercury technology is not profitable for its competitors. As a result, only companies in receipt of State aid will be able to undertake such an investment. This is explained by the fact that the difference between the cost of production of ethylene dichloride (EDC) by chlorination and its cost of acquisition is not such as to justify a large investment to produce chlorine to be used for chlorination. Yet directly produced EDC is less expensive, so Kem One will enjoy a considerable advantage in relation to its competitors, thanks to State aid.

(159) Second, anonymous undertaking 2 stresses the fact that the market is characterised by substantial oversupply, which it estimates at 1 million tonnes per year. In this context, which is made still more difficult by forecasts of stagnant or even falling demand, the return on investment is very uncertain.

(160) Anonymous undertaking 2 disagrees with France about the counterfactual scenario in the absence of aid. It points out that, since Kem One's commercial policy is largely geared to southern Europe, there is no risk that the disappearance of that firm would have a significant impact on available capacity to the detriment of consumers of S-PVC in northern Europe. Anonymous undertaking 2 takes the view that, should Kem One not carry out the conversion of its mercury technology, it could still supply its clients from its industrial site that has already been converted.

(161) Moreover, since the market is characterised by oversupply, Kem One's competitors would have no trouble in supplying its customers from that excess supply if Kem One were to reduce its commercial presence.

(162) Anonymous undertaking 2 suggests that a reduction in Kem One's capacity or commercial presence should be imposed on it by way of compensatory measures.

(163) Lastly, with regard to the viability of the restructuring plan, anonymous undertaking 2 takes the view that the context of oversupply, already emphasised above, coupled with stagnant demand, makes a gradual increase in PVC prices, as envisaged in recital 52 of the opening decision, impossible.

5.2. OBSERVATIONS BY FRANCE

(164) By letter dated 25 February 2015, France replied to the comments by interested parties.

(165) France began by making some general remarks on the comments submitted by Ineos and anonymous undertaking 1.

— According to France, their comments contained factual errors in the references to the opening decision and groundless allegations such as those regarding the supposed discounts granted by EDF or disguised State aid.

— France was surprised that the comments made by the two undertakings in this case differed significantly from those submitted by Ineos and Solvay in reply to the statement of objections in the Ineos/Solvay/JV case. In that case, Ineos and Solvay had argued that 'despite [its financial difficulties], Kem One was a strong competitor in the market' and that 'Kem One's production problems have been resolved'. Regarding Kem One's investment project to convert its mercury technology, Ineos and Solvay had stated that: 'this investment will give Kem One the ability to produce sufficient chlorine in its fully owned integrated membrane plant to operate its S-PVC plant at full capacity'.

— Lastly, the French authorities pointed out that Ineos and Solvay had been obliged to divest vertically integrated PVC production plants, comprising production assets in Belgium, Germany, France, the Netherlands and the United Kingdom ('Newco').

These combined assets were deemed to constitute a viable and independent entity likely to exert competitive pressure comparable to that exerted by Solvay on Ineos before the merger. The positive assessment of these assets in the Ineos/Solvay/JV decision seemed to be in contradiction with the doubts expressed by Ineos and anonymous undertaking 1 with respect to Kem One's return to viability. The two entities (Newco and Kem One) were likely to have comparable turnover figures, even though Newco's business was focused exclusively on S-PVC and caustic soda, for which margins were smaller than for other derivatives in Kem One's portfolio.

These factors contradicted the comments by Ineos to the effect that, in current market conditions of high overcapacity and low customer demand, Kem One's restructuring plan was unlikely to return it to viability.

(166) In summary, France regarded the comments by Ineos and anonymous undertaking 1 as biased, vitiated by errors of fact and motivated by opportunistic considerations.

(167) The compensatory measures requested by Ineos and anonymous undertaking 1 could compromise Kem One's return to viability and trigger its exit from the market, which would undeniably benefit Ineos and anonymous undertaking 1 by strengthening their market positions, resulting in less intense competition in the various PVC markets.

(168) Lastly, France pointed out that numerous conversions of electrolysis facilities from mercury to membrane technology had benefited from Commission-approved State aid between 2003 and 2007. For example, Ineos had received EUR 57,2 million for modernisation at the Runcorn site and Solvay, EUR 36 million for the Rosignano and Bussi sites. To France's knowledge, this aid had been granted without any compensatory measures being required.

(169) France went on to discuss the classification of the measures as aid and their compatibility with the internal market.

5.2.1.1. *Classification of the measures as aid*

(170) FDES loan. France first stressed that it had already shown that the state had a sound guarantee, meaning that the actual rate of 3,5 % corresponded to a market rate. If aid was found to exist, it should be calculated as the difference between the actual rate and a reference rate.

(171) As regards the value of the collateral, which had been called into question by the interested third parties, France reasserted that its net book value was equal to its market value. In support of this assertion, France had provided independent expert reports carried out at the time of the partial transfer of assets from Arkema to Kem One in July 2012. Moreover, the value of the transfers had been validated by a contributions auditor (*commissaire aux apports*). Even supposing that the value of these assets had fallen on account of Kem One's financial difficulties, France pointed out that the assets had been estimated at EUR [130-140] million, while the value of the FDES

loan was no higher than EUR 30 million: the value of the collateral would therefore still largely cover the value of the loan.

(172) As regards the loan repayment terms, France stated that the appropriate rate of repayment had to be calculated in accordance with the beneficiary undertaking's risk of insolvency and the quality of collateral offered. In accordance with the 2008 Reference Rate Communication, a reference rate could be calculated using a base rate of 0,53 % + 400 basis points, giving 4,53 % and not 6,53 % as cited by anonymous undertaking 1. However, the reference rate served merely as a guide and the low risk of insolvency for Kem One coupled with the very high level of collateral justified a rate of 3,5 %.

(173) Lastly, as indicated by the Commission in the opening decision, Kem One's restructuring plan was also being financed by [private operator 2] to the tune of EUR [55-65] million.

(174) Repayable advances. France pointed out that it had never argued that these advances contained no State aid. However, it took the view that they should be assessed as a loan repayable by Kem One. Accordingly, the difference in the rates was the element that could constitute aid and not the entire value of the advances. Contrary to what was argued by Ineos and anonymous undertaking 1, it was not the entire amount in repayable advances that was likely to constitute aid but the grant equivalent estimated at EUR 29,4 million (including the grant of EUR 15 million).

(175) As regards the funding of the SAM project, France indicated that the project was an important element of the restructuring plan and that the funding measures accordingly formed part of the restructuring plan approved by Lyon Commercial Court. They should be analysed in the light of the 2004 Guidelines on the same terms as the other measures that were part of the restructuring plan.

(176) Write-off of tax and social security debts. France reiterated that the CCSF decision to waive […] % of remittable debts was unlikely to contain any State aid elements, as the remission rate was in line with the average rate of remission by the private creditors to allow the undertaking to recover (some creditors, in connection with the recovery plan by way of continuing the business adopted by Lyon Commercial Court, agreed to write off their entire claim, resulting in an average rate of remission by creditors of […] %).

(177) EDF electricity tariffs. France stressed that the argument by the third parties regarding the existence of discounts was based on an erroneous reference to the opening decision (which made no mention of any such discounts) and on market rumours reported by anonymous undertaking 1: 'It is indeed well known in the market that Kem One has been granted price reductions by EDF for its new electricity contracts.'

(178) France insisted that Kem One had not been granted any discounts by EDF.

5.2.1.2. *Compatibility of the measures with the internal market*

(179) Return to long-term viability. France stressed that the industrial restructuring measures provided an appropriate response to the various factors giving rise to Kem One's financial difficulties and would therefore allow the undertaking to return to long-term viability.

(180) First, in response to the argument by Ineos to the effect that Kem One's structural overcapacity problem could not be resolved in a competitive environment suffering in its turn from overcapacity and low demand forecasts, France pointed out that the nominal overcapacity in the S-PVC market in western Europe needed to be qualified. Practical capacity should be cut by 10 % in view of the inevitable irregularity of production (seasonal nature of sales, major shutdowns). France considered real overcapacity in the global market to be no higher than 14 %.

(181) The concept of overcapacity used by Ineos was not that of spare capacity but that of the sum of spare capacity (ignoring the need for a reserve of 8 %) and quantities sold outside Europe.

(182) This concept presupposed both that plants were operating permanently at 100 % of their technical capacity and that the European market was the only profitable outlet (something that was contradicted by export trends), and it ignored geographical reality (very dispersed European locations).

(183) Kem One estimated available capacity in the PVC market in north-western Europe at […] kt and maximum production at […] kt (- [5-15] % for seasonal effects and maintenance). Operating rates for the S-PVC market therefore stood at [85-95] % of the realistic maximum and [80-90] % of operational capacity. For paste PVC (E-PVC), the figures were almost identical: [85-95] % of the realistic maximum and [80-90] % of operational capacity.

(184) The real figures showed that the situations of the S-PVC market and Kem One were better than described by Ineos in its comments.

(185) Second, France took the view that the assertions by Ineos and anonymous undertaking 1 to the effect that Kem One's production sites suffered from overcapacity of 40 % were groundless. Ineos had not explained its calculation method. Even with a fall in production volumes at Kem One's plants in the 2011-2013 period due to technical incidents, the average utilisation rate of the S-PVC plants over five years was [70-80] %, according to France.

(186) So, contrary to what was argued by Ineos and anonymous undertaking 1, Kem One's difficulties were not linked to overly low production levels. The real reasons behind Kem One's filing for insolvency at the end of March 2013 were an accumulation of structural problems (high costs of raw materials, insufficiently competitive chlorine and caustic soda production plant at Lavéra) and cyclical difficulties (scheduled long-term shutdown and technical problem affecting ethylene supplies).

(187) To provide an effective response to these various handicaps, the restructuring plan included:

— major investment to convert the electrolysis facilities at Lavéra and carry out drilling at the Vauvert saltworks,

— renegotiation of Kem One's main contracts for the supply of key raw materials,

— internal restructuring accompanied by a performance and productivity plan, and

— a review of commercial policy.

(188) In the base-case scenario, the restructuring plan would allow Kem One to return to a level of gross margin of [25-35] % of turnover from 2017 and an EBITDA of [5-15] % from 2018, in line with average profitability in the commodity chemicals sector. Moreover, the hypotheses in the restructuring plan and the business plan were based on relatively stable turnover figures (and not necessarily a significant increase in S-PVC sales) and production figures close to historic levels for the undertaking.

(189) In any event, FIDES data (S-PVC industry statistics) showed that Kem One's share of the S-PVC market in western Europe was [10-20] % in 2014, which was similar to its share in 2011 and 2012 and higher than in 2013 ([10-20] %). In addition, Kem One had seen a rise in its sales and export margins to the Turkish market in the last six months, where it had opportunely picked up the market shares of North American producers owing to the significant fall in the euro against the dollar and the drop in oil prices.

(190) The French authorities also pointed out that the assertions by Ineos to the effect that Kem One had a poor reputation among consumers on the S-PVC market in north-western Europe contradicted the argument made elsewhere to justify the requirement for compensatory measures, namely: 'Kem One is a significant player in the S-PVC market'.

(191) France also took the view that the part of the restructuring plan involving the reorientation of Kem One's commercial policy towards markets other than S-PVC was based on prudent and realistic hypotheses and was merely a minor component of the plan compared with the industrial part.

(192) According to France, the undertaking was well aware that the biggest margins would be gained not from the commercial policy side but from the renegotiation of the contracts for access to raw materials and platforms, and from infrastructure modernisation.

(193) Prevention of any excessive distortion of competition. France commented on the following points:

— the structural overcapacity in the S-PVC market,

— the size of Kem One's share of the S-PVC market,

— the credibility of the counterfactual scenario, and

— the proposal of disproportionate compensatory measures by the third parties.

(194) While it could not be denied that there was structural overcapacity, its portrayal by Ineos, in France's view, needed to be significantly qualified in a number of respects. First, producers' unused capacity generally ranged between 8 % and 10 % to take account of the irregular distribution of supply and demand. In addition, the market situation, as pointed out by the Commission in its decision in Ineos/Solvay/JV, varied considerably from one geographic area to another. In the S-PVC market, transport and logistics costs played a significant part in defining the regional limits of the geographic market. Prices and margins varied across regions.

(195) France took the view that Kem One's positions in the main markets in which it operated were far weaker than those of Ineos and Solvay. It pointed out in this connection that the Commission had found in its decision in Ineos/Solvay/JV that 'Ineos [was] the largest supplier of commodity S-PVC in NWE with merchant market shares in 2012 of [30-40] %' and 'Solvay [was] the second largest player in the NWE market for commodity S-PVC'. As for Kem One, the Commission had stated that 'Kem One [was] currently the number five player by sales volume and number three by capacity in NWE ([5-10]* % and [10-20]* % market shares, respectively)'. Moreover, Ineos and Solvay were the only two undertakings to concentrate their business so intensely on the north-western European market, unlike Kem One.

(196) Ineos and anonymous undertaking 1 had questioned the credibility of the counterfactual scenario proposed by the French authorities, according to which a reduction in Kem One's production capacity in the PVC market would result in a reduction in the competitive pressure on the other market players. However, France insisted that the S-PVC market did possess oligopolistic features, as pointed out by the Commission in its decision in Ineos/Solvay/JV. Contrary to what was argued by the interested third parties, France stressed that Ineos, Solvay and Kem One were currently the only market players with spare production capacity in north-western Europe. France therefore took the view that imposing compensatory measures would not only threaten Kem One's return to viability but would also affect the structure of competition in the market, to the detriment of customers.

(197) France regarded the compensatory measures proposed by the interested third parties as disproportionate. First, they were incompatible with the proposed restructuring plan. In France's view, for Kem One to remain in business and return to viability in the long term, a vertically integrated production chain had to be maintained, with, as at present, an economic balance between the capacity of the two upstream sites for chlorine and VCM on the one hand and the five downstream PVC production sites on the other. Closing a site or reducing Kem One's capacity would threaten the industrial balance of its business. By contrast, the French authorities confirmed that the commitment finally proposed to the effect that the nominal chlorine and caustic soda production capacity at Fos-sur-Mer and Lavéra would not be increased for […] constituted an appropriate compensatory measure. This commitment had the advantage of keeping competition in the PVC market at the same intensity and ensuring that Kem One could return to viability, while also safeguarding the jobs that could be maintained under the restructuring plan. Lastly, France pointed out that Kem One's decision to withdraw from the ECVM

was quite justified for reasons connected with its governance and operating costs, and this in no way prevented Kem One from conducting a pro-active environmental policy.

(198) Aid limited to the minimum (own contribution). France pointed out that it had valued the amount of private contributions at EUR 356,3 million, or 68,6 % of all contributions.

(199) France responded to the objections raised by the interested third parties in respect of the bank loan of EUR [55-65], the debt write-off by private partners and the necessity of the SAM project.

(200) France stressed that the comments by the third parties in respect of the bank loan were irrelevant, as it had not included the amount of the loan in the undertaking's own contribution. This loan was not one of the factors considered indispensable for financing the investments specific to the SAM project. Even without the bank loan, Kem One's own contribution represented more than 50 % of the total contributions to the restructuring.

(201) France wished to point out that the Commission had, in previous decisions, already included debt write-off in the calculation of own contribution by the beneficiary. Taking account of debt write-off was also provided for in the new Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ([15]) ('the new Guidelines'), which entered into force on 1 August 2014. France took the view that, by improving own funds (and thus freeing up liquidity that Kem One could then use for its restructuring), this measure had the same effect as a positive financial flow. Like Arkema, France remarked moreover that the debt write-off was an indicator of the confidence that the private partners had in the undertaking's continuing in business. In any event, even if the private debt write-off were not included in the calculation of own contribution, the latter would still account for more than 50 % of the restructuring costs.

(202) Vestolit took the view that the aid measures would allow Kem One to maintain non-viable assets, while its competitors had had to modernise their assets using their own resources. However, France pointed out that numerous competitors of Kem One had already benefited from State aid authorised by the Commission in order to carry out technological conversion measures similar to that put in place by Kem One. This was justified in the light of the low returns on investment in conversion projects of this kind. In response to the comments by anonymous undertaking 1 to the effect that Kem One would be obliged in any event to carry out the work under the SAM project in order to comply with Directive 2010/75/EU of the European Parliament and of the Council ([16]), France stated that the investment was already committed and was expected to be carried out before the end of 2016, in other words a year before the date required by the Directive. Moreover, the SAM project did not concern the mercury electrolysis unit(s) alone. It also involved the modernisation of the diaphragm cell unit at Lavéra, which is why it was so central to the restructuring plan and why it allowed the undertaking to maintain a balance between its upstream (chlorine) and downstream (vinyl) production capacities, while at the same time considerably reducing costs.

6. **ASSESSMENT OF THE AID MEASURES**

(203) France notified the following three measures: (i) the FDES loan (EUR 30 million); (ii) a grant (EUR 15 million) and repayable advances (EUR 80 million); and (iii) the possible write-off of tax and social security debts (EUR 42 million, finally corrected to EUR […]).

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

(204) The Commission must ascertain whether the notified measures could constitute State aid within the meaning of Article 107(1) TFEU.

([15]) OJ C 249, 31.7.2014, p. 1.
([16]) Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ L 334, 17.12.2010, p. 17).

(205) Article 107(1) TFEU lays down that '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'.

(206) This means that a public measure can be classed as State aid if all of the following tests are met: (i) the measure must confer an economic advantage on the beneficiary; (ii) the advantage must be imputable to the state; (iii) the advantage must be selective; and (iv) the measure must distort or threaten to distort competition and be likely to affect trade between Member States.

6.1.1. **Involvement of State resources and imputability to the State**

(207) The FDES loan was granted by order of the Minister for Economic and Financial Affairs and its implementation was entrusted to the Director-General of the Treasury. The Budget Act 2014 awarded the FDES a budget of EUR 300 million. It should be noted that the FDES has its own legal personality independently of the state and cannot be compared to a fund managed subject to an obligation to balance capital reimbursements and their use for new projects. FDES loans are made through a specific Treasury account and constitute expenditure on that account. Interest on the loans, however, is paid into the general budget of the state. The guidelines for using the FDES are still based on the circular of 26 November 2004 referred to in recital 28. FDES loans are always subject to a case-by-case assessment. They are not awarded automatically in accordance with pre-established criteria.

(208) The grant and repayable advances are to be provided under the 'Support for re-industrialisation' mechanism, as part of an agreement concluded with Bpifrance on behalf of the state.

(209) The tax and social security write-offs will be decided by the CCSF. This Committee is chaired by the Director of the Departmental Tax Office.

(210) The FDES loan, the grant, the repayable advances and the write-off of tax and social security debts are therefore provided through public resources and granted by way of decisions taken by the state.

6.1.2. **Selectivity**

(211) The measures under investigation are one-off measures granted exclusively to Kem One for the purposes of its recovery.

6.1.3. **Presence of an economic advantage**

(212) Whenever the financial situation of an undertaking is improved as a result of state intervention, an economic advantage is present. However, intervention by a public authority does not 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 has acted as an operator in a market economy would have done in similar circumstances.

6.1.3.1. *The FDES loan (EUR 30 million)*

(213) Value of collateral. Following the launch of proceedings, France sent the Commission a list of the assets constituting France's first-rank collateral.

(214) It provided a report evaluating these assets, which had been drawn up by independent experts. The report calls for three remarks. First, the Commission would point out that the report contains an evaluation of Kem One's real estate and not of the plant and equipment it had pledged. Next, the experts evaluated the assets at EUR [110-120] million, which is EUR [20-30] million less than the net book value put forward by France, confirming the Commission's doubts about whether the net book value actually reflects the real value of the assets. Lastly, the report dates from July 2012, i.e. before the opening of the court-supervised administration procedure in March 2013. The asset value which should be taken into account is not the book value but the value at which the assets would be exchanged if the creditor, in this instance the state, were to exercise its right of pledge. When an

undertaking is in difficulty and finds itself forced to sell its assets, its weak position and the urgency of the situation generally result in the assets being sold at below market price.

(215) In its reply, France incidentally referred to the value of transactions that took place in 2014 in the PVC sector. While this type of comparison may have some value in a broad sense, neither Vestolit nor Vinnolit were undertakings in difficulty at the time of their acquisition, unlike Kem One. Moreover, the transactions involved the entire undertakings and not just plant and equipment. Accordingly, the comparison is not relevant here.

(216) The Commission had asked France to provide an estimate of the value of the pledged assets in terms of the net revenue that their use could bring in. However, France provided an evaluation of the undertaking as a whole, and not of the pledged assets alone. What is more, to determine the future value of the undertaking in 2014, 2015 and 2016, it took into account the very same investments to convert the electrolysis units at Lavéra which were to be financed by the FDES loan. In sum, to calculate the amount of the collateral securing the FDES loan, France included the value of an asset modernised thanks to that very loan. Accordingly the evaluation cannot be considered.

(217) Lastly, in its reply to the opening decision, France did not provide any evidence that could allay the Commission's doubts about certain outdated and underperforming, or even obsolete, plant pledged by France.

(218) Accordingly, a conservative approach should be adopted and the collateral regarded as 'weak' within the meaning of the 2008 Reference Rate Communication for the purposes of determining a level of remuneration for the FDES loan in accordance with market conditions.

(219) Level of remuneration. The Commission accepts that the level of remuneration calculated using the methodology based on Bloomberg and Capital IQ data (resulting in a rate of 20,95 %) does not reflect real market rates, given that collateral and guarantees are not taken into account. Moreover, no bank has granted a loan to Kem One on the same terms as the state.

(220) Accordingly, and as indicated in paragraph 92 of the opening decision, in the absence of available and satisfactory real market data, the Commission should determine the applicable rate pursuant to the 2008 Reference Rate Communication, which states: 'The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid'.

(221) As has been demonstrated, the collateral constituted to secure the FDES loan cannot be classed as strong, and therefore does not justify application of the 400 basis points, as advocated by France.

(222) Moreover, France has not provided any new evidence to support the view that the effective implementation of the recovery plan and Kem One's commitment to sound financial management, rather than constituting habitual obligations and compensations accompanying a restructuring measure, justify a remuneration below market rate.

(223) Lastly, the comparison with [private operator 2]'s factoring agreement is irrelevant, as the debtor is not Kem One, but its debtors.

(224) In view of its financial difficulties, Kem One must be regarded as a CCC-rated undertaking within the meaning of the 2008 Reference Rate Communication. Likewise, the collateral must be classed as 'weak' within the meaning of the same Communication. In the absence of any evidence that would call into question the interest rates set out in the 2008 Reference Rate Communication, the Commission takes the view that the market rate can be calculated in accordance with it, giving a rate of 10,53 % (0,53 % for the reference rate for France at the time the loan was granted + 1 000 basis points).

(225) Amount of aid. In line with its previous decision-making practice, the Commission considers that the amount of aid is equivalent to the difference between the interest rate calculated in accordance with the 2008 Reference Rate Communication (10,53 %) and the interest rate applied by France (3,5 %). For each due date (each year), the difference has been calculated between the return from the actual interest rate (3,5 %) on the remaining capital and the return from the interest rate applied by the Commission (10,53 %) on the remaining capital. The amounts obtained (seven in total, for the seven-year loan repayment period) have then been discounted and added up to arrive at a figure of EUR […].

6.1.3.2. *The grant (EUR 15 million) and repayable advances (EUR 80 million)*

(226) The grant. The Commission is of the opinion that a grant constitutes an economic advantage that the beneficiary would not obtain under market conditions. A grant is a financial instrument whose capital is not repayable and which does not generate interest to be paid by the beneficiary. A private lender, which has a cost of financing and has to remunerate its capital, would not agree to finance a company by grants. The aid amount is therefore equivalent to the grant in its entirety, namely EUR 15 million.

(227) The repayable advances. The Commission notes the presence of certain conditions relating to the granting of the advances that a private lender would probably not have required. These include in particular the condition relating to maintaining activity and jobs at the Lavéra site for five years after project completion, the sustainability of Kem One permitting, and with the prior agreement of the state. However, the obligation to repay confirms that these repayable advances can be regarded as a loan for the purposes of this Decision.

(228) As for the amount of aid, in the absence of available and satisfactory real market data (such as a bank loan actually granted to Kem One on the same terms as the repayable advances), the Commission should determine the applicable rate in accordance with the 2008 Reference Rate Communication. As it is an undertaking in difficulty, Kem One must be regarded as CCC-rated for the purposes of the Communication. Moreover, the advances are not secured by any collateral. Accordingly, the market interest rate calculated in accordance with the 2008 Reference Rate Communication is 10,53 % (0,53 % for the reference rate for France at the time the loan was granted + 1 000 basis points).

(229) For the first tranche (EUR 65 million) the amount of aid is therefore equal to the difference between the interest rate calculated in accordance with the 2008 Reference Rate Communication (10,53 %) and the interest rate applied by France (3,5 %), namely EUR 21,77 million. The repayable advances have been regarded as loans for the purposes of calculating the discounted amount of aid, resulting in a calculation method similar to that used for the FDES loan. On each due date (each year), the difference is calculated between the return from the actual interest rate (3,5 %) on the remaining capital and the return from the interest rate applied by the Commission (10,53 %) on the remaining capital. The amounts obtained (seven in total, for the seven-year 'loan' repayment period) have then been discounted and added up to arrive at a figure of EUR 21,77 million. Likewise, for the second tranche (EUR 15 million) the amount of aid is equal to the difference between the interest rate calculated in accordance with the 2008 Reference Rate Communication (10,53 %) and the interest rate applied by France (10 %), namely EUR 1,64 million.

(230) The total economic advantage granted under this measure therefore comes to EUR […].

6.1.3.3. *Possible write-off of tax and social security debts*

(231) It should first be observed that in its reply to the opening decision, France clarified that the tax and social security debts came not to EUR 42 million as indicated in the notification but to EUR […]. The amount of EUR 42 million was a very broad estimate by the tax and social security authorities and had been declared provisionally as part of the administration procedure initiated by Lyon Commercial Court, before a detailed list of actual debts had been drawn up.

(232) As for debts to private creditors, most of them have been written off at least up to 70 %.

(233) In this connection, the debt write-offs accorded by [private operator 3] and [private operator 1] should be analysed separately. These debtors are both close commercial partners of Kem One. […] and certain Lavéra products (VCM, chlorinated residues, chloroform) are vital for [private operator 1] because of the vertical integration of the fluorinated gases production chain involving the Lavéra, Saint-Aubain and Pierre-Bénite sites, all in southern France. These products are very difficult to replace by sources further afield. As regards [private operator 3], its facilities are connected to those of Kem One by pipeline. Moreover, there is no alternative outlet for [private operator 3]'s production of ethylene by steam cracker at Lavéra that can be subject to an equivalent evaluation.

(234) The industrial partners know their customer and are vital to the undertaking's continued operation. It is therefore in their interest to remain involved in the undertaking and to accept a debt write-off, unlike a purely financial creditor whose sole objective would be to recover the debt. Bearing in mind the particular situation of these two creditors, it is not admissible to estimate the average rate of debt write-off at […] %.

(235) Nevertheless, all the other creditors who agreed to write off their debts did so at 70 % (368 creditors for a total amount of EUR 33,4 million). These creditors had no priority or collateral and were not in a comparable situation to the tax and social security creditors. Consequently, by agreeing to write off […] % of the remittable debts, France went beyond what the private creditors accepted.

(236) France argued that agreeing to a debt write-off of EUR […] allowed it to avoid possible losses of EUR […]. However, the difference of EUR […] is low compared with the amounts irreparably lost (EUR […]), in particular given the uncertainty of the loss of EUR […]. This solution is not one that a private creditor in a market economy would have adopted.

(237) Accordingly, the amount of aid is equivalent to the difference between the rate of debt write-off applied by France ([…] % or EUR […]) and the rate of debt write-off by the private investors (70 % or EUR […]), namely EUR […].

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

(238) The public support measures favour Kem One by providing it with additional financial resources and preventing it from having to cease operations. The measures allow it to maintain a stronger competitive position than it would have had if the aid had not been provided. They therefore threaten to distort competition between the operators in the PVC sector and in the market for chlorine and caustic soda production.

(239) Furthermore, there is a significant volume of trade between Member States in these sectors in European territory. The PVC market is relatively concentrated: five operators, including Kem One, account for 90 % of the market and Kem One is third among European S-PVC producers. The Commission has already had cause to regard the geographical scope of this market as covering at least north-western Europe, implying that competitive conditions are relatively homogeneous within this area ([17]). The advantage afforded by the measures at issue to an undertaking that operates in a competitive and relatively concentrated market is likely to distort competition and affect trade between Member States.

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

(240) In the light of the above, the Commission concludes that all the measures under scrutiny constitute State aid within the meaning of Article 107(1) TFEU, giving a total aid amount equivalent to EUR 49,27 million.

6.2. ASSESSMENT OF THE COMPATIBILITY OF THE MEASURES WITH THE APPLICABLE STATE AID RULES

6.2.1. **Applicable legal basis**

(241) The prohibition on 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. In the case at hand, the Commission regards the notified aid for the sole benefit of Kem One as serving to restore the long-term viability of an undertaking in difficulty.

([17]) Commission Decision of 26 July 2011 in Case M.6218 — Ineos/Tessenderlo Group S-PVC Assets. See also decision in Ineos/Solvay/JV.

(242) Even though the new Guidelines entered into force on 1 August 2014, the aid at issue will be examined in the light of the 2004 Guidelines. Point 136 of the new Guidelines provides that notifications registered by the Commission prior to 1 August 2014 will be examined in the light of the criteria in force at the time of notification. Since the measures at issue were notified on 30 July 2014 and registered before 1 August 2014, they will be examined in the light of the 2004 Guidelines.

(243) The assessment must therefore establish whether the measures at issue could be found compatible with the internal market on the basis of Article 107(3) TFEU, in the light of the criteria laid down in the 2004 Guidelines.

6.2.2. **Kem One's eligibility for restructuring aid**

(244) A new company, K1, was set up to acquire and hold the shares in Kem One in accordance with the recovery and business continuity plan approved by Lyon Commercial Court. There is therefore economic continuity between K1 and Kem One.

(245) The Commission does not contest Kem One's eligibility for application of the 2004 Guidelines cited by the French authorities. In court-supervised administration since 27 March 2013, Kem One meets the criteria set out in point 10(c) of the 2004 Guidelines.

6.2.3. **Restoration of long-term viability**

(246) Point 17 of the 2004 Guidelines provides that 'Restructuring, on the other hand, will be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. Restructuring usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring operations within the scope of these Guidelines cannot, however, be limited to financial aid designed to make good past losses without tackling the reasons for those losses.'

(247) Points 34 et seq. of the 2004 Guidelines set out the features that a restructuring plan must have in order for the aid to be regarded as compatible with the State aid rules.

6.2.3.1. *On the restructuring costs*

(248) During its in-depth investigation, the Commission examined the arguments put forward by France in its reply to the opening decision, in particular as regards the absence of costs linked to staff restructuring. France clarified that, of the [90-110] jobs that were to go, there would be only [35-45] actual departures from the firm. Arkema had confirmed that it would take [25-35] employees without compensation and only [1-15] staff had had to be compensated by Kem One, for a total of EUR […] million. This sum had been included in the projected deductions from the income statement at the start of the restructuring period. The other job losses were taken from posts that had been vacant up to that point.

(249) Both France and Kem One also confirmed that the restructuring would not entail any additional costs.

6.2.3.2. *On the duration of the restructuring plan*

(250) In response to the doubts expressed in the opening decision, France explained that the start date for the restructuring period was 5 February 2014, i.e. the day on which Kem One's activities were taken over by the new shareholder (transfer of shares held by Kem One Holding, former parent company of Kem One, to K1, holding company holding the shares in Kem One). The end date for the restructuring period is 31 December 2016, the completion date for the SAM project. By that date, all actions under the restructuring plan will have been carried out.

(251) The duration of the restructuring plan is therefore less than three years, in compliance with point 35 of the 2004 Guidelines, which requires the duration of the restructuring plan to be 'as short as possible'. The restructuring plan is therefore likely to restore the viability of Kem One within a reasonable time-scale.

6.2.3.3. *On whether the scenarios for the return to viability are realistic*

(252) In the opening decision, the Commission expressed doubts about the credibility of certain aspects of the scenarios for the restoration of long-term viability presented by the French authorities. It remarked in particular, in relation to the restoration of the cash position, that the base-case scenario left only a small cash surplus at the end of the period in 2020. The cash outcome was even worse under the pessimistic scenario, with a negative amount of EUR [100-150] million in 2020.

(253) The third parties generally shared the doubts expressed by the Commission in the opening decision.

(254) The Commission notes the necessary clarifications and updates provided by the French authorities in their reply to the opening decision in respect of the initial business-plan hypotheses.

(255) First, France, confirmed that the need for and obtention of the bank loan of EUR [60-70] million were hypothetical and that such a loan would in any event not be called for before 2016. Given the uncertainty surrounding the obtention of the loan and its timing and terms, the Commission considers that it is not appropriate to take account of the EUR [60-70] million provided by this hypothetical loan in the assessment of the restoration of viability. At the Commission's request, the French authorities therefore provided accounting projections based on pessimistic, base-case and optimistic hypotheses that did not include the bank loan.

(256) The Commission also takes note of the fact that the investment project linked to the restructuring is progressing better than the initial forecasts suggested. The planned investment amount of EUR [150-250] million has been cut to EUR [15-25] million. Completion has also been brought forward and is scheduled for the fourth quarter of 2016, which is four to five months earlier than the date originally planned. The earlier completion generates estimated savings of EUR [10-20] million. As a result the cash position in the base-case scenario has improved by EUR [30-40] million. In the pessimistic scenario, the cash position has shifted to the same degree and now stands at EUR – [70-80] million.

(257) The Commission notes further that Kem One recorded an overall growth in production and sales of […] % in 2014 compared with 2013 to reach the historic production levels of 2007/2008 and the target set by the restructuring plan for the 2017/2018 financial years. This increase in PVC and caustic soda production volumes is a result of the gradual implementation of the restructuring plan coupled with an absence of technical incidents at the production sites.

(258) Otherwise, owing to the continued downward trend in 2014 of the price of oil and therefore of ethylene, and of the price of caustic soda, Kem One recorded a higher than expected drop in turnover. However, the Commission observes that this drop in turnover has not had a negative impact on the undertaking's margins in so far as the prices of the raw materials required to produce PVC have fallen in the same, or even greater, proportions.

(259) The Commission accordingly concludes that the clarifications provided by the French authorities in response to the opening decision serve to confirm the credibility of Kem One's return to viability in the long term. The restructuring measures are designed, in compliance with the 2004 Guidelines, to allow Kem One to make the necessary transition to a more vertically integrated industrial structure, which will be more efficient in terms of profitability, thanks to the SAM project and to the containment of production costs relating to the supply of raw materials.

6.2.4. **Avoidance of undue distortions of competition**

(260) Point 38 of the 2004 Guidelines provides that 'In order to ensure that the adverse effects on trading conditions are minimised as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as "contrary to the common interest" and therefore

incompatible with the common market'. Point 39 of the 2004 Guidelines states that 'these measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned'.

(261) The purpose of the compensatory measures is therefore to limit the effects of the aid in the markets in which the beneficiary is present, without undermining the structure of competition in these markets or the ultimate viability of the beneficiary.

6.2.4.1. *Divestment of assets is not an appropriate compensatory measure in this instance*

(262) Point 40 of the 2004 Guidelines provides that the compensatory measures 'should take place in particular in the market where the firm will have a significant market position after restructuring'. As set out in Section 2.1 of this Decision, Kem One is active primarily in the PVC market, particularly commodity S-PVC and E-PVC, and it has a relatively significant market position in France and Italy.

(263) However, under point 39 of the 2004 Guidelines, 'when assessing whether the compensatory measures are appropriate the Commission will take account of the market structure and the conditions of competition to ensure that any such measure does not lead to a deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a tight oligopolistic situation. If a Member State is able to prove that such a situation would arise, the compensatory measures should be construed in such a way to avoid this situation'.

(264) As regards the structure of the market, a general feature of the PVC market is the need for operators to be vertically integrated in order to control the whole value chain and to be competitive. The need for operators to have an autonomous and integrated production structure was described by the Commission in its decision in Ineos/Solvay/JV.

(265) In that decision the Commission examined a number of business models with varying degrees of integration in the PVC sector. It pointed out that models without vertical integration of PVC up to chlorine were the exception in Europe and that 'the current competitive landscape indicates that full vertical integration is the general trend in the industry'.

(266) As for the model of 'virtual integration' by way of supply contracts between two players, past examples, some involving Kem One, have demonstrated the risks associated with this kind of structure, based on the external supply of key raw materials.

(267) The importance of vertical integration for the players in the PVC market was confirmed by the commitments offered by the notifying parties and accepted by the Commission in the Ineos/Solvay/JV case. The parties committed to divesting a vertically integrated asset in order to ensure its viability in the market and to resolve the competition concerns identified by the Commission in the S-PVC market.

(268) Moreover, in the past some stand-alone, non-vertically-integrated PVC producers have tried to boost their presence in the PVC market, without success.

(269) Lastly, as soon as there is a geographical separation between plants in the vertical chain, the costs of transporting VCM are particularly high owing to the nature of the product (extremely toxic liquefied gas), whichever mode of transport is used (rail, road or sea). These high transport costs (some 10 % of the value of the product) make matters considerably more difficult in situations of low margins, as the Commission pointed out in paragraph 1452 of its decision in Ineos/Solvay/JV: 'As regards imports from other areas, VCM transport costs seem to constitute a major hurdle. IHS, a global information company that provides, among other things, monthly and annual indexes, reports and news related to the vinyl industry, talks about' prohibitive freight rates'. This is not surprising, as VCM is a chemical product that is hazardous and difficult to transport, as acknowledged by the Notifying Parties'.

(270) Moreover, it is worth noting that the principal compensatory measure suggested by Ineos is the divestment of the entire Lavéra production chain, including the downstream sites. This is an indication that all the market players, including Kem One's competitors, recognise that viability in the market depends on vertical integration.

(271) Consequently, a compensatory measure consisting in the divestment of one of Kem One's PVC production sites (such as Balan or Berre) is not a viable solution. Since it would not have internal access to upstream inputs (chlorine, ethylene), the purchaser would be obliged to conclude supply contracts with Kem One, which would place it in an untenable position from the point of view of its commercial independence and ability to exert genuine competitive pressure. Furthermore, cutting Kem One off from one of its downstream sites would destabilise its entire production chain, by depriving its upstream chlorine and ethylene production sites of internal sales outlets.

(272) In the Ineos/Solvay/JV case, the Commission stressed the uncertainty surrounding the question whether Kem One could be an aggressive competitor to the Ineos and Solvay joint venture, given its difficulties and the uncertainty about whether the restructuring plan would be implemented successfully. However, the Commission found that a reduction in Kem One's production capacity would result in an increased market share for the Ineos and Solvay joint venture, while implementation of the restructuring plan might further reduce Kem One's incentives to expand output significantly as a reaction to a price increase by the joint venture. Moreover, in its assessment of the competitive situation in the market post-transaction, the Commission adopted a conservative approach and took into account Kem One as a full competitive force ([18]).

(273) Accordingly, transforming the structure of Kem One by reducing its sales in the PVC market or substantially modifying the scope of its activity would undermine the equilibrium in the PVC market that has emerged following the creation of the Ineos and Solvay joint venture and the implementation of the commitments made by the parties during the investigation in that case ([19]).

(274) Despite the implementation of the commitments in the Ineos/Solvay/JV decision, which has had the effect of removing the horizontal overlaps between Ineos and Solvay in the S-PVC market in north-western Europe, the Ineos and Solvay joint venture remains by far the biggest player in the market with a market share of [30-40] % in 2012. Imposing a divestment on Kem One would significantly weaken its position and would reduce the competitive pressure it is capable of exerting on the Ineos/Solvay joint venture.

(275) A compensatory measure consisting in dividing Kem One's S-PVC business into two vertically integrated entities by selling one of the S-PVC production sites (Balan or Berre) together with an input production site (Fos-sur-Mer) would have the advantage of keeping the S-PVC production chain vertically integrated. However, such a solution would cut Kem One's S-PVC business by around […] % and would weaken its potential to compete with the Ineos/Solvay joint venture. The scope of this solution would have the effect of destabilising the structure of the market for S-PVC as it stands following the creation of the Ineos/Solvay joint venture and of rendering inadequate the commitments put in place to resolve the competition concerns raised by that transaction and to ensure effective competition in the S-PVC market.

(276) A compensatory measure of this kind would incidentally undermine Kem One's return to viability. Lastly, such a measure would appear to be disproportionate in the light of the amount of aid received by the undertaking (some 10 times smaller) and the restructuring costs (some EUR 100 million less).

6.2.4.2. *No long-term structural overcapacity in the relevant market*

(277) The interested third parties stressed the overcapacity in the European PVC market. They referred in this connection to point 42 of the 2004 Guidelines, which states: 'When the beneficiary is active in a market suffering from long-term structural overcapacity, as defined in the context of the multisectoral framework on regional aid for large investments, the reduction in the company's capacity or market presence may have to be as high as 100 %.'

([18]) See paragraphs 805, 828 and 838 of the Ineos/Solvay/JV decision.
([19]) On 9 June 2015 the Commission cleared the acquisition of certain Ineos chlorovinyls businesses by ICIG and approved ICIG as buyer of divested assets linked to the creation of the joint venture (IP/15/5147).

(278) In its decision in Ineos/Solvay/JV, the Commission did indeed observe a situation of overcapacity in the European PVC market. However, it would stress two points:

— it has not used the method for calculating overcapacity used by Ineos and anonymous undertaking 1, where the definition of overcapacity presupposes that industrial plants are operating constantly at 100 % of their technical capacity,

— the Ineos/Solvay/JV decision was based on 2012 data.

(279) The Commission notes that since 2012 several factors clearly indicate that the situation of overcapacity in the European PVC market has evolved.

(280) Calculation of overcapacity. First, the Commission would stress that, while there has been overcapacity in the past, its extent would seem to have been overestimated by the interested third parties. The actual production capacity of an operator in the market depends ultimately on the seasonality of sales (S-PVC sales in Europe are down in August and December). In addition, shutdowns scheduled for maintenance, the slowdown in chlorine production in winter and the high cost of electricity mean that production capacity is rarely used 100 %. Industrial PVC production is also affected by episodic incidents and gaps in the supply of raw materials. Lastly, free capacity cannot be added in, given the geographical distances involved and the not insignificant transport costs even within Europe.

(281) In reality, actual PVC production on an annual basis rarely exceeds 90 % of the declared capacity of all producers.

(282) According to FIDES data (internal industry statistics), in 2014, nominal PVC production capacity for western and central Europe was [6 000-7 000] kt and actual production was [5 000-6 000] kt, giving a nominal capacity utilisation rate of [80-90] %, so real overcapacity in this market in 2014 was limited. The Commission would also observe that the utilisation rate of S-PVC production capacity is also around 84,3 % in the US (according to data from IHS, one of the main specialist market analysts, together with ICIS (Independent Chemical Information Services)).

(283) Overcapacity in the S-PVC market. Since the summer of 2014, several factors have affected supply in the European market. First, the fall in the euro, combined with a sharp drop in oil prices, significantly boosted export sales (to Turkey, India and North Africa). These export markets are easily accessible for European producers: so, for Kem One, the cost of transporting S-PVC from its Berre plant to Turkey is around EUR […]/t, compared with EUR […]/t to Germany and northern Europe. As a result, Kem One's total exports in the first quarter of 2015 came to […] kt, up from the same period one year earlier ([…] kt). An IHS report dating from March 2015 emphasises this development in the European PVC market. It indicates that in 2009 exports by S-PVC producers based in western Europe represented 19 % of production, compared with 30 % at the end of 2014. This trend is behind the increasing pressure on availability (the exact opposite of a situation of overcapacity in a market) without this resulting in competitive pressure on the Ineos/Solvay joint venture. This pressure pushed up sales prices at the start of 2015. In addition, the drop in supply in the European market increases the bargaining power of PVC producers. An ICIS article dated 10 April 2015 makes this observation, based on contacts with customers in the market: 'One buyer said that with European market seeing low imports, production difficulties and an increase in demand, April will be a month in which producers potentially can break long standing records for margin improvements'. This situation has led producers to impose quotas on major customers and increase sales prices. In these circumstances, dismembering Kem One and/or imposing a long-term reduction in its sales would only strengthen the competitive position of the Ineos/Solvay joint venture to the detriment of competition in non-European markets.

(284) The Commission therefore concludes that the interested third parties, in their analysis of overcapacity in the market, did not take sufficient account of developments in the PVC market since the Ineos/Solvay/JV decision, although these very developments can give rise to a situation in which strategically targeted exports to countries outside the EU and the reorientation of production could, with competition weakened, result in price rises to the detriment of customers located in western Europe.

6.2.4.3. *Compensatory measures deemed appropriate by the Commission*

(285) By way of a preliminary remark, it should be observed that point 39 of the 2004 Guidelines does not give an exhaustive list of possible compensatory measures, but merely indicates a number of solutions that are acceptable in principle, without restricting the Commission's freedom to opt for compensatory measures not listed there.

(286) Following its investigation, the Commission has reached the conclusion that the following constitute appropriate compensatory measures:

— cap on nominal production capacity for chlorine ([600-700] kt/year) and caustic soda ([600-700] kt/year other than for internal use) at the Fos-sur-Mer and Lavéra sites for a period of […] from the date of adoption of this Decision,

— cap on Kem One's share of the S-PVC market in north-western Europe (Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom taken together) ([20]), at [10-20] % in volume terms for a period of […] from the date of adoption of this Decision,

— ban on acquiring shares or assets in undertakings in EEA product markets in which Kem One is present for a period of […] from the date of adoption of this Decision; this ban extends to Kem One and to any natural or legal person exercising control over Kem One now or in the next […] within the meaning of Article 3(2) of Council Regulation (EC) No 139/2004 ([21]).

(287) These three compensatory measures are capable of counterbalancing the adverse effects of the aid measures on trading conditions by preventing Kem One from using the aid to increase its presence in the PVC market and the other markets in which it operates.

(288) Cap for a period of […] from the date of adoption of this Decision on nominal production capacity for chlorine ([600-700] kt/year) and caustic soda ([600-700] kt/year other than for internal use) at the Fos-sur-Mer and Lavéra sites. This measure already amounts to 'reducing' effective production of chlorine by […] kt compared with Kem One's effective production capacity as planned after completion of the SAM project. The current rate of utilisation of production capacities for chlorine and caustic soda is [80-90] % (a habitual utilisation rate of [85-95] % cut by some [5-15] % as a result of an exceptional incident at the Fos-sur-Mer site in June 2014). The production capacity utilisation rate of [90-100] % in 2015 and 2016 corresponds to […] kt/year. Once the conversion of the chlorine/caustic soda electrolysis facilities at Lavéra is complete, their intrinsically greater reliability should push this rate up to [85-95] % to reach the target for effective chlorine production included in the business plan, namely […] kt/year. However, it must be noted that the new membrane electrolysis facility should be capable of producing [5-15] % more than the 'nominal' production of […] kt/year, by increasing the electrical current density from […] to […] kA/m^2. This is the technical solution that Kem One has opted for, and the acquisition of the necessary equipment has been negotiated with the supplier, with a view to facilitating a future increase in production, in line with the growth in the chlorine market expected in 2017 and subsequently.

(289) If all of Kem One's chlorine outlets are considered together (its downstream production plants for S-PVC, paste PVC, chlorinated PVC and chloromethanes), it has sufficient capacity to absorb a chlorine production of […] kt/year. Moreover, Kem One forecasts growth in demand in western Europe of […] % per year for chlorine and […] % per year for caustic soda ([22]). Capping production capacity will therefore prevent Kem One from growing its chlorine production to [600-700] kt/year of actual production, which would have brought it close to saturating all of its potential outlets, in other words, maximising the utilisation rates of its downstream chlorine assets. Ultimately, capping nominal capacity at [600-700] kt/year of chlorine, or an expected actual production of […] kt/year, prevents Kem One from keeping in step with the growth in the caustic soda market, resulting in a lost opportunity of around […] % of growing sales in […]. Kem One's share of the caustic soda market in western Europe, estimated at [5-15] %, would therefore fall to [5-15] %.

(290) Moreover, this measure would make it impossible for Kem One to increase its own outlets and shares of the European and/or export market for the chlorine derivatives of S-PVC, E-PVC (or PVC paste), C-PVC

([20]) See paragraph 403 of the decision in Ineos/Solvay/JV.

([21]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

([22]) The pattern of the last 10 years indicates that demand for caustic soda, the uses of which are extremely varied, grows at a rate very close to GDP, while demand for chlorine grows at a very slightly lower rate.

(or chlorinated PVC), chloromethanes and, to a lesser extent, liquid chlorine. The lost opportunity is calculated at around […] kt of chlorine over […]. By way of illustration, […] kt of chlorine can be used for example to produce […] kt of S-PVC, allowing Kem One to increase its market share from [10-20] % to [10-20] %, calculated with reference to Kem One's PVC sales ([…] kt/year) and the size of the S-PVC market that can be accessed by European producers ([…] Mt).

(291) Cap for a period of […] from the date of adoption of this Decision on the share by Kem One and its present or future subsidiaries of the S-PVC market in north-western Europe (Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom taken together), at [10-20] % in volume terms ([23]). As regards S-PVC (including the M-PVC or 'mass PVC' produced at Saint-Fons, which is treated like it in the market), Kem One has a nominal production capacity of […] kt/year, representing almost […] % of total western European production capacity ([…] Mt/year).

(292) […]

(293) The combination of these industrial and commercial measures should result in a significant increase in volumes sold in this geographical area (around […] Kt), bringing the undertaking's share of the S-PVC market in this area to [10-20] %.

(294) The Commission accordingly takes the view that capping Kem One's share of the S-PVC market at [10-20] % (in volume terms) […] as of the date of adoption of this Decision in the north-western Europe area would ensure that the aid measures are not used by Kem One for the purposes of its commercial activity in this area. The cap would also mitigate the effects of the aid and preclude the risk of any excessive distortion of competition. Moreover, the fact that France, where Kem One has its main industrial and commercial S-PVC base, is part of this geographical area ensures that the requirements of the case-law on compensatory measures ([24]) are met. This option also has the benefit of maintaining the competitive pressure on the Ineos/Solvay joint venture, the main player in the S-PVC market in north-western Europe ([25]), without freezing the competitive situation for an unreasonable length of time.

(295) The Commission accordingly regards these temporary caps as more appropriate than a divestment of assets for the purposes of preventing an excessive distortion of competition by the aid in question, while ensuring that competitive pressure is maintained on the S-PVC market in north-western Europe.

(296) Acquisition ban. This ban will extend not only to Kem One but also to any natural or legal person exercising control over Kem One now or in the next […] within the meaning of Article 3(2) of the EC Merger Regulation, which provides that 'control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.' Accordingly, neither Kem One nor the entities controlling it will be in a position to divert the aid paid by France and to use it to increase their market power to the detriment of operators that have not received public subsidies.

(297) The ban will not cover acquisitions that (i) are necessary for the restoration of Kem One's viability; and (ii) do not constitute a means of circumventing the obligation to limit the effects of the aid to the strict minimum required to achieve the objectives of Kem One's restructuring plan. No acquisition may take place unless the Commission finds that the conditions at (i) and (ii) are met. Any acquisition plans and information enabling the Commission to assess whether the conditions are met must be communicated to the Commission within a reasonable time-frame.

([23]) As sales volumes for the geographical area are published in the industrial statistics with a certain time-lag and do not depend solely on Kem One, and as compliance with the threshold may require adapting commercial policy relatively quickly by redeploying sales within the relevant geographical area, a framework has to be set for the market share threshold. So, if the market share exceeds the ceiling set by this Decision by 10 %, the ceiling will be deemed not to have been exceeded if the beneficiary restores the market share to 11 % within a maximum of one year from the first quarterly report recording the excess.

([24]) T-115/09 and T-116/09 *Electrolux and Whirlpool* v *Commission*, EU:T:2012:76, paragraphs 50 to 58.

([25]) See paragraphs 403 et seq. of the Ineos/Solvay/JV decision.

6.2.4.4. *Monitoring and six-monthly reports*

(298) Point 49 of the 2004 Guidelines provides: 'The Commission must be put in a position to make certain that the restructuring plan is being implemented properly, through regular detailed reports communicated by the Member State concerned'.

(299) In this instance, given the amount of aid involved, the nature of the compensatory measures required to ensure compatibility of the aid with the State aid rules, the objective of ensuring Kem One's return to viability and the competitive situation in the market concerned, the Commission takes the view that France should send it six-monthly reports with information on the following:

— the proper implementation of the restructuring plan, with an assessment as to whether the objective of Kem One's return to viability is being achieved,

— the achievement in practice of the cap on nominal capacity for production of chlorine and caustic soda at Fos-sur-Mer and Lavéra,

— the achievement in practice of the [10-20] % cap on Kem One's share of the S-PVC market in north-western Europe (Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom taken together),

— the absence of any acquisitions of shares or assets in undertakings in the EEA product markets in which Kem One operates,

— an assessment of the competitive situation in the PVC market and the upstream and downstream markets in the EEA, including in particular market shares and capacities of the market players, changes in market structure, price trends and any other element that may aid the Commission's understanding.

(300) These reports must be provided for a period of […] from the date of adoption of this Decision. The first report must reach the Commission six months after the date of adoption of this Decision.

(301) In conclusion, as regards the avoidance of any excessive distortion of competition as a result of the aid measures, given the presence of the Ineos/Solvay joint venture, which is a far stronger player in the S-PVC market, given that more drastic compensatory measures in the form of a divestment of assets as set out in point 39 of the 2004 Guidelines would threaten Kem One's viability and weaken its competitive power, something which would be detrimental to the structure and effect of competition in the market, and given that the compensatory measures examined here in Section 6.2.4 of this Decision are likely to mitigate sufficiently the effects of the aid and provide an appropriate remedy in the circumstances to the distortion of competition caused by the aid and that they will be assessed together with the competitive situation in the market in the regular reports, the Commission finds the compensatory measures concerned to be appropriate.

6.2.5. **Aid limited to the minimum: real contribution, free of aid**

(302) Point 43 of the 2004 Guidelines stipulates that the 'amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs'. Point 44 of the Guidelines provides that 'the Commission will normally consider the following contributions to the restructuring to be appropriate: … 50 % for large firms.'

(303) First, the information obtained following the opening of proceedings did not justify the inclusion of the loan of EUR [60-70] million in Kem One's own contribution. France confirmed the hypothetical and uncertain character of the loan, stressing that in any event it would not come into play before 2016. This loan does not therefore satisfy the condition set out in the 2004 Guidelines to the effect that the beneficiary's own contribution must be real. The Commission accordingly finds that it cannot be included in the calculation.

(304) The Commission's investigation has shown that the resources that can be taken into account for the purposes of calculating Kem One's own contribution to the restructuring costs are:

Table 4

Sources of the private contributions included in the restructuring plan, according to the Commission

Source of contribution	Amount (EUR m)
Kem One self-financing	[10-20]
Financing [private operator 1]	[35-45]
Financing [private operator 2]	[55-65]
Capital injection by the buyers	10
Satisfaction of debts [private operator 6]	[0-10]
Total	**133,4**

Source: Commission

(305) A number of new elements came to light during the investigation. First, regarding self-financing by Kem One, only EUR 18 million has been injected by Kem One into the modernisation project to date. The hypothetical character of the payment of the balance means that this amount cannot be classed as an own contribution. The factoring by [private operator 2] came in the end to EUR [55-65] million (instead of the EUR [40-50] million initially planned) following negotiations between Kem One and [private operator 2].

(306) The restructuring costs are estimated at EUR 222 million. Kem One's own contribution to the restructuring therefore covers 60 % of the restructuring costs.

(307) It can therefore be concluded that the aid is limited to the minimum, without it being necessary to assess the nature of the debt write-offs granted by the private creditors.

6.2.6. **'One time, last time' principle**

(308) In accordance with points 72 et seq. of the 2004 Guidelines, restructuring aid can be granted to an undertaking only once in a 10-year period.

(309) France stated in its notification that neither Kem One nor the group to which it belongs had already benefited from rescue or restructuring aid in the past.

(310) The 'one time, last time' principle has therefore been complied with.

7. **CONCLUSION**

(311) The Commission finds that the aid measures in question can be declared compatible with the internal market in accordance with Article 107(3)(c) TFEU, provided that the compensatory measures set out in Section 6.2.4.3 of this Decision are complied with and that the reports provided for in Section 6.2.4.4 of this Decision are submitted to the Commission within the deadlines laid down,

HAS ADOPTED THIS DECISION:

Article 1

The aid that France plans to implement in favour of Kem One SAS ('Kem One') in the form of: (i) a loan from the Economic and Social Development Fund; (ii) a grant and repayable advances; and (iii) possible write-offs of tax and social security debts; is compatible with the internal market on the conditions laid down in Article 2.

Article 2

1. France shall ensure that nominal production capacity for chlorine ([600-700] kt/year) and caustic soda ([600-700] kt/year other than for internal use) by Kem One at the Fos-sur-Mer and Lavéra sites remains unchanged for a period of […] from the date of adoption of this Decision.

2. France shall ensure that Kem One's share of the S-PVC market in north-western Europe (Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom taken together) does not exceed [10-20] % for a period of […] from the date of adoption of this Decision.

3. France shall ensure that Kem One and any natural or legal person exercising control over Kem One now or in the […] following the date of adoption of this Decision refrains from acquiring shares or assets in undertakings in product markets in the European Economic Area (EEA) in which Kem One is present for a period of […] from the date of adoption of this Decision.

The prohibition set out in this paragraph shall not apply to acquisitions that:

(a) are necessary for the restoration of Kem One's viability; and

(b) do not constitute a means of circumventing the obligation to limit the effects of the aid to the strict minimum required to achieve the objectives of Kem One's restructuring plan.

Plans to make acquisitions covered by this paragraph and information enabling the Commission to assess whether the conditions laid down at (a) and (b) are met shall be communicated to the Commission within a reasonable time-frame. An acquisition may not take place until the Commission establishes that the said conditions are met.

Article 3

France shall send the Commission six-monthly reports providing information on:

(a) the proper implementation of the restructuring plan, with an assessment as to whether the objective of Kem One's return to viability is being achieved;

(b) any useful information on compliance with the conditions laid down in Article 2, and in particular the trend in Kem One's share of the market referred to in Article 2(2);

(c) an assessment of the competitive situation in the PVC market and the upstream and downstream markets in the EEA, including in particular market shares and capacities of the market players, changes in market structure, price trends and any other element that may aid the Commission's understanding.

These reports shall be provided for a period of […] from the date of adoption of this Decision. The first report shall reach the Commission six months after the date of adoption of this Decision.

Article 4

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

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 28 July 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission